BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2015] NZIACDT 101

Reference No: IACDT 026/14

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**The Registrar of Immigration Advisers** Registrar
BETWEEN	**Shirley Bisschoff** Complainant
AND	**Sharon Gail Yerman** Adviser

DECISION

REPRESENTATION:

Registrar: Ms C J Pendleton, lawyer, MBIE, Auckland.

Complainant: In person.

Adviser: Mr H Thompson and Ms J Rutherford, McMahon Butterworth Thompson, lawyers, Auckland.

Date Issued: 11 December 2015

DECISION

Preliminary

[1] Ms Yerman is a licensed immigration adviser practising in South Africa. The Bisschoffs wished to migrate to New Zealand and approached her. They say:

[1.1] Ms Yerman agreed to provide immigration services for a fee, payable before they left South Africa for New Zealand.

[1.2] Ms Yerman assessed their eligibility to migrate from a form they completed. They then met with Mr Yerman, Ms Yerman's husband; he is not a licensed immigration adviser. He advised the Bisschoffs that Mr Bisschoff's occupation was not on the list of qualifications that allow migration to New Zealand, so Ms Bischoff should be the principal applicant.

[1.3] Ms Yerman could not submit the application until Ms Bischoff had a job offer in New Zealand. The Bisschoffs travelled to New Zealand, and Ms Bischoff sought work. Mr Bisschoff could not get a visa allowing him to work unless he was the principal applicant, or in reliance on Ms Bischoff being the principal applicant. As Ms Bischoff did not immediately obtain work, Ms Yerman applied for a three-month visitor visa for the Bisschoffs so they could remain in New Zealand. She did not have a separate written agreement for this work, and did not charge a separate fee for it.

[1.4] Ms Bischoff then asked whether Mr Bisschoff could become the principal applicant due to experience as a customer service manager. Initially Ms Yerman said he had been a pest control officer, and did not qualify. Later, she provided a cover letter for Mr Bisschoff to use, which stated he was an experienced and qualified customer service manager and his skills aligned with Immigration New Zealand requirements to apply for a visa under that category.

[1.5] Ms Bischoff raised concerns regarding Ms Yerman's service. She said all the meetings were with Mr Yerman, and he had incorrectly assessed that Ms Bischoff had to be the principal applicant; when, in fact, Mr Bisschoff also qualified. Ms Yerman responded saying, she could not attend all meetings, and after assessing immigration eligibility her main role was to supervise staff collating documents. She also said Mr Yerman was correct in saying Mr Bisschoff did not qualify as a principal applicant.

[1.6] Ms Bischoff terminated Ms Yerman's services and requested a refund of fees; Ms Yerman offered to refund half the fees.

[2] The Registrar identified four potential breaches of Ms Yerman's professional obligations:

[2.1] Relying on unlicensed staff to perform tasks.

[2.2] She applied for visitor visas so the Bisschoffs could remain in New Zealand, she should have had a separate agreement.

[2.3] She failed to make an adequate assessment of Mr Bisschoff's immigration prospects.

[2.4] She failed to refund fees, when she was obliged to do so.

[3] Ms Yerman responded to the four grounds of complaint, saying:

[3.1] Unlicensed staff did not provide "immigration advice", so there was no breach.

[3.2] The visitor visa was simply incidental to the original agreement, so there was no need to modify it.

[3.3] The Bisschoffs received correct advice regarding their immigration prospects. However, Ms Yerman did accept her process of gathering information to give advice was unsatisfactory.

[3.4] There was no refund due, as Ms Yerman properly charged a fixed fee and fulfilled her obligations.

[4] To decide the grounds of complaint the key issue for the Tribunal is to apply the various regulatory provisions affecting licensed immigration advisers. While there are differences of emphasis and perspective on what happened, they are generally not determinative. The Tribunal must accordingly:

[4.1] Review the restrictions on licensed immigration advisers using unqualified staff, and determine whether Ms Yerman breached them.

[4.2] Decide whether the application for visitor visa came within the original agreement to provide services, which involves a consideration of the circumstances and the regulations regarding agreements.

[4.3] Consider whether Ms Yerman did adequately evaluate the full circumstances relating to the Bisschoffs, and in particular, on the question as to which of them could qualify as the principal applicant; or whether she should have found both could do so.

[4.4] Finally, to evaluate whether Ms Yerman had a right to retain some, or all, of the fee she received. That will require a review of the provisions that require licensed immigration advisers to charge fair and reasonable fees.

The Complaint

[5] The Registrar filed a statement of complaint; it set out a factual narrative, and identified four potential grounds for complaint (as outlined above). The main elements of the factual background in the Statement of Complaint were as follows:

[5.1] The Bisschoffs engaged Ms Yerman to submit work and residence visas. In May 2013, they entered into an agreement for Ms Yerman to provide the services for a fee of approximately $6,300 (denominated in Rand). The fee was payable before the Bisschoffs left South Africa for New Zealand.

[5.2] Ms Yerman assessed the Bisschoffs' eligibility, using information from an assessment form they completed. They then met with Mr Yerman, who is Ms Yerman's husband. He is not a licensed immigration adviser. Mr Yerman advised the Bisschoffs that Mr Bisschoff's occupation was not on the ANZSCO list, so Ms Bischoff should be the principal applicant.

[5.3] Ms Yerman could not submit the application until the complainant had a job offer in New Zealand. In September 2013, the Bisschoffs travelled to New Zealand for the complainant to seek work. Mr Bisschoff did not seek work, as he was not going to be the principal applicant, and accordingly the essential first step was for Ms Bischoff to obtain work, without that Mr Bisschoff could not get a visa allowing him to work. As Ms Bischoff did not immediately obtain work, Ms Yerman applied for a three-month visitor visa for the Bisschoffs. She did not have a written agreement for this work, and did not charge a separate fee for it.

[5.4] In October and November 2013 Ms Bischoff asked whether Mr Bisschoff could seek work due to experience as a customer service manager. Initially Ms Yerman said he had been a pest control officer, and did not qualify. Later, she provided a cover letter for Mr Bisschoff to use, which stated he was an experienced and qualified customer service manager and his skills aligned with Immigration New Zealand requirements to apply for a visa under that category.

[5.5] In November, Ms Bischoff raised concerns regarding Ms Yerman's service. She said all the meetings were with Mr Yerman, and he had incorrectly assessed that Ms Bischoff had to be the principal applicant; when, in fact, Mr Bisschoff also qualified. Ms Yerman responded saying, she could not attend all meetings, and after assessing immigration eligibility her main role was to supervise staff collating documents. She also said Mr Yerman was correct in saying Mr Bisschoff did not qualify as a principal applicant.

[5.6] Ms Bischoff requested an itemised account of disbursements, and a refund as the agreed service was for work and residence visas, which had not commenced. Ms Yerman refused both a breakdown of disbursements, and the request for a refund as she considered it was not required under her service agreement.

[6] The four potential breaches the Registrar identified as potentially arising under the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code) arising out of that background are:

[6.1] *Clause 2.1(b) and 3 of the 2010 Code – staff management.* Ms Yerman relied on unlicensed staff to perform tasks essential to assessing eligibility for immigration options, and considered her main role was determining eligibility prior to meetings, and ensuring unlicensed staff collated documents correctly. Whereas, she was required under the 2010 Code to comply with immigration legislation, and maintain professional practices relating to staff management, and she allowed unlicensed staff to undertake work reserved to licensed or exempt persons.

[6.2] *Clause 1.5(b) and (e) of the 2010 Code – written agreements.* When circumstances changed, and Ms Yerman applied for visitor visas, that was not contemplated in the agreement she had with the Bisschoffs, and she should have entered into a new agreement, or changed the existing agreement. As she did not do so, she breached her obligation to have a written agreement that set out the services to be provided.

[6.3] *Clause 1.1(a) of the 2010 Code – the obligation to perform services with due care, diligence, respect and professionalism.* Ms Yerman failed to make an adequate assessment of Mr Bisschoff's immigration prospects, then took a different view when queried. She failed to make an adequate assessment, and then sought to minimise her responsibility when queried.

[6.4] *Clause 4(c) and 3(d) of the 2010 Code – the obligation to provide refunds.* Ms Yerman's fee was $6,300, to assist with applying for work and residence visas. When Ms Bischoff terminated her services, she had not performed either of those tasks. Ms Yerman claimed she did not have to refund any fees, but offered half of the fees as a refund. Ms Yerman was required to keep fees paid in advance in a client funds account, only use the fees for the purpose she held them, and pay any refunds due. She failed to meet those requirements.

Responses to the Statement of Complaint

[7] Ms Yerman responded to the Statement of Complaint with a statement of reply. She was self-represented, and it suffices to say her responses did not appear to take account of the Tribunal's past decisions on the effect of the Act, the 2010 Code, or deal adequately with evidential matters.

[8] The Tribunal accordingly convened an oral hearing to address the issues in a more satisfactory way. Ms Yerman engaged counsel to represent her.

[9] Counsel for Ms Yerman identified the responses to each of the four grounds of complaint, they were, briefly:

[9.1] Mr Yerman did no more than transmit Ms Yerman's advice regarding the Bisschoffs immigration prospects, and accordingly there was no immigration advice by an unlicensed person;

[9.2] While the written agreement did not refer to applying for a visitor visa, that was within the original scope of Ms Yerman's engagement and done without further cost, and accordingly the original agreement was adequate in the circumstances;

[9.3] In relation to the provision of advice with due care, diligence, respect and professionalism, there is no reliable evidence that the Bisschoffs received any incorrect advice. However, Ms Yerman does now accept her process of gathering information was unsatisfactory.

[9.4] There was no refund due, as Ms Yerman properly charged a fixed fee and fulfilled her obligations.

Evidence

[10] The Tribunal has a body of written material, some filed with the Statement of Complaint, and some filed subsequently by the parties. The Tribunal primarily hears complaints on the papers and, accordingly, the Tribunal will consider all of the written material.

[11] The Bisschoffs attended the oral hearing, and gave evidence. Ms Yerman and Mr Yerman also attended, and gave evidence.

Discussion

The standard of proof

[12] The Tribunal determines facts on the balance of probabilities; however, the test must be applied with regard to the gravity of the potential finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].

The first ground of complaint – unlicensed staff

[13] In many areas of professional and licensed practice, extensive use is made of people who do not hold the professional qualifications required of the person primarily responsible for providing the service. In some cases those persons hold different and complementary qualifications, such as lawyers and legal executives; surgeons, nurses, and anaesthetists; pilots, and first officers. Often people without formal qualifications provide essential services in these settings too, under delegation from the qualified person who is responsible for the work.

[14] If there was no legislative direction, a licensed immigration adviser could conduct their practice using unqualified people, and the case would not be easily made out they acted unreasonably or irresponsibly in doing so. Any complaint would likely require a demonstration of failure to delegate appropriately, or supervise properly if that were the law. Unqualified people successfully provide very important skills in many areas of professional service delivery.

[15] However, the Immigration Advisers Licensing Act 2007 (the Act) was, among other things, intended to put an end to a history of a small minority of advisers who exploited vulnerable migrants. The background to the Act is discussed in *ZW v Immigration Advisers Authority* [2012] NZHC 1069, and reflected in section 3 of the Act.

[16] It is evident the legislative scheme is designed to exclude unlicensed people from engaging in the delivery of professional services to a degree that is far from universal in the regulation of professional service delivery.

[17] It was foreseeable some people who had formerly provided immigration services, and failed to gain a licence, would seek to have a licensed person "rubber stamp" their continuing activity in the industry. Unfortunately, this Tribunal's work demonstrates that was a well-founded apprehension and an area where enforcement action has been necessary.

[18] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.

[19] Section 63 of the Act provides that a person commits an offence if they provide "immigration advice", without being either licensed, or exempt from the requirement to be licensed.

[20] Section 73 provides that a person may be charged with an offence under section 63, whether or not any part of it occurred outside New Zealand.

[21] The scope of "immigration advice" is defined in section 7 very broadly. It includes:

> using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand ...

[22] There are exceptions to consider. Section 7 provides that the definition does not include "clerical work, translation or interpreting services". Accordingly, the question arises as to whether the work in issue came within that exception.

[23] The scope of *clerical work* is important, as otherwise, the very wide definition of immigration advice would likely preclude any non-licence holder working in an immigration practice in any capacity.

[24] *Clerical work* is defined in section 5 of the Act in the following manner:

> **clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
>
> (a) the recording, organising, storing, or retrieving of information:
>
> (b) computing or data entry:
>
> (c) recording information on any form, application, request, or claim on behalf and under the direction of another person

[25] The definition is directed to administrative tasks, such as keeping records, maintaining financial records and the like. The definition deals specifically with the role an unlicensed person may have in the process of preparing applications for visas. They may record information "on any form, application, request, or claim on behalf and under the direction of another person".

[26] The natural meaning of those words is that the unlicensed person relying on the "clerical work" exception may type or write out what another person directs.

[27] That other person may properly be the person who is making the application, a licensed immigration adviser, or a person who is exempt from being licensed. The person typing or writing out the form in those circumstances is not giving immigration advice.

[28] The definition does not give any authority for the unlicensed person to make inquiries, and determine what is to be recorded on the form. Under "clerical work" they must do nothing more than "record" information as directed.

[29] The other exception in section 7 is that immigration advice does not include "providing information that is publicly available, or that is prepared or made available by the Department". This also excludes the possibility of an unlicensed person engaging with the specific factual situation of the person making an application as they may only provide information, not advice.

[30] It is necessary to make the material factual determinations against that background.

[31] Ms Yerman's evidence was that she understood immigration advice occurred when giving advice regarding New Zealand immigration legislation and processes. She explained that was her role, and Mr Yerman provided advice regarding living and settling in New Zealand. I have no doubt Ms Yerman was genuine in saying that was her understanding, and she failed to appreciate the true nature of "immigration advice" as a defined term in the Act which extends far beyond giving advice. I have confidence in that evaluation, as when Ms Yerman responded to this complaint in writing she provided what appeared to be admissions that staff in her office routinely breached the Act. That was a foundation for this allegation in the Statement of

Complaint, and she essentially reiterated the position in her Statement of Reply. Mr Yerman confirmed he shared Ms Yerman's perspective.

[32] The Bisschoffs gave evidence that Mr Yerman completed details of a "points" calculation relating to their eligibility to migrate to New Zealand. They said in an initial meeting Mr Yerman also gave advice regarding Mr Bisschoff's eligibility as the principal applicant. Mr Yerman accepted he had provided a points calculation, and said he understood at the time he was simply relaying Ms Yerman's evaluation. Mr Yerman advised on employment prospects independently of immigration prospects. The boundaries of such a conversation are potentially difficult to measure with accuracy after the event.

[33] To uphold this element of the complaint it is sufficient to accept Mr Yerman's evidence regarding immigration points, and Ms Yerman's obvious failure to ensure he understood the true extent of the prohibition under the statutory definition of "immigration advice". From what Ms Yerman said regarding her office management, potentially the issues were much wider. However, it is not necessary to examine the issue further. Ms Yerman and Mr Yerman have clearly reflected on the restrictions, and implemented substantial changes in the practice. They include bringing another licensed immigration adviser into the practice.

[34] Accordingly I am satisfied that Mr Yerman gave immigration advice to the Bisschoffs in relation to the points they could claim; that occurred as a result of Ms Yerman's failure to ensure Mr Yerman understood the restrictions on him as an unlicensed person. It follows that I find Ms Yerman breached Clause 2.1(b) of the 2010 Code, as she failed to conduct her practice in accordance with the Act, by allowing an unlicensed person to provide immigration advice. She accordingly failed to comply with her obligation in Clause 3 of the 2010 Code to manage her staff, in particular providing training on an elementary restriction of the Act.

[35] However, I do find that this conduct was the result of Ms Yerman's own failure to understand the Act and the constraints it imposes; not wilful defiance of obligations she understood at the time.

The second ground of complaint – written agreement

[36] There is no factual dispute relating to this element of the complaint. The 2010 Code has a strict prescriptive requirement for a written agreement. That protects both licensed immigration advisers, and their clients.

[37] In this case, Ms Yerman had a satisfactory agreement, the services related to applying for work visas and residence visas. When entering the agreement Ms Yerman anticipated that was all she would need to do. As it transpired the circumstances changed, and the Bisschoffs were in New Zealand seeking work. They needed additional time, and Ms Yerman without additional cost applied for visitor visas to allow them to continue their job search. She did not seek to levy any additional charge. Where there is either a different immigration pathway due to changed circumstances, or additional paid work, a new or varied agreement is essential.

[38] In this case, given there was no new paid work, and the immigration pathway did not fundamentally change, I am satisfied the original agreement was acceptable to meet the requirements of the 2010 Code. The highest the matter could be put is that clause 1.5(b) of the 2010 Code requires a "full description of the services to be provided"; and there is no mention of the additional visitor visa applications, so the description was not full. However, in context a "full description" does not require breaking down the professional services into every potential step. Often there will be variations in the precise actions required as matters progress with immigration instructions. If there is no change in the fees, the objective, or immigration prospects; then, there is little obvious value in constantly re-documenting the process. In this case the Bisschoffs were in New Zealand and Ms Yerman effectively applied to extend the permits they had to allow them to say longer. In these circumstances, I do not consider she was required to enter a new agreement, or that the original agreement was deficient. The development was a minor additional step to accommodate a delay, with no further significance at that point.

[39] Accordingly, I dismiss this element of the complaint.

The third ground of complaint – due care, diligence, respect and professionalism

[40] The essence of this issue relates to determining whether Ms Bischoff or Mr Bisschoff should have been the principal applicant, or whether the option was available for both. Overall I am satisfied that what occurred was a reasonable approach, namely Ms Bischoff was the principal applicant, and when there were issues with trying to obtain employment Ms Yerman revisited the question and developed a case for Mr Bisschoff to be the principal applicant. I am satisfied that the first approach was correct, Ms Bischoff was the appropriate principal applicant, it appeared she had substantially more certainty of qualifying.

[41] Mr Bisschoff's experience was more problematic, and verification could have been both a protracted and uncertain process. His entitlement relied on proving the nature of his previous employment, and that outcome of that type of evaluation is unpredictable in many cases. The evidence satisfies me that was so for Mr Bisschoff. When the Bisschoffs had travelled to New Zealand, it would be most undesirable to gain employment, and then fail to complete the immigration requirements. When the possibility of Ms Yerman not getting work emerged, Ms Yerman did take reasonable steps to assist with the alternative strategy of Mr Bisschoff first getting employment. I do not find she should have advised that was a prudent strategy earlier.

[42] The matter of concern is that Ms Yerman failed to interview the Bisschoffs and gain a sound understanding of their circumstances at an early point. To her credit Ms Yerman has now reflected on the situation, and appreciates her management of this aspect was not at the standard required. The circumstances are bound up with the first ground of complaint, namely Mr Yerman's role in taking instructions. Accordingly, I do not regard this issue as more than a dimension of the first ground. Furthermore, it is a circumstance, which the Tribunal has found to be present in many complaints, and potentially reflects a lack of understanding that may still be present among a number of licensed immigration advisers.

[43] Licensed immigration advisers are professional people who provide advice where typically the circumstances presented by a person will require evaluation as to what their circumstances are, what immigration opportunities and options are available in those circumstances; and then after getting informed instructions the adviser implements a course of action. On rare occasions, those matters may be clear and obvious, such as a person seeking a further term for a work visa, who does not wish to remain in New Zealand after completing a work assignment. However, instructions involving permanent migration are virtually always a complex matter where a client needs to understand a process that will occur over an extended period of time.

[44] Many immigration advisers obtain initial information in the form of questionnaires, and in similar ways. In some cases, information gathering of that kind will quickly point to it being unlikely that any realistic immigration options are available, or a step such as gaining an offer of employment is essential. However, beyond indicative evaluations of that kind, there is no substitute for an in depth discussion between a licensed immigration adviser and their client. The various forms of the Licensed Immigration Advisers Code of Conduct have required that licensed immigration advisers gain informed instructions, and that they have a written agreement for their engagement. Further, that they must explain significant matters regarding the written agreement to their client. That includes whether the instructions they have given are the only or best option, what the prospects of success are, and how the relevant immigration pathway will likely resolve if there is a long-term objective. That discussion is immigration advice, and it is both necessary and cannot be delegated to an unlicensed person. It is often conducted using forms of communication other than face-to-face, where that option is not realistic.

[45] Ms Yerman did not personally engage in this process with the Bisschoffs. Had she done so, it would likely have avoided some of the tension regarding Mr Bisschoff's circumstances, as there was something of a defensive reaction on Ms Yerman's part when her strategy was questioned. However, the process would likely have been quite similar in terms of the applications as Ms Bischoff had clear advantages as the principal applicant.

[46] Accordingly I find Ms Yerman's lack of engagement in gaining informed instructions did amount to a breach of clause 1.1(a) of the 2010, as she failed to perform her services with due care, diligence and professionalism in the respect I identified.

The fourth ground of complaint – failure to provide a refund and keep client funds separate

[47] Ms Yerman's fee was $6,300, to assist with applying for work and residence visas. When Ms Bischoff terminated her services, she had not completed either of those tasks. Ms Yerman claimed she did not have to refund any fees, but offered half of the fees as a refund.

[48] Ms Yerman was required to keep fees paid in advance in a client funds account, only use the fees for the purpose she held them, and pay any refunds due. However, Ms Yerman claimed she was entitled to set a fixed fee, and the work was substantially completed as although she had not submitted the work and residence visas, she had undertaken the preliminary work and was in a position to do so.

[49] The Tribunal has consistently accepted that one of the options for licensed immigration advisers is to use a fixed fee. However, clause 8 of the 2010 Code required that licensed immigration advisers must "set fees that are fair and reasonable in the circumstances". Materially these principles have followed:

[49.1] While fixed fees are an option, the Tribunal will look at the circumstances to see whether they are fair and reasonable. What may be fair and reasonable for a commercial client with repeat routine business, may not be fair and reasonable for an individual with a particular issue.

[49.2] So called "sign-on fees", a substantial non-refundable component of the fee paid in advice have to be fair and reasonable, and accordingly generally justified by the work completed or other circumstances.

[49.3] Fees paid in advance had to be kept in a client funds account pursuant to clause 4 of the 2010 Code until earned or otherwise fairly and reasonably becoming the property of the Licensed Immigration Adviser.

[49.4] Refunds may need to be made if fees are not fairly and reasonably due pursuant to clause 3(d) of the 2010 Code.

[50] However, not all licensed immigration advisers have understood these principles. The Registrar issued a notification to licensed immigration advisers in a newsletter of June 2013, Ms Yerman would not have seen that newsletter at the time she received the fees from the Bisschoffs, it was about a month later. Accordingly, I accept Ms Yerman when she received the fees she did not understand the obligations on her.

[51] I am satisfied Ms Yerman was obliged to place all the fees she received into a client funds account. It was not fair and reasonable to treat the whole of her fee as non-refundable. That effectively deprived her client of the option of seeking alternative representation if she failed to meet her client's expectations, or for her client to change her mind about proceeding. Ms Yerman provided no discount or other benefit to her client for the non-refundable nature of the fee. A one-way benefit of that kind demanded by a professional person is not fair and reasonable. Furthermore, Ms Yerman did not in fact have informed instructions when she took the fee, she had no right to the fee at all.

[52] In my view Ms Yerman never became entitled to any of the fee for these reasons:

[52.1] She never completed the client engagement process in accordance with the 2010 Code. She had to gain informed instructions (clause 1.1(b)), and make her client aware of all significant matters (clause 1.5(a)), she failed as she did not undertake a proper evaluation of her clients immigration prospects and advise them on that issue.

[52.2] She provided the services unlawfully; unlicensed persons in breach of the Act performed key elements of them.

[53] It follows that due to non-compliance, Ms Yerman was obliged to return the whole of the fees when her instructions ended.

[54] Notwithstanding these findings, I accept Ms Yerman's non-compliance was due to a lack of understanding, not defiance of her professional obligations. Furthermore that on the evidence

before me I could not find that her offer of 50% refund was inadequate as a measure of the work completed.

[55] Accordingly, I find Ms Yerman breached clause 4(c) of the 2010 Code as she failed to deal with the fee she received from the Bisschoffs as client funds, and clause 3(d) as she failed to refund the fee as she was not entitled to it.

Decision

[56] The Tribunal upholds the complaint pursuant to section 50 of the Act.

[57] The adviser breached the Code of Conduct in the respects identified. Breaches of the 2010 Code are grounds for complaint pursuant to section 44(2)(e) of the Act.

[58] The complaint included wider grounds than those for which the Registrar found support, although the complainant largely accepted the scope the Registrar identified. The Tribunal dismisses the complaint to the extent that it is wider than the breaches of the 2010 Code identified above.

Submissions on Sanctions

[59] The Tribunal has upheld the complaint; therefore, pursuant to section 51 of the Act, it may impose sanctions.

[60] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, the adviser is entitled to make submissions and respond to any submissions from the other parties.

[61] The parties are invited to comment on the following (in addition to any other relevant matters):

[61.1] The Tribunal is conscious that Ms Yerman and Mr Yerman travelled to New Zealand for the hearing, and it will potentially take that into account in relation to the penalties it will impose.

[61.2] The Tribunal notes that its findings likely make an order for the refund of fees a potential outcome, but if so, may have regard to that in relation to penalties.

[61.3] The findings do not include a conclusion that the appropriateness or reasonableness of the decisions made regarding Mr Bisschoff's eligibility to be the principal applicant affected the timing of the Bisschoffs migrating to New Zealand. Accordingly, if there is any claim for compensation, advice on that issue is not likely to be a causal element.

[62] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

Timetable

[63] The timetable for submissions will be as follows:

[63.1] The Authority and the complainant are to make any submissions by 5:00 pm Monday 18 January 2016.

[63.2] The adviser is to make any further submissions (whether or not the Authority or the complainant make submissions) within by 5:00 pm Monday 1 February 2016.

[63.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

DATED at WELLINGTON this 11th day of December 2015.

_____
G D Pearson
Chair