IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 45

Reference No: IACDT 012/17

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**SUSMITH SURESH** Complainant
AND	**JANINE ELIZABETH** Adviser

DECISION
(Sanctions)
Dated 3 July 2019

REPRESENTATION:

Registrar:	J Perrott
Complainant:	In person
Adviser:	M J Logan

INTRODUCTION

[1] The Tribunal upheld this complaint against Ms Janine Elizabeth, the adviser, in a decision issued on 10 May 2019 in *Suresh v Elizabeth*.[1]

[2] It found that Ms Elizabeth breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code), the most serious breach being that she allowed unlicensed staff to engage with the client and provide immigration advice contrary to the Immigration Advisers Licencing Act 2007 (the Act) and the Code.

BACKGROUND

[3] The narrative leading to the complaint is set out in greater detail in the decision of the Tribunal upholding the complaint.

[4] Ms Elizabeth was an Australian based licensed immigration adviser. Her licence expired on 27 May 2017. She was and remains an employee of Best Migration Services Global Pty Ltd (BMS), an Australian company. Ms Elizabeth is still at BMS as a lawyer and licensed Australian migration agent. BMS works in conjunction with FBP International DWC LLC (FBP), a Dubai based company.

[5] The complainant and his wife met a staff member of FBP in Dubai with a view to seeking representation for lodging an expression of interest (EOI) with Immigration New Zealand under the skilled migrant category of residence policy.

[6] On 8 April 2016, the complainant signed a written agreement with FBP for the provision of advice for a residence visa. It was signed by Ms Elizabeth on behalf of FBP on 18 April 2016.

[7] The agreement stated that FBP or an associate office would assist with the presentation of a visa application to Australia's Department of Immigration and Border Protection and/or Immigration New Zealand in accordance with Australian or New Zealand immigration laws and policies.

[8] An initial assessment of the complainant's eligibility for Immigration New Zealand's skilled migrant category was made by an employee of FBP on 8 April 2016, showing that he had sufficient points.

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[1] *Suresh v Elizabeth* [2019] NZIACDT 30.

[9] Employees of both BMS and FBP continued with work on the complainant's prospective application from time to time, including applying on 27 July 2016 to the New Zealand Qualifications Authority (NZQA) for a pre-assessment of his qualification.

[10] Immigration New Zealand changed the policy for the skilled migrant category on 12 October 2016, increasing the number of points for automatic selection from 140 to 160. The complainant was accordingly no longer eligible for automatic selection.

[11] On 12 October 2016, the complainant initiated a complaint with BMS. There followed discussions and emails between the complainant and the staff in relation to his complaint about delay and request for a refund.

[12] There was a telephone discussion between the complainant and a manager on 15 October 2016 concerning his complaint. He was told there was a no-refund policy, as stated in the client agreement. He was further advised that his request to terminate their services would be brought to the attention of the immigration lawyer.

[13] The complainant sent further emails to a BMS employee on 21, 25 and 28 October and 2 November 2016 advising that he had still received no update. There appears to have been a discussion between the complainant and an employee on 31 October. The complainant was advised that they could review whether he had any other options, following the change in his New Zealand eligibility.

[14] An employee of BMS sent an email to the complainant on 10 November 2016 advising that he could migrate to Australia. BMS was unable to provide a refund in relation to New Zealand, but would be happy to "restrategise" his case for Australia.

[15] A Skype call between the complainant and an employee appears to have gone ahead on 18 November 2016. It is not known what was discussed.

[16] On 6 December 2016, the complainant sent an email to a BMS employee advising that due to poor service and the irresponsible way of handling his complaint, he had decided not to continue business with BMS. He wanted to get in touch with the manager or somebody with the authority to discuss his refund. He would be pursuing other channels of complaint and legal action against BMS.

[17] An employee of BMS sent an email to the complainant on 7 December 2016 advising that the agreement stated that there could be no refund and they were not liable for any changes in government policy affecting his application. They had provided an alternative pathway to migrate to Australia. As he had constantly requested a refund, his case would be presented to the management and legal department.

[18] A complaint was made by the complainant to the Immigration Advisers Authority (the Authority) on 25 December 2016. It was referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal on 26 June 2017.

Decision of the Tribunal

[19] As noted above, the Tribunal issued a decision upholding the complaint on 10 May 2019. It found that Ms Elizabeth had allowed unlicensed staff to provide immigration advice in breach of the Act and therefore also of cl 3(c) of the Code. This is known as "rubber stamping". As part of this, she had failed to personally take instructions from the complainant and had failed to engage at all with him, in breach of cl 2(e). Nor had Ms Elizabeth carried out his instructions in breach of cl 2(e). In particular, she had not actively involved herself in the work of advising on eligibility or gathering the necessary information and documents from the complainant and then assessing them in order to complete the EOI.

[20] Ms Elizabeth had also failed to have a written agreement with the complainant tailored to his circumstances, in breach of cl 19(e) of the Code. She had been licensed by the Authority as an employee of BMS, but the written agreement was with another company, FBP. Furthermore, the agreement had been largely designed for Australian migration and while New Zealand had subsequently been incorporated into it, the agreement had not been rewritten specifically to reflect the professional obligations imposed on a New Zealand licensed adviser. Specifically, the agreement did not contain a full description of the services to be provided to the complainant.

[21] Nor did the client agreement have a refund policy, in breach of cl 19(k) of the Code. Ms Elizabeth had also not provided a refund, a breach of cl 24(c).

[22] Additionally, Ms Elizabeth or more particularly the staff in her name, took more than six months to prepare the EOI, by which time it was no longer worthwhile to pursue due to an immigration policy change. Her explanation that technical issues with NZQA's website were responsible for the delay was rejected. This delay amounted to negligence, a statutory ground of complaint. It was also a breach of cl 1 of the Code, the obligation to conduct herself professionally, diligently, with due care and in a timely manner.

SUBMISSIONS

[23] Counsel for the Registrar, Mr Perrott, in his submissions (28 May 2019) contends that Ms Elizabeth should be:

(a) censured;

(b) directed to refund all or any part of the fees or expenses paid by the complainant; and

(c) ordered to pay a penalty not exceeding NZD 10,000.

[24] The complainant, in his submissions of 12 May and 12 June 2019, contends that Ms Elizabeth has provided no evidence supporting her allegation that she was involved in his application by way of advising on the correspondence. Moreover, while she refers to two staff members whom she claims to have provided guidance in relation to his application, there was a third staff member not mentioned by her.

[25] Furthermore, the complainant rejects the submission that Ms Elizabeth's conduct was a consequence of inadequate licensing requirements. He points out there were sufficient materials on the Authority's website concerning her professional obligations.

[26] The complainant says he finds it thoroughly shocking that Ms Elizabeth has confessed to keeping his wife's application on hold deliberately until he paid a further instalment of the fees. Ms Elizabeth should have told him about that.

[27] The complainant contends that the sanctions should be:

(a) a full refund of the fees (which are itemised in his submissions with supporting evidence attached);

(b) an explanation of the inaction and delay;

(c) a detailed chronological record of what was done on his application;

(d) a written apology from the company; and

(e) corrective action against the company and Ms Elizabeth in terms of fines and cancellation of her licence as applicable.

[28] There are submissions (11 June 2019) from Ms Elizabeth's counsel, Mr Logan, together with supporting documents. He states that Ms Elizabeth does not dispute the findings of the Tribunal and fully accepts that she did not have direct contact with the complainant. However, as she had represented herself until the sanctions stage of the process, she may not have set out her position with sufficient clarity. He would therefore take the opportunity of doing so.

[29] It was contended by Mr Logan that Ms Elizabeth was not as disengaged with the complainant's application as the Tribunal's findings suggest. She had a significant indirect role. The two staff members who were responsible for "liaising" with the complainant, identified in his submissions, were closely supervised by Ms Elizabeth. She vetted and advised on the content of all correspondence sent to the complainant by the two employees. She was aware of all the incoming emails from the complainant and all responses provided to him.

[30] Mr Logan advises that Ms Elizabeth is now aware she should have taken a more active role and been the sole point of contact. According to counsel, her failure resulted from a lack of understanding of the particular New Zealand requirements. She did not have sufficient knowledge of her obligations as a licensed New Zealand immigration adviser, having adopted practices that were acceptable in Australia but not in New Zealand.

[31] Ms Elizabeth's lack of knowledge was not surprising given the regulatory framework which allowed her to have a New Zealand qualification. She had obtained it in May 2015 at the age of 23, as a result of the Trans-Tasman Mutual Recognition Act 1997. As a registered Australian migration agent, she was able to obtain the full New Zealand licence without the need to undergo any specific New Zealand training and without initially holding a provisional New Zealand licence or being supervised by a New Zealand licensed adviser.

[32] Nor had it been a requirement for her to undergo any continuing professional development until November 2015, and even then the mandatory requirements were only three webinars of one hour's duration. These webinars only provided limited guidance to an Australian based adviser. The fact that the New Zealand authority did not mandate additional New Zealand specific training contributed to her misunderstanding.

[33] With regard to the issue of delay in preparing the complainant's application, it is acknowledged it should have been processed more promptly. However, some of the delay could be attributed to the complainant.

[34] It is also acknowledged that the contract was deficient in not expressly having a refund policy. However, the payment of this was somewhat out of Ms Elizabeth's hands as it would be her employer who would be paying the refund. Ms Elizabeth had been advised that a full refund would be made upon receipt of the Tribunal's order.

[35] Mr Logan notes that Ms Elizabeth only briefly held a New Zealand licence, from May 2015 to May 2017. As a result of the issues identified by the complaint, she had decided not to renew her licence and had not acted as a New Zealand immigration adviser since then. She had no intention of reapplying for a New Zealand licence and was fully aware that should she change her mind, she would need to undergo appropriate training before obtaining a full licence. These events had taken place when Ms Elizabeth was just starting out on her career and when she had limited experience as an adviser.

[36] It is submitted by Mr Logan that there is no need to impose a financial sanction since she had already given up her licence and acknowledged she would be the subject of a censure. On the assumption that her company refunds the fees, the complainant will not have suffered financial loss. The offending was not deliberate and did not involve any personal gain to Ms Elizabeth but had resulted from a genuine misunderstanding as to her role. It would be excessive to add a fine to the other consequences for her.

[37] In support, there is an email (8 June 2019) from one of the named employees to Ms Elizabeth. The employee left BMS in June 2016. She states that she worked under the direct supervision of Ms Elizabeth for the entire period of her employment with BMS. She followed Ms Elizabeth's instructions and sought assistance from her when communicating with clients, such as the complainant.

[38] A detailed case history and timeline was also provided by counsel.

JURISDICTION AND PROCEDURE

[39] The Tribunal's jurisdiction to impose sanctions is set out in the Act. Having heard a complaint, the Tribunal may take the following action:[2]

> **50 Determination of complaint by Tribunal**
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> After hearing a complaint, the Tribunal may—
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> (a) determine to dismiss the complaint:
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> (b) uphold the complaint but determine to take no further action:
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> (c) uphold the complaint and impose on the licensed immigration adviser or former licensed immigration adviser any 1 or more of the sanctions set out in section 51.

[2] Immigration Advisers Licensing Act 2007.

[40] The sanctions that may be imposed are set out at s 51(1) of the Act:

> **51 Disciplinary sanctions**
>
> (1) The sanctions that the Tribunal may impose are—
>
> (a) caution or censure:
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> (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
>
> (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
>
> (d) cancellation of licence:
>
> (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
>
> (f) an order for the payment of a penalty not exceeding $ 10,000:
>
> (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
>
> (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
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> (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

[41] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

> **3 Purpose and scheme of Act**
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> The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

[42] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:[3]

> …It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

[3] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citations omitted).

> …
>
> The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.
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> …
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> Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[43] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the profession itself.[4]

[44] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.[5]

[45] The most appropriate penalty is that which:[6]

(a) most appropriately protects the public and deters others;

(b) facilitates the Tribunal's important role in setting professional standards;

(c) punishes the practitioner;

(d) allows for the rehabilitation of the practitioner;

(e) promotes consistency with penalties in similar cases;

(f) reflects the seriousness of the misconduct;

(g) is the least restrictive penalty appropriate in the circumstances; and

(h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

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[4] *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee,* above n 2, at [151].

[5] *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

[6] *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633, [2013] NZAR 320 at [49].

DISCUSSION

Engagement with the complainant and his application

[46] The Tribunal found that Ms Elizabeth had no involvement in advising or assisting the complainant or in compiling his immigration application. While Ms Elizabeth's counsel says she accepts the Tribunal's findings in its decision upholding the complaint, it is contended that she was behind all the work undertaken by the unlicensed staff. According to Mr Logan, Ms Elizabeth vetted and advised on the content of all communications sent to the complainant.

[47] There is no affidavit or statement from Ms Elizabeth in support of this contention. The email from the former staff member is brief and somewhat general. It is more about general practice within the company, rather than setting out the details of Ms Elizabeth's engagement with the complainant's file. It is striking that no evidence contemporary with the events is produced showing that Ms Elizabeth had any role in the advice given to the complainant or in the preparation of his EOI.

[48] Ms Elizabeth produces no internal emails or other documentary evidence to show she had guided or instructed the employees in relation to the complainant's application. Communications between the employees and the complainant were not copied to her. None of the communications state that queries had been referred to her or she had advised on some issue, which would be expected if she was actively involved. It would appear that two of the three employees who worked on the complainant's file were based in different offices from Ms Elizabeth, yet no written communications between them and her are produced.

[49] The absence of any mention of Ms Elizabeth in the communications was pointed out in the Tribunal's decision, yet none has been produced in support of the position now being advanced.[7]

[50] According to the timeline in the case history produced to the Tribunal, the file was allocated to Ms Elizabeth on 3 July 2016 "for submission" (presumably lodgement with Immigration New Zealand). This confirms that Ms Elizabeth had no engagement with the complainant or his file until then from the time work commenced on 8 April 2016. Even after 3 July, Ms Elizabeth identifies no communication or piece of work personally undertaken by her. The timeline persistently states "we" did the various items of work described.

[7] *Suresh v Elizabeth* [2019] NZIACDT 30 at [57] & [58].

[51] I do not accept that Ms Elizabeth had anything but minimal involvement with the file. Significantly, she had no involvement with the complainant.

Delays

[52] In the decision of 10 May 2019, the Tribunal found that the period of six months taken to compile the EOI was unduly long. It found that the complainant appeared to have been prompt in responding to requests from the staff. Additionally, it considered that the claimed technical issues with NZQA's website portal were unlikely to have been for long.

[53] In his submissions on sanctions, Mr Logan presents a detailed case history complete with a timeline. It appears to have been authored by Ms Elizabeth.

[54] The case history identifies claimed delays by the complainant in providing documents, delays in payment, as well as a delay in accessing NZQA through its website. There is no analysis of the total period of six months and who bears greater responsibility for the delays. I accept that Ms Elizabeth and the staff were not responsible for all the long periods of inactivity between about 8 April 2016 (receipt of the complainant's instructions) and 12 October 2016 (Immigration New Zealand changed the policy effectively ending pursuit of the application). However, they were primarily responsible.

No training

[55] While acknowledging that a lack of knowledge of her professional obligations is no defence, Ms Elizabeth nonetheless presses her ignorance as a strong mitigating factor. She surprisingly attributes to the Authority some of the responsibility for her own misconduct, since she says it was too easy for her as an Australian licensed agent to become registered without going through New Zealand specific training or supervision.

[56] This is a disappointing position from a professional. A professional person, whether an immigration adviser or otherwise, is responsible for his or her own professional development. Ms Elizabeth voluntarily obtained a full New Zealand licence and then held herself out as a licensed professional for those seeking residence in New Zealand, so she was responsible for ensuring that her knowledge of both New Zealand immigration criteria and her professional obligations was sufficient to do so.

[57] Australian registered immigration practitioners who obtain New Zealand registration must meet the same high standards of knowledge and personal behaviour as those who have been through the New Zealand training regime before licensing. The same is true of New Zealand based practitioners who became licensed before compulsory qualification and training.

[58] Ms Elizabeth should have familiarised herself with New Zealand legislation and the New Zealand Code, all of which was easily available to her. That was her duty. The mode by which she became licensed is irrelevant.

[59] In saying that, I accept that Ms Elizabeth made a genuine mistake as to the professional practices acceptable in this country. In respect of the rubber stamping violation in particular, I acknowledge that Ms Elizabeth did not set up an internal business structure knowing it to be a violation of her obligation to personally engage and carry out the work, as some practitioners have done.

Age and inexperience

[60] I do not accept that Ms Elizabeth's age and inexperience at the time she committed the professional violations are mitigating factors. It must be borne in mind that clients cannot be expected to know or enquire as to an adviser's age or experience. Ms Elizabeth chose to obtain a licence and hold herself out as a fully licensed adviser for New Zealand, despite her age and inexperience. It was her responsibility to decline to accept instructions if she did not feel confident she could meet the high standard expected of a licensed professional adviser.

Sanctions

[61] The complainant seeks a wide range of sanctions, but my power is limited to those permitted by the Act. I will deal with the potentially appropriate sanctions in the order in which they appear in s 51(1).

Caution or censure

[62] As Ms Elizabeth acknowledges, a censure is appropriate. A caution would not reflect the seriousness of the breaches.

Training

[63] If Ms Elizabeth was to renew her licence, it is self-evident that she would need training in both the New Zealand immigration criteria and the New Zealand professional requirements. She acknowledges this. While Ms Elizabeth presently has no New Zealand licence and no intention to obtain one, she acknowledges the possibility of that in the future. Accordingly, it is appropriate to observe that she must attain the Graduate Diploma in New Zealand Immigration Advice available from Toi-Ohomai Institute of Technology, should she seek a licence.

Financial penalty

[64] The Registrar submits it would be appropriate to direct a financial penalty of up to NZD 10,000, which is the maximum that can be imposed. Mr Logan submits this would be excessive given the other consequences for Ms Elizabeth. In this regard, I note the order below that Ms Elizabeth personally refund half the complainant's fees and expenses.

[65] The breaches of cls 2(e) and 3(c) of the Code are serious. It is a fundamental obligation of advisers to personally engage with the client and their application and to ensure that staff are restricted to clerical work. Furthermore, it is possible that Ms Elizabeth and the staff members involved committed statutory offences. While it is not my role to assess that, it does underline the seriousness of the professional violations.

[66] More recent decisions concerning the unlawful delegation of immigration work include *Immigration New Zealand (Carley) v De'Ath* [2019] NZIACDT 1, where Mr De'Ath was ordered to pay a penalty of NZD 8,500 in respect of 11 clients. In *Immigration New Zealand (Foley) v Niland* [2019] NZIACDT 16, there was a penalty of NZD 4,000 against Ms Niland in respect of four clients. In *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 35, there was a penalty of NZD 4,000 in respect of four clients. Then in *Immigration New Zealand (Calder) v Cleland* [2019] NZIACDT 38, the financial penalty was NZD 7,500 in respect of 12 clients.

[67] I recognise that other factors were also relevant to the level of penalty in those decisions. The circumstances in each of them were not identical to those of Ms Elizabeth. In particular, Ms Niland had relevant personal circumstances and Mr Ahmed had a greater level of engagement with his clients than Ms Elizabeth.

[68] In respect of Ms Elizabeth, there was only one client. It has been accepted that she made a genuine mistake as to her professional obligations in this country. While now acknowledging the need to fully and directly engage with her client which she did not do in respect of the complainant, she does not acknowledge having minimal involvement with the complainant's file. Ms Elizabeth maintains that she guided and instructed the staff, which I do not accept. She does not fully acknowledge her wrongdoing. The penalty will be NZD 3,500.

[69] As for the other violations – lack of diligence and due care causing delays, the deficient agreement and the refund breaches – while they are not trivial, I do not propose to impose any additional financial penalty. Apart from the serious rubber stamping violation, the emphasis should be on compensating the complainant, so I will reduce the financial penalty that would otherwise be appropriate in order to maximise the funding available to compensate the complainant.

Refund of fees or expenses to complainant

[70] As a result of the dilatory conduct of Ms Elizabeth and the staff, the complainant's expression of interest was not worthwhile pursuing by the time it was ready for lodgement. This was due to changes in the immigration instructions by Immigration New Zealand. Whether or not the application would have succeeded had it been lodged earlier, I do not know. I cannot therefore make any finding that Ms Elizabeth is responsible for the failure of what would have otherwise been a successful application. Nor can Ms Elizabeth be blamed for the change of policy by Immigration New Zealand.

[71] While the work done was ultimately of no value to the complainant, it was done in good faith in respect of an application which was expected to succeed.

[72] It is also relevant that Ms Elizabeth was licensed only as an employee of BMS. So far as the Tribunal is aware, she remains an employee. Unlike most immigration advisers, she is not the owner and director of the company which took the client's fee. However, I do not accept Mr Logan's submission that payment of the refund is out of Ms Elizabeth's hands. Clause 24(c) of the Code requires an adviser to "promptly provide any refunds payable upon completing or ceasing a contract for services". That obligation is personal to the adviser. She must pay it.

[73] The complainant has set out a schedule of the fees and expenses paid by him to BMS/FBP, being a total of AED (United Arab Emirates Dirham) 6,733. It has not been challenged.

[74] Taking into account that it has not been shown that Ms Elizabeth is responsible for the failure of what would have been an otherwise successful application and that she did not personally benefit from the fees paid, the refund will be set at half the total fees and expenses paid.

[75] If Ms Elizabeth's obligation is discharged by BMS, that will relieve her of personally paying it. Indeed, the company should in good faith repay the entire wasted fee, but I have no power to order the company to do so.

OUTCOME

[76] Ms Elizabeth is:

(1) censured;

(2) ordered to immediately pay to the Registrar NZD 3,500; and

(3) ordered to immediately refund to the complainant AED 3,367 or its equivalent, NZD 1,373.

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D J Plunkett
Chair