IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2013-009-001684

	BETWEEN	CHRISTINE LAI CHUN YAP Appellant
	AND	IMMIGRATION ADVISORS AUTHORITY Respondent

Hearing: 20 January 2014

Appearances: H McKenzie for the Appellant
Mr Lill for the Respondent

Judgment: 20 January 2014

REASONS FOR JUDGMENT OF JUDGE C P SOMERVILLE
On Appeal From The Immigration Advisors, Complaints and Disciplinary Tribunal

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[1] On 12 April 2013, the Immigration Advisors, Complaints and Disciplinary Tribunal ("The Tribunal") upheld a complaint from Ms G, finding that Ms Y:

(a) Had engaged in dishonest and misleading behaviour concerning the fees she charged to Ms G for the supply of immigration services; and

(b) Had breached the Code of Compliance in relation to the charging of a "sign-on" fee.

[2] Then, on 15 July 2013, after hearing submissions from Ms Y as to the penalties to be imposed, the Tribunal censured her, ordered her to pay a penalty of $3500, cancelled her licence under the Immigration Advisors Licensing Act 2007, and prohibited her from re-applying for any category of licence as a licensed immigration advisor for a period of two years.

[3] Ms Y appealed against the imposition of those penalties. Although the Tribunal also ordered Ms Y to refund the fees paid by Ms G and pay her compensation, those payments have been made and that part of the Tribunal's decision is not challenged.

[4] Following the hearing on 20 January 2014, I informed the parties that the appeal would be allowed with all of the penalties, including censure, being quashed. These are my reasons for reaching that conclusion.

Scope of the Appeal

[5] It was accepted by counsel for Ms Y, that this is an appeal by way of re-hearing limited to considering the penalties imposed. Specifically, it was acknowledged that there is no right of appeal against the Tribunal's decision to uphold Ms G's complaint.[1]

[6] In determining this appeal, the Court may confirm, vary or reverse the Tribunal's decision.[2]

[7] The respondent, the Immigration Advisors Authority ("The Authority"), provided the Court with two copies of all of the relevant documents including the Tribunal's decisions. Ms Y provided a supplementary affidavit which was expanded by the giving of oral evidence at my request during the course of the hearing. She also provided an affidavit from her former manager and three testimonials as to her competence, honesty and integrity.

Background

[8] Ms Y is an intelligent and articulate person who holds a BA (Hons) in Law and Psychology from Carleton University in Canada. From May 2001 until her licence was cancelled in 2013, she was employed by Oceania Development Group Limited trading as the Migration Bureau ("Oceania") to provide immigration services to migrants to New Zealand, Australia and Canada. Since May 2009, when the current licensing system was introduced, she has been a licensed immigration advisor.

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[1] *Z W v Immigration Advisors Authority* [2012] NZHC 1069 (Priestly J)
[2] Section 84

[9] Ms Y was paid a fixed salary together with two monthly bonuses, one of $400 for completing tasks set for her by Oceania, and a second for meeting targets based on chargeable time billed on her files. A bonus of $500, for example, would be paid in each month in which she billed in excess of 300 six minute units.

[10] Oceania has a number of trading names, one of which is the Migration Bureau. It has established a comprehensive internet presence under this name, claiming that it is an "online referral network of independent registered migration agents and lawyers who provide a range of visa, job search and relocation services." Prospective migrants are able to use this website to contact Oceania and discuss their plans to immigrate to New Zealand.

[11] Oceania did not have a licence of its own as only natural persons can be licensed. Instead, it employed Ms Y and others, either as salaried staff or as consultants, to provide specialised immigration services. At one stage it had offices in Christchurch, London and Amsterdam, employing between 40 and 50 staff or consultants. It has contracted significantly since but has retained a client service agent in Amsterdam and one or two agents in London.

[12] Oceania has two shareholders, one who lives in Europe, and another, Mr W, who lives in Christchurch and manages the Christchurch office, which consisted of a receptionist, office manager, two other immigration advisors besides the applicant, (one of them part time), three accounts staff and a compliance manager at the time in question. Each of Oceania's immigration advisors had a supervisor employed by Oceania as a consultant to provide those services.

[13] Ms Y's services were billed to the client by Oceania and calculated by multiplying the time charged and the agreed hourly rate. However, the company also quoted a maximum figure to the client which applied as a cap to these fee calculations.

The Tribunal's Penalty Decision

[14] The complaint was dealt with on the papers[3] and Ms Y was provided with a proper opportunity for addressing the complaint before the Tribunal's decision was delivered. A similar process was adopted by the Tribunal before fixing the penalties. No exception is taken by the appellant with the process adopted by the Tribunal.

[15] In its later decision concerning penalties, the Tribunal summarised the decision on the complaint thus:

> "2. Ms Y was found to have acted dishonestly in relation to fees. She told her client [Ms G], that she was being charged fees that were 'in line with industry standards'. The fees charged were in the range of 545/hr to 587/hr, and inflated to a higher effective rate with various devices. The fees were not 'in line with industry standards'.
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> 3. Ms Y had a client who trusted her as a licensed professional but she abused her client's trust. However, Ms Y responded to the complaint by suggesting her client should have done her own research into the level of fees. In addition, Ms Y charged a 'sign on fee', claiming this was non-fundable, regardless of whether services were provided or not."

[16] By the time that the Tribunal began considering the imposition of penalties, it had been told by the Authority that many advisors had a practice of using "sign on fees" and that the Authority had condoned those fees. Although the Tribunal remained of the view that a "sign on fee" was not acceptable, it expressly disregarded its finding in this connection for the purpose of imposing sanctions.

[17] Before beginning the penalty assessment, the Tribunal examined the principles involved in suspending or cancelling licences and elicited the following principles:

(a) It is a last resort to deprive a person of the ability to work as a member of their profession. However, regard must be had to the public interest when considering whether a person should be excluded from a profession due to a professional disciplinary offence[4]

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[3] As required by s 49 (3)

[4] *Complaints Committee of Waikato Bay of Plenty District Law Society v Osmond* [2003] NZAR 162 (HC)

(b) Rehabilitation of a practitioner is an important factor when appropriate[5]

(c) When imposing sanctions in the disciplinary process, it is necessary to consider the alternatives available short of removal and explain why lesser options have not been adopted in the circumstances of the case[6]

(d) 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.[7]

(e) In achieving the statutory purpose of maintaining appropriate standards of conduct, it is necessary to consider public protection[8], demand minimum standards of conduct[9], discourage unacceptable conduct, [10] and consider rehabilitation, when practicable, to have the practitioner continue as a member of the profession practising well.

[18] The Tribunal also drew comfort from the comment by Priestly J in *Z W v Immigration Advisors Authority*[11] that the Tribunal was given a mandate by Parliament to enforce standards in order to clean up an industry which, prior to the passing of the Act, had been subject to much justified criticism. In this regard, the Tribunal noted that because the professional obligations under the Act were being imposed upon an existing body of immigration advisors, a relatively low entrance threshold had been applied, with no long period of academic training with mentored experience being demanded. Instead, it had been sufficient to demonstrate that the applicant had been competently handling immigration applications in the past, had

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[5] *B v B* HC Auckland, HC 4/92, 6 April 1993
[6] *Patel v Complaints Assessment Committee* (HC Auckland CIV-2007-404-1818, 13 August 2007)
[7] *Z v Dental Complaints Assessment Committed* [2008] NZSC 55
[8] Section 3 of the Act
[9] *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) and *Taylor v General Medical Council* [1990] 2 All ER 263 (PC)
[10] *Patel v Complaints Assessment Committee* (HC Auckland CIV-2007-404-1818, 13 August 2007) Ibid
[11] Ibid at [41]

knowledge and understanding of the new professional environment, and adequate language and communication skills. In particular, the Tribunal commented:

> "The low threshold for entry into the profession, in that entry has not required a long period of academic training with mentored experience, has inevitably resulted in some people entering the profession with no real commitment to maintaining professional standards. It is important that this Tribunal exercises the power to remove people from the profession who are in this category.
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> In a sense, the transitional entry has put a co-relative obligation on entrance to the profession to ensure they attain professional standards, having been entrusted with the privilege of entry to the profession."

[19] It is apparent from comments made later in its decision, that the Tribunal considered that Ms Y had no real commitment to maintaining professional standards and should be removed her from the profession.

[20] When determining Ms Y's culpability, the Tribunal noted that the significant factor was Ms Y's "dishonesty" and referred to the observation of the High Court in *Shahadat v Westland District Law Society*[12] that dishonest conduct "inevitably, although not always, may lead to striking off". In this context, the Tribunal said at paragraphs 21 to 24:

> "21. Ms Y's submission that she should face no sanctions and that the Tribunal's conclusions are wrong is grossly misplaced. Ms Y has been found to have acted dishonestly.
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> 22. This was not a case of simple overcharging. This complaint involves Ms Y systematically making statements she knew to be untrue to Ms G to induce her to accept excessive fees.
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> 23. Telling lies to a client to get money you are not entitled to is fundamentally inconsistent with professional standards.
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> 24. It was therefore inevitable that the removal of Ms Y from the profession is an outcome that must be considered by the Tribunal".

[21] At paragraph [50] the Tribunal said:

> "Ms Y's conduct involved dishonestly putting her financial interests before her client's interests and abusing the trust she was accorded as a licensed professional; she cannot expect to be immune from the consequences."

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[12] [2009] NZAR 661

[22] Having made those findings as to culpability, the Tribunal said:

> "51. The primary issue is whether it can be reasonably that Ms Y will in the future discharge her professional duties in a manner that does 'promote and protect the interests of consumers receiving immigration advice', as s 3 of the Act contemplates, I have to conclude that Ms Y has exhibited none of the qualities that could lead to an expectation that she will commit to meeting professional standards in the future."

[23] At paragraph 60 the Tribunal concluded:

> "60. I am accordingly satisfied disciplinary sanctions will not be sufficient to cause Ms Y to appreciate, accept, that to maintain professional standard. The public will only be adequately protected, and the objectives of the Act achieved, by cancelling her licence. I am satisfied that the period should be two years, after that point Ms Y would have to qualify for the profession, and to satisfy the registrar that she otherwise met the statutory requirements.

[24] These conclusions were based on the following factors:

(a) Ms Y entered the profession without having committed to a course of academic study or the mentoring required for persons now entering the profession.

(b) Ms Y rejected the Tribunal's findings against her.

(c) She was uncomprehending of the gravity of such an offence.

(d) Ms Y sought to attribute blame to her client for failing to undertake her own research on the fees commonly charged in the industry, demonstrating that she has no capacity to accept the duties she has as a professional in relation to a client who has trusted her because of her status and accepted representations made to her by Ms Y.

(e) Ms Y's rejection of the findings against her, considering that the Tribunal was wrong, indicates that the statutory disciplinary process brought her no meaningful insight.

(f) She failed to understand the difference between general commerce and the trust and respect for clients that is demanded of licensed professionals.

[25] The Tribunal also ruled out providing Ms Y with a provisional licence, as "it is unrealistic to expect her to be willing to respect, accept, and learn from a mentor."

Grounds of Appeal

[26] The appellant appeals on the following grounds:

(a) The Tribunal failed to take into account, or was plainly wrong in that it did not place enough weight on, the factual circumstances that:

(i) During the course of conduct the appellant was abiding by the policies, pricing structures, and charge out rates of her employer, Oceania.

(ii) The authority had reviewed examples of the appellant's immigration work/files, the company's policies and the fee structure and approved her licence.

(b) The Tribunal took into account the irrelevant consideration of a change in the law relating to entry requirements, which change came into effect after the appellant entered the profession.

(c) Aspects of the Tribunal's penalty appealed against are manifestly excessive and/or plainly wrong. More specifically:

(i) The fine imposed was manifestly excessive.

(ii) The censure was plainly wrong.

(iii) Cancellation of the appellant's licence and prohibition on applying for any type of licence for two years was manifestly

excessive given the factual background and other licence cancellation/suspension options open to the Tribunal.

(iv) The Tribunal was plainly wrong in the weight it put on certain factual findings.

(v) The Tribunal was plainly wrong in the weight it put on the appellant's apparent non acceptance of the Tribunal's findings in a forum where there is no ability to appeal a finding in relation to conduct.

[27] Throughout her submissions, counsel for the appellant struggled with the tension resulting from her client believing that the Tribunal's conduct findings were wrong and Priestly J's ruling in *Z W v Immigration Advisors Authority*[13] that there was no right of appeal against the conduct findings made by the Tribunal. Moreover, Priestly J also found that there was no basis on which to interfere with the Tribunal's stern sanctions because, in that case as here, the appellant had "tried unsuccessfully to deny any culpability" instead of attempting to express contrition. [14]

[28] Priestly J, however, highlighted that issues of fairness and natural justice loom large in a forum where there are very limited appeal rights against decisions of a Tribunal which sits as one member and determines matters on the papers.15 Moreover, he commented in para 39:

> "[39]. Obviously, if the District Court, on perusal of the materials before the Tribunal (or in appropriate cases additional materials), reached the view that the Tribunal had been totally wrong in finding a complaint or charge established then justice can be done by quashing any sanctions imposed."

[29] It is not surprising, therefore, that Ms McKenzie's submissions were directed to the proposition that the sanctions imposed by the Tribunal should be quashed because its findings were plainly wrong.

Discussion

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[13] Ivid
[14] Para [44]
[15] Para [40]

(a) Ms Y's involvement with Ms G

[30] At the heart of this appeal is the question of Ms Y's culpability as an immigration advisor employed by a company in which she has no financial interest, for the actions of her fellow employees. Although Ms Y's employer nominated her as Ms G's investment advisor, her dealings with the client amounted to:

(a) Speaking to Ms G by telephone on 22 March 2011 to confirm the details of her application,

(b) Sending a 15 page letter/email of 28 March 2011 recording the advice she had conveyed in the preceding telephone call,

(c) Speaking to Ms G in a telephone call on 3 May 2011 when Ms G said that she no longer wanted to proceed with her application.

(d) Sending a letter of the same date recording that the file had been put on hold.

(e) Respondng on 9 May 2011 to an email received from Ms G on 5 May 2011 asking what the sign-on fee had been used for and complaining that she felt overcharged.

[31] Ms Y had no contact with Ms G prior to 22 March 2011 or after 9 May 2011.

[32] Of particular significance is that, by the time that Ms Y became aware of the existence of Ms G and took up her role as the latter's immigration advisor:

(a) All Ms G's dealings with the company to that point had been with Ms M G, a licensed immigration advisor.

(b) In the course of that initial contact there had been an exchange of emails, a request for a "full check assessment" of Ms G's eligibility status, payment of a fee by Ms G to Oceania for that full check assessment, and the preparation and submission by Ms M G of a 12

page full check assessment report. This report is dated 14 February 2011.

(c) Ms M G had sent Ms G a personalised 13 page New Zealand fee estimate on 17 February 2011 setting out the services offered by Oceania and the fees charged for those services. Nowhere in that document is Ms Y's name mentioned.

(d) Ms G had signed a service agreement between herself and Oceania on 8 March 2011 in which the services that would be supplied to her and the costs she would be charged for those services were outlined. Nowhere in this document is Ms Y's name mentioned. Instead, in the section relating to fees, it is clear that the fees are being set and charged by Oceania.

(e) Ms G had paid the sign on fee of $1950.

(f) Oceania's accounts department had received the sign on fee and then set up an account for Ms G with hourly rates that varied from $545 per hour to $587 per hour, contrary to the information supplied to Ms G in the fee estimate sent to her on 17 February 2011.

(b) The hourly rate

[33] It was of serious concern to the Tribunal that fees had been charged at this level when the 13 page fees estimate began with the phrase "The Migration Bureau charges fees that are in line with industry standards" and the nine page service agreement had begun the discussion of charges with the phrase "Our professional charges are in line with industry standards ..." The Tribunal was satisfied that charge out rates of $545 to $587 per hour were not "in line with industry standards, and were grossly excessive."

[34] I am satisfied, however, that those high hourly rates were inserted by Oceania's accounts department without Ms Y's knowledge. Her letter (referred to in the service agreement as the "go ahead letter" that would outline the fees) gave estimates

of the estimated time and costs from which it can be seen that the hourly rate she was charging was $305 per hour. Her quoted fee range of $3050 to $575 for lodging a permanent residents application under the skilled migrant category is in line with amounts charged by others in the industry according to a table published at that time by the Immigration Advisors Authority showing that the maximum amount charged for such applications was $12,750, with a medium of $3775 and an average of $4009.

[35] The Authority's table, published on its website, noted that it had been compiled using data collected from licensed advisors between June 2009 and May 2010 concerning their minimum and maximum charges for various services. The Authority told readers that "A licensed immigration advisor must set fees that are fair and reasonable in the circumstances". It is clear from this material, therefore, that it was being published by the authority to help potential migrants evaluate for themselves the reasonableness of the fees being charged. Because the authority has highlighted that the data was drawn from licensed advisors who have a duty to set fees that are fair and reasonable, a reasonable inference can be drawn that fees charged within the published range were fair and reasonable.

[36] Although the industry has subsequently expressed concern about the accuracy of this data, anyone accessing it on the website was entitled to believe that it was accurate having regard to the source of the data and its publication by the authority. Not only was this table likely to be used by potential migrants, but it was also reasonable to expect that licensed advisors would themselves use this data to determine the competitiveness of the rates they were charging.

[37] If the rate being charged by Ms Y for a simple residency application was $305 an hour with the total fee being between $3050 and $4575, then the price being charged to Ms G was "in line with industry standards."

[38] However, the work undertaken by Ms Y for Ms G was actually being charged out at between $545 and $587 per hour. At the lower figure, 10 to 15 hours work would give a range of $5450 to $8175; at $587 per hour this range would be $5870 to $8805. Both of these ranges are double the median and average fees charged as

reported in the authority's table but less than the maximum cited of $12,750. They were, therefore, within the range of fees charged but were clearly at the top end of that range. The Tribunal was entitled to consider that this amounted to gross overcharging. Moreover, because those fees were double the median/average, it was within the Tribunal's power to find that fees of this magnitude were not "in line with industry standard."

(c) Dishonesty

[39] The Authority was also justified in being concerned about a process under which Ms G was told that the fee would be charged at the rate of $305 per hour when it was actually being charged at $545 plus.

[40] At the time Ms Y wrote her letter of 28 March 2011, quoting fees based on an hourly charge out rate of $305, Ms G's account had already been created by Oceania's accounts department and hourly rates of $545 and $587 loaded.

[41] Clearly, from Ms G's perspective, she was told that the immigration services to be provided would be "in line with industry standards". In reliance upon that statement she entered into an agreement for the provision of those services, that agreement also indicating that the professional charges for the services being offered were "in line with industry standards". Both the rates quoted in the fee estimate and those itemised by Ms Y in her letter of confirmation, were in line with industry standards but the actual rates charged to Ms G for the minimal services applied were not.

[42] The Tribunal has found that the situation in which Ms G found herself was the direct result of a serious breach by Ms Y of her professional duties.

(d) Code of Compliance

[43] Clause 8 of the Code of Conduct for Licensed Immigration Advisors that applied in 2010 provides:

> "A Licensed Immigration Advisor must:
>
> (a) Set fees that are fair and reasonable in the circumstances; and

(b) Before commencing work incurring costs, set out the fees and disbursements (including Immigration New Zealand fees and charges) to be charged, including the hourly rate and the estimate of the time it will take to perform the services, or the fixed cost for the services; and

(c) Set out payment terms and conditions; and

(d) Ensure that fees, disbursements and payment terms and conditions are provided to clients in writing prior to the signing of any written agreements; and

(e) Each time the fee is payable, provide clients with an invoice containing a full description of the services that the invoice relates to.

[44] Section 44 of the Act provides that breaches of the Code, negligence, incompetence, dishonesty and misleading behaviour are all grounds for complaint.

[45] The Code also contained more general obligations including:

(a) Perform his or her services and carry out the lawful informed instructions of clients with due care, diligence, respect and professionalism.[16]

(b) To explain to and provide clients with a copy of the Licensed Immigration Advisors Code of Conduct 2010 before any agreement is entered into.[17]

(c) Ensure that before any agreement is entered into:

(i) Clients are made aware, in writing and in plain language, of the terms of the agreement and all significant matters relating to it; and

(ii) Clients are advised that they are entitled to seek independent legal advice before entering into agreements.[18]

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[16] 1.1 (a) and (b)
[17] 1.4 (a)
[18] 1.5 (a) and (c)

(d) Weight given to corporate structure

[46] In its decision the Tribunal recognised that the client relationship with Ms G was established by other Licensed Immigration Advisors prior to Ms Y's involvement with Ms G. Although the Tribunal considered that there were a number of significant lapses in the course of establishing the client relationship, it recognised this by concluding that Ms Y should not be held responsible for the work done earlier by those other Licensed Immigration Advisors. It did consider, however, that she should be held responsible to the extent that she relied on or used information others had provided to Ms G. This is reflected in paragraphs [129] to [131] which state:

> "129. I now apply those principles to the present facts. The failure to have a full description of services in the essential document establishing a professional relationship is a significant failure, and mitigated only to a degree by being able to piece the information together from other documents. However, the fact Ms Yap only relied on the documentation rather than created it satisfies me that I should regard the failure as falling below the threshold of an adverse disciplinary finding.
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> 130. I take a similar view of the failure to get personal written instructions; given the full transparency of Ms Y's role I regard the lapse as technical only.
>
> 131. Accordingly, I make no adverse finding regarding the establishment of Ms Y's client relationship with Ms G, other than as discussed below in relation to fees."

[47] The Tribunal also accepted that there were a number of other complaints made by Ms G which were either not established or not Ms Y's responsibility.

[48] Moreover, although the Tribunal was critical of the non-refundable "sign on fee", considering that to be in breach of clause 8 of the Code, no penalties were imposed in relation to this finding once the Authority had advised the Tribunal that it had condoned this practice in the industry.

[49] The findings against Ms Y, therefore, that resulted in the imposition of penalties relate to the mis-match between the fee rates quoted to Ms G (recorded in the service agreement supplemented by Ms Y's letter of 28 March 2011), and the actual fees charged.

[50] The Tribunal found that Ms Y was well aware of the representations made and the rates quoted. It found that the actual fees charged were not "in line with industry standards", were "grossly excessive", and "designed to exploit her client."

[51] The section of the Tribunal's decision dealing with the fees charged ended with the following six paragraphs.

> "146. Further, Ms Y charges her time at hourly rates from 545/hr to $587/hr. She says some unspecified correction was needed, however, they appeared to be higher than the quoted rates, she has not explained that in any satisfactory way.
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> 147. I am also satisfied that various devices were used to further inflate very high hourly rates. The charges for mailing out general information that may or may not have any relevance to a client, charging a percentage on the hourly rate for "disbursements", and the like were not justified.
>
> 148. What is "fair and reasonable" fees may on occasions be calculated at a very high rate, typically where a client that is fully informed, and demands exceptional service delivery they may fairly agree to pay a substantial premium. However, that was not the case with Ms G.
>
> 149. Ms G was a client who was concerned to limit her costs, while getting a proper professional service. The fees she was charged were not fair or reasonable.
>
> 150. The most serious aspect is that Ms Y misled Ms G by causing her to believe fees that were extremely high were "in line" with the fees charged by other Licensed Immigration Advisors. Ms G trusted her, and it is most unimpressive that Ms Y now contends that Ms G should have done her own research. Ms Y is a licensed professional, and she was trusted as a result of her status. It was dishonest to abuse that trust by misleading her client.
>
> 151. I am satisfied that Ms Y engaged in dishonest and misleading behaviour, which is grounds for complaint under s 44 (2)(d) of the Act."

[52] It will be noted that the authority has referred to Ms G as being Ms Y's client and the fees being charged by Ms Y, despite the Tribunal being aware that Ms Y was employed by a company in an environment where there were three or more Licensed Immigration Advisors.

[53] In an earlier part of its report, the Tribunal commented on the responsibilities of Licensed Advisors operating in a corporate environment. At paragraphs 52, 53 and 54 it said:

> "52. It is not possible for a company to hold a licence, and the Code of Conduct makes it clear that it is necessary for a Licensed Immigration Advisor to be identified, and hold written authority from a client, (clause 2.1 (h) of the Code). The code does not leave open the possibility of a Licensed Immigration Advisor providing professional services without personally holding a written record of their authority from the client.
>
> Written authority to act on the client's behalf is an essential element of a licensing regime. Licensed Immigration Advisors are personally responsible for dealing with client funds, fees and all professional obligations under the Code of Conduct. They cannot avoid personal responsibility by pointing to an employer or other party.
>
> Accordingly, the Minute[19] noted Ms Y should be in a position where she had control of these issues, and ensured that if she was to conduct her practice in association with Oceania, the company respected and preserved her professional control over all material financial and professional matters in relation to clients. Under the Act she is personally responsible and liable for orders for the refund of fees, compensation and other enforcement powers contained in s 51 of the Act."

[54] It is clear from this portion of the Tribunal's decision, that Ms Y has been held accountable to her as the only Licensed Immigration Advisor having responsibility for Oceania's dealings with Ms G on 27 April 2011 when an invoice for $1551.09 was generated by charging out Ms Y's time at a rate that was out of line with standard industry practice and far greater than the rate quoted to Ms G.

[55] In her submissions to the Tribunal on the issue of penalties, Ms Y said:

> "The hourly rate disclosed to Ms G in the assessment letter of 14 February 2011 was NZ$420 for a specialist, NZ$360 for consultant and NZ$450 for head of department.[20] Ms G was charged at a higher rate which was a data entry oversight by a member of the accounts team. The rates mistakenly entered were NZ$587 for head of department, NZ$560 for specialist and NZ$545 for consultant. I should have noticed the mistake but did not and for that I take responsibility. I was not benefiting personally from the mistake and would have corrected it immediately if I had noticed it. The rates were entered into the clients set up in the computing programme and I did not do this and I presumed the correct rates were entered. This was an unintentional mistake which I regret.
>
> I calculate that from the invoices to Ms G, the amount of NZ$728.10 has been overcharged due to the incorrect rate being calculated. This amount will be refunded to Ms G. I can assure you that there was no dishonesty or any intent to mislead Ms G. I had not noticed the higher hourly rate being charged out to Ms G until the issue was raised."

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[19] Issued by the Tribunal for issuing its decision
[20] These rates appear to have GST included

[56] Ms Y then submitted that no sanctions should be imposed as her practice had "involved no intentional acts of dishonesty or designs to mislead Ms G." The Tribunal was quite unmoved by these submissions and concluded its discussion of its earlier findings by concluding that:

(a) She "systematically" made statements to Ms G she knew to be untrue in order to induce her to accept excessive fees.

(b) She told lies to her client to get money to which she was not entitled.

[57] I have some concerns with those findings made in its decision on penalties. In the first place, the Tribunal had been at pains in its decision on Ms G's complaint to insulate Ms Y from responsibility for the actions of those who were responsible for developing the client relationship. The Tribunal acknowledged that none of the representations made in order to induce Ms G to enter into a contract had been made by her or on her behalf. She was simply aware of them and relied upon them when providing her services to Ms G. The statement referred to in [57](a) above is therefore inconsistent with the Tribunal's own findings.

[58] Secondly, the contract into which Ms G entered, when supplemented by Ms Y's letter of 28 March 2011, demonstrate that the contract rate for the provision of services was as represented to Ms G. What Ms Y said to her client, therefore, was the truth.

[59] Thirdly, had the agreed hourly rate been entered into Oceania's computer when Ms G's account was set up, there would have been no breach by Ms Y of her professional obligations: Her services would have been charged out at a contract rate which was in line with the rates represented to her previously, those rates being "in line with industry standards", and "fair and reasonable".

[60] Fourthly, this demonstrates that it was the entry into the computer of the higher rate and the subsequent charging of fees to Ms G at that rate that is crucial to the Tribunal's finding of professional misconduct.

[61] The issue is whether or not Ms Y should be held accountable for the activities of Oceania's accounts department which had entered the higher hourly rates and calculated the charges to Ms G at those rates.

[62] In this context, it is of significance that the letter sent out by Ms N G on 14 February 2001 accompanying the New Zealand fee estimate for Ms G was signed by Ms N G on behalf of Oceania Development Group trading as Migration Bureau. It began:

> "We refer to your recent contact with our company and write to confirm our advice to you. We also take this opportunity to thank you for your payment in respect of that assessment and this letter."

[63] Of more interest, is how that letter concluded:

> "We would like to confirm that if you wished to utilise our service we would provide assistance and advice at each stage of the emigration process. As a professional firm, we would ensure that your interests are protected and that every opportunity is maximised. In addition, our services go far beyond merely obtaining the Visa: We aim to provide you with the support and information that you require as you consider what may be one of the most important decisions of your life.
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> ....
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> We note that you would only seem to have around NZ$263,000 available to you to assist with your migration. We would warn that the costs involved in migration and settlement can be high. In addition we would advise that as a professional firm we charge on an hourly basis for the work carried out on your file. Please read our schedule of fees very carefully before making any commitment, as our fees may prove prohibitive for you. We would be happy to assist you, but would not wish you to experience financial difficulties as a result of using our services.
>
> The Migration Bureau is an international firm and our Visa department team works together irrespective of their location, be it London, Amsterdam, New Zealand, Australia, Canada or North America. Whilst you can always visit the office of the firm closest to you, your physical file may be handled in another country entirely. The Migration Bureau focuses on providing you with a prudent and careful service with supervision by highly qualified consultants.
>
> One of the distinguishing features of the Migration Bureau Service is that we do not allow any correspondence to leave the firm without being sighted by two experienced operatives of the firm. This is an additional protection to you as the Company realises that the accuracy of the advice you receive is fundamentally important, given the significance and consequences of the decision you are making.

Every staff member and associate of the Migration Bureau Consulting Group, irrespective of function, is bound by a strict and binding Code of Conduct that requires the utmost level of personal service to be maintained. If you at any time feel that a member of the firm is not maintaining a standard of excellent service aimed at protecting client interests or if you are dissatisfied with the service provided to you with [sic] please contact our Compliance Officer at compliance@migrationbureau.com and the matter will be looked at in detail.

Please find our terms of business enclosed. These outline our approximate range of fees. You have also been provided with a Payment form, and should you decide to proceed, our Christchurch office will give you instructions on completing this form. Your completed form should then be returned to the relevant office.

...

While our Client Service Officers in Christchurch can assist you in the day to day practicalities of your decision, only members of the Visa department can assist you with the technical and regulatory aspects of your application.

In conclusion we can confirm that we would, as a firm assist you if you so instructed, and look forward to hearing from you in the near future.

Yours sincerely

OCEANIA DEVELOPMENT GROUP

t/a Migration Bureau Megan Groves 201001894

Licensed Immigration Advisor 200800480

This letter has been checked and approved by J M, IAA Number 200902116.

Enclosed: Service Agreement, Estimation of Fees, IAA Code of Conduct, Migration News, ODG Associates, ODG Recruitment and Settlement Services Flyer

cc Christchurch"

[Emphasis added]

[64] The limited role Ms Y played in the process is amply demonstrated by what happened when Ms G sought a refund of her $1980 sign on fee. Control of the situation was immediately taken by Ms A, a person who is not a Licensed Immigration Advisor and whose job title is "Client Care and Compliance Officer". She conducted all further communications between the company and Ms G. She explained the company's policy in relation to the refund of fees, pointing out that the contract made it clear that the sign on fee was non-refundable and refused to refund it. Eventually, she instructed the accounts department to credit $975 of the sign-on

fee towards the costs that had been charged to that date, but still insisted that Ms G pay a balance of $694.81. At no stage did she disclose to Ms G that the actual rate charged was far higher than the hourly rate that had been disclosed to, and agreed with, Ms G. It is clear that Ms Y was under the direction of Ms A, and that the latter was limiting Ms Y's involvement.

[65] I have determined from all of the documentation I have seen and from the manner in which other members of Oceania conducted themselves, that Ms Y was only responsible for "the technical and regulatory aspects" of Ms G's application. Oceania was responsible for everything else, including setting the fee, forming the contract, charging the client, and collecting their fee.

[66] I do not consider that it is appropriate for Ms Y to be held professionally accountable for matters over which she had no control unless it could be established that she was either aware of, or ought to have been aware of, unprofessional practices being adopted by Oceania.

[67] Ms Y said in evidence that an error was made when the accounts section was loading the appropriate hourly rates to be charged to Ms G for Ms Y's time on the file. There is no evidence to the contrary. In particular, there is no evidence that Oceania had a policy of regularly charging its clients at a higher hourly rate than had been agreed with them.

[68] I also note that Ms Y has never attempted to argue that the actual rates charged by Oceania were either fair/reasonable or "in line with industry standards". Instead, her submissions have been based entirely upon the assumption that the quoted hourly rate was the only relevant rate and she has failed to appreciate that the Tribunal was applying those yardsticks to the actual rate. That is consistent with her belief that the higher hourly rates loaded onto the computer were wrong. She says that she was unaware of that and I believe her. Accordingly, I find that she had no actual knowledge that an error had been made by the accounts department.

[69] The more difficult question is to determine whether she ought to have been aware of the error.

[70] In my view, Ms Y is entitled to expect the accounts department to correctly load the hourly rate as agreed.

[71] The corporate structure in which Ms Y has operated, with her employer allocating different functions in the process to other agents, while at the same time retaining control over the contract formation and charging process, must limit Ms Y's accountability for errors made by others. I see no reason why she ought to be held accountable for the actions of the accounts department which, itself, is answerable to Oceania and not Ms Y.

(e) Professional accountability

[72] So was the Tribunal entitled to say at paragraphs 52, 53 and 54:

> "52. It is not possible for a company to hold a licence, and the Code of Conduct makes it clear that it is necessary for a Licensed Immigration Advisor to be identified, and hold written authority from a client, (clause 2.1 (h) of the Code). The code does not leave open the possibility of a Licensed Immigration Advisor providing professional services without personally holding a written record of their authority from the client.
>
> Written authority to act on the client's behalf is an essential element of a licensing regime. Licensed Immigration Advisors are personally responsible for dealing with client funds, fees and all professional obligations under the Code of Conduct. They cannot avoid personal responsibility by pointing to an employer or other party.
>
> Accordingly, the Minute[21] noted Ms Y should be in a position where she had control of these issues, and ensured that if she was to conduct her practice in association with Oceania, the company respected and preserved her professional control over all material financial and professional matters in relation to clients. Under the Act she is personally responsible and liable for orders for the refund of fees, compensation and other enforcement powers contained in s 51 of the Act."

[73] Under s 63 of the Act it is an offence punishable by imprisonment not exceeding seven years or a fine not exceeding $100,000 to provide immigration advice without either being licensed to do so under the Act or exempt from the licensing requirements.

[74] "Immigration advice" is defined in s 7 as meaning "using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent

[21] Issued by the Tribunal for issuing its decision

another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward", but does not include providing information that is publicly available or carrying out clerical work, translation or interpreting services, or settlement services. Because only "natural persons" may be licensed as Immigration Advisors, any company that provides immigration advice is committing an offence under s 63. The situation is no different from that which existed in the legal profession for most of the 20th century. Only lawyers holding practising certificates were able to offer legal services. Because companies could not obtain practising certificates, lawyers were unable to incorporate their businesses and, instead, were limited to forming partnerships with persons of similar qualifications. Only since 2006, have lawyers been able to incorporate their businesses, but even then, the shareholders and directors must be lawyers who are actively involved in the provision of that company's legal services or the administrators of the estates of those solicitors.

[75] Section 12 (6) of the Act provides that a lawyer may neither apply for nor hold a licence. In that context, the Act defines lawyer by reference to s 6 of the Lawyers and Conveyances Act 2006 meaning "a person who holds a current practising certificate as a barrister or as a barrister and solicitor". Mr W, the only New Zealand Director of Oceania, is described by Ms Y as being a barrister. If he holds a practising certificate as such, then Oceania is being owned and controlled by a person who cannot hold a licence in his own right.

[76] In the light of those considerations, it is hard to see why the Authority has tolerated the presence of companies within the industry, especially those, such as Oceania, owned by shareholders and controlled by directors none of whom are Licensed Immigration Advisors. Yet, when Ms Y first sought her licence, she was candid with the Authority about her employment. Before granting her a licence, the Authority was given copies of all of the company's procedures and all of the standard form documents, including the the standard service agreement and the documents/letters setting out the fee structure. It was also given copies of files on which she had acted. On that licensing, and on subsequent renewals, when the Authority requested certain changes to the service agreement and the manner in

which fees were charged, those changes were made with the approval of Oceania's directors.

[77] There are likely to be many licensed advisers in the industry who are employed by others who are themselves licensed. In those circumstances, culpability would be apportioned between the licensed holders, with each being held accountable for their own lapses. I am satisfied that, had Oceania held a licence, then it would have been held accountable to Ms G and Ms Y would not. It is certainly regrettable that the authority's awareness of this corporate structure and the implied approval it has given to it, has led to no-one who can be held accountable for charging, and attempting to retain, fees to Ms G that were in excess of the contract rate, but Ms Y should not be penalised for that.

Conclusion

[78] I have concluded that the Tribunal was plainly wrong to hold Ms Y accountable for the actions of others. It also follows that its findings based on her attitude to its conduct decision are unsustainable.

[79] In those circumstances I have decided to take the course suggested by Priestley J in *Z W v Immigration Advisors Authority.* The penalties against Ms Y, including the censure, are all quashed.

C P Somerville
District Court Judge
Signed at 4.50pm on Tuesday 28 January 2014