Financial Advisers Disciplinary Committee **2018 FADC 009**

IN THE MATTER OF:	**Financial Advisers Act 2008**
BETWEEN:	**FINANCIAL MARKETS AUTHORITY**
	Complainant
AND:	**T**
	Respondent
Committee Panel	Hon Sir Bruce Robertson (Chairman) Geoffrey Clews Peter Houghton
Counsel:	Michael Hodge for the Complainant Donald MacRae for the Respondent
Date of Hearing:	By consent, on the papers
Date of Decision:	14 May 2019

DECISION OF THE COMMITTEE ON DISPOSITION

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A. INTRODUCTION

1. On 29 March 2019 this Committee found that the Respondent had breached Code Standard 8 ("**CS 8**", "**CS**" for Code Standard) of the Code of Professional Conduct for Authorised Financial Advisers ("**Code**") in the case of two clients, in that he failed:

    (a) To make reasonable inquiries as to the medical circumstances of one client; and
    (b) Once aware of a past medical issue affecting existing insurance for the other client, to act consistently with the requirements of CS 8.

2. The Committee sought submissions on disposition from both parties.

B. THE PARTIES' RESPECTIVE SUBMISSIONS ON DISPOSITION

3. The Committee received three written submissions from the Complainant, first at the hearing, secondly after the decision and, thirdly, submissions in reply to those of the Respondent.

4. The first submissions characterised the breaches of CS 8 as not being at the serious end of the scale and suggested a penalty of censure and/or fine. The Complainant accepted that the case did not involve any question of the Respondent's authorisation under the Financial Advisers Act 2008 ("**FAA**") being jeopardised.

5. The second submissions raised factors of which the Complainant considered the Committee ought to be aware, arising from on-line comment about the Committee's decision. The thrust of the submission was that:

    (a) It is difficult to justify name suppression when the Respondent has chosen to comment on the case in a public forum and in one instance has done so openly using his name; and
    (b) The content of the published comment suggests that the Respondent has not gained insight into his breaches of CS 8 and is not remorseful.

6. The Respondent made written submissions through counsel. They dealt with the issue of penalty generally and addressed the on-line posts made by the Respondent in the context of name suppression. As to the first matter, the submissions canvased past penalties imposed by the Committee and argued that the instant case warranted no action being taken, as permitted by section 101(3)(h) of the FAA. As to the second, the Respondent submitted that the views he expressed about the proceedings were consistent with the position he took during the hearing and not inconsistent with him being remorseful.

7. The Complainant's submissions in reply amplified its view that the breaches found to have occurred were the result of a careless approach to fact gathering and medical disclosure. They contested the Respondent's submission that rehabilitation or discipline was not required..

C. ISSUES FOR DETERMINATION

8. The issues to be determined are:

    (a) What if any sanction should be imposed on the Respondent as a result of his having breached CS 8; and
    (b) Whether the Respondent's identity should be suppressed permanently.

D. WHAT, IF ANY, SANCTION SHOULD BE IMPOSED?

Disciplinary objectives and options

9. The options available to the Committee to sanction CS breaches are set out in section 101(3) of the FAA and Rule 29 of the Committee's Procedure Rules (rules cited as **PR 29** etc) states the factors the Committee may weigh in its consideration of penalty. The objective in considering the factors is to protect the public and set professional standards, while arriving at a penalty that is the least imposition on the Respondent that is reasonable: *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand,* [1] cited in *FMA v X*[2] and in subsequent decisions of this Committee. In pursuing these objectives, both *Roberts* and cases such as *Daniels v Complaints Committee 2 of the Wellington District Law Society*[3] make it plain that, within the "least imposition" principle, penalties ought to deter the adviser, and other advisers, from breaching the Code in a similar way, set and maintain professional standards, impose sanctions on an adviser in the sense of denouncing the breach of his/her duties and provide scope for rehabilitation in appropriate cases.

10. As to the latter point, Respondent's counsel helpfully drew the Committee's attention to *A-G v Institution of Engineers New Zealand Incorporated*[4]. This decision considered the Institution's jurisdiction to undertake disciplinary proceedings related to the collapse of the CTV Building in the February 2011 Christchurch earthquake. The Respondent drew particular attention to the non-punitive aspects for which the Court considered disciplinary proceedings could be undertaken. Those observations referred to the objective of maintaining standards of competence, preserving the investment that professional people make in their training and competence, and the possibility that disciplinary proceedings might be more an inquiry into a tragic event rather than into a single person's professional responsibility.

Relevant factors under the Procedure Rules

11. The factors in PR 29 are not exhaustive. They indicate some of the issues to consider when arriving at a penalty that meets disciplinary objectives. Considering the listed factors:

    (a) The Complainant has characterised the breaches considered by the Committee as not falling at the serious end of the spectrum. We agree, although the breaches raise important consumer protection issues.
    (b) The Respondent's conduct in both the instances of breach was genuine. His stance was that he understood his obligations under CS 8 and had abided by those. Despite our findings that he fell short of meeting the obligations imposed by CS 8, we do not consider that he did so deliberately.
    (c) The Respondent chose to test the case brought against him at a hearing. Originally he faced more allegations of having breached the Code than were pursued at the hearing. Given the position that emerged on the evidence, a position that in some respects differed markedly from the case as originally presented by the Complainant, we do not consider that the Respondent's choice to defend the allegations of CS breaches should be treated as an adverse factor when setting penalty.
    (d) We are unaware of any other penalties arising from the breaches of CS 8.

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[1] [2012] NZHC 3354
[2] [2014] FADC 005
[3] CIV-2011-485-000227 (High Court Wellington, 8 August 2011)
[4] [2018] NZHC 3211

(e) There is nothing in the conduct of the Respondent during the Complainant's investigation that should count against him in setting penalty.
(f) No offer of amends has been advised to us, but then there does not seem to be any loss to the clients involved; and.
(g) There are no previous findings of misconduct by the Respondent.

Additional observations

12. The Respondent is an experienced AFA and had for some time specialised in offering personalised insurance options to people working in the construction industry. Catering to members of that industry may put an adviser under time pressure, as we found was the case with Mr P. Any penalty imposed ought to encourage the Respondent and other advisers to take the time that is required to meet their obligations. For instance, it may not always be wise to meet prospective clients at their work sites, unless that is to set up a meeting off site to allow the time required to deal with the substantive matters on which an AFA has obligations under the Code.

13. Any penalty must amplify that an adviser cannot afford to adopt an anecdotal interpretation of the Code. That is what happened here when, in relation to Mr W, the Respondent characterised CS 8 as allowing him to rely solely on what his client told him. The belief that the 2014 version of the Code was "prescriptive" is another example of the need for advisers to be sure they understand what the Code actually says. A penalty should deter the sort of flawed interpretation adopted by the Respondent and encourage a better understanding of Code obligations. In any professional environment members may struggle to understand their obligations in practical day-to-day terms. It is important, however, that the adviser community not assume that "common practice" is necessarily consistent with the Code. A penalty ought to mark this out. The extent of any penalty ought to be balanced, however, with the educative effect of the Committee's substantive decision.

The Respondent's on-line comments

14. That decision has clearly been seen by and commented on by members of the advisory profession. The Respondent had something to say publicly about the Committee's decision before it considered penalty. He would know that his comments might be taken as a gauge of his attitude to the findings made against him. He is, of course, entitled to disagree with the Committee's decision and has appeal rights.

15. Dealing with the comments in sequence, that made by the Respondent to the "Big Read" is innocuous. It was on 27 March 2019, two days before the Committee's decision was issued and simply added some factual comment to the journalist's report of the hearing. The author did not disclose his or her name.

16. The second was on 31 March, after the decision was given. It was published under the Respondent's name as a comment on "Good Returns." We are told that the Respondent quickly asked for and obtained the removal of his name. In this comment the Respondent says, amongst other things, that the Committee "took over the prosecution,"... "pulled out evidence that wasn't even covered in the hearing," and misconstrued evidence on the speed of meetings with Mr P. He then invited RFAs and AFAs, "If you can see where I stepped over the line, please tell me."

17. The third was on 4 April and suggests that, by this time, the Respondent may have gained some better understanding of the Committee's decision as it related to Mr W. He seemed to understand that his breach arose from not taking into account information known to him, in the face of what he was being

told by Mr W. It is noteworthy that some of the responses to the Respondent's comment show the kinds of alternative action that might have been taken in the face of the stance adopted by Mr W and that the Committee suggested ought to have been taken by the Respondent. The third comment includes the view that the Committee adopted a "rather expansive reinterpretation" of the phrase "risk profile."

18. Do these comments indicate a lack of insight and remorse on the Respondent's part that the Committee ought to take into account in its deliberation on penalty? There are some concerning aspects of the comments, but that should not be overstated. The Respondent's request of 31 March for others to show him what he has done wrong suggests that, at that stage, he may not have taken on board the need to look past "common practice." His assertion that the Committee has adopted an expansive interpretation seems to reflect still a view that the 2014 Code was prescriptive, despite our finding to the contrary. The statement that the Committee "took over the prosecution" fundamentally misses the point that matters raised by the Committee during the hearing seemed so obvious to it that they needed to be put to the parties, each of which had the opportunity to be heard on those points. Similarly, evidence "pulled out" by the Committee was actually placed in the record by agreement between the parties. It was received as unchallenged evidence, which could have been explained more had the Respondent thought to do so.

19. Taken as a whole, we see the Respondent's public comments as reflecting natural disappointment at the outcome of the hearing. We are concerned that some of them could suggest an attitude of "I know better," but they were made without the Respondent having had the opportunity to consider our decision more carefully. His submissions suggest to us that, despite disappointment, the Respondent has insight into his CS breaches. It was unwise for him to have engaged in on-line correspondence about his case while it was still unresolved, but on balance we do not treat his comments as aggravating any penalty that should be imposed.

Should a monetary penalty be imposed?

20. We have decided that it is not appropriate to impose a monetary penalty, either by way of fine or costs. Our reasons for that are:

    (a) Imposing a fine in this case would be disproportionate to the severity of the CS breaches compared with others the Committee has dealt with; and

    (b) The Respondent has borne the costs associated with an investigation and complaint that was far more wide-ranging that the case he ultimately faced before the Committee and this is bound to have had a financial impact on him directly and indirectly.

Should the Respondent be censured?

21. The Committee's consideration has been primarily directed to whether it ought to censure the Respondent as the Complainant has urged, or take no action as the Respondent submits. In our view the most important factors in that regard are to reinforce the need for advisers not to adopt an anecdotal or "common practice" assumption when applying the Code, such as we consider the Respondent did in this case in relation to Mr W, and to take the time to inquire properly about medical history, which we consider was not done in the case of Mr P. There are four factors we have taken into account in arriving at our decision:

    (a) The relative seriousness of the breaches in this case;

(b) The effectiveness of our substantive decision in deterring CS breaches by the Respondent and other advisers without further action;

(c) The specific inclusion of the option available to the Committee of taking no action; and

(d) The significance in relation to the Respondent's disclosure obligations of taking no action.

22. On the first point, the breaches are acknowledged as being at the lower end of the scale. Despite that, on the second point, the factors referred to in paragraph 21 mean that the breaches cannot simply be ignored. There has been some professional uptake of the substantive decision, but without a further step to mark out the Respondent's actions as having been unacceptable, the effectiveness of the disciplinary process in upholding professional standards would be compromised in this case. The breaches require censure and this is the least imposition warranted in this case.

23. Addressing the third point, there may be other cases where a decision to take no action would not compromise disciplinary objectives. The option to take no action is not available to some other disciplinary bodies.[5] As Respondent's counsel argued, that means Parliament envisaged cases where CS breaches, though established, might not lead to the affected AFA being formally admonished, but we do not consider that this is such a case. Respondent's counsel placed weight on the fact that we found Mr W had deceived the Respondent. That deception did not go to the heart of the breach as it arose in Mr W's case. The heart of the matter was that the Respondent wrongly believed the Code allowed him to rely on what Mr W told him even though he knew differently. In the case of Mr P, we came firmly to the conclusion that the Respondent's practices left too little time for him to have fulfilled CS 8. Reduced to this, both breaches warrant censure.

24. The censure of a professional disciplinary body is not a light or meaningless penalty. It represents a conclusion that, assessed according to the expectations of a profession as a whole, the default in question falls below the standard expected of a member of that profession. It is a professional admonition and reprimand, which is a public and formal denunciation of the acts and omissions concerned and it reinforces for the advisory profession as a whole the critical importance of compliance.[6] In any professional context formal censure carries inevitable reputational consequences, but we do not consider that censure would be disproportionate to the severity of the CS breaches in this case.

Initial disclosure obligations without censure

25. The fourth point at paragraph 21 arises because Respondent's counsel submitted that censure was not required, in part because the Respondent would still have to disclose the outcome of the proceedings in his initial disclosure statement to clients. We have considered this submission carefully but do not agree. The point arises in relation to the primary disclosure document an AFA must issue to a prospective client under regulation 5 of the Financial Advisers (Disclosure) Regulations 2010. The form of the disclosure is prescribed in Schedule 1 to the Regulations. Under the heading "What else should you know about me," the prescribed form requires an AFA to provide details as to the following:

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[5] An example is the disciplinary committee whose processes were considered in *A-G v Institution of Engineers New Zealand Incorporated,* see n 4.

[6] FADC 002 *FMA v Bourke-Shaw*

> I have, within the previous 5 years, been the subject of disciplinary proceedings before the disciplinary committee (which deals with complaints regarding Authorised Financial Advisers), which has *made a recommendation or order in relation to me, or has censured me.* (our emphasis)

26. Contrary to the argument advanced for the Respondent, we conclude that a decision to take no action is not captured by the standard primary disclosure form. The option for the Committee to take no action is not an order that no action be taken. It is a choice available to the Committee that it do nothing more, not that it order that nothing more be done. The language used in the primary disclosure form mirrors that used in section 101(3) of the FAA. The options set out in that subsection are three instances of recommendations, three of orders, censure and taking no further action. Only the instances of recommendation, orders and censure are referred to in the standard primary disclosure form.

27. In context, therefore, that form is directed to steps actually taken against the advisor as a result of the disciplinary proceedings referred to in the opening words. If such proceedings have occurred but no recommendation, order or censure follows, because the Committee elects to take no action, a finding that the Code has been breached need not be notified to a prospective client. The Respondent's submission on this point implies that he accepts it would be appropriate for him to have to make a primary disclosure about our findings to prospective clients. We agree with that expectation but, for the reasons we have given, that cannot occur without censure.

E. PENALTY ORDERS

28. Taking all of the forgoing matters into account, the Committee orders that the Respondent be censured in respect of both breaches of CS 8.

F. PUBLICATION AND PERMANENT SUPPRESSION OF IDENTITY

29. PR 31(2) permits the Committee to direct non-publication of a party's identity if there are exceptional circumstances. Those are not defined but in other cases the Committee has allowed permanent name suppression where the requirement to disclose to potential clients provides a sufficient protection for the pubic and where the consequences of publication would be disproportionate to culpability. Broadly speaking, those have been more serious cases than this.

30. The only additional factor in this case is the use of the Respondent's name in one on-line post, which was removed shortly after it was found. Respondent's counsel submits that the Respondent did not choose to identify himself in this post. Moreover, he submits that the readership was small and quite different from publication to the wider public, such as through the Committee's decision.

31. Having considered the competing factors, including the important principle of open justice emphasised by Complainant's counsel, a majority of the panel has concluded by a slim margin that the denunciation and deterrent results of our decision are best achieved by censure and the resulting primary client disclosure the Respondent will be required to make over the next five years. In accordance with PR 31, we therefore order that the identity of the Respondent is not to be published.

G. COSTS

32. By consent there is no order as to costs.

H. NOTIFIED RIGHT OF APPEAL

33. Having imposed the penalty referred to in paragraph 28, the Committee is required by PR 30(2) to advise the Respondent that he may appeal this decision under section 138(1)(b) of the FAA. Such appeal must be made within 20 working days of the date this decision is communicated or within such further time as a District Court Judge allows upon application made before or after the standard period expires.

DATED: 14 May 2019

Geoffrey Clews
For the Financial Advisers Disciplinary Committee