

IN THE MATTER OF: Financial Advisers Act 2008

BETWEEN: FINANCIAL MARKETS AUTHORITY

Complainant

AND: W

Respondent

Committee Panel: Hon Sir Bruce Robertson (Chairman)
Tracey Berry
Sarah-Jane Weir

Registrar: Ariarna Hakaraia

Counsel: Simon Chapman for the Complainant
Lisa Hansen for the Respondent

Date of hearing: By consent on the papers

Date of decision: 4 March 2021

DECISION OF THE COMMITTEE AS TO DISPOSITION

Counsel:

Financial Markets Authority, Level 5, Ernst & Young Building, 2 Takutai Square, Britomart, Auckland
Email: Simon.Chapman@fma.govt.nz

Lisa Hansen, Barrister, L7, 101 Lambton Quay, PO Box 5577 Wellington 6145
Email: L.hansen@barristerscomm.com

1. On 20 January 2021 the Financial Advisers Disciplinary Committee (**Committee**) found that the Respondent breached Code Standards (**CS**) 12 and 15 under the Code of Professional Conduct for Authorised Financial Advisers (**Code**). The Committee found that the Respondent had failed:
 - (a) In the case of three clients, to record in writing adequate information about a personalised service provided to a retail client.
 - (b) To demonstrate adequate knowledge of the relevant legislative obligations which result from the term 'personalised service'.
2. The Committee then invited submissions from both parties on the way the matter should be disposed of.

DISPOSAL ON THE PAPERS

3. Both parties consented to the matter being dealt with on the papers in their written submissions.
4. We are satisfied that it is appropriate to proceed on that basis.

ISSUES FOR DETERMINATION

5. The issues for determination are whether the Committee:
 - (a) Orders any disciplinary actions; and
 - (b) Makes a permanent non-publication order of the Respondent's name and identifying details.

DISCIPLINARY OPTIONS FOR CODE STANDARD BREACHES AND RELEVANT FACTORS

6. The options available to the Committee to sanction Code breaches are set out in section 101(3) of the Financial Advisers Act 2008 (**the Act**)¹.
7. Rule 29 of the Committee's Procedure Rules 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

¹ The Act will be repealed by the Financial Services Legislation Amendment Act 2019 (**FSLAA**) as of 15 March 2021. Sections 88 and 89 of Schedule 1, Part 2 of FSLAA provide for the continuation of the Committee under the new regime and permit the Committee to exercise the powers under the Act as if FSLAA had not been enacted. Section 89(2) provides the Committee may also exercise the powers available to it under the FSLAA. However, such powers are only available to the Committee once Schedule 1, Part 2 comes into force on 15 March 2021. Accordingly, any sanction imposed by the Committee before 15 March 2021 will be under s 101(3) of the Act.

that is reasonable: *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand*², cited in *FMA v X*.³

8. Applying the relevant factors, the Committee notes that the Respondent's breaches of the Code are less serious than those breaches found in other cases before the Committee. There is no suggestion that the Respondent has improperly benefited at the expense of her clients, or that any client has been disadvantaged. There are no previous findings of misconduct against the Respondent.
9. However, the breaches are not to be treated lightly. Record keeping is a fundamental duty of an adviser that underpins the supervisory regime established by the Act and its importance cannot be minimised. It's therefore important to sanction breaches where there are multiple instances of poor record keeping. There is a need to reinforce professional standards and ensure the profession remains conscious of the significance of proper records.
10. The breaches of CS 12 and CS 15 come down to a misunderstanding of personalised service, and the obligations providing a personalised service engages (including record keeping). Personalised service is a core concept in the Act: it is a gateway to many of the Act's disclosure obligations (which, in turn, are central to the Act's scheme for informing and protecting the public). A fundamental failure to understand what it means (and therefore when the ensuing obligations are triggered) means some disciplinary action is warranted.
11. The Committee notes that the Respondent has indicated that she intends to leave the industry and has confirmed to the FMA that she will take the necessary administrative steps to wind up her financial advice practice by no later than 31 March 2021. On account of this, the FMA did not seek any orders under section 101(3)(e) of the Act as to ongoing supervision.

PENALTY ORDERS

12. Taking all these matters into account and the submissions made by counsel for each party, the Committee orders, under section 101(3)(d) of the Act, that the Respondent is censured for the Code breaches.
13. This serves to highlight that the breaches are unacceptable in a professional person holding the qualification of AFA. This order comprises the least restrictive and reasonable imposition on the Respondent, consistent with the objectives of admonishing the Code breaches.

PERMANENT SUPPRESSION OF IDENTITY

14. Procedure rule 31(2) permits the Committee to direct non-publication of a party's identity if there are exceptional circumstances. Those are not defined. In other cases before it, which we note were of a more serious nature than this one, the Committee has allowed permanent name suppression where the requirement to disclose to potential clients provides a sufficient protection for the public and where the consequences of publication would be disproportionate to culpability.

²[2012] NZHC 3354.

³[2014] FADC 005.

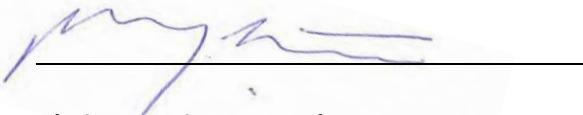
15. Having considered the competing factors, including the important principle of open justice, we note that the publication of the details of the Committee's decision provides market participants with both visible deterrence of code breaches and clear education on the nature, extent and seriousness of their obligations to keep proper records. Publication of the Respondent's identity would not further these objectives. As the Respondent intends to leave the profession, providing sufficient protective mechanism for the public or future clients is not a factor.
16. We therefore make a permanent order under section 101(6) of the Act that any published record of the Committee's decision must exclude any identification of the Respondent or their business.

COSTS

17. No orders were sought as to costs.

NOTIFIED RIGHT OF APPEAL

18. Having imposed the penalty referred to in para 12 above, the Committee is required by Procedure Rule 30(2) to advise the Respondent that they may appeal this decision under section 138(1)(b) of the Act⁴. 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.



Chairman, Sir Bruce Robertson
For the Financial Advisers Disciplinary Committee

⁴ Until 15 March 2021. After that date, the Respondent may appeal this decision under section 532A of the Financial Markets Conduct Act 2013.