

IN THE MATTER OF: Financial Advisers Act 2008
BETWEEN: FINANCIAL MARKETS AUTHORITY
Complainant
AND X
Respondent

Counsel: K. Graham for Complainant
A. Steele for the Respondent

Date of Hearing: 29 May 2014
Date of Decision: 30 May 2014

DECISION OF THE COMMITTEE

Solicitors:

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1. On 27 March 2014 the Financial Adviser Disciplinary Committee (**FADC**) was advised by the Financial Markets Authority (**FMA**) of a complaint against an Authorised Financial Adviser (**AFA**). The complaint alleged breaches of the Code of Professional Conduct for Authorised Financial Advisers (**Code**) in relation to the following Code Standards:
 - a. **Code Standard 6:** An AFA must behave professionally in all dealings with a client, and communicate clearly, concisely and effectively.
 - b. **Code Standard 7:** An AFA must ensure each retail client has sufficient information to enable the client to make informed decision about whether to use the AFA's financial adviser services and/or to follow any financial advice provided by the AFA.
 - c. **Code Standard 8:** When providing a personalised service to a retail client an AFA must take reasonable steps to ensure that the personalised service is suitable for the client.
 - d. **Code Standard 9:** Where an AFA provides a personalised service to a retail client that is an investment planning service or that relates to a category 1 product, the AFA must provide a written explanation to the client of the basis on which those services are provided. The AFA must also take reasonable steps to ensure the client is aware of the principal benefits and risks involved in following any financial advice provided as part of that service, having regard to the characteristics of the personalised service.
 - e. **Code Standard 12:** An AFA must record in writing adequate info about any personalised services provided to a retail client.
2. It is to be thoroughly commended that since that time there has been on-going positive interchange between the FMA and the AFA's legal adviser.
3. In light of additional information which came to hand, the FMA decided not to pursue alleged breaches of Code Standard 6 and 7. At the same time the AFA admitted breaches of Code Standard 8, 9 and 12. This was on the basis of an Agreed Statement of Facts which is set out in Annexure A.
4. Prior to hearing the FADC received a Supervision Plan which was agreed to by the FMA and the AFA. The Supervision Plan is set out in Annexure B.
5. It was submitted by the FMA before us that:
 7. *The overarching purpose of the Financial Advisers Act 2008 (**the Act**) is 'to promote the sound and efficient delivery of financial adviser and broking services, and to encourage public confidence in the professionalism and integrity of financial advisers and brokers'.*
 8. *To achieve this purpose, the Act:*

8.1 Requires financial advisers to take an appropriate degree of care in providing services to investors and consumers and prohibits certain conduct by financial advisers; and

8.2 Requires disclosure by financial advisers to retail clients, thereby ensuring that clients can make informed decisions about whether to use an adviser and whether to follow their advice.”

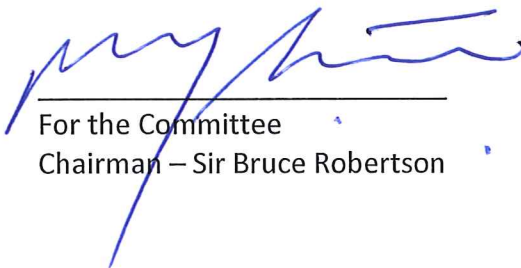
6. The critical issues for determination are whether in addition to the Supervision Plan:
 - a. A financial penalty should be imposed on the AFA, and
 - b. In terms of Procedure Rule 31.2, the circumstances are exceptional so it would be appropriate to direct non-publication of the AFA’s identity.
7. It was common ground before us that as a result of the complaint by the Qualifying Financial Entity (QFE), the QFE had terminated its relationship with the AFA. This appears to have caused the loss of an anticipated opportunity for the AFA to sell the adviser business to the QFE. It was said to be worth in excess of \$200,000. In addition, because of the termination the AFA has not been in employment for a period approaching 9 months.
8. Although at one level these are inevitable consequences of a breach of the Code, the reality cannot be ignored in assessing the appropriate way to respond to the relevant degree of culpability.
9. This is a case in which there has been no client complaint and no identified loss for any client of the AFA. Further there has been no identified material advantage to the AFA.
10. The offending related to the AFA’s failure to keep the required records.
11. The critical importance of proper record keeping cannot be minimised, particularly because of the influence it can have in an AFA determining whether he or she has up-to-date understanding of a client’s financial situation, needs, goals and tolerance for risk. These factors are vital to determining what steps an AFA has taken to ensure that financial services provided to a client are suitable for that client.
12. Counsel for FMA referred us to the recent decision by Collins J in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand*¹. This decision included a list of relevant factors the Judge says must be taken into account. The first of these is imposing a penalty that most appropriately protects the public. Another is the need to assist in setting professional standards.

¹ [2012] NZHC 3354, Wellington HC, VIC-2012-404-3916, 12 December 2012, Collins J.

13. Counsel for FMA suggested that in addition to the Supervision Plan, which was seen as the pivotal part of the disposition, there should also be a fine of \$1,000 for each of the AFA's admitted breaches of the Code.
14. As noted in *Roberts*, the FADC should impose the least restrictive penalty that is reasonable in all the circumstances. There is no question of earlier breaching of obligations. The AFA has been thoroughly co-operative in the investigation and in accepting the proposed supervision. In light of all the relevant factors, we are not convinced there is efficacy in imposing any additional penalty. It would be only tokenism and is not required.
15. On the question of name suppression, arguments were advanced as to the meaning of "exceptional circumstances" under Procedure Rule 31.2. Clearly it means out of the ordinary and beyond the normal consequences of a matter.
16. In the course of the hearing we drew to the attention of Counsel Schedule 1 of the Financial Advisers (Disclosure) Regulations 2010 (**Regulations**). This requires, among other things, that AFAs provide information in a Primary Disclosure Statement of any disciplinary proceedings before the FADC within the previous 5 years. We requested submissions from Counsel on the effect the Regulations would have on any order for suppression.
17. After considering Counsels' submissions we conclude that Procedure Rule 31.2 does not overrule the specific requirement of the Regulations. Therefore the admitted breaches under Code Standards 8, 9, and 12 and the terms of this decision will have to be disclosed in the AFA's Primary Disclosure Statement, regardless of any suppression order made.
18. As noted earlier, this case is out of the ordinary because the acknowledged breaches have resulted in no known financial losses to the AFA's clients. Further, in light of that essential protective mechanism for individual clients under the Regulations, we are persuaded that, seen in totality, the circumstances are exceptional.
19. Part of the FMA's objection to the application for suppression is "*... the need for openness and transparency with respect to any enforcement action which FMA may take in response to non-compliance in financial markets. In order to provide effective regulation there must be visible deterrence of breaches of financial market law, and clear education for market participants about the behaviour and standards ... [required] ... of participants. The deterrence and educational benefits of this action will be reduced where orders of non-publication are made.*"
20. We do not find this argument persuasive in the circumstances of this case. The publication of this case should powerfully demonstrate to AFAs the nature, extent and seriousness of their obligations to keep proper records.

21. The identity of this AFA and this decision will necessarily be known to this AFA's clients under the Regulations, however we are of the view that there is not a benefit to the public in general in the publication of this AFA's identity. The impact of publication would be disproportionate to the AFA's culpability.
22. We conclude that in respect of the three admitted breaches that the AFA shall be subject to the Supervision Plan in Annexure B. The Supervising AFA is to be agreed to in writing by the FMA.
23. We also make an order for the non-publication of the identity of this particular AFA and the QFE complainant in this matter.
24. No orders were sought as to costs.

Dated at Auckland this 30th day of May 2014



For the Committee
Chairman – Sir Bruce Robertson

ANNEXURE A
Agreed Summary of Facts with necessary redactions

1. Mr X is an Authorised Financial Adviser (**AFA**) (FSP No. suppressed) who has worked in the financial services sector for approximately 28 years.
2. On 2 December 2010, X registered as a Registered Financial Adviser.
3. On 20 June 2011, X registered as an AFA to provide financial advice, discretionary investment management services and investment planning services.
4. Until 11 October 2013, X was a nominated representative of a Qualified Financial Entity (**the QFE**).
5. On 11 October 2013, the contract between the QFE and X terminated. X is currently not working as a financial adviser although he has a job opportunity with an investment advising firm. X continues to be registered on the Financial Services Provider Register, trading as 'Y'
6. In October 2013, the QFE notified FMA of alleged breaches of the Code by X as required by their THE QFE terms and conditions.

FMA's investigation

7. The QFE provided FMA with 18 of X's client files. FMA analysed four randomly selected files prior to reading the QFE's report.
8. FMA's review raised concerns which were outlined in FMA's letter to X dated 6 December 2013. X provided a written response dated 3 February 2014 and a subsequent email.
9. FMA sent a subsequent letter to X on 24 February 2014 inviting a further response either in person with FMA representatives or in writing. X elected to make any further submissions to the Financial Advisers Disciplinary Committee (**FADC**).
10. On 27 March 2014, FMA referred a complaint regarding the conduct of X to the FADC pursuant to section 98 of the Financial Advisers Act 2008 (**the Act**) and rule 8 of the Disciplinary Committee Procedure Rules under the Act (**the Rules**).
11. In the FMA's opinion, X's conduct appeared to breach Code Standards 6, 7, 8, 9 and 12 of the Code of professional Conduct for Authorised Financial Advisers (**the Code**).
12. On 19 May 2014, X explained to FMA that contrary to the QFE's correspondence to FMA he did not recommend a reissue of the TrustPower bond which was not on the Approved Product List. In response, FMA sought further information from Y. To date Y has not been able to provide evidence that X recommended the reissue of the Trustpower bond.
13. On 19 May 2014, X also stated that all disclosure documentation was retained electronically on the QFE's Customer Relationship Management system (**CRM**). X does

acknowledge that his files do not record when these documents were provided to clients.

14. FMA confirms that its referral to the FADC related to standards of client care. FMA's referral did not relate to standards of ethical behaviour or standards of competence, knowledge or skill.

CODE STANDARDS

15. X admits that his conduct amounted to breaches of Code Standards 8, 9 and 12.

Breach of Code Standard 8

16. X admits that the files reviewed by FMA did not contain documents recording his up-to-date understanding of the clients' risk tolerances.
17. X acknowledges that in order to comply with Code Standard 8, any discussions he had with his clients about risk tolerance should have been clearly documented.
18. Consequently, X admits that the profile summaries on the four files reviewed by FMA lack detail in respect of his clients' needs and goals.
19. X acknowledges that needs and goals should be specific, ideally measurable and particular to each client and those clients' needs and goals should be restated regularly and confirmed by the client to ensure they are accurate.
20. X admits that the documentation on file lacked the requisite detail to clearly show that recommendations matched risk tolerance, financial situation, needs and goals.

Breach of Code Standard 9

21. X admits that his files did not contain sufficient documentation to record how he had sufficiently explained to clients the basis of his services and the principal risks and benefits of following his advice.
22. X admits that his files do not record adequate explanation to enable the client to understand why he made certain recommendations and the implications of following those recommendations. X acknowledges that documentation should be on file recording conversations with clients explaining the basis or rationale for recommendations.
23. X acknowledges that records of conversations, including comprehensive explanations and confirmation that clients understand the risks involved, is particularly important when the client was taking on more risk than may be having been appropriate for their risk profile.

Breach of Code Standard 12

24. X admits and acknowledges a breach of Code Standard 12 in that he failed to keep comprehensive and adequate record of his clients' financial situation, needs and goals and in some situations the financial advice to those clients.

25. X admits that were deficiencies in his record keeping with regard to Code Standards 8 and 9 that indicate a breach of Code Standard 12. In short and in summary, X admits that he failed to maintain sufficient records on his files.

ANNEXURE B

Supervision plan

Supervision details

AFA being supervised	X
Supervising AFA	TBC
Initial period of supervision	<p>6 months from date X recommences providing financial adviser services to clients as an AFA.</p> <p>Provided that the overall period of supervision does not exceed three years, the initial period of supervision can be extended for a further term and any subsequent period of supervision can be extended for a further term if FMA is not satisfied that the Purpose (as described below) has been met within the completed period of supervision. Any cost of supervision will be borne by X.</p>

Purpose and methodology of supervision

Purpose

To determine whether the AFA being supervised is meeting the following Code Standards under the Code of Professional Conduct for Authorised Financial Advisers (the **Code**) in respect of personalised services provided during the period of supervision:

- Code Standard 8;
- Code Standard 9; and
- Code Standard 12.

(the **Relevant Requirements**)

Methodology

The Supervising AFA shall assess documents and other information provided under this plan against performance criteria of selected unit standards for the National Certificate in Financial Services (Financial Advice) (Level 5) and provide reports to FMA as set out under **Information and Reporting - Supervising AFA**.

The reports provided by the Supervising AFA to FMA will assist FMA with determining whether the AFA being supervised is meeting the Relevant Requirements.

The review will be completed by the Supervising AFA as a 'desk top' review (or as otherwise notified by FMA to the Supervising AFA and AFA being supervised)

Scope of supervision

1. All personalised services provided to retail clients.
2. The Supervising AFA will assess documents and other information provided under this plan against the following unit standards relating to the National Certificate in Financial Services (Financial Advice) (Level 5)(see **Performance Criteria**):
 - a. **Demonstrate the steps in the financial advice process relating to client relationships and gathering information (unit standard 25650):**
 - i. Element 2;
 - ii. Performance criteria 2.1;
 - iii. Performance criteria 2.2; and
 - iv. Performance criteria 2.3.
 - b. **Demonstrate the steps in the financial advice process relating to the development and presentation of recommendations (unit standard 25651):**
 - i. Element 1;
 - ii. Performance criteria 1.2;
 - iii. Performance criteria 1.3;
 - iv. Element 2;
 - v. Performance criteria 2.1;
 - vi. Performance criteria 2.2;
 - vii. Performance criteria 2.3;
 - viii. Performance criteria 2.4; and
 - ix. Performance criteria 2.5.
 - c. **Apply requirements of regulations, professional practice standards, and operational guidelines as a financial adviser (unit standard 25653):**
 - i. Element 2;
 - ii. Performance criteria 2.1; and
 - iii. Performance criteria 2.2.
3. For reference, a copy of the unit standards relating to the Performance Criteria is set out in the Appendix.

Information and Reporting requirements – AFA being supervised

1. Each week, the AFA being supervised must:

- a. Advise the Supervising AFA of any scheduled client and prospect meetings, and provide confirmation of actual meetings from the prior week (**Client Meetings**); and
 - b. Deliver copies of all client files containing records required by Code Standard 12 for any clients or prospects that received personalised services at any Client Meeting, in such manner as reasonably requested by the Supervising AFA.
2. The AFA being supervised will cooperate with the Supervising AFA and do all things necessary to facilitate the Supervising AFA's review under this plan. This includes being ready, willing and able to respond to queries from the Supervising AFA during normal business hours.

Information and Reporting requirements – Supervising AFA

3. At the end of the month (no more than 10 business days from the last business day of the month) the Supervising AFA shall provide a report to FMA in respect of client files reviewed by the Supervising AFA in that month, setting out:
 - a. The name of the client file;
 - b. The date of advice;
 - c. Whether any Performance Criteria has not been met;
 - d. Any corrective action recommended to the AFA being supervised in respect of any failure to meet the Performance Criteria;
 - e. Whether that corrective action has been undertaken by the AFA being supervised to the Supervising AFA's satisfaction.
4. At the end of the period of supervision, the Supervising AFA shall provide to FMA a 'Final Supervision Report' providing the Supervising AFA's recommendation about whether this supervision plan should be continued for a further period of supervision. The Supervising AFA shall have regard to the following factors in reaching this recommendation:
 - a. Number of client file reviews undertaken by the Supervising AFA;
 - b. Whether the Performance Criteria has been consistently met;
 - c. The nature of any process improvements for providing personalised services;
 - d. Any concerns that the Supervising AFA may have in regard to the AFA's compliance with the Relevant Requirements.
5. The Supervising AFA shall provide all reports for FMA to Andrew Cuttriss, Senior Adviser, Retail Monitoring Field.
6. The Supervising AFA must immediately notify FMA (Andrew Cuttriss) if the AFA being supervised fails to meet the requirements of this plan.

7. Should FMA determine that the Supervising AFA is not meeting the requirements under this Supervision Plan, FMA may, in its sole discretion, appoint an alternative Supervising AFA.