



OFFICIAL

DECISION RECORD

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|---------------------------------|-----------------------|
| AGENT | Barbara Maher |
| COMPLAINT NUMBERS | CMP-54605 |
| DECISION | Barring for 24 months |
| DATE OF DECISION | 27 June 2024 |
| TERMS USED FOR REFERENCE | Refer Appendix A |

Jurisdiction

1. The Office of the Migration Agents Registration Authority (the Authority) performs the functions prescribed under section 316 of the *Migration Act 1958* (the Act).
2. The functions and powers of the Authority under Part 3 of the Act and *Migration Agents Regulations 1998* (the Agents Regulations) may only be exercised by the Minister or by a delegate of the Minister. The Minister has delegated the powers under Part 3 of the Act and the Agents Regulations to officers of the Authority. I am delegated under the relevant Instrument to make this decision.

Relevant Legislation

3. The functions of the Authority under the Act include:
 - to investigate complaints in relation to the provision of immigration assistance by registered migration agents (paragraph 316(1)(c); and
 - to take appropriate disciplinary action against registered migration agents or former registered migration agents (paragraph 316(1)(d); and
 - In performing its function under paragraph 316(1)(c), the Authority may start, or complete, an investigation of a complaint about a person at a time when he or she is no longer a registered migration agent (paragraph 316(1A)
4. Section 311A(1) of the Act provides that the Authority may decide to bar a former registered migration agent from being a registered migration agent for a period, if after investigating a complaint about him or her in relation to his or her provision of immigration assistance while he or she was a registered migration agent, it is satisfied that the subject matter of the complaint is made out.

AGENT BACKGROUND

Agent Registration

5. The Former Agent was first registered as a migration agent on 18 November 1993 and was allocated the migration agent registration number 9358090. The Former Agent's registration had been renewed annually until 2 November 2022. The Former Agent's registration expired on 17 November 2023 and has not been renewed to date.
6. While registered as a migration agent, the Register listed the Former Agent's trading name as Sydney Migration Consultancy BJM with an Australian Business Number (ABN) of 17272086602. The Register also listed the Former Agent as having a prior business relationship with Sydney Migration Consultancy Pty Ltd with an ABN of 26093949449.

Prior disciplinary action

7. No disciplinary action has previously been taken against the Agent.

BACKGROUND

Allegations – the Authority's investigation

8. On 15 July 2020, the Authority received a complaint about the Former Agent's conduct as a registered migration agent from Mr S B (Mr B) on behalf of Ms C-L S (Ms S).
9. The complaint about the Former Agent was in relation to her provision of immigration assistance within the meaning of section 276 of the Act.
10. The allegations, about the Former Agent's conduct as a registered migration agent forming the subject matter of the complaint are that she:
 - Expected the visa applicant Ms S to pay the nomination costs associated with the preparation of a nomination application for her nominated employer Mr P C (Mr C). Furthermore, the Former Agent encouraged Mr C to deduct these costs from Ms S' pay.
 - Displayed a significant conflict of interest by advising the nominated employer to recover the costs relating to the preparation of the nomination application from Ms S.
 - Encouraged the nominated employer to act in contravention of the law, specifically Regulation 2.87, contrary to the *Migration Regulations 1994* (the Migration Regulations).
 - Did not deal fairly with her client by making disrespectful comments about Ms S.
 - Failed to provide a written Services Agreement, a Statement of Services and invoices to her client Ms S.

11. In summary, Ms S alleged the following:

- On 9 April 2020, Ms S contacted the Former Agent, via email, as she was looking to apply for permanent residency in Australia. She advised the Former Agent that she was currently sponsored by PC H Pty Ltd and that her subclass 457 visa was due to expire at the end of June 2020. The Former Agent advised Ms S that in order to maintain lawful status in Australia that she should lodge a nomination and visa application under the Short Term (Nomination) scheme (subclass 482).
- On 27 April 2020, Ms S paid the Former Agent \$750 for 'lawyer fees'. Ms S did not receive a written Agreement for Services and Fees.
- On 22 June 2020, Ms S advised the Former Agent, by email, that she had resigned from PC H Pty Ltd and would not be proceeding with the nominated position.
- On 28 June 2020, the Former Agent emailed Mr C. Ms S was copied into this email. This was in response to Mr C's enquiry as to whether he was within his rights to hold Ms S' salary to cover costs associated with the nomination application.
- On 29 June 2020, the Former Agent emailed Ms S an invoice for \$400 seeking payment of professional fees associated with the nomination application.
- Within her response to Mr C to withhold Ms S' salary to cover costs associated with the nomination application, the Former Agent claimed that Ms S lacked integrity as she believed Ms S had been seeking alternative employment opportunities prior to 22 June 2020.

Notice pursuant to section 309 of the Act (section 309 notice)

12. On 2 June 2023, the Authority sent a section 309 notice to the then registered Former Agent advising that the Authority was considering cautioning, or suspending or cancelling her registration under section 303(1) of the Act.
13. On 16 June 2023 the Former Agent provided submissions to the Authority in response to the section 309 notice.
14. On 18 November 2023 the Former Agent's registration ceased.

Notice pursuant to section 311D (1) of the Act (section 311D notice)

15. On 28 February 2024, the Authority sent a 311D notice to the Former Agent, advising that the Authority was considering barring her from being a registered migration agent for a period of up to five years, pursuant to section 311A in Division 4A of Part 3 of the Act.
16. On 11 March 2024, the Former Agent provided submissions in response to Authority's section 311D Notice.
17. In summary, as relevant, the Former Agent stated the following:
- She has retired to use her skills elsewhere currently with various charity organisations.
 - She has no intention to be involved in any migration matters or conversations.

- *'My reputation since 1993 has been based on pride of my work and this can be evidenced by my 99per cent succes rate and no wasted applications at Tribunal as i have ensured my migration knowledge has been up to date in ever changing and challenging decades.'* [sic]
- A sanction would be harsh and unnecessary as she has no intention of ever registering as a migration agent again or being involved with the OMARA or the Department.
- She has made all efforts to reply to the Authority in relation to this matter.
- She maintains that the clients and Mr B withheld information that could have prevented this situation, which involved a one-off error of judgement on her part. Noting that *'this is no defence to my reaction and expectation that Ms CS should be responsible for minimal costs.for a nomination that was not to proceed.'* [sic]
- This was clearly an issue of receiving bad instructions from the employer and employee, who lacked *'truth'*. She was shocked not to have been advised of the other employer nomination.
- She acted on the instructions provided and *'I have never disputed that I did not send retainer written service of fees or invoice or receipt for \$750.00 preparation...'*
- She considers her conduct in this matter is minor in nature.
- She notes that *'in hindsight this complaint commenced by S B was unnecessarily aggressive prior to lodgement of his vexatious law society complaint¹ and did very much concern me due to my belie of a career of positive assistance to all clients. I believe this could be noted by my client list and approvals over nearly three decades and no tribunal cases due to my due diligence in clients and keeping up with many changes over many years.'* [sic]
- The impact of a sanction after 30 years in a career she is proud off is a sad moment.
- She believes Ms S had sought advice and decided to proceed with an alternate employer nomination prior to her resignation from PC H Pty Ltd. She also believes that Ms S should have been advised, by her new migration advisor, to withdraw from the nomination process and for the Former Agent to be advised accordingly.
- She believes she was acting competently and diligently by sending follow up emails to Ms S requesting documentation noting the imminent deadline for lodging the nomination and visa application.
- *'...those costs of \$450² should be seen to be breach of trust between employer and employee.'*
- *'Ms S and P C had both ill advised me and thus there was no conflict as both parties were acting on own frolic.'*

¹ This refers to a separate matter raised by Mr Brouff about the Former Agent

² Costs relating to the preparation of the nomination application.

THE AUTHORITY'S INVESTIGATION

Evidence and other material

18. In reaching the findings discussed in this decision record, the Authority has considered the following evidence:

- Documents contained in the Authority's complaint file CMP-54605;
- Information held on departmental records in relation to the matters raised in the complaint;
- Information held by the Authority in relation to the Former Agent; and
- Information provided by the Former Agent to the Authority in response to the section 309 and 311D notices.

Findings on material questions of fact

19. Having regard to the relevant evidence before the Authority, I am satisfied that:

- (a) the subject matter of the complaints made by Ms S has been made out; and
- (b) while registered, the Former Agent failed to comply with her obligations under the former Code³.

20. My findings and full reasons for my decision are set out below.

Provision of Immigration Assistance

21. The Former Agent has never disputed that both Ms S and Mr C were her clients and she provided immigration assistance to both individuals when she was a registered migration agent. As such I find that Ms S' complaint relates to the Former Agent's provision of immigration assistance, as defined in section 276 of the Act.

The subject matter of the complaint

Failure to act in accordance with the legitimate interests of clients/Conflict of interest

22. In respect of Ms S, the Authority alleged the Former Agent did not act in accordance with the legitimate interests of her client by expecting her, as the visa applicant, to pay the nomination costs associated with the preparation of a nomination application for her nominated employer. Moreover the Former Agent encouraged the nominated employer to deduct these costs from her client's pay. As such the Authority alleged that the Former Agent created a significant conflict of interest by encouraging the recouping of all nomination costs from Ms S, to the detriment of Ms S for the benefit of her nominated employer.

³ The former Code of Conduct for registered migration agents being Schedule 2 to the *Migration Agents Regulations 1998*, as in force prior to 1 March 2022

23. In addition the Authority alleged that the Former Agent did not deal fairly with her client by making disrespectful comments about Ms S.
24. In her response to the section 311D notice the Former Agent infers that Ms S was seeking other migration advice and had found an alternative sponsor. She also infers that there were issues/animosity between Ms S and Mr C, prior to Ms S' resignation two days prior to the expiration of her 457 visa. As such, the Former Agent felt that both parties mislead her and that she had done all the preparation for nothing. *'Noting that this is no defence to my reaction and expectation that Ms CS should be responsible for minimal costs for a nomination that was not to proceed.'*
25. The former Agent also stated the following, as relevant:
- 'Ms S and P C had both ill advised me and thus there was no conflict as both parties were acting on own frolic'.*
- '..that those costs of \$450⁴ should be seen to be breach of trust between employer and employee.'*
26. I have taken into account the Former Agent's claim that this process appears to have been frustrating due to the timeliness of Ms S' resignation and apparent futility of the preparation of the nomination application. However, the Former Agent was engaged to provide a service to her clients and accepted payment to do so regardless of the outcome.
27. It is concerning that the Former Agent does not appear to understand that the conduct, which is the subject matter of this complaint, is not the futility of the application preparation but the fact that the Former Agent advised the sponsor to recoup the costs relating to the nomination application from Ms S.
28. It is also concerning that the Former Agent fails to realise or accept that by advising the sponsor to recover the costs relating to the nomination application from Ms S that this is a significant conflict of interest. Moreover, this advice is contrary to the Migration Regulations by encouraging the sponsor to act in contravention of the law, specifically Regulation 2.87 of the Migration Regulations. As an RMA, it is reasonable to expect that the Former Agent should or ought to have known that it is a contravention of Regulation 2.87 for the visa applicant to cover the sponsor's costs.
29. The Former Agent's comments in her email dated 28 June 2020 to Mr C (in which Ms S was copied) that Ms S was *'not very smart'* and that she was *'a massive waste of my time'* are inconsistent with what I would expect from an RMA dealing fairly with her client.
30. When put to the Former Agent in the section 309 notice that *'your disrespectful attitude towards Ms S appears to demonstrate a significant disregard for the legitimate interests of your client, and your professional obligations as a registered migration agent. Such conduct, represents a serious breach of trust, and demonstrates a lack of honesty, moral character and good judgement by you.'* The Former Agent stated in her response that this *'has made me rather nauseous and I cannot spend more time in any defense [sic] of trying to assist CS in pandemic...'*
31. This matter does not appear to be addressed in the Former Agent's response to the section 311D notice.
32. Such conduct reflects poorly on the Former Agent's professionalism and the reputation of the migration advice profession generally.

⁴ Costs relating to the preparation of the nomination application.

33. As an RMA, the Former Agent had an obligation to deal competently and fairly with her clients and to act in their legitimate interests. The Former Agent's advice to Mr C to deduct costs relating to a nomination application from Ms S' salary is contrary to the Migration Regulations and is not in Ms Still's or Mr C's legitimate interests.
34. I am satisfied that the Former Agent provided poor advice to her client (Mr C) by encouraging him to act in contravention of the law and that such action was at the expense of her other client (Ms S).
35. Accordingly, I find that the Former Agent failed to deal competently or fairly with her clients in this matter and failed to act in their legitimate interests contrary to the Former Agent's obligations under **clause 2.1** of the former Code.
36. An RMA who gives professional advice to a client to act in contravention of the migration law is defeating the purpose of the legislation and demonstrates a lack of integrity and a disregard for his or her obligations under the Code of Conduct. Further, such conduct is indicative of a disregard for the reputation of the migration advice profession.
37. I am satisfied that the Former Agent attempted to facilitate the recovery of the sponsor's costs from the visa applicant, consequently I am satisfied that the Former Agent has demonstrated an indifference for maintaining the reputation and integrity of the migration advice profession.
38. On that basis, I find that the Former Agent's conduct was in breach of **clause 2.23** of the former Code.
39. In addition, I find that the Former Agent created a conflict of interest by encouraging the recouping of all nomination costs from Ms S, to the detriment of Ms S, for the benefit of the sponsor.
40. Accordingly, I find that the subject matter of the complaint in this regard has been made out.
41. For that reason, I am satisfied that the Former Agent did not act in the legitimate interests of Ms S as it appears that she was acting solely in the interests of the sponsor, and that the Former Agent's actions were contrary to clauses 2.1 and 2.1A of the former Code.

Agreements for Services and Fees and Financial Duties

42. The Authority alleged the Former Agent did not provide a written Services Agreement, a Statement of Services and invoices to her client Ms S.
43. In her response to the section 311D notice, the Former Agent stated that she did not dispute that she did not *'send retainer written service of fees or invoice or receipts for \$750.00 preparation....'*
44. In her response to the section 309 notice, the Former Agent stated she accepted her failure to provide a written Services Agreement, a Statement of Services and invoices to Ms S. The Former Agent claimed this was due to *'the covid time and looming pandemic'* and that *'most of the work was with the employer to ensure eligibility for nomination given looming lockdowns.'* The Former Agent believed the allegations put to her *'have missed this sad time that effected the world.'*

45. Notwithstanding that the Former Agent did not provide any further information or explanation as to how the pandemic or '*looming lockdowns*' impeded her ability to fulfil her obligations to Ms S under the former Code, the Former Agent did not provide these documents to her client as standard business practice. The evidence before me indicates that there were a number of emails, dated 16, 18 and 24 April 2020,⁵ between the Former Agent and Ms S discussing her fees, Ms S querying whether there would be additional fees apart from the Former Agent's professional fees and when the fees were expected to be paid. This indicates to me that there was open communication between the Former Agent and Ms S and an obvious and timely avenue for the required documentation to be readily sent to Ms S.
46. The Former Agent does not dispute that she did not provide the relevant documentation required under Parts 5 and 7 of the former Code to Ms S. I am not satisfied that there was an appropriate reason for the Former Agent not providing Ms S with this documentation. It follows, that I am satisfied that the Former Agent failed to provide an Agreement for Services, Statement of Services, invoices or receipts to Ms S and did not deal with her client competently or diligently.
47. In this regard I am satisfied that the subject matter of the complaint is made out.
48. Accordingly I find that the Former Agent has breached **clauses 2.1, 5.2, 5.5, 7.2 and 7.4** of the former Code.

Consideration of whether or not to bar the Former Agent

49. In reaching my conclusion with respect to being satisfied that the subject matter of the complaint is made out, I have considered the strength of the evidence and the level of satisfaction required in accordance with the consequences for the person who is the subject of the decision in terms of his or her livelihood and reputation.
50. In deciding whether or not to bar the Former Agent under to subsection 311A(1) of the Act, I have taken into account all of the circumstances of the complaint, including the following.

Seriousness of behaviour

51. In reaching a decision that a barring sanction under subsection 311A(1) of the Act is appropriate in this case, I have taken the following factors into account:
52. As an RMA, the Former Agent was obligated under the Code and former Code to possess and maintain a high standard of conduct in order to maintain the reputation and integrity of the migration advice profession.
53. The Former Agent has demonstrated behaviour of a serious nature, which was not in the legitimate interests of her clients, creating a significant conflict of interest by encouraging the sponsor, Mr C to act in contravention of the law, specifically Regulation 2.87.

⁵ Detailed in paragraphs 37 to 41 in the section 311D notice (Attachment D)

54. I am satisfied that the Former Agent has acted with a significant degree of indifference towards the law, her clients and her obligations as a member of the migration advice profession. As the Former Agent considers her conduct in this matter to be minor in nature this signifies to me that she fails to realise or accept how serious her conduct was in creating a conflict of interest by advising the sponsor to act in contravention of the law. Therefore, I am further satisfied that if the Former Agent were to be registered again, vulnerable consumers may be subject to her unprofessional conduct.
55. I consider that the Former agent's behaviour:
- Has shown blatant disregard or significant degree of indifference to the law and her professional responsibilities;
 - Has breached multiple clauses of the Former Code, indicating poor practices; and
 - Has, or is likely to have an adverse impact on, or undermine the reputation of the migration advice profession.
56. Applying these factors, I have determined that a barring decision is appropriate as the Former Agent has engaged in conduct that has resulted in her showing no regard for her clients' legitimate interests by creating a significant conflict of interest and encouraging her client Mr C to act on contravention of the law which she knew or ought to have known and fails to accept. I have also found that the Former Agent, while registered, breached multiple clauses of the Code as discussed throughout this decision.

Aggravating Factors

57. I consider the Former Agent's conduct falls well below the standard expected of a RMA, particularly her apparent indifference towards her obligations to her clients and the Department. I find the following are aggravating factors that increase the severity of the sanction:
- The Former Agent has not denied attempting to recoup the nomination costs from the visa applicant. However, the evidence before me demonstrates that the Former Agent fails to recognise or accept the implications of her conduct for her own reputation, her clients' interests and reputation of the migration advice profession.
 - The Former Agent has consistently maintained, throughout her responses, that it was due to Ms S' conduct that warranted the Former Agent to try to recoup the nomination costs from her client.
58. I consider the Former Agent's conduct falls short of the standard expected of a RMA, and that the conduct poses a risk to migration consumers and to the integrity of the migration advice profession.

Mitigating Factors

59. In respect to the section 309 and section 311D Notices, the Former Agent included the following mitigating factors which were considered prior to a disciplinary decision being made:
- She has retired to use her skills elsewhere currently with various charity organisations;
 - She has no intention to be involved in any migration matters or conversations;

- *'My reputation since 1993 has been based on pride of my work and this can be evidenced by my 99per cent succes rate and no wasted applications at Tribunal as i have ensured my migration knowledge has been up to date in ever changing and challenging decades .' [sic]*
- A sanction would be harsh and unnecessary as she has no intention of ever registering as a migration agent again or being involved with the OMARA or the Department.
- Has made all efforts to reply to the Authority in relation to this matter.

60. I have considered that the Former Agent has cooperated with the Authority in relation to this matter. I have also considered that the Former Agent has not previously been the subject of a sanction or disciplinary action by the Authority. However, I am not satisfied that this mitigates the seriousness of the conduct which is the subject of this decision.

61. I have taken into account the Former Agent's claims that she has retired and has no intention to be registered as a migration agent in the future. I note that the Former Agent did not seek to renew her registration when it expired on 17 November 2023, I am therefore satisfied that barring the Former Agent from future registration would not impact on her livelihood.

Consumer Protection

62. Consumers of professional services of RMAs are often vulnerable and place a high degree of trust in their RMA. Consumers are therefore entitled to a high level of professional service from their RMA.

63. The behaviour demonstrated by the Former Agent falls short of the reasonably expected standards of an RMA. I consider that the Former Agent would pose a risk to consumers if she was registered as a migration agent, particularly due to her non acceptance of her conduct in relation to the conflict of interest she created. I am satisfied that if the Former Agent were to practice as an RMA, she would not demonstrate the requisite competency expected of an RMA. I consider that a disciplinary decision is warranted to address the conduct that is the subject of this decision, and in the interests of consumer protection.

64. I expect that a decision to sanction the Former Agent would more likely than not deter other RMAs from engaging in similar conduct and ensure that public confidence in the migration agent profession is maintained.

65. Given the aggravating factors considered and that the Former Agent has failed to recognise or accept her conduct, I am satisfied that the Former Agent would continue to display the same unprofessional conduct if she was registered as a migration agent, posing an ongoing risk to consumers.

Period of barring

66. I consider that a barring decision is warranted to addres the conduct of the Former Agent which has been the subject of this decision. Under section 311A of the Act, the Authority is empowered to bar a formely registered migration agent for a period of no more than five years.

67. Having regard to all the circumstances, I consider that the Former Agent's conduct falls within the middle range of severity.

Decision

68. I have decided to bar the Former Agent from being registered as a migration agent for a period of two (2) years that starts when she is taken to have been given this Notice under section 332H of the Act and ends at the expiration of two (2) years after this date.

A handwritten signature in black ink, appearing to be 'J. Ramsay', with a stylized, cursive script.

J. Ramsay
Investigations Officer
Office of the Migration Agents Registration Authority (OMARA)
Immigration Integrity and Assurance Branch
Immigration Operations I Immigration Group
Department of Home Affairs

APPENDIX A: TERMS USED FOR REFERENCE

The following abbreviations may have been used in this decision:

| | |
|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ABN | Australian Business Number |
| AAT | The Administrative Appeals Tribunal |
| BVA/B/E | Bridging Visa A, B or E |
| MARN | Migration Agent Registration Number |
| Section 309 Notice | Notice issued by the Authority under section 308 of the Act |
| Section 311 Notice | Notice issued by the Authority under section 311 of the Act |
| The Act | The Migration Act 1958 |
| The Regulations | Migration Agents Regulations 1998 |
| The Authority | The Office of the Migration Agents Registration Authority |
| The Code | The Migration (Migration Agents Code of Conduct) Regulations 2021 prescribed for the purposes of subsection 314(1) of the Migration Act 1958 |
| The Former Code | Code of Conduct prescribed for the purposes of subsection 314(1) of the <i>Migration Act 1958</i> by regulation 8 and Schedule 2 of the <i>Migration Agents Regulations 1998 – repealed on 1 March 2022</i> |
| The Department | The Department of Home Affairs |
| The Register | Register of migration agents kept under section 287 of the Act |
| VEVO | Visa Entitlement Verification Online |