**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2013] NZREADT 32

READT 016/11

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| **IN THE MATTER OF** | charges laid under s.91 of the Real Estate Agents Act 2008 |
| **BETWEEN** | **REAL ESTATE AGENTS AUTHORITY (CAC 10027)** |
| | Prosecutor |
| **AND** | **JOSEPH BRANKIN (LICENSED AGENT)** |
| | Defendant |

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

**HEARD** at CHRISTCHURCH on 18 and 19 October 2012 (with subsequent typewritten submissions)

**DATE OF DECISION** 24 April 2013

**COUNSEL**

Mr L J Clancy for prosecution
Mr J J McCall for defendant

**DECISION OF THE TRIBUNAL**

***Introduction***

[1] Mr Joseph Brankin, real estate agent, faces a charge of misconduct (laid as an amended charge on 20 August 2012) reading as follows:

> *"1. Following a complaint made by Annie Smith (complainant) Complaints Assessment Committee 10027 charges Joseph Brankin (defendant) with misconduct under s.73(a) of the Real Estate Agents Act 2008 in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.*
>
> ***Particulars***
>
> *(a) That the defendant advised the complainant that a complaint had been laid with the Real Estate Institute of New Zealand Incorporated with respect to her carrying out her duties as a real estate salesperson, when no such complaint had been made.*

*(b) That the defendant advised the complainant that a number of prospective clients had refused to deal with her.*

*(c) That the defendant alleged that the complainant was dishonest in her dealings with him (the defendant) and clients.*

*(d) That the defendant restricted the complainant's hours in the office and instructed her she was not allowed more than ten listings at any one time.*

*(e) That the defendant accessed the complainant's private emails.*

*(f) That the defendant disclosed to a friend of his private and confidential details with respect to a client for whom he was acting."*

[2] *"Misconduct"* is defined under s.73 of the Real Estate Agents Act 2008 as follows:

*"**73 Misconduct***
*For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—*

*(a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
*(b) constitutes seriously incompetent or seriously negligent real estate agency work; or*
*(c) consists of a wilful or reckless contravention of—*

*(i) this Act; or*
*(ii) other Acts that apply to the conduct of licensees; or*
*(iii) regulations or rules made under this Act; or*

*(d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee."*

***Factual Background***

[3] This matter arose out of a licensed salesperson, Ms Annie Smith, having worked under the defendant's management at "X Limited". In early 2010, she complained to the Authority that, while so working, she had been harassed, bullied, and intimidated by the defendant, and that the defendant had disclosed private and confidential information about a client to a third party.

[4] Ms Smith worked for X Limited between 8 August 2006 and 14 September 2009. The defendant, a proprietor of that company, was her supervising branch manager and, until early 2009, their professional relationship was good. However, she states that from January 2009 she felt that the defendant started to bully her in the workplace with a view to making her leave that company.

[5] Accordingly, in early 2010 she made a complaint to the Authority about the defendant's conduct by lodging an objection to the issuing of an agent's licence to the defendant. She has also made complaints to the Human Rights Commission, the

Privacy Commissioner, the Real Estate Institute of NZ, and has pursued a personal grievance for unjustifiable dismissal in respect of her view of the defendant's actions towards her.

[6] In a 29 July 2010 decision, the relevant Committee of the Authority decided to take no further action on her complaint to the Authority. However, on 10 December 2010 this Tribunal reversed that decision and remitted the complaint back to the Committee for a charge of misconduct to be laid. Hence these proceedings.

***Specific Evidence***

*Evidence of Ms Smith*

[7] Ms Smith had filed a written brief and stated that in early 2009 she felt that, in order to substantiate her claims that the defendant was bullying her, she would record conversations *"to get concrete evidence to present to the other partner of X Limited, Chris Flanagan"*. Some of these recordings have been ruled inadmissible in these proceedings.

[8] With regard to particular (a) of the charge, Ms Smith said she had a conversation with the defendant on 26 February 2009 during which he told her, that Mr Flanagan (also a proprietor of the company) had told him that a client had laid a complaint against her with the Real Estate Institute of New Zealand but, that same day, Mr Flanagan told her that he was unaware of any such complaint. Later the same day, the defendant again referred to such a complaint and, again, a little later Mr Flanagan said there had been no such complaint that he was aware of. She asserts that those comments of the defendant about such a complaint are *"part of the bullying, harassment and intimidation that I was subjected to by him"*.

[9] With regard to particular (b) of the charge that she was advised by the defendant that a number of prospective clients had refused to deal with her, she said that the defendant told her that *"numerous times"* during conversations, and she regarded that as part of the *"bullying, harassment and intimidation I was subject to by"* the defendant.

[10] Ms Smith then referred to particular (c) of the charge and said that, during a conversation between her and the defendant on 8 February 2009, he accused her of lying and she considered that accusation was part of the bullying, harassment and intimidation she was subjected to by the defendant.

[11] Ms Smith then referred to particular (d) of the charge and stated that, during a conversation with her on 26 February 2009, the defendant advised her that he was restricting her hours in the office and instructed her that she was not permitted to have more than ten listings at any one time.

[12] By way of background with regard to particular (e) of the charge alleging that the defendant accessed her private emails, Ms Smith noted that there was only one work computer located in the company's reception area but she had supplied her own computer (on her own desk) which could access the company's computer system. She said that, sometimes, when she was working on the computer in the reception area she would send personal emails which would be saved in the company's system. Ms Smith said that in February 2009 the atmosphere in the company's office was *"particularly bad"* and, on about 16 February 2009, the

defendant told her that some potential clients were unwilling to list their property with the company if she was to be involved in the listing. She states that the defendant would not clarify the source of this information nor what she might have done to cause such a complaint.

[13] On 18 February 2009 she left a tape recorder unattended and recording at the front desk in the reception area. It recorded a conversation between the defendant and Karen Martin (a company employee) during which they talked about the content of personal emails the complainant had sent. Ms Smith felt that it was clear that Ms Martin had gone through the emails in her folder with, she alleges, the active encouragement and participation of the defendant and there were comments about some emails. Ms Smith said that on 6 March 2009 the defendant admitted to Mr Flanagan that he had seen her personal emails.

[14] Particular (f) of the charge is that the defendant disclosed to a friend of his certain private and confidential details with respect to a client for whom he was acting. Ms Smith stated that her tape recorder near the front reception area recorded a conversation between the defendant and Ms Martin in which he said he had discussed confidential information with an acquaintance about one of his clients, a Mr Colee, and had disclosed information which Ms Smith regarded as *"sensitive commercial information"* about a deal with a company named *"Agriseeds"* and that the defendant made it clear that this person was not a party to that deal between Mr Colee and Agriseeds. Ms Smith says there are two other recordings showing that the defendant discussed that deal with people not involved in any way with it, and also a recording where the defendant tells Ms Martin how sensitive Mr Colee is about the deal to the extent that, in the course of it, Mr Colee did not even want to be seen talking to his friend the defendant at the local rugby club.

[15] Ms Smith also gave detailed oral evidence and was extensively cross-examined.

[16] She mentioned that, when making her complaint, she had been seeking mediation but her job with the company was terminated. She said she began to tape conversations between her and the defendant back in early 2009 *"as I couldn't believe myself. He would give me directions and later deny that or alter them so I taped to establish I was not going mad"*.

[17] She said she was very frightened, distressed, and surprised by a complaint from a Ms Savage and found it mortifying and of serious concern to her. She said she had no reason to doubt what the defendant was saying to her and he was very angry and annoyed about the complaint and *"he stood over me"*. She was given to understand from the defendant that Mr Flanagan had become very angry about it as well as the defendant, although when she saw Mr Flanagan about it she found *"he was not furious with me"*.

[18] She said that the defendant put to her names of clients who refused to deal with her, but she now seemed very doubtful about the truth of that. However, at the time she had believed what the defendant told her as her manager, although she felt she had a loyal and appreciative clientele and could not understand why things seemed to be falling apart. She felt that the defendant was engineering her departure from the company and even accused her of dishonesty and of being untruthful but in a vague way.

[19] There was reference to a transaction handled by the complainant involving a Mr and Mrs Exley as vendors. There was a complaint against Ms Smith that she had allowed the purchaser from them to take possession prior to settlement. She did not deny this, but said that, at the time, she was under family stress in terms of the health of her aunt to whom she had to attend urgently, and the defendant was not available to assist. It seems she had provided the purchasers with a key to the garage of the property prior to settlement and with consent of the vendors but also on that ring was the key to the house, and the purchasers used it and took occupation of the house prior to settlement. Her employer company reduced its commission to sooth the vendors, Mr and Mrs Exley, but the reduction seemed to be taken from Ms Smith's share of commission.

[20] Inter alia, there was reference to a transaction involving a Mr and Mrs Tweed. Ms Smith had been at some apartments when Mr Tweed arrived in a vehicle and wanted to know from her if a particular unit was still available for purchase. Although her company's sale agency had lapsed, Ms Smith then treated with Mr Tweed over that apartment. She seemed to be saying that the defendant rebuked her about that situation and stood over her and would not let her comment or even interrupt him.

[21] Ms Smith said that when the defendant limited her listings to 10 that was far too low a workload for her and she realised it would affect her livelihood. She preferred to carry 30 to 40 listings and hire the help of a personal assistant for administrative matters. At the time that restriction was imposed upon her in January/February 2009, she had about 25 listings and she felt she had not deserved the cut-back as she was very capable and a top salesperson. This led her to make contact with another real estate firm in March 2009 because she felt she was being squeezed out by the defendant and wanted to explore options.

[22] Inter alia, there was an allegation that she told her new employer she had sought a $250,000 settlement from the company on the basis of her having an employment dispute with it. She denied ever having said that or making such a claim. She added that, because the defendant had asked her what it would take for their problems to be resolved, her lawyer had told her *"you must start somewhere, what about $250,000"* on the basis of the effect of the defendant's attitude on her income and health. She said that, as a matter of full disclosure of her problems in her current appointment to her prospective new employer, she would have told him about that advice.

[23] Ms Smith said that, in September 2009, she was given one month's notice by the defendant's company to sever her contract as an independent contractor salesperson and, almost immediately, she went to work with a real estate company in Christchurch. She felt that her relationship with the defendant and his company had become beyond repair some months earlier and she had heard derogatory remarks to that effect about her in late March 2009. She felt that the defendant was endeavouring to have something *"bubble"* so he could squeeze her out and she had realised by late March 2009 that her job with the defendant was coming to an end. We understood that this caused a great emotional crisis in her life.

[24] Ms Smith asserts that during January to September 2009 she was being continuously bullied and harassed by the defendant. She insisted it was ridiculous to suggest that she contrived such a breakdown in relationship in order to obtain damages for wrongful dismissal. She said she felt obliged to sit and be intimidated and interrogated by the defendant for hours at a time as he was trying to force her

from the business. She seemed to be saying that at material times she was stressed as the defendant alleges, but that stress was not caused by overwork but by the attitude of the defendant towards her. She pointed out that when she was transferred to the office of Mr Flanagan in late February 2009, she found there were no issues of concern between her and Mr Flanagan.

[25] Inter alia, cross-examination covered the so called business mistakes made by Ms Smith when working for the defendant and his company, and the various complaints made against her. Her answers seemed candid and she insisted that the defendant had been destroying her self confidence when she was top salesperson for the company.

***Evidence of the Defendant***

[26] First, the defendant dealt with the issue of his telling the complainant of an alleged complaint made to REINZ about her when (according to the complainant) no such complaint had been made. He said he became aware of a complaint against his company by Glenda Savage and Jock Dalley from a telephone call to him by Mr Flanagan who was then upset with Ms Smith *"concerning her behaviour but principally the amount of commission they had been charged"*. The defendant said that Mr Flanagan told him that Ms Savage had rung REINZ to lay a complaint and asked him to ring Ms Savage, which he did. She told him that the complaint principally was to do with the amount of commission which she had been charged by Ms Smith. All this seems to have happened on 26 February 2009 and caused Ms Smith to be moved to Mr Flanagan's office at Rolleston to work from there. Ms Smith had said that she was often praised by Mr Flanagan for her work.

[27] The defendant could not understand why Ms Savage had telephoned Mr Flanagan in the Rolleston office, rather than the defendant in the Darfield office, when her property and Ms Smith were based in Darfield. It transpired that when Ms Savage made the complaint to REINZ she was advised by it to contact Mr Flanagan.

[28] In any case, as a result of discussions with Mr Flanagan and Ms Savage the defendant formed the view that a complaint had been laid with REINZ against the company or, at the very least, was in the process of being laid. Accordingly he met with Ms Smith to discuss the complaint and did not know that some of his discussions with her were recorded by her. We observe that such recording seems to have been illegal.

[29] It seemed to be accepted that Ms Smith's error over the amount of commission charged to Ms Savage related to her failing to compete paperwork correctly, and that she readily admitted she had made a mistake at the time.

[30] The defendant emphasised that from that time he became concerned *"that Annie Smith's performance was falling away dramatically compared to when she first began working for us"*. He said he put it to her a number of times that her workload was too heavy and affecting the quality of her work and that he sought to remedy that situation.

[31] Eventually, the company paid Ms Savage and Mr Dalley $2,000 as a sign of good faith to settle their complaint about commission. The defendant's company seemed very sensitive about the complaint because, the defendant put it, there had

not been a complaint against it in the previous 100 years and the complaint was made against the company and not against Ms Smith. Immediately the complaint had been settled, which was within five days of its receipt, the defendant told Ms Smith that the matter had been settled. The defendant emphasised that he then believed that Ms Smith and his company had a relationship which was salvageable and he put his focus on making that relationship continue for their mutual benefit.

[32] With regard to the pleading that he had advised Ms Smith that a number of prospective clients had refused to deal with her, the defendant noted that Ms Smith had quite often admitted that to be the situation i.e. that a number of people would not work with her and examples were referred to. The defendant stated this was not the first time he had raised such concerns with Ms Smith since mid to late 2008 and that she understood that some people were not dealing with her because of her personality. In the course of the hearing we gathered that she is regarded as having a strong and decisive personality.

[33] The defendant maintains he never had any intent to either intimidate, bully or harass Ms Smith by raising such issues with her, but saw it as his managerial duty to do so and remedy matters for their mutual benefit.

[34] The defendant insists that he never told Ms Smith that she had been dishonest although he did seem to put it to her on some occasions that he felt she had *"not been entirely upfront with myself or clients"*. He gave as an example her advising him and the vendors that a sale had been made to a purchaser domiciled in the United Kingdom when, in fact, negotiations were still continuing. The outcome was a $10,000 shortfall between what Ms Smith had told the vendors the property had been sold for and what it was eventually sold for. To maintain their firm's credibility, the defendant and Mr Flanagan decided to discount the real estate commission by $10,000. Apparently, somehow that allowed the contract to become unconditional and settlement took place in the usual way.

[35] The defendant gave examples of his having had *"great difficulty obtaining payment for advertising from Annie Smith's clients"*.

[36] The defendant states that, at material times, he had concluded that, due to the sheer volume of work Ms Smith was handling, she was making mistakes and people were complaining about her and she was not quite telling the truth due to work pressure in order to avoid having to deal with a particular issue.

[37] The defendant maintained he had no malicious intent about Ms Smith but *"was simply trying to manage the day to day operation of the Darfield office"*.

[38] The defendant's explanation for endeavouring to restrict Ms Smith's working hours and listings to ten at any one time was that the company had received a number of complaints from clients alleging lack of work performance by her. He gave a number of examples which seemed to relate to early 2009. On 8 February 2009 he seems to have told her that he had received seven complaints from people who were not prepared to deal with her over the previous three weeks.

[39] There seems to be no doubt that Ms Smith was working long hours at material times and was not sleeping well nor eating properly for various reasons.

[40] The defendant maintains that, in trying to reduce her workload, he was not being critical of her but was simply trying to guide and assist her. He felt the restrictions he imposed were never carried out by her but he seemed to achieve that she *"take one day off a week"* from about February/March 2009.

[41] The defendant denied that he ever accessed private emails of Ms Smith and put it that he did not have the ability to do that. He admitted the incident of an email of Ms Smith having been left open on the office computer and he had noted it contained details of a hotel booking including some credit card details. He was called to the reception area by Ms Martin to see this and they seemed amused that the credit card expiry date had passed. This situation was revealed by Ms Smith having left a recorder hidden somewhere next to the reception desk.

[42] The defendant then dealt with the allegation that he disclosed to a friend private and confidential details of a client's transaction. He noted that he and Ms Martin had worked on a sale of a business called Agriseeds. He insists that there was no disclosure of any private or confidential details of any client.

[43] He accepted there had been a discussion between a local farmer and the defendant and that farmer's daughter worked at Agriseeds. The farmer told him he (the defendant) had completed a deal with Agriseeds for purchasing Colee's farm and then corrected that by saying *"sorry I don't mean Agriseeds, I mean Colee"*. From that the defendant knew that the farmer was aware that there was an offer from Agriseeds for Colee's farm and the defendant told that farmer that Agriseeds were buying the Colee farm. The defendant insists that there was nothing private or confidential about that and that his practice was never to discuss contracts with third parties until a contract had become unconditional. He then stated *"However, in these circumstances when this person, through his daughter, was aware that Agriseeds were looking to purchase the Colee farm, I did not see myself doing anything that compromised my position as a real estate agent"*. The material time for this incident seemed to have been February 2009.

[44] The defendant added that although Mr Colee took care not to be seen with the defendant at the local rugby clubs rooms because he did not want members of the community observe him talking to *"a well known local real estate agent"*, that had nothing to do with Mr Colee purchasing a property or selling his farm some months later to Agriseeds.

[45] Generally speaking, the defendant concluded his prepared brief by insisting that he never engaged in behaviour intended to be bullying, intimidating, or amounting to harassment of Ms Smith; that she was an extremely difficult and challenging person to manage; that he tried to find a solution to retain her in his business but could not, so there was a need to terminate *"our relationship"*; that the state of their contract enabled that to be done without giving reasons, and there was no need to drive Ms Smith out of the business as she alleged. He then added that his company was concerned about the complaints against Ms Smith and the poor quality of her paperwork and that she would not acknowledge any such deficiencies. He reiterated his wish to remedy her performance.

[46] The defendant was then extensively cross-examined on the detail of his evidence-in-chief. We note that, inter alia, he admitted that, in effect, some of his conversation with Ms Smith came close to accusing her of dishonesty and that his

general line of discussion with her could explain why she came to feel harassed. He disagreed she was harassed or that he had been in any way forceful or direct to her.

[47] It was put to him that *"when you drill down the position* [with Ms Smith] *is not as serious as you have asserted".* He would not accept that but admitted that Ms Smith had worked well in the past and he was very happy with her performance up to about mid 2008. He stressed that he had initiated her joining his company on an independent contractor basis. The defendant would not accept that he had been overly confrontational with her. The defendant maintained that he was endeavouring to set up a structure so that the company and Ms Smith could move forward. He felt she worked too long hours, endeavoured to service too many clients and, at material times, she was not sleeping or eating well and she admitted she was under stress of a personal nature.

[48] In terms of the Agriseeds matter referred to above, the defendant said a local farmer told him that such a deal had taken place and that he, the defendant, simply confirmed that and, as he did so, he knew that the affected parties did not regard the fact of the transaction as personal or confidential. Inter alia, it was put to him that he did not need to confirm that information to the farmer and he seemed to reply *"there was no privacy sought by the purchasers and I knew there was no such issue to them in this case"*. He did not coherently quite answer the question: *"But here the purchaser's name should not have been put on the open market at that stage"?*

[49] In re-examination of the defendant, we noted that, although he is an office manager of the real estate company, he spends about 90 percent of his time as a real estate salesperson.

***Further Evidence***

[50] Helpful briefs of evidence were admitted by consent from a number of other witnesses including the investigator for the prosecution, and from Messrs Flanagan and Irvine. The latter was the next employer of Ms Smith. We do not need to take any of that further except to note that Mr Flanagan regarded Ms Annie Smith as *"flamboyant"* when most of the firm's clients were *"reasonably conservative"* people and that (he says) Ms Smith was *"very flirtatious"*. He seemed to be putting it that, at material times, Ms Smith had some personal stress concerning a boyfriend in Auckland. Generally Mr Flanagan's evidence was consistent with that of the defendant.

[51] Mr Irvine is the owner of the company which Ms Smith worked for upon leaving the defendant's company. Inter alia, he said that when she commenced work for him she said she was about to obtain a $250,000 settlement from that company for sexual harassment. He said that she was, initially, an enthusiastic salesperson but always had a problem of not completing the necessary paperwork. After a while he started receiving complaints about her from clients, and he gave quite some detail on that theme. He said that Ms Smith has a very dominating and forceful personality and is difficult to manage. He eventually arranged for her to leave his company in about mid 2011 which, he seemed to be saying, caused her to complain against him to the Real Estate Agents Authority, but her complaint was not upheld.

***The Stance of the Defendant***

[52] The defendant acknowledges that he did tell Ms Smith that he believed a complaint had been laid with REINZ about her activities as a real estate salesperson. What is in dispute is whether that or anything else was done for the purposes of harassment, bullying, or intimidation.

[53] Due to conversations he had had with Mr Flanagan and Mrs Glenda Savage (a client of that company), the defendant says he had a genuine belief that there had been a complaint made concerning Ms Smith's behaviour as a real estate agent. Ms Savage's complaint concerned the amount of commission she was charged. That was capable of forming the basis of a complaint to REINZ. Once that complaint was resolved, the defendant advised Ms Smith that the complaint had been settled. It was submitted by Mr McCall (counsel for the defendant) that removed any undue pressure or stress which the complaint may have caused Ms Smith. He also submitted that no malice was intended by the defendant in advising Ms Smith of Ms Savage's complaint. Mr McCall emphasised that Ms Smith has acknowledged that she made a mistake regarding Ms Savage.

[54] Mr McCall also refers to evidence of the defendant having stated to Ms Smith at a material time *"I'm concerned about your wellbeing"* and puts it that shows no malice could have been intended by the defendant.

[55] With regard to the pleading that the defendant had advised the complainant that a number of prospective clients had refused to deal with her, the defendant accepts that he advised that to Ms Smith. There seems to be no dispute that there were a number of prospective clients who refused to deal with Ms Smith. The issue for us is whether advising Ms Smith of that was a necessary and reasonable response by the defendant in trying to manage a real estate agent under his immediate responsibility. Mr McCall particularly referred to s.50 of the Act which requires a manager to *"properly supervise and manage"* an agent to ensure *"that the work is performed competently"*, and the work complies with the requirements of this Act.

[56] Mr McCall submits that since the relevant statement of the defendant to Ms Smith that people would not deal with her was truthful, we should find that this particular does not support a finding of disgraceful conduct against the defendant. Mr McCall also pointed out that there is evidence that there were people who would not deal with Ms Smith and this was causing stress to the company and, in particular to the defendant, and there is evidence that Ms Smith acknowledged the difficulty this was causing the defendant's company at material times.

[57] With regard to the particular of the charge that the defendant alleged the complainant was dishonest in her dealings with him and with clients, the defendant denies that he ever said that Ms Smith was dishonest. However, the defendant does accept that he had formed the view that Ms Smith was not entirely straightforward with clients and/or him. He says that, in particular, he had formed the view that this was occurring because it was seen by Ms Smith as the best way of dealing with an issue rather than dealing with a particular issue head-on.

[58] In that latter respect, Mr McCall referred to the lack of payment by certain clients for advertising costs; the advice to a client in the United Kingdom that a contract had been settled when it had not; this meant that the company eventually paid $10,000 as the difference between what the client understood the property had

been sold for and what it had actually sold for; the situation where Ms Smith had advised Mr and Ms Savage that they knew the commission was 3.95 percent but that was not accepted by Ms Savage and eventually a payment was made to her the company.

[59] Mr McCall referred to those matters and other extracts of conversations between Ms Smith and the defendant. He submitted that, in their context, they did not amount to bullying, harassment or intimidation and that, in particular, the evidence shows that the defendant was trying to resolve what he saw as a very serious employment situation with Ms Smith, and was trying to find out why people would not deal with her and what could be done to arrest that situation.

[60] It is submitted for the defendant that there has been no intimidation, bullying or harassment but, merely, a discussion to resolve a problem.

[61] The particular of the charge that the defendant *"restricted the complainant's hours in the office and instructed her she was not allowed more than ten listings in any one time"* is based on a recorded conversation between Ms Smith and the defendant when discussing, in particular, the complaint from Ms Savage. Mr McCall submits that the issue of restricting the listings and/or hours of Ms Smith must be viewed in the context of the complaints which were being received from clients and from those who had said they would not become clients of Ms Smith.

[62] Part of the transcript evidence of the complainants' tapings shows the defendant stating to Ms Smith that she needed to consider long and hard the idea of working seven days a week in real estate and look at alternatives. A number of scenarios are given to her by the defendant whereby she may want to regulate her listings and only list in the Darfield township in order to restrict the days on which she works. The defendant refers to the effect which her work is having on her and, in particular, observes that she is not thinking straight, is losing sleep, not eating, and that her health has been impacted adversely due to her heavy work-load.

[63] Accordingly, Mr McCall submits that the defendant was merely looking for a solution in working with Ms Smith and trying to ascertain a solution to those problems which the defendant felt needed to be managed. Inter alia, he suggested to her that she take some time off, as a break from work, and think about his advice in terms of her welfare and her livelihood. Mr McCall submits that it was in the course of that type of discussion that the defendant is recorded as saying to Ms Smith on 26 February 2009 *"to alleviate the complaints being received and this was in the context of the complaint just received from Ms Savage, that the listing be reduced to 10"*. A little later the defendant states to her *"I'm not going to say to you we need to put controls in place to keep your workload in a manageable level so it doesn't cause you to become, and I will use the word 'flustered'."*

[64] Mr McCall submits on behalf of the defendant that this was a reasonable proposal put by the defendant to Ms Smith in the context of complaints being received in early 2009 from clients and potential clients of Ms Smith.

[65] Particular (e) of the charge is *"that the defendant accessed the complainant's private emails"*. This is denied by the defendant but he accepts that he may have seen an email of Ms Smith's not because he *"accessed"* it, but rather it had been left open by Ms Smith on a computer at the reception desk. Mr McCall submits for the defendant that it was not a coincidence that this email was left on the computer at

reception with a hidden tape recorder running to record the reaction of the defendant and/or Ms Martin when they saw the email on the computer screen.

[66] Particular (f) of the charge is that the defendant disclosed to a friend private and confidential details about a client. Mr McCall submitted that the overall evidence from the investigator is that, in terms of the sale of the Colee's land to Agriseeds, there was no expectation of any privacy, and that was acknowledged by Mr Willocks of Agriseeds and by Mr John Colee. It was pointed out that Mr Willocks, when interviewed, stated in relation to the purchase from Mr John Colee:

> *"No. There was no secrecy over it at all. Most of our employees are all locals and things get talked about. I had no concerns at all. This was a normal transaction and we receive good service from [the defendant]".*
>
> *"Question, did you have any confidentiality expectations over this deal?*
> *Answer, no. Jo did it well. Straight up. No complaints. In fact it was done in conjunction with Karen Martin. She got the commission. There was nothing out of the ordinary."*

### *Misconduct*

[67] We have set out the definition of misconduct above. It was submitted that, with the exception of particular 1(f) of the charge, the conduct alleged against the defendant does not involve real estate agency work as that term is defined at s.4 of the Act which relevantly reads:

> *"**Real estate agency work or agency work –***
>
> *(a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and*
>
> *(b) includes any work done by a branch manager or salesperson under the direction of, or on behalf of, an agent to enable the agent to do the work or provide the services described in paragraph (a)."*
>
> *...*

[68] It seems to us that the defendant's conduct comes within (b) of the definition.

[69] In any case, conduct not involving real estate agency work may nevertheless amount to misconduct under the Act if that conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[70] The Tribunal considered the ambit of the term disgraceful, as used in s.73, in *CAC v Downtown Apartments Ltd* [2010] NZREADT 06 and held:

> *"[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is given its natural and popular meaning in the ordinary sense of the word. But s.73(a) qualifies the ordinary meaning by reference to the reasonable regard of agents and good standing or reasonable members of the public.*

*[56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess. [See Blake v The PCC [1997] 1 NZLR 71].*

*[57] The 'reasonable person' is a legal fiction of common law representing an objective standard against which individual conduct can be measured by under s.73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.*

*[58] So while the reasonable person is a mythical ideal person, the Tribunal can consider, inter alia, the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the ... defendant.*

*[58] So, in summary, the Tribunal must find on balance of probabilities that the conduct of the ... defendant represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public."*

[71] Section s.73(a) of the Act allows us to assess whether conduct is disgraceful both by reference to reasonable members of the public and agents of good standing. The section allows for disciplinary findings to be made in respect of conduct which, while not directly involving real estate agency work, nevertheless has the capacity to bring the industry into disrepute and which, for that reason, agents of good standing would consider to be disgraceful. We recognise that s.73(a) may apply to conduct by a real estate agent outside of real estate agency work.

[72] In *CAC v Dodd* [[2011] NZREADT 01, the Tribunal made a finding of misconduct and suspended a real estate agent as a result of conduct in his personal life (forging his wife's signature on personal finance documents). We considered that there must be sufficient nexus between the conduct proved and the fitness of the licensee to conduct real estate agency work in order to make a finding under s.73(a).

[73] There are, therefore, two important considerations in applying s.73(a) to non-real estate agency work, namely, is there a sufficient nexus with the fitness of the licensee to conduct real estate agency work; and is the conduct a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public?

[74] The decision of this Tribunal in *CAC v Beiszer* [2011] NREADT 05, turned on the second of these considerations. The case involved a licensee sending an offensive electronic message to a former work colleague about her client, intending it to be private (not realising that for a period of time it was, in fact, able to be viewed by third parties on Facebook). The Tribunal found that although the conduct was unacceptable, misconduct under s.73(a) was not made out.

[75] By contrast, in *CAC v Arthur Subritzky* and *CAC v Robert Subritzky* [2012] NZREADT 19 and [2012] NZREADT 20, we concluded that it was disgraceful conduct for two licensees to, between them, send a radically offensive text message to a process server and behave in a verbally and physically aggressive manner towards a second process server, notwithstanding that neither licensee was engaged in real estate agency work at the time of the conduct. We found that there was a sufficient nexus between the behaviour proved and the licensee's fitness to carry out

real estate agency work. We noted that licensees must be able to be trusted to conduct themselves in a calm and professional manner at all times if consumer interests are to be promoted and protected.

## *DISCUSSION*

[76] Charges 1(a) to 1(e) are effectively particulars of Ms Smith's original complaint, namely, that the defendant harassed, bullied and intimidated her during the course of her employment relationship with X Limited. The final particular, 1(f), relates to the allegation that the defendant disclosed private and confidential information relating to a client.

[77] Particulars 1(a) to (e) are self-explanatory and, to a large extent, not in dispute. What is in dispute is whether or not the particulars disclose a course of conduct on the part of the defendant which amounted to bullying, harassment or intimidation (as Ms Smith says) or whether, as the defendant contends, the incidents described show him as an agent, in good faith, attempting to manage a difficult and challenging employee.

[78] It is submitted for the prosecution that, should we accept that the defendant bullied, harassed and intimidated Ms Smith as she alleges, there would be a sufficient nexus between that conduct and the fitness of the licensee to conduct real estate agency work. We agree with that hypothesis. Licensed agents will often have management responsibility for licensed salesperson working under them. Section 50 of the Act provides that a salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or branch manager.

[79] That agents behave in a proper professional manner when managing staff is in the interests of the consumers being served by those staff members. Where a licensed agent's conduct in managing staff falls so markedly below expected standards that agents of good standing would regard that conduct as disgraceful, we agree that misconduct findings are warranted.

[80] We note that counsel for the defendant submits that the defendant's actions were never intended to, nor did they, amount to disgraceful conduct.

[81] Section 73(a) of the Act, provides for an objective test, as for agents of good standing or reasonable members of the public, as to whether conduct is 'disgraceful'. The Concise Oxford Dictionary (11th Edition) defines disgraceful as *"shockingly unacceptable"*.

[82] Mr McCall, counsel for the defendant, submits that the defendant was placed in an invidious position in managing the complainant real estate salesperson who had become the subject of a number of complaints from clients and potential clients. It is put that, particularly, those conversations recorded and annexed to the transcript of recorded, conversations show someone who is attempting to resolve a difficult situation with Ms Smith; and that the defendant was, at material times, looking for remedies to try and change her behaviour, relieve the stress that she was under; and so, hopefully, reduce the complaints being received about her.

[83] Mr McCall also submits that the defendant's actions were not only required of him as a good and prudent manager, but also there is a statutory requirement under

s.50 of the Act to *"properly supervise and manage"* agents and, in the particular circumstance that confronted him with Ms Smith, that is what he did.

[84] Mr McCall submits that the evidence of Ms Smith that she was the subject of continuing bullying and harassment at the hands of the defendant, which amounts to disgraceful conduct, is to be rejected. He also submits that the defendant acted in a manner designed to prevent Ms Smith's behaviour being repeated in order to protect members of the public who may become clients of the company.

[85] Mr McCall particularly submits that the thrust of the evidence of Ms Smith, that the purpose of this bullying and harassment was to remove her from her position as a real estate agent with the company, is not correct because:

[a] in March 2009 Ms Smith, according to the evidence of Mr Irvine of Initial Realty Ltd, telephoned Mr Irvine enquiring as to a position with that company as a real estate agent;

[b] and at that time there had been no decision made by the defendant's company to terminate its agreement with Ms Smith and this did not happen until September 2009.

[86] Mr McCall submits for the defendant that it was Ms Smith who had, at the latest by March 2009, already decided to leave the company; yet the company and, in particular, the defendant continued with their attempts to try and resolve the situation which had arisen following the complaints received about her.

[87] We do not find that rationale to be convincing or particularly logical. The issue is whether or not there was harassment of Ms Smith.

[88] Mr McCall submits that the particulars do not disclose, either individual or cumulatively, conduct which, viewed objectively, could amount to disgraceful conduct. That is the main issue for us.

[89] Findings of unsatisfactory conduct under s.72 of the Act are only available in respect of 'real estate agency work' as defined at s.4 of the Act. It was accepted that particular (f) of the charge relates to real estate agency work. By contrast, a finding of misconduct under s.73(a), on the grounds of disgraceful conduct, is available where the conduct in issue does not relate to real estate agency work. See *CAC v Dodd* [2011] NZREADT 01 and *Smith v CAC & Brankin* [2010] NZREADT 13.

[90] Mr Clancy accepted that particular 1(f) of the charge against the defendant relates to real estate agency work. The charge refers to confidential information relating to a client being, allegedly, disclosed by the defendant. He submits that it would, accordingly, be open to us to find that the defendant's conduct in respect of charge 1(f) was unsatisfactory under s.72 (should we not be satisfied that misconduct under s.73 has been made out). We find that the defendant's breach of confidentiality, even though condoned by the affected parties as covered above, is disgraceful in the circumstances explained above and amounts to misconduct.

[91] Mr Clancy puts it that the remaining particulars do not relate directly to services provided to clients or interactions with customers. He noted our indication at the hearing that paragraph (b) of the s.4 definition of real estate agency work may cover the management of the performance of salespersons by branch managers. He

advises that the Authority is neutral as to whether such work, which would include particulars 1(a) to 1(e) in the present charge, amounts to real estate agency work as defined. We consider that such work does include particulars (a) to (e) except that particular (a) has not been proved because a complaint had been made against Ms Smith or the defendant understood that it had. Also, particular (b) is not proven because a number of clients had refused to deal with Ms Smith. We find the other particulars proven on the balance of probability. Overall, we find the pattern of the defendant's behaviour to Ms Smith, as described above, to be of an oppressive and character-destructive nature so as to amount to harassment, which is disgraceful conduct.

[92] We consider that the defendant was engaged in real estate work at the material times we have described above because, as a manager of a real estate business, he was managing Ms Smith an employee (on an independent contractor salesperson basis) of the business at her real estate marketing work.

[93] We set out a summary of the evidence above in some detail to support our findings. Although credibility of witnesses is not easy to determine, the stance of the parties is not so much about what happened but about how we should interpret what happened.

[94] Simply put, we conclude that the manner in which the defendant treated the complainant Ms Smith over material times was harassment of her, even allowing for her attitudes from time to time as described. She was subjected to regular and lengthy critical interviews by the defendant. She was too firmly told by the defendant that a complaint had been laid about her; he kept stressing to her that a number of prospective clients had refused to deal with her; he alleged that she was dishonest in her dealings with him when that cannot be substantiated except for some gilding of the lily or careless reporting of a situation; he restricted her hours in the office and reduced the number of listings that she could carry at any one time when she was a top-line salesperson; his methodology of dealing with her seemed designed to smash her underlying self confidence; and he did improperly access the complainant's private emails albeit by condoning that from Ms Martin.

[95] The defendant did disclose to a friend confidential details with respect to a transaction of another client even though that other client did not seem concerned about the disclosure.

[96] Overall, the defendant seems to have had some plan of his, over material times, to force Ms Smith out of her job because, for some reason or other which is not quite apparent, he no longer wished to be associated with her.

[97] We accept that, perhaps, the defendant's approach of so offending was due to being misguided in his methods for resolving aggravation by the complainant, as he perceived it, to his business. It is unfortunate that an experienced real estate salesperson like the defendant, with seemingly an impeccable record for many years, so mishandled what he saw as an employment problem in the form of Ms Smith. It is equally unfortunate that she felt bullied, harassed and intimidated by the approach of the defendant to such an extent that her former top performance as a real estate agent declined.

[98] For the above reasons, we find the charge of misconduct against the defendant to have been proved.

[99] The parties are well aware that, at the end of the hearing, we put forward suggestions for settlement and, while they have not been adopted, a consequence has been that the defendant has had his lawyer pay $10,000 to Ms Smith's solicitor even though Ms Smith will not accept it as in full and final settlement of the matters in dispute between the defendant and the complainant. To his credit, the defendant did not require that payment to be made only if accepted in full and final settlement.

[100] We take that feature into account in dealing with penalty. Under ss.110(2)(a) and 93(1)(b), we may order that an agreed settlement between a licensee and a complainant have effect, by consent, as all or part of a final determination of a complaint. In fact there has been no agreed settlement in this case.

[101] It is our practice to allow separate submissions about penalty and for those submissions on penalty to lead to a fixture for the purposes of our Orders on penalty if the parties wish. We understand that the parties do not wish to make further submissions about penalty, but we grant leave to apply in that respect for 21 days in case we have misunderstood the position.

[102] The conduct in issue in this case took place prior to the Act coming into force on 17 November 2009. Section 172 of the Act therefore applies and we have frequently covered the effect of that. Simply put, the defendant could have been complained about under the 1976 Act and his conduct could have been considered by the then Real Estate Agents Licensing Board. We have found that the defendant's conduct did amount to misconduct under the 2008 Act and, certainly, amounted to unsatisfactory conduct.

[103] We accept that only orders which could have been made against the defendant under the 1976 Act are available to us upon finding that the defendant's conduct has amounted to misconduct under the 2008 Act. It also follows, in terms of s.172 of the Act, that the only orders now available to us by way of penalty against the defendant are cancellation of the defendant's certificate of approval; suspending that certificate of approval; and/or imposing a fine up to $750. The Board could have made such orders under s.99(1) and (4) of the 1976 Act. We also accept that the effect of s.172 is that, if we were relying on a finding of unsatisfactory conduct by the defendant, rather than misconduct, no orders by way of penalty would be available to us as orders would only have been available against the defendant's employing agent rather than against himself.

[104] Subject to either party wishing to make further submissions on penalty, we do not think it appropriate to cancel or suspend the defendant's licence. We consider that in the rather curious circumstances of this case, and taking into account that the defendant has gratuitously paid Ms Smith $10,000 with no tags or conditions as a result of our suggestion, and that we should fine the defendant $750, and also bearing in mind that we are not prepared to make a Non Publication Order; then there has been appropriate and sufficient penalty for the defendant in this case.

[105] If the parties accept the above suggestions for penalty, the fine of $750 is to be paid to the Registrar of the Authority within 15 working days from the date of this decision. We would also Order costs to this Tribunal of $1,750 against the defendant

to be paid to the Tribunals Unit, Ministry of Justice, Wellington also within the said 15 days.

[106] We note that there has been previous publicity in a newspaper about this prosecution but, in any case, we consider that any interest the defendant may have in non-publication does not outweigh the public interest in open reporting and transparency in our processes.

[107] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

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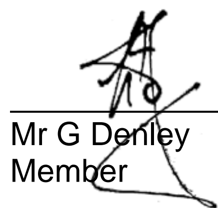
Judge P F Barber
Chairperson



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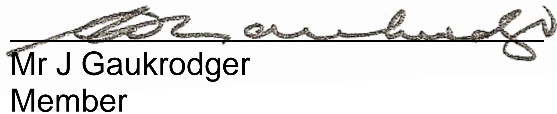
Mr G Denley
Member



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Mr J Gaukrodger
Member