

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 18

READT 063/13

IN THE MATTER OF

a charge laid under s.91 of the
Real Estate Agents Act 2008

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC 20005)**

Prosecutor

AND

PAUL McGOWAN of
Christchurch, Licensed
Salesperson

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

SUBSTANTIVE CASE HEARD at CHRISTCHURCH on 2 September 2014

SUBSTANTIVE DECISION ISSUED 20 November 2014 as [2014] NZREADT 92

DATE OF THIS DECISION ON PENALTY 5 March 2015

COUNSEL

Mr R M A McCoubrey for the prosecution
Mr G M Brodie for the defendant

DECISION OF THE TRIBUNAL ON PENALTY

Background

[1] On 20 November 2014, we found the licensee guilty of misconduct, generally, for swearing at a fellow real estate agent and assaulting her in the course of a workplace argument.

[2] In our paragraph [51] we held that:

"[51] On the one hand, human relations blow-ups in the workplace occur from time to time but, on the other hand, real estate salespeople are engaged in an important profession and should always act in a professional manner. We consider that the defendant failed to do that and, accordingly as set out above, there has been misconduct rather than the lower offence of unsatisfactory conduct."

[3] We suggested that an appropriate penalty would be a fine of \$2,000 plus a significant contribution to costs, and a censure. In those respects, we actually stated as follows:

“[48] In any case, subject to the right of parties to make submissions to us on penalty, we consider that an appropriate penalty would be a fine of \$2,000, plus a significant contribution from the defendant to costs, and a censure. We do not contemplate touching the defendant’s licence even as to suspension and, certainly, not as to revocation.”

Stance of the Prosecution

[4] Mr McCoubrey noted that we have previously dealt with similar cases which have resulted in fines ranging from \$1,500 to \$3,000. He was referring to such cases as *Weldrand* [2013] NZREADT 78; *Arthur Subritzky* [2012] NZREADT 19; *Robert Subritzky* [2012] NZREADT 20. He puts it that this case again demonstrates the importance of the maintenance of standards within the profession and noted that in *Hume* [2014] NZREADT 10 we stated at [15]: *“Real estate work can be stressful and licensees must be able to be trusted to conduct themselves in a calm and professional manner to ensure that consumer interests and public confidence in the industry are promoted and protected.”*

[5] Mr McCoubrey then advised that taking those matters into account, the Authority accepts that a fine of \$2,000, as we proposed, is within the range available for this type of misconduct; but notes that a higher fine would similarly be within that range; and that the Authority further agrees that it would be appropriate to censure the licensee.

The Stance of the Defendant

[6] Mr Brodie submits that Mr McGowan accepts as appropriate the penalty we proposed at paragraph [48] of our decision (as set out above). He puts it that counsel for the Authority appears to agree and advises that, in those circumstances, the defendant does not wish to address the issue of penalty further on the assumption that we will adhere to the indication we have given.

[7] Mr Brodie does wish to be heard on the question of costs and puts it that Mr McGowan’s principal concern has been to avoid a possible suspension of licence, or striking off. He adds that, in this respect, he has been successful so that he cannot be said to have wasted our time.

[8] Mr Brodie also submits that Mr McGowan has promptly faced up to his responsibilities; that his response to the charge includes a comprehensive and frank admission and apology; and that it cannot be said that he has taken an unmeritorious position.

[9] Mr Brodie notes that in other similar cases we have either made no order as to costs or have made an order for a modest amount. He particularly noted that in *Complaints Assessment Committee v Eden* [2011] NZREADT 12 there was no order made towards costs; that in *Real Estate Agents Authority v Subritzky* [2012] NZREADT 20 costs were ordered in the sum of \$2,000; and that in *Complaints Assessment Committee v Hume* [2013] READT 91, in rather similar circumstances it is put, we imposed a fine but made no order as to costs.

[10] In all the circumstances, Mr Brodie respectfully submits for Mr McGowan that there should be no order for costs or, at the most, an order in keeping with the decision in *Subritzky*.

Outcome

[11] We are most appreciative of the said thoughtful submissions from both counsel as to the views we had expressed in terms of penalty. We do not intend to depart from those views in general; but do record that we have had drawn to our attention a 4 February 2015 newspaper report of our said substantive decision in this case which ends as follows:

“McGowan, who is now employed by Property Brokers Rangiora, said it was “a regrettable incident”. “It never is one sided”, there’s always two sides to the story,” he said. He was not sure if he would appeal the decision. “It’s a fairly minor incident; these things always seem to get blown out of all proportion. I don’t know how well you know the REAA (Real Estate Agents Authority), but it’s a bit of an ass of the law and authority sometimes – I don’t think it protects the people that it’s meant to”.”

[12] Our reaction was that, if such comments have been fairly and accurately attributed to Mr McGowan, his reaction to our finding of guilt, i.e. of misconduct against him, is rather unprofessional. It may well be that such a statement should tell against him in terms of our imposition of penalty. However, we decided to ignore those remarks except to draw attention to the fact that they are unwise at any time but, particularly, when penalty had yet to be fixed and suggest a lack of remorse on the part of the defendant.

[13] Having so reacted to the newspaper report, on 10 February 2015 we received a submission on the issue from Mr McCoubrey part of which reads:

“1.4 It is the Committee’s submission that Mr McGowan’s comments reveal a lack of remorse and a lack of insight into his misconduct and into the role played by the industry regulator.

1.5 Furthermore, while the Tribunal is not referred to in the quoted comments, it is clear to any reader of the article that Mr McGowan’s case has been through the Tribunal’s processes and that he was found guilty of misconduct. For Mr McGowan to make the criticisms he does in these circumstances serves to bring the industry into disrepute as it says to the reader that (at best) the disciplinary process is not to be taken seriously.

1.6 It is for these reasons that the Committee brings the licensee’s comments to the Tribunal’s attention. This may be a matter that the Tribunal wishes to be taken into account in its assessment of the appropriate penalty against Mr McGowan, including as to whether a suspension is necessary to bring home to him the gravity of his misconduct and the need to maintain proper professional standards in the industry as a whole.”

[14] Although we agree with those views of Mr McCoubrey and appreciate his ensuring we were aware of the newspaper report, we still decided not to take such foolish remarks from the defendant into account. We felt that, of course, he may have been misreported. Nevertheless, real estate agents and consumers need to understand that, normally, such disrespect for a judicial authority will affect penalty.

[15] We had invited Mr Brodie to respond for the defendant licensee, if he wished, and, on 23 February 2015, we received a short response on that newspaper report issue from him which substantively reads:

“Mr McGowan was telephoned at an inconvenient moment when he was in the middle of an important and substantial business meeting. He was pressed for a comment and did not really have time to consider his response. He accepts that he was critical of the REAA in the sense that in his view the REAA should be concerned with protecting the public rather than being involved in a dispute between two agents. This is what he was trying to get across. It is obviously not expressed very well. Mr McGowan did not intend to attack the Tribunal in any way and apologises for any offence that his remarks have caused.”

[16] Our views on penalty remain unchanged in this case but it needs to be noted that we shall not be tolerating contemptuous remarks or conduct.

[17] Mr McGowan is fined \$2,000 and is censured; and we also order that he pay \$2,000 to the Authority towards the costs of this prosecution. Both the fine and the contribution to costs are to be paid to the Registrar of the Authority at Wellington within one calendar month of the date of this decision.

[18] 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.

Judge P F Barber
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member