BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 46

READT 045/14

IN THE MATTER OF	a charge laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE (per CAC 20004)**
	Prosecutor
AND	**ALLAN ROSS VESSEY** of Waikanae, licensed salesperson
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms C Sandelin - Member

SUBSTANTIVE CASE HEARD at WELLINGTON on 2 December 2014

SUBSTANTIVE DECISION ISSUED 28 January 2015 [2015] NZ READT 10

HEARING ON PENALTY 29 May 2015

THIS DECISION ON PENLTY DATED 15 June 2015

COUNSEL

Mr M J Hodge and Ms S M Earl for the prosecution
Mr J Waymouth for the defendant

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] In a decision of 28 January 2015 ([2015] NZREADT 10) we found the defendant guilty of misconduct for reasons which we explained in some detail but, essentially, he altered the database of his former employer company upon resigning from it as a salesperson. He had also resigned from it as a director and shareholder after a dispute with the other director-shareholders.

[2] The particulars of the charge of misconduct under s.73(a) of the Real Estate Agents Act 2008 ("the Act") read:

> *"The defendant falsified property and contact details contained on the database maintained by Steinmetz Berryman Real Estate Ltd (agency) when he left the*

agency, with the effect that agency's database contained inaccurate information".

[3] As further background we set out the following extract from our said substantive decision, namely:

*"**Our view***

[63] The offending may have been mainly limited to one isolated incident but it was not rectified by the defendant, nor admitted to until these proceedings. It is an explanation but no real excuse that the offending was triggered by the emotion of a business dispute. There was at least the potential to adversely affect the public and, certainly, the complainants and their company. It could be inferred that the defendant's conduct was intended to give him a commercial advantage as a competing salesperson in the area of Paraparaumu and Waikanae.

[64] Overall, the defendant's conduct represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public and therefore is a breach of s.73(a) and amounts to "misconduct". It is possible to regard the offending at the lower end of the scale of misconduct.

[65] Simply put, we accept the general submissions of Ms Earl for the prosecution and indeed we add that the conduct of the defendant amounts to a type of commercial sabotage. In our view there can be no doubt that the conduct as charged has taken place. Obviously, it is very wrong and disturbing for a salesperson to tamper with the business records of his or her employer. We are conscious that the complainants needed to spend much time and effort in rectification of their company's database.

[66] If the parties wish, we shall direct the Registrar to arrange a directions hearing by telephone to fix a procedure for submissions on penalty, whether by way of a formal hearing or on the papers. Our current view is that a fair penalty in all the circumstances might be a package of a $3,000 fine, a contribution to the costs of the Authority of $1,000 and to this Tribunal of a further $1,000, and a compensation payment to the complainants of $2,000."

The Stance of the Prosecution on Penalty

[4] In pre-hearing written submissions, Ms Earl observes that we found the defendant to have engaged in a type of *"commercial sabotage"* and that it was wrong and disturbing for a salesperson to tamper with the business records of his employer. She submits that conduct of this nature, which must be seen as malicious in this case, should be met with a stern response. She acknowledges our observation that the offending was mainly limited to one isolated incident and it is accepted that the interference with the data was not particularly sophisticated. However, Ms Earl submits that the defendant's conduct caused significant inconvenience and was not rectified by the defendant nor admitted until a late stage in the proceedings.

[5] Ms Earl also submitted that, in some situations, conduct of this nature could lead to cancellation of a salesperson's licence but it is accepted that such an outcome would be disproportionate in the circumstances of this case. However, she submits that a low level fine would not have a sufficiently deterrent effect necessary for the maintenance of professional standards.

[6] Accordingly, it is submitted for the Committee that, in the context of deliberate misconduct and in the circumstances of this case, the appropriate penalty is either a short term suspension of the defendant's licence (in the vicinity of three months it is put), or a fine towards the upper end of the available range.

[7] In terms of compensation, Ms Earl set out further information about the effect of the offending on the complainants and submitted that *"an approximation of the loss to the business is a sum in the region of $3,325-$3,900."* She added that it is clear from the evidence that the defendant's conduct had a real impact on the agency's business to result in work by its staff which would not have been required had the defendant not engaged in the relevant offending conduct. Ms Earl submits that it is appropriate that the complainants be compensated accordingly.

[8] We received further thoughtful submissions from Mr Hodge at the penalty hearing in which he referred to the detail of our findings, particularly those set out above.

[9] He stressed that the offending of the defendant was deliberate and agreed with our view that it was a form of commercial sabotage in that the defendant had accessed the computer of the agency and altered its client database, and not in a particularly sophisticated manner. Mr Hodge submitted that while the prosecution did not seek cancellation of the defendant's licence by way of penalty, it stresses its submission that the offending is serious with very inconvenient and time consuming consequences to the agency, and to the complainants who needed to comprehensively work through their computer systems to ascertain the extent of the defendant's curious sabotage.

[10] Mr Hodge put it that rather than the sabotage having been effected in the heat of the moment, it was a calculated activity by the defendant flowing from his dissatisfaction over business issues with the complainants. He stressed that the defendant did not assist in any way in remedying matters but rather denied the offending until the course of the hearing before us on 2 December 2014.

[11] Mr Hodge also put it that the suggestion from the defendant (through his counsel) that compensation to the complainants would contain a *"commercial benefit"* to them, showed a strange attitude on the part of the defendant to his destructive conduct. Mr Hodge submitted that the defendant should take responsibility for that conduct which had a consumer impact in that, although the business records of the agency had been wantonly altered, there were consumers whose details with the agency had become incorrect and without their knowledge.

The Stance of the Defendant

[12] Mr Waymouth emphasised that, essentially, the defendant has been willing to accept the sentencing package we proposed in paragraph [66] of our said decision (set out above). However, he opposed our suggested compensation payment, then

put at $2,000, seemingly on the basis that would be a commercial benefit to the complainants and could not be proved as to quantum.

[13] Mr Waymouth clarified that the defendant had been reluctant to admit to the facts of his conduct in question because, initially, he understood that the allegations against him were much wider than those eventually comprised in the charge heard before us. Mr Waymouth also put it that the defendant fairly soon admitted to unsatisfactory conduct as distinct from the more serious offending of misconduct.

[14] Mr Waymouth submitted that the defendant's interference with the agency's databases was to historical information of some years ago rather than to current information. That seems to us to be gilding the lily somewhat because the information which was altered was meant to be related to a current client database of the agency.

[15] Mr Waymouth also put it that the offending should not be regarded as by an employee against an employer but of a dissatisfied business partner against other partners who had wronged him. That too seems to be somewhat gilding the lily as there was a commercial dispute between the defendant and the complainants which seems to have caused the defendant, after some brooding on the situation, to have been destructive towards property of the agency in a surreptitious manner.

[16] Mr Waymouth also seemed to be submitting that our forum should not focus on civil remedies, such as the compensation now in issue, but only on the professional standards of the defendant. We accept that our main focus is on the conduct of the licensee, but the Legislature has provided us with clear powers of compensation in appropriate cases.

[17] Mr Waymouth submitted that the defendant's offending had a one-off aspect and was in a commercial dispute context. However, he accepted that the conduct was improper but put it that our penalty should not be punitive, particularly, when (he put it) no member of the public had complained. It seems to us that the complainants are members of the public and that other members of the public affected (by records about them being improperly altered) could not complain until they knew of the offending conduct.

[18] However, it is to the credit of the defendant, and we take that into account, that he accepts that his conduct was improper and caused disruption to the complainants and to the agency, and that he tendered an apology at the penalty hearing before us. Mr Waymouth submits that the defendant has paid a heavy price and, presumably, that is a reference to the stressfulness of the charge proceeding before us.

Discussion and Our Orders

[19] As we have covered in our substantive decision, the defendant's conduct represented a marked or serious departure from the standards of an agent of good standing or of a reasonable member of the public and, therefore, breached s.73(a) of the Act and amounts to *"misconduct"*.

[20] As we also said in that decision, the conduct of the defendant amounted to a type of commercial sabotage and it is very wrong and disturbing for a salesperson to tamper with the business records of his or her employer. We also then noted that the complainants needed to spend much time and effort in rectification of their company's database and we accept that the realistic cost of that to them would have

been nearly $4,000. We do not accept that fair compensation is some sort of commercial benefit to the complainants.

[21] Broadly, we agree with the submissions on penalty put for the prosecution as we have summarised them above.

[22] In our summary of the submissions for the parties set out above, standard principles of sentencing have been covered including factors such as aggravating and mitigating features, and remorse. We observe that the defendant could have been more cooperative with the prosecution and the complainants over his conduct much sooner than he was. We accept, of course, that the principle purpose of the Act is to promote and protect the interests of consumers in respect of real estate transactions and promote public confidence in the performance of real estate agency work.

[23] Professional standards must be maintained. The aspects of deterrence and denunciation must be taken into account. It is settle law that a penalty in a professional disciplinary case is primarily about the maintenance of standards and the protection of the public, but there can be an element of punishment. Disciplinary proceedings inevitably involve issues of deterrence, and penalties are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.

[24] Generally speaking, orders under s.93 must be proportionate to the offending and to the range of available orders. Similarly, with regard to orders made by us under s.110 of the Act.

[25] We confirm the decisions we advised parties of orally at the end of the penalty hearing. As we said, even taking into account the apology now forthcoming from the defendant, our said suggested penalty package as at 28 January 2015 seems to us now, with hindsight, to have been a little light. Accordingly, we now order as follows:

[a] The licence of the defendant is suspended for one calendar month from the date of this penalty decision.

[b] The defendant is fined $3,000 to be paid to the Registrar of the Authority at Wellington within one calendar month from the date of this decision.

[c] The defendant is ordered to contribute $1,000 towards the costs of the prosecution to be paid in the manner referred to above.

[d] The defendant is to contribute $1,500 to the costs of this Tribunal, with regard to the substantive hearing and the penalty hearing, by payment to the Tribunals Unit, the Ministry of Justice, at 86 Customhouse Quay, Wellington, also within one calendar month from the date of this decision.

[e] The defendant is to make a compensation payment to Mr P Berryman and Rachael Steinmetz of $3,000 as some compensation to them for the said damage to their computer systems to be paid to them by the defendant within 8 weeks from the date of this decision.

[26] In general, we feel that it would not have been excessive for the defendant's period of suspension to have been longer than we have ordered.

[27] 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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Ms C Sandelin
Member