BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 74

READT 045/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	BAHA MABRUK Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 409) First Respondent
AND	AARON WATSON (not participating in the appeal) Second Respondent
Hearing:	8 November 2018, at Wellington
Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Appearances:	Mr B Mabruk Mr R W Belcher, on behalf of the Authority
Date of Decision:	19 November 2018

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Mabruk has appealed pursuant to s 111 of the Real Estate Agents Act 2008 ("the Act") against the decision of Complaints Assessment Committee 409 ("the Committee"), dated 10 April 2018, in which it found that he had engaged in unsatisfactory conduct by breaching a number of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules") ("the substantive decision"). He has also appealed against the Committee's decision, dated 23 July 2018, in which the Committee censured him and ordered him to pay a fine of $1,000 ("the penalty decision").

Factual background

[2] The Committee's finding of unsatisfactory conduct followed a complaint made by a prospective purchaser of a property, Mr Watson, whose tender for the property was unsuccessful. All relevant events occurred between April and June 2017.

[3] At the time of the relevant events Mr Mabruk was a licensed salesperson engaged at Redcoats Limited, trading as The Professionals, in Wellington. He was first licensed on 29 August 2016.

[4] On 3 April 2017, the owners ("the vendors") of a property at Southgate, Wellington ("the property"), asked Mr Mabruk to prepare an appraisal of it. The property was described as "unique", as the house comprised two domes, joined in the centre by an entryway and conservatory. Mr Mabruk provided the owners the same day with a Comparative Market Analysis ("the CMA"). The CMA comprised information sourced from CoreLogic, and included "property details", which recorded sales history, and maps of the property, as well as details of sales of 15 properties in surrounding areas, an area profile, and general information as to sales in the area. Mr Mabruk's "appraisal price" was "$590,000 – $650,000 – $720,000"

[5] There was some dispute in the statements to the Committee as to Mr Mabruk's discussion with the vendors regarding the possible sale price for the property. Mr Mabruk said that he told the vendors that a sale price of $700,000 would be

achievable, but the market would determine the actual price. He further said that the vendors told him that they would accept an offer of $700,000, but would look at offers below that. He said that on one occasion, he told the vendors that the market value could be around $650,000.

[6] The vendors said in a statement to the Committee that that they were very clear as to their "bottom line" sale price of $700,000 prior to listing. At the hearing there was no dispute that Mr Mabruk was aware that the vendors' bottom line was $700,000.

[7] On 3 May, the owners signed a general agency agreement with Mr Mabruk as listing salesperson. This agreement recorded that the sale was to be by negotiation. Neither the appraised base market price, nor the estimated commission based on that price, was entered where required on the agreement. On 25 May, Mr Mabruk asked the vendors to confirm that the property was to be marketed at "Buyer Budget Up From" ("BBU") $595,000, with three open homes, and tenders closing on 7 June. The vendors responded the same day "Yes, that all looks good, thank -you". Mr Mabruk advertised the property on TradeMe on 26 May, for sale by tender, with a BBU of $595,000.

[8] On 27 May, the vendors entered into a sole agency agreement, again with Mr Mabruk as listing salesperson. No mode of sale was recorded on this agreement. Again, the section requiring the appraised base market price and the estimated commission to be entered was left blank.

[9] Mr Mabruk conducted the open homes, and reported to the vendors after each one. After the final open home Mr Mabruk reported viewer indications of the selling price of "around early $600k", "between 615-620K", and "between 590-615K". On 7 June, the complainant, Mr Watson, submitted a tender to buy the property $620,000. A tender was also received from Mr Roberts, at $629,000. Neither tender was accepted by the vendors.

[10] 8 June, Mr Mabruk sent an email to Mr Watson's partner:

> Thank you for your offer. There were multiple offers received. It would appear that the Vendor has found or is looking for a new tenant. If I see any similar property on this price range I will let you know.

[11] In response to this email, Mr Watson's partner emailed Mr Mabruk, asking what the range of offers was, and whether the vendors were prepared to negotiate. Mr Mabruk told him that the vendors were adamant that they did not wish to sell the property.

[12] Mr Mabruk sent a slightly different email to Mr Roberts:

> Thank you for your offer. There were multiple offers received. At this point the property has not sold. It would appear that the Vendor has found or is looking for a new tenant. If I see any similar property on this price range I will let you know.

[13] Mr Roberts asked Mr Mabruk to discuss the tender. Mr Mabruk responded by text message on 8 June: Hi Matt, because this is a multi offer situation the office Manage[r] (Charles Lindsay) is handling negotiations, he will give you a call this afternoon". Mr Lindsay telephoned Mr Roberts and told him (among other things) that he was handling the multi offer process, and would be going back to the vendors to discuss whether any offers could be negotiated.

[14] Mr Mabruk sent text messages to the vendors on 9 June, asking for a discussion regarding counter-offers, but was instructed to remove the "For Sale" signs from the property, which he did.

Complaint

[15] Mr Watson subsequently spoke to the vendors and was told that their bottom line was $700,000. The essence of his complaint to the Authority was that advertising a BBU $595,000 was misleading, as the vendors were not prepared to accept less than $700,000. He said that as a result, his tender was not given serious consideration. Mr Watson also spoke to the second tenderer, who made a similar statement to the Committee.

Extension of Committee's inquiry

[16] During its inquiry into the complaint against Mr Mabruk, the Committee decided pursuant to s 78(2) of the Act, to inquire into the Agency's supervision of Mr Mabruk.

In doing so it considered the conduct of the Agency's branch manager, Mr Lindsay, and Mr Dickason, a salesperson who was Mr Mabruk's supervisor.

Substantive decision

[17] As regards Mr Mabruk, the Committee found as follows:

[a] The CMA was "useless", and misleading, as there was no explanation of the "uniqueness" of the property, and its impact on identifying directly or semi-directly comparable sales, the range of selling prices given for 15 properties (from $571,000 to $759,300) was not explained, and the $135,000 range of the appraised value was too great, and not explained. It found that Mr Mabruk was in breach of r 5.1 of the Rules (by failing to exercise skill, care, competence, and diligence) and r 6.4 (by misleading the vendors).[1]

[b] Mr Mabruk had breached r 10.6 (as to information required to be included in an agency agreement) by failing to record the appraised base market price and estimated commission on the general and sole agency agreements.[2]

[c] Mr Mabruk misled Mr Watson (and the other tenderer) as to the vendors' price expectation by advertising the property as BBU $595,000 when (because of the vendors' bottom line of $700,000) there was no reasonable prospect of an offer at or around that price being accepted. That conclusion also followed if the BBU were considered against Mr Mabruk's evidence (not accepted by the Committee) that he had been told that the vendors would consider offers over $650,000.[3] The Committee considered that it was irrelevant that the vendors agreed to the property being advertised as BBU $595,000, as he should have explained to them that such a figure was misleading as to their bottom line. The Committee found that Mr Mabruk had breached r 6.4 and r 9.1 (by failing to act in his clients' best interests),

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1 Substantive decision, at paragraphs 3.6 to 3.16.
2 At paragraphs 3.18 to 3.20.
3 At paragraphs 3.22 to 3.33.

r 9.4 (by misleading Mr Watson as to the vendors' price expectations), and 10.4 (as the advertised price did not reflect the vendors' expectation).

[d] Mr Mabruk had misled Mr Watson (and the other tenderer) and breached r 6.4 in his email stating that "multiple offers were received".[4]

[18] As regards the Agency, the Committee found that it had failed to supervise Mr Mabruk adequately. In particular, the Committee found that there were failures of the supervision of Mr Mabruk in respect of each of the matters on which it found Mr Mabruk had breached provisions of the Rules.[5] It concluded that the Agency had "utterly and completely" failed to meet its responsibility to ensure that salespersons were properly supervised and managed.[6] It found the Agency had engaged in unsatisfactory conduct by breaching s 50 of the Act, and r 8.3 of the Rules.[7]

[19] The Committee did not make individual findings of unsatisfactory conduct against the Agency in respect of Mr Mabruk's appraisal and CMA, the failure to provide mandatory information as to commission, or in respect of Mr Dickason's ordering Mr Mabruk to send a misleading email to the unsuccessful tenderers. It observed that if Mr Mabruk had been properly supervised and managed the inadequate appraisal would have been discovered, the missing mandatory material in the agency agreements would have been discovered, and he would not have been ordered to send a misleading email to the unsuccessful tenderers. It stated that that conduct would be counted as aggravating circumstances when penalty orders would be made.[8]

[20] Nor did the Committee make a separate finding of unsatisfactory conduct arising out of the misleading BBU. It found that there was a "red flag" when Mr Mabruk mentioned the vendors' price expectation of $700,000, and it was not sufficient to rely on Mr Mabruk's information. It found that Mr Dickason should have contacted the

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4 At paragraphs 3.35 to 3.42.

5 At paragraphs 3.17 (the CMA), 3.21 (the listing agreement), 3.34 (misleading information as to the vendors' price expectations), and 3.43 (finding that Mr Dickason directed Mr Mabruk to send the emails).

6 At paragraph 3.76.

7 At paragraph 3.77.

8 At paragraphs 3.78 and 3.79.

vendors to clarify their price expectations. The Committee stated that that, too, would be counted as an aggravating circumstance.[9]

[21] The Committee also considered the position of Mr Lindsay (branch manager) and Mr Dickason (salesperson). It referred to the Agency's statement (provided in a statement by the Agency's Human Resources manager) that Mr Mabruk was supervised by both Mr Lindsay and Mr Dickason.

[22] With respect to Mr Lindsay, the Committee noted the Agency's statement that Mr Mabruk was supervised by both Mr Dickason and Mr Lindsay. After referring to Mr Mabruk's evidence that Mr Lindsay provided the text of the email to be sent to Mr Roberts on 8 June, the documentary evidence that Mr Mabruk copied one of his emails to Mr Lindsay, and the telephone call to Mr Roberts, the Committee found that Mr Lindsay's "limited engagement" with Mr Mabruk was not supervision or management. The Committee further found that as Mr Lindsay was "not a party to this complaint", it did not have to decide disputes in the evidence relating to Mr Lindsay.[10]

[23] While recording the differences in the statements by Mr Mabruk and the Agency as to supervision, the Committee assessed the Agency's evidence as "vague, disjointed and unconvincing". It found that all actual supervision provided to Mr Mabruk was provided by Mr Dickason. It found that he reviewed the agency agreements and advertising and it was "very likely" that he reviewed Mr Mabruk's appraisal and CMA. Further, he saw the email exchange in which the vendors approved the BBU of $595,000. It found that all other actions by Mr Dickason involved him telling Mr Mabruk how to act and what to do.[11]

[24] The Committee recorded that Mr Dickason held a salesperson's licence, and therefore was not "qualified" to supervise and manage Mr Mabruk. It went on to find

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9 At paragraph 3.80.
10 At paragraphs 3.56 to 3.60.
11 At paragraphs 3.61 to 3.68.

that even if Mr Dickason were "a party to this complaint", he had no legal liability to properly supervise and manage Mr Mabruk.[12]

Penalty decision

[25] The Committee did not accept Mr Watson's submission that the marketing of the property was "bait advertising", or that the conduct of Mr Mabruk or those acting on behalf of the Agency was dishonest or deliberate. Further, it excluded the emails to Mr Watson and Mr Roberts referring to multiple offers from its penalty consideration (although suggesting that the Agency should exercise greater care in the wording of its written correspondence with customers).[13]

Mr Mabruk

[26] The Committee assessed Mr Mabruk's conduct as being in the low to moderate range of unsatisfactory conduct. It recorded that his inexperience and lack of supervision mitigated his conduct, but did not excuse it. It also took into account that he had no previous disciplinary findings, and that he had apologised to Mr Watson (albeit qualified by references to the Agency's supervision and constraints put on him by the Agency). Mr Mabruk was censured and ordered to pay a fine of $1,000 (reduced from a starting point of $2,000 as a result of the mitigating factors). The fine was considered necessary to give effect to personal and general deterrence, but was mitigated by his inexperience and the steps he had taken to undertake further education.[14]

The Agency

[27] The Committee assessed the Agency's conduct as being in the high range for unsatisfactory conduct, on the grounds that there was a complete failure of supervision and management of Mr Mabruk, and because of the aggravating factors recorded in its substantive decision (noted at paragraphs [19] and [20], above). It recorded that the

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12 At paragraphs 3.67 and 3.75. Section 50 of the Act provides that salespersons must be supervised and managed by an agent or a branch manager

13 Penalty decision, at paragraphs 4.10 to 4.17.

14 At paragraphs 4.19 to 4.29.

failure of supervision had to be placed in the context of Mr Mabruk being inexperienced, and being seen by the Agency to have poor language skills. It also had to be placed in the context of the fact that those purportedly supervising him had had two opportunities to discover the problems with the transaction (when the appraisal and CMA were reviewed, and in discussions regarding the vendors' price expectations), but failed to act.[15]

[28] The Committee considered a number of mitigating factors, which were applied to reduce the fine ordered against the Agency from a starting point of $13,000 to $5,000. The Agency was also censured and ordered to make a payment to Mr Watson (offered by the Agency and accepted by Mr Watson) for out-of-pocket expenses.[16]

Appeal submissions

[29] Mr Mabruk submitted in his written submissions that the Committee had failed to take into account the information he provided to it: in particular, his responses to the questions put to him by the Authority's investigator, and the evidence of his messages to the vendors asking for a discussion regarding counter offers.

[30] At the hearing, he accepted in his oral submissions that he failed to comply with his duties to his client and customers. However, he submitted that every finding against him resulted from the Agency's failure to supervise and manage him. He submitted that the difference between the fine ordered against him ($1,000) and that ordered against the Agency ($5,000) was insufficient to recognise this.

[31] Mr Mabruk also submitted that the Committee's reference to personal and general deterrence was inappropriate. He submitted that he had been made a "victim of the need for general deterrence".

[32] Mr Belcher submitted for the Authority that each of the findings of breaches of the Rules was justified on the evidence, and should be upheld. He submitted that the Rules apply to all licensees, and Mr Mabruk did not comply with his obligations under

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15 At paragraphs 4.30 to 4.37.
16 At paragraphs 4.40 to 4.51.

the Rules. He submitted that Mr Mabruk's underlying conduct sustained the finding of unsatisfactory conduct.

[33] With respect to the fine imposed by the Committee, Mr Belcher submitted that it (necessarily) recognised that regardless of the circumstances, a licensee owes duties to the public at large, and the licensee's vendor client. He submitted that the fine properly reflected Mr Mabruk's offending, the circumstances in which the offending occurred, and his personal circumstances.

Discussion

Substantive decision

[34] We agree with Mr Belcher's submission that Mr Mabruk's conduct constituted breaches of the Rules, and that the finding of unsatisfactory conduct was justified. The Committee made no error in making that finding, and to find that his inexperience and lack of supervision does not excuse his conduct. Two points should be noted.

[35] The Committee's finding that it was misleading to refer to a BBU of $595,000, when the vendors' bottom line was $700,000, was in accordance with the judgment of her Honour Justice Mallon in *Commerce Commission v Whitehead*,[17] that it is misleading conduct to indicate a BBU price that is below the vendor's price expectation. Her Honour said, concerning a "BEO" price of $380,000 (where, on the seller's evidence, she had made it clear that she wanted to receive, net of commission, $400,000):[18]

> That [BEO] guide cannot be misleading. … the BEO price sets the seller's lowest possible acceptable price. The BEO price will be misleading if there is no prospect of an offer over the BEO price, but below some higher desired price, being accepted (just as a Buyer Enquiry Range is misleading if there is no prospect of an offer being accepted at the lower end of the range indicated). (The same would apply to "negotiation from $380,000" or Buyer Budget Over $380,000" advertising.)

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17 *Commerce Commission v Whitehead* HC Wellington, CIV 2006-485-88, 4 July 2007.

18 At paragraph [49]. "Buyer Enquiry Over" (BEO) is analogous to "Buyer Budget Over" (BEO) referred to in this decision.

[36] Her Honour said later in the judgment that determining whether price guidance is misleading is:[19]

> … If the seller has indicated that, although she hopes and expects to get a higher price, she is prepared to consider any offer that is over the BEO price, then the advertising is not misleading. If, on the other hand, the seller has said that she will not go below her expected price, then a BEO price that is below her expected price is misleading.

[37] The Committee was also correct in its finding that as Mr Dickason was a licensed salesperson, rather than an agent or branch manager, he was not "qualified" to be a supervisor and had no legal liability to properly supervise and manage Mr Mabruk. As his Honour Justice Toogood said in his judgment in *Wang v Real Estate Agents Authority*: [20]

> The Authority argues that there is nothing in s 50 of the [Act] which precludes experienced salespersons from being involved in the supervision of junior salespersons. That may be so, but it is clear that a salesperson who may be given actual responsibility for supervising the real estate work of another salesperson by an agent or branch manager, or who may assume such responsibility, is not under a statutory duty in carrying out that role.

[38] His Honour added that it was not open to a branch manager to delegate his or her statutory duty of supervision under s 50 to a salesperson. It follows that it is not open to an agent to do so.

Penalty decision

[39] We approach the appeal against penalty on the basis that it is an appeal against the Committee's exercise of its discretion in making penalty orders.[21] That is, Mr Mabruk must satisfy the Tribunal that the Committee made an error of principle, considered irrelevant matters or failed to consider relevant matters, or was plainly wrong. We therefore turn to the Committee's consideration of penalty.

(a) Lack of supervision and management of Mr Mabruk

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19 At paragraph [72](b).

20 *Wang v Real Estate Agents Authority* [2015] NZHC 1011, at paragraph [36].

21 See the discussion by his Honour Justice Woodhouse in *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at paragraphs [81] to [86].

[40] We agree with the Committee's finding that the Agency "completely and utterly" failed to supervise Mr Mabruk. There was no, or no adequate, supervision of Mr Mabruk's appraisal and CMA, the listing agreements, the marketing (in particular the BBU figure), or the emails sent to the unsuccessful tenderers. In the light of Mr Mabruk's inexperience and language difficulties (as the Agency perceived there to be), the Agency's failure is a significant factor when considering the appropriate penalty to be imposed on Mr Mabruk.

[41] Mr Mabruk's inexperience (he had been a licensed salesperson for just six months when he was asked to do the appraisal and CMA, and about nine months when the vendors rejected the tenders) is a significant factor in itself. He did not have the experience to undertake this transaction without close supervision.

[42] The fact that he undertook further training on his own initiative, expressed genuine remorse, and acknowledged his errors are also significant mitigating factors. In light of the short period since Mr Mabruk was first licensed, the fact that he did not have any previous disciplinary findings against him is a less compelling mitigating factor.

[43] Where we find the Committee to have been in error is in its application of the principles regarding determining a penalty. While the Committee expressly referred to the need for personal and general deterrence, it failed to refer to other equally important principles: in particular, that it should impose a penalty that was appropriate for Mr Mabruk's conduct, that the penalty should be the least punitive penalty that was appropriate in the circumstances, and that rehabilitation is an important consideration.[22] We are satisfied that if those factors are given proper consideration, a different penalty from that imposed by the Committee is indicated.

[44] We accept that Mr Mabruk is unlikely to offend in a similar form in the future. A disciplinary finding at this early stage of his career is a very strong message to him of the importance of complying with his obligations under the Act. The finding in and

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[22] See, for example, *Complaints Assessment Committee 409 v Wong* [2018] NZREADT 16, at paragraph [13], and *Complaints Assessment Committee 403 v Zhang* [2018] NZREADT 53, at paragraphs [9] and [10].

of itself will act as a strong deterrent to him, personally. It is also a strong message that if he does not consider that he is receiving proper supervision and advice from his nominated supervisor then he should raise the matter with other people in the agency where he is engaged.

[45] Further, the particular circumstances of this case meant that it was not one where the penalty orders made against Mr Mabruk should have been determined by a need for general deterrence. The issue requiring a penalty which would have a general deterrent effect was that of the Agency's "complete and utter" failure to supervise and manage Mr Mabruk.

[46] The Committee needed to send a strong message to the industry as to the importance of providing effective and documented supervision and management of salespersons. A penalty order against the salesperson who should have been supervised and managed properly does not achieve the aim of general deterrence.

[47] The proper order in this case was to make an order for censure, but not to order Mr Mabruk to pay a fine. In this respect, we accept Mr Mabruk's submission that the difference between the fine imposed on him, and that imposed on the Agency, does not adequately reflect their respective culpability. Further, we do not accept Mr Belcher's submission that not to impose a fine would be to send a message to the industry that at the early stage of a licensee's career, the licensee's obligations need not be complied with. If it is thought that there is a need for such a message, then it is appropriately given in salespersons' training.

[48] We agree with the Committee's conclusion that it is not necessary to order Mr Mabruk to undertake further education. He has attended to that himself.

[49] The Committee's order that Mr Mabruk pay a fine will be quashed.

Observations

[50] We agree with the Committee's expression of surprise that the response to the Complaint, and to the Committee's extension of its inquiry to the Agency, came from

the Agency's Human resources manager. In taking that course the Agency, and Mr Lindsay and Mr Dickason (being the licensees whose dealings with Mr Mabruk were under scrutiny), failed to meet their obligations to co-operate and assist in the investigation. However, we note that it would have been open to the Committee to require responses from Mr Lindsay and Mr Dickason, personally.

[51] We are concerned that the Committee expressed itself to be constrained in the findings it could make on the basis of who were the "parties to the complaint" (that is, neither Mr Lindsay (see paragraph [24], above) nor Mr Dickason (see paragraph [26]) were "parties to the complaint".

[52] The only "party to the complaint" was the complainant, Mr Watson. The inquiry into the complaint was extended to the Agency, pursuant to s 78(2) of the Act, and the Committee made findings against the Agency. It is not clear to the Tribunal why, once the Committee decided that the complaint raised issues as to Mr Mabruk's supervision, the inquiry was not also extended to Mr Lindsay and Mr Dickason, as they were the individuals said to have carried out the supervision being inquired into. Cases of inquiries into supervision coming before the Tribunal have consistently included the individuals providing the supervision in the inquiry.

[53] Further, the Committee's inquiry under s 78(b) is not limited to where there is a specific allegation against a licensee. Such a limitation would not be consistent with the purpose of the Act to "promote and protect the interests of consumers in respect of transactions that relate to real estate agency work and to promote public confidence in the performance of real estate agency work".[23]

[54] If Complaints Assessment Committees are to carry out their functions under the Act, and to further the purposes of the Act, they must have a broad power to inquire into and investigate matters which arise in the course of their inquiry into a complaint, and which are of concern to the Committee.[24]

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23 Section 3 of the Act.

24 See also *Gillies v Real Estate Agents Authority (CAC 410)* [2018] NZREADT 4, at paragraphs [26] to [28].

[55] The concern expressed by the Committee concerning the supervision (or lack of supervision) by Mr Lindsay and Mr Dickason would suggest that it would have been appropriate to extend the inquiry in this case. By not exercising its power to extend it to Mr Lindsay and Mr Dickason, the Committee unnecessarily limited the inquiry.

[56] If the Committee considered that it was constrained in making orders against either of them in relation to s 50 of the Act, it would have been open to it to consider possible breaches of the Rules and to have taken such action as it considered appropriate.

Outcome

[57] Mr Mabruk's appeal against the Committee's finding of unsatisfactory conduct is dismissed. His appeal against the Committee's penalty orders is allowed, to the extent that the order that he pay a fine is quashed. The order for censure remains in place.

[58] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews
Chairperson

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Ms C Sandelin
Member

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Mr N O'Connor
Member