

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2021] NZREADT 39**

**READT 006/21**

IN THE MATTER OF                      a charge laid under s 91 of the Real Estate Agents  
Act 2008

BROUGHT BY                              COMPLAINTS ASSESSMENT COMMITTEE  
1901

AGAINST                                      MICHAEL LEE  
Defendant

On the papers

Tribunal:                                      Hon P J Andrews, Chairperson  
Mr G Denley, Member  
Mr N O'Connor Member

Submissions received from:              Ms Z Wisniewski on behalf of the Committee

Date of Decision:                              29 July 2021

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**DECISION OF THE TRIBUNAL  
(PENALTY)**

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## **Introduction**

[1] In a decision issued on 17 June 2021 the Tribunal found Mr Lee guilty of misconduct under s 73(c)(i) of the Real Estate Agents Act 2008 (“the Act”).<sup>1</sup> The Tribunal found that Mr Lee had wilfully or recklessly failed to comply with a Notice issued under s 85 of the Act (“the s 85 Notice”)

[2] The Tribunal has now received submissions as to penalty from counsel for the Authority. No submissions were received from or on behalf of Mr Lee.

## **Facts**

[3] At all relevant times Mr Lee was the holder of a salesperson’s licence under the Act. On 13 March 2020 the Committee decided pursuant to s 78(b) of the Act to inquire into and investigate whether he had carried out real estate agency work in respect of the sale and purchase of the property at 40 B Buckley Road, Epsom, Auckland (“the 40 B property”), outside the scope of his real estate salesperson’s licence. He was asked to provide (by 3 April 2020) a written response or explanation of the matters raised by the Committee, and to provide any documents in his possession relating to the sale and purchase of the 40 B property.

[4] Mr Lee requested and was granted extensions of time until 12 May and 19 May, but did not respond until 27 May 2020. His response referred to a property at 40 A Buckley Road, but did not address the 40 B property.

[5] On 4 June 2020, Mr Lee was advised that the investigation concerned the 40 B property, not the property at 40 A Buckley Road. Mr Lee was provided with a file note of a statement by the vendor of the 40 B property, referring to a commission paid to Mr Lee, and asked to comment on the vendor’s statement and to provide copies of the agreement for sale and purchase, the invoice for commission, and any correspondence with the vendor, purchasers, or their solicitors relating to the 40 B property. Mr Lee’s response was required by 9 June 2020.

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<sup>1</sup> *Complaints Assessment Committee 1901 v Lee* [2021] NZREADT 29.

[6] Mr Lee did not respond by 9 June 2020, and was given extensions of time to respond until 8 July 2020 and 17 July 2020. On 17 July 2020 Mr Lee sent a letter in response to the vendor's statement, but did not provide any of the documents requested. On 28 July 2020 he was asked to provide copies of the agreement for sale and purchase and commission invoice for the 40 B property, to be provided by 31 July 2020. Mr Lee did not respond by that date, or at all.

[7] The s 85 Notice was served on Mr Lee on 22 September 2020. The Notice required him to produce copies of the agreement for sale and purchase and of the invoice for commission for the 40 B property, and was required to be complied with within ten working days of the date the Notice was given. The Notice also stated that failure to comply with the Notice without reasonable excuse is an offence under s 148 of the Act.

[8] Mr Lee acknowledged receipt of the s 85 Notice on 23 September 2020. He did not comply with the s 85 Notice either within the required ten working days, or at all, despite further communications from the Authority on 7 and 8 October 2020.

[9] The charge against Mr Lee was heard by the Tribunal on 17 June 2021. Mr Lee did not appear at the hearing, in person or by counsel, and failed to provide any explanation for his non-appearance. The Tribunal therefore determined the charges by way of formal proof. A copy of the decision was provided to Mr Lee.

### **Penalty principles**

[10] The principal purpose of the Real Estate Agents Act 2008 is to “promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.”<sup>2</sup> The Act achieves these purposes by regulating agents, branch managers, and salespersons, by raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.<sup>3</sup>

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<sup>2</sup> Section 3(1) of the Act.

<sup>3</sup> Section 3(2).

[11] In order to meet the purposes of the Act, penalties for misconduct and unsatisfactory conduct are determined bearing in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection, the maintenance of confidence in the industry, and the need for deterrence.

[12] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.<sup>4</sup>

[13] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As relevant to the present case, the Tribunal may:

- [a] make any of the orders that a Complaints Assessment Committee may make under s 93 of the Act (following a finding of unsatisfactory conduct);
- [b] order cancellation of the licensee's licence, or suspension for a period not exceeding 24 months; and
- [c] order an individual licensee to pay a fine of up to \$15,000.

[14] Pursuant to s 110A of the Act, the Tribunal may also order a licensee to pay costs.

## **Submissions**

[15] Ms Wisniewski submitted that the Act and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 impose obligations on licensees to assist with the disciplinary investigation process, and that such obligations require honesty and co-operation from licensees to ensure that the disciplinary process is able to function properly and achieve its intended purpose.

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<sup>4</sup> See *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30; *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804, at [128]; and *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, at [97].

[16] She submitted that Mr Lee had many opportunities to disclose the information requested by the Committee, and failed to do so. She submitted that his breaches were serious, ongoing, and deliberate. She further submitted that the industry must expect more from its members than such a persistent failure to engage with, and significant disregard for, the Act's regulatory processes.

[17] Ms Wisniewski submitted that Mr Lee's misconduct should be placed towards the higher end of misconduct of its type, as it was characterised by:

- [a] A lack of co-operation and a poor attitude towards the investigation;
- [b] A failure to provide information and documents requested by the Committee on multiple occasions; and
- [c] A failure to participate in the disciplinary process, including failure to respond to the charges against him, causing the Committee and the Tribunal to expend unnecessary time and resources.

[18] Ms Wisniewski advised that Mr Lee's licence has recently been cancelled on the grounds of his failure to pay annual fees. Accordingly, she submitted, cancellation or suspension of Mr Lee's salesperson's licence is not available as an element of the penalty to be imposed. She submitted that an order to pay a fine is the appropriate remedy.

## **Discussion**

[19] We record, first, that notwithstanding the cancellation of Mr Lee's licence, the disciplinary provisions of the Act, including those as to penalty, apply to him as a "former licensee".<sup>5</sup>

[20] We accept Ms Wisniewski's submission that Mr Lee's misconduct should be placed at the higher end of the scale of misconduct. His failure to comply with the s 85 Notice was serious, deliberate, and ongoing. We accept that members of the

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<sup>5</sup> See s 71 of the Act.

industry are expected to engage with, and participate in, disciplinary inquiries. The importance of complying with a s 85 Notice is underscored by the fact that failure to do so is an offence pursuant to s 148 of the Act, punishable by a fine (in the case of an individual) of up to \$10,000.

[21] Ms Wisniewski referred the Tribunal to the penalty orders made in *Complaints Assessment Committee 1901 v New Zealand LJ International Ltd & Zeng*.<sup>6</sup> In that case Mr Zeng was found guilty of misconduct in two respects: his failure to comply with the requirements of ss 134 to 137 of the Act in relation to the purchase of a property, and his failure to respond adequately to a s 85 Notice. The Tribunal also accepted a submission on behalf of the Committee that over the course of three investigations, he failed to engage appropriately in the process, and failed to respond appropriately to the investigators' requests for information and documents.

[22] The agency, New Zealand LJ International Ltd, was found guilty of misconduct in respect of its failure to respond to a s 85 Notice, and of unsatisfactory conduct in relation to the failure to comply with ss 134 to 137 of the Act in relation to the purchase of the property.

[23] Mr Zeng was censured, he was ordered to pay a fine of \$5,000, and his licence was suspended for 18 months. An order was also made that he must complete specified training before his licence could be re-issued. The agency was censured, ordered to pay a fine, and its licence was suspended for 18 months.

[24] We accept Ms Wisniewski's submission that the level of fine ordered in respect of Mr Lee should reflect the fact that an order for suspension is not available. However, it must also reflect the fact that he has been found guilty on only one charge of failure to comply with a provision of the Act, albeit a significant provision.

[25] We have not been advised of any previous disciplinary findings against Mr Lee. We therefore assume that he is entitled to some reduction in penalty to reflect his "clean" record. Further, the Tribunal has not been advised that any client or customer

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<sup>6</sup> *Complaints Assessment Committee 1901 v New Zealand LJ International Ltd & Zeng* [2021] NZREADT 28.

of Mr Lee having suffered any loss as a result of his misconduct. We have concluded that the appropriate penalty orders are that he is censured and ordered to pay a fine of \$5,000.

### **Application for costs**

[26] Section 110A of the Act provides (as relevant to this proceeding):

#### **110A Costs**

- (1) In any proceedings under this Act, the Disciplinary Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy.
- (2) Without limiting the matters that the Disciplinary Tribunal may consider in determining whether to make an award of costs under this section, the Disciplinary Tribunal may take into account whether, and to what extent, any party to the proceedings—
  - (a) has participated in good faith in the proceedings:
  - (b) has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal:
  - (c) has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.

....

[27] Ms Wisniewski submitted that a large proportion of the legal work in this proceeding had been carried out by the Authority's in-house legal counsel. She provided a schedule of work done and time expended on this matter, noting that the total time spent was 28 hours.

[28] Since the introduction of s 110A into the Act the Tribunal has accepted that a licensee against whom disciplinary findings are made following charges laid by a Complaints Assessment Committee should generally (although not invariably) be ordered to pay a contribution towards the Committee's costs.<sup>7</sup> This reflects the purposes of the Act, in particular accountability through the disciplinary process, and recognises that the costs associated with charges proceedings are borne by members of the industry.

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<sup>7</sup> See *Complaints Assessment Committee v Wright* [2019] NZREADT 56, *Complaints Assessment Committee 1902 v Hanford* [2020] NZREADT 21, and *Complaints Assessment Committee 1901 v New Zealand LJ International Ltd & Zeng*, fn 6, above..

[29] The Tribunal follows the principles set out by his Honour Justice Palmer in *TSM v A Professional Conduct Committee* as to orders for costs in professional disciplinary proceedings:<sup>8</sup>

- (a) professional groups should not be expected to bear all the costs of the disciplinary regime;
- (b) members who appeared on charges should make a “proper contribution” towards costs;
- (c) costs are not punitive;
- (d) the practitioner’s means, if known, are to be considered;
- (e) a practitioner’s defence should not be deterred by the risks of a costs order; and
- (f) in a general way 50 percent of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.

[30] In its decision in *Complaints Assessment Committee 1907 v Lindsay*, the Tribunal accepted that an award of costs can be made when a party is represented by in-house counsel.<sup>9</sup> The Tribunal also accepted that \$100 per hour is a reasonable rate for in-house counsel.<sup>10</sup> We accept Ms Wisniewski’s submission that an order that Mr Lee pay 50 per cent of the Committee’s costs is appropriate in this case.

## Orders

[31] Having been found guilty on a charge of misconduct under s 73(c)(i) of the Act, we order that Mr Lee is censured and ordered to pay a fine of \$5,000. the fine is to be paid to the Authority within 20 working days of the date of this decision.

[32] We also order that Mr Lee is to make a payment of \$1,400 towards the Committee’s costs in relation to this proceeding. The payment is to be made to the Authority within 20 working days of the date of this decision.

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<sup>8</sup> *TSM v A Professional Conduct Committee* [2015] NZHC 3063, at [21], citing *Vatsayann v Professional Conduct Committee of The New Zealand Medical Council* [2012] NZHC 1138, at [34].

<sup>9</sup> *Complaints Assessment Committee 1907 v Lindsay* [2021] NZREADT 36, at [79]. See also *McGuire v Secretary for Justice* [2018] NZSC 116, at [88].

<sup>10</sup> See *Royal Forest and Bird Protection Society of New Zealand Inc v Northland Regional Council* [2019] NZHC 449, at [31].



[33] 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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Mr G Denley  
Member

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Mr N O'Connor  
Member