

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 42

READT 005/2021

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

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE
2103

AGAINST NICOLAI MARIO VULINOVICH
Defendant

On the papers

Tribunal: Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms F Mathieson, Member

Submissions received from: Mr I Sugrue, on behalf of the Committee
Ms T Wood, on behalf of the Defendant

Date of Decision: 6 August 2021

**DECISION OF THE TRIBUNAL
(Charge/Penalty)**

Introduction

[1] On 25 March 2021, Complaints Assessment Committee 2013 (“the Committee”) charged Mr Vulinovich with misconduct under s 73(a) of the Real Estate Agents Act 2008 (“the Act”). The Committee alleges that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[2] Mr Vulinovich admitted the charge in his Response to the Charge filed on 12 April 2021.

[3] The parties have agreed on a summary of facts.

Facts

[4] Mr Vulinovich was first licensed as a salesperson in May 2013. At the time of the relevant conduct he was engaged at CBRE South Auckland (“the Agency”).

[5] In February 2016, Mr Vulinovich moved to Sydney, Australia, where he obtained a New South Wales real estate licence through the Trans-Tasman Mutual Recognition Act 1997 (“the TTMRA”) and worked for CBRE South Sydney until November 2017. His New Zealand licence expired on 14 May 2016.

[6] Mr Vulinovich moved back to New Zealand and began working for the Agency on 8 January 2018. His New South Wales licence expired in February 2018, but he did not revive his New Zealand licence, and he did not seek to have his New South Wales licence recognised in New Zealand under the TTMRA. He worked as a real estate agent in New Zealand without holding any category of licence until December 2018.

[7] During this time Mr Vulinovich undertook real estate agency work as listing agent in respect of five properties and received commissions for real estate agency work in respect of four further properties. He did not act alone and there was at least one licensee helping with the real estate agency work for each transaction. He received no more than 50 percent of the total commissions for any of the transactions.

[8] In November 2018 the Agency announced that it was undertaking a “global audit” of its licensees’ licences. Mr Vulinovich then applied to the Real Estate Authority (“the Authority”) for a salesperson’s licence. He provided a curriculum vitae (“CV”) which stated that he had worked for CBRE South Sydney from January 2016 to June 2018, then for the Agency as an “agency analyst preparing for agency work in the investment sales team”. He signed a statutory declaration dated 21 November 2018 stating that there were no circumstances that would or might make him not a fit and proper person to hold a licence and that the documents submitted with the application were true and correct.

[9] In fact, Mr Vulinovich had resigned from CBRE South Sydney in November 2017 and had worked as a real estate agent for the Agency from January 2018 onwards.

[10] Before Mr Vulinovich’s licence application was granted the Agency found that he did not have a licence. On 28 November 2018 Mr Vulinovich explained to the Agency that “[b]efore coming back to NZ I filled out the mutual recognition paperwork and sent it in but failed to follow up”. The Agency suspended Mr Vulinovich and on 4 December 2018 made a report as to his conduct to the Authority.¹ However, before that report had been fully processed, the Authority issued Mr Vulinovich with a licence on 6 December 2018.

[11] Mr Vulinovich’s engagement with the Agency was terminated on 5 March 2019. The Tribunal was advised that he has been engaged at Barfoot & Thompson Ltd since 11 March 2019.

Mr Vulinovich’s response to the charge

[12] In his response to the charge, Mr Vulinovich said that none of his actions were conducted with any malice or with the intent of disadvantaging anyone, and that it was a big mistake that he had handled poorly. He also said that his initial failure to secure a licence before re-commencing work in January may have been related to a then-

¹ Pursuant to r 7.1 of the Rules, a licensee who has reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct may make a report to the Authority. Pursuant to r 7.2, a licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct must make a report to the Authority.

undiagnosed medical condition (attention deficit hyperactivity disorder (“ADHD”)) which had since been diagnosed and for which he was receiving medication.

[13] Mr Vulinovich admitted that the explanation he gave the Agency on 28 November 2018 was untrue, and that he had not submitted a TTMRA form. He said that when he moved back from Australia he looked at the form, noted that he did not yet have all the information required to complete it, then forgot to make the application.

[14] In respect of the false statements in the CV submitted to the Authority, Mr Vulinovich said that he knew that if he had written in the CV that he was acting as an agent it would raise immediate red flags and his concern at the time was that it could drag out the application time considerably. He was concerned at the prospect of not being able to work for an extended period of time, knowing it can take a long time to work through the regulatory process. He said he believed it would be preferable to have a licence and deal with any fallout through a disciplinary process while being licensed as opposed to having the licence itself withheld for an unknown period.

[15] Mr Vulinovich said he is incredibly sorry for his actions. He has never been the subject of a complaint in New Zealand and the New South Wales public register shows no disciplinary action against him (including cautions and reprimands). He said he has been open, transparent, and compliant with the investigation against him from the outset. He said he has already suffered greatly during the disciplinary process, having lost a job which he had held since starting his career, and that the uncertainty around the process has taken a mental toll over the past few years.

Disciplinary finding

[16] In carrying out real estate agency work without holding a licence to do so (as he did between January and December 2018) Mr Vulinovich contravened s 6 of the Act, which provides that a person must not carry out real estate agency work unless the person is licensed to do so under the Act. Under s 141 of the Act, a person who carries out real estate agency work without a licence commits an offence under the Act.

[17] In relation to the false statements to the Authority in support of his application for a licence, we note that the Tribunal said in *Complaints Assessment Committee 20002 v Gollins*:²

... dishonesty of any nature runs contrary to the principles of registration and privilege that go with registration. As Tribunals and Courts have said in numerous cases, registration as a professional lawyer, doctor and real estate agent carries with it privileges but also the obligation to behave in a certain way. Dishonesty of any type is met with the highest degree of disapprobation by registration bodies and by members of the public who must retain confidence in the honesty and integrity of agents.

[18] The Tribunal further said in relation to licensees' dealings with the Authority, in *Complaints Assessment Committee 409 v Ganesh*:³

... a licensee has an obligation to be honest with clients, customers, and the Authority as the regulatory body for the industry. Honesty is essential to achieve the purpose of the Act, in particular the purpose of maintaining public confidence in the industry.

[19] We accept Mr Sugrue's submission that dishonesty in any form is antithetical to the standards expected of the real estate industry.

[20] We are satisfied that Mr Vulinovich's conduct in acting as a real estate salesperson without holding a licence to do so, and in providing false information to the Agency and the Authority, constitutes conduct which would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful. In the light of Mr Vulinovich's admission of the charge, and acceptance of the summary of facts, the Tribunal finds him guilty of misconduct under s 73(a) of the Act.

Penalty principles

[21] The principal purpose of the Act 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."⁴ The Act achieves these purposes by regulating agents, branch managers, and salespersons, by raising industry

² *Complaints Assessment Committee 20002 v Gollins* [2015] NZREADT 2, at [42].

³ *Complaints Assessment Committee 409 v Ganesh* [2018] NZREADT 19, at [115].

⁴ Section 3(1) of the Act.

standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.⁵

[22] In order to meet the purpose 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.

[23] 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.⁶

[24] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As may be 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;
- [c] order an individual licensee to pay a fine of up to \$15,000.

Submissions

[25] Mr Sugrue referred the Tribunal to the penalties imposed in *Complaints Assessment Committee 416 v Prasad*,⁷ and *Complaints Assessment Committee 413 v Mairs*.⁸

⁵ Section 3(2).

⁶ 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].

⁷ *Complaints Assessment Committee 416 v Prasad* [2019] NZREADT 17.

⁸ *Complaints Assessment Committee 413 v Mairs* [2018] NZREADT 41.

[26] Mr Sugrue submitted that each of these cases is similar to the present case in that both licensees engaged in concerning conduct then attempted to lie to escape the consequences of that conduct: they found themselves in high-pressured situations and they fell back on dishonesty as a means of defence or escape.

[27] Mr Sugrue acknowledged that there are differences between the present case and *Prasad* and *Mairs*. The first is the presence of personal mitigating factors: Mr Vulinovich has admitted his conduct, expressed remorse, and entered a guilty plea at an early stage, whereas both Ms Prasad and Mr Mairs maintained their dishonesty throughout the proceeding. Further, Mr Vulinovich was co-operative and constructive with the investigation, as evidenced by his willingness to negotiate an agreed summary of facts in good faith. Finally, he referred to Mr Vulinovich's diagnosed ADHD that may have had an impact on his failure to apply for a new licence when moving back to New Zealand.

[28] However, Mr Sugrue submitted that unlike Ms Prasad and Mr Mairs, Mr Vulinovich financially benefitted, and continues to benefit, from his conduct. He submitted that he currently holds a fraudulently obtained salespersons licence, whereas if he had been honest about his unlicensed trading, his application for a licence may have been rejected, given the requirement that an applicant must be "a fit and proper person to hold a licence".⁹ He submitted that this reflects what can be viewed as a conscious, deliberate decision on his part to deceive the Authority in order to obtain the benefits and privileges of licensing (and employment opportunities attendant on that) that he continues to hold today.

[29] Mr Sugrue submitted that consistent with the approach of the Tribunal and the High Court in cases involving dishonesty, the starting point for penalty must be cancellation of Mr Vulinovich's licence. While accepting that there are relevant mitigating factors to be considered, the aggravating factor of his having benefitted from his dishonesty must be balanced against the mitigating factors.

[30] Mr Sugrue submitted that if consumers and licensees are to be expected to continue to place their trust in the integrity of the regulatory system under the Act, a

⁹ Section 36(1)(c) of the Act.

licensee who has consciously deceived the Authority and an employer in order to obtain a licence ought not to continue to hold that licence. He submitted that to allow Mr Vulinovich to continue to hold a licence risks seriously undermining consumer confidence in the regulatory system. Accordingly, he submitted, the appropriate penalty is that Mr Vulinovich is censured and an order made for cancellation of his licence.

[31] On behalf of Mr Vulinovich, Ms Wood acknowledged that in cases of proven dishonesty, while cancellation of licence is not an invariable outcome, it will generally be the starting point for penalty. However, she submitted, the end point must be reached following a full and principled consideration of the relevant circumstances.

[32] She submitted that the cases of *Prasad* and *Mairs* involved far more serious offending than the present case. She submitted that Ms Prasad had acted incompetently or negligently and caused a customer (purchaser) to suffer loss, then deliberately falsified records to support her lies, had two previous findings of unsatisfactory conduct, had not accepted responsibility for her actions, and had not demonstrated insight or remorse. Mr Mairs' conduct involved an unauthorised intrusion onto a property which resulted in the Police being called, he had lied to a member of the public, the Police and Authority investigators, and his conduct when dealing with the Authority was objectionable, non-co-operative, insulting, and included threats of legal action. He maintained his dishonesty throughout the Tribunal's process, and he lacked insight into the seriousness of the situation he had brought about.

[33] In contrast, Ms Wood submitted, Mr Vulinovich had accepted responsibility and has comprehensive insight into his actions, reflected in his acknowledgement that his conduct constitutes disgraceful conduct for the purposes of the Act. She submitted that Mr Vulinovich had been open, transparent and co-operative throughout the Authority's investigation and is remorseful and has learned a lot from his actions.

[34] Ms Wood also submitted that it is important to understand the context of Mr Vulinovich's conduct. She submitted that he did not make a conscious decision to carry out real estate agency work without a licence. Rather, on his return to New Zealand he started the licence application process but was unable to complete it as he

did not have the required information, then forgot to complete the application. She submitted that upon realising that he did not have a licence, Mr Vulinovich panicked and made a reckless, rash and opportunistic decision to provide the Authority with false information to obtain a licence. She submitted it was not a calculated and premeditated decision. She also submitted that Mr Vulinovich's ADHD can cause him to act without thinking and make impulsive decisions.

[35] Ms Wood further submitted that at no time did Mr Vulinovich pose a risk of harm to the public, and no harm has in fact occurred. She submitted that "notably", the referral to the Authority was from his then employer rather than from a member of the public. She submitted that Mr Vulinovich is a well-regarded and competent real estate agent, he takes his work very seriously, and is embarrassed by his actions. She submitted that the fact that he was suspended then dismissed by the Agency means that he has already suffered the consequences of his misguided actions, and that cancellation of his licence will lead to significant financial loss.

[36] Ms Wood referred to three further Tribunal decisions: *Complaints Assessment Committee 20002 v Brar*,¹⁰ *Complaints Assessment Committee 20009 v Li*,¹¹ and *Complaints Assessment Committee 409 v Ganesh*.¹² In *Brar*, the Tribunal ordered suspension of Mr Brar's licence for two years after he signed a document he knew to be false, knowing that it would be used to obtain finance to purchase a property. Although Mr Brar expressed regret and apologised for his actions and pleaded guilty to the charge, the Tribunal doubted that he had any real insight into the dishonesty involved in his offending. In *Li*, Mr Li had failed to disclose that his niece was the purchaser of properties he was marketing, and lied to the Authority on five occasions about his relationship with his niece. Also, at his instigation, Mr Li's niece lied to the Authority about the relationship. The Tribunal took into account that no loss was caused to any purchaser and ordered suspension of Mr Li's licence for 17 months and ordered him to pay a fine of \$10,000. In *Ganesh*, Mr Ganesh failed to disclose to a purchase that he and/or his wife might benefit from the sale of a property, and lied in

¹⁰ *Complaints Assessment Committee 20002 v Brar* [2015] NZREADT 59.

¹¹ *Complaints Assessment Committee 20009 v Li* [2015] NZREADT 48.

¹² *Complaints Assessment Committee 409 v Ganesh* [2018] NZREADT 27.

the course of the Authority's investigation. Mr Ganesh was censured, his licence was suspended for 18 months, and he was fined \$5,000.

[37] Ms Wood submitted that there is little difference between Mr Vulinovich's conduct and that of Mr Li: both acted recklessly then provided the Authority with false information, both pleaded guilty at an early stage, and in both cases there was no evidence of loss to vendors or purchasers. She submitted that Mr Vulinovich's conduct was at a similar level of seriousness as that of Mr Ganesh: she submitted that like Mr Ganesh, Mr Vulinovich had engaged in conduct that was unsatisfactory conduct and had then lied to the Authority in an attempt to absolve himself from the unsatisfactory conduct.

[38] Ms Wood submitted the appropriate penalty for Mr Vulinovich is an order for censure and a period of suspension of his licence.

Discussion

[39] As his Honour Justice Brewer accepted in *Prasad*,¹³ an order for cancellation will generally be the starting point for penalty orders in cases of proven dishonesty, but it is not the invariable outcome. Determination of the penalty to be imposed in a particular case requires a proper assessment of all the relevant circumstances. While there are similarities between the circumstances of the five cases referred to and those of Mr Vulinovich's conduct, none of the cases is on all fours with the present case.

[40] In Mr Vulinovich's case, the salient features of his conduct are first, that he carried out real estate agency work in New Zealand between January and December 2018 without holding a licence to do so, in contravention of s 6 of the Act. During this period he was listing agent for five properties and received commissions for real estate agency work in respect of four further properties. Secondly, he lied in the CV submitted in support of his application for a New Zealand licence by saying that he had worked for CBRE South Sydney from January 2016 to June 2018 and that he had worked for the Agency as "an agency analyst preparing for agency work in the investment sales team" from June 2018 to November 2018, when in fact he had

¹³ *Prasad*, fn 7, above, at [50].

resigned from CBRE South Sydney in November 2017 and had worked as a real estate agent at the Agency from January to December 2018.

[41] He also lied in a statutory declaration provided to the Authority with his application for a New Zealand licence, in stating that there were no circumstances which would or might make him not fit to hold a licence, and that the documents submitted with the licence (including the CV) were complete and correct.

[42] We do not accept Ms Wood's submission that Mr Vulinovich's conduct is at a similar level of seriousness to that of Mr Ganesh, in engaging in conduct that was unsatisfactory, then providing false information in an attempt to absolve himself from the unsatisfactory conduct. That submission does not take account of the period of 11 months in which Mr Vulinovich carried out real estate agency work in New Zealand without holding a licence to do so. We do not accept that Mr Vulinovich's having forgotten about his application for a licence in any way excuses him. As a former licensee re-entering the industry it was his responsibility to ensure that he was properly licensed to do so.

[43] Nor do we accept her submission that Mr Vulinovich's conduct was "rash and opportunistic" rather than a "calculated and premeditated" decision. In his explanation (recorded in the agreed summary of facts) Mr Vulinovich said that:

... he knew that if he had written that he had been acting as an agent in the CV it would raise immediate red flags, and his concern at the time was that it could drag out the application time considerably. He was concerned at the prospect of not being able to work for an extended period of time knowing it can take a long time to work through the regulatory process. Mr Vulinovich says that he believed that it would be preferable to have the licence and deal with any fallout via a disciplinary process while being licensed as opposed to have the licence itself withheld for an unknown period.

[44] We take Mr Vulinovich's response as being that having balanced the disadvantage of a possibly lengthy period without a licence if he were honest about his having worked as a real estate agent against the advantage of not being honest and working with a licence and dealing with any disciplinary consequences later, he preferred the immediate ability to work, notwithstanding the dishonesty involved. That indicates a "calculated and premeditated decision".

[45] Against that we must take into account that Mr Vulinovich admitted the charge promptly, and he has no previous disciplinary findings against him. These are important factors in deciding whether cancellation of Mr Vulinovich's licence should be ordered, rather than suspension. In those two respects he differs significantly from Ms Prasad and Mr Mairs.

[46] In *Prasad* his Honour Justice Brewer regarded as being of "greatest significance" the fact that Ms Prasad maintained her lies and continued her claim that the falsified records were genuine and refused to accept responsibility for her actions. His Honour characterised Ms Prasad as having come before the Tribunal "not ... as a penitent but as a recalcitrant".¹⁴ On those grounds, the Authority's appeal against the Tribunal's order for suspension of Ms Prasad's licence was overturned and cancellation ordered.

[47] Similarly, Mr Mairs did not admit any wrongdoing and maintained that stance throughout the disciplinary process. The order for cancellation of licence made by the Tribunal was upheld by the High Court.¹⁵

[48] We also take into account that in Mr Vulinovich's case there was no evidence of any loss to any client or customer as a result of his conduct. Again, that is a distinguishing factor from *Prasad* and *Mairs*.

[49] We give less weight to Ms Wood's submission that the fact that the charge against Mr Vulinovich did not result from a complaint by a client or customer alleviates the seriousness of his conduct. As recorded earlier, the conduct was brought to the Authority's attention by way of a report from the Agency.

[50] Having considered all of the relevant circumstances, while accepting that Mr Vulinovich's conduct was serious and justifies a serious disciplinary response, we are not persuaded that cancellation of Mr Vulinovich's licence is required in order to address the purpose of the Act and the principles as to penalty set out earlier. We have

¹⁴ *Prasad*, at [61].

¹⁵ *Mairs v Complaints Assessment Committee 413* [2019] NZHC 1839.

concluded that the appropriate penalty is an order for censure, suspension of his licence for a period of 18 months, and an order to pay a fine.

[51] We are satisfied that the penalty orders to be made by the Tribunal are appropriate to the nature of Mr Vulinovich's conduct, and to the need to maintain industry standards, maintain public confidence in the industry, and to the need for personal and general deterrence. We are also satisfied that the orders are the least punitive penalty that is appropriate in the circumstances.

Orders

[52] Mr Vulinovich is found guilty of misconduct under s 73(a) of the Act (disgraceful conduct).

[53] Mr Vulinovich is censured. The Tribunal orders that Mr Vulinovich's licence is suspended for a period of 18 months, commencing on the date of this decision. Mr Vulinovich is also ordered to pay a fine of \$5,000, which is to be paid to the Authority within 20 working days of the date of this decision.

[54] 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.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms F Mathieson
Member