

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2021] NZREADT 53

Reference No: READT 018/2021

**IN THE MATTER OF**

An appeal under s 111 of the Real Estate Agents Act 2008

**BETWEEN**

**BD**  
Appellant

**AND**

**THE REAL ESTATE AGENTS AUTHORITY  
(CAC 2103)**  
First Respondent

**AND**

**CX**  
Second Respondent

Hearing on the papers

Tribunal:

D J Plunkett (Chair)  
G Denley (Member)  
F Mathieson (Member)

Representation:

Counsel for the appellant:	R B Hern
Counsel for the first respondent:	I Sugrue
The second respondent:	Self-represented

---

**DECISION**  
**Dated 15 October 2021**

---

## INTRODUCTION

[1] BD, the appellant, is a licensed real estate salesperson (the licensee). On learning that he had not been chosen by the vendors to market a property, he wrote an email to them to say that the licensed salesperson chosen, OD (the salesperson), was a rookie and he hoped the choice did not cost them tens of thousands of dollars. The salesperson was from another agency.

[2] The salesperson's supervisor was CX (now CB), the second respondent, who is a licensed agent and principal of her agency (the principal). She made a complaint to the Real Estate Agents Authority (the Authority), the first respondent. A Complaints Assessment Committee (CAC 2103) decided that the licensee had engaged in unsatisfactory conduct and reprimanded him.

[3] The licensee has appealed against the Committee's decisions. He acknowledges that he did not meet the standard expected of an agent, has apologised and made a donation to charity. However, the licensee says his conduct was inconsequential and does not meet the threshold for regulatory action. He seeks the quashing of the Committee's decisions. The Authority consents to quashing the decisions. The principal opposes.

## BACKGROUND

[4] The salesperson met with the vendors in July 2020 to discuss listing a property in provincial Canterbury. The licensee did the same. Both gave valuation appraisals. The vendors chose to list with the salesperson.

[5] On 10 August 2020, about 12 minutes after the vendors had told the licensee of their chosen agent, he sent a text to them:

K, thinking about the agent you have chosen, I'm seriously worried about the result you may get with a rookie agent on their first listing. I hope a cheap commission doesn't cost you tens of thousands of dollars. [the licensee's name].

[6] The vendors replied by text:

Thanks, but she has [the principal] behind her every step of the way and whilst we do know some of [the principal's] history, we do have confidence she will make sure [the salesperson] gets the right result with a deadline sale.

We have signed for 6 weeks only so if we don't get that result we'll be sure to contact you :)

[7] The licensee replied:

Best wishes

[8] When the property went on the market on 14 August 2020, the licensee sent a text to the principal stating:

Well done ... should sell well.

## **THE COMPLAINT**

[9] A complaint was made by the principal to the Authority on 20 August 2020.

[10] The Authority informed the licensee of the complaint. On an unknown date, he provided a response. He said it was a very poorly worded text which fell short of what he was trying to explain. He wanted to say that an experienced agent could be expected to potentially realise a better sale price. The licensee said he should have called them instead. He was worried a new salesperson may not get the best result for them. It was not his intention to offend.

[11] A facilitator from the Authority rang one of the vendors on 11 September 2020. The vendor said she did not appreciate the text, the licensee was not very supportive, he had changed her view of working with him in the future and he had behaved unprofessionally.

[12] The licensee rang the vendors on 14 September 2020 offering a full apology. On the following day, he left a written apology at their house, together with a gift box of wine. Later that day, he again apologised to them over the phone.

### *Decisions of the Committee*

[13] On 15 April 2021, the Complaints Assessment Committee (CAC 2103) issued a decision. It was noted from the Authority's investigation report that the licensee sent the text out of genuine concern for the vendors. The Committee recorded that he appeared to genuinely care about his clients. It found that the text was not intended to offend. Nonetheless, as the Committee noted, the vendors did not appreciate the message and thought it was unprofessional.

[14] The Committee decided that the licensee had breached r 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Professional Rules), whereby a licensee must not engage in conduct likely to bring the industry into disrepute. It considered that contacting the vendors was unprofessional and could potentially damage the salesperson's reputation and that of her agency. It was also likely to bring the real estate industry into disrepute.

[15] It was determined by the Committee, pursuant to s 89(2)(b) of the Real Estate Agents Act 2008 (the Act), that the licensee had engaged in unsatisfactory conduct, as defined in s 72(a), (b), (c) and (d). It sought submissions on the orders to be made.

[16] The principal sent an email to the Authority on 23 April 2021 referring to the Committee's decision. She said the licensee had damaged her staff, her agency and herself. She described him as a wonderful salesperson with a talent for real estate. The principal did not want any unnecessary implication for the licensee, but would appreciate a genuine, written apology to the salesperson.

[17] On 29 April 2021, the licensee wrote to the salesperson apologising for the text.

[18] The licensee sent an email to the Authority on 13 May 2021 stating that he had stayed in touch with the vendors who had sent him a message:

It is sad to hear that a text message misunderstanding between [the licensee] and ourselves has been the source of an ongoing REA investigation lasting several months. [The licensee] treated us as friends of a friend, and from his apologies over the phone, and in writing, dealt with this matter in the best way possible... We feel it would be excessive to say that [the licensee] has brought the industry into disrepute, more that he let only himself down, and we believe [the licensee] has learned that sending impulsive text messages without careful consideration of the wording is to be avoided.

[19] The same email to the Authority was also expressed to be an open letter to the principal. He apologised and stated that he never set out to offend anyone. He went on to discuss some history between the two of them.

[20] The Committee reconvened to consider the penalty orders, issuing its further determination on 16 June 2021. It noted that the licensee had apologised to the principal and salesperson, and had offered to make a donation of \$2,000 to a charity chosen by the vendors. The principal had described the licensee as a "wonderful salesperson with a talent for the real estate business" but the text was damaging. She asked that there be no penalty, but that he learned from the process. The vendors had said that it would be excessive to say that the licensee had brought the industry into disrepute, rather he let himself down and they believed he had learned that sending impulsive texts without careful consideration of the wording was to be avoided.

[21] The Committee considered that the text was at the lower end of the unsatisfactory conduct spectrum, warranting consideration of a penalty of \$1,500 to \$2,000. It noted that the licensee had no prior disciplinary history, that he had apologised and had offered to make a donation of \$2,000.

[22] It decided that the complaint process was itself a sufficient penalty for what was a lapse in an otherwise well conducted career. The Committee determined to reprimand the licensee. It recommended that he learned from the experience and took time to consider the impact of messages before sending them.

## **APPEAL**

[23] The licensee appealed to the Tribunal on 13 July 2021 against the Committee's determinations.

### *Submissions from the licensee*

[24] Mr Hern, counsel for the licensee, in his memorandum (27 July 2021), states that the issue is whether the licensee's conduct was severe enough to warrant a finding of unsatisfactory conduct. The vendors were happy with his apology and the findings against him are excessive.

[25] A joint memorandum (29 July 2021) was filed on behalf of the licensee and the Authority. It states:

The appellant's actions were not of the standard expected of a professional member of the industry. However, on the specific facts of this situation, a finding that the nature of the appellant's conduct was inconsequential or of a minor concern when measured against the threshold relevant to conduct which may bring the industry in to disrepute and viewed from a regulatory perspective, is open to the Tribunal. Additionally, while it is acknowledged the appellant's conduct was offensive to the second respondent, there is a lack of identifiable wider potential regulatory harm. Additionally, the appellant has made an apology and the complainant has indicated they do not wish to participate in the appeal process.

[26] The licensee and the Authority sought orders by consent allowing the appeal, quashing the unsatisfactory conduct decision and the reprimand penalty.

[27] There are further submissions from Mr Hern (27 August 2021). It is submitted that the key issue is whether the licensee's conduct was sufficiently serious to warrant an unsatisfactory conduct finding, specifically whether the Committee:

1. Adequately justified its finding that the licensee breached s 72(a), (b), (c) and (d) of the Act; and
2. Erred in finding the licensee's actions were likely to bring the industry into disrepute.

[28] According to Mr Hern, the Committee had noted that the licensee's message was sent out of genuine concern for the vendors and was not intended to offend. He had become friendly with the vendors. They were hoping for a good price. The wife had lost her job and the husband was off work post-operation. They needed to achieve a certain amount to establish themselves back in the United Kingdom.

[29] The salesperson was newly qualified. The principal had said it was basically her first listing. In any industry, a professional's skills are refined with experience. The licensee was entitled to express concern based on the salesperson's experience. He did not use language any more slanderous or provocative than necessary to convey his concerns.

[30] Most vendors would not find it inherently offensive or unacceptable to receive this message. The licensee's genuine concern is an important context. When he sent the message, he was not aware that the salesperson would be under the supervision of the principal. Once he was notified of this by the vendors, his doubts dissipated and he took no further steps.

[31] It is contended there was no harm or prejudice to any party. The licensee's message did not change the vendors' opinion of the salesperson. The message was entirely private. There was no reputational damage to the salesperson, principal or their agency.

[32] The principal says the vendors were highly offended, but there is no supporting evidence. The investigation report recorded that they did not appreciate the message and did not find the licensee very supportive. The vendors consider the matter dealt with and the licensee stays in touch with them. They told the Authority that the licensee had treated them as a friend and had apologised. They thought it was excessive to say he had brought the industry into disrepute.

[33] The focus of professional disciplinary cases is consumer protection. The vendors are not aggrieved. There is nothing about the text which undermines public confidence.

[34] The principal suggests that the licensee did not consider the feelings of herself, the salesperson and their agency. While sympathetic, their hurt is not a harm which should attract an unsatisfactory conduct finding. The licensee and principal have a "colourful history". This may inform the principal's high level of offence.

[35] Counsel submits that it is within the Tribunal's power to deplore behaviour without reaching an unsatisfactory conduct finding. In one case in the High Court concerning a legal practitioner, it was observed:<sup>1</sup>

The ability to take no further action on a complaint can be exercised legitimately in a wide range of circumstances... It is not confined to circumstances where there is no basis for the complaint at all.

[36] The licensee agrees with the Committee's statement that he learns from the experience and takes time to consider the impact of messages. He also agrees with its statement that the process had been a sufficient penalty for a lapse in an otherwise well conducted career. The principal had said she did not want the licensee to receive any unnecessary implications and hoped he had learned from the process. The vendors believed he had learned that sending impulsive messages was to be avoided. The complaint itself has reprimanded the licensee in clear terms that his comments were unacceptable and unprofessional. The process has had an educative value for him which will translate into his future dealings.

[37] The licensee apologised to all parties and made a donation of \$2,000 to a charity. He has no disciplinary history. He cares deeply for his clients and the industry. The Tribunal can be satisfied that the licensee will take great care going forward.

[38] The licensee's actions were not of the standard expected of a professional member of the industry. However, they were not a dramatic departure from the required standards. He was entitled to observe that inexperience can be a concern. No harm ensued. Accordingly, the Committee erred in finding unsatisfactory conduct.

[39] There are additional submissions (24 September 2021) from counsel for the licensee. He submits that the principal's assertion that the vendors raised the issue with her only once they had confidence in her agency, is purely speculative. There is no evidence of fragility in the relationship pending a quick offer. It is possible the vendors did not raise the issue because they were not concerned about the agency's competence. There is little value in speculating as to what would have happened in the absence of a quick and successful offer. The licensee should not be disciplined for events which did not happen.

#### *Submissions from the Authority*

[40] Counsel for the Authority, Mr Sugrue, in his submissions (17 September 2021), states the Authority's position that the licensee's actions were not of the standard expected of the profession. However, on the specific facts, it is open to the Tribunal to

---

<sup>1</sup> *Burgess v Tait* [2014] NZHC 2408 at [82].

find that the conduct is of only minor concern and does not justify a finding of unsatisfactory conduct. The Authority does not oppose the appeal.

[41] In *Vosper v Real Estate Agents Authority*, the High Court considered whether a finding of unsatisfactory conduct should be made against a licensee who had been found guilty of a relatively minor breach of a rule:<sup>2</sup>

A balance needs to be struck between the competing goals of promoting a consistent and effective disciplinary process and avoidance of the stigma of a finding of unsatisfactory conduct, where the conduct in issue is relatively minor and all other circumstances point to the absence of a need to mark the conduct in that way.

[42] This was followed in the Tribunal by a decision where a licensee was found to have breached a rule though the actions were relatively minor.<sup>3</sup> It concluded that the errors were not such as to require the licensee to be marked by way of a disciplinary finding and the Committee did not err in deciding to take no further action.<sup>4</sup>

[43] Mr Sugrue observes that the Committee accepted the licensee in the case now before the Tribunal was not motivated by ill intentions and the text was not intended to offend. The vendors said it would be excessive to say that the licensee had brought the industry into disrepute, though the principal believes the conduct was unsatisfactory. While the licensee's behaviour was ill-conceived, the motivations behind it could be viewed as aligning with the consumer protection purposes of the legislation and not with a desire for personal gain.

#### *Submissions from the principal*

[44] The principal sent an email to the Tribunal on 22 July 2021, copied to the licensee's counsel. She addressed the licensee directly, as well as the Tribunal. To the licensee, she said it was important for him to understand that the matter did not solely affect the clients, but also affected her, her staff and the agency a great deal professionally. According to the principal, what she set out to achieve was that he learns from the process and thinks twice before doing things professionally damaging to others.

[45] In an email to the Tribunal on 29 July 2021, the principal expressed her disagreement with quashing the decision, as the licensee had not considered their feelings or those of the vendors. It was unsatisfactory behaviour to all of them and to the industry.

---

<sup>2</sup> *Vosper v Real Estate Agents Authority* [2017] NZHC 453 at [74].

<sup>3</sup> *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [77]–[79].

<sup>4</sup> At [79].



[46] In her further submissions of 8 September 2021, the principal states that the appeal should not be allowed because the conduct was unsatisfactory for a professional. She is concerned that such behaviour is increasing in the industry.

[47] According to the principal, it is important to note that the vendors did not make the principal aware of the text until four days later, when she and the salesperson presented an offer to them. The vendors then had a reason to have confidence in the agency. One of her concerns is what would have happened if they were not able to secure an offer so quickly and a perception of their capabilities had been put into the vendors' minds. The vendors initially described the text as offensive. Her impression is that they formed a bad view of the process. It is unsurprising that having got a good result they have moved on and do not harbour any ill feeling towards the licensee. They have left the country.

[48] The principal does not agree that the licensee was entitled to express concern based on a salesperson's experience. It is concerning that he still does not appear to accept that his conduct was unprofessional. Nor does she agree that most vendors would not find such a message inherently unacceptable. It was an insult, not just to fellow professionals, but also to the vendors on their decision-making capabilities. It sets an undertone of dirty business to the public and negatively impacts on the public's ability to trust agents.

[49] The licensee's message also diminishes confidence in those starting out in the profession. Everyone has to start somewhere. The public would not think it acceptable that a senior member of the profession is critical of a junior, purely on the basis the person is new. Junior members should be confident they will not be discounted and discredited by senior peers.

[50] It is only sheer luck that no harm or prejudice resulted. The apology was well received by the vendors, but no apology would have been made without the complaint. The fact the vendors thought an apology necessary indicates a level of harm.

[51] The principal strongly rejects being highly offended as a result of her history with the licensee. She is justifiably protective of her agency and the industry. It is important to ensure that the real estate profession is a respectable one.

[52] While the unsatisfactory conduct may be low level, it was still unsatisfactory, unprofessional and worthy of condemning. This was conduct which fell short of the standard that a reasonable member of the public was entitled to expect. No agent of good standing would consider it acceptable.

## JURISDICTION AND PRINCIPLES

[53] This is an appeal pursuant to s 111 of the Act.

[54] The appeal is by way of a rehearing.<sup>5</sup> It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.<sup>6</sup> After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.<sup>7</sup> If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.<sup>8</sup>

[55] A hearing may be in person or on the papers.<sup>9</sup> A hearing in person may be conducted by telephone or audiovisual link.

[56] This appeal is against the determination of the Committee under s 89(2)(b) to find unsatisfactory conduct. It is a “general appeal”. The Tribunal is required to make its own assessment of the merits in order to decide whether the Committee’s determination is wrong.<sup>10</sup> An appellant has the responsibility of showing on the balance of probabilities that their version of the events is true and hence the Committee is wrong.

### *Procedural directions*

[57] The Tribunal issued a timetable for submissions on 30 July 2021. It directed a hearing on the papers on 22 September 2021.

## DISCUSSION

[58] On being informed that he was unsuccessful in achieving a listing, the licensee sent a text to the vendors. It is this text which is the subject of the complaint. It is short and it is useful to recollect the precise message and its tone:

K, thinking about the agent you have chosen, I’m seriously worried about the result you may get with a rookie agent on their first listing. I hope a cheap commission doesn’t cost you tens of thousands of dollars. [the licensee’s name].

[59] The Committee found this to be unsatisfactory conduct, which is defined in the Act:<sup>11</sup>

<sup>5</sup> Real Estate Agents Act 2008, s 111(3).

<sup>6</sup> *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].

<sup>7</sup> At s 111(4).

<sup>8</sup> At s 111(5).

<sup>9</sup> At ss 107, 107A.

<sup>10</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] & [16] and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

<sup>11</sup> Real Estate Agents Act 2008, s 72.

## 72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.

[60] The finding was that it amounted to unsatisfactory conduct under all the available arms, (a) to (d). In respect of subsection (b), the relevant rule found to be breached was r 6.3 of the Professional Rules:

A licensee must not engage in any conduct likely to bring the industry into disrepute.

[61] The penalty imposed by the Committee was a reprimand only. The Committee decided that the complaint process had been a sufficient penalty for what it regarded as a lapse in an otherwise well conducted career.

[62] There are some important factual findings by the Committee concerning the licensee's conduct which need to be borne in mind.

[63] The Committee accepted that the licensee had sent the text out of genuine concern for the vendors. It was not intended to offend. He appeared to genuinely care about his clients. It noted that he had apologised and made a donation to charity.

[64] The purpose of the Act is the promotion and protection of the interests of consumers and the promotion of public confidence in the industry.<sup>12</sup> The disciplinary provisions of the Act have the same purpose. The central focus of professional conduct standards, with their compliance regimes, is the protection of the public.<sup>13</sup>

[65] It is notable that the complaint was made by another agent, not by a consumer. The complainant (the principal) was not mentioned in the complaint. The person mentioned was the salesperson, a member of the principal's staff. But she did not complain. There is no evidence the salesperson supports this complaint. There is no evidence the consumers involved, the vendors, support the complaint. Indeed, the

---

<sup>12</sup> At s 3(1).

<sup>13</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

uncontested evidence from the licensee is that the vendors believe the Committee's finding, that the licensee brought the industry into disrepute, to be excessive.

[66] The licensee's text was certainly unprofessional, as the Committee rightly found. We agree with the principal that the text was an insult to the salesperson and the vendors. Nor is it appropriate for an experienced professional to undermine confidence in a junior professional commencing her career.

[67] However, we agree with the vendors that it is excessive to regard the text as bringing the industry into disrepute. It is an isolated communication using moderate language. In the circumstances and having regard to the Committee's acceptance of the licensee's motivation, the text is not likely to bring the industry into disrepute. There is no breach of r 6.3.

[68] Nor is any other arm of the definition of unsatisfactory conduct in s 72 contravened. Arguably, the text falls short of the standard to be expected of a reasonably competent licensee and might be regarded by agents of good standing as unacceptable, but only marginally so and it does not warrant a disciplinary process. Nor does the text fall sufficiently below the standard of a reasonable, professional agent to be regarded as incompetent or negligent.

[69] Conduct which is unprofessional does not necessarily justify the stigma of an adverse disciplinary finding.<sup>14</sup> The conduct here is relatively minor and does not need to be marked by a finding of unsatisfactory conduct. The nature of the transgression is not sufficient to attract disciplinary sanctions.<sup>15</sup>

[70] We are reinforced in our view by the licensee's apologies to the vendors and the salesperson and his donation to a charity. We believe the licensee has learned from the experience and will be careful in the future about texting. There is no need for the public to be protected from the licensee nor for him to be deterred by the stigma of a complaint being upheld. The complaint has substantially achieved the principal's stated objective, that the licensee learn from the experience.

### *Conclusion*

[71] We find that the licensee has not engaged in unsatisfactory conduct. The Committee erred in its conclusion. The appeal is allowed. The finding of unsatisfactory

---

<sup>14</sup> *Vosper*, above n 2, at [74] & [76]; *Watson*, above n 3.

<sup>15</sup> See also *Liston v The Director of Proceedings* [2018] NZHC 2981 at [42] & [44].

conduct is set aside. It follows that the order to reprimand the licensee must also be set aside.

## **OUTCOME**

[72] The Committee's decisions of 15 April and 16 June 2021 are reversed. We substitute a decision to take no further action since the subject matter of the complaint is inconsequential.<sup>16</sup>

[73] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, which sets out the right of appeal to the High Court.

## **PUBLICATION**

[74] The Committee made an order on 16 June 2021 directing publication of the decision without identifying the complainant, the licensee or the property. The licensee seeks a continuation of the order in respect of him. This is not opposed by the Authority. The principal agrees that the decision probably does not require publication.<sup>17</sup>

[75] In light of the outcome of this appeal and having regard to the interests of the parties and of the public, it is proper to order publication of the decision of the Tribunal without naming any party (apart from the Authority) or identifying the property.

---

D J Plunkett  
Chair

---

G Denley  
Member

---

F Mathieson  
Member

---

<sup>16</sup> Real Estate Agents Act 2008, ss 80(1)(b), 111(5).

<sup>17</sup> Email to Authority (29 July 2021), submissions (8 September 2021) at [2].