

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2023] NZREADT 1

Reference No: READT 013/2020

**IN THE MATTER OF**

Charges laid under s 91 of the Real Estate Agents Act 2008

**BROUGHT BY**

**COMPLAINTS ASSESSMENT  
COMMITTEE 1904**

**AGAINST**

**MURRAY ALFRED BRIGHT**  
Defendant

Tribunal:

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

Appearances:

Counsel for the Committee:	R McCoubrey, J Ah Koy
The Defendant:	Self-represented
Counsel appointed by the Tribunal:	T Cooper

**SUBJECT TO NON-PUBLICATION ORDER**

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**DECISION (PENALTY)**  
**Dated 16 January 2023**

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## **INTRODUCTION**

[1] In a decision issued on 8 November 2022, the Tribunal found Mr Bright guilty of the reckless contravention of r 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules). This amounted to misconduct pursuant to s 73(c)(iii) of the Real Estate Agents Act 2008 (the Act).

[2] The Tribunal will now determine the penalty.

## **BACKGROUND**

[3] The background facts, as found by the Tribunal, are set out in its earlier decision and are summarised below.

[4] Murray Alfred Bright, the defendant, was a licensed agent under the Act. He was at the relevant time employed by Bay of Islands Realty Limited, t/a Harcourts Coopers Beach (the agency). He is no longer licensed.

[5] On 3 July 2019, the complainant travelled in Mr Bright's vehicle to view two properties. The viewing of the first property was uneventful. The second property was at a remote location. While sitting on the bed in the master bedroom, Mr Bright embraced the complainant. He gave her a short peck on the cheek, though his lips did not touch her cheek. Their cheeks came together. Both of them pulled back and released and as they did so, their lips accidentally brushed.

[6] The motivation for the embrace was explained by Mr Bright in evidence accepted by the Tribunal. The complainant had spontaneously disclosed very personal events. He considered she was in a sad state. Mr Bright asked her if she would like a hug and she leaned towards him with her arms out to initiate the hug. He did likewise. They both leaned in and the hug occurred. Mr Bright subsequently drove the complainant back to the agency's office.

[7] On the following day, the complainant rang the agency's office and spoke with another licensee. She said she was uncomfortable with Mr Bright and did not want to deal with him anymore. In due course, the complainant made a formal complaint against him.

## **THE TRIBUNAL'S DECISION**

[8] In its decision of 8 November 2022, the Tribunal found the complainant's version of the incident to be a fabrication and accepted Mr Bright's version. His behaviour (as

described by him) was found to be a reckless contravention of r 6.3 and therefore misconduct, pursuant to s 73(c)(iii) of the Act. Rule 6.3 states:

**6 Standards of professional conduct**

...

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

...

[9] The Tribunal had regard to the following circumstances in finding r 6.3 to be contravened:

1. Mr Bright is a very experienced licensee.
2. The complainant and Mr Bright are strangers. Mr Bright's relationship with her is professional. This is the context in which they were together.
3. They were alone at the property.
4. The complainant is vulnerable for two reasons. First, this was at a remote location with which the complainant was unfamiliar and she had travelled there in Mr Bright's vehicle. She would have to travel back to the office, at least 30 minutes away, with him. Second, there is the significant disparity in their size.
5. They were in someone else's house and significantly, sitting on a bed in the master bedroom, with the innuendo any physical touching might convey.
6. The physical contact was initiated by Mr Bright.
7. There were obvious other means of Mr Bright showing empathy to the complainant's situation. He could have verbally expressed sympathy and/or asked if she was 'OK' and/or asked her if she wanted a moment on her own and/or offered a coffee on the way back to the office.

[10] The Tribunal regarded the totality of these factors as establishing that Mr Bright's conduct would likely bring the industry into disrepute in this age, where 'private space' is critical in work or professional relationships. It noted that Mr Bright himself, in the earlier stages of the complaint, conceded that his conduct was unprofessional, though he resiled from that concession at the hearing. Mr Bright was found to have overstepped the professional boundaries.

[11] The circumstances of the complainant and Mr Bright at the time, the consensual hug coupled with a peck on the cheek (with only their cheeks touching) leading to an accidental brushing of the lips, was found to be a marked and serious departure from the standards required. While not disgraceful, there was a reckless indifference to the Rules. It was a momentary lapse, but nonetheless a serious lapse. Members of the public would not find such physical contact acceptable in the context in which it occurred here, irrespective of the compassionate circumstances. If it was accepted, it would lower the standing and reputation of the profession.

## **PENALTY**

### *Jurisdiction and principles*

[12] The Tribunal's jurisdiction to impose penalty orders if misconduct is proven is set out in the Act:

#### **110 Determination of charges and orders that may be made if charge proved**

- (1) If the Disciplinary Tribunal, after hearing any charge against a licensee, is satisfied that it has been proved on the balance of probabilities that the licensee has been guilty of misconduct, it may, if it thinks fit, make 1 or more of the orders specified in subsection (2).
- (2) The orders are as follows:
  - (a) 1 or more of the orders that can be made by a Committee under section 93 (except under section 93(1) (ha)):
  - (b) an order cancelling the licence of the licensee and, in the case of a licensee that is a company, also cancelling the licence of any officer of the company:
  - (c) an order suspending the licence of the licensee for a period not exceeding 24 months and, in the case of a licensee that is a company, also suspending the licence of any officer of the company for a period not exceeding 24 months:
  - (d) an order that a licensee not perform any supervisory functions until authorised by the Board to do so:
  - (e) an order, in the case of a licensee who is an employee or independent contractor, or former employee or former independent contractor, that any current employment or engagement of that person by a licensee be terminated and that no agent employ or engage that person in connection with real estate agency work:
  - (f) an order that a licensee who is an individual pay a fine not exceeding \$15,000 and order a licensee that is a company pay a fine not exceeding \$30,000:

- (g) where it appears to the Tribunal that any person has suffered loss by reason of the licensee's misconduct and the order is one that a court of competent jurisdiction could make in relation to a similar claim in accordance with principles of law, an order that the licensee pay to that person a sum by way of compensation as is specified in the order, being a sum not exceeding \$100,000.

...

[13] The Committee can make the following orders:

**93 Power of Committee to make orders**

- (1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:
    - (a) make an order censuring or reprimanding the licensee:
    - (b) order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint:
    - (c) order that the licensee apologise to the complainant:
    - (d) order that the licensee undergo training or education:
    - (e) order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint:
    - (f) order the licensee—
      - (i) to rectify, at his or her or its own expense, any error or omission; or
      - (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:
    - (g) order the licensee to pay to the Authority a fine not exceeding \$10,000 in the case of an individual or \$20,000 in the case of a company:
    - (h) order the licensee, or the agent for whom the person complained about works, to make his or her or its business (including any records, accounts, and assets) available for inspection or take advice in relation to management from persons specified in the order:
- ...
- (i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee
- (2) An order under this section may be made on and subject to any terms and conditions that the Committee thinks fit.

[14] There are additional requirements in s 110 regarding compensation orders.

[15] In determining the appropriate penalty, it is relevant to note the purpose of the Act:

### 3 Purpose of Act

- (1) The purpose of this 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.
- (2) The Act achieves its purpose by—
  - (a) regulating agents, branch managers, and salespersons:
  - (b) raising industry standards:
  - (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[16] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:<sup>1</sup>

...It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

...

The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

...

Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[17] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the collective reputation and public confidence in the profession itself.<sup>2</sup>

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

<sup>2</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; *Z v Dental Complaints Assessment Committee*, above n 1, at [151].

[18] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.<sup>3</sup>

[19] The most appropriate penalty is that which:<sup>4</sup>

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

## SUBMISSIONS

### *Submissions of the Committee*

[20] In submissions (2 December 2022), counsel for the Committee note their inability to find any previous misconduct cases in the Tribunal's jurisdiction involving offending on all fours with the present case.

[21] Counsel cite three earlier decisions of the Tribunal and two decisions of the Health Practitioners Disciplinary Tribunal, which will be discussed later to the extent relevant.<sup>5</sup> Counsel regard *Rabih* and *Mlilo* as the most analogous as they involved one off incidents of attempted unwanted touching of a sexual nature. According to counsel,

<sup>3</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

<sup>4</sup> *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633, [2013] NZAR 320 at [49].

<sup>5</sup> *Real Estate Agents Authority (CAC 10027) v Brankin* [2013] NZREADT 32; *Real Estate Agents Authority (CAC 20004) v Lindsay* [2013] NZREADT 113 at [75], [2014] NZREADT 35; *Complaints Assessment Committee 403 v Licensee B* [2017] NZREADT 21; *Rabih* [2014] NZHPDT 638 (11 August 2014), *Rabih v Professional Conduct Committee of Dental Council* [2015] NZAR 1102, *Mlilo* [2012] NZHPDT 453 (15 May 2012).

suspension was ordered in both cases. The Tribunal records that suspension was not ordered in *Mililo*, as in fact the Committee's counsel recognised earlier in their submissions.

[22] Counsel submit that Mr Bright demonstrated a serious lapse in judgement as a very experienced licensee. He would have known at the time that his actions were inappropriate. He was indifferent as to whether it would bring the profession into disrepute. He was in a position of power as a professional with more knowledge of the locality and was physically much bigger than the victim.

[23] It is contended that the Tribunal should record what it considers would have been the appropriate penalty had Mr Bright been licensed at the time of the decision.

[24] The Committee submits that the appropriate penalty would be:

1. Censure.
2. A fine in the vicinity of \$6,000 to \$8,000.

[25] The Committee also seeks an order for 50 per cent of its costs. A schedule produced to the Tribunal (6 December 2022) shows costs of \$35,546.40, of which 50 per cent would be \$17,773.20.<sup>6</sup>

[26] The Committee replied (23 December 2022) to Mr Bright's submissions. It notes the essence of his submissions being that a misconduct charge should never have been laid. Yet a misconduct charge was proven against him. It does not matter that it was on the Committee's alternative case. Materially, the same investigation and hearing was required whether the Committee pursued that charge alone, or did so in conjunction with its primary case.

#### *Submissions of Mr Bright*

[27] In his submissions (21 December 2022), Mr Bright states that the Committee aggressively attacked him. They had all the information that was heard at the hearing and their own investigations would have shown major discrepancies in the complainant's version of the events (as listed in his submissions). If the Committee had been more diligent, a misconduct charge would not have been laid. The aggressive pursuit of this charge would have been the majority of the costs. The complainant's account was fabricated. There were challenges "to" the High Court, unnecessary delays, various

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<sup>6</sup> The Tribunal has been informed these costs do not include the associated proceedings in the High Court.



objections and “Court time”. Mr Bright therefore objects to being liable for any of the Committee’s costs.

[28] Mr Bright states that being charged has had the most devastating impact on his life. He has been unable to transfer his licence to Australia where he now lives because of the charges. This has created an immediate financial issue which has affected him mentally and physically in the ways he describes, requiring medical support. From being an outward and social person, he has become a hermit. He had to cancel his New Zealand licence as he could not afford to continue to pay the licence fees.

[29] For the past three years, his only income has been the Australian aged pension and a small New Zealand aged pension (amounts given). His wife has no income apart from the Australian aged pension. They have a mortgage. He grows his own fruit and vegetables.

[30] According to Mr Bright, he has lost potential earnings of \$300,000 to \$500,000 over the last three years. He had initially paid legal fees of approximately \$10,000.<sup>7</sup>

[31] In light of the misconduct charge and the false accusations of sexual assault, Mr Bright claims \$700,000 for loss of earnings, health issues, medical and legal costs. Furthermore, the Real Estate Agents Authority (the Authority) should renew his licence for a period of 12 months at no cost, so he can transfer it to Australia.

## **DISCUSSION**

[32] Any misconduct involves a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public. Mr Bright’s conduct was therefore serious, albeit a momentary lapse only. It must be borne in mind, however, that the Tribunal did not characterise it as disgraceful, the most serious form of misconduct. There was not such a high degree of opprobrium. In terms of the spectrum of reckless breaches, the Committee describe it as a low-moderate to moderate. The Tribunal agrees.

[33] The Tribunal accepts the Committee’s submission that it is important that consumers feel confident and safe knowing they will be treated professionally and respectfully by licensees.

[34] It is notable that the incident was consensual. In setting the penalty, the Tribunal will be mindful of the consensual nature of the physical contact. Furthermore, it is not

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<sup>7</sup> See Mr Bright’s email to the Tribunal on 26 December 2022.

accepted by the Tribunal that Mr Bright's conduct was sexually motivated. It was motivated by compassion for what he regarded as the complainant's sad state.

[35] The Committee says that ordinarily it would seek suspension as a starting point, but Mr Bright is no longer licensed so it cannot do so in this case. It invites the Tribunal to record what it considers would have been the appropriate penalty had Mr Bright retained his licence. Given the consensual and non-sexual nature of his conduct, the Tribunal would not have cancelled or suspended his licence.

[36] The Tribunal notes what Mr Bright describes as the devastating impact of being charged on his life, including his health and financial situation. This is accepted. He writes though as if he has been acquitted of all the charges, but he was not. The alternative charge of misconduct, based on Mr Bright's own version of the event, was upheld. He cannot attribute to the complainant's false narrative all the unfortunate consequences for him of the charges.

[37] This is Mr Bright's first appearance before the Tribunal.

#### *Censure or reprimand*

[38] It is appropriate to censure Mr Bright to mark the Tribunal's disapproval of his conduct.

#### *Fine*

[39] The maximum fine is \$15,000. The Committee submits a fine in the vicinity of \$6,000 to \$8,000 would be appropriate.

[40] The Tribunal does not find the three READT decisions cited by the Committee to be helpful. They involved wrongful conduct different from that of Mr Bright. Briefly, *Brankin* concerned the more serious charge of disgraceful conduct and the sustained harassment of a colleague. *Lindsay* concerned a licensee who tendered for a property in competition with a client without disclosing that until the last moment. *Licensee B* concerned the more serious charge of disgraceful conduct and involved sexual harassment and bullying over a period of some weeks. We are dealing with a non-sexual isolated incident.

[41] Nor do the health practitioner decisions assist us. The Tribunal does not agree with the submission of counsel for the Committee that *Rabih* and *Miilo* are analogous. They both involved conduct of a sexual and non-consensual nature.

[42] The Tribunal notes Mr Bright's limited income, though he has not disclosed his asset or savings circumstances.

[43] Mr Bright was found guilty of misconduct, which is serious. The event was consensual. It was not sexual, but was motivated by compassion. It was an isolated incident. He readily admitted it (to the extent upheld by the Tribunal). The fine will be \$4,000.

#### Costs

[44] The Committee seeks a contribution of 50 per cent of its costs. A schedule produced to the Tribunal (6 December 2022) shows costs of \$35,546.40, of which \$17,773.20 is sought.

[45] The Tribunal's discretion to award costs is set out in s 110A of the Act, which lists certain factors to take into account. The High Court has identified the relevant considerations relating to the award of costs in professional disciplinary cases:<sup>8</sup>

1. Professional groups should not be expected to bear all the costs of the disciplinary regime.
2. Members who appeared on charges should make a proper contribution towards costs.
3. Costs are not punitive.
4. The practitioner's means, if known, are to be considered.
5. A practitioner's defence should not be deterred by the risks of a costs order.
6. In a general way, 50 per cent of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.

[46] The Tribunal accepts that the Committee's costs of \$35,546.40 are reasonable for charges of this nature. However, the most serious charge was not upheld. Indeed, our dismissal of the most serious charge was by a wide margin.

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<sup>8</sup> *TSM v Professional Conduct Committee* [2015] NZHC 3063 at [21], citing *Vatsyayann v Professional Conduct Committee of New Zealand Medical Council* [2012] NZHC 1138 at [34]. Relied on by the Tribunal in numerous cases. See, for example, *Complaints Assessment Committee 2108 v Rankin* [2022] NZREADT 15 at [128].

[47] Furthermore, Mr Bright had admitted the factual narrative underpinning the alternative charge upheld, though not that such conduct was unprofessional (he resiled at the hearing from an earlier admission it was unprofessional). The acknowledgment of such conduct had been made by Mr Bright early in the Tribunal's process, when he filed his response on 7 July 2020 to the amended charge.<sup>9</sup> A short hearing in order to hear argument as to whether the admitted conduct amounted to professional wrongdoing, would still have been necessary. It would not have required witnesses. Mr Bright correctly attributes the majority of the Committee's costs to the failed charge. The Committee's submission that the same investigation (by counsel) and hearing were required is not correct. The investigation required had largely been carried out by the Authority's own investigators before the charges were filed in the Tribunal.

[48] The usual contribution of 50 per cent of the reasonable costs is not appropriate in this case. Mr Bright will be directed to pay 20 per cent of the costs, being \$7,109.

#### *Compensation to Mr Bright*

[49] For the sake of completeness, the Tribunal records Mr Bright's unique claim for compensation despite the upholding of the alternate misconduct charge. He does not cite any legal basis for the award of compensation in his favour and none is known to the Tribunal. There was no bad faith or obstruction of the Tribunal's process by the Committee. Nor does the Tribunal have the power to direct to the Authority to issue a licence.

#### **ORDERS**

[50] Mr Bright is:

1. Censured.
2. Ordered to pay a fine of \$4,000 to the Authority within one month of this decision.
3. Ordered to pay costs of \$7,109 to the Authority within one month of this decision.

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

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<sup>9</sup> See also Mr Bright's "Comments/Responses to Complaint" dated 31 July 2019 (at [18]).

## **PUBLICATION**

[52] Having regard to the privacy of the complainant and the interests of the public, it is appropriate to order publication of this decision without identifying the complainant.<sup>10</sup>

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D J Plunkett  
Chair

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G J Denley  
Member

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F J Mathieson  
Member

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<sup>10</sup> Real Estate Agents Act 2008, s 108.