

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 72

READT 002/15

IN THE MATTER OF

a charge laid under s 91 of the Real Estate Agents Act 2008

BROUGHT BY

COMPLAINTS ASSESSMENT
COMMITTEE 403

AGAINST

AARON DREVER
Defendant

Substantive Hearing:

8 August 2016

Penalty hearing:

21 October 2016 (at Auckland)

Tribunal:

Hon P J Andrews, Chairperson
Ms N Dangen, Member
Mr G Denley, Member

Appearances:

Ms C Paterson and Ms K Lawson-
Bradshaw, on behalf of the Committee
Mr R Parmenter, on behalf of Mr Drever

Date of Decision:

4 November 2016

**DECISION OF THE TRIBUNAL
(PENALTY)**

Introduction

[1] On 15 January 2015, Complaints Assessment Committee 403 (“the Committee”) laid a charge of misconduct under s 73(a) (disgraceful conduct) of the Real Estate Agents Act 2008 (“the Act”) against the Defendant, Mr Drever. On 8 August 2016 the Committee was given leave to amend the charge to misconduct under s 73(c) of the Act (reckless contraventions of the Act), the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (“the 2009 Rules”), and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the 2012 Rules”).¹ On 8 August 2016, Mr Drever admitted the amended charge. Throughout this decision, references to “the charge” will be to the amended charge.

[2] Mr Drever is a licensed agent, but at the time relating to the present charge, was engaged as a licensed salesperson. The charge was founded on real estate transactions involving three complainants, as summarised below.

Deyermond charge

[3] In early 2013, Mr and Mrs Deyermond (“the Deyermonds”) listed their property at Henderson for sale. Mr Drever was the listing agent. Mr Drever gave them an oral appraisal, when he was required by r 9.5 of the 2009 Rules to give them a written appraisal. He did not provide them with a copy of the New Zealand Residential Property Agency Agreements Guide and the New Zealand Residential Property Sale and Purchase Agreements Guide (“the REAA Guides”). Further, he invited the Deyermonds to sign the agency agreement without entering the appraised value on the agreement, and he did not discuss a marketing plan. Finally, when bringing a customer to view their property, he told the Deyermonds to “shut your mouth, don’t say a word, they’re my clients”, or words to that effect.

¹ The 2009 Rules apply to conduct before 7 April 2013. The 2009 Rules were revoked and replaced by the 2012 Rules as from 8 April 2013.

Van Eijk transaction

[4] Ms Van Eijk listed her property at Kelston for sale in August 2013. Mr Drever was the listing agent. He did not give Ms Van Eijk a written appraisal, and he invited her to sign an agency agreement without entering the appraised value. Mr Drever did not provide Ms Van Eijk with copies of the REAA Guides before she signed the listing agreement or the agreement for sale and purchase. In the course of a rushed process, the only discussion was, briefly, as to the commission Mr Drever would charge, and he promised to get Ms Van Eijk a good price for her property.

Lowe transaction

[5] Ms Lowe listed her property at Glendene for sale with Mr Drever in August 2013. As was the case in the two transactions referred to above, he did not provide her with a written appraisal, the REAA Guides, or a marketing plan. Despite repeated requests, he did not provide Ms Lowe with a copy of the signed listing agreement. Ms Lowe cancelled her listing with Mr Drever in late September 2013, after she learned that he should have provided her with the REAA Guides.

Previous disciplinary history

[6] Mr Drever has been charged with misconduct or unsatisfactory conduct in respect of his conduct as a licensee on eight occasions since 2011. A summary of the conduct, the findings against Mr Drever, and the penalties imposed (in chronological order according to the period of the charged conduct), is set out in an Appendix to this decision.

Penalty principles

[7] As stated by McGrath J, for the majority of the Supreme Court, in *Z v Dental Complaints Assessment Committee*:²

... the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that

² *Z v Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 (SC) at [97].

effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned.

[8] 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.”³ The Act achieves these purposes by:⁴

- (a) Regulating agents, branch managers, and salespersons:
- (b) Raising industry standards:
- (c) Providing accountability through a disciplinary process that is independent, transparent, and effective.

[9] These purposes are best met by penalties for misconduct and unsatisfactory conduct being determined bearing in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection, and the maintenance of confidence in the industry, and the need for deterrence.

[10] A penalty should be appropriate for the particular nature of the misbehaviour, the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances, and should impose the least punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.⁵

[11] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. Briefly, they include:

- [a] Any of the orders that a Complaints Assessment Committee may make under s 93 of the Act (these include censuring or reprimanding the licensee, and ordering the licensee to undergo training or education);
- [b] A fine of up to \$15,000;

³ Real Estate Agents Act 2008, s 3(1).

⁴ Real Estate Agents Act 2008, s 3(2). See also *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804 at [88]–[90].

⁵ For examples, see *Complaints Assessment Committee v Khan* [2011] NZREADT 11; *Complaints Assessment Committee v Raj* [2013] NZREADT 52; *Complaints Assessment Committee v Ferguson* [2013] NZREADT 30.

- [c] Cancellation or suspension of the licensee's licence;
- [d] An order that the licensee not perform any supervisory functions until authorised to do so;
- [e] An order that a licensee's employment (or engagement if the licensee is an independent contractor) be terminated and that no agent may employ or engage the licensee;
- [f] An order that the licensee pay compensation of up to \$100,000 to any person who has suffered loss by reason of the licensee's misconduct.

[12] We record that Mr Drever voluntarily suspended his licence as from 29 January 2016.

Evidence

[13] The Tribunal was provided with an affidavit affirmed by Mr Drever on 19 October 2016. Mr Drever stated that he is now 33, and has been a land agent since he was 18. He set out the "root cause of my failings" which led to his appearances before the Tribunal, over the past five years. He said that during this period he had no effective supervision and support, while at the time he was frantically busy. He was selling a very large number of properties, and was earning "over a million dollars a year". He was ranked the Number One salesperson internationally in the agency he worked for between 2011 and 2013, and was ranked the Number Four salesperson nationally (Number 5 internationally) in the agency he worked for between 2013 and 2015.

[14] Mr Drever was cross-examined on his affidavit. He said again that he had not received sufficient supervision or management oversight, such that his shortcomings would have been picked up. In the case of one agency, he said there were no systems in place that would have ensured that the REAA Guides could be provided, as the manager of that agency did not want to pay for them. He also said that this agency was not paying commission owed to him. Another reason for failing to

comply with the Rules and the Act was that he was in the process of trying to leave the agency at the relevant time. Finally, he said that one of the charges was in relation to conduct as an auctioneer.

[15] Mr Drever accepted that he had not “dotted his i’s and crossed his t’s”, but said this was not done intentionally, but resulted from the volume of business he was doing, and the fact that no one was providing supervision, management, or help. When asked why he did not consider taking fewer listings, he responded that it was necessary to keep business coming in, in order to maintain an income.⁶ He further said that if he had reduced his listings, he would have faced complaints from clients that he had left them.

[16] In answer to questions from the Tribunal, Mr Drever outlined the training he received before receiving his licence, and training courses he had completed since his voluntary suspension.

Submissions

The Committee

[17] Ms Paterson for the Committee first noted that Mr Drever was originally charged in respect of the three complaints in January 2015. He denied all particulars of the charge during the investigation, in his response to the charge, and in his statement of evidence provided to the Tribunal in July 2016. He admitted the amended charge on the morning the hearing was to begin, after counsel for the Committee was given leave to withdraw certain particulars.

[18] Ms Paterson submitted that the three complaints are highly similar to each other, involving failure to provide written appraisals, to provide the REAA Guides, to provide written marketing plans, and to ensure that essential particulars were included in listing agreements. She submitted that Mr Drever’s conduct is serious, in being repeated breaches of an agent’s fundamental obligations to ensure that clients are fully aware of and understand the process cost of selling their homes.

⁶ The Tribunal notes that this is in contrast to Mr Drever’s statement that he was earning “over a million dollars a year” at that particular agency.

[19] Ms Paterson further submitted that, as Mr Drever acknowledged by admitting the charge under s 73(c) of the Act, his conduct amounted to reckless breaches of the Act and Rules. She submitted that Mr Drever had demonstrated a cavalier attitude to the obligations he owed to each complainant and, overall, a reckless approach to undertaking real estate agency work.

[20] Ms Paterson also referred to Mr Drever's previous disciplinary history, noting that those charges were in respect of conduct that is similar to his conduct in the present case. She submitted that the previous disciplinary findings are directly relevant to the Tribunal's penalty decision in this case, and are a highly aggravating factor. Mr Drever had failed to learn from previous disciplinary sanctions, and had persevered with the same cavalier approach towards his clients and customers. She submitted that Mr Drever either lacks insight into the causes or effects of his repeated breaches of his professional obligations, or is unable to comply with them (in the sense that he has continued to act in the same way by recklessly breaching the same rules despite repeated regulatory intervention).

[21] Finally, Ms Paterson submitted that when Mr Drever's present conduct is viewed in the context of his previous disciplinary history, nothing less than cancellation of Mr Drever's licence would adequately protect the public. She submitted that his continued breaches shows he lacks insight into his conduct, and is unable and/or unwilling to comply with the the duties and obligations required of licensees. She submitted that the Tribunal could have no confidence that Mr Drever would not continue to breach those duties and obligations. Accordingly, she submitted, any penalty short of cancellation would not provide sufficient protection for the public.

Mr Drever

[22] On behalf of Mr Drever, Mr Parmenter submitted that cancellation of Mr Drever's licence would be unfairly excessive in all the circumstances, and that a suspension for the maximum period of two years, coupled with further orders, would be the most appropriate response to the charge.

[23] Mr Parmenter submitted that there was no element of dishonesty in the present charge, or in Mr Drever’s disciplinary history. He further submitted that Mr Drever’s offences were, by and large, matters of omission rather than commission. He submitted that what “screams out” from the charged conduct is an agent under pressure, and an agent balancing a number of competing claims to his available time. He acknowledged that this did not excuse unprofessional behaviour, but submitted that the causes of the conduct in respect of which Mr Drever was charged should be looked at by the Tribunal when considering his penalty, and that it should recognise that “some of the blame is systemic and beyond Mr Drever”.

[24] In regard to Mr Drever’s personal circumstances, Mr Parmenter submitted that real estate work is all Mr Drever has for the earning of a living, as he has no other qualifications, and no other experience. He submitted that Mr Drever would suffer a very substantial financial loss from a two-year suspension, which would be a heavy price to pay for his conduct. He further submitted that cancellation, with no light at the end of the tunnel, would be a punishment of cruel proportions.

Assessment

[25] Counsel were not able to refer us to any previous misconduct penalty decisions which are on all fours with the present case. Ms Paterson referred us to recent penalty decisions in respect of wilful or reckless breaches of the Act or Rules.⁷ There appears to have no relevant previous history in any of these cases. The penalties imposed in the cases referred to ranged from cancellation⁸ to fines (and in one case, the Tribunal noted that it would have cancelled the licensee’s licence if he had not voluntarily suspended it).⁹

[26] In determining the appropriate penalty for misconduct, the nature of the misconduct will be considered along with other factors. In *Hart v Auckland Standards Committee* (in relation to a lawyer), the High Court noted that the

⁷ See *Complaints Assessment Committee v Hughes* [2016] NZREADT 57, *Complaints Assessment Committee v Cui* [2015] NZREADT 23, *Complaints Assessment Committee v Morgan* [2015] NZREADT 21, *Complaints Assessment Committee v Stevenson* [2013] NZREADT 74, and *Complaints Assessment Committee v Picknell* [2013] NZREADT 41.

⁸ *Complaints Assessment Committee v Stevenson*, above n 7.

⁹ *Complaints Assessment Committee v Hughes*, above n 7.

“ultimate issue” is as to the practitioner’s fitness to practise, and factors which will inform this decision include the nature and gravity of the charges, the manner in which the practitioner has responded to the charges (such as the practitioner’s willingness to co-operate in the investigation, to acknowledge error or wrongdoing, and to accept responsibility for the conduct), and the practitioner’s previous disciplinary history.¹⁰

[27] We do not accept that any lack of supervision, management oversight, or systems within an agency ameliorates Mr Drever’s conduct to any great extent. If those were lacking, Mr Drever could have made a complaint to the Authority in respect of the manager concerned. We do not accept that, for any reason, Mr Drever was unable to comply, or was prevented from complying, with his obligations under the Act and Rules. Rather, his conduct over the course of several years shows that he ignored those obligations. His wish to maintain an income, and the fact that (at the time of some of the charged conduct) he may have been trying to leave an agency, do not provide a satisfactory explanation for his conduct, and it does not excuse it.

[28] Put simply (and as was submitted on his behalf), Mr Drever took on far too much business, and he failed to ensure that there were back-up systems to manage the business he had taken on. Notwithstanding his assertion that he was engaged as a licensed salesperson, Mr Drever would have been well aware, as a consequence of his status as a licensed agent, that the agency which engaged him had to be managed appropriately. Finally, Mr Drever’s repeated plea that he had been inadequately supervised and managed indicates that he failed to take responsibility for his conduct, and failed to comprehend what was required to remedy the situation.

[29] Finally, we do not accept that (as Mr Drever appeared to be suggesting) a charge relating to conduct as auctioneer should be regarded any differently from any other charge. As an auctioneer, Mr Drever was carrying out real estate agency work just as he was when listing a property, marketing the property, and completing a sale for a client.

¹⁰ *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2013] NZHC 83, [2013] 3 NZLR 103 at [185]–[189].

[30] The nature of the conduct which was the foundation for the present charge would not, on its own, justify a serious penalty. However, it must be viewed in the context of the conduct which led to the earlier charges, and the penalties imposed. The previous disciplinary findings against Mr Drever are, as Ms Paterson submitted, a seriously aggravating factor. Mr Drever asserted that poor supervision and management was the “root cause” of his breaches. However, that assertion was directed only at the first agency he was engaged by, and his breaches continued after he left that agency.

[31] The number of charges Mr Drever has faced since mid-August 2011 over the course of his engagement by two agencies, and the fact that he has been ordered to complete courses of training on three occasions, on three different aspects of real estate agency work, causes the Tribunal to have grave concerns as to Mr Drever’s competence to carry out real estate agency work to the standard required within the industry, and his commitment to avoiding any further breaches of the Act and Rules. So, too, does the fact that when he appeared before the Tribunal in December 2014, Mr Drever was given a “polite warning” as to the possible consequences should he appear again before the Tribunal.

[32] As noted earlier, we must consider Mr Drever’s personal circumstances. We take into account Mr Parmenter’s submission that real estate work is all Mr Drever knows, and that he has no training or experience for any other work. We also take into account his submission as to the substantial financial loss Mr Drever will suffer as a result of a suspension, and that a cancellation would give him no “light at the end of the tunnel”. A factor weighing in Mr Drever’s favour is the fact that he has undertaken some training courses since his voluntary suspension.

[33] In deciding whether it should make an order cancelling Mr Drever’s licence, the Tribunal is required to consider whether Mr Drever is a “fit and proper person to hold a licence.”¹¹ Having considered all of the factors set out above, we have concluded that cancellation of his licence is the only appropriate response to Mr Drever’s continuing breaches of his obligations. A less punitive penalty would not

¹¹ Real Estate Agents Act 2008, s 36 (1)(c) of the Act: “Entitlement to licence”.

serve the purposes of the Act and the principles on which penalties are determined for breaches of the Act and the Rules.

Orders

[34] Having admitted the charge, the Tribunal finds the charge of misconduct under s 73(c) of the Act (reckless contraventions of the Real Estate Agents Act 2008 and Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012) proved.

[35] Pursuant to s 110(2)(b) of the Act, the Tribunal orders that Mr Drever's licence is cancelled.

[36] Mr Drever is ordered to pay \$3,000 as a contribution to the Authority's costs in relation to this charge.

[37] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms N Dangen
Member

Appendix: Complaints Assessment Committee: Charge against Aaron Drever

Summary of Previous Disciplinary Findings

Complaint Reference	Period of Charged Conduct	Nature of Conduct	Substantive Decision	Penalty Decision
CA4825587	January–February 2011	Conduct relating to instructions for sale by auction	22 August 2011 Unsatisfactory conduct	4 November 2011 Censured (appealed by Complainant; settlement reached)
CB5858318	November 2011	Did not provide Guides, provided insufficient information relating to subdivision, did not insert material particulars on sale and purchase agreement, did not advise purchasers to seek legal advice	10 October 2012 Unsatisfactory conduct	13 December 2012 Censured Fined \$2,500 Ordered to reimburse Complainant \$1,035
C00412	March–August 2012	Failed to explain amendments to sale and purchase agreement, overcharged commission because care not taken to confirm the actual price	17 October 2013 Unsatisfactory conduct	14 April 2014 Censured Ordered to complete course “Demonstrate knowledge and use of inspection, appraisal and agency agreement for real estate property” Refund fees to Complainant Fined \$3,500
C00566	December 2012–January 2013	Acted in conflict of interest, failed to obtain written confirmation of commission agreement	27 June 2013 Unsatisfactory conduct	27 August 2013 Censured Ordered to complete course “Explain the principles of ethics applying to real estate practice”
READT 036/14	2013	Held advertising money in his personal bank account rather than	25 November 2014 (Guilty plea)	18 December 2014 [2014] NZREADT 101

		depositing it in the agency's account	Misconduct (Seriously negligent real estate work)	Ordered to complete "a suitable refresher educational course to focus on general office practice in handling clients' and customers' money" Fined \$5,000 Contribution to costs \$2,00
C07072	September–October 2014	Failed to provide Complainant with copies of photographs, failed to provide Complainant with prompt feedback about open homes, failed to attend meetings, put pressure on Complainant to withdraw her complaint to the agency regarding his conduct	15 September 2015 Unsatisfactory conduct	17 December 2015 Censured Ordered to reduce, cancel, or refund fees up to \$10,000 Fined \$8,000
C06292	August–September 2014	Failed to follow Complainants' instructions, failed to ensure that he explained matters relating to the sale of a property to a level and in a manner that the Complainants understood the process	5 November 2015 Unsatisfactory conduct (Under appeal)	17 March 2016 Censured Ordered to rectify error omission at his own expense Fined \$5,000
C07275	December 2014–April 2015	Pressured Complainants (purchasers) to sign a variation to the sale and purchase agreement, failed in his obligations to the Complainants as he went overseas and did not delegate his ongoing transactions to another licensee within the agency	15 December 2015 Unsatisfactory conduct	11 March 2016 Censured Fined \$10,000 Ordered to pay costs or expenses incurred to the Complainant