

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 32

Reference No: READT 017/2022

IN THE MATTER OF

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

BETWEEN

UM
Appellant

AND

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

AND

NED GOW
Second Respondent

AND

SU
Third Respondent

Tribunal:

D J Plunkett (Chair)
G J Denley (Member)
P N O'Connor (Member)

Representation:

The appellant:	Self-represented
Counsel for the first respondent:	M Mortimer-Wang, A Stuart
Counsel for the second respondent:	R Stewart, H Piggin, K Achari
The third respondent:	No appearance

SUBJECT TO NON-PUBLICATION ORDER

DECISION (PENALTY)
Dated 3 November 2023

INTRODUCTION

[1] UM, also known as [redacted], the appellant, was the highest bidder at an auction of a dairy/superette property in central Auckland (the property). The sale and purchase agreement (the agreement) was ultimately cancelled. She made a complaint to the Real Estate Agents Authority (the Authority), the first respondent. It was against both the agent, Ned Gow, the second respondent, and the auctioneer, the third respondent. She alleged amongst other things, that Mr Gow misrepresented the annual rent. Complaints Assessment Committee 2103 (the Committee) decided to take no further action on her complaint.

[2] The appellant appealed to the Tribunal. On 26 July 2023, the Tribunal partially upheld her complaint and found unsatisfactory conduct on the part of Mr Gow as he overstated the actual rent paid in the immediate past.¹ It dismissed the complaint against the auctioneer.

[3] The Tribunal will now assess the appropriate penalty. The appellant seeks substantial compensation and costs.

BACKGROUND

[4] The narrative is recorded in greater detail in the Tribunal's earlier decision and will only be summarised here.

[5] Mr Gow is a licensed salesperson under the Real Estate Agents Act 2008 (the Act). He was engaged by Colliers International Ltd (the agency).

[6] The appellant was the highest bidder at an auction on 2 September 2020. The transaction did not proceed as the agreement was cancelled. The purchaser forfeited part of the deposit.

[7] The agency's online listing and hard copy advertising had stated that the net annual return was \$49,062. However, unknown to Mr Gow, the owner had granted the existing tenant a rental holiday during the COVID-19 lockdowns of \$9,405.15, so the annual rent in the 12 months prior to the auction was \$39,656.85, not \$49,062.

[8] The Tribunal found that Mr Gow's representation concerning the net annual rent was a positive statement as to not just the contractual rent, but also the actual rent paid in the recent past. This representation was incorrect and misleading. The misrepresentation was found to be innocent, not deliberate deceit. It amounted to a

¹ *UM v Real Estate Agents Authority* [2023] NZREADT 17.

breach of r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules). Mr Gow did not have good grounds to make the representation, having failed to ask the owner whether all the rent had been paid.

[9] Furthermore, Mr Gow had in his possession the owner's bank statements, which would have showed him the representation as to the net annual rent was not correct. He did not deliberately withhold them from the appellant, but carelessly sat on them without assessing them. The failure to analyse the bank statements and hence inform the appellant of the non-payment of rent amounted to a failure to exercise skill and diligence in regard to a significant feature of the property, being the actual rent paid in the recent past. This was a breach of r 5.1 of the Rules.

[10] The Tribunal found the breaches of rr 6.4 and 5.1 to amount to unsatisfactory conduct under s 72(a) and (b) of the Act. It accordingly upheld the appeal in respect of the misleading statement as to the actual rent paid, but otherwise dismissed it.

SUBMISSIONS ON PENALTY ORDERS

Submissions of the appellant

[11] In her submissions (16 August 2023), the appellant outlines what she contends were the severe consequences for her due to Mr Gow's unsatisfactory conduct. His misrepresentation led to significant financial, emotional and health consequences.

[12] The appellant says she was significantly influenced by the representation as to the net rent being \$49,062. She was targeting a yield of 5.219%, so based on the rent, she agreed a price of \$940,000. The rent though was only \$39,656.85, so using the same yield, the appropriate valuation was \$759,855. Hence, she overpaid \$180,144.66. This direct financial loss was avoided by eventually cancelling the agreement.

[13] According to the appellant, she has been a dedicated university employee for more than 17 years enjoying stable emotional and physical health. Following the distressing encounter with Mr Gow, the emotional turmoil led to 15 counselling sessions. She believes that a sudden spike in her blood pressure was the result of stress from this case. It required medical treatment and sleeping aids.

[14] Moreover, says the appellant, her professional life as a teacher was adversely affected. The demands of the case encroached upon her weekends and holidays, depriving her of much needed rest and recreation.

[15] The appellant calculates the total estimated cost to her to be \$148,145. This is largely her own time (at an hourly rate of \$75) attending counselling, communicating with various parties (such as Mr Gow/the agency, valuers, property and litigation lawyers, the Authority and the Tribunal), seeking funding due to the low earthquake threshold and collecting evidence. The appellant says she dedicated more than 600 hours to meticulously crafting numerous submissions and communications over the course of the appeal to ensure justice was served.

[16] There is a breakdown of the heads of claim in the appellant's submissions:

Summary Table of Total Estimated Costs

Item/Activity	Amount
Counselling with Registered Counsellors	\$2,050
Communication with Colliers regarding the property	\$2,372.40
Funding Arrangements	\$2,047.50
Communication with Valuers and Valuation Costs	\$4,112.50
Communication with Property Lawyers and Lawyers' Cost	\$5,544.50
Communication with Litigation Lawyers and Legal Fees	\$38,545.63
Loss of Deposit	\$45,000
Communication with REA and Evidence Collection	\$8,550
Communication with Tribunal and Submissions	\$39,922.50
Total Estimated Costs	**\$148,145**

[17] It is submitted that considering the magnitude of the costs, lost opportunities and the emotional toll, the Tribunal should award compensation at or near the statutory maximum of \$100,000.

[18] In support, the appellant attaches a detailed schedule of her own time, a schedule of counselling appointments, invoices from valuers and lawyers, as well as photographs of her medication.

[19] There were further submissions from the appellant (18 October 2023). She repeats much of her earlier submissions. According to the appellant, at the heart of the case lies the egregious conduct of Mr Gow. The very essence of a professional's duty is to provide accurate and clear information. Mr Gow's misrepresentation led to significant financial, emotional and health consequences for her.

[20] An independent valuation assessed the property's market value to be between \$645,000 and \$770,000, with an adopted value of \$700,000 (plus GST), as of 20 November 2020. When compared to the price of \$940,000 paid by the appellant, the

overpayment is up to \$295,000. This showcases the profound financial impact of the misrepresented rental income on her.

[21] According to the appellant, had Mr Gow been transparent about the actual rental income, she might have refrained from bidding, avoiding an overcommitment and the ensuing ordeal of three years. The cancellation was directly precipitated by Mr Gow's misrepresentation. The cancellation prevented a direct financial loss of \$180,144.66, but it did not shield her from the other substantial losses.

[22] Far from being an innocuous or technical oversight, Mr Gow's actions appear to be deliberate. They misled an unsuspecting and inexperienced commercial property investor. The tangible losses incurred were \$84,412.63, being:

1. A forfeited deposit of \$45,000.
2. Accumulated legal and valuation expenses associated with the purchase and settlement, of \$39,412.63.

[23] Furthermore, over the course of the complaint, the appellant dedicated more than 600 hours meticulously preparing a plethora of documents, submissions and correspondence, as well as attending counselling and organising funding. At \$75 per hour, this amounts to additional costs of \$63,632.40 or \$63,732.37.²

[24] While the lawyers' invoices pertain to the purchase of the property and the ensuing civil dispute, the root cause of the legal engagements was Mr Gow's misrepresentation.

[25] The appellant contends she has clearly demonstrated causal links between the losses claimed and Mr Gow's breaches, emphasising that the costs were the foreseeable consequences of his conduct.

[26] The appellant says that following the ordeal with Mr Gow, she experienced elevated blood pressure and cholesterol, and was diagnosed with cancer. She firmly believes that stress from the case directly contributed to her subsequent health challenges. The relentless demands of the case consumed her free hours, weekends and holidays, leaving her perpetually exhausted.

[27] It is contended that the insertion of s 110A of the Act, the Tribunal's discretion to award costs, is particularly noteworthy for self-represented litigants. The amendment

² The different figures and the mathematics are from the appellant.

provides a balanced and equitable framework preventing financial disadvantage to those without the means to hire a lawyer.

[28] The essence of the appellant's participation in the proceedings is her genuine belief that she was misled by Mr Gow. This belief is not based on any whim or unfounded suspicion, but stems from her actual experience and interactions with Mr Gow. Some of her allegations, even if not upheld, were based on her genuine experience and perceptions.

[29] The hours the appellant spent navigating the complexities of the disciplinary proceedings are not just about financial recompense, but an acknowledgement of the personal strain and sacrifice endured. Treating such claims as costs would set a concerning precedent. It would suggest that individuals who seek justice, especially those without legal representation, should bear the burden of their time without adequate compensation.

[30] The appellant's lack of success on ancillary procedural matters does not negate the substantive finding that she prevailed on the core issue of Mr Gow's unsatisfactory conduct. The heart of the case was the misrepresentation of rental payments, which takes precedence over other secondary issues. It is crucial to note that the lack of success was on minor aspects. The minor setbacks on secondary issues pale in comparison to the decisive triumph on the central matter. The true rental payment is a cornerstone of commercial property investments.

[31] The principle of reciprocity emphasises the idea of mutual exchange. The appellant's immense dedication and time invested in seeking justice should be reciprocated by appropriate compensation. The effort, akin to that of a legal representative, underscores the commitment to redress.

[32] Mr Gow argues that a censure is significant, but it pales in comparison to the substantial harm caused to the appellant in this case. The Authority's suggested fine of \$3,000, when juxtaposed with the gravity of the misrepresentation, appears markedly insufficient. The breaches in the precedent cases cited by both counsel, in terms of their nature, scope and materiality, make it clear that the current case stands apart in its severity and impact. It is submitted that a fine of \$10,000 would be a proportionate penalty for Mr Gow's egregious conduct.

[33] In support, the appellant adduces a valuation report (20 November 2020) setting out an assessment of the market value of the property at 19 November 2020. It is assessed to be in the vicinity of \$645,000 to \$770,000, with an adopted market value of \$700,000 (plus GST).

Submissions of the Authority

[34] In his submissions (6 September 2023), Mr Mortimer-Wang on behalf of the Authority notes that Mr Gow's misrepresentation concerning the rent was a matter of importance to the appellant. It is therefore something that should have been checked by him before he made the representation. However, it could not be said that the incorrect statement was made without any foundation, as Mr Gow did check the lease. As the Tribunal found, he should have gone further.

[35] The Authority submits there is a need for general deterrence. Licensees need to know there are consequences for not checking the basis for their representations about material matters.

[36] It is noted that Mr Gow does not have a disciplinary history.

[37] Having regard to the penalties in *Wilson* and *Tesar*, the Authority submits the appropriate penalty would be:³

1. Censure.
2. A fine in the vicinity of \$3,000.

[38] In respect of the appellant's claim for compensation, some aspects are more appropriately treated as a costs matter rather than compensation for loss. The Tribunal can award costs to a successful party in an appeal, but costs in the Tribunal do not follow the event in the same way as for ordinary proceedings in the civil courts. There is a simple answer to the question of costs. The appellant is self-represented and while entitled to recover disbursements, she is not entitled to recover costs. If a costs award was to be made, the Tribunal might take into account that the appellant did not succeed on an interlocutory application and on most of her appeal grounds.

[39] The Authority acknowledges that there is no legal barrier to the Tribunal self-referring a compensation claim. If it reverses or modifies a decision of a Committee, it may exercise any of the powers that the Committee could have exercised, including a referral under s 93(1)(ha). This is consistent with the consumer protection focus of the Act. Access to the Tribunal should not be unduly deterred.

[40] In self-referring, the Tribunal would have to be satisfied of the existence of the same criteria as the Committee would have to be. The Committee's role in considering such a referral is to act as a screening mechanism, using the criteria of "more than a

³ *Wilson v Real Estate Agents Authority* [2023] NZREADT 15; and *Tesar v Real Estate Agents Authority* [2014] NZREADT 18.

minor or technical” breach to filter out the lowest level claims. It should not perform a ‘dry run’ of any compensation claim, as it is not for the Committee to assess the merits of the compensation claim.

[41] In regard to the claim for compensation here, Mr Gow’s unsatisfactory conduct might properly be seen as towards the less serious end of the spectrum, but it was not a minor or technical breach. The misrepresentation was about an important matter. However, in terms of the overall appropriateness of compensation, the Tribunal may wish to first confirm the terms of any settlement agreement between the appellant and the agency. It is unlikely to make a compensation order that would result in a windfall for the appellant.

Submissions of Mr Gow

[42] In his submissions (27 September 2023), Mr Stewart submits Mr Gow’s behaviour was at the low end of unsatisfactory conduct. A finding of unsatisfactory conduct is a sufficient penalty. At most, a censure should be ordered.

[43] Mr Gow’s statement as to the rent was innocent. He had a strong foundation for the statement, as it reflected the rent provided for in the lease. His failure to review the bank statements was an innocent oversight.

[44] It is relevant to note that Mr Gow fully cooperated with the complaints process. Furthermore, he was put to the cost of responding to the appellant’s extensive and repetitive submissions, which included very serious allegations of dishonesty and exploitation which the Tribunal found to be baseless.

[45] It is submitted that, as in *Zhang*, an unsatisfactory conduct finding is a sufficient penalty.⁴ Such a finding is, in itself, a black mark on the record of Mr Gow and the agency. He has no prior disciplinary history. His conduct did not significantly impact the appellant, as she ultimately did not purchase the property.

[46] In respect of compensation, the starting point is that the appellant is barred from such a claim as the parties (the appellant, the owner, Mr Gow and the agency) entered into a legal settlement. The parties agreed to terms in relation to all matters arising out of the civil dispute between them. The terms of the agreement are confidential, though

⁴ *Zhang v Real Estate Agents Authority* [2015] NZREADT 39.

its existence is not. The agency and the appellant consent to it being disclosed to the Tribunal, though the owner's consent is conditional.⁵

[47] It is submitted that the appellant has not proven the requisite causal link between Mr Gow's conduct and the compensation sought.

[48] Some of the appellant's claims are more appropriately treated as claims for costs, which are not claimable as the appellant is a self-represented litigant. Many of the expenses claimed do not even relate to the complaints process. Expenses are recoverable only if they are specific to and necessary for the conduct of the complaint proceeding and are reasonable in amount.

[49] It is further submitted that the appellant has not participated in the proceedings in good faith. She has made repeated allegations of dishonesty on the part of Mr Gow, none of which were found to be true. Nor has she acted in a manner that facilitated the resolution of the issues. Of the eleven different heads of complaint, only one was upheld by the Tribunal.

[50] According to counsel, the primary focus in disciplinary cases is the maintenance of professional standards and the protection of the public. They do not replicate, and are not a substitute for, private civil proceedings. In this case, the parties have already had a civil dispute and agreed terms. It would be wholly inappropriate to award compensation in the circumstances.

[51] There is another memorandum (19 October 2023) from Mr Stewart, in reply to that of 18 October 2023 from the appellant. He submits that the valuation report is new evidence, which does not form part of the evidence which the Tribunal is able to consider.

PENALTY

Jurisdiction and principles

[52] Having found unsatisfactory conduct on the part of Mr Gow and modified the Committee's decision to take no further action, the Tribunal may exercise any of the powers that the Committee could have exercised had it found unsatisfactory conduct.⁶ The Committee's power to make penalty orders is set out at s 93 of the Act:

⁵ The claim for compensation is assessed later. Given the Tribunal's dismissal of the claim predominantly on the basis that any losses or expenses were not caused by the misrepresentation, neither the owner's condition nor the settlement agreement are relevant.

⁶ Real Estate Agents Act 2008, s 111(5).

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:
 - (ha) if the Committee is satisfied that the unsatisfactory conduct involves more than a minor or technical breach of this Act or of any regulations or rules made under this Act, make an order referring the matter to the Disciplinary Tribunal for the Tribunal to consider whether to make a compensation order under section 110(5):
 - (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.

[53] 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.

[54] The focus of professional disciplinary proceedings is not punishment, but the protection of the public.⁷

...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 *Zideman 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.

[55] 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.⁸

[56] 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.⁹

⁷ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] and [151].

⁸ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 and 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; and *Z*, above n 7, at [151].

⁹ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

[57] The most appropriate penalty is that which:¹⁰

- (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.

DISCUSSION

[58] The Tribunal has found that Mr Gow misrepresented to the appellant, the purchaser of a commercial property, the net annual rent. The lease required the payment of \$49,062 annually in rent, but in the twelve months immediately prior to the auction, the tenant had paid only \$39,656.85. This was due to an informal temporary arrangement between the owner and the tenant, rent relief having been granted as a result of the COVID-19 lockdowns.

[59] The incorrect statement as to the annual rent was innocent, as Mr Gow was not aware of the rental holiday granted. We do not agree with Mr Stewart's submission that Mr Gow had a strong foundation for the misrepresentation. The lease was a foundation, but he had not asked the owner whether all the contracted rent had been paid and he had not reviewed the owner's bank statements in his possession, despite this being the time of lockdowns and rental holidays.

[60] Mr Gow was found to have breached rr 5.1 (requiring skill and diligence) and 6.4 (must not mislead) of the Rules and to be guilty of unsatisfactory conduct.

¹⁰ *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].

[61] The Tribunal agrees with Mr Mortimer-Wang's classification of Mr Gow's wrongdoing as being towards the less serious end of the spectrum or as low-medium, but it is not so low as to be minor or technical, as Mr Stewart contends. It concerned an important matter for the appellant and there were breaches of two rules.

[62] Mr Gow does not have a disciplinary history. He cooperated in the complaint process, but we note that he has made no apology for his misrepresentation.

[63] The Tribunal has the power to impose any penalty that the Committee could have imposed, had it found unsatisfactory conduct.

Censure or reprimand

[64] Mr Mortimer-Wang seeks a censure. Mr Stewart does not dispute that censure may be appropriate. We do not agree with his submission that the finding of unsatisfactory conduct of itself, with its attendant publicity and reputational damage, is an adequate penalty. Mr Gow will be censured.

Relief and compensation

[65] The Committee, and therefore the Tribunal, has the power to order a licensee to rectify any error or omission, or where that is not practical, to pay any expense of relief from the consequences of the error or omission.¹¹ The appellant would no doubt say that she rectified the omission, or at least relieved herself of its consequences, by cancelling the agreement. Hence she would say she is entitled, as a minimum, to reimbursement by Mr Gow of the forfeited deposit and the other expenses resulting from cancellation or wasted by cancellation (such as the costs of the aborted purchase).

[66] For the reasons given below for dismissing the claim for compensation, notably that it has not been established that cancellation was caused by the misrepresentation and that it was a reasonable consequence of the misrepresentation, we will not award any of the reimbursement sought as relief from the misrepresentation.

[67] Turning then to the Committee's power to refer the making of a compensation order to the Tribunal (where the Committee itself finds unsatisfactory conduct), there is an issue as to whether the Tribunal has jurisdiction to award compensation in circumstances where it has found unsatisfactory conduct, not the Committee.

¹¹ Real Estate Agents Act, s 93(1)(f).

[68] Mr Stewart submits the Tribunal does not have the power to order compensation in this case for two reasons:

1. It would amount to a blurring of the roles of the Authority and the Tribunal and would be inconsistent with the independent and transparent disciplinary process.
2. The referral power is discretionary and should not be exercised where, as here, the breach is minor or technical.

[69] Had the Committee itself found unsatisfactory conduct and that it was more than a minor or technical breach, it could have referred to the Tribunal consideration of whether to make a compensation order.¹² We have already found that Mr Gow's innocent misrepresentation as to the annual rent is more than a minor or technical breach of the Rules, so it follows that we consider the Committee could and should have referred the issue of compensation to the Tribunal (this disposes of Mr Stewart's second objection to the Tribunal considering the claim for compensation).

[70] If the Committee could (indeed should) have referred to the Tribunal the issue of compensation, we find that the Tribunal must have the power to consider compensation in circumstances where it finds unsatisfactory conduct on appeal. Such a power would be congruent with the Tribunal's power to consider compensation where a charge is upheld, whether the charge is misconduct or unsatisfactory conduct.¹³ We agree with Mr Mortimer-Wang that the power to 'self-refer' the issue of compensation to the Tribunal is consistent with the consumer protection focus of the Act.

[71] It would seem to us to be somewhat nonsensical for the Tribunal to refer back to the Committee consideration of referring to the Tribunal whether a compensation order should be made, in circumstances where we have found the unsatisfactory conduct is not a minor or technical breach (thereby disposing of Mr Stewart's first objection). There would be no principled basis for the Committee to refuse to refer the matter of compensation to the Tribunal. As Mr Mortimer-Wang contends, it is not for the Committee to assess the compensation claim in any way.

[72] The measure of loss compensatable should also be consistent with the Tribunal's power to award compensation where referred by the Committee. Hence, the person seeking compensation on an appeal must have "suffered loss by reason of the licensee's unsatisfactory conduct".¹⁴ While this phrase is interpreted broadly, the loss for which

¹² Section 93(1)(ha).

¹³ Sections 110(2)(g) and (4).

¹⁴ Section 110(4)(b), as directed by s 110(5).

compensation can be directed must bear a “causal connection” to the unsatisfactory conduct found.¹⁵

[73] The appellant did not proceed with the purchase. One of the reasons the appellant gives is what she describes as the challenge of securing a loan due to the building’s earthquake rating.¹⁶ This head of complaint against Mr Gow was dismissed by the Tribunal, as there is evidence she obtained finance for the purchase.¹⁷

[74] The appellant primarily blames Mr Gow’s misrepresentation for the cancellation of the agreement.¹⁸ Yet there is no evidence she paid more than the market value for the property (being the market value with knowledge of the tenant’s rental holiday).¹⁹ There is no evidence that knowledge of the short, past rental holiday would have had any effect on the value of the property. Nor is there any evidence that the tenant’s historic inability to pay all the rent continued post-auction. It is not alleged the tenant absconded or defaulted on the rent. In other words, there is no evidence the tenant could not or did not pay \$49,062 annually from the time of the auction.

[75] While the appellant appears to believe that cancellation was “directly precipitated” by Mr Gow’s misrepresentation,²⁰ such a consequence would not be a reasonable or foreseeable reaction to the misrepresentation. On the evidence before us, we find that the appellant is attributing to Mr Gow what she came to believe, for reasons which are unjustified, was a poor investment or an investment she could not afford.

[76] The appellant has not established any causal connection between her expenses and Mr Gow’s misrepresentation. It follows that she is not entitled to reimbursement for the partial loss of the deposit or any other loss or expense resulting from the cancellation.

[77] We make the same finding concerning the appellant’s health and the expenses associated with it. It is unfortunate that her health deteriorated but it has not been shown that had anything to do with Mr Gow’s misrepresentation.

[78] There is another reason to reject the claim for compensation. The appellant has indiscriminately mixed into the claim various items which, on the evidence before us,

¹⁵ *Complaints Assessment Committee 409 v Cartwright* [2018] NZREADT 25 at [46] and [49].

¹⁶ Appellant’s submissions (16 August 2023) at [7].

¹⁷ *UM v Real Estate Agents Authority*, above n 1, at [98].

¹⁸ Appellant’s submissions (16 August 2023) at [25] and (18 October 2023) at [93].

¹⁹ We have had no regard to the late emerging valuation report (20 November 2020). Leave to adduce this new evidence should have been sought by the appellant in her earlier interlocutory application. In any event, it is based on the assumption, unsupported by the evidence, that a 50% abatement in rental until expiry of the lease should be applied.

²⁰ Appellant’s submissions (18 October 2023) at [93].

bear no relation to Mr Gow's misrepresentation and/or are otherwise irrecoverable in this appeal proceeding.

[79] First, the Tribunal is aware of an expert determination (12 November 2020) which apparently addressed the appellant's complaint against the owner. We have not seen the determination and do not know its outcome. Mr Gow was not a party.²¹ As Mr Stewart points out, there are costs relating to the civil dispute between the parties, which the appellant is impermissibly seeking to recover. There is not just the expert determination, but also the confidential settlement deed in late 2020. The Tribunal has not seen the deed and does not know the nature of the civil dispute or its outcome. If these processes related to Mr Gow's misrepresentation (as to which we do not know), the appellant should have sought the attendant valuation and legal costs of the dispute as part of those exercises. They are not recoverable here.

[80] Second, the appellant failed on appeal as to most of her allegations against Mr Gow and the entirety of her claim against the auctioneer, so she could not recover for any expense or any time spent on such failed items. She also failed on a substantial interlocutory matter.²² The appellant has not apportioned that part of her claim which relates to the sole successful head of complaint against Mr Gow.

[81] Third, much of the claim is recompense of the appellant's own time in making a complaint and pursuing an appeal at an arbitrary \$75 per hour. This is not a loss or expense for which compensation is potentially available (see the Tribunal's later assessment of the claim for costs).

[82] The appellant relies on the Tribunal's decision in *Cartwright* where substantial compensation (\$30,518.50) was awarded.²³ In the circumstances of that case, it was found that the losses were either closely connected to the licensee's conduct, or were at least by reason of his conduct.²⁴ That may be contrasted with the present case, where it has not been proven that any of the appellant's claimed losses are by reason of Mr Gow's unsatisfactory conduct. It is also relevant to note that *Cartwright* concerned misconduct, a more serious wrongdoing than Mr Gow's unsatisfactory conduct. The gravity of the offending is a relevant factor in the exercise of the Tribunal's discretion as to the award of compensation.

[83] The claim for compensation is dismissed.

²¹ Submissions of Mr Pasley on behalf of Mr Gow (15 September 2022) at [10.1].

²² Ruling on Appellant's Application to File Further Evidence and on Mode of Hearing (1 May 2023).

²³ *Complaints Assessment Committee 409 v Cartwright*, above n 15.

²⁴ At [50]–[51].

Fine

[84] The maximum fine is \$10,000. The appellant seeks a fine of \$10,000, which she submits would be proportionate to Mr Gow's egregious conduct. Mr Mortimer-Wang submits that a fine in the vicinity of \$3,000, in the low-medium part of the available range, might be considered. He relies on *Wilson* and *Tesar*, where fines of \$3,000 and \$2,500 were imposed. Mr Stewart says no financial penalty is warranted, relying on *Zhang* where a finding of unsatisfactory conduct was regarded as a sufficient penalty. He says *Wilson* and *Tesar* are not comparable.

[85] In *Wilson*, the unsatisfactory conduct was the misleading marketing of a property as 'home and income' when the licensee knew the downstairs area could not be used for residential purposes. The Tribunal found the unsatisfactory conduct was not at the lower end. The Tribunal imposed a censure or reprimand (confirming the Committee's decision) and a fine of \$3,000.

[86] In *Tesar*, the unsatisfactory conduct was telling the purchasers that obtaining consent for an unconsented wood burner would only require a 'paper chase', when in fact it would cost nearly \$6,000. The licensee was passing on information from the vendor. It was regarded as unintentional and a relatively low level misleading statement. The penalty was censure, a fine of \$2,500 and compensation of \$2,000.

[87] In *Zhang*, the licensee's unsatisfactory conduct was advising a purchaser that a neighbouring property sold for \$643,000, when it had actually sold for \$634,500. The licensee had carelessly provided the figure without checking it on her office computer. It was found the misrepresentation likely influenced the purchaser. The statement was innocent but misleading. The unsatisfactory conduct was at the lower level. The Tribunal imposed no penalty as the unsatisfactory conduct finding was regarded as penalty enough.

[88] In *Grindle*, also relied on by Mr Stewart, the unsatisfactory conduct was advertising a farm using inaccurate milk production data provided by the vendors without verification.²⁵ The licensee was aware of the importance of the production figures and that they had not been verified by the milk company. He should have made proper inquiries himself or advised prospective purchasers that the production figures came from the vendors and were unverified. It was found to be low to mid-level unsatisfactory conduct. The Tribunal ordered censure and a fine of \$1,000.

²⁵ *Grindle v Real Estate Agents Authority* [2014] NZREADT 85.

[89] The precedent decisions of the Tribunal cited by both counsel are helpful but are of only limited assistance as none are identical in regard to the entire circumstances of this case (the nature of the wrongdoing, its gravity, mitigation and the parties' personal circumstances).

[90] We agree with Mr Stewart that *Wilson* is a more serious case of misleading marketing than that of Mr Gow, as the licensee knew the downstairs area could not be used for residential purposes. The Tribunal in *Wilson* found the unsatisfactory conduct was not at the lower end.

[91] The other three decisions (*Tesar*, *Zhang* and *Grindle*) all bear some degree of comparability. We do not accept Mr Stewart's distinguishing of *Tesar* on the ground that the licensee had "actual knowledge".²⁶ The licensee knew the burner was deficient, but did not know that obtaining consent would not merely be a paper chase. The gravity of wrongdoing in *Tesar* was "relatively low level" which might be thought little different from "low to mid-level" which is how we would describe Mr Gow's.²⁷ In comparison with *Zhang*, we regard Mr Gow's wrongdoing (low to mid-level) as marginally graver than that of the licensee in that case (lower level). The most comparable decision is *Grindle*.

[92] Having regard to the three reasonably comparable decisions cited by counsel and the other relevant factors, we conclude that a fine of \$1,500 would be appropriate.

Costs

[93] The appellant discloses that she opted for self-representation in the Tribunal, yet she contends there is a compelling case for the award of costs. She seeks reimbursement for her own time, or alternatively the "equivalent to what Mr Gow's legal fees might have been".

[94] The Tribunal's jurisdiction to award costs is set out in s 110A of the Act:

110A Costs

- (1) In any proceedings under this Act, the Disciplinary Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy.
- (2) Without limiting the matters that the Disciplinary Tribunal may consider in determining whether to make an award of costs under this section, the Disciplinary Tribunal may take into account whether, and to what extent, any party to the proceedings—

²⁶ Submissions of the second respondent (27 September 2023) at [20].

²⁷ *Tesar v Real Estate Agents Authority*, above n 3, at [55].

- (a) has participated in good faith in the proceedings:
- (b) has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal:
- (c) has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.

...

[95] The Tribunal has considered its approach to costs in a number of decisions, as summarised in QQ.²⁸ It has been guided by the High Court decision in *Commissioner of Police v Andrews*.²⁹ In QQ, the Tribunal awarded the respondent licensee costs against an unsuccessful appellant. It was found there was no principle that costs follow the event. A party was not entitled to costs merely because of success. Nonetheless costs were awarded in QQ because there was no reasonable basis for the appeal.³⁰

[96] However, those principles are not applicable here. The appellant did not incur any legal costs in pursuing the appeal. She represented herself. The Supreme Court has determined that a successful litigant in person who is not a lawyer is entitled to recover disbursements, but not costs.³¹

[97] As for the non-exhaustive factors set out in s 110A(2), we find that Mr Gow participated in the proceedings in good faith and that he facilitated the Tribunal's process. Had there been any costs, no award would be warranted by the statutory factors.

[98] There is no principle or practice justifying an award of costs based on Mr Gow's unknown legal expenses. The appellant has not identified any authorities.

[99] We record that even if the appellant had incurred legal costs, we would not have exercised our discretion to award her any costs despite her success on what she correctly describes as the "central matter".³² This is because she failed on most of her allegations, some of which were of no merit and some of which were an unsuccessful attack on Mr Gow's integrity. Additionally, she failed on a substantial interlocutory matter.

[100] There will be no award of costs.

²⁸ QQ v *Real Estate Agents Authority* (CAC 1902) [2022] NZREADT 22 at [33]–[43].

²⁹ *Commissioner of Police v Andrews* [2015] NZHC 745.

³⁰ At [70].

³¹ *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [55]–[56] and [88].

³² Appellant's submissions (18 October 2023) at [141].

ORDERS

[101] Mr Gow is:

1. Censured.
2. Ordered to pay a fine of \$1,500 to the Authority within one month of this decision.

[102] 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.

PUBLICATION

[103] Having regard to the interests of the public in the transparency of the Tribunal and knowing of wrongdoing by licensees, it is appropriate to order publication of this decision without naming the appellant.³³

D J Plunkett
Chair

G J Denley
Member

P N O'Connor
Member

³³ Real Estate Agents Act, s 108.