

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 4

READT 081/14; READT 019/16; READT 024/16

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

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEES
301 and 403

AGAINST GRANT TUCKER
Defendant

On the papers

Tribunal: Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms C Sandelin, Member

Counsel: Mr M Hodge and Ms K Lawson-Bradshaw, on
behalf of the Committees
Ms N Pender, on behalf of Mr Tucker

Date of Decision: 26 January 2017

**DECISION OF THE TRIBUNAL
(PENALTY)**

Introduction

[1] In its decision issued on 27 September 2016 the Tribunal found two charges of misconduct laid by Complaints Assessment Committees 301 and 403 (“the Committees”) under s 73(a) (“disgraceful conduct”) of the Real Estate Agents Act 2008 (“the Act”) proved against Mr Tucker (“the substantive decision”).¹ The charges were laid following complaints made to the Real Estate Agents Authority (“the Authority”) in March 2014 and July 2015 by a licensee, Mr Wills, and Custom Residential Limited (“the Agency”), and by the Agency’s solicitor, Mr Beard (together, “the complainants”)

[2] The first charge alleged that between February and May 2014 Mr Tucker pursued a dispute with Mr Wills and the Agency in a manner that would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[3] The second charge alleged that between March and October 2015 Mr Tucker pursued a dispute with Mr Wills and/or the Agency in a manner that would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[4] Mr Tucker appealed to the Tribunal against the decision by Complaints Assessment Committee 403 to lay the second charge. The Tribunal dismissed that appeal in the substantive decision.²

[5] The Tribunal subsequently received submissions as to penalty from counsel for the Committees and Mr Tucker.

¹ *Real Estate Agents Authority (Complaints Assessment Committees 301 and 403) v Tucker* [2016] NZREADT 65 (“the substantive decision”) at [81].

² At [56].

Facts

[6] The relevant facts are set out in detail in the substantive decision. Mr Tucker admitted some of the alleged conduct, and denied the remainder. He denied that his conduct, as charged in both charges, was disgraceful conduct.

[7] Regarding the first charge, the Tribunal found that Mr Tucker had engaged in the conduct set out below (including Mr Tucker's explanations, where given).

[a] In or around February 2014, Mr Tucker sent letters signed "Tiki Leaks" to employees of the Agency which contained derogatory and/or offensive comments about Mr Wills and the Agency.

[b] On 15 February 2014, Mr Tucker sent an email (from his professional email) to Ms G Mirkin (a former licensed salesperson at the Agency, and Mr Tucker's former partner) which contained offensive and/or derogatory comments about Ms Mirkin, Mr Wills, and the Agency. Mr Tucker said at the hearing that he had "probably" written this email, and that it could be construed as a threat, but it was a private email to Ms Mirkin which she forwarded to the Agency. He said it was sent in the context of an on-going commission dispute with the Agency, and the breakdown of their relationship and the fact that Ms Mirkin had "kidnapped" their two dogs.

[c] On 16 February 2014, Mr Tucker left a message on Mr Wills' answering machine which was abusive and offensive. Mr Tucker admitted leaving this message, but said it was left following Ms Mirkin having attacked him with pepper spray then trying to frame him for the attack. As a result of this, he missed an Open Home. He then tried to call Mr Wills and was frustrated by not being able to get through to him.

[d] On 18 February 2014, Mr Tucker sent an email to the then solicitor for the Agency which contained derogatory comments about the Agency. Mr Tucker said this email was sent in the context of the pepper spray

attack, which he believed was orchestrated by Mr Wills and the Agency. Regarding the message itself, Mr Tucker said “I say it as I see it”.

[e] In or about late February/early March 2014, Mr Tucker sent a package to Mr Beard which contained faeces and broken glass. Mr Tucker said he received the package in his mailbox, photographed it and reported it to the Police. He said he had no doubt that the package had come from Mr Wills, and he sent it on to Mr Beard to show him what his clients were like.

[f] Between 29 March 2014 and 15 May 2014, Mr Tucker sent letters to two licensed salespersons at the Agency and the manager of another real estate agency alleging dishonesty and deception by the Agency and its salespeople.

[8] Criminal charges were laid against Mr Tucker under the Telecommunications Act 2001 in respect of the message left on Mr Wills’ answering machine, and under the Postal Service Act 1998 in respect of the package of faeces. The Telecommunications Act charge was dismissed on the grounds that while the words used were indecent or obscene, there was insufficient evidence on which to determine whether they were used with the intention to offend the recipient.³ Following Mr Tucker’s acceptance of a sentencing indication,⁴ he was discharged without conviction on the Postal Services Act charge.⁵

[9] Regarding the second charge, the Tribunal found that Mr Tucker had engaged in the conduct set out below, including Mr Tucker’s explanations, where given.

[a] On 13 March 2015, Mr Tucker verbally abused Mr Wills at Ponsonby Road, Auckland. Mr Tucker said that Mr Wills tried to “entrap” him and

³ *R v Tucker* [2015] NZDC 5566, at [8] and [9].

⁴ A sentencing indication is as to the sentence which would be imposed in the event that the person charged pleads guilty to the offence with which he or she is charged.

⁵ *R v Tucker* DC Auckland CRI-2014-004-003578, 20 April 2015.

made a false and misleading allegation that he had breached bail conditions.⁶

[b] Between June and November 2015, Mr Tucker sent seven letters to clients of the Agency which contained derogatory and/or offensive comments about the Agency.

[c] On 17 July and 23 July 2015, Mr Tucker sent packages containing soiled sanitary pads and/or a condom to Mr Beard.

[d] On 22 July and 26 August 2015, Mr Tucker sent packages containing soiled sanitary pads and condoms to Mr Wills.

[e] On 28 October 2015, Mr Tucker posted an inappropriate comment on the Agency's Facebook page. Mr Tucker admitted that he had posted this comment.

[10] The Tribunal concluded its assessment of Mr Tucker's conduct in the substantive decision as follows:⁷

... It is not necessary to set out, again, the conduct alleged in the particulars of the first and second charges . In respect of both the first charge and the second charge the Tribunal has no hesitation in finding that the conduct admitted by Mr Tucker, and that the Tribunal has found proved, would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Sentencing principles

[11] As stated by McGrath J, for the majority of the Supreme Court in *Z v Dental Complaints Assessment Committee*:⁸

... 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 appropriate standards of conduct are maintained in the occupation concerned.

⁶ Mr Tucker was at this time on bail on the two charges referred to at paragraph [8].

⁷ Substantive decision, at [80].

⁸ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55; [2009] 1 NZLR (SC) 1, at [97].

[12] 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.”⁹ The Act achieves these purposes by:¹⁰

- (a) regulating agents, branch managers, and salespersons;
- (b) raising industry standards;
- (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[13] These purposes are best met by penalties for misconduct and unsatisfactory conduct being determined while 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.

[14] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.¹¹

[15] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As relevant to the present case, the Tribunal may:

- [a] Make any of the orders that a Complaints Assessment Committee may impose under s 93 of the Act;
- [b] Impose a fine of up to \$15,000;
- [c] Order cancellation or suspension of the licensee’s licence;
- [d] 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;

⁹ Section 3(1) of the Act.

¹⁰ Section 3(2).

¹¹ See, for example, *Complaints Assessment Committee 10012 v Khan* [2011] NZREADT 11; *Complaints Assessment Committee 10063 v Raj* [2013] NZREADT 52; *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30.

- [e] Order that the licensee pay compensation of up to \$100,000 to any person who has suffered loss by reason of the licensee's conduct.

[16] 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 1 of The New Zealand Law Society*, the High Court noted (in relation to a lawyer) that the “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.¹²

Submissions

Submissions for the Committees

[17] The submissions for the Committees may be summarised as follows:

- [a] Mr Tucker's conduct could only be regarded as serious, and it is difficult to overstate the complete and alarming lack of judgment and proportion demonstrated by Mr Tucker. Cancellation is the starting point for penalty and, in this case, the only appropriate response. The nature of the individual acts, repeated over a significant period of time, despite intervention by the Authority and the District Court, demonstrated that Mr Tucker had carried out a campaign of harassment against the Agency and individuals connected with it, which was planned, persistent, vindictive, highly disturbing and distressing to those subjected to it.
- [b] Mr Tucker's overall conduct reflects adversely on his judgment, character and ability to comply with his professional obligations, and demonstrates that he is at a high risk of engaging in disputes in an offensive, inappropriate, and disproportionate manner, and places clients,

¹² *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* [2013] NZHC 83; [2013] 3 NZLR 103, at [185]–[189].

customers, and the public at risk. The Tribunal can have no confidence that Mr Tucker will not engage in inappropriate behaviour in the future.

- [c] The explanations given by Mr Tucker did not excuse his conduct. Referring specifically to the package of faeces, Mr Tucker's sending it to Mr Beard was in itself disgraceful conduct, regardless of how he came by it. Mr Tucker's sending of soiled of sanitary pads and condoms to Mr Wills and Mr Beard months later was also in itself disgraceful conduct, and a continuation of his campaign.
- [d] Mr Tucker showed no genuine remorse and had no meaningful insight into his behaviour: he had refused to accept responsibility, and had attempted to justify his conduct with the breakup of his relationship, and place blame on the complainants.
- [e] While Mr Tucker said in evidence that he suffered from various health issues, no medical evidence had been given in support of that evidence.¹³ In any event, the maintenance of professional standards must take priority.
- [f] Mr Tucker could be given no credit for his lack of previous disciplinary history, as the proved conduct extended over a period of 20 months (rather than being a "one-off" event), and continued after the District Court proceedings and the first charge being laid. It is not open to Mr Tucker to rely on previous good character.

Submissions for Mr Tucker

[18] We note, first, that an affidavit sworn by Mr Tucker was filed with his counsel's submissions on penalty. In large part, Mr Tucker repeated what he had said at the hearing of the charges; in particular, the explanations he gave for particular actions, and his denial of conduct that the Tribunal had found proved. To that extent, Mr Tucker's affidavit does not assist the Tribunal in considering penalty.

¹³ The Tribunal notes that a medical certificate was annexed to an affidavit sworn by Mr Tucker and filed with his counsel's submissions on penalty.

The Tribunal has, however, taken a letter from Mr Tucker's doctor into consideration.

[19] Ms Pender's submissions for Mr Tucker may be summarised as follows:

- [a] Mr Tucker's conduct was not at the most extreme end of the spectrum, and should be viewed as low to moderate. It would not be in the public interest to cancel or suspend his licence.
- [b] The finding that Mr Tucker sent a package of faeces to Mr Beard was the most serious aspect of the first charge. Mr Tucker was discharged without conviction in the District Court. While the Judge described his conduct as "distasteful, disgusting and offensive" and "extremely juvenile, ill-considered and stupid", she assessed the conduct as "moderately serious". She submitted that it is particularly relevant that the Judge "acknowledged" that Mr Tucker had "simply forwarded a noxious substance that some else had sent to him".
- [c] The remainder of the conduct alleged in the first charge was to be seen in the context of the breakdown of Mr Tucker's relationship with Ms Mirkin, which Ms Pender described as being typically a time of acute stress for any individual, and not necessarily indicative of a person's ability to cope with the stresses of ordinary life, including those associated with real estate work. Individual aspects of Mr Tucker's conduct either did not warrant suspending or cancelling his licence, or were not properly found against him.
- [d] The most serious of the findings against Mr Tucker in the second charge were that he sent offensive packages to Mr Wills and Mr Beard in 2015. It would be unjust to give significant weight to the findings, "in light of further evidence which casts doubt on the likelihood that Mr Tucker was in fact the sender". If there is a reasonable doubt that Mr Tucker was responsible for sending the packages of soiled sanitary pads and condoms to Mr Wills and Mr Beard, it undermines the Committees'

characterisation of his behaviour, and significantly reduces the seriousness of its case.

- [e] If the allegations regarding the offensive packages are put to one side, the seriousness of the second charge (and the cumulative effect of both charges) significantly decreases. The remaining allegations in the second charge were not serious enough to warrant a finding, were wrongly found against Mr Tucker or (in the case of the Facebook posting) should not be penalised as to do so would seriously curtail the right of freedom of expression.
- [f] Mr Tucker cooperated fully with the Authority and the Tribunal, and had the right to choose to defend the charges rather than accept them. Ms Pender noted that Mr Tucker had not been legally represented at the Tribunal hearing, and this “put him on the back foot”. It would doubly jeopardise him if his lack of legal sophistication or objectivity were counted as aggravating factors. As Mr Tucker said in his affidavit filed with the penalty submissions, he had doubled his normal dose of anti-anxiety medication before the hearing, and this may well have had an impact on his ability to conduct his defence effectively. Further, the manner in which Mr Wills and the Agency’s solicitor had pursued their criminal and disciplinary complaints against Mr Tucker (described as “aggressive”), and the colour of some of the language used had at times served only to inflame the situation.
- [g] There is not a serious question of Mr Tucker being a fit and proper agent, having regard to his successful real estate career over 20 years and the fact that he has never had a consumer complaint against him. His actions are well removed from the “dishonest, violent conduct” which features in cases where agents have previously lost their licences.
- [h] Mr Tucker had already been pilloried as a consequence of sending faeces to the Agency’s solicitor, and his business has severely suffered as a result, with clients electing not to use his services. To suspend or

cancel his licence would add no further protection to the public, nor provide any greater deterrence to him or others than has already occurred.

- [i] Mr Tucker is 59 years old, is not in the best of health, and has seen his real estate business decimated. It is possible he will never be able to restore the damages, but he should still be allowed to try.

Authorities as to the appropriate penalty on a finding of disgraceful conduct

[20] The Tribunal was not referred to any penalty decisions which are on all fours with this case. In the context of disciplinary proceedings under the Act, the Tribunal was referred to its decisions in *Complaints Assessment Committee 10054 v Hume*¹⁴ and *Parlane v Registrar of the Real Estate Agents Authority*.¹⁵

[21] In *Hume*, an order for cancellation was made against Mr Hume following findings that he had threatened to “smash” a former employer, threatened to kill two subsequent employers on two separate occasions, and assaulted a former employer by pushing or throwing him backwards on two occasions. In its decision the Tribunal said:¹⁶

The findings disclose a theme in the way the defendant conducts himself when challenged. He becomes angry, fails to control his temper and is highly confrontational and aggressive. Real estate work can be stressful and licensees must be able to be trusted to conduct themselves in a calm and professional manner to ensure that consumer interests and public confidence in the industry are promoted and protected.

[22] In *Parlane*, the Tribunal considered an application to review a Registrar’s decision to cancel Mr Parlane’s licence after he had previously been struck off the roll of solicitors.¹⁷ Mr Parlane was found to have refused to discharge a mortgage, obstructed the mortgagor’s solicitor in her attempts to facilitate refinancing and to discharge the mortgage, and relied on his status as mortgagee to demand payments and concessions from the mortgagor to which he was not entitled. Mr Parlane was

¹⁴ *Complaints Assessment Committee 10054 v Hume* [2014] NZREADT 10, at [15].

¹⁵ *Parlane v Registrar of the Real Estate Agents Authority* [2013] NZREADT 94.

¹⁶ *Hume*, at [15].

¹⁷ As to that decision, see *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No.2)* HC Hamilton CIV-2010-419-1209, 20 December 2010.

also found to have obstructed the relevant Standards Committee in the exercise of its statutory functions and powers by refusing to comply with requirements to produce files and records, and by communicating in an unprofessional and belligerent manner.

[23] The Tribunal declined the application for review and said:¹⁸

It is concerning that there are various correspondences and communications which display quite some belligerence on the part of the applicant. That would be an unfortunate trait in a real estate salesperson. Such persons might easily become embroiled in disputes with consumers, their principals, other agents, and members of the public. Many of the responses referred to above by the defendant, in terms of his problems with the Law Society and clients, indicate that he reacts to issues belligerently and unprofessionally, and obsessively insists on what he regards as his rights.

[24] The Tribunal was also referred to the dicta of Sir Thomas Bingham MR in *Bolton v The Law Society*, as to the circumstances in which it may be appropriate to strike off or suspend a professional person (in that case, a solicitor):¹⁹

Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. ... The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the Tribunal as an informed and expert body on all the facts of the case.

Discussion

[25] The focus of Ms Pender's submissions can be seen in the following paragraph:²⁰

The Tribunal has of course already reached a decision on the charges and having made those findings only has jurisdiction to determine an appropriate penalty. However, the Tribunal can still reconsider the seriousness of its findings when making orders under s 110. If the Tribunal considers that any of its findings were marginal, it can give less weight to them when determining whether to impose a penalty as serious as cancellation of Mr Tucker's licence.

¹⁸ *Parlane*, above n15, at [57].

¹⁹ *Bolton v The Law Society* [1994] 2 All ER 486, at 491.

²⁰ Paragraph 8 of the submissions for Mr Tucker.

[26] It is not appropriate for the Tribunal to make any comment on those of Ms Pender's submissions which were, in effect, a challenge to the Tribunal's factual findings.

[27] It is necessary to comment on two aspects of Ms Pender's submissions. The first is her reference to the fact that the charge against Mr Tucker under the Telecommunications Act was dismissed, and the second is her reference to Mr Tucker's discharge without conviction on the charge relating to the package of faeces. Both charges were laid in the criminal jurisdiction. The professional disciplinary jurisdiction is directed at the maintenance of professional standards. A criminal charge is different from a professional disciplinary charge both in the terms of the relevant statutory context (not the least of which are the different purposes of the respective legislative provisions) and the different standard of proof that is applied in each case. Accordingly, the outcome of criminal proceedings may not be relevant to professional disciplinary proceedings.

[28] Mr Tucker's discharge without conviction requires particular comment. It must first be noted that the Judge did not "acknowledge" that Mr Tucker had "simply forwarded a noxious substance". Rather, her Honour noted that Mr Tucker had acknowledged in an affidavit that sending the package was "a stupid decision because it simply carried on the nastiness that you endured in initially receiving the package".²¹

[29] That aside, while the Judge described Mr Tucker's offending as "distasteful", and "disgusting and offensive", it is apparent that the Judge considered the disciplinary charges Mr Tucker would face to be a significant relevant factor in considering his application for a discharge without conviction, referring to them frequently in her decision. In particular, the Judge referred to the possibility of Mr Tucker's licence being cancelled or suspended, describing it as a significant penalty. It cannot be said that the fact that he was granted a discharge without conviction in any way lessens the seriousness of Mr Tucker's actions.

²¹ *R v Tucker*, above n 4, at [33].

[30] As recorded earlier, the Tribunal must determine the penalty to be imposed having regard to the charges, the conduct it has found proved, the purposes of the Act, and the relevant principles of sentencing. The Tribunal must consider the totality of the proved conduct. Having considered the charges and the proved conduct, the Tribunal concluded in the substantive decision that the charges of disgraceful conduct were proved. The Tribunal doubts whether there could be said to be a “spectrum” of disgraceful conduct but if there is such a spectrum, the Tribunal places Mr Tucker’s conduct at the “high” end of it.

[31] The Tribunal has considered the letter from Mr Tucker’s doctor which outlines his treatment of Mr Tucker. The doctor has not expressed any opinion as to whether, and if so, to what extent, the conditions for which Mr Tucker has been treated have caused him to act in the manner set out in the substantive decision, and summarised earlier in this decision. While noting the matters referred to by the doctor, the Tribunal is not able to determine the extent to which they might ameliorate Mr Tucker’s conduct.

[32] The Tribunal is, of course, well aware that Mr Tucker was not represented at the hearing of the charges, although he was represented by counsel in the District Court proceedings and from late April 2015 until early March 2016 in the Tribunal proceeding (during which period his first statement of evidence was prepared). No adverse inference is drawn from Mr Tucker’s having appeared in the Tribunal on his own behalf. Indeed, Mr Tucker did not appear to be impaired in conducting his defence, and his approach was consistent with his earlier responses to the charges. The Tribunal does not consider that Mr Tucker failed to cooperate in the investigation, or impeded the disciplinary process.

[33] The Tribunal notes Ms Pender’s submissions as to Mr Tucker’s age, and the fact that he has no previous disciplinary history. However, it accepts the Committees’ submission that in the present case, where the proved conduct was ongoing, those matters can be given little weight.

[34] The Tribunal must then consider whether the proved conduct affects whether Mr Tucker is a fit and proper person to hold a licence to undertake real estate agency

work. In this case, Mr Tucker's conduct was directly within the context of real estate agency work. It occurred within the context of a dispute with the Agency and its principal, it involved offensive actions and acrimonious communications concerning members of the industry, and it incorporated inappropriate approaches to members of the public.

[35] In the present case, the Tribunal has concluded that the proved conduct seriously and adversely affects Mr Tucker's fitness and propriety to hold a licence. The Tribunal accepts the Committees' submission that cancellation of Mr Tucker's licence is the only appropriate response to the finding of disgraceful conduct, essentially for the reasons set out in its submissions. The Tribunal will so order.

Compensation

[36] In addition to the submissions as to compensation on behalf of the Committees and Mr Tucker, the Tribunal has considered a memorandum prepared by Mr Beard on behalf of himself, Mr Wills, and the Agency as to their claim for loss incurred and suffered by reason of Mr Tucker's misconduct.

[37] Counsel for the Committees noted that the complainants sought compensation under s 110(2)(g) of the Act for legal costs incurred, the cost of installing a security system as a result of Mr Tucker's harassment, and for hurt, humiliation, distress and loss. The Committees referred to the Tribunal's "broad power" to award costs and expenses incurred in respect of the inquiry, investigation or hearing by a Complaints Assessment Committee and in respect of proceedings before the Tribunal.

[38] The Committees recorded that Mr Wills and the Agency sought compensation of \$25,840.60 for legal costs (\$17,430.00 of which related to the complaint to the Authority, the investigation, and the Tribunal proceeding), and \$1,940.66 for the installation of a security system. Mr Beard sought legal costs of \$11,270 for legal costs, and \$6,440 for loss of income during the Tribunal proceeding and the criminal proceeding against Mr Tucker. Both Mr Wills and Mr Beard sought \$100,000 as compensation for hurt, humiliation, distress and loss to their reputations in respect of each charge (thus \$200,000 for each complainant).

[39] Ms Pender opposed orders being made to either complainant, on any of the grounds sought. She submitted that the disciplinary regime is not designed to operate as a de facto compensation regime,²² and that the Tribunal has declined to order compensation where there is insufficient evidence to establish loss or no proper causal relationship between the loss suffered and the established misconduct.

[40] In particular, Ms Pender submitted that the Tribunal should not order compensation to a complainant for legal costs in relation to a Tribunal disciplinary hearing (in which the complainant is a witness, not the prosecuting party), that there was an established causal link between Mr Tucker's conduct and legal costs incurred by Mr Wills and the Agency, and that Mr Beard was not entitled to compensation for his attendance at either the District Court proceedings, or the Tribunal.

[41] Ms Pender further submitted that Mr Wills and the Agency are not entitled to compensation for installation of a security system. She noted that while Mr Wills claimed that the security system was installed "due to the distress and fear caused by [Mr Tucker's] behaviour", the system appeared to have been installed in September 2016.²³

[42] Finally, Ms Pender submitted that no independent evidence had been adduced to support the claim for damages for hurt, humiliation, distress and loss to their reputations, and adopted the submissions for the Committees which cast doubt on the Tribunal's ability to award such damages in the absence of an express statutory power.

[43] The Tribunal accepts the Committees' submission as to the Tribunal's wide discretion as to awards of compensation. However, there is force in Ms Pender's submission that in the course of the investigation of complaints to Authority, the investigation process, and hearings before the Tribunal, a complainant is not a "party" in the sense of being a prosecutor in criminal proceedings, or the plaintiff in civil proceedings.

²² Referring to the judgment of the High Court in *Quin v The Real Estate Agents Authority* [2012] NZHC 3557.

²³ The invoice for installation, annexed to a memorandum concerning compensation, filed on behalf of the Committees, is dated 9 September 2016, and appears to record that the work was carried out that day.

[44] The analogy is more properly to a witness in those jurisdictions. The functions of the preparation of formal statements of evidence, conduct of the hearing (calling evidence, cross-examination, and submissions) are carried out in the Tribunal by counsel for the relevant Complaints Assessment Committee. Thus it would not be expected that a complainant would incur significant (or any) legal costs. Further, it is not customary for the Tribunal to make an order that would be akin to “witnesses’ fees” under the rules applying in the civil and criminal jurisdictions.

[45] In the present case, the Tribunal has concluded that it is not appropriate to make an order for payment of the claimed legal costs, or to compensate for Mr Beard’s loss of income while giving evidence in the Tribunal.

[46] Regarding the other claims, the Tribunal accepts Ms Pender’s submission that it is difficult to see a causal connection between Mr Tucker’s conduct in 2014 and 2015 and the installation of a security system in September 2016, which is claimed to have been needed as a result of Mr Tucker’s conduct. The Tribunal does not consider it has jurisdiction to make any order for hurt, humiliation, distress and loss to reputation.

Orders

[47] Pursuant to s 110(2)(b) of the Act, the Tribunal orders that Mr Tucker’s licence is cancelled as from the date of this penalty decision.

[48] Ms Pender requested that if an order for cancellation were made, the Tribunal direct that the order not take effect until the hearing on 4 April 2017 of Mr Tucker’s appeal to the High Court against the substantive decision. Counsel for the Committees opposes the making of such an order.

[49] The Tribunal accepts the Committees’ submission that penalty imposed by the Tribunal should take effect when it is made, notwithstanding future appeals. The Tribunal also notes that pursuant to s 117 of the Act, the High Court may make an interim order allowing a licensee to continue working as a licensee pending the outcome of an appeal to that Court.

[50] Mr Tucker's request for a stay of the order for cancellation is declined.

[51] Pursuant to s 110(2)(f) of the Act, the Tribunal orders Mr Tucker to pay a fine of \$3,500. The fine is to be paid to the Authority within 15 working days of the date of this decision. In the light of the order for cancellation, the Tribunal has set the fine at a modest level.

[52] The Tribunal makes no orders as to compensation.

[53] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member