

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 65

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 THE REAL ESTATE AGENTS AUTHORITY (CAC 301) and THE REAL ESTATE AGENTS AUTHORITY (CAC 403)

AGAINST GRANT TUCKER
Defendant

AND

IN THE MATTER OF an appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN GRANT TUCKER
Appellant

AND THE REAL ESTATE AGENTS AUTHORITY(CAC 403)
Respondent

Hearing: 22-24 August 2016 (at Auckland)

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

Appearances: Mr M Hodge and Ms K Lawson-Bradshaw, on behalf of the Authority
Mr G Tucker, in person

Date of Decision: 27 September 2016

DECISION OF THE TRIBUNAL

Introduction

[1] On 16 September 2014 Complaints Assessment Committee 301 (“CAC 301”) laid a charge of misconduct against Mr Tucker, under s 73(a) (disgraceful conduct) of the Real Estate Agents Act 2008 (“the Act”) (“the first charge”). The first charge alleges that between February and May 2014 Mr Tucker pursued a dispute with another licensee, Mr J Wills, and/or Custom Residential Ltd (“the Agency”) in a manner that would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful. Mr Tucker filed a Response to this charge, in which he denies it.

[2] On 11 May 2016 Complaints Assessment Committee 403 (“CAC 403”) laid a further charge of misconduct against Mr Tucker, under s 73(a) (disgraceful conduct) of the Act (“the second charge”). The second charge alleges 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.

[3] On 23 May 2016 Mr Tucker filed an appeal against CAC 403’s decision to lay the second charge (“the appeal”). Counsel for CAC 301 and CAC 403 then sought leave to have the first and second charges joined, and for the charges and the appeal to be heard at the same hearing. Committees 301 and 403 will be referred to in this decision as “the Committees”.

[4] In a decision of the Tribunal dated 9 June 2016, leave was given for joinder of the first and second charges, and for the charges and the appeal to be heard at the same hearing. The charges and the appeal were heard over a period of three days, 22-24 August 2016. The Tribunal heard oral evidence and submissions on behalf of the Committees and Mr Tucker.

[5] In the course of the hearing, Mr Tucker applied for the issue of a witness summons to Mr John Stempa, to attend and give evidence. He submitted that Mr Stempa’s evidence would be primarily relevant to issues of credibility, and would show a “tone” within the Agency, in that it includes people who are not ideal to work

in the industry. The application was opposed by Mr Hodge on behalf of the Committees, on the grounds that Mr Stempa's evidence would have little if any relevance to the matters before the Tribunal. Mr Tucker's application was denied.¹

[6] The Tribunal's decision regarding the charges rests on its findings of fact in respect of the alleged conduct. In defending the charges, Mr Tucker contended either that he was not responsible for particular alleged conduct or, where he acknowledges responsibility, that conduct does not amount to disgraceful conduct.

The charge of disgraceful conduct

[7] Section 73(a) of the Act provides:

73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

(a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or

...

[8] The judgment of Woodhouse J in *Morton-Jones v Real Estate Agents Authority*, in particular his Honour's discussion of s 73(a) of the Act, is relevant to the Tribunal's consideration of a charge of disgraceful conduct.² His Honour referred to the Tribunal's decision regarding a charge of disgraceful conduct in *Complaints Assessment Committee (CAC 10024) v Downtown Apartments Ltd*³ and said:⁴

[29] ... If the charge is under s 73(a) the critical enquiry is whether the conduct is "disgraceful". Conduct which involves a marked and serious departure from the requisite standards must be assessed as "disgraceful", rather than some other form of misconduct which may also involve a marked and serious departure from the standards. ...

¹ *Real Estate Agents Authority v Tucker* [2016] NZREADT 58.

² *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804.

³ *Complaints Assessment Committee (CAC 10024) v Downtown Apartments Ltd* [2010] NZREADT 6. See, in particular, at [59].

⁴ *Morton-Jones*, above n2, at [29].

[9] If the Tribunal finds that the alleged conduct is proved, then it must decide whether that conduct is “disgraceful”. Accordingly, we first set out the background to Mr Tucker’s dispute with Mr Wills and the Agency, then consider the particulars of the conduct alleged in each charge.

Background facts

[10] Mr Wills is director and shareholder of the Agency. Mr Tucker was employed by the Agency as a contract salesperson between January and July 2011. He became involved in a dispute with the Agency over the commission on a property sale. Mr Wills and Mr Tucker have differing views as to the origins of the dispute. Mr Tucker said that he and his then partner, Ms Mirkin, had the listing, and he had shown the property to a potential interested buyer. Mr Wills said that another salesperson at the Agency had the listing, the property did not sell, and Mr Tucker tried to get the listing.

[11] A salesperson for another agency (L J Hooker) then obtained a listing agreement for the property. Mr Tucker said that this salesperson had not followed the correct procedure to get the listing. Because of this he carried on and sold the property. L J Hooker then claimed 50% of the commission from the sale. Mr Tucker did not consider they were entitled to any commission. The two agencies reached an agreement to split the commission.

[12] The commission split affected Mr Tucker’s entitlement to commission, as he maintained that only the Agency had a legitimate claim to the full commission. He considered that the Agency had not supported him over the commission dispute, and resigned. Mr Tucker said that “to his disgust”, Ms Mirkin remained with the Agency.

[13] On 8 August 2011 Mr Tucker made a complaint to the Real Estate Agents Authority (“the Authority”) against the rival salesperson. The salesperson was found to have engaged in unsatisfactory conduct.⁵ Mr Tucker also claimed against the Agency in the Disputes Tribunal, and was awarded the additional commission he

⁵ *Real Estate Agents Authority v Richardson* [2013] NZREADT 92.

would have received, if the Agency had received the full commission upon sale. A payment was also made to Ms Mirkin.

[14] Mr Tucker's relationship with Ms Mirkin broke down in late 2013. Mr Tucker said the breakdown was due to a number of reasons, and the ongoing dispute with the Agency was a contributing factor. Mr Tucker said that he and Ms Mirkin remained on amicable terms until February 2014 when a dispute arose concerning two dogs they had owned together.

[15] On 21 March 2014 Mr Wills and the Agency laid a complaint with the Authority, against Mr Tucker ("the first complaint"). After inquiring into the complaint, CAC 301 laid the first charge against Mr Tucker. The hearing of the first charge was deferred while criminal charges against Mr Tucker were dealt with. Those charges were that he posted an objectionable thing (under s 21 of the Postal Service Act 1998, in respect of the conduct set out at [36] and [37], below), and that in using a telephone device, he used profane, indecent or obscene language (under s112(1) of the Telecommunications Act 2001, in respect of the conduct described at [27] and [28], below).

[16] In a judgment delivered on 1 April 2015, Judge Mathers dismissed the charge under the Telecommunications Act.⁶ Having read an agreed statement of facts, her Honour held that while the words in themselves were indecent or obscene, there was insufficient evidence before her to ascertain whether they were used with the intention of offending the recipient.⁷

[17] On 20 April 2015, Judge Ryan gave a sentencing indication of a discharge without conviction on the charge under the Postal Services Act.⁸ Her Honour referred to Mr Tucker's actions as "distasteful", and said that they would be seen by the public as "disgusting and offensive".⁹ Her Honour described Mr Tucker's offending as "moderately serious",¹⁰ and in indicating a possible discharge without conviction, took into account information she had as to health issues affecting Mr

⁶ *R v Tucker* [2015] NZDC 5566.

⁷ At [8] and [9].

⁸ *R v Tucker* DC Auckland CRI-2014-004-003578.

⁹ At [19].

¹⁰ At [22].

Tucker, and the possible consequences of disciplinary action brought by the Authority.¹¹

[18] On 23 July 2015 the Authority received a further complaint by Mr Wills and the Agency against Mr Tucker (“the second complaint”). This complaint related to alleged conduct by Mr Tucker between March and November 2015. On 11 May 2016 CAC 403 decided to lay the second charge against Mr Tucker.

[19] We now turn to the particulars of Mr Tucker’s conduct, as set out in the first charge. We follow CAC 301’s references to the particulars.

First charge

Particular (a): Anonymous letter sent to an Agency employee

[20] It is alleged that in or around February 2014, Mr Tucker sent anonymous letters signed “Tiki Leaks” to employees of the Agency, and that the letters contained derogatory and/or offensive comments about Mr Wills and the Agency. Mr Tucker denied the particular.

[21] An undated letter was included in the Bundle of Documents before the Tribunal. It referred to the dispute with L J Hooker, and stated that “they wanted 50% of the commission”. The letter said that the Agency’s decision to reach a compromise was based on its “poor understanding” of the Act, that it “had already come to the attention of the [Authority] too many times”, that “80% of the commission” belonged to the sales people so the Agency’s financial loss was minor, and that the Agency “just didn’t have the balls to stand up for their sales people”. The letter also referred to the “licensee” having to “take [the Agency] to the small claims court” to recover commission, and stated that “the arrogance of the sole director is only exceeded by his inability to comprehend” the Act.¹²

¹¹ At [24]–[31].

¹² The reference to the “small claims court” is assumed to be intended to be to the Disputes Tribunal: see [13], above.

[22] Mr Tucker denied any knowledge of the letter, and denied sending it. However, in cross-examination, Mr Tucker accepted that the letter dealt in detail with his commission dispute, and was in the same or similar terms as his response to the complaint, and his submissions.

[23] The Tribunal is satisfied that this letter was sent by Mr Tucker. The language is identical to that in Mr Tucker's brief of evidence, and in his submissions to the Tribunal. The Tribunal finds this particular proved.

Particular (b): Email from Mr Tucker to Ms Mirkin

[24] Mr Tucker initially admitted that on 15 February 2014 he sent an email to Ms Mirkin, from his professional email. The email was as follows:

I really do feel sorry for you! Your treachery is only exceeded by your stupidity. The fact that you were prepared to support someone who didn't have a clue about a really simple act of law and used yours and my income to pay off someone who was blackmailing him is plain stupidity. The buck stops at the top and your good friend John Wills was completely out of his depth when it came to the [Act].

I have kicked [Mr Wills'] gay ass in the small claims court and L J Hookers in the READT twice and he continues to bury his head in the sand and not admit he fucked up. It must be hard for the Cunts R us crew to get into the office with that massive arrogant ego in there.

I even helped the dumb fucks put a case together to get the commission back and they still fucked it up and pussy ass Wills didn't want to know cause he couldn't get his head around it. I can see why he is an ex-cop NO balls, and a gutless faggot! I see he's also giving you every support during these trying times. What a girl!

You can only imagine what I have in store for you and the snakes at Cunts R us.

It's not really hard it's just a case of exposing Cunts R us for what they really are.

If you would like to thank me for getting your commission back for you off pussy ass Wills and apologise I will just focus on Cunts R us.

...

[25] At the hearing, Mr Tucker said that he was now not certain that the email was "100% legitimate", but then conceded that he had "probably" written it, and that it could be construed as a threat. He said it was a private email sent in the context of

the breakdown of his relationship, and the fact that Ms Mirkin had “kidnapped” the two dogs. He submitted that all he meant by “what I have in store” was that he would advise the Authority of the Agency’s deceptive conduct. He submitted that Mr Wills and his solicitor, Mr Beard, had put a sinister spin on the contents of the email, and had exploited it as much as possible with fabricated allegations.

[26] The Tribunal is satisfied that Mr Tucker sent this email, and finds this particular proved.

Particular (c): Voicemail message on Mr Wills’ answering machine

[27] Mr Tucker admitted that on 16 February 2014 he left the following voicemail message on Mr Wills’ answering machine:

Yeah I bet you are John. Cock sucking faggot. One of your most loyal contractors has got herself into trouble today. I suggest you show her er ah the same loyalty as she showed you and help her out. Over and out.

[28] Mr Tucker said that on that day Ms Mirkin had attacked him with pepper spray and she had tried to frame him as the attacker. The Police were called. As a result, he missed an Open Home, over which he was very frustrated. He believed Ms Mirkin was put up to this by Mr Wills, so he tried to call Mr Wills. He was further frustrated by not being able to get through to him. In the light of Mr Tucker’s admission, the Tribunal finds this particular proved.

Particular (d): Offensive package sent to Mr Wills and the Agency

[29] On or about 17 February 2014, an NZ Post package containing a decapitated rat was received in the Agency’s mail box. The words “JILTED LOVE” had been written in the panel for the sender’s details.

[30] Mr Hodge submitted for the Committees that the Tribunal could infer that this was sent by Mr Tucker, as it was in similar packaging as other packages sent to the Agency (in particular the package referred to in (f), below), the timing was consistent with the breakdown of Mr Tucker’s relationship with Ms Mirkin, and shortly after the weekend’s events referred to in relation to particulars (b) and (c), above. Further,

although a handwriting expert called by the Committees could not say conclusively that the handwriting was Mr Tucker's, she could not say conclusively that it was not.

[31] Mr Tucker vehemently denied sending this package. He said he was a life member of the SPCA, and found what had been done to the animal abhorrent. He further submitted that there was no evidence showing that he had any involvement. It was, he said, an unsubstantiated allegation. In answer to questions in cross-examination, Mr Tucker suggested that Mr Wills had sent the package to the Agency himself.¹³

[32] The Tribunal is not satisfied that the Committees have established that this package was sent by Mr Tucker. Even bearing in mind the matters noted by Mr Hodge, NZ Post packaging is commonplace, and while the item in the package is offensive, it is not of the same nature as that referred to in (f). We find this particular is not proved.

Particular (e): Email sent to the Agency's lawyer

[33] Mr Tucker admitted sending an email to Mr Lockhart, former lawyer for the Agency, on 18 February 2014. The email was on Mr Tucker's business email account, and included many derogatory comments about Mr Wills and the Agency. It also included:

...

I cannot prove any of the following so it should be off the record however I believe they have another ex-cop in their employment who had to leave the police force as he was dealing drugs while also working in the drug squad.

I have also been told that the branded company car has been used to pick up recreational drugs in.

[34] Mr Tucker said the email was sent in the context of Ms Mirkin's pepper spray attack on him and her subsequent accusations about him to the Police. As she was still a licensee at the Agency he believed this was an orchestrated attack by Mr Wills

¹³ The Tribunal is not required to determine the veracity of this allegation, or any other allegations made by Mr Tucker.

and the Agency. As to what he said, and the manner in which he said it, Mr Tucker said “I say it how I see it”.

[35] In the light of Mr Tucker’s admission, the Tribunal finds this particular proved.

Particular (f): Offensive package sent to the Agency’s lawyer

[36] Following the incidents described above, Mr Wills took advice from Mr Beard. A trespass notice was served on Mr Tucker on 20 February 2014. On 7 March 2014 an NZ Post package was delivered to Mr Beard. The package contained faeces and broken glass, together with a letter dated 26 February. The letter alleged that someone from the Agency had placed the parcel in Mr Tucker’s mail box. Mr Wills said he had met with staff, and did not believe that anyone from the Agency had done that.

[37] Mr Tucker admitted that he sent a package containing faeces to Mr Beard, and that it was inappropriate for him to post it. He said the package was put in his own mail box on 19 February, he photographed it, and he reported it to the Police the same day. He said he had to send the package to Mr Beard to show him what his clients were like. He had not apologised to Mr Beard as he was not allowed to contact him. However, he was prepared to apologise now (although he later said in cross-examination that he had lost sympathy for Mr Beard).

[38] Mr Tucker further said that in the course of subsequent criminal proceedings (referred to at [15], above) the Police and the presiding Judge accepted that he had received the package. He said he had no doubt that the package had come from Mr Wills, and that by sending it on to Mr Wills’ solicitor he was illustrating his client’s conduct towards him.

[39] In the light of Mr Tucker’s admission, we find this particular proved.

Particular (g): Agency’s Open Home signs vandalised

[40] Around 7 and 8 March 2014 two “Open Home” signs put up by the Agency were cut into pieces. As these were in streets in the vicinity of Mr Tucker’s home,

no other signs erected by the Agency were damaged, and no other agencies' signs were damaged, Mr Hodge submitted that the Tribunal could infer that he was responsible. Mr Tucker denied responsibility for the damage, asking why he would have damaged a sign worth \$10. He submitted that Mr Wills and the agency had damaged the signs in order to implicate him.

[41] The Tribunal is not satisfied that the Committees have established that Mr Tucker damaged the signs. The conduct is different from other conduct alleged against or admitted by Mr Tucker, and we do not consider the matters put to us allow the inference. The Tribunal finds this particular not proved.

Particulars (h), (j) and (k): Unsigned letters

[42] On or about 29 March, 15 April, and 15 May 2014 undated and unsigned letters were received by a salesperson at the Agency, Mr Dowdle, the manager of another agency, Unlimited Potential, and another salesperson at the Agency, Ms Blackie. The letter to Mr Dowdle included a photograph, modified to show Mr Dowdle with an elongated nose, and said:

You have been telling porky pies and it shows.

Nobody likes you when you tell porky pies, not even God.

Why would an honourable man put his reputation at risk to protect a dishonourable rat?

His enemies have become your enemies! His screw ups you problem!

His arrogance is only exceeded by his stupidity.

[43] The letter to Unlimited Potential said:

FYI. In case you didn't already know your competition just never stops deceiving the public.

[44] Enclosed with this letter was a copy of one of the Agency's fliers, and a page of photographs. Photographs of Mr and Mrs Dowdle had been modified to show them with elongated noses, and each wearing a three-cornered hat with the word "dumb" or "dumba" typed on them. Each photograph had a "speech bubble" which

purported to portray each of them admitting to breaches of the Fair Trading Act, and to lying.

[45] The letter to Ms Blackie said

Do you really want to be part of a dodgy company like CRL where even the management don't trust the owner?

It's unlikely you were told they are currently under investigation.

Unlimited Potential is a far better place for you! Just talk to one of the many ex-CRL people there.

[46] Enclosed with this letter was a copy of an advertisement featuring Mr and Mrs Dowdle, announcing them as co-owners of the Agency. Underneath their photograph was the following text:

Well ... actually it was more one of a TUI's beer moments... "***Yeah right***"
They didn't buy into **Custom** residential and have never been Co-Owners.

After doing a spot of due diligence and management the really found they couldn't trust John Wills with their money as minority shareholders.

Which begs the question, why would anyone trust **Custom** Residential or John Wills with one of their most valuable assets?

There was also a photograph of Mr Wills (with an elongated nose) with a "speech bubble": "I'm so brilliant in my mind I don't need those dicks anyway". The text alongside this photograph was:

Sole shareholder and Director of Deception, honest John Wills. "No one has ever had to take legal action against him to get paid for anything" "***Yeah right***".

[47] Mr Tucker denied sending these letters, or having any knowledge of them, and said that all correspondence he sent was in his own name. He believes there are numerous people who were unhappy with the Agency, who may have had cause to send the letters. Mr Tucker acknowledged in cross examination that it was probable that the same person had sent the letters. He also acknowledged that the author of the letters was fixated on the ownership of the Agency, and that he had raised ownership of the Agency as an issue. He further acknowledged that he had made allegations as to breaches of the Fair Trading Act by the Agency. He said there were a number of

people who had issues with the Agency, and could be fixated, and that the Authority “does not want to know”.

[48] Mr Hodge submitted that the contents of the letters were unique to Mr Tucker. He referred the Tribunal to Mr Tucker’s acknowledgement that he repeatedly made allegations as to the ownership of the Agency, and that the Agency had “blatantly” breached the Fair Trading Act in his response to the complaint.

[49] We accept Mr Hodge’s submission. Given the similarity of the letters’ contents, and the references to matters raised by Mr Tucker concerning ownership of the Agency, breaches of the Fair Trading Act, and resignations of Agency licensees, the Tribunal can reasonably infer that the letters were all sent by the same person, and that Mr Tucker sent them. The Tribunal finds these particulars proved.

Particular (i): Eggs thrown at Mr Dowdle’s car

[50] This particular alleged that on 1 April 2014, Mr Tucker threw eggs at Mr Dowdle’s car while it was parked near the Agency’s premises. Mr Hodge submitted that this was part of Mr Tucker’s continuing conduct against Mr Wills and the Agency. Mr Tucker denied the allegation, and said he had no knowledge of the incident.

[51] The Tribunal does not consider that it can reasonably draw an inference that Mr Tucker was responsible for Mr Dowdle’s car being “egged”. The conduct is different from that which Mr Tucker has admitted, and the conduct which the Tribunal has found to be proved against him. Accordingly, the Tribunal finds this particular not proved.

[52] In summary, in respect of the first charge, the Tribunal records Mr Tucker’s admission of particulars (b), (c), (e) and (f), and finds those particulars proved. The Tribunal find particulars (a), (h), (j), and (k) proved. The Tribunal find particulars (d), (g) and (i) not proved.

Second charge

[53] Before considering the particulars of the second charge, we consider Mr Tucker's appeal against CAC 403's decision to lay it. The grounds of appeal were that there had been no notice of determination setting out CAC 403's reasons for determining to lay the charge, and that there was no evidence to support it.

[54] As to the first ground, a Complaints Assessment Committee is not required to give reasons for its decision to lay a charge. As the Tribunal said in *Sherburn v Complaints Assessment Committee*, in deciding to lay a charge the Committee is not acting as a judicial body, but is merely carrying out a screening role. It is, therefore, not required to give substantive reasons for its decisions.¹⁴

[55] Regarding the second ground, in determining an appeal against a Committee's decision to lay a charge, the Tribunal need only enquire as to whether there is a case to answer – that is, whether there is evidence on which a charge could be founded. In this case, the Tribunal is satisfied that there is sufficient evidence to found the second charge.

[56] Mr Tucker's appeal against CAC 403's decision to lay the second charge is dismissed.

[57] We now turn to consider the particulars of the second charge, by reference to CAC 403's identification of the particulars.

Particular 1.1: Abuse of Mr Wills

[58] It is alleged that on or around 13 March 2015 Mr Tucker verbally abused Mr Wills at Three Lamps, Ponsonby, Auckland. Mr Wills' evidence was that he was collecting money for charity at the Three Lamps corner of Ponsonby Road. He said Mr Tucker approached him and said "Found your balls yet you gutless piece of shit". Mr Wills immediately recorded this event in an email to Mr Beard. Mr Beard

¹⁴ *Sherburn v Complaints Assessment Committee* [2012] NZREADT 33, at [58].

contacted the Police because he believed that Mr Tucker's approach was in breach of his bail conditions.

[59] Mr Tucker denied abusing Mr Wills. His evidence was that Mr Wills tried to entrap him, by walking towards him, gesturing with his head. He said Mr Wills continued to follow him up the road, continuing to gesture and to try to entrap him. He said Mr Wills had made a false and misleading allegation that he had breached bail conditions. He produced a letter from Constable Mani of Auckland Police which, he said, proved this.

[60] Constable Mani's letter was attached to Mr Tucker's response to the second complaint. The letter was dated 21 May 2014, and referred to a complaint made on 11 May 2014. In his response to the complaint, Mr Tucker said that the Constable's letter was in relation to a Police complaint made by Mr Beard and that "Wills made a similar accusation among others on or about April 2015". Patently, a letter from the Police in 2014 cannot prove an allegation of a false complaint said to have been made in 2015. In any event, the Constable's letter could not be read as supporting Mr Tucker's allegation that Mr Wills and Mr Beard made a false complaint to the Police. All it said was that the Constable had concluded that there was no breach of bail.

[61] The Tribunal notes Mr Tucker's submission that he is pursuing disclosure from the Police through the Ombudsman's office, but is satisfied that Mr Tucker did approach Mr Wills, and that he made the statement recorded by Mr Wills. The Tribunal finds this particular proved.

Particulars 1.2 (a) to (g): Unsigned letters to clients of the Agency

[62] This particular alleges that between June and November 2015 Mr Tucker sent unsigned letters to seven clients of the Agency, which contained derogatory and/or offensive comments about the Agency. The letters were as follows:

(a) (14 June 2015)

We really like your property and would be more than happy to pay you a fair price.

However we don't trust your agents in any way. They are not able to give us a straight answer on anything about the property and seem sly and cunning.

When we mentioned this to friends they have told us that most people who use to work there quit because the owners ripped the sales people off.

If you decide to change to some trust worthy agents who know what they are selling we will then make you a fair offer.

(b) (Undated)¹⁵

We love your property but were disappointed to see you are not using an ethical agency like Harcourts to sell it like.

We have heard nothing but bad things about your agents and prefer not to have anything to do with them.

More recently we see they have made the papers once again.

Best of luck you will need it!

(c) (Undated)¹⁶

What your agents (Custom real estate) didn't want you to know and didn't tell us when they conned us with their lies:

1. There is nothing bespoke about their service, it's the same for everyone that uses them.
2. Virtually all their staff resigned over the past 12 months because the management ripped off the sales people and bullied the administration staff. If their staff who knew them best didn't trust them why would anyone else?
3. Their success rate with auctions is less than 50% out side their own area and just over 60% for all areas. Well below other agencies!
4. Most of the advertising you have been duped into paying for is about promoting their brand in the NZ Herald not your property.
5. Their best agents moved to Ray White Ponsonby and that's why their success rate is now so low. Only a few pretenders are left and they are not allowed to sell your property just the dodgy poodles.
6. You have every right to cancel your agency with them and use an honest agency because they would have been dishonest con-artists once again.

(d) (Undated)

What they don't tell you at Custom Real Estate is the most interesting thing.

¹⁵ Attached to this letter is a copy of a news item concerning Mr Tucker's discharge without conviction, following his having admitted the charge of posting a noxious substance.

¹⁶ The envelope which contained this letter is post-marked 7 August 2015 and is marked in handwriting "PRIVATE & CONFIDENTIAL".

Did Mr Collins tell you he has only sold two properties this year?
Did they tell you their auction failures are almost 50%?
Did they tell you you are not required to pay for the advertising Custom Real Estate use to promote their brand at your expense?
Did they tell you their top agent for Kingsland resigned and moved to Ray White as did all their good honest agents?

Our experience was they will just try and talk the reserve down so they get an easy sale.

(e) (Undated)

What the great pretenders at Custom real estate don't tell their customers and didn't tell us:

Their success rate for auctions is about 60%. Well below other agents in Auckland.

They will always try to talk your sale price down to you so they get an easy sale.

The reason for this is all their good agents resigned from the company in 2014 due to a lack of trust in the deceptive management.

Recent failed auctions include ...

The level of trust in this agency among local residents would be the lowest of all agencies in Auckland.

Ask any agent from any agency especially any of those who use to work there.

(f) and (g) These letters are identical to letter (e)

[63] Mr Tucker denied sending these letters. He said he believed that both Mr Wills and Mr Beard sent them. He referred to the handwriting expert's evidence that she found nothing to associate the handwriting "Private & Confidential" on the envelope for letter (c) with Mr Tucker.

[64] Mr Hodge submitted that notwithstanding that they are in different typefaces, and slightly different format and wording, the letters had a common theme: they referred to the Agency ripping off staff, to there being a lack of trust, to employees and licensees having left the Agency, and to "deceptive management". Those themes reflect the terminology of Mr Tucker's responses to the first and second complaints in 2014 and 2015, in which he talked of staff resigning and of the management of the agency being deceptive. Mr Hodge also referred to the "speech bubble" on the photograph of Mr Wills (referred to at [46], above) describing him as "director of deception".

[65] We are satisfied that the commonality in the themes and language of the letters, in particular the references to matters that Mr Tucker has raised against the Agency over the period covered by the complaints and in his responses to the two complaints, shows that all seven letters were written by the same person, and that Mr Tucker wrote them. The evidence that the handwriting on the envelope for letter (c) was not associated with Mr Tucker is not conclusive evidence that he did not send that letter, or any of the other letters. As Mr Hodge submitted, there would be no difficulty in getting another person to write “Private & Confidential” on an envelope. Accordingly, the Tribunal finds particulars 1.2 (a) to (g) proved.

Particulars 1.3 to 1.6: Offensive packages sent to Mr Wills and Mr Beard

[66] This particular alleges that Mr Tucker sent packages to Mr Wills and Mr Beard, which were received as follows:

1.3: On 17 July 2015, Mr Beard received a package containing a soiled sanitary pad and a condom;

1.4: On 22 July 2015, Mr Wills received a package containing a soiled sanitary pad and a condom;

1.5: On 23 July 2015, Mr Beard received a package containing two soiled sanitary pads;

1.6: On 26 August 2015, Mr Wills received a package containing a soiled sanitary pad and a condom.

[67] In closing, Mr Hodge applied to amend particular 1.6, which originally stated that the package received on 26 August was received by Mr Beard. He submitted that the Briefs of Evidence, provided to Mr Tucker in June 2016, made it clear that this package was received by Mr Wills, not Mr Beard. The Tribunal is satisfied that the amendment to the charge reflects the evidence given to the Tribunal, Mr Tucker has not been prejudiced, and it is appropriate to allow the amendment.

[68] Mr Tucker denied that he sent these packages. He said he had no doubt that Mr Wills and Mr Beard sent them to themselves, because they were bitterly disappointed that he had not been convicted in the criminal proceedings, and believed that (following his admission that he had sent Mr Beard the package of faeces) Mr Tucker would be the prime suspect. He rejected outright the suggestion put to him in cross-examination that the notion that Mr Wills or Mr Beard had sent the packages to themselves was absurd. He said he would never do anything as petty as this, but would go through proper processes.

[69] The packages contain similar, offensive, contents, and they were received over a short period of some five weeks. They were sent over a similar period as the letters set out at [62], above.¹⁷ They were sent to two people towards whom Mr Tucker had particular animosity. We are satisfied that one person sent all four packages, and that they were sent by Mr Tucker. The Tribunal finds this particular proved.

Particular 1.7: Facebook posting

[70] This particular alleges that on 28 October 2015, Mr Tucker posted a comment on the Agency's Facebook page, which was derogatory and/or offensive. The comment was identified as being by Mr Tucker, and was as follows:

People who have worked there have needed to take legal action to get paid.
That pretty much sums up their integrity.

[71] In a response to the Authority's investigator dated 16 December 2015, Mr Tucker said that the comment was on his Facebook page, and had been placed there by the Agency. Mr Tucker later accepted he had posted the comment on the Agency's Facebook page. In the light of that acceptance, the Tribunal finds this particular proved.

[72] In summary, the Tribunal has found particulars 1.1 to 1.7 of the second charge proved. Mr Tucker has accepted particular 1.7.

¹⁷ The envelope containing the letter at [62](c) was postmarked 7 August 2015.

Assessment

[73] Mr Hodge referred the Tribunal to Woodhouse J's comment in *Morton-Jones v Real Estate Agents Authority*, that the critical enquiry in a charge under s 73(a) is whether the conduct is "disgraceful".¹⁸ He submitted that on its own, Mr Tucker's admitted conduct in sending the package of faeces to Mr Beard (particular (f) of the first charge) is "a long way past" the threshold for a finding of disgraceful conduct under s 73(a) of the Act in that it establishes that Mr Tucker's conduct was plainly disgraceful.

[74] Mr Hodge submitted that even if Mr Tucker's assertion that this package was placed in his mail box by Mr Wills or the Agency is true (which he did not concede), that cannot possibly justify his sending the package to Mr Beard. Mr Hodge submitted that Mr Tucker's evidence and submissions regarding the package demonstrates his lack of insight into how serious and disgraceful his conduct was.

[75] Regarding the second charge, Mr Hodge submitted that this conduct was similar to the conduct covered by the first charge, and occurred after the criminal proceedings against Mr Tucker, in which Mr Tucker was given a clear message to "let this go". In that context, Mr Tucker's conduct referred to in the second charge can only be regarded as plainly disgraceful.

[76] Mr Tucker submitted that under the circumstances of what he had been subjected to during the previous week (having his dogs taken, being pepper sprayed, facing armed policemen, receiving the package of faeces in his mail box, receiving threats from Mr Wills and Mr Beard) his conduct in sending the package of faeces to Mr Beard was not disgraceful. He submitted that anyone would be stressed, and would react. He further submitted that he had acknowledged that his reaction was not appropriate. Regarding the emails, Mr Tucker submitted that he was angry and frustrated at what had been done to him, and should be "allowed some slack" as to the words he used. He submitted that a finding of misconduct was not justified.

¹⁸ *Morton-Jones v Real Estate Agents Authority*, above n 2 at [29].

[77] Mr Tucker submitted that he had to leave the Agency to avoid interference from Mr Wills, and it took a while to resolve matters. He submitted that he had offered assistance to Mr Wills to recover the commission, and had secured the payment to Ms Mirkin, and these were not the actions of a person with animosity.

[78] With regard to the allegation in the second charge that he sent packages containing soiled sanitary pads and condoms to Mr Wills and Mr Beard, Mr Tucker submitted that putting the packages together would take some time, and as a busy person he had better things to do with his time than pursue trivial matters against Mr Wills and Mr Beard.

[79] Mr Tucker submitted that he had been the subject of a sustained hostile attack by Mr Wills and Mr Beard. He said he was “sick and tired” of being the subject of false and misleading claims directed at him by two complainants who, he said, had been proved to be completely untrustworthy themselves.¹⁹

[80] The Tribunal does not accept Mr Tucker’s submissions but even if they were to be accepted, that does not excuse his conduct. 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.

Outcome

[81] For the above reasons, the Tribunal finds that the first and second charges under s 73(a) (disgraceful conduct) are proved against Mr Tucker.

[82] A telephone conference of the parties is to be arranged in order to set a timetable for filing submissions as to penalty and, if sought, to schedule a hearing on penalty.

¹⁹ Mr Tucker made allegations of unlawful conduct by Mr Wills and Mr Beard. It is not appropriate to set out those allegations.

[83] 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 C Sandelin
Member