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BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 001

READT 78/15

IN THE MATTER OF	A charge laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 403
AGAINST	[LICENSEE B] Defendant
Hearing:	28 and 29 September 2016, at Christchurch
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Mr J Gaukrodger, Member
Appearances:	Ms R Savage, on behalf of the Committee Ms N Pender, on behalf of the defendant
Date of Decision:	17 January 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Complaints Assessment Committee 403 ("the Committee") has charged the Licensee B ("the defendant") with misconduct under s 73(a) of the Real Estate

Agents Act 2008 ("the Act"). The Committee alleges that the defendant engaged in conduct that would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful. Put very briefly, the particulars of the charge allege that he sexually harassed and/or bullied a co-worker (to be referred to in this decision as "Ms A") by way of offensive personal or sexual comments, unwelcome sexual jokes and/or sexual or offensive gestures and behaviour. The conduct was alleged to have occurred between July and December 2014.

[2] In setting out and discussing the background facts and the evidence before us, the Tribunal has anonymised references to witnesses. The Tribunal records that an order has been made for suppression of Ms A's name.

Background facts

[3] The charge was filed following the Committee's consideration of a complaint made by Mr W, a director of the Agency at which both the defendant and Ms A worked.

[4] Ms A started working at the Agency in July 2014. The terms of her employment required her to work half days as personal assistant to the defendant (a licensed salesperson), sharing an office with him and an associate salesperson, Mr X. The defendant and Ms A did not know each other at the time, but prior to her being employed by the Agency the defendant sent her Facebook messages providing advice and encouragement regarding her interview with the Agency.

[5] On 16 September, Ms A spoke to Mr W about the defendant's behaviour towards her. Two of Mr W's business partners at the Agency were also present. Ms A said that the defendant had made offensive personal and sexual comments to her, had made unwelcome sexual jokes, and had made offensive sexual gestures towards her.

[6] Mr W spoke to the defendant the next day. When the defendant returned to his office he made an offensive comment. Ms A went to Mr W and said she did not want to work for the defendant any longer. The defendant telephoned Ms A later

that day and apologised for hurting her feelings. Ms A then told Mr W that the defendant had apologised, and she would continue working for him.

[7] About one month later, Ms A made a complaint to another business partner of the Agency concerning the defendant's conduct towards her. The Agency decided that Ms A would no longer work for him, and Ms A moved to another office. However, Ms A and another sales associate later complained about further offensive behaviour by the defendant.

[8] The defendant resigned from the Agency on 18 December 2014. Ms A resigned from the Agency on 6 January 2015.

[9] Ms A subsequently took legal advice, and negotiations were entered into between counsel on her behalf and the Agency. A settlement agreement was entered into, the terms of which are confidential to the parties and have not been disclosed to the Tribunal. The Tribunal understands that a settlement was also reached between Ms A and the defendant, following a complaint made by her to the Human Rights Commission. The terms of that agreement are also confidential to the parties, and have not been disclosed to the Tribunal.

Disgraceful conduct

[10] 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; …

[11] As the Tribunal said in *Complaints Assessment Committee v Downtown Apartments Ltd (In Liq)*:[1]

> The word disgraceful is in no sense a term of art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of the word.

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[1] *Complaints Assessment Committee 10024 v Downtown Apartments Ltd (In Liq)* [2010] NZREADT 6, at [55].

[12] In considering the charge against the defendant, the Tribunal refers to the discussion of disgraceful conduct in 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.[2] His Honour said:[3]

> [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. The point is more than one of semantics because s 73 refers to more than one type of misconduct. In particular, s 73(b) refers to "seriously incompetent or seriously negligent real estate agency work". Work of that nature would also involve a marked and serious departure from particular standards; the standards to which s 73(b) is directed are those relating to competence and care in conducting real estate work.

His Honour went on to say that:[4]

> … If the work was not real estate agency work, but the person doing the work was a licensee, the appropriate provision for a charge would be s 73(a).

[13] Thus, conduct charged against a licensee under s 73(a) may be found to be disgraceful (whether or not it is in the course of, or related to, real estate agency work) if it meets the ordinary meaning of "disgraceful". That is, whether the licensee's conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful.

[14] When determining whether conduct would reasonably be regarded as disgraceful, the Tribunal takes into consideration the standards that an agent of good standing should aspire to, in order to promote and protect the interest of consumers in respect of transactions relating to real estate, and of promoting public confidence in the performance of real estate agency work. The standard of proof required before the Tribunal can find a charge under s 73(a) proved is the balance of probabilities.[5]

[15] It is clear from *Morton-Jones* that when dealing with a charge under s 73(a), it is important not to conflate the two separate issues of liability (whether the licensee's

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2 *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804.
3 *Morton-Jones,* at [29].
4 *Morton*-Jones, at [30].
5 Pursuant to s 110(1) of the Act. See also *Real Estate Agents Authority v Murphy* [2015] NZREADT 42, at [79].

conduct was disgraceful) and penalty (the consequences of a finding that the licensee's conduct was disgraceful). The proper approach is that the Tribunal must:

[a] consider whether the licensee's conduct was disgraceful (the liability stage), then, if such a finding is made,

[b] consider whether that conduct affects the licensee's fitness to hold a licence: see s 36(1)(c) of the Act and (for example) the Tribunal's decision in *Revill v Registrar of the Real Estate Agents Authority*.[6] This enquiry is properly undertaken at the penalty stage.

The factual issues

[16] The Tribunal must first determine, as matters of fact, whether the conduct alleged against the defendant is proved. We set out below the particular conduct alleged by Ms A, and our factual findings in respect of each. The alleged conduct is set out first in respect of the period up to the meeting with Mr W on 17 September 2014, and secondly, in respect of the period after that meeting. The Tribunal must then determine whether the proved conduct was disgraceful.

The alleged conduct before 16 September 2014.

[17] (Between August and September): *The defendant called Ms A "shit tits"*. Ms A said she was not particularly upset at this at first, and responded in kind. Other employees of the Agency heard the "shit tits" comments and one of them told the defendant to stop. However, Ms A said that the defendant's conduct then escalated. The defendant admitted using the expression, but said that this was a "joke" expression used by himself, Ms A, and Mr X. We note the defendant's admission and find that he made these comments. For the purposes of proof of the charge, reciprocity is not relevant. It may be relevant at a later stage.

[18] (Between August and September): *The defendant called Ms A "ugly" and "fat", and said she had a "big belly"*. The defendant admitted that he had said to

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6 *Revill v Registrar of the Real Estate Agents Authority* [2011] NZREADT 41.

Ms A that she had a "pregnant belly". He said it was meant as a joke, and that it could not be applied to Ms A, as she is of slim build. He also said that the statement was never intended to be cruel or offensive. We note the defendant's admission and find that he made these comments.

[19] (Between August and September): *The defendant got Ms A to stand on a desk in order to write on a Whiteboard positioned above the desk, then looked up her skirt and commented on her underwear*. The defendant admitted that he may have made a statement regarding Ms A's underwear, but said it would have been said as a joke, as he could not actually see it. He denied that he had "got Ms A to stand on a desk … then looked up her skirt". The defendant's evidence in this respect was supported by Mr X, who was present at the time. We are not satisfied that the allegation that the defendant "got Ms A to stand on a desk … then looked up her skirt" has been proved on the balance of probabilities. However, in the light of the defendant's admission, we find that he commented on Ms A's underwear.

[20] (Between August and September): *The defendant would casually undo his fly zip, put his hand in his pants, and zip and unzip his fly zip against Ms A's back.* Two co-workers gave evidence that Ms A had told them that the defendant would play with his fly zip in front of her, zipping his fly up and down. The defendant said he had a habit of undoing his fly zip in the office, in order to tuck his shirt in, and he admitted that he "probably" did this when Ms A was in the office. He denied that he had any physical contact with Ms A when he zipped and unzipped his fly zip. On the balance of probabilities, we are not satisfied that the defendant zipped and unzipped his fly zip against Ms A's back. However, it was inappropriate in a shared office for the defendant to undo his zip in order to tuck his shirt in. In the light of his admission, we find that he zipped and unzipped his fly zip in Ms A's presence.

[21] On 12 and/or 13 September, the defendant said:[7]

[a] Ms A had *"a saggy vagina", "biscuit nipples", "saggy tits", and "a massive gut"*.

[7] Ms A said in her statement of evidence that there were exchanges on both 12 and 13 September, but the defendant said that there was only one exchange, on 13 September. That difference in their evidence is not material.

[b] *"Remember I used to fuck girls like you and leave them crying. Your vagina would probably reek out the whole office but I can still fuck you".*

[c] (after Ms A said to the defendant that she would "never go near you with your small dick syndrome") *"go back to work slave"*.

[d] *"You might as well walk out now, no one will believe you, the only reason why you got the job is because of me"*

[22] Ms Savage submitted for the Committee that Ms A's evidence as to these statements was supported by the Facebook messages she sent to her boyfriend, in which she set out what the defendant had said and done.

[23] The defendant accepted that there had been an exchange, but denied that he had made some of the statements. In particular, he denied [21][a], [b], and [d]. He admitted that he had said "That's great [Ms A] because you are batshit ugly and I wouldn't fuck you with a 10-foot bargepole". He also admitted that "slave" was a term he used in relation to Ms A. To some extent, the defendant's evidence was supported by Mr X, but he conceded that he was not present with the defendant and Ms A at all times.

[24] Ms Pender submitted on the defendant's behalf that some of the statements (for example [21][c]) were said as jokes, to "lighten the mood". She further submitted that the Facebook messages could not be relied on as a verbatim account of the 12/13 September exchange, and may have been indicative of the type of statement the defendant had intended to be funny, but which had started to upset Ms A by the time of the exchange. Ms Pender submitted that bearing in mind that Ms A "gave as good as she got", and was "stoic" under cross-examination, it was reasonable for the defendant to have been unaware of the impact of his remarks on Ms A.

[25] We find on the balance of probabilities that the defendant made all of the statements set out in paragraph [21]. The statements at [21][a], [b] and [d] require further comment. Those at [21][a] and [b] are supported by Ms A's Facebook messages to her boyfriend. If (as was submitted by Ms Pender) some of what Ms A

said in the messages referred to statements made at other times, that does not detract from the fact that they are a contemporaneous record of statements made by the defendant.

[26] The statement at [21][d] is consistent with the defendant's statement to Ms A to "go back to work slave", which he admitted.

[27] (On 16 September): *The defendant came into the office in a foul mood, and made Ms A re-write a contract because he did not like her handwriting on the document.* The defendant does not remember being in a "foul mood" but accepts that he could have been pre-occupied with work. Mr X remembered tension in the office, and that the defendant was very stressed about work. He said this was not directed at anyone, and doubted that it had anything to do with Ms A. We find that this allegation has been proved, but we will disregard it in our assessment of the defendant's overall conduct.

The alleged conduct after the meeting with Mr W

[28] (On 17 September): *The defendant left Mr W's office and returned to the office he shared with Ms A and Mr X and said, in front of Ms A, that "all [he] wanted to do was take his dick out and have a wank".* The defendant admitted that he probably said something rude about Mr W. He said that he does not remember Ms A being there, and he did not intend her to hear it, as the statement was directed at Mr X. We note the defendant's admission and find that he made this statement, in Ms A's presence.

[29] As noted earlier, the defendant apologised to Ms A for hurting her feelings. He said that this was before his meeting with Mr W. Ms A said it was after the meeting. We accept Ms A's evidence. As recorded earlier, Ms A returned to work with the defendant after receiving his apology.

[30] (In October 2014, when Ms A was again working with the defendant): *The defendant saw a copy of a social media photograph of a friend of Ms A. He said he found the friend sexually attractive and constantly discussed what he wanted to do*

with her. In cross-examination Ms A accepted that the defendant had made the statement about Ms A's friend only once. The defendant agreed that he said Ms A's friend was attractive but denied that he "constantly discussed what he wanted to do with her". Mr X said that both he and the defendant commented that Ms A's friend was good looking, but the defendant did not "constantly discuss what he wanted to do" with Ms A's friend. We accept Ms A's evidence and find on the balance of probabilities that the defendant made the statement about Ms A's friend. The statements are consistent with statements made by the defendant before his meeting with Mr W on 17 September**.**

[31] In relation to our factual findings, we found Ms A to be a credible and composed witness. She did not seek to exaggerate the defendant's conduct as she described it, and she did not seek to minimise her own responses to some of his statements to her. In general, we have preferred Ms A's evidence over the defendant's. Ms A's evidence is supported in material respects by her messages to her boyfriend. The messages were contemporaneous with the events, and we see no reason for not accepting them as a portrayal of the events. While the defendant's evidence received some support from Mr X, he conceded that he was not present during all of the exchanges. Further, he gave evidence of having told the defendant that he had gone too far.

Evidence of consistent conduct

[32] Ms A worked with another salesperson, Mr Y, as from October 2014. He gave evidence that he heard the defendant refer to Ms A as having a *"pregnant belly"*. He said that when he told the defendant not to speak like that, the defendant responded *"Oh don't worry Bro, your girlfriend is going to be in my cum bucket in a few months anyway"*. The defendant denied that he had made this statement and said that Mr Y had told him that he had beaten up a flatmate who had sent a text to his girlfriend.

[33] Mr Y was not cross-examined on this evidence. We find that the defendant made the statements to Ms A and to Mr Y. Ms Pender submitted that whatever he said to Mr Y said is not relevant to the charge against the defendant. We do not

accept that submission. The statement to Mr Y followed a statement by the defendant to Ms A, which is consistent with earlier statements about Ms A. The statement to Mr Y is relevant because it demonstrates a course of consistent conduct by the defendant, which continued after the meeting with Mr W.

[34] Another employee, Ms Z, said in a statement of evidence that in about late 2012 and mid 2013, the defendant said to her *"you look mighty fine I just about jizzed in my pants when I first saw you"*. Ms Z attributed this statement to typical young male behaviour and she let the defendant know that he should not speak in this way again. She also said that in about November 2014, she and the defendant were talking about a movie night and *"next thing I knew he was talking about vaginas and unnecessary adult conversation"*.

[35] Ms Z was not required for cross-examination. As with Mr Y's evidence, we find that the defendant made the statements referred to. Ms Z's evidence is relevant to consideration of the charge against the defendant because it demonstrates a consistent course of conduct by him.

[36] This evidence assists the Tribunal to assess of the veracity and reliability of Ms A's evidence. It is in relation to conduct which is similar to that alleged in the charge against the defendant, and is either within the timeframe of the alleged conduct, or within recent time of that conduct.

Submissions as to the Tribunal's consideration of the charge

[37] Counsel made submissions regarding issues to be considered in relation to the charge against the defendant. In large part they concern our assessment of Ms A's evidence. The submissions are best set out according to the matters raised.

The timing of Ms A's statement to the Authority

[38] A matter Ms Pender raised in relation to Ms A's evidence was the fact that when Mr W complained to the Authority in January 2015, she was not prepared to make a statement to the Authority. Ms Pender submitted that as this "was three

months after she had resolved things with [the defendant]", Ms A's reason for not making a statement (that she was "so fragile" as a result of the defendant's behaviour) should not be accepted.

[39] We have difficulty understanding the relevance of this submission, but we reject any suggestion that we should draw an adverse inference when assessing Ms A's evidence, from the timing of her statement. Her statement to the Authority's investigator is dated 22 February 2015. It was within a very short period of her resignation, and Mr W's complaint. Ms A was consistent in her complaint to Mr W, her statement to the investigator, and her evidence at the hearing.

Comparing the defendant's evidence with Ms A's

[40] Ms Pender referred to Ms A's "stoicism" under cross-examination, and contrasted this with the defendant, whom she described as having shown "grace under fire". This submission is not of assistance in our assessment of the veracity of the defendant and Ms A, respectively. However, we found Ms A to be a credible witness. She gave her evidence carefully and made concessions where appropriate.

[41] On occasion, the defendant was combative, and appeared to be unable, or reluctant, to answer a direct question (even when directed to do so by the Tribunal). Further, he appeared to be placing blame on his lawyers for not saying all that he wanted to say. That said, we have assessed the defenadnt's and Ms A's evidence carefully, and without reference to what may have been, for both of them, a reaction to the unfamiliar environment they found themselves in.

Did Mr Y influence Ms A's evidence?

[42] Ms Pender referred in her submissions to Ms A's evidence that Mr Y (with whom she worked after ceasing to work with the defendant) had helped her to prepare her response to the Authority's investigator. It was put to her in cross-examination that Mr Y had influenced her evidence (which she denied). We reject the submission that Ms A's evidence was influenced by Mr Y. The fact that Ms A's

evidence is consistent with what she said to Mr W, and what other witnesses have said, makes the submission untenable.

The "line in the sand"

[43] It was frequently put to Ms A that a "line in the sand" was drawn at the meetings on 16 September (Ms A and Mr W) and 17 September (Mr W's meeting with the defendant. The defendant referred to the "line in the sand" in his evidence. As Ms Pender put it in her submissions, all statements made up to, and including, the meetings were part of a package, which was "aired, cleared and resolved by lunchtime on 17 September 2014." She submitted that analysis of those statements had to be weighed against Ms A's decision to continue working with the defendant. She also submitted that Ms A's allegations of statements and conduct after that time were baseless or consequential.

[44] Ms A did not accept that the 'line in the sand" represented the end of the conduct she had complained about. Rather, when the point was put to her in cross-examination, Ms A's response was that it was the "middle" period of her allegations against the defendant.

[45] Whether there was a "line in the sand" at 16 September is not relevant to our consideration of whether the statements and conduct alleged by Ms A are proved and, if so, whether they amount to disgraceful conduct under s 73(a) of the Act. The fact that Ms A resumed working with the defendant (for a short period) does not alter or qualify our assessment as to whether the alleged statements were made, and conduct occurred, either before or after that date.

The significance of Ms A no longer working with the defendant

[46] Ms Pender submitted that the Tribunal could not find that the defendant had committed any form of bullying or sexual harassment after Ms A stopped working with him on 13 October 2014. This was, she submitted, because the defendant was no longer responsible for managing Ms A's work, and the "quasi-employer/employee relationship through which the earlier comments were filtered no longer applied"

[47] If this submission was intended to suggest that an employer/employee relationship is required before the defendant could be found to have engaged in sexual harassment or bullying, then it is incorrect and we reject it utterly. The charge does not depend on there being an employer/employee relationship.

The "office culture" of the Agency

[48] The defendant said in evidence that the way he spoke was symptomatic of the culture at the Agency: he said that everyone used foul language, and talked to each other in this way. Witnesses who submitted evidence for the defendant agreed with this proposition, while those for the Committee disagreed.

[49] We do not consider this to be relevant, and we do not need to make a finding as to the nature of the "office culture" at the Agency. The Tribunal is required to consider the charge against the defendant. We are not concerned as to how others at the Agency may or may not have behaved. We consider the charge against the defendant by looking objectively at the conduct we have found to be proved, against the standard of whether the conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Mr W's motive for making a complaint to the Authority

[50] Ms Pender's closing submissions included extensive submissions concerning Mr W's motivation for complaining to the Authority. She submitted that the Tribunal could conclude on the evidence that Mr W's complaint to the Authority was motivated by malice, and to pursue a vendetta against the defendant following his resignation from the Agency. She also submitted that a "strong inference" could be drawn that Mr W was prepared to pay Ms A compensation for the events in September 2014 in order to "coax" her into supporting the complaint against the defendant.

[51] Ms Pender submitted that this amounted to using the complaints process for an improper purpose, in breach of r 7.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. She invited the Tribunal to find that Mr W's

actions in laying the complaint for an improper purpose amounted to misconduct, and to refer the matter back to the Committee for further investigation.

[52] Ms Savage submitted that Mr W's motivation for laying a complaint to the Authority is not relevant to consideration of whether the defendant's conduct, as alleged, occurred. She further submitted that there is no correlation between any improper motive on the part of Mr W, and Ms A's evidence. She noted that there had been no suggestion that Ms A had made up her allegations, and that the the defendant had accepted a number of them. She further submitted that any issue as to the payment of compensation to Ms A is completely irrelevant, and it is simply not possible to draw any inference that the payment was instrumental in Ms A's being prepared to make a statement.

[53] We accept Ms Savage's submissions. Whatever motivated Mr W to make the complaint (and we note his evidence that he was under a professional obligation to do so) is not relevant to the charge laid against the defendant, in which the only issue the Tribunal is concerned with is whether he was in breach of his professional obligations. Nor do we accept that we should draw an adverse inference against Ms A on the grounds that she reached settlements with the Agency and the defendant. There can be no suggestion that Ms A made up her evidence concerning the defendant as a result of Mr W's alleged improper motive. Further, any settlement agreements reached are not relevant to the Tribunal's enquiry.

Does the conduct we have found proved amount to sexual harassment and/or bullying", as alleged?

Sexual harassment

[54] The Tribunal is assisted in understanding what is meant by the term "sexual harassment" by s 62 of the Human Rights Act 1993, which provides:

> **62 Sexual harassment**
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> …
>
> (2) It shall be unlawful for any person (in the course of that person's involvement in any areas to which this subsection is applied by subsection (3)) by the use of language (whether written or spoken) of a sexual nature, or of

visual material of a sexual nature, or by physical behaviour of a sexual nature, to subject any other person to behaviour that–

(a) is unwelcome or offensive to that person (whether or not that is conveyed to the first-mentioned person); and

(b) is either repeated, or of such a significant nature, that it has a detrimental effect on that person in respect of any of the areas to which this subsection is applied by subsection (3).

(3) The areas to which subsections (1) and (2) apply are–

…

(b) Employment, which term includes unpaid work:

…

(4) Where a person complains of sexual harassment, no account shall be taken of any evidence of the person's sexual experience or reputation.

[55] Assistance is also provided by the Ministry of Justice document: "The Non-Discrimination Standards for Government and the Public Sector – Guidelines on how to apply the standards and who is covered".[8] This states that sexual harassment can involve such things as personally sexually offensive comments, sexual jokes, repeated comments about a person's alleged sexual activities or private life, offensive hand or body gestures, and physical contact such as patting, pinching, or touching.

[56] We reject Ms Pender's submission that "sexual harassment" means "aggressive pressure or intimidation of a sexual nature".

[57] We have considered (taken as a whole) the conduct and statements we have found proved, Ms A's evidence that the conduct and statements were unwelcome, and the fact that the conduct occurred at the Agency, where the defendant and Ms A were both employed. As set out earlier, we have disregarded the conduct referred to at paragraph [27], above. We are satisfied that the defendant's statements and conduct, as set out at paragraphs [17], [18], [19] (qualified as noted), [20] (qualified as noted), [21][a]–[d], [28], and [30], amount to sexual harassment.

Bullying

[8] Ministry of Justice, Wellington, 2002, at 36.

[58] The defendant denied that he had bullied Ms A, but accepted that his conduct "could be construed as bullying", although he qualified that with the words "out of context". However, he also accepted that Ms A looked up to him as a mentor, and that she looked up to him for guidance. That is the context in which the defendant's conduct is to be considered. In that context, we find that the defendant's conduct towards Ms A amounted to bullying.

In the light of the Tribunal's factual findings, is a finding of disgraceful conduct (s 73(a) of the Act) justified?

[59] Ms Pender submitted that:

> [The defendant] has always acknowledged that he made some offensive comments and upset [Ms A]. He also accepts that the imbalance in their working relationship at the time it happened meant his remarks could be construed as bullying. But this was never about sexual harassment. The issue between [the defendant] and [Ms A] was an employment matter which was appropriately managed (and resolved) at the time. The defendant owned up to his conduct and learned from the experience. The matter was not serious enough to involve the regulatory body or warrant a charge of misconduct.

[60] We reject that submission. While it may be accepted that the defendant owned up to (some of) his conduct, that he has learned from the experience, and that settlement agreements have been reached, those matters are not relevant to the issue we must determine at this stage. That issue is whether those of the defendant's statements and conduct we have found proved, and are to be considered in our assessment, were in breach of his professional obligations pursuant to the Act, and justify a finding of misconduct under s 73(a) of the Act.

[61] The charge is concerned with professional obligations, not how the defendant's statements and conduct may be viewed in another context. We repeat our earlier statement that the Tribunal's task is to consider the proved conduct and statements objectively, and to decide whether they would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful

Was the defendant's conduct disgraceful?

[62] Ms Savage submitted that the threshold for "disgraceful conduct" must be determined by reference to the principle that "licensees must be able to be trusted to conduct themselves in a calm and professional manner at all times if consumer interests are to be promoted and protected."[9] That principle is also applicable to how

[9] See *Real Estate Agents Authority v Arthur Subritzky* [2012] NZREADT 19, at [21].

licensees conduct themselves in circumstances which do not involve real estate agency work. In *Real Estate Agents Authority v Brankin*,[10] the Tribunal said:

> That agents behave in a proper professional manner when managing staff is in the interests of the consumers being served by those staff members. Where a licensed agent's conduct in managing staff falls so markedly below expected standings that agents of good standing would regard that conduct as disgraceful, we agree that misconduct findings are warranted.

That statement is equally relevant to a situation where a licensed salesperson (rather than a licensed agent) is managing staff.

[63] Both counsel referred the Tribunal to previous cases where licensees were (or were not) found to have engaged in disgraceful conduct.

[64] Ms Savage submitted that decisions in which the Tribunal found that the threshold of disgraceful conduct was met, such as *Brankin*,[11] *Complaints Assessment Committee 20003 v Weldrand*,[12] *Complaints Assessment Committee 10054 v Hume*,[13] *Real Estate Agents Authority v McGowan*,[14] *Real Estate Agents Authority v Arthur Subritzky*,[15] and *Real Estate Agents Authority v Robert Subritzky*,[16] assisted the Tribunal in assessing the defendant's conduct. While acknowledging that the facts of every case turn on their specific circumstances, she submitted that the Tribunal's finding in *Brankin* (concerning a licensee's behaviour in managing staff) supports in this case a finding that the defendant's conduct fell so markedly below expected standards that agents of good standing would reasonably regard it as disgraceful.

[65] Ms Pender submitted that conduct must reach a high threshold of reprehensibility before it will meet misconduct under s 73(a) of the Act. She submitted that the defendant's conduct is markedly dissimilar to the cases cited by Ms Savage, where the Tribunal assessed conduct as disgraceful, and less serious than in the cases of *Complaints Assessment Committee 20004 v Singh*,[17] and *Complaints*

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10 *Real Estate Agents Authority v Brankin* [2013] NZREADT 32, at [79].
11 *Real Estate Agents Authority v Brankin*, above, n 10.
12 *Complaints Assessment Committee 20003 v Weldrand* [2013] NZREADT 78.
13 *Complaints Assessment Committee 10054 v Hume* [2013] NZREADT 91.
14 *Real Estate Agents Authority v McGowan* [2014] NZREADT 92.
15 *Real Estate Agents Authority v Brankin*, above, n 10.
16 *Real Estate Agents Authority v Robert Subritzky* [2012] NZREADT 20.
17 *Complaints Assessment Committee 20004 v Singh* [2016] NZREADT 63.

Assessment Committee v Towers[18], where the Tribunal concluded that the relevant conduct did not meet the "disgraceful" threshold. She further submitted that the defendant's conduct was "closer in seriousness" to that considered by the Tribunal in *Complaints Assessment Committee v Beiszer*,[19] and to that considered by a Complaints Assessment Committee in *L*,[20] where, again, conduct was found not to be disgraceful.

[66] In summary, Ms Pender submitted that the defendant's conduct, while unacceptable, fell well short of constituting misconduct; and in particular it was not sufficiently serious that it would be regarded by agents of good standing or reasonable members of the public, as disgraceful.

[67] It is a truism that in no two cases are the circumstances the same. The Tribunal can do no more than refer to previous decisions as indications as to the type of conduct where the Tribunal has concluded that conduct was disgraceful.

[68] We reject the submission that the conduct in *Singh, Towers, Beiszer,* and *L* is in any way comparable to the defendant's proved conduct. One or more of the members of the Tribunal in this case are familiar with the circumstances of each of the Tribunal decisions cited to us. We are satisfied that the circumstances of this case are markedly dissimilar to, and more serious than, in those cases.

[69] The case that has most similarity to the present one, for the purpose of assessing whether the threshold for disgraceful conduct is met, is *Brankin*, where the Tribunal found that Mr Brankin had alleged that the complainant (a licensed salesperson at the agency where Mr Brankin was manager) was dishonest in her dealings with him and clients when that could not be substantiated, had restricted her hours of work when she was a "top-line salesperson", and had improperly accessed her private emails. The Tribunal found that the manner in which Mr Brankin treated the complainant was harassment and found that his conduct was disgraceful, under s 73(a) of the Act.

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18 *Complaints Assessment Committee 407 v Towers* [2016] NZREADT 24.
19 *Complaints Assessment Committee 10053 v Beiszer* [2011] NZREADT 05.
20 *L (Complaint CA4043613)* [2011] NZREAA 132.

[70] Other cases that have some similarity to the present one, although the only common factor was that the conduct arose out of interactions between a licensee and colleagues and former colleagues at their respective agencies, are *Hume* and *McGowan*.

[71] In *Hume*, the licensee on four separate occasions threatened violence and (in one case assaulted) the principals of three agencies he had worked for over a period of nearly three years. In *McGowan*, the genesis of the charged conduct was a dispute between Mr McGowan and a former colleague regarding the split of a commission. Mr McGowan lost his temper, swore at her, called her derogatory names, pushed her against a door frame, and closed the door, causing bruising.

[72] Ms A was younger than the defendant, and had very recently been employed at the agency. She had no experience in real estate, whereas the defendant had several years' experience in the industry. She looked up to the defendant as a mentor and a person from whom she would seek guidance

[73] In this case, the defendant failed to act in a professional manner when managing his staff member, Ms A. We find that:

[a] The defendant made inappropriate, offensive, and unwelcome statements of a sexual nature (amounting to sexual harassment) to Ms A, both before his meeting with Mr W and afterwards; and

[b] The defendant acted in a bullying manner towards Ms A.

[74] We are satisfied that the defendant's conduct was well over the threshold of "disgraceful".

Finding

[75] The Tribunal finds the charge of misconduct under s 73(a) of the Act (disgraceful conduct) is proved against the defendant.

[76] A telephone conference is to be arranged with counsel to set a timetable for submissions as to penalty and, if sought, to schedule a hearing on penalty.

[77] As a final point, the Tribunal records that it is regrettable that the Agency's senior management was not more assertive in preventing the type of behaviour of which the defendant was accused.

[78] 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 procedures to be followed are set out in Part 20 of the High Court Rules.

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Hon P J Andrews
Chairperson

_____
Mr J Gaukrodger
Member

_____
Mr G Denley
Member