

In the Matter of **Part 4 of the Real Estate Agents Act 2008**

And

In the Matter of **Complaint No CA3129186**

In the Matter of **XYZ**
Licence Number: XXXXXXXX

Decision of Complaints Assessment Committee

Dated this 15th day of October 2010

Complaints Assessment Committee:

CAC10037

Chairperson: Sandra Gill

Deputy Chairperson: Robyn Wilson

Panel Member: Denise Bovaird

Complaints Assessment Committee – Decision finding unsatisfactory conduct

Decision

1. The Complaint

- 1.1 This is a complaint lodged with the Real Estate Agents Authority (the Authority) by Mr N on the 23rd of March 2010 against XYZ. XYZ is a holder of an agent's licence under the Real Estate Agents Act 2008 (the Act).
- 1.2 Mr N's complaint is that XYZ carried out real estate work while not having an officer of the company licensed as an agent, as required by s44(2) of the Act, following Mr N's summary dismissal from the company.

2. Material Facts

- 2.1 Mr N states he was employed by XYZ in the position of Licensee/Principal Officer and a Director.
- 2.2 Mr N states that on 19 January 2010 he was suspended from his employment at XYZ pending disciplinary proceedings and not allowed to return to the premises, thereby preventing him from carrying out the requirements of s50 (supervision of salespersons) of the Act.
- 2.3 Mr N states that on 29 January 2010 he received notice of immediate termination of his employment with XYZ.
- 2.4 Mr N states that this left XYZ without an officer of the company who was a holder of an agent's licence as required under s44(2) of the Act.
- 2.5 Ms W, on behalf of XYZ, responded to Mr N's complaint in a letter to the Authority dated 20 May 2010.
- 2.6 XYZ acknowledged the facts as outlined above, but stated that a replacement for Mr N was

sought as quickly as possible.

- 2.7 XYZ state that Mr N “*without any entitlement or agreement (either contractual nor verbal) mis-appropriated two sums of money totaling to \$17,760 [seventeen thousand seven hundred and sixty dollars]*” which he told XYZ was “*owed to him as a salespersons commission payments.*”
- 2.8 Following the discovery of this, XYZ state they attempted to discuss the issue with Mr N, but were then served a legal notice by Mr N’s legal representative on 19 January 2010 requesting a meeting.
- 2.9 XYZ state that upon receiving the notice from Mr N’s legal representative, the shareholders of XYZ requested Mr N take a leave of absence from his employment until the dispute was remedied.
- 2.10 XYZ state that after the meeting with Mr N and his solicitor, and after due diligence, XYZ sent Mr N an official letter of dismissal on 29 January 2010.
- 2.11 XYZ state that they then filed a complaint with the Authority “*to remedy the situation of monies misappropriated by [Mr N] from [XYZ] and discipline [Mr N] for his dishonest and unethical conduct.*” They go on to state that the complaint was considered by a Complaints Assessment Committee on 8 April 2010 and the decision is still pending.
- 2.12 XYZ state that within 10 (ten) working days of Mr N’s dismissal, and in accordance with the regulations set out in the Act, Mr S was appointed as the new Principal Officer and Director of the company. A copy of Mr S’s contract was attached to their response to the Authority. Mr S signed his contract on 12 February 2010.
- 2.13 From the information provided by XYZ, there is exactly 10 (ten) working days between Mr N’s departure and the appointment of Mr S. This meant that the company was without at least 1 (one) officer of the company holding an agent’s licence during the relevant 10 (ten) days which is a requirement under the Act.
- 2.14 From a search of records held on the Authority’s database, XYZ did not notify the Authority that they would be, or were, without a licenced agent for the 10 (ten) days between 29 January 2010 and 12 February 2010.

3. Relevant Provisions

3.1 This complaint is covered under s44 of the Act.

3.2 Section 44 of the Act sets out provisions in respect of partnerships and companies:

44 Special provisions in respect of partnerships and companies

(1) A person must not, after the issue to him or her of an agent's licence, enter into partnership with any person in respect of his or her business as an agent without the prior approval of the Authority; and the authority must refuse to grant its approval unless it is satisfied that the proposed partner holds an agent's licence.

(2) If a company is the holder of an agent's licence, at least 1 officer of the company must, at any given time, hold an agent's licence.

3.3 Having satisfied itself that it had completed its enquiry into the complaint, the Committee conducted a hearing with regard to the complaint under Section 89 (1) of the Act.

3.4 The hearing was conducted on the papers pursuant to Section 90 of the Act. Pursuant to Section 90 (2) the Committee made its determination on the basis of the written material before it.

4. Discussion

4.1 XYZ acknowledge that there was a gap of 10 (ten) working days between the dismissal of Mr N and the appointment of Mr S.

4.2 A search of the records at the Authority shows that XYZ did not notify the Authority of the situation in place.

4.3 XYZ were in clear breach of s44(2) of the Act during that 10 (ten) days.

4.4 The Committee does note however, the presence of a mitigating factor in that XYZ did move quickly to replace Mr N and appoint an appropriate person to the position. Notwithstanding this factor, XYZ failed to notify the Authority of the situation.

5. Decision

5.1 The Committee met on 16 August 2010 to consider the complaint against XYZ and reach a determination. The Committee has determined under section 89(2)(b) of the Act that it has been proven that XYZ has committed a breach of the Act under s44.

5.2 Having determined that XYZ is guilty of a breach of the Act, the Committee has the power to make one of the orders set out in section 93(1) of the Act.

Section 93 provides:

- (1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:
 - (a) make an order censuring or reprimanding the licensee:
 - (b) order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint:
 - (c) order that the licensee apologise to the complainant:
 - (d) order that the licensee undergo training or education:
 - (e) order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint:
 - (f) order the licensee –
 - (i) to rectify, at his or her or its own expense, any error or omission; or
 - (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:
 - (g) order the licensee to pay to the Authority a fine not exceeding \$10,000 in the case of an individual or \$20,000 in the case of a company:
 - (h) order the licensee, or the agent for whom the person complained about works, to make his or her business available for inspection or take advice in relation to management from persons specified in the order:
 - (i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.
- (2) An order under this section may be made on and subject to any terms and conditions that the Committee thinks fit.

5.3 Based on the established facts that;

- XYZ did operate for a short period without an officer or director who was the holder of an agent's licence as required under s44(2), which is a clear breach of the Act.

- XYZ did not notify the Authority that these circumstances were in place and the steps they had in progress to rectify the situation.

The Committee makes the following Orders under section 93(1) of the Act.

- An order censuring or reprimanding the licensee under s93(1)(a).
- An order that XYZ are to pay to the Authority a fine of \$2,500 (two thousand five hundred dollars) under s93(1)(g) which is to be paid to the Authority within 30 (thirty) days of receipt of this determination.

5.4 In making an order at this level of penalty, the Committee has taken into account that XYZ did make efforts to appoint an appropriate person once their previous employee's contract had been terminated.

5.5 The Committee also takes into account that XYZ did not notify the Authority of their situation, and given the circumstances behind the termination of their employee's contract, there would have been some prior warning that XYZ might be left without a licensed agent in place.

6. Publication

6.1 One of the Committee's functions pursuant to section 78(h) of the Act is to publish its decisions.

6.2 Given that there are legal issues still outstanding between the complainant and the licensee at this time, the Committee directs publication of its decision, but omitting the names and identifying details of the complainant, the licensee and any third parties.

7 Right of Appeal

7.1 A person affected by a determination of a Complaints Assessment Committee may appeal to the Disciplinary Tribunal against a determination within 20 working days after the date of this notice.

7.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this determination with your Appeal.

7.3 Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at www.justice.govt.nz/tribunals.

Signed

A handwritten signature in blue ink, appearing to read 'Sandy Gill', is written over a light grey rectangular background.

Sandy Gill

Chairperson

Complaints Assessment Committee

Real Estate Agents Authority

Date: 15 October 2010