

REA Case Summary: Compensation Referrals

Cho v REAA (CAC 2108) [2024] NZHC 2812

In September 2024, the High Court issued its judgment for the case of *Cho v REAA (CAC 2108)* (the **Decision**). The Decision deals with provisions in the Real Estate Agents Act 2008 (the **Act**) that allow for a Complaints Assessment Committee (**CAC**) to make a referral to the Real Estate Agents Disciplinary Tribunal (the **Tribunal**) to make a compensation order in favour of a complainant in the event of a finding of unsatisfactory conduct. This case summary sets out the key legislative provisions and key findings in relation to compensation referrals.

When a CAC may consider referring a case to the Tribunal for compensation

1. When a complaint is made to REA, if REA has the jurisdiction to consider the complaint, the Registrar of REA must refer a complaint to a CAC, where the Registrar has determined not to deal with it under section 74(3) of the Act. The CAC will then decide if the complaint should be investigated. After reviewing all information obtained during the investigation, if the CAC believes a licensee has breached their professional obligations, the CAC may find that the licensee engaged in "unsatisfactory conduct". When a licensee is found guilty of unsatisfactory conduct, the CAC may make orders. Parties are invited to make submissions on what penalty orders they believe the CAC should impose.
2. Pursuant to section 93(ha) of the Act, if the CAC is satisfied that the unsatisfactory conduct involves more than a minor or technical breach, it may make an order referring the matter to the Tribunal to consider whether to make a compensation order under section 110(5) of the Act (a "compensation referral").
3. Only the Tribunal may make a compensation order - either following its own finding of misconduct (section 110(3)(g)) or following a referral from a CAC (section 110(5)). The Tribunal may make a compensation order if it is satisfied that the following requirements under section 110(4) are met:
 - a. if it appears to the Tribunal that any person has suffered loss by reason of a licensee's unsatisfactory conduct;
 - b. if the unsatisfactory conduct is more than minor or technical contravention of the Act or any regulations or rules made under the Act (the Tribunal will not consider this where a CAC has made a compensation referral to the Tribunal, pursuant to section 110(5) of the Act); and
 - c. the order is one that a court of competent jurisdiction could make in relation to a similar claim in accordance with principles of law.
4. If a CAC makes a compensation referral, the complainant has an opportunity to make a case to the Tribunal claiming compensation they believe the licensee owes them (up to a maximum of \$100,000).

What a CAC may consider when making a compensation referral

5. A CAC considering a compensation referral under section 93(ha) must decide whether the licensee's unsatisfactory conduct amounts to more than a minor or technical breach of their obligations.

6. In the Decision, the High Court found that beyond considering whether the licensee's unsatisfactory conduct was minor or technical, the CAC has a limited residual discretion when deciding whether to make a compensation referral. The Court noted that CACs "*should only be filtering out [compensation] claims where it is abundantly clear ...that it is not the type of claim that the Tribunal should assess under s 110(5) [of the Act]*" (see paragraph 60(c) of the Decision). This means that a CAC may only decline to make a compensation referral in limited circumstances, such as where it does not fall within the language of sections 110(4) and (5) of the Act.

REA position

7. The High Court did not expand on the circumstances in which it would be "abundantly clear" that a claim is not one that the Tribunal should assess. However, it did acknowledge REA's submissions on the point. REA considers that the circumstances include but are not limited to where:
- a. a complainant does not seek compensation;
 - b. the complainant does not disclose any loss;
 - c. a complainant wrongly attached the label 'compensation' to something that could be remedied by other orders available to a CAC, for example costs incurred in respect of the inquiry or investigation by the CAC;
 - d. a complainant sought compensation only in respect of a point that the CAC had found was not established, such that the established unsatisfactory conduct does not lend itself (as a matter of jurisdiction) to any compensation; or
 - e. a request for referral is plainly frivolous, vexatious, brought for an improper purpose or an abuse of process, such as because:
 - (i) the complainant has already recovered their loss;
 - (ii) the amount sought to be recovered is not more than *de minimis* or taking into account the facts of the particular case does not justify the use of the regulatory scheme to recover it.
8. The list of situations provided above is non-exhaustive and is intended to assist anyone involved in the complaint process to better understand the compensation provisions under the Act. This is a developing area of the real estate regulatory regime. Regard should be had to Tribunal and court decisions following the Decision regarding the compensation referral power. These will provide further insight into the scope of CACs' powers when dealing with compensation claims made by complainants.

References

- High Court Decision: [Cho v REAA \(CAC 2108\) \[2024\] NZHC 2812](#), see particularly para[60] and [65]
- [Real Estate Agents Act 2008](#) (see Part 4 and ss 93(1)(ha), 110(4)(b) and 110(5)).