

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 52

READT 012/15

IN THE MATTER OF an application to review a decision of the Registrar pursuant to s.112 of the Real Estate Agents Act 2008

BETWEEN **WEN CHAO WANG**

Applicant

AND **THE REGISTRAR OF THE REAL ESTATE AGENTS AUTHORITY**

Respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms C Sandelin - Member

HEARD ON THE PAPERS

DATE OF THIS DECISION 14 July 2015

REPRESENTATION

The applicant on his own behalf
Mr M J Hodge, counsel for the Registrar

DECISION OF THE TRIBUNAL

Introduction

[1] This application relates to a 2 February 2015 decision by the Registrar of the Real Estate Agents Authority to cancel the applicant's licence pursuant to s.54(d) of the Real Estate Agents Act 2008 ("the Act").

[2] Section 54 provides:

"54 Cancellation of licence

The Registrar must cancel a person's licence and remove that person's name from the register,—

...

(d) if the person has failed to complete any continuing education required by practice rules made by the Authority pursuant to section 15; ...

[3] The Registrar's decision was made because the applicant had failed to meet his continuing education requirements for the 2014 calendar year in accordance with the Real Estate Agents Act (Continuing Education) Practice Rules 2011 Notice issued

under s.15 of the Act. That decision was communicated to Mr Wang by the Registrar in her letter to him of 2 February 2015.

[4] The applicant did not wish to proceed to a formal hearing before us and relies on his Application To Review form in which he states:

“My Real Estate License has been cancelled by 2 February 2015. The reason is I haven’t met the requirements of 2014 calendar year verifiable continuing education. I admitted it’s my careless, I remember the due day wrong to complete the education, but due to serious consequence (I will not eligible to apply for a new license for 5 years if my license has been cancelled), I really want to keep my license because I had spend too much time and effort to the license and I am really like Real Estate salesperson this job. I ask to give me a chance to keep my license and I will complete the continuing education as soon as possible.”

The Central Question

[5] Did the Registrar make an error of fact or law in cancelling the applicant’s licence?

[6] Central to this issue is whether the respondent, having determined the applicant had failed to meet his continuing education requirements in accordance with the practice rules, had any discretion under s.54 or, rather, was required to cancel the applicant’s licence.

Grounds Relied on by the Applicant

[7] It is submitted for the Authority that the applicant’s grounds of appeal are not immediately clear, and that the application does not identify any error of fact or law in the Registrar’s decision.

[8] It is not disputed by the applicant that he failed to complete the continuing education required by the practice rules.

[9] The applicant broadly asks us to reverse the Registrar’s decision based on the consequences of the Registrar’s determination. He asserts he forgot or overlooked the deadline for these educational requirements, and asks us to give him a second chance.

[10] The Authority opposes the application and submits that it should be dismissed because the Registrar acted in accordance with the requirements of the Act.

Our Jurisdiction

[11] Section 102(d) of the Act sets out our functions which include the broad function of conducting any review of a decision of the Registrar under s.112. Our jurisdiction on such a review is set out in s.112 of the Act, which provides:

“112 Application to Tribunal to review determination by Registrar

- (1) *An applicant may apply to the Tribunal against a determination of the Registrar that adversely affects the applicant within 20 working days after the date the applicant is notified of the determination.*
- (2) *The application must be made by way of written notice to the Tribunal of the applicant’s intention to apply, accompanied by—*
 - (a) *a copy of the notification; and*
 - (b) *any other information that the applicant wishes the Tribunal to consider in relation to the appeal.*
- (3) *The review must be conducted on the papers unless the applicant requests to be heard in his or her application.*
- (4) *After conducting the review, the Tribunal may confirm, reverse, or modify the decision of the Registrar.*
- (5) *If the Tribunal reverses or modifies a determination of the Registrar, it may exercise any of the powers that the Registrar could have exercised.”*

[12] As Mr Hodge puts it for the Authority, we therefore have no wider powers than those of the Registrar to determine matters arising under s.54 of the Act. Accordingly, if we find the Registrar was required to cancel the applicant’s licence once a failure to complete any continuing education required by the practice rules had been identified, the same requirement will apply to us.

The Initial Submissions for the Authority

[13] Mr Hodge submitted for the respondent Authority that:

- [a] The use of the word “*must*” in s.54 is prescriptive and required the Registrar to cancel the applicant’s licence;
- [b] The Registrar’s decision to cancel the applicant’s licence was therefore in accordance with the Act.

Discussion

[14] Mr Hodge submitted that it is well established that the use of the word “*must*” denotes an imperative. He referred to *Smith v Accident Compensation Corporation* [2010] NZACC 227 at [11] where the District Court noted when considering the phrase: “*the leave of the District Court must be sought within 21 days after the District Court’s decision,*” that “*there is no discretionary power granted to the District Court ... it is clear from the wording that it is an imperative that leave must be sought within 21 days*”.

[15] Similarly, in *Mana Property Trustee Ltd v James Development Ltd* [2010] NZSC 90 at [26], when considering the importance of a clause contained in a contract, the Supreme Court expressed the view that:

“As a starting point in the interpretation, it is to be observed that the clause is imperatively expressed: the area “must not be less than” the stated minimum ... what is decisive in this case is the use of language of that kind in the overall context.”

[16] In light of the use of the imperative “*must*” in s.54, Mr Hodge submits for the respondent that the inescapable conclusion is that the Registrar was bound to cancel the applicant’s licence once she had determined that the requirement under s.54(d) had not been complied with. Mr Hodge puts it that the overall context of the section is to create a set of circumstances which are deemed to be serious enough to result in cancellation of licences, and to ensure there is uniformity in the Registrar’s response to such circumstances and certainty of outcome for all persons subject to the Act.

[17] The respondent is not aware of any discretion provided to the Registrar elsewhere in the Act; nor are we. We agree that no error of fact or law has been identified by the applicant.

Our Chairperson’s Memorandum of 18 May 2015

[18] On 18 May 2015 our Chairperson expressed his concern at Mr Wang’s predicament in a Memorandum to the parties part of which read as follows:

“[3] There is no dispute that, apparently by oversight, Mr Wang failed to complete Verifiable Continuing Education requirements in the 2014 calendar year. Accordingly, his licence under the Act has been cancelled. Also, he has been advised that he is no longer able to carry out real estate work and that he will not be eligible to apply for a new licence for a period of five years from the date of cancellation. That reference to a five year restriction would be based on s.37(1)(c) of the Act which reads:

“A person whose licence or certificate of approval has been cancelled within the preceding five years or whose licence is suspended at the time of application under the Real Estate Agents Act 1976 is not eligible to hold a licence.

[4] We note that Mr Wang was also advised by the Registrar on 2 February 2015 that he may seek a review before us pursuant to s.112 of the Act. We take it that the licence must have been cancelled as at 2 February 2015 rather than 2 February 2014 as stated in the Registrar’s letter.

...

The Chairperson’s Concern

*[5] Mr Wang’s application for review has got to the stage where, by consent and in terms of s.112(3), this matter has been referred to this Tribunal to deal with on the papers. Mr Wang did not wish to provide further evidence or argument. However, in the usual way, we have received most helpful submissions from Mr Hodge on behalf of the Authority based on the broad submission that the use of the word “*must*” in s.54 is prescriptive and required the Registrar to cancel the applicant’s licence and that there has been no error of fact or in law in the process.*

[6] *Because I have concerns about this matter in general I have not yet referred it to my above members. The current outcome, and that supported by the Authority at this review, seems rather harsh. The point of this memorandum to the parties is simply to observe that it is puzzling that s.54 of the Act seems to be in the imperative and yet under s.55 of the Act there is a prescribed process for cancellation (for most situations but with some exceptions) and that process requires not only written notice to the licensee of the Registrar's intention to cancel the licence and a statement of reasons, but also the providing of 10 days to the licensee to make written representations and the Registrar is to take any such representations into account "when deciding whether to cancel the licence".*

[7] *It seems to me that the discretionary process referred to in s.55 of the Act does not quite square up with the imperative or mandatory nature of s.54. Accordingly, as a preliminary issue, I invite the parties to provide me with a succinct response to my concern within the next three weeks."*

[19] Mr Wang did not respond to that Memorandum but Mr Hodge, very helpfully, filed further submissions dated 17 June 2015 related to our Chairperson's concerns together with an affidavit of Ms Vivienne Stanley, Senior Licensing Advisor – Continuing Education, for the Authority. She exhibited copies of the documents relevant to the process by which Mr Wang's licence was cancelled. In those submissions of 17 June 2015 Mr Hodge submitted:

"Section 54 and 55

- 5 *Section 55 is a procedural provision designed to cover a wide range of possible circumstances. It provides for written representations to be made before cancellation is effected. This makes obvious sense when what is in issue, for example, is whether a false or fraudulent representation or declaration has been made of a kind that engages s.54(g). It makes little sense, for example, when a licensee has died thus engaging s.54(a). Yet on its terms s.55 applies equally in both circumstances.*
- 6 *It is therefore submitted that the extent to which the s.55 process carries with it matters for evaluation and judgment on the part of the Registrar depends on the ground of cancellation which is engaged under s.54.*
- 7 *In terms of s.54(g), it is submitted that written submissions may result in cancellation being avoided where the licensee can show that he or she has in fact completed the required continuing education.*
- 8 *It is also relevant to note that the Authority allows licensees to voluntarily suspend or surrender their licence and complete their continuing education requirements during the period of voluntary surrender or suspension. Where this option exists, the period for written representations under s.55 also affords licensees a final opportunity to write to the Registrar to take advantage of this option, before mandatory cancellation takes effect.*
- 9 *The s.55 process has utility in the circumstances just referred to, but does not go wider to confer a broader discretion on the Registrar, which would effectively operate to repeal the mandatory language contained in s.54 and would, in effect, replace the word "must" with "may".*

[20] With regard to the process in this case Mr Hodge submits that it is clear from the affidavit of Mrs Stanley that Mr Wang knew about his continuing education requirements because:

- [a] As Mrs Stanley deposes, wide-spread information about continuing education obligations have been disseminated to the industry.
- [b] Mr Wang complied with his continuing education requirements in 2012.
- [c] Mr Wang received no less than five separate written communications notifying him of the need to meet continuing education requirements and of the consequences of failing to do so.
- [d] Mr Wang's employer also advised him of the need to meet his continuing education requirements.

[21] Mr Hodge notes that on 15 January 2015 the Authority emailed Mr Wang advising him that his licence may be cancelled if he did not complete the required continuing education. The notice specifically referred to s.54(d) to the effect that the Registrar must cancel a person's licence if they have failed to complete any continuing education requirements. The email advised Mr Wang that he needed to come back to the Authority in writing (he could either provide proof of completion of continuing education requirements or he could voluntarily suspend or surrender his licence) by 28 January 2015. The email also made it clear that if he should take no action he would thus be allowing his licence to be cancelled, and the consequence of that would be ineligibility to apply for a new licence for a period of five years.

[22] Mr Hodge submits that when this email is read as a whole, Mr Wang has been put on notice of the relevant matters required under s.55 of the Act, and his failure to take any steps means that the cancellation of his licence on 2 February 2015 was by that stage mandatory. The Authority's advice in its 15 January 2015 email was restarted in a letter to Mr Wang dated 20 January 2015, also annexed to Mrs Stanley's affidavit.

[23] For completeness, Mr Hodge also noted that the 15 January 2015 email advised Mr Wang that if his continuing education was not completed his licence "*may be cancelled*". That was appropriate because the email also helpfully raised the option of voluntary suspension or surrender of his licence, which would have avoided cancellation taking effect. Regrettably, Mr Wang chose not to take those steps available to him, as a result of which cancellation became mandatory. This consequence was made clear in the 15 January 2015 email, and indeed in other communications as well, by the reference to s.54(d) and by the advice in the final paragraph of the email.

[24] Finally Mr Hodge recorded that the Registrar readily appreciates why we would be concerned that the outcome in this case is harsh. However, it is submitted that this is the unavoidable consequence of the mandatory terms of the Act, which were unfortunately engaged as a result of Mr Wang's complete failure to take any steps, including after the alternative option of suspending his licence while he completed his continuing education requirements was given to him. Mr Hodge observed that it is regrettable that cancellation became a mandatory requirement in this case, but that is as a consequence of Mr Wang's actions.

Outcome

[25] We can only agree with Mr Hodge's submissions on behalf of the Registrar. It is clear from the documents adduced to us on behalf of the Registrar that all the procedural requirements of s.55 have been complied with.

[26] Having determined that the applicant failed to meet the continuing education requirements prescribed by the practice rules, the Registrar cancelled the applicant's licence.

[27] It seems to us that the Registrar acted consistently with the Act by doing so. Her decision was correct in law and properly founded and she was required to cancel the applicant's licence. Accordingly, the application is dismissed.

[28] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

Judge P F Barber
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member