

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 20

READT 075/15

IN THE MATTER OF an appeal under s111 of the Real Estate Agents Act 2008

BETWEEN **DELAWER HOOSAIN KUMANDAN**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC 404)**

Respondent

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Mr G Denley – Member
Ms N Dangen – Member

HEARD ON THE PAPERS

APPEARANCES

The appellant on his own behalf
Mr J Simpson, counsel for the Authority

DECISION NO. 1
AS TO WHETHER NOTICE OF APPEAL IS OUT OF TIME
DATED 26 FEBRUARY 2016

[1] Mr Kumandan is facing a charge laid by the Complaints Assessment Committee following an investigation by the Complaints Assessment Committee. When Mr Kumandan received advice from the Complaints Assessment Committee that they were intending to lay charges with the Real Estate Agents Tribunal he lodged a Notice of Appeal. The Tribunal Secretariat rejected this appeal saying that it was out of time, not being filed within 20 working days of the date of decision of the Complaints Assessment Committee.

[2] Mr Kumandan challenges this decision asserting that the 20 working days ran from the date of service of the notice. Thus, he claims that his Notice of Appeal was filed in time. Counsel for the Complaints Assessment Committee agree with Mr Kumandan and submit that the date on which the time for calculating the 20 working days commences is the date when the notice of the decision is received.

[3] The relevant timeline is as follows:

- (a) **12 November 2015**: the Complaints Assessment Committee reached a decision to lay charges. They issue a decision dated 12 November 2015.

- (b) **16 November 2015:** Mr Kumandan is served with the decision.
- (c) **10 December 2015:** date of expiry of the 20 day appeal period if time for calculating the 20 days ran from 12 November 2015.
- (d) **14 December 2015:** the date of expiry of the Notice of Appeal period if time begins to run from the date of service of the decision. On this day Mr Kumandan served his appeal.

Decision

[4] The appeal is filed out of time.

Reasons

[5] Section 111 provides a person affected by a determination may appeal against the determination of the Committee *within 20 days after the date of the notice given under ss 81 or 94*.

[6] Section 81 deals with situations where the Complaints Assessment Committee determines to take no action.

[7] Section 94 is the section which is appropriate to this case and deals with cases where the Committee makes a determination under s 89 including a decision to lay charges. In such cases the Act requires the Committee to give written notice of that determination to the complainant and the licensee. This notice must state the determination reached and the reasons for it and specify any orders made under s 93 and describe the right of appeal under s 111.

[8] Section 111 refers to the *date of the notice given* under ss 81 or 89. The notice given in these cases is the *notice of determination* which must contain the matters set out in s 94.

[9] The 20 working day appeal period runs from the date of the notice of the decision (determination) under s 89. (i.e. 12 November 2015).

[10] At page 2 of the notice of determination, the notice says "*You may appeal in writing to the Tribunal within 20 working days after the date of this decision*". Thus the decision itself makes it clear that time begins to run from the date of the decision. In this case the date of the decision was 12 November and the date of expiry of the appeal period was 10 December 2015. Thus the date of service is irrelevant. Nor is it arguable that s 111 refers to the date when the notice is given to the agent as the date from when time runs. The reference to "*given*" is a reference to when the notice of determination is given, i.e. dated.

Additional comment

[11] Had Mr Kumandan's appeal been in time against the decision of the Committee to lay a charge then it is likely that the Tribunal would have found that there were sufficient grounds under s 89 for the Complaints Assessment Committee to refer the charges to the Tribunal.

[12] In *Brown v Complaints Assessment Committee & Weallens*¹ the Tribunal found that when considering an appeal from a decision to lay a charge, the Tribunal needed to consider only whether the Complaints Assessment Committee had provided sufficient evidence to establish a *prima facie* case. The question that was posed by the Tribunal in *Brown* was: is there a case to answer?

[13] In *Miller v the Complaints Assessment Committee* the Tribunal said “*the test for the appeal is whether or not there is some evidence, which is not inherently incredible, which if established as accurate would establish the essential element in the alleged offending*”.

[14] In this case we have the evidence of Ms Morrell and Ms Gerrard which, if accepted, would certainly provide *prima facie* grounds for the Tribunal to consider the charge against Mr Kumandan.

[15] The Tribunal draws to the parties’ attention the appeal provisions of s 116 of the Real Estate Agents Act 2008.

Ms K Davenport QC
Chairperson

Mr G Denley
Member

Ms N Dangen
Member

¹ [2011] NZREADT at [42].