

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 003

READT 067/14

IN THE MATTER OF

An application under s 108 of the Real Estate Agents Act 2008

PETER EGDEN
Applicant

REAL ESTATE AGENTS AUTHORITY
Respondent

On the papers

Tribunal:

Hon P J Andrews (Chairperson)
Mr G Denley (Member)
Ms C Sandelin (Member)

Submissions filed by:

Mr J Simpson, on behalf of the Authority

Date of Decision:

23 January 2019

DECISION OF THE TRIBUNAL
(Application for non-publication order)

Introduction

[1] On 9 July 2014, Complaints Assessment Committee 20005 found that Mr Egden had engaged in unsatisfactory conduct. He was found to have employed, as a salesperson, a person who did not hold a salesperson’s licence, in breach of s 143 of the Real Estate Agents Act 2008. He was also found to have failed to ensure that the employee was familiar with the Act and the licensing requirements of the Act, in breach of r 8.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. The Committee imposed a fine of \$1,500, and ordered publication of its decision.

[2] Mr Egden appealed to the Tribunal against the Committee’s decision. In a decision issued on 12 November 2015 the Tribunal upheld the Committee’s finding of unsatisfactory conduct, albeit finding that he had breached s 50 of the Act (as to supervision and management of salespersons), rather than s 143. The Tribunal did not disturb the Committee’s penalty order (“the Tribunal’s decision”).¹

[3] In the course of its decision, the Tribunal considered Mr Egden’s application for an order prohibiting publication of his name, under s 108 of the Act. The Tribunal declined the application, on the grounds that it was not satisfied that the matters advanced by him outweighed the public interest in publication. Mr Egden did not appeal against the Tribunal’s decision.

[4] The Tribunal noted that on 17 December 2014 a finding was made against Mr Egden (by a different Complaints Assessment Committee) that he was in breach of s 142 of the Act by failing to ensure that a salesperson he had employed did not have a current licence. He did not appeal to the Tribunal against that decision, and did not apply for a non-publication order.

¹ *Egden v Real Estate Agents Authority (CAC 20005)* [2015] NZREADT 80.

Application

[5] By way of an email dated 30 October 2018, Mr Egden applied to the Tribunal for an order for non-publication of the Tribunal's decision. He set out the reasons for his application for non-publication as being:

[a] It is now three years since his application was considered by the Tribunal and almost five years since the original complaint against him; and

[b] He is successfully employed in the real estate industry as both a licensee and a sales manager and feels that enough time has passed for the record of the Tribunal's decision to be removed.

[6] On 9 November 2018, the Tribunal sent Mr Egden a copy of the Tribunal's decision in the Tribunal's decision in *Complaints Assessment Committee 10020 v McDonald* ("*McDonald*"),² concerning an application to remove the record of disciplinary charges from the Tribunal's website, and directed him to file written submissions in support of his application within ten working days (that is, by 23 November 2018). Mr Egden did not file any submissions in support of his application.

[7] Submissions were filed on behalf of the Authority, in opposition to Mr Egden's application, on 7 December 2018. Mr Egden did not file any submissions in response to those for the Authority.

[8] The Authority submitted that Mr Egden's application should be declined. It submitted first that the Tribunal does not have jurisdiction to make the order sought by Mr Egden. It submitted that the Tribunal's powers are entirely contained within the provisions of the Act, it has no discretion outside those provisions, and the power to order non-publication under s 108 of the Act is limited to proceedings which are currently in existence before the Tribunal.

² *Complaints Assessment Committee 10020 v McDonald* [2018] NZREADT 67.

[9] It also submitted that in the present case, Mr Egden's case is at an end. The Tribunal's decision was sealed, and there has been no appeal against it. Accordingly, there is no case before the Tribunal in which a non-publication order could be made.

[10] The Authority referred to the Tribunal's decision in *McDonald*, in which an application for a non-publication order, made four years after the relevant Tribunal decision was issued, was declined. Notwithstanding the Tribunal's decision to decline the application, the Authority submitted that, in the absence of the benefit of full submissions on the point, the Tribunal took the wrong approach in stating that the Tribunal might have the power to consider an application for a non-prohibition order well after the relevant proceedings have been concluded, albeit on strictly narrow grounds.

[11] It submitted that the proper approach is that non-publication orders can only be made in proceedings that are before the Tribunal, and that s 108 of the Act does not give the Tribunal a power that can be exercised separately from extant proceedings.

[12] Secondly, and in the alternative, the Authority submitted that in any event Mr Egden's application does not reach the threshold for granting an order for non-publication. It submitted that cases where non-publication orders have been made under the Act have involved consequences well over and above those that would ordinarily be expected from publication of an unsatisfactory conduct or misconduct finding, and that the paradigm is where the health or mental health of the licensee or the licensee's family would be affected.

[13] The Authority submitted that the grounds of Mr Egden's present application have not substantially changed from those set out in his earlier, unsuccessful, application. It further submitted that Mr Egden can point to no error of procedure or injustice in the original decision that needs re-consideration and, as Mr Egden still holds a licence under the Act, the public interest in publication continues to apply.

The Tribunal's decision in *McDonald*

[14] The Tribunal found Ms McDonald guilty of misconduct on 17 October 2013. Her salesperson's licence was suspended for three years, and she was fined \$5,000. She had not participated in the Tribunal hearing or made an application for a non-publication order.

[15] Ms McDonald applied to the Tribunal in 2018 for an order removing the substantive and penalty decisions from the Tribunal's website, on the grounds that the passage of time since the decisions, and the absence of any repetition of misconduct, meant that continuing publication was having a disproportionate and unfair effect on her, and was no longer serving any legitimate purpose of the disciplinary process.

[16] Her application was declined. The essence of the Tribunal's decision was that the disciplinary proceeding against her had concluded, and could not be re-visited for the purpose of considering her application for a non-publication order. The Tribunal stated that it is in the public interest that there is an end to litigation, and that it would cut across the principle of finality of litigation if parties could return to the court (or Tribunal) at a later stage and seek orders varying the original decision.

[17] The Tribunal was not required to, and did not, make a finding that it had a discretionary power to consider an application for a non-publication order after a proceeding has ended. It noted that it might, in some exceptional circumstances, have the power to recall a matter for further consideration where there has been a clear miscarriage of justice.

[18] The Tribunal observed that other than to refer to "any proceedings before the Tribunal" in s 108(1)(a), s 108 does not specify a time limit within which an application for a non-publication order can be made, and that there is no explicit statutory obstacle to making a non-publication order, even a number of years after the original decision.

[19] Sub-paragraphs (b) and (c) of s 108(1) do not refer to "proceedings before the Tribunal". We note the Authority's submission that sub-paragraphs (b) and (c) should

be interpreted as being similarly restricted to proceedings currently before the Tribunal. However, in the absence of any limitation to “proceedings before the Tribunal” in the opening words of s 108(1) the difference in the wording of sub-paragraphs (b) and (c), as opposed to that of sub-paragraph (a), may not support the Authority’s submission.

[20] The Tribunal accepted in Ms McDonald’s case that the general principle of finality of proceedings applies to applications under s 108, and the Tribunal does so in this case, also. If the Tribunal does have a power to entertain an application for a non-publication order after a proceeding has ended (and we are not required to, and do not, determine the point), then it could only be exercised in truly exceptional circumstances. Such circumstances must, by definition, occur only very rarely. They certainly do not arise in cases based on the passing of time since the original decision, and any effect on a licensee’s work or position in the real estate industry.

[21] In the case, as the Tribunal said with respect to Ms McDonald’s application, there is no justification for departing from the general principle of finality, even if the Tribunal had a discretion to do so.

The Authority’s alternative submission

[22] Mr Egden’s application referred to the passage of time since the original complaint was made, and the Tribunal’s decision declining his original application for a non-publication order. He said he felt that enough time had passed for the record of the Tribunal’s decision to be removed. The passage of time since the Tribunal’s decision does not outweigh the public interest, and the interests of consumers in respect of transactions that relate to real estate agency work, in publication of the proceeding.

Decision

[23] Mr Egden’s application for a non-publication order is declined.

[24] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member