BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

	[2020] NZREADT 44
	READT 041/19
IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	HENRY BARFOOT Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1902) First Respondent
AND	LEJUN (JAMES) WU and SHUNYI (CANDY) CAO Second Respondents

On the papers:

Tribunal:	Mr J Doogue (Deputy Chairperson) Ms C Sandelin (Member) Mr N O'Connor (Member)
Submissions filed by:	Mr T Rea, on behalf of the appellant Ms L Lim, on behalf of the Authority
Date of Decision:	18 September 2020

DECISION OF THE TRIBUNAL (application to recall decision)

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[1] The Committee made a finding against the appellant that his conduct as the supervisor of staff employed by the agency of Barfoot and Thompson's Milford branch, did not meet the required standard. The CAC concluded that the various deficiencies together constituted unsatisfactory conduct. The penalty that the CAC imposed was a fine and censure. The Committee's order also said:

> The Committee orders that Licensee 3 undertakes further training on the requirements for properly supervising and managing a real estate business.

[2] The Committee also imposed a fine of $4000.

[3] The appellant filed an appeal against both the finding of unsatisfactory conduct and the penalty that the Committee imposed.

[4] The Tribunal heard the appeal on 14 May 2020. The appeal against a finding of unsatisfactory conduct was dismissed and the fine reduced to $3000. The Tribunal did not make any order with regard to the extra training that had been directed.

[5] The contention of the appellant was that the in-service training which he undertook was the same he would be required to undertake pursuant to the Committee's order

[6] For the foregoing reasons, the appellant sought the recall of our decision so that we could give consideration to setting aside the order which the Committee made. His contention was that he should not have to submit again to training with regard to the same matters that were covered in 2015.

[7] We understand that there is no dispute that the appellant did in fact undertake some further training in 2015. However, we also understand that the Authority does not make any concession that the training that he would be required to undertake pursuant to the order would cover the same ground as that which he underwent in 2015.

[8] The position which counsel for the Authority takes is to agree that if the memorandum from the appellant's counsel had not in fact been provided to the Tribunal before it made its decision on the appeal, then it would be permissible for it

to recall its decision. If, on the other hand, the Tribunal had received the material before making its decision, then the Tribunal could not properly recall its decision.

[9] We are of the view that it is important that the requirement for finality in litigation before the Tribunal be upheld and that departures from that requirement should only occur in cases where justice so requires.

[10] In this case, the appellant put forward additional submissions concerning the penalty after the date on which the appeal was heard but before a decision had been issued.

[11] The Tribunal overlooked the additional submissions about the re-training order when it gave its decision. The circumstances in which that occurred was that the appeal against sentence was not addressed in the submissions that the appellant was required to file for the appeal but was raised in a subsequent memorandum that counsel filed on behalf of the appellant. We accept that for that reason, the consideration which the tribunal gave to the appeal was incomplete. It seems not unreasonable that the decision should now be reconsidered and for it to be possibly recalled and amended. The circumstances could justify that because they are sufficiently exceptional.

[12] Turning to the penalty order itself, we assume that the approach that the CAC had in mind when making the order that the appellant undertake additional training was to address the shortcomings in the appellant's management methods which had led to the charge against him. Such a rationale for the obligatory training would seem to be correct in principle. On the other hand, we do not consider that it would be reasonable for an order to be made which would mandate additional training that had little or no relevance to the shortcomings that the appellant has demonstrated.

[13] However, there is something of an information vacuum in this area. The first is concerned with what training the applicant would be required to undertake pursuant to the order.

[14] The Committee stated at paragraph 5.28 of its decision that:

> The Committee orders that Licensee 3 undertakes further training on the requirement for properly supervising and managing a real estate business is in direct relation to Licensee 3's position in this regard

[15] The Appellant through counsel submits that this is the same sort of training that he previously undertook in 2015. We note that counsel for the Authority does not refute that submission.

[16] The essence of the contention put forward on behalf of the Appellant is that it would be duplicatory and therefore futile for him to redo the training that he carried out in 2015.

[17] Counsel for the Authority makes the point that there is no restriction that limits the CAC to making orders of this type only in cases where training has not been previously undertaken. Counsel for the Authority also points out that where there has been a lapse of a considerable period since the training was first undertaken, it may be advantageous for the course to be taken again[1].

[18] Unsurprisingly perhaps, the Committee did not provide an explicit statement concerning what the objective of ordering further training was. Common sense suggests that what they had in mind was that having observed real shortcomings in the way that the appellant managed his staff, further training could have the desirable effect of avoiding any further breaches on the part of the appellant.

[19] We consider that because of the shortcomings that the appellant showed in regard to supervising staff, further training was required. That is because it would seem that the 2015 training was on its own insufficient to apprise the appellant of what his responsibilities were. Alternatively, training may have been ineffective or the appellant may have forgotten aspects of it. We consider that the events which led to the appellant being charged demonstrate on their own that the licensee needs refresher training.

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[1] The training took place in 2015, the unsatisfactory conduct in early 2019

[20] That leads us to the view that it is unlikely that requiring him to undergo further training in this area would be a waste of time.

[21] To conclude, our view is that there was no appealable error on the part of the Committee when they posed the requirement for additional training. That being so, the application to recall the decision so far is concerned that matter is declined.

[22] 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.

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Mr J Doogue
Deputy Chairperson

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Ms C Sandelin
Member

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Mr N O'Connor
Member