

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 47

READT 030/19

IN THE MATTER OF

An Application for Review of a Registrar's
decision, under Section 112 of the Real
Estate Agents Act 2008

BETWEEN

SIMON ALEXANDER CALLAGHAN
Applicant

AND

THE REGISTRAR OF THE REAL
ESTATE AGENTS AUTHORITY
Respondent

On the papers

Tribunal:

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

Submissions received from:

Mr Callaghan, Applicant
Ms E Mok, on behalf of the Registrar

Date of Decision:

5 November 2019

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Callaghan has applied under s 112 of the Real Estate Agents Act 2008 (“the Act”) for review of the Registrar’s decision to cancel his licence, conveyed to Mr Callaghan in a letter dated 20 August 2019.

Background

[2] On 3 August 2018 Mr Callaghan applied to suspend his salesperson’s licence for three years. He was required to pay an annual suspension fee. On 22 June 2019, the Authority emailed Mr Callaghan a reminder that he was required to pay the annual suspension fee by 3 August 2019 if he wished to keep his licence suspended. Mr Callaghan was advised that if the fee were not paid, his licence would be cancelled and he would be prohibited from being re-licensed for five years. Mr Callaghan was sent a further reminder email on 20 July 2019, then a reminder text message on 21 July 2019.

[3] Mr Callaghan did not pay the annual suspension fee by 3 August 2019. On 5 August 2019 Mr Callaghan was sent a letter (by email and by post), advising him of the registrar’s intention to cancel his licence under s 54(h) of the Act, as he had failed to pay the annual suspension fee. The letter advised Mr Callaghan that he had ten working days (that is, by 19 August 2019) within which to provide the Registrar with a written response as to why his licence should not be cancelled.

[4] On 9 August 2019, Mr Callaghan contacted the Authority by phone and spoke with a Regulatory Services Administrator. The Administrator’s record of this call was as follows:

[Mr Callaghan] suspended his licence for 3 years and thought he had paid for 3 years. I told him that the 170.20 he paid in 2018 was only for one year.

[5] On 20 August 2019, Mr Callaghan was sent a letter (by email and by post) advising him that the Registrar had cancelled his licence.

Submissions

[6] Mr Callaghan submitted that after speaking with the Regulatory Services Administrator, he “precipitately made a snap-shot decision to allow my licence to be cancelled”. He submitted that he had “pretty much instantly regretted” his decision, when the importance of it became evident to him. He further submitted that he had been unwell in the week leading up to his conversation, and put his “uncharacteristically thoughtless behaviour down to a lingering malaise”.

[7] Mr Callaghan also submitted that he had never had cause to be brought to the Tribunal’s attention during his years as a real estate professional. He submitted that his hasty action was a thoughtless oversight which he deeply regretted. He requested that his suspension be restored.

[8] On behalf of the Registrar, Ms Mok noted that Mr Callaghan was required to establish that the Registrar had made an error of fact or law in cancelling his licence. She submitted that Mr Callaghan had not identified any such error. Ms Mok further submitted that the Registrar had made no error of fact or law, and had followed the correct process for cancellation.

[9] Ms Mok also submitted that the Registrar was required to cancel Mr Callaghan’s licence when he failed to pay the annual suspension fee. She submitted that once it was established that Mr Callaghan had failed to pay the fee, the Registrar had no discretion to decide not to cancel his licence. She further submitted that the Tribunal has no wider powers than those of the Registrar. Accordingly, if the Tribunal finds that the Registrar was required to cancel Mr Callaghan’s licence, it has no discretion to reach a different conclusion from the Registrar.

Relevant statutory provisions

[10] Mr Callaghan’s application to suspend his licence was made pursuant to s 58 of the Act, which provides:

58 Voluntary suspension of licence

- (1) A licensee may, by written notice to the Registrar, request that the registrar suspend his or her licence for a period specified in the notice.

- (2) The Registrar must suspend the person's licence and record the suspension in the register for that specified period.
- (3) A person whose licence is suspended may, by written notice to the Registrar, request that the Registrar revive that person's licence.
- (4) The Registrar must then revive that person's licence unless there is some other ground for cancellation or suspension of that person's licence under s 54, 110(2)(c), or 115.

[11] Pursuant to s 20 of the Act, the Authority has prescribed an annual fee of \$148 (GST excl) to maintain a suspended licence.

[12] Section 54 of the Act provides, as relevant:

54 Cancellation of licence

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

...

- (h) if the person has failed to pay any prescribed fees or levies, or payment of the fee or levy has subsequently been dishonoured

[13] The process to be followed by the Registrar is specified in s 55 of the Act:

55 Process for cancellation

- (1) The process for cancellation licence, other than by determination of the Tribunal under s 110 or at the request of the licensee under s 54(b), is as follows:
 - (a) the Registrar must give the licensee written notice of the Registrar's intention to cancel the licence; and
 - (b) the notice must —
 - (i) contain or be accompanied by a statement of the Registrar's reasons for the cancellation; and
 - (ii) state that the licensee has 10 working days within which to make written representations to the Registrar as to why the licence should not be cancelled; and
 - (c) if any written representations made by the licensee in accordance with paragraph (b)(ii), the Registrar must take those representations into account when deciding whether to cancel the licence; and
 - (d) the Registrar must then decide whether to cancel the licence and notify the licensee of the Registrar's decision as soon as practicable.
- (2) If the Registrar decides to cancel the licence, the Registrar must—
 - (a) include in the notice referred to in subsection (1)(d) the grounds for the decision and the date on which the cancellation takes effect; and

- (b) specify in the notice that the licensee has a right of appeal to the Tribunal under section 112; and
- (c) record the cancellation on the register as soon as practicable.

[14] Section 112 sets out the Tribunal’s powers as to applications to review Registrar’s determinations. As relevant to this decision, it provides:

112 Application to Tribunal to review determination by Registrar

...

- (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 the Registrar could have exercised.

Discussion

[15] We are satisfied that the Registrar followed the correct procedure, and made no errors of fact or law in cancelling Mr Callaghan’s licence. We note that Mr Callaghan was sent two reminders of the need for him to pay the annual suspension fee, on 22 June and 20 July 2019. Each of these reminders clearly advised him that he was required to pay the fee by 3 August 2019. He was also clearly advised that if he failed to pay the suspension fee the Registrar “must” cancel his licence, and if his licence were cancelled he would be prohibited from being re-licensed for five years.

[16] Further, there is no question that Mr Callaghan was properly notified of the Registrar’s intention to cancel his licence, and given the opportunity to make written representations. He spoke with a Regulatory Services Manager, and decided to allow his licence to be cancelled.

[17] The Tribunal has made it clear in a number of decisions that s 54 is in the imperative: if one of the provisions set out in subsections (a) to (h) applies, the Registrar “must” cancel the relevant licence. The Registrar has no discretion not to cancel the licence.¹

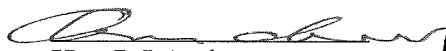
¹ See *Wang v The Registrar of the Real Estate Agents Authority* [2015] NZREADT 52, at [11]–[12] and *Reid v The Registrar of the Real Estate Agents Authority* [2019] NZREADT 22, at [16]–[18].

[18] Further, we accept Ms Mok's submission that the Tribunal has no wider powers than the Registrar to determine matters under s 54 of the Act. Having found that Mr Callaghan failed to pay the annual suspension fee, and that the Registrar was required to cancel his licence and followed the correct procedure in doing so, the Tribunal cannot interfere with the registrar's decision.

Outcome

[19] We are satisfied that the Registrar made no error of fact or law, and followed the correct procedure, in determining to cancel Mr Callaghan's licence after he failed to pay the annual suspension fee. Mr Callaghan's application for review of the Registrar's determination is dismissed and the Registrar's decision is confirmed.

[20] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of 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