

Introduction

[1] On 22 August 2019, Complaints Assessment Committee 1901 (“the Committee”) issued a decision in which it made a finding of unsatisfactory conduct against the second respondent, Ms Steenberg. That finding was made following a complaint made to the Authority by the applicant, Mrs Christine Beckett.

[2] On 19 November 2019, the applicant submitted an appeal against the Committee’s finding to the Tribunal. The Tribunal is required to decide whether it should be accepted for filing as a late appeal.

Background

[3] The applicant and her husband were tenants of a property in Albany, Auckland. They entered into an unconditional agreement for sale and purchase to buy the property. However, the applicant’s husband died, and she was no longer in a financial position to settle the purchase. The owner agreed to the applicant marketing and on-selling the property, with settlement of both transactions to occur contemporaneously.

[4] The second respondent is a licensed salesperson engaged at Barfoot & Thompson Milford (“the Agency”). In February 2018, she entered into a sole agency agreement to market the property. The agency agreement was extended several times, up to December 2018.

[5] On 2 November 2018, the applicant accepted a conditional offer from a prospective purchaser to sell the property for \$1,050,000. On 9 November 2018, the owner gave the applicant notice terminating the tenancy. The conditional offer lapsed on 14 November 2018, as the condition was not satisfied.

[6] The second respondent then presented the applicant with a further offer from the same prospective purchaser, to purchase the property for \$975,000. The applicant rejected this offer.

[7] The owner's solicitors then instructed the second respondent to prepare an agreement for sale and purchase of the property. On 10 December 2018, the owner and the prospective purchaser entered into an agreement for the sale and purchase of the property for \$975,000, subject to the agreement with the applicant not settling. The applicant did not complete the purchase and the owner cancelled the agreement with the applicant. The owner's agreement for sale and purchase with the prospective purchaser was settled in January 2019.

The Committee's substantive decision

[8] The applicant complained to the Authority that the second respondent had sold the property on behalf of the owner while it was subject to an agency agreement with the applicant, to a buyer introduced to the property during the applicant's listing period. She further complained that the second respondent had not acted in her best interests, but rather in the interests of the owner and the prospective purchaser.

[9] The Committee found in its decision issued on 22 August 2019 ("the substantive decision") that the second respondent was in breach of rr 6.1 (duty to comply with fiduciary obligations) and 6.2 (duty to act in good faith and deal fairly with all parties) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 by continuing to act for the applicant after she had been instructed to act for the owner.

[10] The Committee also found that the second respondent was in breach of r 9.6 of the Rules, as she had marketed the property to the prospective purchaser without having an agency agreement in place with the owner.

Statutory provisions as to appeals against decisions of a Complaints Assessment Committee

[11] Section 111 of the Act (as amended as from 14 November 2018 by the Tribunals Powers and Procedures Legislation Act 2018) provides, as relevant to this application:

111 Appeal to Tribunal against determination by Committee

- (1) A person affected by a determination of a Committee may appeal to the Disciplinary Tribunal against the determination within 20 working days after the date on which notice of the relevant decision was given under s 81 or 94, except that no appeal may be made against a determination

under section 89(2)(a) that a complaint or allegation be considered by the Disciplinary Tribunal.

- (1A) The Disciplinary Tribunal may accept a late appeal no later than 60 working days after the day on which notice was given to the appellant if it is satisfied that exceptional circumstances prevented the appeal from being made in time.
- (2) The appeal is by way of written notice to the Tribunal of the appellant's intention to appeal, accompanied by–
 - (a) a copy of the notice given to the person under s 81 or 94; and
 - (ab) the prescribed fee, if any; and
 - (b) any other information that the appellants wished the Tribunal to consider in relation to the appeal.

[12] At paragraph 6.1 of its substantive decision, the Committee stated:

The Committee considers that the 20 working day appeal period does not commence until it has finally determined this complaint by deciding what orders should be made, if any.

[13] An Appendix to the Committee's substantive decision set out relevant provisions of the Act. The Appendix included s 111 (as to appeals to the Tribunal), but it was incorrect, in that it set out s111 prior to its amendment as from 14 November 2018.

[14] In its decision in *Catley v The Real Estate Agents Authority (CAC 521)*,¹ issued on 24 September 2019, the Tribunal held that the effect of s 111(1) of the Act, as amended, is that if a person affected by a Committee's finding of unsatisfactory conduct wishes to appeal against that finding, an appeal must be filed within 20 working days of notice being given of that determination; that is, from the date of the finding of unsatisfactory conduct, not the date of a subsequent penalty decision.

[15] On 17 October 2019 (following the issuing of the Tribunal's decision in *Catley v The Real Estate Agents Authority (CAC 521)*), the Authority sent an email to the applicant, as follows (emphasis as in the Authority's email):

Important notice regarding your appeal period

This email is to notify you that, due to a recent ruling by the Real Estate Agents Disciplinary Tribunal clarifying amendments to section 111(1) of the Real Estate Agents Act 2008 (Act), the appeal period for the Complaints Assessment Committee (CAC) decision of Unsatisfactory Conduct (dated 22 August 2019) on your case (C29986) has changed.

¹ *Catley v The Real Estate Agents Authority (CAC 521)* [2019] NZREADT 40.

Section 111(1) of the Act:

A person affected by a determination of a Committee may appeal to the Disciplinary Tribunal against the determination within 20 working days after the day on which notice of the relevant decision was given under section 81 or 94, except that no appeal may be made against a determination under section 89(2)(a) that a complaint or an allegation be considered by the Disciplinary Tribunal.

Your right to appeal the CAC decision of Unsatisfactory Conduct (dated 22 August 2018) will expire on **15 November 2019 [20 working days from the date of this notification]**.

Your right to appeal the CAC decision on Orders will remain one those orders are issued.

Please contact us if you have any questions or concerns.

[16] The Tribunal accepts that the Authority's letter of 17 October 2019 constituted a fresh notice of the Committee's substantive decision, and that the 20 working day within which an appeal to the Tribunal against that decision could be filed commenced on 17 October 2019, and expired on 15 November 2019.

[17] The Tribunal understands that the Committee issued a penalty decision on 18 October 2019.²

Steps taken regarding applicant's appeal to the Tribunal

[18] On 22 October 2019, Ms Liz Beckett (on behalf of the applicant) emailed the Authority, asking if the Authority's advice of 17 October 2019 meant that "we are able to appeal the details of the report received (Aug 22nd) that we disagree with, before the 15th of Nov". The Regulatory Services Administrator of the Authority replied the same day that Ms Beckett was correct, and the unsatisfactory conduct decision dated 22 August could be appealed to the Tribunal up until 15 November. It was noted that the "orders" decision was also appealable to the Tribunal.

[19] On Friday 15 November 2019, at 11.27 am, Ms Beckett sent an email to "Existing Complaints" at the Authority with the subject heading "C29986 – Response". Attached to the email were a copy of the Committee's substantive decision (together with the Appendix), five character references, and a typed document headed

² The 20 working day appeal period in respect of the penalty decision expired on 18 November 2019.

“REA Response”. This sets out a number of factual matters disputed by the applicant. The Tribunal understands that a Notice of Appeal was not included with this email.

[20] The Tribunal understands that Ms Beckett may have been advised by the Authority that an appeal should not be filed with the Authority, as she sent the Regulatory Services Manager a further email at 12.41 pm, saying that she thought the appeal was required to be sent to the Authority, but if not, asking who it was to be sent to. At 12.51pm, Ms Beckett sent the following email to the Tribunal’s generic email address:

We have until today to appeal a decision that has been made, and unfortunately for us, we weren’t aware that it was through a different body from the one we were originally working with..

So we are definitely on the back foot now – given that it’s the closing day today.

Can you advise if there is anything else we need to do, bar submitting our appeal online via the usual channels?

I presume you have access to original findings from this? If not, I can supply.

Hope to hear from you soon.

Kind Regards

[21] Ms Beckett’s email did not include a Notice of Appeal. The Tribunal’s case manager was not alerted to Ms Beckett’s email, and first saw it on Monday 18 November. She telephoned Ms Beckett, and advised her that if she wished to appeal against the Committee’s decision, she would have to file a Notice of Appeal and, as the last day for filing an appeal was 15 November, she would be required to apply to the Tribunal to accept a late appeal. Ms Beckett responded by email that she was at home and unwell that day, and was not able to scan documents on her home printer. She said that she would not be able to file a Notice of Appeal until the next day, with an application to file a late appeal.

[22] On 19 November 2019, Ms Beckett emailed a Notice of Appeal (dated 15 November 2019) to the Tribunal. Also attached to the email were the emails and other documents earlier emailed to the Authority. In her covering email, Ms Beckett said:

I hope this is all the information needed to process our appeal.

I have attached proof that we did try to do this on the closing date. We hope you will still review this decision.

Kind Regards

[23] On receipt of the above email, the Tribunal's case manager advised Ms Beckett that as her appeal was out of time, she would have to make an application for a late appeal, and include reasons why the appeal could not have been filed in time. Ms Beckett responded that the paperwork she had already submitted explained why the appeal was late, and that an attempt had been made to file an appeal within time.

Submissions

[24] Neither the applicant nor Ms Beckett wished to submit any further submissions as to why a late appeal should be accepted.

[25] On behalf of the Authority, Ms Earl submitted that the applicant's Notice of Appeal should not be accepted as a late appeal, as no formal application had been made, setting out the exceptional circumstances relied on, and there did not appear to be any exceptional circumstances that could be relied on. She submitted that the applicant was aware of the deadline for filing an appeal, as recorded in the Authority's letter of 17 October 2019. She further submitted that while there appeared to have been some confusion on the part of Ms Beckett as to where the appeal was to be filed, she and the applicant were advised by the Authority on two occasions that the appeal was to the Tribunal.

[26] Ms Earl submitted that Ms Beckett had sent an email to the Tribunal on 15 November 2019, but had given no explanation for why the material she had sent to the Authority that day was not sent to the Tribunal, or why no Notice of Appeal was sent with the email, or why the applicant had delayed in filing an appeal until 15 November.

[27] On behalf of Ms Steenberg, the second respondent, her manager (Mr Barfoot) submitted that the deadline for the appeal had been clearly stated by the Authority, the disciplinary process had been very stressful for Ms Steenberg and should be completed in a timely fashion, and that the applicant had not identified any deficiencies in the Committee's reasoning. In particular, he submitted that if it is the applicant's intention to argue that Ms Steenberg should have been charged with misconduct, the applicant had not set this out in her Notice of Appeal or supporting documents.

[28] Mr Barfoot also submitted that the applicant appeared to have confused the submissions made on penalty with the submissions which resulted in the Committee's substantive decision. He submitted that the appeal contained largely the same information as had been provided to the Committee, and that the appeal appeared to be merely against the Committee's exercise of its judgment.

Discussion

[29] As the Tribunal said in its decision in *Kooiman v The Real Estate Agents Authority (CAC 519)*, statutory tribunals exist in order to provide simpler, speedier, cheaper, and more accessible justice than do the ordinary courts.³ Consistent with that objective, in order for the disciplinary process to be "effective", appeals from decisions should be disposed of promptly. That objective will in general not be achieved if appeals can be brought long after the conclusion of the primary proceeding. But neither should the appeal provisions in the Act be interpreted so restrictively that a significant number of litigants are shut out from appeal rights.

[30] The Act seeks to harmonise these various provisions by making it clear that in general, appeals brought more than 20 working days after the date of the decision appealed against will not be accepted. The exclusion of late appeals, while it deprives some litigants of access to appeal rights, is the price of achieving the expeditious and economical disposition of proceedings under the Act.

[31] The Tribunal set out advice as to applications to file a late appeal in its decision in its decision in *Matson v Real Estate Agents Authority (CAC 401)*, issued on 4 March 2019, as follows:⁴

[a] At the time that a late appeal against a determination of a Complaints Assessment Committee is filed in the Tribunal (or when the proposed appellant has been advised by the Tribunal registry that an appeal has not been filed in time), the proposed appellant (applicant) must make an application to the Tribunal for it to be accepted as a late appeal.

[b] There is no particular form, or format, for an application, but the applicant must specify the circumstances that prevented the appeal being filed in time, and satisfy the Tribunal that those circumstances were exceptional.

³ *Kooiman v The Real Estate Agents Authority (CAC 519)* [2019] NZREADT 11, at [63][b], citing *Commissioner or Police v Andrews* [2015] NZHC 745, at [61].

⁴ *Matson v the Real Estate Agents Authority (CAC 410)* [2019] NZREADT 9, at [18][a]–[e].

[c] The applicant must provide evidence in support of the contention that the circumstances were exceptional.

[d] The application must be served on all parties to the appeal: that is, the Real Estate Authority (on behalf of the Complaints Assessment Committee), and any other party to the proceeding before the Committee.

[e] The applicant bears the onus of persuading the Tribunal that the “circumstances” were “exceptional”. The word “exceptional” creates a high threshold. To be “exceptional”, the circumstances must be able to be properly described as unusual, uncommon, special, or rare. They must be out of the ordinary course of events as to filing a notice of appeal. However, the circumstances need not be very rare, unique, or unprecedented.

[32] The substance of this advice was provided to Ms Beckett by the Tribunal’s case manager.

[33] Ms Beckett did not specify the circumstances that prevented the applicant from filing her Notice of Appeal within the prescribed time. While she explained in an email to the case manager that she was not able to scan a document from her home printer, on 18 November, she did not provide any explanation as to why no steps were taken to file an appeal in the Tribunal before 15 November 2019, notwithstanding that she was advised by the Authority on 17 October, confirmed on 22 October, that the appeal was to the Disciplinary Tribunal, and that the period would expire on 15 November.

[34] The Tribunal has been given no explanation, or supporting evidence, of what it was that prevented an appeal being filed during the period between 17 October and 15 November. The Tribunal must conclude that there were no circumstances, exceptional or otherwise, that prevented an appeal being filed prior to 15 November.

[35] Ms Beckett gave as her reason for not filing the appeal within time as being that “we were not aware that [an appeal] was through a different body”. That submission cannot be accepted, as Ms Beckett and the applicant were advised that an appeal is to the Tribunal. First, a copy of s 111 of the Act was included with the Committee’s substantive decision. That states that a person affected by a determination of a Committee may appeal against the determination to the Tribunal. Secondly, the Authority’s letter of 17 October referred again to appeals to the Tribunal. Thirdly, the Authority’s email of 22 October confirmed that the applicant could appeal to the Tribunal, up until 15 November.

[36] As recorded earlier, the applicant must establish that the “circumstances” were “exceptional”. The word “exceptional” creates a high threshold. To be “exceptional”, the circumstances must be able to be properly described as unusual, uncommon, special, or rare. They must be out of the ordinary course of events as to filing a notice of appeal. However, the circumstances need not be very rare, unique, or unprecedented.

[37] The applicant may have misunderstood the advice as to where, and when, an appeal could be filed. It may have been mistakenly thought that the Tribunal and the Authority were the same entity. However, it was not suggested that such a mistaken understanding was “unusual”, or “exceptional”, and reaching an erroneous conclusion as to where an appeal is to be filed is not likely on its own to be an exceptional circumstance. Such occurrences are not unusual.

[38] Further, the correct position could have been ascertained readily by means of an internet search, or an email or telephone call to the Authority or the Tribunal. We do not consider that Parliament intended, when enacting the provision allowing late appeals, that there should be a dispensing provision which excuses a party who had not acted reasonably assiduously in ascertaining the correct position. Further, it is always open to a party in doubt to obtain legal advice.

[39] We are conscious that in this instance the delay in filing the appeal is very short. It was filed only two working days late. However, we are not persuaded that the applicant has established that exceptional circumstances prevented her from filing the appeal within time. We have concluded that the appeal should not be accepted.

Outcome

[40] The applicant’s late appeal will not be accepted for filing.

[41] 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