

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 26

Reference No: READT 009/2023

IN THE MATTER OF

An application for review of a Registrar's
decision under s 112 of the Real Estate
Agents Act 2008

BETWEEN

TATJANA DAY
Applicant

AND

**THE REGISTRAR OF THE REAL ESTATE
AGENTS AUTHORITY**
Respondent

Hearing on the papers

Tribunal:

C Sandelin (Deputy Chairperson)
G Denley (Member)
F Mathieson (Member)

Representation:

The applicant:

Self-represented

The respondent:

N Sirisamphan

DECISION
Dated 20 September 2023

INTRODUCTION

[1] Tatjana Day (the applicant) has filed an application for review under s 112 of the Real Estate Agents Act 2008 (the Act) against the determination of the Registrar of the Real Estate Agents Authority (the Registrar) on 29 May 2023 declining to defer completion of the 2022 verifiable continuing professional development (CPD) requirements.

[2] The Registrar declined Ms Day's application on the basis that the Registrar did not consider that, on the information provided, Ms Day had shown exceptional circumstances which prevented her from completing her CPD.

BACKGROUND

[3] Ms Day held two classes of licence under the Act, being:

- (a) a salesperson's licence, issued pursuant to s 43 of the Act. Ms Day's salesperson's licence has been voluntarily suspended since August 2020; and
- (b) an agent's licence, issued pursuant to s 15 of the Trans-Tasman Mutual Recognition Act 1997. Ms Day's agent's licence was active from 9 June 2022 until 26 May 2023. Ms Day's licence has been voluntarily suspended from 26 May 2023.

[4] In order to renew their licences each year, licensees are required to complete ten hours of verifiable continuing professional development, in addition to ten hours of non-verifiable education, each calendar year in accordance with s 5(1) of the Real Estate Agents (Continuing Professional Development Rules) Notice 2018 (the Notice).

[5] On 14 October 2022, the Real Estate Agents Authority (the Authority) wrote to Ms Day by email to notify her that the Authority did not have a record that she had completed the requisite CPD for 2022. The correspondence reminded Ms Day that if she did not complete her 2022 CPD by 31 December 2022 she would no longer be able to carry out real estate work and the Authority would be required to cancel her licence.

[6] On 16 December 2022, Ms Day was again sent a reminder by the Authority of the requirement to complete CPD by 31 December 2022.

[7] On 8 February 2023, the Registrar advised Ms Day by letter, of the intention to cancel her licence due to non-compliance with CPD requirements. The letter set out

options available to Ms Day to avoid having her licence cancelled including the ability to apply for an exemption or deferral if there were exceptional circumstances as to why Ms Day was not able to meet the CPD deadline. Ms Day was given 10 working days to respond.

[8] On the same day, Ms Day contacted the Authority and explained that she wanted to maintain her licence. On 10 February 2023, the Authority emailed Ms Day an exception/deferral application form and was advised to explain the circumstances and reasons why she had not completed the CPD requirements.

[9] On 10 February 2023, Ms Day completed an application for exemption or deferral for CPD requirements under exceptional circumstances.

[10] On 26 May 2023, Ms Day voluntarily suspended her agent's licence.

[11] On 29 May 2023, the Registrar advised Ms Day by email that her application for a deferral to complete CPD had been declined. The decision was made on the basis that the Registrar did not consider that, on the information provided, Ms Day had shown that exceptional circumstances prevented her from completing her required CPD.

[12] On 31 May 2023, Ms Day sought review by the Tribunal of the Registrar's decision of 29 May 2023 to decline her application for deferral of CPD requirements.

[13] Ms Day set out her reasons for seeking review as follows:

I have misunderstood the requirement for suspending my Agents licence and thought the first year CPD requirements weren't applicable... I got my Agent licence to gain the qualification and my intention was to keep it suspended so when I return to the industry, I can complete my CPD and training then to continue real estate work swiftly.

JURISDICTION

[14] Section 54 of the Act stipulates the Registrar's power to cancel a licence in certain circumstances, including the failure to complete continuing education. The Registrar must follow the process specified in s 55:

55 Process for cancellation

- (1) The process for cancellation of a licence, other than by determination of the Tribunal under section 110 or at the request of the licensee under section 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

...

[15] Clause 13(2) of the Notice states as follows:

13 Exemptions or deferrals in exceptional circumstances

...

- (2) The Registrar may defer some or all of the CPD requirements for a licensee for the calendar year in exceptional circumstances.

...

[16] Section 102(d) of the Act provides that one of the functions of the Tribunal is to conduct any review of a decision of the Registrar.

[17] Section 112 of the Act sets out the Tribunal's jurisdiction on review, which 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 that the Registrar could have exercised.

[18] As the review is against the exercise of the Registrar's discretion, the grounds for review are limited to those identified by the Supreme Court in *Kacem v Bashir*, that is, whether the decision:¹

- (a) Was based on an error of law or principle;
- (b) Took account of irrelevant considerations;
- (c) Failed to take into account relevant considerations; or
- (d) Was plainly wrong.

¹ *Kacem v Bashir* [2010] NZSC 112 at [32].

[19] The issue on review is whether the Registrar made an error in fact or law in declining Ms Day's application for deferral to complete CPD requirements.

SUBMISSIONS

Ms Day

[20] Ms Day filed submissions on 14 August 2023.

[21] Ms Day submitted that:

- (a) She had failed to keep up with some of her life affairs in 2022 and early 2023, due to [redacted];
- (b) She had moved house three times throughout this time for [redacted]. She did not receive any mail notices sent to her old addresses;
- (c) She wanted to resubmit her application for deferral to include the circumstances which hindered her ability to manage many of her personal affairs during this time.

The Authority

[22] On 30 August 2023, the Authority filed a memorandum seeking directions from the Tribunal on the basis that Ms Day's submissions raised "fresh evidence" which was not before the Registrar at the time Ms Day's application for review was considered.

[23] The Authority submitted that it is not in dispute that Ms Day failed to complete her continuing education. The Authority submitted that Ms Day was informed multiple times as to the Act's continuing education requirements and, as a result of her failure to comply with these, the Registrar was obligated to notify Ms Day of the intention to cancel her licence due to non-compliance with CPD requirements.

[24] The Authority submitted that the information provided by Ms Day in her submissions as summarised at [21] above was not before the Registrar as part of Ms Day's application for CPD deferral. What was before the Registrar was the information provided by Ms Day and set out at [13] above.

[25] It was submitted by the Authority that, in assessing Ms Day's application, the Registrar applied the plain meaning of "exceptional circumstances", which is consistent with the Tribunal's use of the same criteria in the context of the acceptance of a late appeal.

[26] The Authority referred to *Catley v Real Estate Agents Authority*,² where the Tribunal adopted the use of the term “exceptional” in *Matson v The Real Estate Agents Authority*³ as follows:⁴

...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.

[27] The Authority submitted that so long as the correct process was followed, the Tribunal must confirm the Registrar’s decision.

DISCUSSION

[28] We agree with the submissions of the Authority. Ms Day had failed to comply with her CPD obligations. We are satisfied that the Registrar followed the correct process in issuing reminder notices to Ms Day of her CPD obligations, and in issuing a notice of intention to cancel Ms Day’s licence pursuant to s 55 of the Act. This provided Ms Day with the opportunity to apply for a deferral of her CPD obligations on the ground of exceptional circumstances.

[29] Ms Day’s application for deferral made no reference to [redacted] or any change in address. The intention to cancel letter was received by Ms Day as she contacted the Authority on receipt of the letter.

[30] We are satisfied that the Registrar made no error of fact or law in its decision to decline Ms Day’s application for deferral and was correct to decline Ms Day’s deferral application on the information provided before it. There is no evidence before us to suggest that the Registrar took account of irrelevant considerations, or failed to take into account relevant considerations.

[31] Ms Day was unable to show, on the information provided to the Registrar, that exceptional circumstances prevented her from completing her required CPD.

[32] Even if the Tribunal were to accept the new evidence raised by Ms Day, the outcome would be the same. The reason Ms Day would not have received the Authority’s communications was not due to [redacted] or subsequent changes of

² *Catley v Real Estate Agents Authority* (CAC 521) [2019] NZREADT 57.

³ *Matson v Real Estate Agents Authority* (CAC 410) [2019] NZREADT 9.

⁴ At [18(e)], cited by *Catley*, above n 2, at [43].

address, but because she failed to notify the Authority of any changes of address. Such a failure was not an exceptional circumstance out of Ms Day's control.

[33] Ms Day filed a further memorandum on 6 September 2023 in response to the memorandum filed by the Authority. Nothing in her memorandum identifies any error by the Registrar in applying the statutory criteria or process.

OUTCOME

[34] The applicant's application for review of the Registrar's decision is dismissed and the Registrar's decision is confirmed.

C Sandelin
Deputy Chairperson

G Denley
Member

F Mathieson
Member