

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 14

READT 047/19

IN THE MATTER OF

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

BETWEEN

LARISSA ROGERS
Applicant

AND

THE REGISTRAR OF THE REAL
ESTATE AUTHORITY
Respondent

On the papers

Tribunal:

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

Submissions received from:

Ms Rogers, Applicant
Mr I Sugrue, on behalf of the Registrar

Date of Decision:

20 March 2020

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Rogers has applied under s 112 of the Real Estate Agents Act 2008 for review of the Registrar's decision, made on 15 November 2019, to decline her application for a salesperson's licence.

Background

[2] Ms Rogers has not previously held a salesperson's licence.

[3] The Registrar received an application for a salesperson's licence from Ms Rogers on 10 October 2019. As is required under s 38(b) of the Act, her application was accompanied by a formal declaration¹ that she was eligible to obtain a licence by virtue of s 36 of the Act, and not prohibited from being licensed under s 37 of the Act. Ms Rogers consented to the Real Estate Authority making enquiries with other Authorities in relation to her application.

[4] The New Zealand Police advised the Authority that Ms Rogers was convicted on 4 May 2016 of an offence under s 219 of the Crimes Act 1961, having been charged that she "did steal a bottle of wine valued at \$10.00 the property of Ngunguru Foodmart". Ms Rogers was ordered to come up for sentence if called upon within six months, and to pay court costs of \$130.00 and reparation of \$12.00.

[5] On 25 October 2019, the Registrar advised Ms Rogers that as a result of the conviction, she did not appear to be eligible to hold a licence under s 37(1)(a) of the Act. Ms Rogers was given ten working days to provide any further information or comment, together with supporting material she wished the Registrar to consider before he made a final decision.

[6] Ms Rogers responded to the Registrar on 11 November 2019. She asked the Registrar to reconsider his decision, in light of the fact that she had "made only one (albeit huge in its obvious repercussions) error in judgment, at a younger, more

¹ Under the Oaths and Declarations Act 1957.

impressionable and irresponsible age,” four years previously. With regard to the circumstances of her offending and conviction, she said:

As an 18-year-old, I stupidly decided to steal a \$10 bottle of wine. I was young, hanging out with a bad crowd, and felt peer pressured into stealing the wine. I was not caught at the time, but later, feeling incredibly guilty about what I had done, handed myself in to the police station, admitting the shoplifting, taking full responsibility for my actions, and was charged. ...

[7] Ms Rogers went on to say:

Over the last 4 years I have changed my life completely. I no longer associate with those type of people and have worked hard to create a good life for myself. ...

I have worked hard in various roles in hospitality, admin and service coordinating providing the high standards of client care which have gone towards my developing strong, on-going relationships throughout Whangarei. None of my employers have had occasion to question my honesty and integrity and my criminal history has since remained blemish-free.

I have always been interested in real estate and with the support of my partner I decided to give up my full-time Service Coordinator role in Whangarei and temporarily relocate to Auckland to undertake the 12-week Real Estate Licence course at Unitec in Albany.

Completion of this course has meant huge pressure on myself and my partner in terms of time, money and effort, however, I have been determined to succeed as we see this as being instrumental in the success of our future careers and family goals.

I have now completed the course ... I have also been fortunate enough to secure a position with Ray White Whangarei, on the condition that I complete my licence.

...

[8] Ms Rogers enclosed a reference from her course tutor at Unitec, Mr Futter. Mr Futter spoke highly of Ms Rogers’ total commitment to her new chosen career, and the quality of her work. He believes her to be a young woman who could do well in the real estate industry. Mr Futter was not aware of Ms Rogers’ conviction until it was raised by the Registrar, but observed that she “has no further association with that supposed group of friends and has surrounded herself with positive role models”. He expressed the view that the fact that she had saved hard and purchased a house on her own efforts was a testimony to this turnaround.

[9] Ms Rogers advised that she has made an application to the District Court under the Criminal Records (Clean Slate) Act 2004.

[10] On 15 November 2019, the Registrar advised Ms Rogers of his final decision to decline her application for a salesperson's licence, on the grounds that as a result of her conviction in 2016 of a crime involving dishonesty, she is not eligible to hold a licence under s 37(1)(a) of the Act. The Registrar advised Ms Rogers of her right to seek a review of the Registrar's decision.

Submissions

[11] Ms Rogers did not wish to file submissions. She referred to the material she had submitted to the Registrar.

[12] On behalf of the Registrar, Mr Sugrue submitted that the issue to be determined is whether the Registrar erred in fact or law in declining Ms Rogers' Application for a salesperson's licence. He submitted that Ms Rogers had not identified any error of fact or law in the Registrar's decision. He further submitted that the Registrar had not made any such error.

[13] Mr Sugrue submitted that as Ms Rogers was convicted on a crime involving dishonesty within ten years before her application for a licence, she was not eligible to hold a licence, and the Registrar was compelled to decline the application. He submitted that the Registrar had no discretion to grant a licence in circumstances where an applicant is not eligible to hold one.

[14] Mr Sugrue further submitted that the Registrar had complied with the procedural requirements set out in s 43(3) of the Act. That is, he notified Ms Rogers of his decision, and his reasons for it, and advised her of her right to seek review by the Tribunal. He submitted that although not expressly required under the Act, the Registrar had also given Ms Rogers notice of his intention to decline her application, and allowed her the opportunity to respond.

Relevant provisions of the Act

[15] Section 36 provides, as relevant:

36 Entitlement to licence

...

- (2) An individual may be licensed as a salesperson if the individual satisfies the Registrar that he or she—
 - (a) has attained the age of 18 years; and
 - (b) is not prohibited from holding a licence under section 37; and
 - (c) is a fit and proper person to hold a licence; and
 - (d) has the prescribed qualifications.

[16] Section 37 is headed “Persons prohibited from being licensed” and includes:

- (1) The following persons are not eligible to hold a licence:
 - (a) a person who has been convicted, whether in New Zealand or another country, of a crime involving dishonesty (or a crime that, if committed in New Zealand, would be a crime involving dishonesty) within the 10 years preceding the application for a licence:

...

[17] A “crime involving dishonesty” is defined in s 4(1) of the Act as having the same meaning as in s 2(1) of the Crimes Act. There, “crime involving dishonesty” is defined as:

Any of the crimes of offences described in—

- (a) sections 100 to 105F;
- (b) Part 10, except sections 267, 298A, and 298B;
- (c) the Secret Commissions Act 1910.

[18] Part 10 of the Crimes Act is headed “Crimes against rights of property”. Section 219 of the Crimes Act (“Theft or Stealing”) is within Part 10.

[19] Section 43 of the Act is headed “Registrar to license applicant or decline application”. As relevant, it provides:

- (1) The Registrar must grant a licence to the applicant if, after hearing any objection to the issue of a licence, the Registrar is satisfied that the applicant—
 - (a) is entitled to be licensed as ... a salesperson under section 36; and
 - (b) is not prohibited from being licensed as ... a salesperson under s 37; and
- ...
- (3) If the Registrar is not satisfied that the applicant is entitled to be licensed as ... a salesperson, the Registrar must—

- (a) decline the application; and
- (b) notify the applicant of the Registrar's decision and the reasons for it; and
- (c) notify the applicant of his or her right of review by the Tribunal against the decision.

Discussion

[20] It is clear that a conviction on a charge of theft under s 219 of the Crimes Act is a conviction of a "crime involving dishonesty".

[21] There is no dispute that Ms Rogers was convicted on 4 May 2016, which is less than ten years before she applied for a licence on 10 October 2019. As Ms Rogers' conviction was within ten years before she applied for a salesperson's licence, she is prohibited from being licensed, and not eligible to hold a licence pursuant to s 37 of the Act. She therefore did not meet the requirements for being licensed as a salesperson under s 36 of the Act.

[22] In the circumstances, the Registrar made no error in deciding that he was not satisfied that Ms Rogers was entitled to be licensed.

[23] Section 43(3) then provided that, as he was not satisfied that Ms Rogers was entitled to be licensed, the Registrar "must decline the application". The word "must" is an imperative. It means that having correctly decided that Ms Rogers was not eligible to hold a licence, the only course the Registrar could take was to decline her application. The Act gave him no discretion in the matter: he was required to decline the application.

[24] Further, it is evident that the Registrar complied with the requirements of s 43(3) as to notifying Ms Rogers of his decision, and of her right to seek review by the Tribunal.

Outcome

[25] Ms Rogers' application for review is dismissed.

[26] 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