

Licence
Appeal
Tribunal

Tribunal
d'appel en
matière de permis



DATE: 2014-01-15
FILE: 8162/MVDA
CASE NAME: 8162 v. Registrar, Motor Vehicle Dealers Act, 2002

Appeal from a Proposal of the Registrar under The *Motor Vehicle Dealers Act, 2002*
S.O. 2002, C. 30, Sch. B to Refuse a Registration

Philippe Oliver Villanueva

Applicant

-and-

Registrar, Motor Vehicle Dealers Act, 2002

Respondent

ORDER

ADJUDICATOR: D. Gregory Flude, Vice-Chair

APPEARANCES:

For the Applicant: Self-Represented

For the Respondent: Michelle Samaroo, Counsel

Heard in Sarnia: December 16 & 17, 2013

Reasons for Decision and Order

[1] The Applicant appeals to this Tribunal from a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act, 2002* S.O. 2002 C. 30 Sched B (the "Act") to refuse him registration as a motor vehicle salesperson. The Registrar's proposal to refuse registration is based on criminal activity in 2007 resulting in a conviction in 2008 and on recent breaches of the Act committed by the Applicant while awaiting registration.

[2] The Tribunal heard from five witnesses: Mary Jane South, the Deputy-Registrar, Steven Spencer, an investigator with the Ontario Motor Vehicle Industry Council ("OMVIC"), the office of the Registrar under the Act, Sergeant John Austen, Joseph Andali, the owner of the dealership sponsoring the Applicant and the Applicant himself. Because of the nature of the criminal charges, the Tribunal will make every effort to cite relevant evidence without identifying the location of certain events or providing other information that may identify the victim and infringe on her privacy.

[3] The Applicant is a practitioner of Tae Kwon Do. In addition, he ran a studio and coached at a very high level. One of his students was a minor. She was very talented in the sport and a candidate for the national team. As part of her development, she attended events away from home, often as the only representative from the studio. The Applicant, as her coach, would accompany her. At a very young age, she became intimate with the Applicant. At that time, the Applicant was approximately 30 years of age. The transcripts from the criminal proceedings suggest that the relationship started when the student was as young as 14 years of age. The relationship continued for two years. At one point, the Applicant had convinced the minor's parents that, in the interests of saving money, the parents should pay for only one hotel room for the Applicant and the minor. When the minor's parents raised concerns, the Applicant sent a long email reassuring them of his integrity and putting their mind at rest.

[4] In 2007, the Applicant was operating two studios with a business partner. While using the business computer in the studio run by the Applicant, the business partner came across sexually explicit photographs of the Applicant and the minor. The matter was ultimately referred to the police and charges of possession of child pornography and sexual exploitation of a minor were laid. The Applicant pleaded guilty to the charge of sexual exploitation of a minor and the child pornography charge was dropped. He was sentenced to 18 months imprisonment and probation for 18 months. In a pre-sentencing psychiatric assessment he was deemed to at low risk of reoffending.

[5] While he was awaiting trial, the Applicant was under a recognizance not to contact the minor or any one of a number of potential witnesses in the case. He sent bulk emails to his students, including the minor and the other prohibited persons, to explain why the studio was closed. Sergeant John Austen, who had been lead investigator, reminded the Applicant of his release conditions and advised him to remove the prohibited names from the bulk email address. While it appears that the Applicant complied with Sergeant Austen's advice, he maintained some level of contact

with the minor. He was eventually arrested with the minor in his car and charged with breach of recognizance. He plead guilty and was sentenced to 3 months for that offence.

[6] Following his release, the Applicant moved to British Columbia. He answered a newspaper advertisement for car salespersons. He was interviewed, then re-interviewed and offered a position. He fully disclosed his criminal convictions to his potential employer at the second interview. He was hired. Following training, he began selling cars. As part of his employment he submitted an application to the B.C equivalent of OMVIC, the Motor Vehicle Sales Authority (MVSA). While awaiting registration he sold cars for his new employer. The MVSA decided to interview him and ultimately granted him a registration as a car salesperson. No issue was taken with the fact that he had been selling cars in the period between submitting his application for registration and receiving confirmation that he was registered. The Applicant was of the view that he received some form of temporary registration pending final approval but he was unsure of this fact. He sold cars for two years in B.C. and was the dealership's salesperson of the year in both years before deciding to move back to Ontario to assist his mother and father, his father having been diagnosed with cancer.

[7] Prior to returning to Ontario, the Applicant made enquiries of OMVIC about the application process. He stated that he was told that he had to be resident on Ontario and employed by an Ontario car dealer to apply. This information is incorrect since residency is not a requirement and an applicant may not be employed until registration has been granted. Rather, the Applicant should have been informed that he required an Ontario based sponsoring dealership. Ms South testified that that OMVIC has no record of this phone call and would be shocked if one of her staff made these statements, but conceded that she had no personal knowledge to assist the Tribunal in determining the exact content of the Applicant's phone enquiry. She also conceded that general registration enquiries might not be recorded. The Tribunal finds that this telephone conversation did take place in substantially the form described by the Applicant.

[8] The Applicant moved back to Ontario and began training with his sponsoring dealer. Whereas his B.C. training had taken a week, the Ontario training took two days. By this point, of course, the Applicant was already an experienced car salesperson. He filled out a number of documents early in his training, including an application to be registered as a motor vehicle salesperson in Ontario. Provisions in the Application form state clearly that applicants may not act as salespersons until registration has been granted. The Applicant acknowledged that he was aware of these provisions. Notwithstanding that awareness, the sponsoring dealership told the Applicant to begin work as a salesperson as soon as his training was completed and the Applicant did so.

[9] Throughout the fall and winter of 2012/2013, the Applicant sold cars for his sponsoring dealership. He was very good at it and after a couple of months he was made sales manager at the dealership. It appears that the dealership had some concern about using an unregistered salesperson as the bulk of the Applicant's sales commissions were entered into the dealership's computer system in the name of

Joseph Andali, the dealer principal and employer of the Applicant. The Applicant also testified to some ongoing concern. He stated that in November 2012 he asked Mr. Andali to move him from the sales floor into a training role and to employ two salespersons to replace him. Because of lagging sales, Mr. Andali did not do so.

[10] In the spring of 2013, Steven Spencer was assigned to investigate the Applicant. He went to the sponsoring dealership and posed as a customer. He spoke to the Applicant who explained to him the difference between two models and then gave him a *pro forma* bill of sale setting out the list price of the model he was interested in. Mr. Spencer then arranged for charges to be laid against both the dealership and the Applicant for selling without registration. He returned to the dealership, served the summonses and collected records from the dealership. The dealership has pleaded guilty to the charge and has been fined \$5,000.00. Mr. Andali was contrite when he testified about his behaviour and acknowledged the dealership's mistake in using an unregistered salesperson. The Applicant has pleaded not guilty and the matter is yet to come to trial. All of the evidence in this proceeding confirms that the Applicant did act as a salesperson while he was not registered to do so and the Tribunal has no hesitation in finding that, on a balance of probabilities, he breached the Act in this regard from approximately June 2012 until charges were laid in the spring of 2013.

[11] Since the spring of 2013, the Applicant has been unemployed. As a result, his wife has now left him. He wants to be employed as a motor vehicle salesperson to earn sufficient income to fulfill his family support obligations to his two very young children. He also wants to support his parents and other family members, especially given his father's medical condition. He emphasized that he is a very good salesperson; as a beginner in the industry he was top salesperson at the dealership in Nanaimo two years in a row; and he has never had a consumer complaint against him. In fact, he testified that customers from Nanaimo still call him to talk and for advice on car deals they are thinking of making. He is of the view that consumers can deal with him confident that he has the integrity not to mislead them.

ANALYSIS

[12] The Registrar relies on s. 6 (1) (a) (ii) of the Act which states:

6. (1) An applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless,

(a) the applicant is not a corporation and,

(ii) the past conduct of the applicant or of an interested person in respect of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty,

[13] In questioning Sgt. Austen, the Applicant asked him if his intimate relationship

with the minor would have been criminal had he not been her coach. Sgt. Austen said it would not have been. The Applicant made this point again in closing submissions. This submission causes the Tribunal great concern as it appears to indicate that the Applicant's lack of insight into the nature of his wrongdoing. Ms Samaroo pointed out that the crime of sexual exploitation of a minor is a crime of breach of trust. The Applicant was put in a special relationship with the minor and entrusted with her care by her parents. When her parents expressed concern, the Applicant sent a long email essentially saying: "How dare you impugn my integrity," while at the same time planning to have the minor's parents unwittingly fund the illicit relationship. Despite this concern, the Tribunal notes that a presentencing report found the Applicant unlikely to re-offend. Since that time, in addition to completing his jail sentence and term of probation, the Applicant has worked in the same regulated industry in British Columbia with a large measure of success and no consumer complaints.

[14] In Ontario, the Applicant followed the same course of action he had followed in British Columbia. After training he began selling and allowed the registration process to run its course while he made a living. The B.C. law was not put before the Tribunal so the Tribunal cannot come to any conclusion about B.C. practice. It may be that there is an interim registration provision as suggested by the Applicant or that B.C. simply turns a blind eye to such behaviour. Ontario does not turn a blind eye. It recognizes that such actions potentially expose consumers to unscrupulous individuals. Unlike B.C. the Ontario regulator laid charges. Does the fact that industry specific charges have been laid against the Applicant, either when combined with the earlier criminal behaviour or standing alone, create reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty? If there are such reasonable grounds, should the Applicant be denied registration outright or is this a case for the imposition of terms.

[15] The Tribunal finds that the past conduct of the Applicant does not give reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. The Tribunal is swayed by the more recent evidence of industry specific behaviour in coming to this conclusion. Without minimizing the seriousness of the Applicant's earlier criminal behaviour and despite the concerns stated above, the lapse of six or seven years since the events in question combined with several years in a regulated industry without running afoul of the law, convinces the Tribunal that this behaviour is now behind the Applicant and he is unlikely to reoffend in the future. While greater insight into the nature of the wrong the Applicant committed might have made this finding easier, overall, the Tribunal accepts the Applicant's submission that he truly regrets his behaviour and wishes to move on.

[16] There is the industry specific offence of selling cars without the benefit of registration. While there is evidence that the misleading information he received from his telephone enquiry to OMVIC made him commit to a move back to Ontario leaving him jobless with a young family to support, there is also clear evidence that both his sponsoring dealership and the Applicant were aware that it was a breach of the Act for the Applicant to be selling motor vehicles. The accounting system was set up in such a

manner that the Applicant's sales were recorded under the dealer principal's name with a reconciliation done each month. There is the Applicant's evidence of his awareness of the situation and his attempts to have his dealer principal take him off sales and move him into training. The fact is clear that the Applicant was well aware that he should not be selling motor vehicles in Ontario but continued to do so. Despite this behaviour, the Tribunal Act requires the Tribunal to find that there are reasonable grounds for belief that he will not carry on business appropriately in the future. In determining if such grounds exist, the Tribunal looks backward to interpolate future behaviour. The Applicant's past conduct raises concerns but he has a history of learning from his mistakes and the Tribunal is satisfied that going forward he will carry on business in accordance with law and with integrity and honesty.

[17] The Registrar submitted that the Applicant's past conduct is such that he should be denied registration. In the alternative, the Registrar submits that the Applicant should be subject to terms and conditions of registration. The Registrar proposed three terms: that the Applicant should notify the Registrar of future charges or convictions within five days; that for a period of two years the Applicant should not work for his current sponsoring dealer or any related or affiliated dealership; and that for a period of two years the Applicant shall not become an officer, director, partner, owner, manager or be in direct or indirect control of a dealership. The Registrar's reasoning with respect to the second condition addresses the concern that the current sponsoring dealership has engaged in extensive and ongoing breaches of the Act with the Applicant and should not now assume a supervisory role with respect to the Applicant as a new registrant with conditions attached to his registration. Similarly, given the Applicant's recent breaches of the Act, the Registrar is concerned about the Applicant assuming a supervisory role in a dealership.

[18] The Applicant opposed conditional registration. It was his position that his current sponsoring dealer is the only dealership that offered him employment in Sarnia. To impose such a condition would render any order in favour of his registration moot. Similarly, he is expecting to take over a management role at his sponsoring dealer. He has already acted as sales manager and would expect to be promoted to that role again in the near future if the Tribunal were to grant him registration. He has no difficulty reporting charges or convictions, but the Tribunal notes that registrants currently have a legal obligation to report charges and convictions.

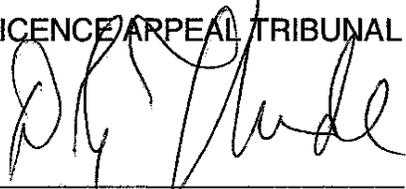
[19] To prohibit the Applicant from working for his sponsoring dealership would be to render the Tribunal's decision to register the Applicant on terms moot. The Tribunal accepts the Applicant's submission in this regard. The sponsoring dealership has paid a hefty fine for its behaviour and, as a result, the Tribunal is satisfied that it will ensure strict compliance with the Act and any conditions imposed on the Applicant. Not to do so would have potential dire consequences for both the dealership and the Applicant. Matters change when considering conditions limiting the Applicant to a sales role rather than a management role. The Applicant's rise has been meteoric. In B.C. it was expected that the Applicant would become sales manager in the near future. In Ontario he became sales manager within a couple of months. While his meteoric rise reflects

well on the Applicant's abilities, the Tribunal is of the view that he may have sacrificed the development of a knowledge base of the many temptations facing industry participants. The Applicant must first understand and embrace the fact that he works in a highly regulated profession before he assumes a supervisory position in the industry. It is better to develop this knowledge base under the supervision of an experienced sales manager rather than as the supervisor.

DECISION

[20] Pursuant to the provisions of s. 9 (5) of the Act, the Tribunal orders the Registrar not to carry out his proposal to refuse the Applicant registration under the Act. It orders the Registrar to register the Applicant subject to two conditions:

1. The Applicant should notify the Registrar of future charges or convictions within five days; and
2. For a period of two years, the Applicant shall not become an officer, director, partner, owner, manager or be in direct or indirect control of a dealership.

LICENCE APPEAL TRIBUNAL

D. Gregory Flude, Vice Chair

Released on: January 15, 2014