Financial Services Tribunal

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DECISION NO. 2018-FIA-001(b)

In the matter of an appeal under section 242 of the *Financial Institutions Act,* RSBC 1996 c 141

BETWEEN:	Varinder Grewal	**APPELLANT**
AND:	Insurance Council of British Columbia	**RESPONDENT**
AND:	Financial Institutions Commission	**THIRD PARTY**
BEFORE:	Michelle Good, Panel Chair	
DATE:	Conducted by way of written submissions concluding on June 26, 2019	
APPEARING:	For the Appellant: Vinay Verma, Legal Counsel For the Respondent ICBC: David T. McKnight, Counsel For the Respondent FICOM: Sandra Wilkinson, Counsel	

INTRODUCTION

[1] Varinder Grewal (the "Appellant" or "Licensee") was licensed as a life insurance agent in British Columbia in February 2017 and was authorized to represent an agency (the "Agency") licensed in British Columbia to engage in activities related to life insurance.

[2] The Respondent, Insurance Council of British Columbia (the "Council"), is a statutory body established under section 220 of the *Financial Institutions Act*, RSBC 1996 c 141 (the "Act").

[3] Ms. Grewal appeals from an order of the Council, informed by a report of the Hearing Committee of the Council (the "Hearing Committee"), which was rendered on September 11, 2018

[4] The Hearing Committee heard the matter on April 26, 2018 and a Report of the Hearing Committee, along with its recommended penalty, was provided to the Council on August 13, 2018.

[5] An order was issued by the Council on September 11, 2018 cancelling the Appellant's licence and prohibiting reapplication for a period of five years. The order also imposed a penalty of $7,500.00, investigation expenses in the amount of $3,180.00 and hearing costs in the amount of $7,476.17.

[6] The Appellant appeals the above penalty order to the Financial Services Tribunal (the "FST") under section 242 of the Act. In particular, she seeks a reduction of the time period that her licence is to be cancelled, a reduced fine and an elimination of the enforcement expenses levied against her.

[7] By operation of section 242(3)(a) of the Act, the Financial Institutions Commission ("FICOM")[1] is also a party to this appeal.

[8] Section 242.2(11) of the Act applies to this appeal and provides that the FST may confirm, reverse or vary a decision, or send the matter back for reconsideration with or without directions.

[9] The Appellant submits that she was denied procedural fairness and that the decision amounts to a denial of natural justice.

[10] The Council, supported by FICOM, submits that this appeal is without merit and asks that it be dismissed on all grounds.

BACKGROUND

[11] Candidates seeking a life agent licence must successfully complete four Life Licence Qualification Program ("LLQP) training modules as well as four corresponding exam modules. These exams are multiple choice in design.

[12] A collusion detection analysis was performed on the LLQP results from across Canada in early 2017 (the "Collusion Report") which identified a number of examinees in British Columbia, all linked to the same agency, with similar answer sequences.

[13] The Collusion Report identified the Appellant as one such examinee. The Collusion Report indicated that the Appellant used a Collusion Sequence on two of the four LLQP exams in January 2017.

[14] Over 5,500 LLQP Exam results from British Columbia were reviewed and the only examinees identified as having used a Collusion Sequence were linked to the same branch office of the Agency. This included the Appellant, recruits belonging to her team and her personal recruits.

[15] The Council initiated an investigation and the Licensee was interviewed by Council staff. She denied using a Collusion Sequence when completing her LLQP Exam and could offer no explanation for the findings of the Collusion Report.

[16] On the strength of the information before it, the Council concluded that the Licensee used a Collusion Sequence and thus had cheated on her exam.

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[1] Although FICOM was dissolved and replaced by the BC Financial Services Authority in November 2019, submissions on this appeal closed before that time so I have decided it most appropriate to maintain reference to the original parties to this appeal.

[17] Council found that this brought into question her suitability to hold an insurance licence and that she had failed to demonstrate that she had the minimum knowledge to hold an insurance licence.

[18] Council decided that her licence should be cancelled and prepared an intended decision pursuant to section 231 of the Act.

[19] The intended decision provided that the Appellant's licence would be cancelled. The Appellant requested a hearing.

[20] Following disclosure of evidence, in the form of a redacted statutory declaration in which the declarant swore that the Appellant provided her with answer sequences for the exams and encouraged her to cheat, the Appellant advised the Council that she did not wish to proceed with a hearing.

[21] On April 24, 2018 the Appellant submitted an email to Council advising that neither the Appellant nor her counsel would attend the hearing and requesting that the Appellant's licence only be cancelled for two years. This email from the Appellant's counsel also requested that the hearing costs be kept to a minimum given that the hearing would be unopposed. The hearing proceeded in the Appellant's absence on April 26, 2018.

[22] The Hearing Committee released its report on August 13, 2018 (the "Report"). The Hearing Committee found that the Appellant had committed a serious violation of the Code of Conduct, and recommended the following penalty:

- the Appellant's licence be cancelled for a period of 5 years;
- the Appellant be fined $6,000;
- The Appellant pay Council's costs associated with the investigation and hearing; and
- The Appellant be required to complete an ethics course prior to applying for a new licence.

[23] In coming to its conclusion and in determining the recommended penalty, the Hearing Committee relied on two primary findings of fact – (1) that the Appellant had cheated on her own exam, and (2) that she had encouraged and/or assisted others to cheat as well. The latter finding was considered to be an aggravating factor with respect to the recommended penalty.

[24] Having considered the Report of the Hearing Committee, Council made the order which is the subject of this appeal, on September 11, 2018.

STANDARD OF REVIEW

Standard of Review on Law, Mixed Fact and Law, and Fairness

[25] Given that decisions of the FST are not subject to precedent, it behooves the FST to clearly establish the appropriate standard of review in each appeal.

[26] Section 58(1) of the *Administrative Tribunals Act*, SBC 2004 c 45 (the "ATA") states that in relation to the courts, the FST is considered an expert tribunal as pertains to all matters over which it has exclusive jurisdiction.

[27] Further, the FST will not necessarily apply the standard of review that is exercised in matters under judicial review (*Westergaard v British Columbia (Registrar of Mortgage Brokers)*, 2011 BCCA 344 ("*Westergaard*")).

[28] *Hensel v Registrar of Mortgage Brokers*, 2016-MBA-001(a) ("*Hensel*") held that since the FST is required to hear appeals on the record as opposed to conducting hearings *de novo*, it must accord deference in instances where an appeal takes issue with evidentiary findings and findings of fact. However, with respect to findings regarding questions of law, the FST in *Hensel* held that a specialized Tribunal, like an appellate judge, is "entitled to proceed on the premise that the legislature intended that the specialized Tribunal would correct legal errors made by the first instance regulator" (at para 18).

[29] In *Kadioglu v Real Estate Council of British Columbia*, 2015-RSA-003(b) ("*Kadioglu*") the FST considered the findings in *Seaspan Ferries Corp v British Columbia Ferry Service Inc*., 2013 BCCA 55 ("*Seaspan*") and agreed that the standard of review applicable when addressing issues of procedural fairness is best described as a standard of fairness.

[30] The FST addressed the question of the standard of review of questions of mixed fact and law in *Schoen v Real Estate Council of BC and Superintendent of Real Estate*, 2017-RSA-002(b) ("*Schoen*"). Paragraph 34 is instructive, wherein the FST stated that the standard "may vary based on the particular context of each case". According to *Schoen*, the FST will give more deference to decisions that are more fact-intensive and less law-focused.

[31] I agree with and adopt the following standards of review articulated and refined in *Westergaard*, *Hensel*, *Kadioglu*, *Seaspan*, and *Schoen*:

a) Correctness for questions of law;

b) Reasonableness for issues of fact, discretion or mixed fact and law, and;

c) Fairness for issues of procedural fairness.

[32] Neither the Appellant nor the Respondent submit any disagreement with respect to the appropriate standard of review.

Standard of Review on Penalty

[33] In FST Decision No. 2017-FIA-002(a)-008(a) ("*Bridge Tolls*") Chair Strocel discussed the applicable standard of review applicable to penalty determinations as follows (at paragraph 77):

> …[I]t is my view that the Tribunal should unapologetically accept that the Legislature expected it to intervene in any penalty appeal where it finds that there has been an error in principle as opposed to an "error" in line-drawing by the Insurance Council, and that it is for the Tribunal to determine where an error in principle has occurred. The Tribunal should apply this test not as if it were a court, but should apply it from its specialized institutional vantage point and with

> a careful eye to the public interest. It is for the Tribunal to arrive at its own specialized judgments about what is a reasonable penalty range. In this way, the Tribunal can grant appropriate respect to Insurance Council decisions and precedents without treating those decisions and precedents as if only the Insurance Council had a legitimate say in how to protect the public interest. The Tribunal is not required to define the range of reasonable outcomes in the same way as would a court.

[34] I agree that the FST, a specialist Tribunal, should intervene in a penalty decision if it determines an underlying decision-maker has made an error in principle; in such cases it is the job of the FST to thoroughly engage in analysis of the question of what amounts to a reasonable penalty, not simply apply a high-level deference to the original decision-maker.

[35] While reasonableness remains the standard of review on penalty decisions, it goes beyond whether or not the regulations or guidelines were followed in assigning a penalty, and allows the FST to consider reasonableness in all the circumstances. While the FST must be cautious about not simply replacing the original decision-maker's discretion with its own, it must apply its discretion to consider whether or not the penalty decision is reasonable in the broader context of the case before it.

PRELIMINARY MATTERS

Improper Reply

[36] The Respondent argues that the Appellant's reply is improper and that it amounts to a collateral attack on an earlier decision in this appeal, 2018-FIA-001(a) issued by Member Tourigny in April 2019 (the "New Evidence Decision"). The Respondent further argues that the Appellant's reply improperly includes new arguments. The Respondent has referred me to caselaw in support of this argument.

[37] In the New Evidence Decision, the FST ruled against the Appellant on her application to admit new evidence (with one exception addressed later in these reasons) and held that the Settlement Correspondence and the Second RK Statutory Declaration did not meet the test for admission as new evidence. The New Evidence Decision thus bars the Appellant from formulating arguments that rely on either the Settlement Correspondence or the Second RK Statutory Declaration. A final decision has been rendered finding that evidence to be inadmissible.

[38] It is not open to the Appellant to ignore the limits the New Evidence Decision places on what evidence is admissible by referencing and relying on evidence the FST has explicitly deemed inadmissible. The Respondent is correct that those portions of the Appellant's argument which reference or are based on evidence which has been found inadmissible in the New Evidence Decision, are improper reply.

Deficient Grounds of Appeal

[39] The Respondent argues that the grounds of appeal do not meet the required standard. While I agree with the Respondent insofar as the Appellant's submissions are not easily absorbed and lack clarity, I find that the grounds of appeal are discernable and I reject the Respondent's argument that they are deficient.

[40] For example, in the first paragraph of her Notice of Appeal the Appellant states "I wasn't treated fairly". While this may not be a nuanced articulation of an issue on appeal, it clearly puts forth a denial of procedural fairness. Likewise, in the Notice of Appeal she draws attention to the fact that despite the Hearing Committee's recommendation that she be fined $6,000 she was in fact fined $7,500, which raises the question of the reasonableness of the penalty. The Appellant also argues that the failure to disclose certain emails between one of Council's witnesses and a Council investigator (admitted in the New Evidence Decision and referred to as the "RK Emails") amounted to a breach of procedural fairness. Finally the Appellant submits that the penalty and order for enforcement costs are unreasonable. Notably, the Appellant was unrepresented by counsel when she submitted her Notice of Appeal. While her grounds of appeal are not articulated in the manner legal counsel would articulate them, they are indeed discernable.

New Arguments

[41] The Respondent further argues that the Appellant improperly raises new arguments in reply and notes that this is contrary to section 3.11 of the FST Practice Directives and Guidelines (the "Guidelines").

[42] Specifically, the Respondent notes that in the New Evidence Decision the FST ordered that the Appellant be given the opportunity to make new submissions on the questions of whether her right to procedural fairness was contravened by the failure of the Council to disclose the RK Emails to the Hearing Committee before the Committee rendered its decision.

[43] The Appellant was given a deadline of May 10, 2019 for the submission of new arguments on the issue of procedural fairness. The Appellant elected not to take advantage of the opportunity provided to her to make submissions on the matter of the non-disclosure of the RK Emails in the context of a potential denial of procedural fairness.

[44] As a matter of record, the Appellant gave written notice that she would not be submitting new arguments on the matter of procedural fairness and that she intended to rely on her December Submissions.

[45] The Respondent submits that despite her written notice that she would not be submitting new arguments regarding procedural fairness, the Appellant now submits arguments that extend beyond her December Submissions to include new arguments focusing on the failure to disclose the RK Emails to the Hearing Committee prior to the issuance of its decision. These new arguments posit that the failure to disclose was procedurally unfair and resulted in the findings made against her with respect to collusion, cheating, encouraging others to cheat, and also resulted in a more severe penalty rendered against her than levied against others.

[46] In her final sur-reply, the Appellant admits that these arguments were not made prior to the May 10 deadline set by the New Evidence Decision but asks the FST to find that the May 10 deadline does not apply to her and that she should be free to submit these new arguments. The Appellant admits here that she is in fact submitting new arguments and asks that she be permitted to in spite of the New Evidence Decision which both gave her an opportunity to make new arguments and a deadline for submitting them.

[47] Typically, if a party has been given a specific opportunity to make submissions on a matter which has bearing on that party's appeal and that party explicitly declines to do so I would have little hesitation in determining that subsequent arguments raised on that matter in reply submission should be excluded from consideration. This is simply a matter of fairness. It would be unfair to allow a party to raise new arguments in reply which the other parties have not had a chance to respond to.

[48] However, in the present situation, through correspondence dated June 18, 2019 the Respondent raised its concern that the new arguments submitted in the Appellant's reply amounted to a collateral attack on the New Evidence Decision and amounted to improper reply given the introduction of new arguments.

[49] In response, Panel Member Purdie issued an order granting the Respondent's request to file a sur reply to address these matters. In her order she gave specific instructions to the Respondent as follows:

> The FST expects that the Council will use this opportunity to canvass all issues it considers relevant with respect to the Appellant's reply submissions, <u>including, if necessary, providing substantive submissions on any new issues it believes have been improperly raised in the Appellant's reply.</u> [emphasis added]

[50] Given that the Respondent was explicitly given the opportunity to reply substantively to the new arguments raised, I cannot find that it has been prejudiced by the new arguments. The Respondent had the opportunity and clear, unambiguous instructions to respond and elected not to, focusing instead on the issues of collateral attack and improper reply.

[51] This finding should not be taken as condoning the Appellant's conduct in advancing new arguments in reply after being given a clear opportunity to amend her original submissions. The purpose of a reply is to rebut the Respondent's arguments, not to advance new arguments.

[52] However, in the present case the potential harm of these actions was mitigated by the opportunity provided the Respondent to provide a substantive reply to the arguments raised by the Appellant on reply.

Decision on Preliminary Matters

[53] Given the foregoing analysis, I find that the Appellant's arguments that reference evidence excluded from consideration by the New Evidence decision, in particular the Settlement Correspondence and the Second RK Statutory Declaration, amount to improper reply and as such those arguments will not be considered in this appeal.

[54] However, I will consider the Appellant's argument which relate to whether or not the failure to disclose the RK Emails amounted to a breach of her rights to procedural fairness, given that I have found there is no unfairness to the Respondents in doing so.

[55] Having made the above finding with respect to improper reply, it is not necessary for me to consider the question of whether the Appellant's reply submissions amount to a collateral attack.

ISSUES

[56] The submissions of the parties give rise to the following issues which I will consider in this appeal:

a. Was the Appellant notified that the hearing could proceed without her and could result in monetary penalties and enforcement expenses, and if not, did this amount to a denial of procedural fairness?

b. Was the Appellant denied procedural fairness by the failure to disclose the RK Emails?

c. Was the penalty levied against the Appellant reasonable?

d. Were the enforcement expenses assessed against the Appellant reasonable?

ANALYSIS

Was the Appellant notified that the hearing could proceed without her and could result in monetary penalties and enforcement expenses, and if not, did this amount to a denial of procedural fairness?

[57] This is a matter of procedural fairness and is decided on the fairness standard.

[58] The Amended Notice of Hearing, which was served on the Appellant as confirmed in the affidavit of JW, clearly states that "[f]ailure to attend the hearing may result in Council making a determination in the Licensee's absence."

[59] Further, correspondence dated October 17, 2017, was sent to the Appellant indicating both that "a hearing may result in a decision that is less or more favourable than that proposed in Council's intended decision", and further that "Council also has the authority to assess its hearing costs to the Licensee."

[60] The Appellant submits that she did not attend the hearing as she was advised by her counsel that she need not attend given that the Hearing Committee would take a settlement offer into consideration. I do not find this argument persuasive. As noted at paragraph 40 of the New Evidence Decision, the FST found that "[a]ny questions or concerns about that legal advice leading to her decision not to attend the Hearing are matters between the Appellant and her former legal counsel and are not a proper subject of this appeal." I concur and also find that issues relating

to the manner in which the Appellant was advised by her former legal counsel, are between her and her counsel, and are not part of this appeal.

[61] Further, throughout her submissions, the Appellant argues that she was dealt an unfairness when the Hearing Committee elected to proceed with the hearing in her absence.

[62] The Appellant was aware that the Hearing might proceed in her absence as noted above. Having been notified of the possibility, it is not open to her now to suggest that she didn't know or that it was unfair that this may occur.

[63] I therefore find that there was no absence of procedural fairness as it pertains to whether or not the Appellant knew that the Committee may levy monetary penalties and enforcement expenses.

Was the Appellant denied procedural fairness by the failure to disclose the RK Emails?

[64] This is a matter of procedural fairness and is decided on the standard of fairness.

[65] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 articulates the common law test with respect to procedural fairness. It states:

> [22] ..,the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statue and the rights affected… the purpose of the participatory rights contained within the duty of fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[66] Fundamentally, as was held in *Nicholson and Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311 at 327-328, if a person could be adversely affected by an investigation or report, they must know the case against them and be given a fair opportunity to respond to it.

[67] I will now consider whether or not, on the record before me, the failure to disclose the RK Emails was a denial of procedural fairness.

[68] RK is the witness who swore the statutory declaration alleging that the Appellant provided her with answer sequences for the exams and encouraged her to cheat. The evidence at issue here (referred to in the New Evidence Decision as the RK Emails) consist of an email exchange between the witness and an investigator with the Council, which occurred after the hearing but prior to the Hearing Committee delivering its Report. In that exchange, the witness purports to provide additional information not included in her statutory declaration, and which could arguably (although I make no findings in this regard) bring that evidence into question. This information was not provided to the Hearing Committee for consideration. The RK Emails were admitted into evidence on this matter in the New Evidence Decision on the basis that they were relevant to the question of whether a breach of procedural fairness had occurred.

[69] The Council argues that in spite of the fact the RK Emails were not disclosed to the Hearing Committee, the Appellant was not denied procedural fairness because she knew the case before her and had she attended the hearing she could have cross-examined RK on the subject of her statutory declaration in which she swore that the Appellant provided her with answer sequences for the exams and encouraged her to cheat. The Council also submits that the RK Emails "do not recant [RK's] sworn evidence" and that they are "less about changing [RK's] evidence, and more about asking for a specific outcome." In essence, the Council appears to be submitting that the RK Emails are not exculpatory.

[70] In my view, the fact that RK provided the email to the Council Investigator prior to the release of the decision of the Hearing Committee is an important consideration. The Hearing Committee was not *functus officio*. Given that the Hearing Committee was still deliberating and had not yet issued any decision, it was open to the Council to bring this to the attention of the Hearing Committee, and the amount of time between the disclosure of the RK Emails and the issuance of the Decision is irrelevant. It is clear that the Hearing Committee was particularly concerned about the allegations that the Appellant encouraged and assisted others to cheat. The RK Emails were relevant evidence in that they, at least on their face, were presented by RK as exculpatory with respect to the Appellant.

[71] Council and Council investigators have a special place within the statutory regime. They have the power to compel evidence, to enter premises, and to require disclosure. In a public hearing such as the one in this case, Council acts in the role of prosecutor, tasked with putting forward the evidence and arguments relevant to the Hearing Committee's deliberations. Given their overarching duty to protect the public interest, it is important that they act objectively, provide complete disclosure to the Appellant, and ensure that all relevant and credible evidence is placed before the Hearing Committee.

[72] The failure to disclose this evidence prevented the Hearing Committee from considering all available relevant evidence for the purpose of rendering a decision and/or engaging in further exploration of RK's evidence. It also prevented the Appellant from knowing that evidence which was presented against her was purportedly being recanted, and thus deprived her of the opportunity to respond fully to the case against her.

[73] Whether or not the said email was in fact exculpatory was a matter for the Hearing Committee to decide, not the staff of the Council.

[74] Given its role in the proceedings, it was incumbent on the Council to alert the Appellant to this issue and to forward the email to the Hearing Committee for consideration. On the record before me, none of this occurred. Had the Council done so, the Hearing Committee would have had the opportunity to decide if it was exculpatory evidence and whether it brought key evidence before the Committee into question. If the Hearing Committee had determined that the email brought key evidence into question, it would have had the ability to recall RK as a witness for cross examination.

[75] I am of the view that this evidence should have been brought to the attention of the Appellant and put before the Hearing Committee. The failure to do

so amounts to a denial of procedural fairness in that the Appellant was entitled to know the full case against her and to respond to it.

[76] The Respondent argues in the alternative that the Committee relied primarily on the Expert Report in arriving at its ultimate findings, and that should I find that the failure to disclose does amount to a denial of procedural fairness, I can overlook this because the introduction of the evidence would not have had a material effect on the decision.

[77] The Respondent relies on *Iqbal v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1388 CanLII ("*Iqbal*") at para 18 for the proposition that a breach of procedural fairness may be overlooked if it is certain that it had no material effect.

[78] Paragraph 18 of *Iqbal* states that "[a] breach of procedural fairness can only be overlooked if there is *no doubt* that it had no material effect on the decision." (emphasis added). This establishes that the test for making a such a determination is certainty.

[79] A test of certainty is a very high standard indeed.

[80] The Respondents argue that this standard is met as, in their submission, the Hearing Committee relied heavily on the Expert Report and even if the RK Emails had been disclosed they would have arrived at the same decision and thus there would have been no material effect on the decision.

[81] Respectfully, this argument is highly speculative. It asks that we look at the emails and weigh them against the other evidence in the matter before the Hearing Committee and conclude what impact they would have had. The Respondent cannot know what weight the Hearing Committee would have given the emails or what steps they may have taken had they received it and certainly, not how their ultimate decision may or may not have been affected.

[82] It is also possible that the Hearing Committee would have called RK as a witness, heard her *viva voce* evidence under cross examination and found her evidence highly compelling.

[83] The Respondent further argues that had the Appellant attended the Hearing she would have had the opportunity to challenge the RK Statutory Declaration. While this is true, it is equally true that had the RK Emails been disclosed, the Hearing Committee would have had the opportunity to recall the witness as well as the benefit of having the evidence tested. Moreover, the Appellant may have decided to participate in a re-opened hearing if the RK Emails had been brought to her attention.

[84] In its decision, the Hearing Committee found that the Appellant's conduct was particularly egregious in that she colluded and encouraged others to cheat. If the RK Emails had been disclosed, whether the Appellant colluded or encouraged others to cheat would have been called into question and the decision may have been significantly different in this regard. There may well have been further implications in terms of the nature of orders made by the Hearing Committee if they gave weight to the evidence.

[85] I find that, on the record before me, the *Iqbal* test is not met in the circumstances of this case. The Respondent's argument does not convince me that it is certain there would have been no material effect on the decision if the RK Emails had been disclosed to the Hearing Committee.

[86] I cannot accept the Respondent's argument on this point and find that the failure to disclose the emails amounts to a breach of procedural fairness that cannot be overlooked.

[87] Further, as is well established, the FST is not bound by precedent and as such this decision does not mean that if the certainty test was met the Panel would be bound to overlook instances of a breach of procedural fairness.

[88] Fairness is a critical underpinning in administrative law proceedings. Parties and the public in general must be certain that their right to fairness in administrative proceedings will be upheld.

[89] In conclusion, I find that the Appellant was denied procedural fairness in a manner that cannot be overlooked. As a result, the penalty decision is invalid.

Was the Penalty levied against the Appellant reasonable?

[90] Given my finding that there has been a breach of procedural fairness, it is unnecessary to determine whether the Penalty was reasonable, and I decline to do so. However, in the circumstances, I think it appropriate to make a few comments about the Council's departure from the Hearing Committee's recommended penalty amount.

[91] The Appellant submits that an unfairness arose when the Council elected to increase the monetary penalty levied against her by $1,500 more than what was recommended by the Hearing Committee. The Appellant also submits that the penalty as a whole (both the length of cancellation and the monetary amount) are disproportionate to other penalties.

[92] The Council's submissions acknowledge the Appellant's argument on this point, but the Council does not address the issue directly, instead submitting the following with respect to the penalty overall:

> [T]he penalty decision was reasonable; it fell within a range of possible, acceptable outcomes given the Appellant's misconduct. The decision was reached in a justified, transparent and intelligible manner.

[93] In its decision, the Hearing Committee recommended a penalty of $6,000 be levied against the Appellant. However, when Council issued the penalty order, the penalty was in the amount of $7,500.

[94] No reasons were provided by the Council for its decision to depart from the Hearing Committee's recommended penalty.

[95] It is important, as a matter of justification and transparency, that a disciplinary body like the Council provides clear reasons for imposing sanctions. The Appellant was entitled to reasons for the penalty assessed against her.

[96] The Hearing Committee articulated the factors it considered in its assessment of penalty, as well as its rationale for fixing the penalty amount at $6,000. The rationale of the Hearing Committee included consideration of proportionality of the penalty as compared to other decisions which were presented to the Committee as follows (Hearing Committee Report at p 7):

> At the same time, the Hearing Panel has also reviewed the above-noted prior decisions of Council so as to ensure that the penalty for the Licensee is in proportional (sic) to penalties assessed by Council in similar previous matters.

[97] The decision of the Committee was rational and, importantly, transparent.

[98] However, in deciding to depart from that recommendation of the Hearing Committee, the Council did not provide any analysis or rationale for substantially increasing the penalty.

[99] As stated by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 (CanLII) (as summarized in the headnotes):

> Reasonableness review is not a line-by-line treasure hunt for error. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. Because formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point.

[100] Although the Council can be seen to have implicitly endorsed and adopted the reasons of the Hearing Committee with respect to those items of the penalty order which are consistent with the Hearing Committee's recommendations, I do not find the same can be said for the assignment of the monetary penalty, which diverges substantially from what the Hearing Committee recommended. Although tempting to simply accept that the Council's reasons for the imposition of the $7,500 fine are those of the Hearing Committee, without any explanation from the Council for why it diverged from the recommended penalty, I am unable to discern the Council's reasons for the amount of the monetary penalty ultimately imposed. Any future decisions on this matter should ensure that they provide the required transparency and intelligibility.

Were the enforcement expenses assessed against the Appellant reasonable?

[101] As a matter involving the exercise of discretion, this issue attracts a reasonableness standard of review.

[102] It is entirely within the jurisdiction of the Committee to levy hearing costs against a licensee found to have breached the obligations inherent in granting licences.

[103] The Hearing Committee gave consideration to the Appellant's request to withdraw her request for a hearing in its decision. The Committee noted that in her request to withdraw the hearing, wherein her Counsel stated the matter would be unopposed, in fact, a part of the recommended penalty was not unopposed. As noted in the email of April 20, 2018, which is in the Record as an exhibit to the affidavit of JW, then Counsel for the Appellant contested the recommended term for cancellation of the Appellant's licence. So, in fact, the matter was not unopposed because an aspect of the proposed penalty was opposed. The Hearing Committee gave consideration as to whether a hearing was necessary and found that while the Appellant was agreeable to having her licence cancelled, she was not agreeable to the length of cancellation. The Hearing Committee then found that "In the result, it remained necessary for Council to proceed to a hearing in order to prove the allegations against the licensee."

[104] It was necessary for the Hearing Committee to proceed with a hearing. The Appellant did not agree with the penalty that was being proposed. This then placed the Hearing Committee in the position of having to prove the allegations against the Appellant as the basis for levying a penalty consistent with the facts of the case.

[105] I note that the Appellant does not specifically argue that the hearing and investigative costs are excessive.

[106] Further, I note that the Appellant concedes that some hearing expenses are appropriate, stating in her Final Reply that:

> The Appellant acknowledges that the Council had to incur some hearing costs for the benefit of the Appellant, however, the fine and re-applying period are clearly unfair…

[107] Having decided that the hearing was necessary, it is clear that levying hearing costs against the Appellant was appropriate. I have considered the amount of costs levied against the Appellant and while it is slightly higher than in other cases I do not find the amount to be excessive or a great departure from other cost orders in comparable cases.

DECISION AND REMEDY

[108] For the convenience of the parties, given I have made a number of findings, I offer them in summary here:

a. I find that the Appellant's submissions which rely on evidence excluded in the New Evidence Decision amount to improper reply. I have not considered those submissions in my consideration of this appeal.

b. I find that the Appellant's grounds of appeal are not deficient.

c. I find that although the Appellant raised new arguments in her reply submissions, the Respondent was expressly given the opportunity to

respond to any new substantive matters raised and thus is not prejudiced by them.

d. I find that the Appellant was properly notified both of the hearing and of the possibility of an adverse order being made against her.

e. I find the failure to disclose the RK Emails was a breach of procedural fairness which cannot be overlooked.

f. I find that convening a hearing was necessary and that the hearing costs levied against the Appellant were reasonable.

[109] The FST receives its jurisdiction from the *Financial Institutions Act*. Section 242.2(11) of the Act provides that:

> The member hearing the appeal may confirm, reverse or vary a decision under appeal, or may send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

[110] As noted in the Act, it is within my discretion to confirm, reverse, or vary a decision or to send it back for reconsideration. However, as I have found that the Appellant was denied procedural fairness by the failure to disclose that RK Emails to the Hearing Committee, the result is, that the penalty order is invalid.

[111] Due to the delay between the issuance of the penalty order and the issuance of this decision, and considering the significant time and expense the parties have already invested in this case, I am hesitant to send it back for reconsideration. However, given that the breach of procedural fairness raises questions related to findings of fact made by the Hearing Committee, I am of the reluctant view that this is the proper remedy in this case.

[112] The broad discretion granted to the FST under section 242.2(11) of the Act also applies to the scope and nature of directions I can provide to Council. Given the Council's breach of procedural fairness, I find that the proper remedy should include directions that ensure, as best they can, that the harms associated with that breach are rectified.

[113] In that respect, the breach of procedural fairness I've found impacts the extent to which the finding of the Hearing Committee, regarding the Appellant's encouragement and assistance of others to cheat, can be maintained, and if not, whether the penalty should be reduced accordingly.

[114] Based on my conclusions above, I order that the penalty order is set aside and that only the matter of **the factual finding of encouragement and assistance of others to cheat, and whether any reduction in penalty is warranted,** be remitted to Council for reconsideration with the following directions:

a. If Council delegates this reconsideration hearing to a hearing committee under section 223(1) of the Act, I direct that if practicable, the members of the Hearing Committee should make up the reconsideration hearing committee.

b. The "record" to be considered by Council on its reconsideration is to be made up of the following:

i. The record on this Appeal (including the RK Emails);

ii. This decision;

iii. Written (and/or oral) submissions from the parties; and

iv. Any additional evidence tendered by the Appellant, as addressed below and admitted by Council in accordance with the Hearing Guidelines.

c. The Appellant is granted leave to elect whether to adduce further evidence related only to the matter under reconsideration.

d. The Appellant is also granted leave to elect whether to cross-examine RK on her statutory declaration.

e. Written submissions, restricted to the matter under reconsideration, will be exchanged by the parties on a schedule to be set by Council.

f. Based on my reasons for requiring this reconsideration hearing, I direct that costs of the reconsideration hearing are not to be imposed on the Appellant by Council.

g. Given my reasons with respect to the reasonableness of the original enforcement costs, those costs are not subject to reconsideration.

h. Upon completion of the reconsideration hearing, Council will make its decision on the matter and provide written reasons for whatever decision it then may make, which reasons are required to be adequate and reasonable as guided by this decision.

"Michelle Good"

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Michelle Good
Member, Financial Services Tribunal

February 03, 2021