BRITISH COLUMBIA

Financial Services Tribunal

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.fst.gov.bc.ca
Email:
financialservicestribunal@gov.bc.ca

DECISION NO. 2019-FIA-001(a)

In the matter of an appeal under

BETWEEN:	Xiaomei (May) Zou	**APPELLANT**
AND:	Insurance Council of British Columbia	**RESPONDENT**
AND:	British Columbia Financial Services Authority	**RESPONDENT**
BEFORE:	A Panel of the Financial Services Tribunal Jane A. G. Purdie, Q.C., Panel Chair	
DATE:	Conducted by way of written submissions concluding on May 28, 2019	
APPEARING:	For the Appellant: Self-represented For the Respondent (ICBC): Naomi Kreuger, Counsel For the Respondent (BCFSA): Sandra A. Wilkinson, Counsel	

INTRODUCTION

[1] This is an appeal to the Financial Services Tribunal (the "Tribunal") of an Order made by the Insurance Council of British Columbia (the "Council") on February 8, 2019, by which the Appellant: was fined a total of $3,000, was required to take the Council Rules course, was required to make up outstanding Continuing Education ("CE") credits and was ordered to pay hearing costs totalling $5,875.71.

[2] The Order was made after Council considered a report of the Hearing Committee (the "Committee") which found that the Appellant had not attained the requisite number of CE credits over a period of several years. As part of her Notice of Appeal the Appellant requested a stay of the Order. On March 21, 2019, the Tribunal stayed the Order by consent of the parties.

[3] The Order was made pursuant to sections 231, 236 and 241.1 of the *Financial Institutions Act,* RSBC 1996 c 141 (the "*FIA*"). An appeal of such orders may be taken to the Tribunal pursuant to section 242(1)(a) of the *FIA*.

[4] The Council opposes the appeal and has provided written submissions which the Respondent British Columbia Financial Services Authority[1] has adopted.

[5] Section 242.2(11) of the *FIA* applies to this appeal, and provides that the Tribunal may confirm, reverse, or vary a decision or send the matter back for reconsideration, with or without directions, to the person or body whose decision is under appeal.

BACKGROUND

[6] The *FIA* establishes a regulatory scheme for the licensing of insurance licensees and authorizes the Council to discipline them by suspending or cancelling their insurance licences, imposing conditions and fines, and/or requiring them to meet the requirements of the Rules of the Council (the "Rules") and the Code of Conduct of the Council.

[7] Pursuant to Rule 7(5) of the Rules, "A licensee must meet the requirements of the Continuing Education ("CE") program established by Council, as amended from time to time". The Council set out the CE program in a Notice issued to all licensees dated April 18, 2008 which requires, in the Appellant's situation, the completion of 15 credits per year for her Life and Accident and Sickness Insurance Licence (the "Life Licence") and 4 credits per year for her General Insurance Licence (the "General Licence"). The Notice also sets out that credits are required for each licensing year being June 1 through May 31 of the following year, and that no carry-over of credits is allowed.

[8] The Notice sets out a regime where the respective licensee is responsible for taking appropriate continuing education within a broad framework, and for obtaining and maintaining evidence of their CE credits for the prior 5 years. The evidence must be available for inspection in case of audit as to the quantity and qualification of those credits.

[9] The Appellant was licensed as a General Insurance Agent in 2006 and obtained her Canadian Accredited Insurance Broker ("CAIB") designation in 2008. She was licensed as a Life Agent in 2014. While the Appellant is from China and English is her second language, she managed to obtain her CAIB designation at her first attempt.

[10] In early 2017, the president/compliance officer of the Appellant's life brokerage sent an email to the Council advising that the Appellant did not obtain her CE credits for her Life Licence for the 2017 year. Less than one month later, the Council audited the Appellant's CE credits and determined that the Appellant was short 25.5 Life Agent CE credits for licensing years 2015-2017 and had zero General Agent CE credits for licensing year 2015.

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[1] At the commencement of this Appeal the Financial Institutions Commission had party status pursuant to section 242(3)(a) of the *FIA*, however, on November 01, 2019 FICOM was dissolved and replaced by the BC Financial Services Authority (the "Authority"). Pursuant to section 26(4) of the *Financial Services Authority Act*, 2019, SBC 2019, c 14, the Authority replaced FICOM as a party in this appeal.

[11] As a result of the audit, a Council investigator sent a report to the Rules Review Committee. The Rules Review Committee allows the Licensee to appear before it, after which meeting it issues an Intended Decision and notifies the licensee that the licensee can accept the Intended Decision or apply for a hearing of the matter.

[12] The Appellant chose not to appear at the Rules Review Committee meeting, after which Council issued an Intended Decision which ordered that she pay a penalty for each audit year for each type of licence she held where she failed to complete the required CE credits, and to make up the outstanding credits, amongst other conditions.

[13] The Appellant did not accept the Intended Decision, and instead applied for a hearing. The Council held a hearing and by its end, the Hearing Committee had determined that the Appellant had completed 5 more General Agent CE credits for 2014-2018 than required, even though she had not provided evidence of these prior to the Hearing. Additionally, the Council conceded that the Appellant was short only 12 Life Agent CE credits rather than the originally audited 25.5 credits, with the shortfall incurred in two licence years.

[14] The Hearing Committee presented a report to the Insurance Council which recommended that the Appellant be required to complete the 12 outstanding credits for her Life Licence, successfully complete the Council Rules Course, and pay a $3,000 fine, representing $1,000 for each audit year for each type of licence she held where she failed to complete the required CE credits within the audit year. Additionally, the Hearing Committee recommended that the Council should permit both parties to provide written submissions on costs for review by Council.

[15] The submissions on costs by the Council lawyer appear to have consisted of *Policy J.21 – Assessing Investigation Costs and Hearing Costs Policy* and Council's Bill of Costs. The Appellant's submission consisted of email responses to the effect that she should not pay costs.

[16] There is no evidence in the appeal record of any other written submissions on costs.

[17] The Council Order mirrored the recommendations of the Hearing Committee in all respects, but without any reference to any submissions or analysis of the costs issue. The Council also made an order assessing the Appellant the Respondent's claimed hearing costs of $5,875.71.

[18] The Council ultimately ordered the Appellant: to pay a total fine of $3,000, being $1,000 for each licence for which the Appellant failed to fully complete the required CE credits within the specified licensing years (being 2015 and 2016 for her Life Licence and 2015 for her General Licence);to take the Council Rules course; to make up the 12 outstanding Life Insurance CE credits; and to pay hearing costs totalling $5,875.71.

ISSUES

[19] The Appellant appeals the decision of the Council and sets out her reasons for doing so in her Notice of Appeal and also in her two-page letter of submission.

While not drafted in legal language, the grounds for her appeal can be formulated into the following questions:

a) Was the penalty assessed with regard to the shortfall of CE credits for the Appellant's General Insurance licence and Life Licence reasonable?

b) Did the Council or the Hearing Committee breach the requirements for procedural fairness by:

   a. publishing the decision and the Appellant's name on the Council website and by email to all licensees prior to the finalization of all possible appeals; and/or

   b. failing to provide an interpreter?

c) Was the imposition of Costs reasonable?

FRESH EVIDENCE

[20] Both parties have included "fresh evidence" as part of their appeal submissions.

[21] The Appellant provided extensive documentary evidence as to various CE credits she had completed, presumably with a view that this "fresh evidence" should be considered when determining her compliance with the CE credit requirements.

[22] In response to the Appellant's submissions regarding unfair procedure, the Council seeks to have a "Book of Fresh Evidence" containing various pieces of correspondence between the parties and website printouts admitted as fresh evidence.

Test for Admission

[23] The *FIA* sets out a clear and comprehensive code governing the test for admitting new evidence on appeal:

> 242.2(8) On application by a party, the member considering the appeal may do the following:
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> (a) permit oral submissions:
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> (b) permit the introduction of evidence, oral or otherwise, if satisfied that new evidence has become available or been discovered that
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> (i) is substantial and material to the decision, and
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> (ii) did not exist at the time the original decision was made, or did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

Appellant's Fresh Evidence

[24] The Appellant submitted more than 80 pages of "fresh evidence", consisting of emails and certificates to prove the attainment of the required CE credits for her Life Licence for various audit years.

[25] The Respondent argues that the Appellant's fresh evidence should not be admitted in evidence, but the Respondent acknowledges that the new certificates show that the Appellant completed her CE credits for 2015 as required, and, applying some 2017 Certificates retroactively to the 2016 shortfall, the Appellant would not be short any Life Licence CE credits if the new certificates were admitted.

[26] In my view, the Appellant's fresh evidence meets the first test of being substantial and material, as it goes to the very essence of the matter under consideration.

[27] The Appellant has not, however provided any compelling evidence to explain why the additional certificates were not discovered and could not, through the exercise of reasonable diligence, have been discovered. Although the Appellant has alleged that her life brokerage led her to believe that they were keeping track of CE credits and purposely kept this information from her, she has also acknowledged that it was her responsibility to keep track of her own CE credits, and, ultimately, she has been able to produce evidence of the missing CE credits on this appeal.

[28] The relevant certificates and emails all bear dates some years in the past. Further, the audit was instituted in March of 2017, and the Appellant had until November 1, 2018, the actual date of the Hearing, to produce the documentary evidence she now submits for consideration on this appeal. While sympathizing with the Appellant in her attempts to reconstruct her CE credits from information available to her, she appears to have ultimately been reasonably successful. I have no evidence or submissions as to what prevented the Appellant from locating or obtaining this evidence prior to the Hearing held on November 1, 2018. There is nothing to support a finding that this evidence could not have been discovered through the exercise of reasonable diligence at the time of the Hearing.

[29] I do not admit the fresh evidence provided by the Appellant for consideration in this appeal.

Respondent's Fresh Evidence

[30] The Respondent submits that its Fresh Evidence is submitted to help me assess the exercise of procedural fairness in response to the Appellant's submissions.

[31] The Respondent's Book of Fresh Evidence containing: emails and letters between the parties, a copy of the Notice of Hearing and a printout from the Council's website on disciplinary process, is presented mainly to respond to the costs issue and refute the Appellant's assertions that she would not have proceeded to a hearing if she were aware of the potential costs.

[32] The Respondent argues that fresh evidence may be admitted in cases where it is necessary to assess the exercise of procedural fairness of a tribunal:

> Council further submits the Fresh Evidence should be admitted because procedural fairness is a new issue on appeal. With the exception of the Notice, at the time of the Hearing, the Fresh Evidence was not before the Hearing Committee because it was neither relevant nor material to the Hearing Committee's determination of the issues or to its exercise of discretion regarding the Hearing costs at the time the Order was made**.** The Fresh Evidence is made

relevant, material and, therefore, admissible by the Appellant's assertion that she was unaware of the potential for hearing costs to be assessed against her or that Council would retain a lawyer for the Hearing.

[33] The Appellant admitted in the Hearing that once she knew there was a lawyer and there was discussion of money that she hung up the telephone while discussing her options with the Respondent's representative. The Respondent relies on the Hearing Committee's finding that the Notice of Hearing clearly sets out that costs may be imposed against the Licensee.

[34] The Hearing Committee was alive to the issue of the disputed costs as it noted that the Appellant indicated at the hearing that she was not aware that costs could be awarded against her. To give her an opportunity to make submissions on the point, the Committee recommended to Council that it permit both parties to provide written submissions on costs for review during its consideration of the matter.

[35] The Appellant's submission regarding costs was "I am not the guilty one, I shouldn't pay those cost. I was not one start the whole event, I just cooperated whatever comes. By the way I didn't hire lawyer to help me." And subsequently, "most of the cost is legal fees and related expenses. I know lawyer is expensive, so I didn't hire any lawyer or legal office to assist me. I was there alone to defence. Insurance council hired the lawyer give me hard time."

[36] The Respondent provided the Appellant with its Bill of Costs.

[37] As Council did not provide any analysis or rationale for its order of costs and did not refer to any submissions, we do not know what evidence was before them, other than the Appellant's emails referred to above and the Respondent's Bill of Costs.

[38] The Respondent argues that because procedural fairness is a new issue raised on appeal, all of the fresh evidence should be admissible to show the Appellant was aware of the possibility of the liability for costs.

[39] I disagree. While in the instance of a new issue the contents of the Respondent's Book of Fresh Evidence might be considered substantial and material to the decision, the issue regarding whether the Appellant was aware of the costs consequences is not a new issue. In fact, the issue was squarely before the Council prior to issuing its decision. All the material the Respondent seeks to introduce now existed at the material time, was easily available, and could have been referred to prior to or at the Hearing or in the written submissions to the Council with regard to the costs issue.

[40] For the above reasons, I do not admit the Respondent's Book of Fresh Evidence.

STANDARD OF REVIEW

[41] The Appellant does not raise the issue nor provide any input on the appropriate standard of review. The Respondent Council provided various decisions of this Tribunal to support its submission for the appropriate standard of review

including, *Kadioglu v Real Estate Council of BC and the Superintendent of Real Estate,* Decision No. 2015-RSA-003(b) ("*Kadioglu"*).

[42] I agree with and adopt the standards of review set out in *Kadioglu* as follows:

(a)Correctness for questions of law…,

(b)Reasonableness for questions of fact and discretion, and

(c) Fairness, for questions of procedural fairness.

[43] With respect to the standard of review of decisions regarding penalty, I find the decision of the Tribunal in *Financial Institutions Commission v Insurance Council of BC et al,* Decision No. 2017–FIA-002(a)-008(a) ("*FICOM*") helpful, and I adopt the Tribunal's standard of review as applicable here. In that case, the FST described the standard of review for penalty decisions as follows (at para 77):

> Taking all these factors into account, it 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…

[44] The less deferential reasonableness standard of review of penalty decisions set out in FICOM involves an assessment by the Tribunal of whether, in the particular circumstances under appeal, there has been an error in principle made by the decision-maker in coming to his or her decision on penalty. I will apply the less deferential reasonableness standard of review set out in FICOM to my assessment of the penalty issues in this appeal.

ANALYSIS

[45] An important function of the Council is to ensure licensed insurance agents, salespersons, and adjusters act within a professional framework, which promotes ethical conduct, integrity, and competence. Council's mandate includes being responsible for ensuring education requirements for licensing meet the minimum standards necessary to protect the public. To that end, it would seem incumbent on the Council to encourage its licensees to obtain as much education as practical, and to provide easily accessible means of obtaining, recording and benefitting from appropriate educational opportunities.

[46] The regime of keeping track of insurance CE credits for retroactive audit is awkward at best. The Appellant points out that the Insurance Council requires licensees to complete an annual filing and pay a renewal fee for their licence and state at that time that they have completed their required CE credits, yet does not require a licensee to prove at the time of licence renewal filing that they have achieved the required number of CE credits that year. The Appellant's suggestion that the Insurance Council should require licensees to provide evidence of CE credits for each licensing year rather than requiring agents to keep evidence of

each prior 5-year period has merit. This would certainly impress upon licensees the need to obtain the minimum credits and ensure that even if the credits are not assessed as accredited on a yearly basis that they are readily available to do so if audited in the future.

a) Was the penalty assessed with regard to the shortfall of CE credits for the Appellant's General Licence and Life Licence reasonable?

[47] Although the Council initially advised the Appellant that it was auditing her CE credits for her General Licence for 2014-2016 and her Life Licence for 2015-2016, eventually the Hearing Committee indicated that Council had audited the Appellant for CE credits for her General licence for 2014-2017, and for her Life Licence for 2015-2017. While this did not prejudice the Appellant in this instance, it was quite confusing and not always clear what years were actually being considered.

General Licence

[48] The Committee determined that the Appellant failed to complete any CE credits for the General Licence during the licensing period from June 1, 2014 through May 31, 2015. The Rules Review Committee report, which was provided to the Hearing Committee, showed the Appellant's CE history as:

- 2014 – excess 5 credits;
- 2015 – short 4 credits;
- 2016 – excess 2.5 credits;
- 2017 – excess 1.5 credits

[49] While the Notice setting out the requirements for CE specifically precludes the carryover of credits and requires the licensee to acquire a minimum number of hours during each licensing year, there is no prohibition on the carry-back of credits. Indeed, the ultimate Order of the Council did not require the Appellant to take any further CE credits for her General Agent Licence to make up for the fact that no credits were completed for the 2015 licensing period. The Appellant was fined $1,000 for "each year in which she failed to fully complete the required CE credits", which for her general licence was the 2015 licensing year.

[50] The Council and Hearing Committee did admit, however, that the Appellant had sufficient CE credits to cover the audit period. Based on the evidence presented, the Appellant failed to prove completion of any General Agent licence CE credits in 2015, although in aggregate she had sufficient credits for the audit period 2014-2018.

Life Licence

[51] The Appellant was audited for the years 2015-2017 for provision of her CE credits (45 required in total) for her Life Licence. She failed to provide sufficient CE credits and it was alleged that she was short 25.5 credits. After much Council staff effort and review of documents provided by the Appellant up to the time of the Hearing, the Hearing Committee conceded that the total outstanding Life CE credits

amounted to 12 units. The Appellant had provided further evidence which, if accepted would have reduced the outstanding CE credits to 8, but the Hearing Committee declined to accept those credits, determining that the documents lacked sufficient detail to indicate if CE credits were actually obtained.

[52] As I have not admitted the fresh evidence provided by the Appellant, I am of the view that the Hearing Committee's finding that the Appellant was 12 hours short of the CE credits for the audit period was reasonable. The issue is whether the penalty assessed on the basis of this shortfall was reasonable.

Committee assessment

[53] The Hearing Committee made a finding that the Appellant's failure to provide records to prove completion of all her required CE credits for her Life Licence was a violation of Council Rule 7(5) and Code of Conduct articles 5.2 and 5.3, and that failure to obtain any training in 2015 for her General Licence was a violation of the Rules and Code of Conduct. However, the Hearing Committee did not specifically link the penalties they assessed against the Appellant to the findings of the various breaches of the Rules and Code of Conduct.

[54] When making its Recommendations to Council, the Hearing Committee recommended that the Licensee be fined $1,000 for each audit year within which she failed to fully complete the required education credits (2015 and 2016 for Life Agent and 2015 for General Agent); having already conceded that in aggregate she had sufficient credits for her general licence audit years.

Standard of review

[55] The less deferential reasonableness standard of review, outlined above in *FICOM*, is applicable here with respect to penalty. This allows there to be less deference shown to a decision-maker's penalty decision but only overturning it if wrong in principle as opposed to "line-drawing".

Findings

[56] The Appellant submitted that there should be no harm in obtaining CE credits early but clearly the Notice provides for no carry-over of CE credits. The Appellant had been a general insurance licensee for many years and should have been aware of the requirements.

[57] The Appellant further submitted that the Hearing Committee should have considered extenuating factors in her not being able to provide the records for her CE credits. She was a recent Life licensee, gave birth in 2016 after some hospitalization and was a single mother, speaks English as a second language and was in a difficult work situation. She alleged that the brokerage where she was an independent broker had lulled her into thinking that they were keeping track of her Life Licence CE credits and that courses taken through the brokerage would be recorded. There was a further suggestion from the Appellant that whatever CE records she had maintained in a folder went missing from her office at the brokerage.

[58] In the email evidence provided, the Appellant raised the issue in the original audit about her disputes with her life broker and the email exchange between the

licensee and the President of the brokerage in Calgary shows the difficulties in her work situation.

[59] The Appellant's argument in relation to these points was also supported to some extent through the testimony and evidence of the employee of the life brokerage office who the Council called as a witness at the hearing. That witness produced additional CE certificates for the Appellant and gave evidence advising that she had not looked for evidence of CE credits as requested by the Council because she was "too busy", despite being asked to do so over a year in advance of the hearing.

[60] As set out in the Council's "Comments Log Report", at the original audit stage the brokerage witness "did iterate that she may have attendance sheets only, of who attended certain seminars or training sessions" but did not provide any and in a later phone call "mentioned that the previous employee who was handling the CE and marketing did not do a great job of coordinating CE credits and would often forget to send attendance sheets, and therefore, licensee's would not get their certificates, hence, why he is no longer working there".

[61] The Respondent in its original Argument recites from the January 2014 Council policies and guidelines under section 4: Suitability, which provides that Council considers the nature of a matter to determine if it is relevant to a person's trustworthiness or intention to carry on the business of insurance in good faith and to consider a person's overall fitness to be licensed.

[62] The Respondent in its argument went on to recite the factors from that policy and guideline that Council would consider:

> Aggravating: (1) whether a licensee has been subject to one or more relevant matter (2) ongoing risk to the public (3) outstanding or unfulfilled obligations involving the relevant matter (4) likelihood of being repeated
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> Mitigating factors: (1) matter isolated in nature (2) risk of harm to the public (3) rehabilitative efforts to improve his or her suitability (4) whether employer is aware of the relevant matter and supports the person having a licence with council.
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> The Respondent's counsel went on to indicate that the list of aggravating factors and mitigating factors was not exhaustive.

[63] The Hearing Committee made no comments or findings as to any aggravating or mitigating factors, instead stating that much of the Appellant's oral evidence "was not relevant to the issues".

[64] The Respondent submits that for the FST to consider aggravating and/or mitigating factors on this appeal would be to reweigh the evidence to reach an outcome in favour of the Appellant; however, it is not clear to me from the reasons provided that any evidence of aggravating and mitigating circumstances was considered and weighed. In my view, the Tribunal must decide whether a penalty is reasonable in light of all of the evidence.

[65] The only analysis the Hearing committee did with respect to the reasonableness of the penalty was to look at the decision in the 2018-05-02 *Annie*

Chu case, which the Hearing Committee referred to as "extremely similar"[2]. That case was a consent order with a very limited factual context other than the actual offence of not completing CE credits with the licensee acknowledging that she was aware of the CE requirements and, based on the decision, not providing any argument as to her failure to comply.

[66] In the present case, the similarity to the *Chu* case is that the Appellant clearly failed to provide evidence of completing the requisite CE credits within the audit years. However, the present case differs from the *Chu* case in terms of the presence of the mitigating factors of the Appellant's pregnancy, single-parenthood, difficult work situation, her mistaken belief that her life brokerage was maintaining CE records for her and her allegation that her folder with CE credits had been removed from her office. Although the Hearing Committee made no factual findings on whether these states of affairs were accurate, the Appellant presented mostly unrefuted evidence on each of these items.

[67] On my review of the penalty decision, the Hearing Committee either failed to consider the Appellant's evidence of mitigating factors in its consideration of an appropriate penalty, or at least failed to include the analysis of such evidence in its reasons. The Hearing committee described the Appellant's oral evidence as mostly "not relevant to the issues", yet the position of Respondent at the hearing was that the Hearing Committee needed to consider aggravating and mitigating factors in coming to its decision on penalty.

[68] The Respondent submits that I should impute consideration of these factors into the penalty decision because the evidence was before the Hearing Committee and the penalty, which was ultimately imposed, falls within a range of acceptable outcomes on the record.

[69] While I have struggled with the Hearing Committee's failure to explain whether and how it considered aggravating and mitigating factors and circumstances in this appeal, it is not the role of the Tribunal to vary a penalty decision with which it may disagree to accord with how the Tribunal might have decided. Rather, the role of the Tribunal is to consider if the Council's decision, evidenced by the reasons, falls within a reasonable range of possible outcomes, and whether the Council has breached any policy or law. In reading the reasons as a whole, and considering the penalty which was ultimately imposed, I am unable to find that the penalty falls outside of a range of acceptable outcomes in this case or that any penalty or law has been breached.

[70] Although I would have appreciated (and as a matter of transparent decision-making the Appellant should have been provided with) a more thorough discussion of the factors at play in this case, the fact remains that the Appellant was unable to show that she completed the requisite courses in the appropriate timeframes. The Council must act in the public interest to ensure licensees are up to date with their professional educational requirements, and to that end, must ensure penalties associated with failing to do so achieve the goals of both specific and general deterrence. In this case, the monetary penalty was not extreme insofar as the

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[2] Hearing Committee Report at page 10.

range of monetary penalties was up to $10,000, and it was in line with cases with similar factual underpinnings. I find the penalty was reasonable in all the circumstances.

b) Did the hearing committee breach the requirements for procedural fairness in the Hearing?

[71] The standard of review for issues of procedural fairness, as set out in *Kadioglu*, involves asking whether the decision-maker acted fairly in all the circumstances, and I adopt that standard of review with respect to the issues of procedural fairness raised by the Appellant.

Publication of the Decision and the Appellant's Name

[72] The Appellant argues that it was a breach of fairness for the Council to publish the Decision and her name on the Council website and by email to all licensees prior to the finalization of all possible appeals. I disagree.

[73] The publication of the decision and the ultimate Order made by Council were made after the hearing. Orders are reasonably posted by the Council when made. If an appeal is taken to this Tribunal, a covering note is attached to the posted Hearing Decision indicating that the licensee exercised their right to appeal the Order. This is a reasonable process.

[74] The Appellant objected to her Licensee profile continuing to show that she was "subject to conditions" as set out in the format of the licensee directory even though the Order had been stayed pending the appeal. That indication on the licensees' directory has since been removed, though the email had been sent and information distributed between the date of the Order and the date of the stay of the Order pending this Appeal. A stay of an Order, while having the effect of freezing or postponing its effect does not act retroactively. I do not find that this was a breach of procedural fairness to the Appellant.

Lack of an Interpreter

[75] The Appellant first raised this issue on her appeal. There is no evidence in the Appeal record that there was a request for an interpreter prior to the appeal. All dealings with the Insurance Council were conducted in English and all courses, correspondence and licensing transactions for the 13+ years in which the Appellant has been a licensee have been in English; albeit not necessarily "legalese" as complained of by the Appellant at the hearing.

[76] The Respondent submits that "the Council owes no duty to make interpreters available at hearings, absent a request by a licensee".

[77] On reading the transcript, it is clear to me that throughout the hearing the Appellant was confused by the process. However, it is unclear to me how much of the Appellant's confusion arose as a result of language difficulties and how much arose as a result of the Appellant representing herself in a complex, legalistic hearing process. However, the Appellant did not seek a delay or request assistance with interpretation.

[78] At the time of the hearing the Appellant had been an insurance Agent for approximately 13 years and competed all of her technical exams and CE credits in English. Considering the lack of evidence that the Appellant sought any language supports at the hearing, I am not persuaded that the lack of an interpreter breached any requirements for procedural fairness.

Effective Participation

[79] Although I have found no technical breach of the Appellant's right to procedural fairness based on her lack of an interpreter, I do think the hearing panel could have better supported the Appellant in her understanding of and participation in the hearing process. Excerpts of the transcript detailing the Panel's denial of the Appellant's request for a bathroom break[3], and the Panel's denial of the Appellant's ability to ask a witness a question relating to the issue of how credits were calculated in circumstances of pregnancy[4] stood out to me as examples of instances where the Appellant did not understand the procedure or her rights and role in the process and where more fulsome explanation and support might have helped her, or at least allowed her to feel more comfortable with the process. The procedure would have been more comprehensively fair, rather than having attained the minimum level to qualify as procedurally fair.

Was the imposition of Costs Fair and Reasonable?

Costs - Procedural Fairness

[80] The Appellant submits that she was unaware of the jeopardy in which a licensee places him or herself if he or she chooses to request a hearing rather than accepting the Intended Decision of the Council.

[81] The Appellant submits that if she had been aware that the outcome could turn out to be more disadvantageous than the Intended Decision she would have accepted the Intended Decision. The procedure of the Council to issue a preliminary Intended Decision which allows the licensee to either accept the decision or request a hearing on the matter is an interesting one. Prior to the Council issuing an Intended Decision, a licensee can make an appearance in front of the Rules Review Committee. In the present case, the Appellant chose not to attend the Rules Review Committee meeting.

[82] Once the Intended Decision is rendered, the licensee has the option of accepting the decision and complying with it or requesting a hearing. The Appellant submits that she disagreed with the Intended Decision, but she was only offered the option of a hearing which she submits, unknown to her, could incur significant costs.

[83] The Respondent's lawyer, in her opening statement at the Hearing, paraphrased the Notice of Hearing. When asked if she were prepared to proceed

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[3] Transcript at page 115.
[4] Transcript at page 58.

the Appellant responded that she thought the matter was about CE credits but in fact there was a list of issues of which she was not previously aware.

[84] There was no further referral to the Notice of Hearing, though the Chair continued with the Hearing after stating that the purpose of the hearing was set out in the Notice of Hearing sent to the Appellant

[85] One of the Appellant's main arguments on appeal was in relation to the jeopardy for costs that were incurred by her as a result of the Hearing. The Notice of Hearing in its list of possible sanctions to be imposed by the Council includes: "Require the Licensee to pay the Costs of Council's investigation and/or of this hearing". The Respondent relies on the Hearing Committee's finding that the Notice of Hearing clearly sets out that costs may be imposed against the Licensee.

[86] The Appellant admitted in the Hearing that once she knew there was a lawyer and there was discussion of money that she hung up the telephone on a discussion of her options with the Respondent's representative. While she might not have wanted to discuss money, I find that the Appellant recognized her jeopardy for the imposition of costs prior to her attendance at the hearing.

[87] Under section 241 of the *FIA*, the Council may order the Licensee to pay costs or part of the costs of the investigation or hearing, not to exceed actual costs incurred, which allows the Council to exercise its discretion in awarding costs.

[88] During submissions on the matter of costs at the Hearing, the Respondent's lawyer submitted that the Appellant should be required to pay costs. The lawyer argued that while the Appellant had a right to the hearing, her failure to provide the evidence of her CE credits prior to the hearing despite ample opportunity to do so, should attract an order for hearing costs

[89] The Hearing Committee permitted both parties to provide written submissions on costs for review by Council after the hearing.

[90] The Appellant's submissions regarding Costs were to the effect that she did not hire a lawyer and all the costs were incurred by the Council.

[91] The Respondent provided a Bill of Costs and the Council's Policy J.21 Apportioning Hearing Costs as its submissions.

[92] I do not find any breach of procedural fairness arising from the imposition of costs in this case. I find the Notice of Hearing provided notice to the Appellant that she might be subject to the payment of costs as a result of the hearing. Further, the Hearing Committee permitted both parties to provide written submissions on costs after the Hearing. At that point, being aware of the potential award of costs, the Appellant could have provided more input both as to the imposition of costs and their reasonableness.

Costs - Reasonableness

[93] Council's Policy *J.21, Assessing Investigation Costs and Hearing Costs Policy,* recognizes the importance of ensuring that hearing costs not be a barrier to the due process provided to licensees under the *FIA.* It then goes on to say that if hearing costs will be assessed, an explanation for the assessment will be provided to the

Licensee in writing including whether the costs are made in accordance with Council's schedule or based on actual hearing costs.

[94] In my view, the process which the Insurance Council uses for its disciplinary matters is not easily understood. Upon review of the record it is clear to me that the Appellant here was woefully unprepared to participate in a hearing of an adversarial nature and this resulted in excessive time and costs being incurred. Surely at the investigative stage some information, education or peer support could be provided in a timely manner, clearly setting out the practical application of rules and code of conduct rather than the brief outlines of disciplinary process set out in the website, so that licensees could better understand the process and options at the very first instance.

[95] Here, the Council ordered costs of the Hearing pursuant to the Council's Schedule to be paid by the Licensee without any discussion and with no explanation for the assessment or any analysis of the rationale for the imposition of costs. While the order for costs is discretionary, the Policy requires an explanation for the assessment. There was no such explanation provided, and no indication of the factors which gave rise to costs being awarded, their amount or allocation.

[96] It was clear that the Appellant had only a very basic understanding of the process and had requested a hearing in good faith in hopes of obtaining a better outcome than the Intended Decision which was made by the Council after a Rules Review Meeting.

[97] I find that because of the lack of any explanation of the assessment of costs I am unable to determine if Council exercised its discretion in a reasonable manner; therefore, Council's order for costs cannot be shown deference. Council's apparent blind reliance on the submitted bill of costs is an error in principle. The imposition of costs as assessed in this instance is unreasonable.

REMEDY

[98] Section 242.2(11) of the *FIA* sets out the remedial authority of the Tribunal as follows:

> (11) 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.

[99] I have found that the Council's imposition of Costs in the amount of $5,875.71 was unreasonable as Council failed to provide any explanation of its costs as provided by its own Policy and Guidelines, and failed to provide any rationale for exercising its discretion as it did. I agree with the statement in *Administrative Law (6th Ed.) 2017* Blake at para. 2.291 that: "reasons can demonstrate that the issues have been carefully considered and reinforce public confidence in the judgment and fairness of the tribunal".

[100] In situations involving insufficient reasons it is sometimes preferable to return the matter to the underlying decision-maker for reconsideration. In the present situation, I am unable to discern whether the costs award was reasonable as Council provided no rationale for the award. As such, I would exercise my

discretion to remit the matter of costs only back to the Council for reconsideration of both the order for costs and the amount of costs. Once that reconsideration has occurred, I would expect that Council would provide adequate written reasons for the decision.

[101] I hereby provide the following directions:

i. The matter of whether costs should be assessed against the Appellant, and if so, in what amount, is remitted back to the Council for reconsideration in light of the findings in this decision;

ii. The costs issue shall be decided on the record, without further written or oral submissions;

iii. The Record for the purposes of reconsideration of this matter shall include the Appeal Record on this appeal, the Council's Order, the Hearing Committee Report, and this decision;

iv. In reconsidering the costs matter, the Council shall consider all of the circumstances involved in this matter, including, but not limited to, the Council's policy J.21 that highlights the importance of hearing costs not being a barrier to due process;

v. The Council shall provide adequate and reasonable written reasons for whatever decision it comes to on the matter of costs;

vi. Because the reason for this remittance back to the Council is an error by the Council, no costs associated with this reconsideration process shall be assessed against the Appellant.

COSTS OF APPEAL

[102] The Appellant sought reimbursement of the appeal filing fee of $850; however, neither the Appellant nor the Respondent made complete submissions as to costs of the appeal to the Tribunal. The Respondent British Columbia Financial Services Authority specifically asked that costs not be granted to or awarded against it.

[103] With respect to costs, either party may make submissions regarding costs by **January 15, 2020** to which the other party will have a right of reply until **January 29, 2020**. In the event both parties make an initial submission, a right of reply will exist for both parties to the extent of dealing with matters not already addressed.

DECISION

[104] For the reasons outlined above, I Order the following:

1) the penalty of $3000 is upheld;

2) the costs award is remitted to the Council for reconsideration in accordance with the above directions;

3) I uphold the remaining portions of the Order requiring the Appellant to take the Council Rules Course, make up the outstanding CE credits and to make payment of the penalties.

[105] With respect to the Stay of the Order which this Tribunal Ordered by consent on March 21, 2019, I note the Stay will expire with the issuance of this Decision. As a result, the timelines for payment of the penalties and completion of the outstanding CE Credits and course as set out in the Order would become effective. I note those timelines have come and gone, and it will be up to the parties to determine a suitable timeframe which would allow the Appellant to make payment and complete the outstanding courses and CE credits. Although I decline to make an order on this issue, I would expect that the minimum amount of time provided from the date of this Order would mirror the three-month period contemplated in the original Order.

"Jane Purdie"

Jane A. G. Purdie, Q.C.
Panel Chair,
Financial Services Tribunal

December 30, 2019