



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-002(a)

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

BETWEEN:	Manjit Kaur Brar	APPELLANT
AND:	Insurance Council of British Columbia	RESPONDENT
AND:	British Columbia Financial Services Authority	THIRD PARTY
BEFORE:	A Panel of the FST, George Hungerford, Chair	
DATE:	Heard by way of written submissions closing July 05, 2019	
APPEARING:	For the Appellant:	Self-Represented
	For the Respondent ICBC:	David T. McKnight and Naomi Krueger, Counsel
	For the Third Party BCFSA:	Sandra Wilkinson, Counsel

APPLICATION FOR EXTENSION OF TIME TO FILE APPEAL AND STAY OF UNDERLYING DECISION

Application Overview

[1] On February 5, 2019, the Insurance Council of British Columbia ("Council") made an order that:

- a) the Appellant's life accident and sickness insurance licence (the "Licence") be cancelled with no opportunity to reapply for a period of four years, commencing February 5, 2019 and ending at midnight on February 4, 2023 (the "Cancellation Order");

- b) the Appellant pay investigation costs in the amount of \$3,055 (the "Investigation Costs Order");
 - c) the Appellant pay hearing costs in the amount of \$5,196.25 (the "Hearing Costs Order"); and
 - d) the Appellant complete an ethics course, as approved by Council, before reapplying to be licensed (the "Education Requirement").
- (collectively, the "Order").

[2] The Appellant seeks:

- a) an extension of time to appeal the Order (the "Extension") and
- b) a stay of the Order (the "Stay") pending the outcome of the appeal.

Background

[3] Under section 237 of the *Financial Institutions Act*, RSBC 1996 c 141 (the "FIA"), Council convened a hearing at the request of Ms. Brar to dispute an intended decision of Council dated October 31, 2017. The Notice of Hearing was dated April 23, 2018, and the Hearing Committee heard the matter on May 7, 2018.

[4] The Report of the Hearing Committee was considered by Council on January 22, 2019, where Council made the Order, effective February 5, 2019.

[5] As set out in paragraph 3.2 of the Financial Services Tribunal's Practice Directives and Guidelines (the "Guidelines"):

A Notice of Appeal must be filed in accordance with the statute under which an appeal decision was made or otherwise within **30 days** of the date of the decision being appealed.

[6] As such, the filing deadline in Ms. Brar's case was March 07, 2019; being 30 days from the date of the February 05, 2019 decision.

[7] Ms. Brar filed her original Notice of Appeal, her application for the Extension, and her application for the Stay via email which was received by the FST on April 11, 2019. As outlined in a letter from the FST dated April 17, 2019, the Notice of Appeal did not meet the requirements of section 22(2) and 22(3) of the *Administrative Tribunals Act*, SBC 2004, c 45 (the "ATA"). The Acting Chair provided Ms. Brar with an opportunity to correct her Notice of Appeal by May 1, 2019.

[8] Ms. Brar perfected her appeal on April 24, 2019.

[9] In accordance with instructions from the Acting Chair on May 27, 2019 and July 5, 2019, Ms. Brar made further submissions on why the FST should grant the Extension and the Stay.

THE EXTENSION APPLICATION

Test for extension of time for appeal

[10] Under subsection 24(2) of the ATA, a tribunal may extend the time to file a notice of appeal, even if the time to file has expired, if the tribunal is satisfied that “special circumstances” exist.

[11] There is no definition for “special circumstances” in the legislation.

[12] Section 3.2 of the Guidelines provides direction on what the Chair may consider in an application for an extension of time.

[13] The Guidelines state:

In order to ensure that the FST understands these special circumstances, appellants should ensure that their application to extend the time to file sets out the relevant issues regarding an extension including:

- whether there was an intention to appeal before the appeal period expired, and if so, was that intention communicated to the original decision-maker;
- what caused the delay in filing the notice of appeal;
- who will be prejudiced if an extension of time is not granted; or
- who may be prejudiced if an extension is granted.

In deciding whether to extend the time to file an appeal, the Chair will examine whether special circumstances exist and may consider the following factors or any other factor the tribunal considers relevant in making the determination:

- promptness – the date the application to extend was filed with the FST;
- the reasons a notice of appeal was not filed within the required time;
- possible prejudice to a party if an extension is or is not granted;
- whether there is a reasonable, arguable ground of appeal; and
- whether it is in the interests of justice that an extension be granted.

The Chair of the FST may consult the other parties to an appeal for their position on whether an extension application should be granted.

[14] The special circumstances to justify the application for an extension of time cited by the Appellant include the following:

- 1) An increase in medical issues due to stress from receiving the Order. In particular, the Appellant submits that when she received the decision it “stressed her to the limits” and, further, that her health “spiraled out of control due to the stress the [decision] caused me”.
- 2) She would suffer prejudice if an extension was not granted due to the financial hardships related to her loss of another job and her husband’s car accident that has reduced her family’s income and she therefore would have difficulty paying the costs.

Promptness

[15] The Appellant filed the application for an extension of time over one month after the expiry of the 30-day period.

[16] Ms. Brar should have filed within 30 days of February 5, 2019, i.e. on or before March 7, 2019.

[17] Instead, she filed on April 11, 2019, perfecting her appeal on April 24, 2019. This was over one month late. I do not find that the Appellant provided any evidence that she applied for an extension as soon as reasonably possible after receiving the Order.

[18] I find that this delay of over one month is significant but not determinative.

Reasons for the delay

[19] Ms. Brar indicated that the main reason for the delay was because her health "spiraled out of control" after receiving the Order.

[20] The doctor's note from Dr. S., dated July 5, 2019, provides information regarding the Appellant's intermittent treatment for health issues starting in 2009, and her inability to maintain employment (outside of the Insurance context) since 2017 due to a health issue. According to Dr. S's note, the Appellant left one job at the end of 2017 and the other in the summer of 2018 because of increasing difficulties in dealing with her health issue. According to Ms. Brar, she was only able to work about 2.5 months in 2018.

[21] Ms. Brar's health appears to have deteriorated throughout the period of time from the intended decision dated October 31, 2017, through to and beyond the hearing in May 2018. The time period in which the Appellant suffered deterioration in her health roughly lines up with the time period of Council's disciplinary process. According to the medical evidence, Ms. Brar's symptoms appear to have been bad enough that she was unable to work for the balance of 2018. I find it plausible that the stress of receiving the Order could have triggered or exacerbated Ms. Brar's health problems, which may have caused or contributed to her failure to file her appeal on time.

[22] I therefore find that Ms. Brar's medical conditions alone give rise to a special circumstance that justifies an extension. However, for thoroughness, I will review the other considerations in the Guidelines.

Prejudice to parties

[23] Ms. Brar has submitted that her family is under economic hardship triggered by the loss of her two jobs and her husband's car accident. She says that she has lost medical benefits, lost a 10% discount at the supermarket from her former employer and has had to pull her children from private school.

[24] Ms. Brar wishes to have an opportunity to appeal the assessed hearing costs, as she will have difficulty paying them. In particular, at \$5,196.25, I find the hearing costs to be a non-trivial amount to Ms. Brar. She could suffer some prejudice if her case is not heard.

[25] Regarding the cancellation of her licence, in Ms. Brar's April 11, 2019 Notice of Appeal she indicated that she "really needed the job [she] would have had", referencing her employment in the insurance industry. However, in submissions she filed a month later she indicated that she "was not even working selling insurance policies" and went into the field to help family members. These conflicting submissions do not assist me in assessing prejudice to the Appellant in this context.

Reasonable, arguable grounds for appeal

[26] I find that the three grounds raised by Ms. Brar are:

- 1) the evidence of cheating should be reweighed;
- 2) the allocation of hearing costs based on her financial and medical circumstances should be reassessed; and
- 3) there was procedural unfairness in the underlying proceeding.

Reweighing of evidence

[27] Although it is difficult for me to assess the merits of Ms. Brar's grounds of appeal without fulsome submissions from the parties, at first blush the conclusions of the Hearing Committee regarding the likelihood of the Appellant having cheated appear to be well-founded. Council had the benefit of persuasive expert evidence regarding the statistical improbability of the Appellant having more or less the same answers as other test takers, and the Appellant does not challenge the expert evidence on this appeal.

[28] In her Notice of Appeal the Appellant suggests the Council should have reviewed the video footage of the testing environment to see whether "there was any indication that I cheated", or to ask the two invigilators whether either of them "saw anything that looked like cheating", but, importantly, she does not raise objections to or arguments against the expert evidence the Council relied upon in finding she cheated.

[29] In a full appeal on the merits the FST would be deferential to the Hearing Committee's findings of fact.

[30] Accordingly, I find that the Appellant's contention that the evidence should be reweighed is not a strong ground of appeal.

Allocation of costs based on circumstances

[31] The Respondent submits that the Council fully considered Ms. Brar's financial and medical circumstances at the hearing and found that she had been "earning a lot of money". The Respondent argues that the orders for hearing costs and investigation costs were reasonable and fell within a range of possible, acceptable outcomes on the evidence.

[32] Ms. Brar was able to adduce evidence of health and financial circumstances at the hearing. What she adduced was considered by the decision maker.

[33] In a full appeal on the merits, the FST would afford some deference to the Hearing Committee's determination as to costs.

[34] As to her new submissions regarding her health and financial circumstances, evidence from after the time of the hearing would not be relevant; evidence on her health and financial circumstances prior to or at the time of the hearing would appear to have been likely discoverable at the time of the hearing and therefore inadmissible.

[35] Accordingly, I find that the Appellant's arguments that the hearing costs and investigation costs should be reconsidered is not a strong ground of appeal.

Procedural Fairness

[36] Ms. Brar argues Council should have mentioned or given written notice that costs could be assigned to her. She submits that the first time she became aware that she could incur costs of the hearing was the day before the hearing as follows:

The cost was not appointed before to me, as you guys called me one day before the heading, and this was said to me; "Do you want to attend the hearing? It's all on your cost." You are coming or not but that is not appointed on this June letter or on the hearing decision letter.

[37] It appears that in the hearing, Ms. Brar also questioned the fairness of the timing of receiving the hearing materials. The Respondent submits that during the hearing Ms. Brar testified that she was first advised of the hearing costs when she spoke with Counsel for the Council on the Friday before the hearing. The Respondent does not submit that Ms. Brar was advised of hearing costs before this point in time.

[38] I have reviewed the transcript of the May 07, 2018 hearing of this matter and I note that it is not altogether clear to me when Ms. Brar became aware of the possibility of hearing costs. It does appear that Ms. Brar was sent the Notice of hearing and other materials by email one or two weeks prior to the hearing date, but that she may not have reviewed the email right away, and that even when she did, she may not have been able to open the email attachments.

[39] It appears to me from my review of the parties' submissions and the transcript, that it is possible that Ms. Brar became aware of the possibility of hearing costs being assessed against her only one to two business days prior to the hearing date. It further appears that she may not have had access to the hearing documents Council provided her until one to two business days prior to the hearing date.

[40] Were this to be correct, it raises significant procedural fairness concerns that the Appellant may not have had enough time to digest the materials and consider if she required counsel or if she should withdraw the request for the hearing.

[41] The Respondent argues that the Appellant had notice of the possibility of hearing costs prior to the hearing date, being the Friday before the hearing, and as such, it met its duty of fairness to the Appellant and was permitted to order, and indeed was reasonable in ordering, that she pay the costs of the hearing.

[42] The standard of review the FST generally applies in assessing questions of procedural fairness is whether the procedure followed was fair in all of the circumstances (*Kadioglu v Real Estate Council of British Columbia et al*, Decision No. 2015-RSA-003(b)). In essence, Ms. Brar argues the procedure followed unfairly

deprived her of her right to know she could face costs consequences for requesting and attending the hearing. Further, her evidence about the timing of the delivery of the hearing materials raises the issue of whether the procedure followed allowed her enough time to meaningfully prepare for the hearing.

[43] Although I make no findings on the merits of these issues, I find that Ms. Brar has raised a reasonable and arguable ground for appeal based on an alleged breach of procedural fairness.

Interests of justice

[44] The “interests of justice” speaks to whether the grant of an extension of time to file the appeal would be just and equitable given the circumstances of the case. The FST must consider the public interest and issues such as the effective use of public resources and the fair and timely disposition of the matter.

[45] The discretion to extend must be exercised carefully so as not to render the 30-day statutory limitation period for filing an appeal meaningless. The person seeking the extension must be able to demonstrate compelling reasons warranting the extension of time.

[46] I have found that the Appellant has provided a reasonable explanation for having filed her appeal late. I have also found that she has raised a substantive issue regarding whether she was treated justly and fairly in having enough time to review the hearing materials and to consider whether she should withdraw her request for a hearing.

[47] I therefore find that it is in the interests of justice to allow the Appellant’s appeal to proceed.

Conclusion on Extension Application

[48] For the reasons outlined above, I find that the Appellant has raised the existence of special circumstances which justify the FST granting her application for an extension of time, and I so grant the application.

THE STAY OF THE ORDER

[49] To stay an authoritative order, otherwise in effect and to be accepted as correct and binding, is a serious matter. *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 334, sets out a three-prong test for stay of an order, being the existence of a serious issue, proof of irreparable harm if the motion is refused, and the balance of convenience between the parties.

[50] I will consider the three-prong test of *RJR-MacDonald* in my analysis.

Serious Issue

[51] Here, there is the potentially significant issue of procedural fairness of the hearing, including whether the Appellant received the materials in time to be able to prepare herself for the hearing and whether the Appellant received timely notice that the Council would be seeking costs.

Irreparable Harm

[52] Regarding the Cancellation Order, although the Appellant has indicated that she needs a job selling insurance, she also indicated that she did not intend to work as a broker to make money, rather she wanted to help people. She testified that she had not placed any policies since obtaining her licence. The Appellant also appears to have difficulty working, which raises doubts of her ability to work selling insurance. The Respondent noted that the Appellant has not led any evidence in these applications that she would suffer irreparable harm if the decision were not stayed, including records regarding her CPP benefits, monthly income, expenses, savings or financial obligations to establish that she requires an insurance licence in order to earn income. Assertions of financial hardship without evidence are insufficient to establish irreparable harm. Therefore, I do not find that there is irreparable harm for her to not be licensed.

[53] Regarding the Investigations Costs Order and Hearing Costs Order, the Appellant has demonstrated some financial hardship and that the payment of these orders may have an impact on her ability to manage her household. The Costs are harms. However, the Appellant has not produced evidence to show the payment of Costs to be irreparable harms; should she win her appeal, she would get some or all of the Costs back.

[54] Regarding the Education Requirement, the Appellant would be required to complete an ethics course if she were to reapply for a life and accident and sickness insurance licence, which would not be until 2023. This time is far in the future and not prejudicial to the Appellant.

[55] I therefore do not find that the Appellant will suffer irreparable harm if the Order is not stayed.

Balance of convenience

[56] The balance of convenience considers the potential harm to the Respondent and Appellant and weighs them.

[57] The cheating claims against the Appellant raise significant public policy issues including:

- the protection of the public from the Appellant who, based on significant evidence, may have cheated on her exams and may not be qualified to sell and/or advise on insurance.
- deterrence of prospective insurance brokers from cheating on exams,
- the undermining of public confidence in the insurance licensing regime due to cheating.

[58] The Order reflects serious concerns about the honesty, competency and trustworthiness of the Appellant. To continue to licence an individual who has been found by the Council to have cheated to get the licence would be an outcome that would not be in the public interest.

[59] On the other hand, as discussed above, the Appellant has not proven that she will suffer irreparable harm if the stay is not granted.

[60] Accordingly, I find that the balance of convenience is in favour of not granting the stay.

Conclusion on Stay Application

[61] After considering the above public policy concerns, as well as the analysis of the *RJR-MacDonald* factors, I am not persuaded to exercise this Tribunal's discretion to enter a stay of the Order or its parts.

"George N.F. Hungerford"

George N. F. Hungerford
Chair, Financial Services Tribunal

July 31, 2020