BRITISH COLUMBIA

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DECISION NO. 2019-FIA-007(a)

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

BETWEEN:	Pamela Peen Hong Yee	**APPELLANT**
AND:	Insurance Council of British Columbia	**RESPONDENT**
AND:	British Columbia Financial Services Authority	**THIRD PARTY**
BEFORE:	George N. F. Hungerford, Chair	
DATE:	Conducted by way of written submissions concluding on February 17, 2021	
APPEARING:	For the Appellant: Self-Represented For the Respondent ICBC: David T. McKnight, Counsel For the Third Party BCFSA: Jessica S. Gossen, Counsel	

APPLICATION FOR EXTENSION OF TIME TO FILE APPEAL

[1] This ruling concerns the application to the Financial Services Tribunal (the "FST" or "Tribunal") by Pamela Peen Hong Yee (the "Appellant"), for an extension of time to file an appeal (the "Extension Application") of an Order of the Insurance Council of British Columbia (the "Council"), effective June 25, 2019, that imposed:

a. cancellation of the Appellant's life and accident and sickness insurance agent licence with no opportunity to reapply for a period of two years, commencing June 25, 2019 and ending at midnight on June 24, 2021;

b. a fine of $5,000, due and payable no later than September 23, 2019;

c. investigation costs of $1,862.50, due and payable no later than September 23, 2019;

d. hearing costs of $20,209.10, due and payable no later than September 23, 2019.

[2] The Council is a Respondent in this matter, and the British Columbia Financial Services Authority (the "BCFSA")[1] is a Third Party. Both parties oppose the Appellant's Extension Application, with the BCFSA adopting the submissions of the Council in full.

BACKGROUND

[3] On January 29-31, 2019, a hearing committee (the "Hearing Committee") reviewed whether the Appellant:

a. made material misstatements on an application for life insurance;

b. made misrepresentations to the insurer about the replacement of a client's (the "Complainant") previously purchased life insurance policy;

c. processed an electronic life insurance application without a client's consent and then improperly attempted to influence the client to keep the policy after the client decided not to proceed with the insurance;

d. offered to pay the client's premiums in order to maintain her commission from the insurer; and

e. failed to keep adequate records.

(the "Misconduct Allegations").

[4] The Hearing Committee found that the Misconduct Allegations were substantiated in large part, though it did not accept that the Appellant offered to pay the client's premiums. The Hearing Committee presented a report of the hearing (the "Report") dated May 5, 2019 at the Council's May 14, 2019 meeting.

[5] Council considered the Report and made the Order under sections 231, 236 and 241.1 of the *Financial Institutions Act* (the "FIA"), effective June 25, 2019.

[6] On August 28, 2019, the Appellant filed an application for an extension of time to file a Notice of Appeal.

[7] On September 2, 2019, the Appellant filed a perfected Notice of Appeal and on October 7, 2019 she filed an application for a stay of the Order (the "Stay Application") pending her application for an extension of time. On November 18, 2019, the Appellant filed an additional application for an Interim Stay of the Order (the "Interim Stay Application").

[8] I requested the Appeal Record on April 23, 2020 and the Board received it on May 21, 2020.

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

[9] On December 9, 2020, the Appellant applied for the admission of new evidence (the "New Evidence Application"). The New Evidence Application was subsequently withdrawn on January 22, 2021.

[10] On January 22, 2021, the Appellant made additional submissions on her Extension Application and provided a final reply on February 17, 2021 (the "New Submissions").

[11] This ruling deals solely with the Extension Application, and I make no findings respecting the merits of the appeal or the Appellant's Stay or Interim Stay Applications.

[12] In coming to my determination on this Extension Application I have thoroughly reviewed the Council's submissions, the numerous and lengthy submissions of the Appellant, the Notice of Appeal and attachments, as well as the full Appeal Record. I have carefully considered all of the evidence before me and the submissions and arguments made by each of the parties, whether or not they have been referred to in these reasons.

DISCUSSION AND ANALYSIS

Preliminary Issue - New Evidence

[13] The Appellant's Extension Application includes numerous references to material which was not before the original hearing panel. This material constitutes "new evidence", however the Appellant has not specifically applied to have this new evidence admitted.

[14] Further, although the Appellant withdrew her December 9, 2020 New Evidence Application, the New Submissions contain some material which also amounts to new evidence.

[15] Section 3.15 of the *FST Practice Directives and Guidelines* (the "Guidelines") references section 242.2(8)(b) of the FIA and indicates that in order to be admitted any new evidence must:

a) be substantial and material to the decision; and

b) not have existed 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.

[16] I have carefully reviewed the Appellant's submissions and find that most, if not all, of the new evidence that the Appellant seeks to include appears to have existed at the time of the underlying proceeding, could have been discovered at the time of the underlying proceeding, or was otherwise included as evidence in the Joint Book of Documents.

[17] Further, the new evidence appears to be neither substantial nor material. For example, the Appellant's allegations regarding the revenge motive of another Licensee (the "Other Licensee") and his collusion with the Complainant to

undermine the Appellant appear to be little more than bare assertion unsupported by evidence.

[18] Also, the Appellant wishes to adduce evidence about a potential subsequent change to the Complainant's policies that may have been purchased through the Other Licensee. However, I find it highly unlikely that evidence related merely to the purchase of a new policy, if it were purchased through the Other Licensee (who sold the Complainant her initial policy) would provide evidence of collusion. It would not be unusual for someone to buy a policy from a licensee that they already knew and had a policy with.

[19] The Appellant also wishes to adduce extensive new evidence as part of her New Submissions as to a flood in her apartment on September 28, 2019 and health effects relating thereto. This relates to a period after the Notice of Appeal was filed and is not relevant to the issues under consideration in this Extension Application.

[20] I have reviewed all of the material the Appellant has provided to the Tribunal, with the exception of the December 9, 2020 New Evidence Application which was withdrawn, and have concluded that it is unlikely that any of the new evidence the Appellant has tendered would be admissible on this appeal, and even if it was, it would be of minimal probative value.

Extension Application

[21] Under section 24(1) of the *Administrative Tribunals Act* (the "ATA"), which is made applicable to the Tribunal by section 242.1(7)(d) of the FIA, a notice of appeal must be filed within 30 days of the decision being appealed.

[22] The decision is dated June 25, 2019 and the application for an extension was dated August 28, 2019. The Notice of Appeal was filed outside the 30-day limit by over a month.

[23] 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.

[24] There is no definition for "special circumstances" in the legislation.

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

[26] 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.

[27] The special circumstances cited by the Appellant in her Extension Application include the following:

a. the Appellant's belief that the Council's decision would have been made later in the year, in the fall;
b. the Appellant's shock at the Order being more severe than what her lawyer advised her would be the likely outcome (significantly less than a 2-year cancellation);
c. depression over the loss of her business and being angry, disappointed and dis-satisfied with the decision;
d. time required to consider whether she could afford a lawyer;
e. allegations that the Other Licensee told the Complainant to lie to the Council;
f. assertions that the Appellant was not apprised of the Other Licensee's involvement with the Complainant until after she reviewed the Joint Book of Documents submitted to the Hearing Committee; and
g. the difficulty for the Appellant to pay her expenses, support elderly family members and retrain for a new career.

[28] I find that that these justifications relate to the issues of whether she intended to appeal before the appeal period expired, what caused the delay and how the Appellant may be prejudiced.

[29] The Appellant did not make submissions as to whether she communicated the intent to appeal to the Council and as to whether the Council or other parties would be prejudiced if an extension were granted. However, she stated that she "tried to make further submission and have communicate my intention to ICBC and to my lawyer before the ICBC's final intended decision". It appears to me that this statement was with respect to the Appellant's assertion that she had asked her lawyer to ask the Hearing Committee to reopen the hearing to accept further submissions, and not with respect to any assertion that the Appellant communicated to the Council that she intended to appeal the Order.

[30] I will review the suggested factors in the Guidelines.

Promptness

[31] The Appellant filed the Extension Application over one month after the expiry of the 30-day filing period. 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. The Appellant submits that she was unsure about whether she wanted to appeal and whether she wanted to take on the expense. The Council submits that she also was aware of her right to appeal when she received the Order on June 11, 2019. I find the additional month or so, on its own, to not be determinative of my analysis.

Reasons for the delay

[32] The Appellant's reason for the delay rests on time it took her to digest a shocking decision and to determine if she could afford to hire a lawyer for the appeal. She also indicated dis-satisfaction with the decision and depression, though she did not provide any medical evidence. Regarding her argument that she had not seen the Joint Book of Documents, I note that she had counsel and an opportunity to review. Her surprise that the decision came earlier than she expected is not an unusual situation. These issues would not be dis-similar to other appellants who are not successful in their hearing and are in no way special.

Prejudice to parties

[33] The Appellant has raised issues with respect to her inability to pay expenses, retrain and cover the costs of her elderly relatives if she is unable to sell insurance. She initially did not submit evidence as to the magnitude of her financial difficulties or the costs of taking care of her relatives; her New Submissions provided more information. However, her situation, while challenging and unfortunate, is not unusual and materially different from other appellants who must care for dependents. These issues might be relevant in the context of a stay application, however I do not find the Appellant's situation to rise to the level of being a special circumstance.

[34] For the Council, a time extension would result in more resources required for the case, and additional case management coordination. This is no different than the typical prejudice to the Council which arises when individuals file appeals with the Tribunal.

Reasonable or arguable grounds of appeal

[35] With respect to this criterion, the Respondent cites the test which arises in *Simon v Canada (Attorney General)*, 2018 BCCA 54 ("*Simon*") as follows (at paras 35-39):

> [35] The test for merit on an application to extend time is low. The threshold question is whether the appeal is "doomed to fail" or, alternatively, whether "it can be said with confidence that the appeal has no merit" [citations omitted]
>
> [36] An extension of time to begin an appeal by filing a notice of appeal, as opposed to an extension to continue prosecuting an appeal, should not be granted if the appeal is without merit. In *Franks v. British Columbia (B.C.*

> *Benefits Board)*, 1999 BCCA 165, aff'd 1999 BCCA 407, leave to appeal ref'd, [1999] S.C.C.A. No. 361, Proudfoot J.A. in Chambers stated (at para. 10):
>
> > [10] There is ample authority for the proposition that an extension of time [to file a notice of appeal] should not be granted if the appeal is without merit.
>
> [37] This principle was affirmed in *Deutschmann Estate v. Fallis*, 2011 BCCA 404 at para. 5 and *MacLanders v. MacLanders*, 2012 BCCA 218 at para.19.
>
> [38] This principle applies even where the other Davies factors are met. See e.g., *Stewart v. Postnikoff*, 2014 BCCA 292, where Goepel J.A. in Chambers dismissed an application for an extension of time to file a notice of appeal solely on the basis that the appeal was "doomed to fail". See also *Kedia International Inc. v. Royal Bank of Canada*, 2008 BCCA 305 at para. 27.
>
> [39] The absence of merit also informs the interests of justice factor, the overriding criterion, as discussed in *Seiler v. Mutual Fire Insurance Co. of British Columbia*, 2003 BCCA 696, leave to appeal ref'd [2004] S.C.C.A. No. 60, at para. 18:
>
> > [18] While refusal to extend the time for service in these circumstances may seem like a harsh result, the fact is that there is no prospect of the plaintiffs succeeding on their appeal. Extending the time for service of notice for an appeal that is doomed to fail would put all parties to unnecessary expense, and clearly would not be in the interests of justice.

[36] I agree with the above excerpt from the *Simon* case insofar as it relates the concept of merit of a matter to the determination of what is in the interests of justice. In the context of FST proceedings, "no reasonable or arguable grounds of appeal" means that the appeal appears to have no prospect of success. It is not in the interests of justice to devote resources of the parties and the Tribunal to adjudication of an appeal which will likely fail.

[37] The difficulty in undertaking this analysis, is making a preliminary determination of merit without fully considering the appeal.

[38] For the purposes of the FST, the analysis involved in determining whether there are reasonable and arguable grounds of appeal is very similar to the analysis involved in summary dismissal applications involving the concept of "no reasonable prospect of success". The decision-maker must review and analyze the material before him or her and decide if there is some argument or evidence which could result in success on appeal (i.e. is not a failing argument). It is not as deep a dive into the merits of the case as a full adjudication, but the decision-maker must nevertheless carefully review parties' submissions and other available material to determine if a ground of appeal has a fair chance of being successful.

[39] After carefully reviewing the large volume of material before me I have determined that the Appellant looks to appeal the Order on the following general bases: 1) that the Hearing Committee made errors in findings of fact and assessments of credibility, 2) that the penalty and hearing costs are unreasonable, and 3) that the underlying proceeding was procedurally unfair.

[40] I will now consider whether these grounds of appeal are reasonable or arguable.

Findings of Fact and Credibility

[41] The Appellant's lengthy submissions to the FST are primarily comprised of a re-arguing of the case and a challenge to the Hearing Committee's findings of fact and credibility. The FST gives deference to underlying decision-makers with respect to findings of fact and credibility (*Kadioglu v Real Estate Council of British Columbia and Superintendent of Real Estate*, Decision No. 2015-RSA-003(b)). This is the case, in particular, because decision-makers who are actually present during hearings are best positioned to experience and analyze the testimony and other evidence of witnesses.

[42] In the present case, the Hearing Committee heard in person from both the Appellant and the Complainant, and the witness testimony was tested by legal representatives of both parties. As already discussed, some of the new evidence that the Appellant wishes to introduce appears to relate to the motive of the Complainant to make the complaint against the Appellant, and to undermine the Complainant's credibility. For the reasons above, I do not find it likely that evidence would be admitted and, even if it were, I do not think it would be of sufficient probity to impugn the Hearing Committee's findings on credibility.

[43] In any event, several findings did not relate to the testimony of the Complainant and are not affected by the credibility argument. Specifically, the Hearing Committee made findings that the Appellant conceded that she did not meet her obligations to the insurer and the Complainant with respect to completion of the policy, that the Appellant accepted that there were a series of material and serious errors in the application that were attributable to her failure to meet her professional obligations, and that the Appellant admitted that she electronically signed the application on behalf of the Complainant, in breach of her professional obligations. The Hearing Committee also found that the Respondent did not submit the declaration to replace the policies, as required, and that her record-keeping practices were "woefully inadequate" and not in keeping with her obligations. A key factor in determining the penalty (see below) was the principle of progressive discipline and the trustworthiness and integrity of the Appellant. These issues remain at the core of the Hearing Committee's above findings.

[44] For the purposes of this application, I find the Appellant's arguments regarding the Hearing Committee's errors of fact and credibility do not have a prospect of success and therefore do not raise reasonable or arguable grounds of appeal.

Penalty and Hearing Costs

[45] In her notice of appeal, the Appellant alleges the penalty is "overly harsh and unreasonable in all of the circumstances" but provides little detail on how this is so. With respect to the imposition of the costs award, she argues she should not have had to bear the cost of the interpreter because she required interpretation services in order to understand the allegations being made against her and in order to try to refute them. Further, she argues that the imposition of license cancellation along

with approximately $27,000 in fines and costs imposes undue hardship on her as the sole breadwinner in her family.

[46] In its assessment of penalty, the Hearing Committee found significant concerns regarding the Appellant's competency, integrity, honesty, trustworthiness and her previous disciplinary record. The Hearing Committee noted the key factor of assessing a disciplinary penalty in this matter to be specific deterrence—ensuring that the Appellant does not commit further misconduct and ensuring the public is protected. It also noted the principle of progressive discipline being a key factor in favour of a significant penalty, and that the Appellant's breaches of the Act, Code and Rules raise serious issues about her trustworthiness and integrity. The Hearing Committee concluded that the licence cancellation period must be "at the higher end of the spectrum" due to the history of professional misconduct. The fine of $5,000 was not inconsistent with the precedents cited by the Council.

[47] The Council also has significant discretion as to ordering costs. The FST will intervene on issues of penalty determination when there are errors of principle.

[48] In my review of the Hearing Committee Report, the Order and the submissions of the Appellant regarding the reasonableness of the penalty, I am unable to identify an error in principle in the assessment of penalty against the Appellant. Although I recognize I do not have the benefit of fulsome submissions on the merits of this argument, I find the grounds the Appellant has raised, in the context of her particular circumstances, are not compelling. Accordingly, for the purposes of this application, I find the Appellant has not raised reasonable or arguable grounds of appeal in regard to the Hearing Committee's assessment of penalty.

Procedural Fairness

[49] As to the Appellant's allegations regarding various breaches of procedural fairness in the underlying proceeding, the Appellant alleges that the hearing panel did not assist her in her understanding of the process, that the Council was the prosecutor, and that her initial interview with the Council was not fair. However, after thoroughly reviewing the appeal record, the report of the Hearing Committee and the parties' submissions I find that the processes that were followed by the Council are consistent with expected fair procedure in professional discipline cases and hearings.

[50] The Appellant also argued that she was not able to ask questions during the hearing. On this point I note that at the hearing the Appellant's lawyer did permit her to present material evidence in her defense including evidence that she has raised in her appeal submissions:

a. that the Complainant was holding her baby in all four alleged meetings and may not have been paying attention to the responses she gave the Appellant for filing out the electronic form;

b. regarding the special relationship and recent sales that the Appellant had with the Complainant's family members such that it should be inferred that the Appellant would not want to lose their trust or lose the recent sales by mistreating the Complainant; and

c. that the Complainant's policy was surrendered in July 2016, suggesting she applied for whole life with another agent around the same time as her meetings with the Appellant, the other agent was the Other Licensee and that the Other Licensee may have had reasons to take revenge on the Appellant.

[51] The Appellant also argued that evidence about the revenge conspiracy between the Complainant and Other Licensee should have been included. On this point, she alleges that she wanted to provide more information to the Hearing Committee prior to the Council issuing its decision but after the hearing. As discussed above, new evidence would be unlikely to be admissible on this appeal under the Guidelines section 3.15.

[52] Further, regarding the Appellant's arguments about procedural fairness, I note that the Appellant was represented by Counsel who argued her case over three days in front of the hearing panel. He advanced evidence and arguments and conducted cross-examination. Further, I note the Hearing Committee provided an interpreter for the Appellant in order to ensure she understood the proceeding.

[53] I also note that the Hearing Committee determined that, despite the volume and complexity of the evidence, it was not a difficult task to reach a conclusion that the Complainant had not met her obligations to the insurer and to the Complainant on allegations regarding the material and serious errors in the application regarding the Complainant's employment, personal finances and family medical history.

[54] The Hearing Committee also determined that conflicts of evidence regarding the May 14, 2016 meeting were not necessary to resolve because in its totality the evidence indicated that the Complainant did not consent to the new policy.

[55] Accordingly, I find that the Appellant's allegations regarding lack of procedural fairness do not amount to reasonable and arguable grounds for appeal.

Interests of justice

[56] 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 potential prejudice to the Appellant in not considering her appeal, as well as the public interest and issues such as the effective use of public resources and the fair and timely disposition of the matter.

[57] 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.

[58] In this case, I have not found compelling reasons. Furthermore, it would appear that the case against the Appellant is overwhelming. There are multiple proven heads of allegations, a history of progressive discipline (including triggering the allegations while still under a supervision order), and serious issues about the Appellant's trustworthiness and integrity. It appears likely that an appeal would merely reargue the findings of fact and credibility that were made at the hearing, based on existing evidence, and consume significant and limited Council and FST

resources. I do not find it would be in the interests of justice to extend the time for such a case when the rationale for late filing is less than compelling, and when there is little expectation of a successful appeal.

DECISION

[59] For the reasons provided above, I concur in the submissions of Council that there are no special circumstances that warrant granting the request for an extension of time to file an Appeal.

[60] Accordingly, the Application for an extension of time is denied. The Appellant's notice of appeal is dismissed under section 31(1)(b) of the ATA on the ground that it was not filed within the applicable time limit.

[61] I understand that the Appellant has obligations and cares deeply about her family. She is a passionate and strong advocate and put much energy into her submissions. I have reviewed and carefully considered the Appellant's submissions in coming to my decision.

[62] In its submissions Council has raised the issue of costs. As such, I request the parties provide submissions on the issue of whether costs should be awarded in relation to this application. The submissions must be delivered on the following schedule:

a. the Respondent and Third Party will have until April 23, 2021 to provide their submissions electronically to the FST and to the other parties;

b. the Appellant will then have until April 30, 2021 to provide her response submissions electronically to the FST and to the other parties; and

c. the Respondent and Third Party will then have a right of final reply due no later than May 3, 2021.

"George N.F. Hungerford"

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George N. F. Hungerford
Chair, Financial Services Tribunal

April 13, 2021