Financial Services Tribunal

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DECISION NO. FST-FIA-20-A001(b)
In the matter of an appeal under section 242 of the *Financial Institutions Act,* RSBC 1996 c 141

BETWEEN:	Xiaomei (May) Zou	**APPELLANT**
AND:	Insurance Council of British Columbia	**RESPONDENT**
AND:	British Columbia Financial Services Authority	**THIRD PARTY**
BEFORE:	Michelle Good, Panel Chair	
DATE:	Conducted by way of written submissions concluding on August 21, 2020	
APPEARING:	For the Appellant:	Ross Davidson, Legal Counsel
	For the Respondent:	Naomi J. Krueger, Legal Counsel
	For the Third Party:	Jessica Gossen, Legal Counsel

APPEAL

[1] The Appellant, Xiaomei (May) Zou, appeals to the Financial Services Tribunal (the "FST") the decision of the Insurance Council of BC (the "Council") to uphold its original decision with respect to the amount of hearing costs the Appellant is required to pay (the "Reconsideration Decision").

[2] The Respondent, the Council, opposes the appeal and submits that the Reconsideration Decision should stand.

[3] The Third Party, British Columbia Financial Services Authority, agrees with and has adopted the submissions of the Council on this appeal.

BACKGROUND

[4] The Appellant appealed a February 08, 2019 decision of the Council which levied fines, applied conditions to her licences and levied hearing costs against her. A decision was rendered in December 2019 by the Financial Services Tribunal upholding the decision of the Council with the exception of the matter of whether or

not the order for the Appellant to pay hearing costs in the amount of $5,875.71 was reasonable (FST Decision No. 2019-FIA-001(a)).

[5] The FST found that the order was not reasonable as the Council failed to articulate adequate reasons for its decision to levy hearing costs against the Appellant as follows (FST Decision No. 2019-FIA-001(a) at paras 95 and 97):

> [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.
>
> [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.

[6] As a remedy, the FST ordered the Council to reconsider the aspect of its decision relating to the imposition of hearing costs. The FST provided specific instructions for the scope of that reconsideration as follows (FST Decision No. 2019-FIA-001(a) at para 101):

> [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;
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> 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.

[7] On February 11, 2020, the Council reconsidered the part of the February 08, 2019 decision relating to hearing costs. Council decided to uphold the original order regarding hearing costs and on April 02, 2020 issued an amended Order with supporting reasons.

[8] The Appellant now appeals the Council's Reconsideration Decision on the grounds that the Council has still failed to provide adequate reasons for its decision to levy hearing costs against the Appellant, and that the quantum of hearing costs ordered against the Appellant is unreasonable.

[9] The Council opposes the appeal and submits that the only matter to be determined by the FST in the present appeal is whether the Reconsideration Decision is reasonable; which the Council submits it is.

ISSUE

[10] Is the Reconsideration Decision reasonable insofar as the hearing costs award is supported by transparent and adequate reasons which are responsive to the issues raised by the FST in its reconsideration instructions?

PRELIMINARY MATTERS

Procedural Fairness Issues and Fresh Evidence

[11] In her submissions the Appellant seizes on comments made in the original FST decision wherein the Panel Chair states (FST Decision No. 2019-FIA-001(a) at para 79):

> [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… 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…

[12] The Appellant argues in her submissions that the Council (Appellant Submissions on the Merits at page 3):

> sidestepped the concerns raised by the Panel Chair about the level of understanding of the Appellant, limiting its consideration of the Appellant's understanding to the question of English language interpretation, rather than the broader question of her understanding the process and the possible role and responsibility of Council in this regard.

[13] The Council, in its submissions, responds by noting that in the original appeal to the FST, the Council sought to have new evidence admitted on the basis that the documentary evidence was necessary for assessing the fairness of the Council's process during the audit and disciplinary process, with particular attention to the matter of hearing costs.

[14] The Council further notes that in the FST's decision the Panel Chair found that there was no denial of procedural fairness on the part of the Council when it made its order regarding hearing costs despite the lack of evidence in the record regarding the support the Appellant received from the Council during the audit and hearing process.

[15] The Council responds to the Appellant's submission on fairness of procedure and the Appellant's understanding of the process at the original hearing by pointing out that the FST has finally determined the matter of fairness of procedure and that matter is not at issue in the present appeal.

[16] In the alternative, the Council submits that if the FST decides it is necessary, in the course if deciding this appeal, to determine whether the Council's process during the disciplinary proceedings was fair to the Appellant, then the FST should admit certain documents it characterizes as "fresh evidence". It argues that such evidence is necessary for it to be able to properly respond to the Appellant's fairness arguments.

[17] In her Reply submissions, the Appellant argues the fresh evidence should not be admitted on this appeal for the same reasons that it was not admitted on the first appeal; namely, because the evidence does not meet the test of admissibility of new evidence set out under section 242.2(8) of the *Financial Institutions Act* (the "FIA")[1]. The Appellant further disagrees with the Council's characterization of her arguments as being based on whether there was a breach of procedural fairness, instead submitting that her arguments in this regard show that "Council has still not provided adequate and reasonable reasons for its decision on costs despite the clear directions of the FST on the first appeal that it should do so".

[18] I find it is unnecessary to admit the fresh evidence on this appeal. The matter of procedural fairness in the underlying hearing is not before me, having been finally determined by the Panel Chair in FST Decision No. 2019-FIA-001(a). This appeal is of a very limited nature. The Panel Chair ordered the Council to reconsider and provide reasons for its hearing costs decision. The Council provided the Reconsideration Decision. Therefore, the only issue before me is whether or not Council's Reconsideration Decision is reasonable.

[19] No new evidence is required to address the sole issue before me and therefore I decline to admit the fresh evidence.

STANDARD OF REVIEW

[20] Neither party made submissions on the appropriate standard of review the FST ought to apply in the present appeal. However, both parties framed their submissions in terms of the "reasonableness" of the Reconsideration Decision.

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

[22] Further, the Tribunal will not necessarily apply the standard of review that is exercised in matters under judicial review[2].

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[1] *Financial Institutions Act*, RSBC 1996, c 141.

[2] See *Westergaard v British Columbia (Registrar of Mortgage Brokers)*, 2011 BCCA 344 ("*Westergaard*"), and *TruNorth Warranty Plans of North America v Superintendent of Financial Institutions*, Decision No. 2019-FIA-003(a), at para 68.

[23] The FST has well-settled jurisprudence on the appropriate internal standard of review it will apply to various kinds of decisions which come before it. The issue currently before me has to do with a discretionary decision of the Council to assess hearing costs against the Appellant. Typically, discretionary decisions are reviewable by the FST on a reasonableness standard[3].

[24] Though it remains true that decisions of the FST are not bound by internal precedent in the same way that decisions of the Courts are, the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov"*) makes it clear that departures from "longstanding practices or established internal decisions"[4] must be explained and justified.

[25] In the present appeal, I see no reason to depart from the application of the reasonableness standard to discretionary decisions, and will assess this matter on that standard.

POSITIONS OF THE PARTIES

[26] The Appellant submits that the Council does not provide adequate reasons in its Reconsideration Decision for levying hearing costs against the Appellant. In particular, the Appellant argues that the Council has not provided an explanation that demonstrates how an order for hearing costs that nearly doubles the penalty levied is reasonable.

[27] The Appellant also argues the Reconsideration Decision is unreasonable because it didn't follow the FST's instruction to reconsider the costs issue in the context of the "importance of hearing costs not being a barrier to due process".[5]

[28] The Council argues that the reasons set out in the Reconsideration Decision are adequate, reasonable, transparent and provide a "justifiable rationale" for the manner in which Council exercised its discretion to levy hearing costs against the Appellant.

[29] The Council cites *Vavilov* for the principle that it is a requirement that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties.

[30] The Council further acknowledges that it was directed by the FST to "consider all of the circumstances involved in the matter, including, but not limited to the importance of hearing costs not being a barrier to due process..." and submits that its reasons on reconsideration expressly do address the matter of hearing costs as a potential barrier to due process.

[31] The Appellant replies that the Council did not "meaningfully deal with the central issue" in the reconsideration process, and submits the following argument in

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[3] See for example *Kia v Registrar of Mortgage Brokers*, Decision No. 2017-MBA-002(b), at para 20, citing *Kadioglu v Real Estate Council of British Columbia and Superintendent of Real Estate*, Decision No. 2015-RSA-003(b) at para 32.
[4] *Vavilov* at para 131.
[5] FST Decision No. 2019-FIA-001(a) at para 101 (iv).

support of her position that the Council didn't properly deal with the issue of hearing costs being a bar to due process (Appellant Reply Submissions at para 7):

> Council did not consider whether imposing costs in an amount that was nearly double the penalty sought in the first place would in and of itself be a bar to due process. The question is that even if the Appellant had appreciated before her hearing that she could face costs in an amount nearly two times the penalty sought, then would this have been a bar to due process? It is obvious it would have been. A licensee such as the Appellant, seeking in good faith to exercise her right to a hearing, might reasonably feel dissuaded from proceeding given the jeopardy for costs being held over her.

ANALYSIS

[32] In its Reconsideration Decision, the Council set out the circumstances it took into consideration when arriving at its decision to not vary the amount of hearing costs levied against the Appellant. It articulated the factors it considered both for and against levying hearing costs.

[33] In essence, the factors the Council considered in favoring an order for hearing costs to be paid by the Appellant were as follows:

a) Having been licensed since 2006, the Appellant's obligations to complete required Continuing Education ("CE") courses were known to her as was her responsibility to maintain records of same.

b) Following receipt of the Intended Decision, the Appellant had many opportunities including participation at the Review Committee meeting where she could have made submissions and presented further information to support her claim that she had in fact completed the necessary CE credits.

c) Although the Appellant asserted that she did not understand the proceedings due to language barriers, all of her licence examinations and annual filings were in English, she did not request an interpreter at any time, and notes which were before the original hearing committee showed that she was assisted by a staff member in English during the audit.

[34] In essence, the factors the Council considered as militating against an order for hearing costs were as follows:

a) That the Appellant was a single mother and had difficulty with respect to her ability to work and attain the necessary credits; and.

b) That the Appellant's agency only admitted at the hearing that it had not searched for records of the Appellant's CE credits as requested and did provide information supporting that some additional credits had been earned by the Appellant.

[35] In terms of the weight the Council gave to the factors against a hearing costs order, the Council considered the fact that the Appellant maintained throughout that she had complied with all CE requirements when in fact she knew she had not.

[36] The Council also considered that the hearing had some benefit for the Appellant in that her agency did provide records of some additional credits earned by the Appellant. However, these additional credits were not sufficient to put the Appellant in a position of compliance with the CE requirements.

[37] In its reasons, the Council placed significant emphasis on the fact that the Appellant knew her obligations with respect to CE and failed to meet those obligations. The Council also referenced its role as a self-funded regulatory body and pointed out the additional considerations that go along with that role as follows (Appendix A to Reconsideration Decision at para 6):

> Council concluded that, as a self-funded regulatory body, it looks to licensees who have engaged in misconduct to bear the costs of their disciplinary proceedings so they are not unfairly borne by other licensees.

[38] I understand the Council's reasons on reconsideration to be that had the Appellant participated in pre-hearing opportunities to support her assurances that she was in compliance a hearing may have been avoided. Likewise, I take the Council's reasons on reconsideration to be that the Appellant, and not the broader group of Licensees who fund the Council, was ultimately responsible for earning and maintaining records of her CE credits, and she failed at hearing to show that she did so.

[39] The Appellant takes the position that the she was in the difficult position of either accepting the Intended Order or to proceed with a hearing which could result in a Hearing Costs order.

[40] While this is true, I agree with the Council in its submission that in and of itself, this does not amount to a bar to due process. Unfortunately, litigation, in any form, is at best an imperfect solution to a conflict. I agree with the Council's submission that:

> As with all litigants, whether in administrative law context or in a civil context, individuals faced with a decision such as the Intended Decision are expected to make decisions about their legal options as best they can in their circumstances …

[41] The Appellant further argues that a disproportionate costs order is contrary to the policy that hearing costs should not to be a bar due process and should not be so high as to "discourage a well-intentioned licensee such as the Appellant from pursuing her right to a hearing."

[42] Except to argue that a costs order which is "almost twice the amount of the penalty itself" is disproportionate, the Appellant does not offer any analysis or comparison that would demonstrate that the cost order is disproportionate. The fact that a hearing costs order may be in excess of a penalty order does not, by itself, make the hearing costs order disproportionate. The manner in which a cost order is calculated is transparent and different from the manner in which a penalty award is determined. For me to make a finding that the hearing cost is disproportionate, given that the costs order is not inconsistent with the tariff and policy related to its application, would require a comparison to hearing costs decided in comparable cases.

[43] Ultimately, the Appellant was responsible for completing her CE requirements and maintaining records of the same and it would represent an unfairness to other licensees should they be required the bear the costs of a hearing at which she was unsuccessful.

[44] The Appellant also argues that the Council has still not provided adequate reasons for its Reconsideration Decision on hearing costs. I do not agree.

[45] I take the Council's reasons as a clear statement that the Appellant knew her obligations, failed to meet them and also failed to take advantage of opportunities afforded her to establish clarity in the matter of whether she had or had not met her obligations with respect to CE credits. This precipitated the necessity of a hearing to make out her claim that she had met her CE requirements.

[46] The reasons, while not lengthy, clearly set out the chain of reasoning the Council followed in coming to its ultimate decision to levy hearing costs. I find the Reconsideration Decision is transparent and intelligible, and the Council has considered relevant factors and the specific issues remitted back to it for reconsideration by the FST.

DECISION

[47] For all of the above reasons, I find that the Reconsideration Decision is reasonable and that Council has provided adequate reasons to support the award of hearing costs against the Appellant. I find that the Appeal cannot stand and is thus denied.

"Michelle Good"

Michelle Good, Panel Chair
Financial Services Tribunal

December 24, 2020