



Citation: 2013 BCSECCOM 362

Marlene Legare and Mutual Fund Dealers Association

Securities Act, RSBC 1996, c. 418

Hearing and Review

Panel	Bradley Doney	Chair
	Judith Downes	Commissioner
	Suzanne K. Wiltshire	Commissioner

Hearing Date June 13, 2013

Date of Decision September 4, 2013

Appearing

Hugh Corbett	Mutual Fund Dealers Association
Maria Abate	

Decision

I Introduction

- ¶ 1 This is a hearing and review under section 28 of the *Securities Act*, RSBC 1996, c. 418 of decisions of a hearing panel of the Mutual Fund Dealers Association (MFDA) in the matter of Marlene Legare.
- ¶ 2 By *Decision and Reasons (Misconduct)* dated October 29, 2010, the MFDA found that Legare, an approved person of the MFDA, had:
- engaged in conduct contrary to MFDA Rules 2.1.4 (*Conflicts of Interest*) and 2.1.1 (*Standard of Conduct*) by borrowing \$49,650 from a client which she did not repay, and
 - failed thereafter to cooperate with the investigation of her activities by refusing to attend for an interview requested by MFDA staff, contrary to section 22.1(c) of MFDA By-law No. 1 (*Investigatory Powers*).
- ¶ 3 By *Decision and Reasons (Penalty)* dated June 10, 2011, the hearing panel permanently prohibited Legare from selling mutual funds and fined Legare \$50,000 in respect of the "personal financial dealings" contravention (MFDA Rules 2.1.4 and 2.1.1) and \$25,000 in respect of the "failure to cooperate" contravention (s. 22.1(c) of MFDA By-law No. 1). The hearing panel also ordered \$10,000 costs against Legare.

¶ 4 On July 18, 2011, Legare applied for a hearing and review of the MFDA decisions. Legare filed written submissions, but did not appear at the hearing on June 13, 2013. We considered Legare's submissions, as well as the MFDA's submissions and the record from the MFDA hearing.

II Background

¶ 5 Legare was registered as a mutual fund sales person in British Columbia from January 1991 until July 2006. From December 11, 2002 until July 7, 2006, Legare was a registered mutual fund salesperson at the mutual fund dealer where the underlying events took place.

¶ 6 While working at the mutual fund dealer, Legare's clients included S.G. and S.G.'s husband. Between November 2005 and June 2006, Legare received a series of payments from S.G. The mutual fund dealer became aware of the payments, totalling \$49,650, and advised the MFDA that they were loans made from S.G. to Legare.

¶ 7 MFDA staff conducted an investigation relating to these payments. During the course of the investigation, MFDA staff gathered evidence that included:

- the July 7, 2006 Agreement of Purchase and Sale of Legare's book of business after her departure from the mutual fund dealer, signed by Legare, acknowledging outstanding loans owed by Legare to S.G.;
- a July 12, 2006 letter from the mutual fund dealer to the MFDA, describing conversations between the mutual fund dealer and Legare, in which Legare admits to borrowing money from S.G.; and
- an August 24, 2006 letter to the MFDA from Legare's legal counsel, describing the payments she received from S.G. as "money...borrowed in a series of smaller loans" to cover unexpected travel expenses and legal fees.

¶ 8 Legare refused to participate in the MFDA's investigation, in particular by not attending an interview with MFDA staff.

¶ 9 Legare testified in the MFDA hearing, in April 2010, and for the first time asserted that the payments at issue were not loans from S.G., rather they were repayments to Legare for an undocumented previous loan to S.G.'s husband. Legare did not produce evidence to corroborate her story.

III Jurisdiction of the Commission

- ¶ 10 Section 28 of the Act provides that a person directly affected by a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument of a self-regulatory organization may apply by notice to the Commission for a hearing and review of the matter.
- ¶ 11 Section 165(4) of the Act provides that, on a hearing and review, the Commission may confirm or vary the decision under review or make another decision it considers proper.
- ¶ 12 The Commission's standard for reviewing decisions under section 28 of the Act is set out in BC Policy 15-601, Part 5 – Reviews, section 5.9(a) which provides as follows with respect to the review of a decision of a self-regulatory organization:

5.9 Form and Scope of Reviews

(a) Where the review of an SRO decision proceeds as an appeal – The Commission does not provide the parties with a second opinion on a matter decided by an SRO. If the decision under review is reasonable and was made in accordance with the law, the evidence, and the public interest, the Commission is generally reluctant to interfere simply because it might have made a different decision in the circumstances. For this reason, generally, the person requesting the review presents a case for having the decision revoked or varied and the SRO responds to that case.

In these circumstances, the Commission generally confirms the decision of the SRO, unless:

- the SRO has made an error in law;
- the SRO has overlooked material evidence;
- new and compelling evidence is presented to the Commission; or
- the Commission's view of the public interest is different from the SRO's.

- ¶ 13 The role of the Commission in a hearing and review is not to provide a second opinion of an SRO decision. The onus is on the applicant on a hearing and review to both identify the criteria in s. 5.9 of BCP 15-601 that applies to the SRO's decision, and show that the decision is unreasonable as a result. If the Commission agrees that an SRO decision under review is unreasonable, it will consider whether to confirm or vary the decision, or make another decision it considers proper. On the other hand, if the Commission finds an SRO's decision reasonable, it will not interfere in it.

IV The Application

- ¶ 14 In Legare's written submissions, she outlines the grounds in support of her application for a hearing and review, including:

- (a) failure by MFDA staff to meet its disclosure obligations during the hearing
- (b) a reasonable apprehension of bias on the part of the hearing panel
- (c) the hearing panel misapprehended evidence, overlooked material evidence and made findings of fact unsupported by the evidence
- (d) the hearing panel offended the principles of natural justice and procedural fairness through reliance on hearsay evidence instead of Legare's *viva voce* evidence
- (e) the hearing panel erred in determining the appropriate penalty
- (f) the hearing panel erred in awarding costs of \$10,000 in the absence of full particulars of the costs incurred.

V Review and Findings

(a) Disclosure

- ¶ 15 Legare alleges that MFDA staff failed to provide disclosure consistent with the *Stinchcombe* standard. Legare made this same allegation in an application for a “mistrial” before the hearing panel.
- ¶ 16 The hearing panel considered and dismissed this application, giving extensive oral reasons found in the transcript of the hearing. We have reviewed the reasons of the hearing panel on the application for disclosure and find them reasonable. We dismiss this ground for review.
- ¶ 17 Legare further argues that, in dismissing her disclosure application, the hearing panel demonstrated a reasonable apprehension of bias. She has produced no evidence to support this serious allegation. We dismiss it.

(b) Bias

- ¶ 18 Legare argues that the hearing panel “demonstrated numerous indications of bias throughout the hearing.” Legare identifies in her submissions a number of “actions” on the part of the hearing panel that allegedly demonstrate a reasonable apprehension of bias.
- ¶ 19 Legare made these same allegations before the hearing panel, which spent half a day on April 19, 2010, the whole day on April 20, 2010 and part of July 30, 2010 to review each of the numerous allegations of bias. The parties made detailed oral and written submissions, and the hearing panel provided extensive oral reasons on each allegation in the hearing transcripts.

¶ 20 We have reviewed the hearing transcripts and the thorough reasons of the hearing panel. The hearing panel correctly identified the proper legal test for determining allegations of bias and carefully considered each allegation raised by Legare. We find the hearing panel’s dismissal of Legare’s bias applications reasonable and decline to interfere with them.

(c) Evidentiary Matters

¶ 21 The onus is on the applicant to establish that the hearing panel overlooked material evidence in order to satisfy that ground for review in BCP 15-601. A finding that material evidence has been overlooked can be made when an SRO fails to give appropriate weight to the evidence before it, that, if properly understood, ought to have led to a different finding (*Re Global Securities Corp.* 2007 BCSECCOM 445).

¶ 22 Legare argues that the hearing panel overlooked material evidence, resulting in findings of fact not supported by the evidence, relating to:

- the existence of a “previous loan”;
- a \$2300 payment; and
- the existence and use of blank signed cheques.

¶ 23 The hearing panel considered these same evidentiary arguments. The hearing panel had the advantage of seeing and hearing Legare testify, and weighed her *viva voce* evidence against the documentary evidence produced by MFDA staff. The hearing panel found Legare to be “not truthful” and “not believable”. Having discredited Legare as a witness, with no other corroborating evidence in support of her testimony, and substantial reliable documentary evidence produced by MFDA staff, the hearing panel made reasonable and comprehensive findings on these same matters. We dismiss this ground for review.

(d) The hearing panel failed to adhere to the principles of natural justice

¶ 24 Legare argues that the principles of natural justice and procedural fairness required the hearing panel to give her *viva voce* evidence more weight than the hearsay evidence adduced by MFDA staff. Legare argues that the hearing panel acted contrary to these principles when it dismissed her *viva voce* testimony and concluded that the \$49,650 was a loan from her client S.G.

¶ 25 The MFDA's Rules of Procedure permit the hearing panel to accept hearsay evidence and assess the weight to be placed on it. These rules are consistent with the rules of the BCSC (see: section 173 of the *Securities Act*) as well as other administrative tribunals (see: section 40(1) of the *Administrative Tribunals Act*, SBC 2004, c. 45).

¶ 26 MFDA staff produced documentary evidence that consisted of cancelled cheques, investment account statements and bank statements and a letter written by Legare’s

former counsel, outlining the details of the payments to her from S.G. – all written almost four years before Legare first testified about the “previous loan.”

¶ 27 In its thorough and comprehensive reasons, the hearing panel weighed all the evidence and in doing so dismissed Legare’s *viva voce* evidence as “not truthful” and “not believable.” It concluded that Legare borrowed the \$49,650 from S.G. We find the hearing panel’s reasons were reasonable and dismiss this ground for review.

¶ 28 Legare further argues that, in preferring the evidence of MFDA staff to her oral testimony, the hearing panel demonstrated a reasonable apprehension of bias. Again as before, Legare has produced no evidence to support this serious allegation. We dismiss it.

(e) Penalty

¶ 29 Legare asserts that the hearing panel erred in failing to impose the same or lesser penalties as were imposed by previous MFDA hearing panels in *Zenon Smiechowski (Re)* MFDA File No. 201007, decision dated December 31, 2010 and *Scott Andrews Stevens (Re)*, MFDA File No. 200514, decision dated June 14, 2006.

¶ 30 The hearing panel thoroughly examined these decisions, concluded that the facts of both *Smiechowski* and *Stevens* were distinguishable and neither were helpful in determining an appropriate penalty in this matter. We see no reason to disturb those findings.

¶ 31 In considering what penalty to impose, the hearing panel made findings that are entitled to deference, including:

- Legare’s violations continued over a seven month period;
- Legare was related to S.G. through marriage and knew that she was vulnerable;
- Legare did not disclose her financial involvement to the mutual fund dealer
- There was no evidence of remorse
- Legare had not reimbursed the mutual fund dealer for the \$49,650 paid to S.G.
- Legare was not truthful in her evidence before the hearing panel

¶ 32 The determination of appropriate penalties is at the discretion of the hearing panel. Where a hearing panel makes considered and comprehensive findings that support a reasonable sanction decision, it should not be disturbed on review: see *Re Cartaway Resources Corp* [2004] S.C.J. No. 22. In our view, that is what the hearing panel did, and we dismiss this ground of review.

(f) Costs

- ¶ 33 Legare asserts that natural justice and fairness dictate that costs should only be awarded when they are supported by evidence, including detailed records and accounts of the costs claimed.
- ¶ 34 Generally, when MFDA staff asks for costs, it should provide support for its claim with reasonable documentation. Further, it is not unreasonable on the part of a respondent to ask for such documentation.
- ¶ 35 MFDA staff sought costs in a range between \$10,000 and \$15,000. The hearing panel awarded \$10,000 in costs even though it concluded \$15,000 would be reasonable given the nature of the hearing. It is obvious that \$10,000 falls far below the actual costs of the hearing. The MFDA hearing required all or parts of 15 hearing days to complete, despite the fact that only two witnesses testified - an MFDA investigator and Legare. Significant time was spent addressing procedural and collateral issues, as well as a number of unsuccessful applications brought forward by Legare.
- ¶ 36 In these circumstances, we find that the hearing panel acted reasonably in exercising its discretion in awarding a portion of the actual costs of the hearing without documentation, and we dismiss this ground for review.

VI Summary

- ¶ 37 This case involved relatively simple facts but was protracted by multiple applications and delays instigated by Legare. The hearing panel demonstrated considerable patience in dealing with Legare, and exercised its powers judiciously and made extraordinary efforts to accommodate her.
- ¶ 38 As documented in the transcripts, the hearing panel issued carefully considered rulings after reviewing Legare's applications. Its written findings and penalty decision were similarly measured and comprehensive. In our opinion, the MFDA's findings were reasonable.

¶ 39 We, in turn, have carefully considered the grounds for review Legare identifies. We have concluded that they are without merit, and do not meet the requirements of BCP 15-601 to vary or set aside the MFDA's decision. We dismiss the application.

¶ 40 September 4, 2013

¶ 41 **For the Commission**

Bradley Doney
Commissioner

Judith Downes
Commissioner

Suzanne K. Wiltshire
Commissioner