BRITISH COLUMBIA SECURITIES COMMISSION
***Securities Act*, RSBC 1996, c. 418**

Citation: Re Jones, 2015 BCSECCOM 199 Date: 20150525

Review

Catherine Deborah Jones and Investment Industry Regulatory Organization of Canada (IIROC)

Panel	Nigel P. Cave Suzanne K. Wiltshire	Vice Chair Commissioner
Dates of Hearing	January 5, 6 and April 20, 2015	
Date of Decision	May 25, 2015	

Appearing

Randall Howarth	For Catherine Deborah Jones
Paul Smith Stacey Robertson	For IIROC

Decision[1]

I Introduction

[1] This is a hearing and review under section 28 of the *Securities Act*, RSBC 1996, c. 418, of:

1. a liability decision of an IIROC hearing panel against Catherine Deborah Jones, dated December 16, 2013; and

2. a penalty decision of an IIROC hearing panel against Jones, dated March 31, 2014.

[2] On January 13, 2014, Jones filed an application under section 28 of the Act for a hearing and review of the liability decision.

[3] On April 10, 2014, Jones filed an application under section 28 of the Act for a hearing and review and a stay of the sanction decision.

[4] On May 2, 2014, the Commission granted a stay of IIROC's sanction decision on the condition, among others, that Jones filed her statement of points within 60 days and the review was held within 180 days after Jones filed her statement of points.

[1] Commissioner Farber participated in the hearing but resigned from the Commission before this Decision was issued.

[5] On June 17, 2014, Jones requested an extension to file her statement of points. On June 30, 2014, the Commission varied its stay of the sanction decision, to extend the time for Jones to file her statement of points to July 23, 2014, with all other conditions remaining the same.

[6] On July 11, 2014, hearing dates of January 5 and 6, 2015 were set for the review and hearing of the IIROC decisions.

[7] On January 5 and 6, 2015, the Commission heard Jones' application for a hearing and review of the IIROC liability decision. Time did not permit hearing Jones' submissions with respect to the IIROC penalty decision on January 5 and 6, 2015. A further hearing date of April 20, 2015 was set to hear that application.

[8] On January 5, 6, and April 20, 2015 both parties made written and oral submissions on Jones' applications for a hearing and review of the IIROC liability and penalty decisions.

II Background Facts

[9] IIROC commenced disciplinary action against Jones in respect of five allegations:

a) between March 2009 and March 2010, she engaged in unauthorized discretionary trading in the client's accounts;

b) between March 2009 and July 2010, she failed to ensure that the use of margin in the client's accounts was suitable for the client;

c) between January 2009 and May 2010, she misrepresented the nature of certain solicited orders by marking them as unsolicited;

d) between September 2009 and November 2009, she communicated with the client using an email address not approved by the firm; and

e) between February 2012 and March 2012, she provided misleading information to IIROC staff during its investigation into Jones' conduct.

[10] All of the allegations relate to Jones' activities with respect to one client's account.

[11] The IIROC hearing took seven days to complete. During the hearing, Jones was represented by counsel for parts of four days of the hearing.

[12] The IIROC hearing panel reached its finding on liability after hearing the testimony of the client, an IIROC investigator, the Chief Compliance Officer of Jones' employer and another registered representative with another firm that met with the client. The panel also was provided with documentary evidence, including e-mails, trade tickets, account statements and phone records. Jones did not testify.

[13] In its liability decision, the IIROC hearing panel found that the allegations in paragraphs a) through d) above were proven but that the allegation in paragraph e) was not.

[14] Jones' application for a hearing and review of the liability decision challenges the IIROC panel's findings with respect to the allegations in paragraphs a), b) and c) above. Jones does not challenge the IIROC panel's finding in paragraph d) above.

[15] Following a sanctions hearing, the IIROC panel ordered that Jones:

a) be subject to suspension for three months to commence 30 days from the date of the penalty decision;

b) pay a fine of $48,000 with minimum payments of $2,000 per month to be paid at the beginning of each month, commencing on the month following the date of the penalty decision, and with the prospect of immediate suspension at the discretion of IIROC Staff should any payment be in default;

c) be subject to strict supervision for one year; and

d) pay $15,000 in costs to be paid in one year from the date of the penalty decision.

III Summary of key findings by IIROC panel

a) Liability

[16] With respect to the allegation against the applicant that she engaged in discretionary trading, the key issue was whether the client had provided the requisite instructions for certain trades in her account.

[17] This allegation focused on two lengthy periods in which the client was out of the country. The client was in New York during May through to the beginning of August, 2009 and then she was in Europe and Asia between mid-August, 2009 through January, 2010. During those time periods a total of 39 trades took place in the client's account. The client testified that she had not provided specific approval for any of those trades. The IIROC panel found that evidence of phone and e-mail communications between Jones and the client confirmed this testimony as there were limited communications between the parties.

[18] With respect to the allegation against the applicant regarding the client's margin account, the key issue was whether this was suitable for the client given her investment goals and her level of securities investment knowledge.

[19] The client clearly signed account opening documents authorizing the establishment of a margin account. The IIROC panel found that while the opening of a margin account in and of itself was not inappropriate, the amount and use of that margin was inappropriate in the circumstances. The panel accepted the client's testimony that she was most interested in capital preservation. The panel also concluded that Jones knew that she was exceeding the permissible limits of the use of margin in the client's account.

[20] With respect to the allegation against the applicant regarding her misrepresentation of client trades, the key issue was whether Jones had inappropriately marked certain trades as unsolicited when they were in fact solicited.

[21] The panel concluded that certain trades had been incorrectly marked as unsolicited when they were, in fact, solicited. They also found that the trading system used by Jones' firm defaulted to marking a trade as solicited (if nothing was noted on the trade ticket as to whether a trade was solicited versus unsolicited) such that Jones would have had to take a proactive step to incorrectly mark the trades as unsolicited.

b) Penalty

[22] The panel considered a number of factors and specifically acknowledged taking into account that by the time of the penalty hearing Jones had been under close supervision for the past three years and that she had been subject to the stress of a full hearing without the aid of counsel for much of that process. The panel concluded that the penalty imposed should not be so severe as to actually or practically bar her from practicing her profession again.

IV Arguments of the parties

a) Liability

[23] The applicant says that the IIROC hearing panel erred in law in its liability findings in applying the incorrect legal test for assessing the credibility of oral testimony provided by IIROC witnesses.

[24] The applicant further says that this error in law led to:

a) the panel determining facts in an unreasonable manner;

b) the panel relying on fragile or suspect evidence to support the findings of contravention;

c) the panel making unreasonable inferences based on insufficient evidence,

all of which, the applicant says, led to a decision that is not reasonable and should be set aside.

[25] IIROC says that the liability findings are reasonable and there is no compelling reason to interfere with the findings. They further say that there was no error of law as it relates to the panel's assessment of the credibility of the oral testimony.

b) Penalty

i) Error in Law

[26] The applicant says that the IIROC hearing panel erred in law in its penalty finding:

a) in that having set out the appropriate "main concerns" in determining the appropriate penalty as set out in *Re Derivative Services Inc.*, [2000] I.D.A.C.D. No.26, the panel failed to assess each of these concerns in its decision and that the panel failed to reach an overall conclusion as to how serious the applicant's misconduct was on the spectrum of similar misconduct;

b) by failing to properly take into account Jones' ability to pay; and

c) by failing to properly apply the test for awarding costs against Jones as set out in *Blackmont Capital*, 2010 IIROC 57.

[27] IIROC says that there is no error in law in the panel's penalty decision. It says that each aspect of the decision, other than the costs award, was considered and took into account the relevant factors in determining the appropriate penalty, including Jones' ability to pay. IIROC says that costs are generally awarded as a matter of course in their hearing process and that the costs awarded in this case are substantially less than IIROC's actual costs incurred in the proceedings.

ii) Unreasonableness

[28] The applicant further says that we should interfere with the IIROC penalty decision on the basis that it is unreasonable in the circumstances.

[29] In particular, the applicant referred to a number of IIROC settlement decisions and one hearing decision and says that the imposition of a suspension, the magnitude of the fine and the imposition of costs, individually and in totality, is on the high end of the spectrum of penalties previously imposed by IIROC for the contraventions that Jones has been found to have committed. Jones says that the findings in the penalty decision suggest that the panel did not find Jones' conduct to have been of an egregious nature.

[30] The applicant further says that the IIROC panel incorrectly stated that Jones had been subject to an extensive period of "close supervision" prior to the penalty hearing, when, in fact, she had been subject to "strict supervision" during this period. The applicant says that "strict supervision" is considerably more onerous than "close supervision" and that this error led the panel to not giving proper weight to this restriction. In effect, the applicant is suggesting that she has not been given proper credit for this, analogous to a "time served" concept in the penal realm.

[31] IIROC says that the penalty decision was not unreasonable. In so arguing they highlight that all but one of the decisions used by the applicant as a basis to show that the decision was unreasonable were settlement decisions. They say that settlement decisions should be given little weight on the basis of the reasoning in *Re Milewski*, [1999] I.D.A.C.D. No. 17. IIROC further highlights that the totality of Jones' contraventions make most, if not all, of the cases referenced by the applicant distinguishable.

[32] IIROC says that Jones' registration restriction prior to her penalty hearing was a mixture of "close supervision" and "strict supervision" and that that was appropriate given the

applicant's outstanding IIROC disciplinary cases and her having changed employers several times. They say that there is not a significant difference between close supervision and strict supervision and that the panel clearly considered the negative impact that Jones had already suffered as a result of the restrictions on her activities.

[33] Finally, IIROC submits that the panel's ultimate decision on the quantum of the fine and the costs was not sufficiently different from the applicant's own submissions to the hearing panel as to be unreasonable. They also say that the quantum of the monetary amounts were not unreasonable in the context of the applicant's income at the time of the hearing and that the applicant's more recent (lower) income does not make the original decision unreasonable.

V Analysis

a) Liability

i) Error in law

[34] The applicant says that the following statement in the IIROC panel decision on liability, at paragraph 6, represents an error in law:

> On the issue of credibility an outstanding feature of this case before us is that Ms. Jones decided not to give testimony. Accordingly, we are left with the uncontradicted testimony of various witnesses called on behalf of IIROC.

[35] She says that the above statement fails to properly summarize the law of witness credibility, which requires an assessment of demeanor, inconsistencies in evidence (i.e. documentary evidence or cross examination which contradicts direct testimony) or whether the witness is generally credible.

[36] The applicant pointed to this exchange between the Chair of the IIROC panel and herself during the hearing, which she says is further illustrative of the error in law enunciated by the IIROC panel in its decision (as set out above):

> MS. JONES: So can I just understand, anything a witness says is direct evidence – anything – is that correct? – that is the truth, the whole truth, no matter what? No one lies? No one forgets?
>
> THE CHAIRPERSON: Nobody is saying that.
>
> MS. JONES: Okay, but this is important.
>
> THE CHAIRPERSON: I'm just saying the uncontradicted evidence is the evidence of Pringle.
>
> MS. JONES: But it's their job to make sure – it's [the IIROC investigator's] job to make sure at the time of the investigation that these avenues are checked into

when you are accusing an advisor who may lose their license, who may be suspended, who may be fined.

THE CHAIRPERSON: I know all that.

MS. JONES: It's very important, though. It shouldn't –

THE CHAIRPERSON: No, what is important is the evidence in the stand.

MS. JONES: And what if it's mistaken? What if it's got holes in it?

THE CHAIRPERSON: Somebody has to contradict it. Or it's patently –

MS. JONES: Okay. So my understanding is they can come up with any charges they want, they can say whatever they want, and it's my or the respondent's job to prove that it's wrong. Is that correct? Is that how the proceed[sic] goes?

THE CHAIRPERSON: Pretty close.

[37] We agree that the ending of the above exchange is not a good summary of the evidentiary onus on the parties in an administrative proceeding such as the IIROC hearing. However, the exchange during the hearing, particularly when both parties were cutting off the thoughts of the other, is not the issue. The question is whether the IIROC liability decision contains an error of law based on the manner in which the panel assessed the credibility of the witnesses who gave evidence.

[38] The applicant's submission that the panel erred by simply accepting the oral testimony of all of IIROC's witnesses because it was uncontradicted is not supported by a review of the decision as a whole. It is clear from a review of the decision that the IIROC panel weighed the evidence before them, accepting some, but rejecting certain evidence given by IIROC witnesses.

[39] In particular, they did not accept the client's evidence that the applicant had promised her a 10-15% return per month. The panel indicated that either that was not true or that the client had misunderstood a suggested annual return as a monthly return. Further, the panel indicated that they did not understand the client's evidence of what she meant by intending to pursue an investment strategy for "passive income".

[40] It is also clear that on the question of whether the trading system of the applicant's employer defaulted to marking a trade as solicited versus unsolicited (where no indication was made on the ticket), the panel deferred to the evidence of the Chief Compliance Officer responsible for the trading system rather than the confused testimony of the IIROC investigator. The Chief Compliance Officer testified that the default was to mark a trade as solicited. The IIROC investigator first said it was his understanding that the default was to mark the trade as solicited but later, in cross examination, said that the default was to mark the trade as unsolicited. The IIROC panel preferred the evidence of

the Chief Compliance Officer who was better placed to give that evidence. We do not find that unreasonable.

[41] We do not find that the IIROC panel erred in law in applying the test for determining witness credibility or in determining whether to accept, in whole or in part, the testimony of witnesses. On the contrary, it is clear from the decision that the IIROC panel assessed the witnesses' evidence, determined its credibility and made reasonable decisions to accept some of the uncontradicted evidence, but not all. We dismiss this ground for review.

ii) Reasonableness of the decision

[42] As outlined in *Re Legare and Mutual Fund Dealers Association* 2013 BCSECCOM 362 at paragraph 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).

[43] The applicant identifies four findings by the IIROC panel that she says are not supported by the evidence, or are based on unreasonable inferences. We deal with each of them in turn.

[44] On the discretionary trading finding, the applicant pointed to certain e-mails, phone records and answers given by the client in cross-examination as support for her submission that the panel should not have accepted the evidence of the client that the trades were not properly authorized. The applicant suggests that this contradictory evidence made the IIROC decision on this point unreasonable. We do not accept this submission.

[45] At best, the conflicting evidence might have connected a communication from the client with one trade for which IIROC alleged there were not proper instructions. It might also suggest one further call between the parties than suggested by the client in her direct examination. This would not help explain all of the 39 trades for which IIROC said there was no proper instructions.

[46] The applicant also suggested that there was a failure by IIROC to review all possible phone numbers on which calls could have been made by the client to the applicant. The existence of other calls on other lines is speculative at best and does not lead us to conclude that the IIROC panel's conclusions were unreasonable.

[47] On the breach of suitability finding, the applicant submitted that there was contradictory evidence to that provided by the client in her direct testimony. The applicant says that examples of that contradictory evidence are the panel's inability to ascertain what the

client meant by passive income and that the client was sophisticated enough to understand the difference between high and low risk investment strategies.

[48] A review of the IIROC decision makes it clear that the IIROC panel did not simply accept the testimony of the client on this issue. In fact, the panel expressly rejected the client's testimony that she was promised a return of 10-15% per month. The IIROC panel also looked at documentary evidence to show that the compliance department of the applicant's employer was repeatedly concerned about the margin status in the client's accounts. There is no evidence these communications were passed on to the client. There was other documentary evidence that the client did not understand why she would be charged interest within her accounts.

[49] We find the IIROC panel's findings on this allegation reasonable.

[50] Finally, with respect to the allegation that the applicant breached IIROC Member Rule 29.1, as a result of misrepresenting a large number of trades as unsolicited when they were solicited, there was no dispute from the applicant during the hearing and review that certain trades were improperly marked. The applicant focused her submissions on the IIROC panel's finding that the trades were marked incorrectly with proactive intent rather than by neglect or mistake. Key to this finding was a determination that the default with the trading system used by the applicant's employer was to mark a trade as solicited.

[51] In support of her submission that the panel erred in making this finding, the applicant pointed to the inconsistent evidence of the IIROC investigator. We have already addressed this submission above and find the panel's finding on this to be reasonable.

[52] The applicant also submitted that she was under close supervision at the time that these trades occurred. The applicant submits that the IIROC investigation did not determine what the requirements were for marking trades in this circumstance or whether there was supervisory oversight of her trade tickets at the time. We do not see the relevance of this submission. The trade tickets were either correctly marked or they were not. That others might have had a responsibility to review those tickets-is not relevant to the applicant's conduct.

[53] We find the IIROC panel's finding, that the applicant misrepresented trade tickets as unsolicited when they were solicited, reasonable.

b) Penalty

i) Error in Law

[54] We do not find that there was any error in law in the IIROC panel decision on penalty. In fact, the applicant agreed that the panel set out the applicable criteria and factors to consider based upon prior IIROC (or predecessor entity) decisions. That the panel did not separately set out findings in respect of each of the identified concerns or factors is not an error of law. It is also not an error of law for the panel to have avoided making a "summation" of where the applicant's conduct fit on the spectrum of misconduct.

[55] It is clear from the decision that the panel took into account a number of factors in reaching its decision. It is also clear that the panel took into account Jones' ability to pay as part of their consideration. The $48,000 fine included a payment plan structured over two years.

[56] Although the applicant stated that the *Blackmont* decision represents the appropriate legal analysis for approaching the award of costs in an IIROC hearing, IIROC submitted other decisions which demonstrate that costs are still awarded in IIROC hearings even if the respondent has been partially successful in defending allegations brought against them. Further, those cases demonstrate that a finding of having somehow delayed or obstructed the investigation or hearing process is not necessary in order for costs to be awarded. We do not find that an award of costs against Jones represents an error in law.

ii) Unreasonableness

[57] We also find that the penalty decision was reasonable.

[58] We agree with the submissions of IIROC that settlement agreements should be given little weight in a contested hearing context. Settlement agreements arise in a completely different context. Notwithstanding this, our review of the settlement agreements tendered by the applicant did not support her submission that the quantum of the fine was unreasonable. The settlements referred to were largely cases of improper discretionary trading and/or breach of suitability requirements. While those settlements suggested a smaller fine than the $48,000 in question here, Jones has been found to contravene both of those obligations and to have contravened two other IIROC obligations. If anything, we would have found the settlements supported the reasonableness of the panel's findings.

[59] The one hearing decision that the applicant provided was *Re Beck*, 2012 IIROC 41. In that decision, improper discretionary trading in similar magnitude to that of Jones, resulted in a penalty of $20,000 fine, $3,300 disgorgement of commissions, one year of close supervision, and $15,000 of costs. When taking into consideration that Jones was found liable for three additional contraventions, we find the *Beck* decision to be generally supportive of the reasonableness of the panel's penalty decision in this case.

[60] Further, the applicant provided submissions to the IIROC panel to the effect that if a fine was to be imposed then the appropriate amount of that fine was in the range of $25,000 to $35,000. Although the $48,000 fine exceeds the upper end of the range suggested by the applicant herself as the appropriate amount of the fine, it is not so significantly outside the range to find that it is unreasonable. We find that the quantum of the fine is reasonable in the circumstances.

[61] It is also clear the panel took into account Jones' financial circumstances when they structured the monetary penalties, as discussed above. That Jones' income has deteriorated since the date of the penalty decision cannot make the decision itself unreasonable. We also were not pointed to any evidence that the applicant provided the IIROC panel with a comprehensive assessment of her financial situation (e.g. a listing of

her assets versus liabilities) at the time. Based on the financial information that the panel had at the time of making the decision, the quantum of the financial sanctions are not unreasonable.

[62] In reaching its decision to impose a suspension, it is also clear that the IIROC panel was mindful of the potential career implications that a suspension can have on an IIROC member. The IIROC penalty decision cites this Commission's decision in *Carolann Steinhoff*, 2013 BCSECCOM 308, wherein the seriousness of a suspension was addressed. In reaching a suspension of three months in this case, it is evident that the IIROC panel was attempting to balance the seriousness of the applicant's contraventions and the significance of a suspension. We find the IIROC panel's award of a three month suspension to be reasonable.

[63] We also do not find the IIROC panel's reference to Jones' historical restriction of "close supervision" versus "strict supervision" to be material. It appears that she was subject to a mixture of close supervision and strict supervision during that three year time period. It is clear that the IIROC panel understood that supervisory restrictions on an IIROC member do involve a punishment element due to the inconvenience of that restriction. This was specifically addressed by the IIROC panel and we find those conclusions to be reasonable.

[64] Finally the applicant argued that the award of costs should either be overturned, relying on the *Blackmont* case, cited above or, in the alternative, that the quantum of the costs were unreasonable.

[65] The IIROC hearing panel did not provide any analysis in the penalty decision to explain the basis of determining the quantum of the cost award. This should have been done.

[66] However, a review of the record shows that IIROC staff submitted a bill of costs in excess of $18,000 relating to the hearing. The bill of costs records time spent preparing witnesses, preparing for and attending eight days of hearing, and receipts documenting witness travel expenses. The IIROC hearing panel determined that the quantum of costs should be reduced to $15,000, and made an award in that amount. In the circumstances,

we find that the IIROC panel acted reasonably in exercising its discretion in awarding a portion of the actual costs of the hearing, after reviewing the documentation in support of that award. We dismiss this ground for review.

VI Ruling

[67] Having reviewed the materials filed by the parties and heard their oral submissions, and considering it to be in the public interest, under section 165(4) of the Act, we dismiss Jones' applications for review and confirm IIROC's liability and penalty decisions.

May 25, 2015

For the Commission

Nigel P. Cave
Vice Chair

Suzanne K. Wiltshire
Commissioner