Re Ahrens

IN THE MATTER OF:

The Dealer Member Rules of the Investment Industry Regulatory Organization of Canada

and

Robert Justin Ahrens

2014 IIROC 46

Investment Industry Regulatory Organization of Canada
Hearing Panel (Pacific District)

Heard: July 9 and 10, 2014 in Vancouver, BC
Decision: July 10, 2014
Reasons: September 29, 2014

Hearing Panel:
Mr. Stephen D. Gill, Chair, Mr. Chris Lay and Ms. L. Karen Henderson
Appearances:
Ms. Kathryn Andrews, Enforcement Counsel
Mr. Robert Justin Ahrens, Present

REASONS FOR DECISION ON PENALTY

INTRODUCTION

¶ 1 On March 17, 2014 this Panel rendered its decision on the merits, namely that the Respondent, Robert Justin Ahrens committed the following contravention:

> "From December, 2008 to March, 2009, Robert Justin Ahrens, as Branch Manager failed to adequately supervise Registered Representative Doreen Lowe, contrary to IIROC Dealer Member Rules 1300.2 and 2500."

¶ 2 On July 9 and 10, 2014 this Panel conducted a hearing on penalty. At that hearing we received written penalty submissions from both IIROC counsel and the Respondent Ahrens. We also received the Affidavit of R. Newmarch (Exhibit 15) re; costs, and a substantial brief of authorities both from IIROC counsel and from the Respondent. IIROC counsel also provided the Panel with written Reply submissions. We are indebted to IIROC counsel, and the Respondent, for their helpful briefs and authorities.

¶ 3 It should be noted that the Notice of Hearing in this matter was issued February 15, 2013, but related to conduct occurring in late 2008 and early 2009. We commented that this was a lengthy period of time between the conduct and the Notice of Hearing. IIROC counsel in response advised the notice of investigation to the Respondent was in April 2010.

¶ 4 IIROC counsel sought the following penalty and costs:

(i) a 6 – 8 month suspension from registration in any supervisory capacity with IIROC;

(ii) a fine of $35,000;

(iii) to rewrite the Branch Manager's Course, or its equivalent, should he reapply for registration with

IIROC in any supervisory capacity; and

(iv) IIROC also sought costs of $20,000.

¶ 5 The Respondent, in his penalty submissions (Exhibit 14) submitted that the penalty should be both reasonable and appropriate in light of his personal circumstances, and the facts of his case. He submitted the penalty should be:

(i) no suspension, or alternatively if a suspension is considered it should not be for more than 4 weeks;

(ii) a fine of $10,000;

(iii) costs of $5,000; and

(iv) rewrite the Branch Manager's Course.

¶ 6 Pursuant to IIROC Rule 20.33, a hearing panel may impose any one or more of 9 categories of penalty, which range from a reprimand to a permanent bar from approval, and includes "any other fit remedy or penalty". Further, IIROC counsel submitted an Affidavit attaching a Bill of Costs (Ex. 15) outlining time spent and associated costs incurred by IIROC counsel as a result of the investigation, and prosecution, and requested costs in the amount of $20,000.

¶ 7 On July 9, 2014 the Panel heard submissions from IIROC counsel, and the Respondent, and adjourned shortly after 3:00 p.m.; the Panel then retired to consider the submissions, the evidence and authorities. The Hearing reconvened on July 10, 2014 at 1:30 p.m. Due to what the Panel considered somewhat unusual circumstances in this case, the Panel gave its penalty decision on July 10th. The Panel at that time stated:

> "This is the decision of this Panel with respect to penalty in the matter of Mr. Ahrens. It is the unanimous view of this Panel that we give our decision on penalty today so that the Respondent and IIROC will know the disposition of this case. We are cognizant that the infractions detailed in the Panel's decision on the merits occurred from December 2008 to March 2009. We are cognizant that the Respondent has re-established himself in the industry. There is no evidence or allegation of any other transgressions by the Respondent, either before December 2008 or since March of 2009.
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> The Respondent testified he is employed in a salaried position in a firm with a strong culture of compliance, and in our view that should be encouraged.
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> We will give reasons for our decision in the near future, and we have carefully reviewed the many factors present in this case, the authorities, and, of course, the submissions of counsel and the Respondent.
>
> This Panel orders that the Respondent, Robert Justin Ahrens:
>
> 1. Be suspended from any activity requiring supervisory registration for a period of four consecutive weeks. Said period of suspension to be completed by December 31st, 2014.
> 2. Pay a fine of $15,000 on terms we will give you.
> 3. Pay costs of $5,000 on terms.
> 4. The said fine of $15,000 and costs of $5,000 are payable in 24 equal monthly instalments commencing on or before September 30th, 2014.
> 5. That Mr. Ahrens rewrite the Branch Manager's Course examination or its equivalent on or before December 31st, 2014.
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> This is our decision on penalty."

¶ 8 At that time we indicated that reasons for the penalty would follow; these are those Reasons.

¶ 9 With respect to disciplinary sanctions, the Panel has the benefit of Dealer Member Disciplinary Sanction Guidelines (the "Guidelines") which quote the decision of *Re Derivative Services Inc.,* (2000) IDACD No. 26 at p.3, namely that a hearing panel's main concern to determine an appropriate penalty are:

(a) Protection of the investing public;

(b) Protection of the investment industry regulatory organizations membership;

(c) Protection of the integrity of IIROC's process;

(d) Protection of the integrity of the securities markets; and

(e) Prevention of a repetition of conduct of the type under consideration.

¶ 10 "The penalty imposed in a specific proceeding should reflect the hearing panel's assessment of the measures necessary in the specific case to accomplish these goals, ranging from a reprimand to an absolute bar, and may take into account the seriousness of the respondent's conduct and specific and general deterrents." Guidelines, *General Principles, para.1.*

¶ 11 The authorities indicate, and counsel and Mr. Ahrens did not disagree, that the penalty imposed must reflect the Panel's assessment of what penalties are appropriate, in this case, to accomplish the above goals. The penalty must take into account the seriousness of the respondent's conduct, and the principles of general and specific deterrents. An appropriate balance must be struck.

¶ 12 In *Re Mills*, (2001) IDACD No. 7, a case involving a failure to supervise by a branch manager, the panel assessed a penalty of a fine of $50,000.00, costs of $35,000.00, and the respondent re-write and pass the partners, directors and officers examination. In the course of its decision, the panel stated:

> "**6** Industry expectations and understandings are particularly relevant to general deterrence3 [at the end of document]. If a penalty is less than industry understandings would lead its members to expect for the conduct under consideration, it may undermine the goals of the Association's disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention, rather than punishment.
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> **7** An appropriate penalty will achieve both specific and general deterrence. The primary focus of the District Council, however, is the respondent; the appropriateness of the penalty relates most directly to the nature of the respondent's violation, the circumstances in which it was committed and other aggravating and mitigating factors relevant to the respondent's conduct and its consequences, like those identified in the TSE Guidelines. Such considerations may lead the District Council to conclude that a respondent should be prohibited from participation in the securities industry or that a lesser penalty is sufficient to prevent repetition of the misconduct. The emphasis is thus on specific deterrence on the assumption that general deterrence will follow from an appropriate decision; cf., e.g. In the Matter of CCI Capital Canada Ltd., (1999) 22 O.S.C.B. 6289 (October 8) at 6291.
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> **8** Although the seriousness of a respondent's conduct may incline a District Council toward increasing a penalty in order to enhances its general deterrent effect4 [at end of document], any temptation to treat general deterrence as providing an independent basis for an additional penalty should be resisted. A penalty based on general deterrence, considered separately, may result in a greater

penalty than would otherwise be imposed on a respondent in order to influence the conduct of others who are not before the District Council. In the District Council's view, this would be unfair to the respondent; cf. R.A. Duff, Trials and Punishments 235-36 (1986), quoted in A. Manson, supra. at 52. An appropriate penalty should satisfy the demands of general deterrence without having to bump it up.

9 General deterrence may, however, provide a means of assessing the appropriateness of a penalty. In the course of its deliberations the District Council may consider the adequacy of a penalty in terms of its likely effect on others.

Such consideration may indicate that a penalty is too low, or possibly too high, in the circumstances. General deterrence may thus serve as an additional factor assisting a District Council to weigh the appropriateness of a penalty under consideration and to relate it more closely to industry understandings and expectations.

10 A penalty decision thus inevitably involves an exercise of judgment by the District Council reflecting the values of the securities industry, as well as the goals embodied in the Association's Constitution. It must also be tailored to the circumstances of the matter before the District Council, see, e.g. DSI, 23 O.S.C.B. at 5068-69, but not in isolation, as one aspect of fairness is that like cases be treated alike.

11 Comparison with penalties imposed in similar cases may provide another means of ensuring proportionality, always recognizing that the imposition of sanctions is premised in large part on factors specific to the circumstances of each case and that only rarely will there be correspondence on all matters between two cases. As the penalty in each case must be determined on its own merits, precedents can serve only a limited function; cf. In re National Gaming Corp., (2000) 9 A.S.C.S. 4592 (November 10) at 4598. While they, like the TSE Guidelines, may assist in an attempt to treat similar cases similarly, they are no more than factors to be taken into account, whose weight varies with the degree of correspondence to the facts under consideration.

12 Although the preceding comments also apply to the settlement process, there is a distinction between penalties agreed to in a settlement and those imposed in a hearing such as this one. As has been previously stated, a penalty under a settlement agreement is likely to be at the low end of the spectrum. The difference is highlighted by the District Council's responsibility to determine an appropriate penalty in a hearing such as this one, as opposed to accepting a penalty agreed to in a settlement; see, e.g. Milewski, 22 O.S.C.B. AT 5407; In the Matter of Scott Alexander Clark, [1999] I.D.A.C.D. No. 40 (P.D.C.) ("settlement process is one of negotiation and compromise", Quicklaw at 3). Penalties imposed under settlement agreements thus cannot define the parameters of the penalties available. These are defined in paragraph 20.10 of the Association's By-laws. Within these parameters, the District Council's responsibility is to determine the penalty that it believes is the correct one, taking into account relevant principles and factors, in the circumstances of the case before it."

¶ 13 The Guidelines set forth key considerations for determining sanctions under various headings. Those headings are appropriate for the facts of this case.

¶ 14 **Harm to clients, employer and/or the securities market.** There is no evidence of harm to clients, the employer, or the securities market in this case. It may be said however that failure to supervise is clearly a

serious matter, and may harm the reputation of the securities market in general.

¶ 15 **Blameworthiness.** The Respondent acknowledges that he had responsibilities for daily and monthly supervision, and had the opportunity to review and monitor Lowe's activity. The Respondent was found to have failed to adequately supervise Lowe's activities in the December 2008 to March 2009 period.

¶ 16 **Degree of participation.** The Respondent did not participate in Lowe's activities.

¶ 17 **Extent to which the Respondent was enriched by the misconduct.** There is no evidence that the Respondent was enriched by Lowe's conduct.

¶ 18 **Prior disciplinary record.** The Respondent has no previous disciplinary history, and there is no evidence of any complaints or disciplinary history after the events under consideration in this case.

¶ 19 The Guidelines state:

> "The fact that a Respondent has no prior disciplinary record should, in the absence of evidence to the contrary, lead a Panel to a presumption that the Respondent was of good moral character prior to the misconduct. A first conviction may be seen as a measure of punishment in and of itself, given the intended stigma attached to the process of charging, finding of guilt and imposition of sanction."

¶ 20 Further, the Respondent said that this matter has had a very significant impact on him, and has been on his mind every day since the events in question. He said that his concerns for ethical trading practices, and compliance with the Rules, had led him to obtain employment with a large integrated Member Firm that has a culture of compliance and high standards that must be met.

¶ 21 A further guideline is **Acceptance of responsibilities, acknowledgement of misconduct and remorse:** clearly in this case the Respondent does accept full responsibility, has acknowledged his misconduct, and spoke as to his remorse. Further, there is no evidence of any complaints or misconduct either before or since this event.

¶ 22 **Credit for cooperation.** The Respondent submits, and IIROC counsel agrees, that the Respondent was fully cooperative throughout this investigation and the disciplinary process.

¶ 23 The Guidelines, under **Failure to supervise**, recommend sanctions for a supervisor: a fine: a minimum of $25,000; re-write PDO; a period of suspension or a permanent bar from supervisory or compliance responsibility; and a permanent bar from approval in all capacities in egregious cases. In our view this is not an egregious case warranting removal from the industry.

¶ 24 In respect of "failure to supervise" authorities, IIROC counsel, and the Respondent, both referred the Panel to a significant number of authorities. Clearly the authorities all depend upon their particular facts, and the conduct of the branch manager under consideration. Further, many of the authorities were decisions by way of settlement agreement, and thus may not be particularly relevant. We do note however that in three cases, *Wellington West*[1] , *Re Johnson*[2] , and *Re Beaudoin*[3] , no suspension was ordered. In *Re Beaudoin*, the penalty ordered was a fine of $10,000 and a requirement that the respondent re-write the PDO exam if he seeks to hold a partner/director/officer position. We note a majority of the authorities pertained to branch managers who, at the time of the pertinent Decision, were no longer in a supervisory role but had continued employment in the industry as an RR. The Respondent did not at the material time, nor currently, have an active book of clients and therefore continuing as an RR (with an existing book of clients) is not open to him.

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[1] 2013 IIROC No. 46

[2] 2012 IIROC No. 19

[3] 2011 IIROC No. 66

¶ 25 In *Re Johnson*, where the respondent's failure to supervise occurred over a five year period, the respondent had been a branch manager for 24 years, with no previous disciplinary history. The penalty was a fine of $20,000 plus costs.

¶ 26 In our view a detailed review in these Reasons of the authorities is not particularly helpful. We have reviewed those authorities, and have taken into account the principles therein, including the principles of both specific and general deterrence, in deciding on the appropriate penalty in this case.

¶ 27 Considering all of the facts and circumstances that are in evidence, it is our view that the Respondent's conduct is properly characterized as an error in judgment in a narrow time period regarding one RR. Clearly there is no suggestion, and no evidence, that there was conduct involving manipulative, fraudulent or deceptive practices.

¶ 28 In coming to our decision on penalty, we considered the submissions of IIROC counsel and the Respondent, and the material that they presented. In our view this is a somewhat unique case, and given the Respondent's personal circumstances, including the fact he says he has a negative net worth, a significant suspension from a supervisory role and/or a significant fine would likely be career ending as a Supervisor. To our mind that would serve no useful purpose, particularly given the fact that we are now approximately five years post the events that led to this matter. We did consider the Respondent's ability to pay, which was reflected in our decision as to the terms of payment.

¶ 29 The Panel, following the conclusion of submissions, took the time to fully consider the facts, authorities and submissions. In our view it was entirely appropriate to render the penalty decision at the conclusion of the penalty hearing so that the Respondent, and IIROC counsel, would know going forward the decision of the Panel.

¶ 30 For the foregoing reasons, we imposed, as stated above, the following penalty:

(a) The Respondent be suspended from any activity requiring supervisory registration for a period of four consecutive weeks; said period of suspension be completed by December 31, 2014.

(b) The Respondent pays a fine of $15,000 on terms.

(c) Pay costs of $5,000 on terms.

(d) Said fine of $15,000 and costs of $5,000 are payable in 24 equal monthly instalments commencing on or before September 30, 2014.

(e) The Respondent re-writes the branch manager's course examination or its equivalent on or before December 31, 2014.

Dated at Vancouver, BC this 29 day of September, 2014.

These Reasons may be signed in counterpart.

Stephen D. Gill, Chair

Chris Lay

L. Karen Henderson