Re Workun

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Wayne Frederick Workun

2020 IIROC 31

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

Heard: August 21, 2018 (by videoconference)
Decision: August 21, 2018
Reasons for Decision: September 10, 2020

Hearing Panel:
Eric Spink, QC, Chair, William Welton and David Johnson
Appearance:
Andrew Wilson, for IIROC Enforcement Staff
Kelly Hannan, for Wayne Frederick Workun
Wayne Frederick Workun, present

REASONS FOR ACCEPTANCE OF SETTLEMENT

Introduction and Background

¶ 1 This Settlement Hearing considered a Settlement Agreement between IIROC and Wayne Frederick Workun (the "Respondent"), dated July 30, 2020, which is attached as Appendix 1. After hearing submissions, the Hearing Panel accepted the Settlement Agreement, and these are our reasons.

¶ 2 In the Settlement Agreement, the Respondent admitted the following contraventions of IIROC's rules:

(a) Between approximately November 2011 and December 2015, the Respondent failed to use due diligence to ensure that recommendations were suitable for the accounts of his client BW, contrary to Dealer Member Rule 1300.1(q); and

(b) Between approximately November 2011 and December, 2015, the Respondent engaged in discretionary trading with respect to the accounts of BW, without being authorized and approved to do so, contrary to Dealer Member Rule 1300.4.

¶ 3 The Respondent agreed to the following sanctions and costs:

(a) A fine in the amount of $40,000;

(b) A 60 day suspension from registration in any capacity with IIROC;

(c) A suspension from acting as a Branch Manager for one year;

(d) Workun will re-write the Conduct and Practices Handbook exam; and

(e) Costs in the amount of $2,500.

¶ 4 A prior settlement agreement relating to these same contraventions was rejected by a hearing panel on May 27, 2020, with careful reasons for their conclusion that "the proposed sanctions were not appropriate to the conduct of the Respondent". Those reasons shaped the Settlement Agreement that was presented to us, which contained increased sanctions and additional contextual information responding directly to concerns expressed by the previous panel. Both counsel emphasized, and this panel agreed, that the additional contextual information was crucial to our determination that the Settlement Agreement is acceptable.

Summary of Contraventions

¶ 5 The contraventions here involved a single client, the Respondent's mother. BW opened accounts with the Respondent in 2003, and passed away in 2016 in Calgary. The contraventions occurred between November 2011 and December 2015, when BW's health was declining with increasing symptoms of dementia. During that period, the Respondent basically ignored suitability requirements and engaged in unauthorized discretionary trading, pursuing a high-risk strategy that resulted in BW's accounts sustaining a total net loss of $617,740, or 91% of her portfolio. In August 2015, the Respondent signed his mother's name on client forms.

¶ 6 BW's Last Will and Testament, executed in 2007, provided that the residue of her estate be divided equally between the Respondent and his sister, DR. The Respondent admits that the unsuitability contraventions resulted from that fact, and there was no attempt to conceal the situation from DR, who received monthly disclosure and had online access to BW's accounts. After BW's death, a dispute arose between the Respondent and DR relating to his handling of BW's accounts. That dispute was settled by the Respondent paying or assigning significant assets to DR, the details of which we redacted from the attached Settlement Agreement, at the request of IIROC's counsel, to avoid disclosure of personal matters in accordance with Rule 8203(5)(iii).

Guidelines, Previous Decisions, and Key Factors in Determining Sanctions

¶ 7 The Panel was referred to the IIROC Sanction Guidelines and to previous decisions, inlcuidng *Re Newbury* 2019 IIROC 07; *Re Clarke* 2016 IIROC 12; *Re Reyes* 2018 IIROC 47; and *Re Cavalaris* 2017 IIROC 4.

¶ 8 The *Cavalaris* decision usefully summarizes the duty of a hearing panel to apply the public interest test, as articulated in *Re Milewski*, [1999] IDACD No. 17, and more recently by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43. That is the test we applied here when considering whether to accept or reject the Settlement Agreement.

¶ 9 The Panel found the other decisions are less useful because, although they address the same categories of contraventions, they all involved normal client relationships, and not personal family relationships such as this situation. The personal dimension cannot justify the Respondent's behaviour nor detract from the seriousness of the contraventions. However, in light of the fact that IIROC Staff are unaware of any complaints from clients during the Respondent's 35-year career, it seemed clear to the Panel that the Respondent's conduct here was both anomalous and peculiar to his family situation. As the Respondent's counsel suggested, the personal dimension does not make it right, but it does make it different.

¶ 10 The Panel considered the principles described in the IIROC Sanction Guidelines (at page 4, footnotes omitted):

> The purpose of sanctions in a regulatory proceeding is to protect the public interest by restraining future conduct that may harm the capital markets. In order to achieve this, sanctions should be significant enough to prevent and discourage future misconduct by the respondent (specific deterrence), and to deter others from engaging in similar misconduct (general deterrence). …

General deterrence can be achieved if a sanction strikes an appropriate balance by addressing a Regulated Person's specific misconduct but is also in line with industry expectations. Any sanction imposed must be proportionate to the conduct at issue and should be similar to sanctions imposed on respondents for similar contraventions in similar circumstances. The sanction should be reduced or increased depending on the relevant mitigating and aggravating factors.

¶ 11 The Panel considered the illustrative list of key factors in the IIROC Sanction Guidelines. We found it particularly significant that the Respondent voluntarily compensated DR, prior to the commencement of these proceedings. By accepting responsibility in that manner, the Respondent has to some extent mitigated the harm to market integrity and the reputation of the market place caused by his actions. The financial losses to the Respondent have been significant – Staff received evidence of the Respondent's current financial situation, and is satisfied that a higher penalty or longer suspension would compromise his ability to meet basic living expenses. We also noted that the Respondent has already been suspended from his Branch Manager position since October 15, 2019, in addition to the one-year suspension imposed by the Settlement Agreement.

Conclusion

¶ 12 Having regard to the circumstances described above, the Panel determined that the sanctions proposed in the Settlement Agreement are fair, reasonable, and sufficient to achieve both specific and general deterrence. We therefore accepted and executed the original Settlement Agreement on August 21, 2020.

Dated at Calgary, Alberta this 10th day of September, 2020.

Eric Spink

William Welton

David Johnson

APPENDIX 1

Settlement Agreement

PART I – INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada ("IIROC") will issue a Notice of Application to announce that it will hold a settlement hearing to consider whether, pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC, a hearing panel ("Hearing Panel") should accept the settlement agreement ("Settlement Agreement") entered into between the staff of IIROC ("Staff") and Wayne Frederick Workun ("Workun" or "Respondent").

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement in accordance with the terms and conditions set out below.

PART III – AGREED FACTS

3. For the purposes of this Settlement Agreement, the Respondent agrees with the facts as set out in Part III of this Settlement Agreement.

Overview

4. The Respondent Workun is a Registered Representative ("RR") with Leede Jones Gable Inc. ("Leede") in Calgary.

5. The matter relates to his handling of the accounts of his late mother, BW. During the period from November 30, 2011 to December 31, 2015 (the "Relevant Period"), BW was a retired widow in declining health. She suffered with symptoms of dementia and did not consistently have the capacity to make financial decisions and understand investment recommendations.

6. During the Relevant Period, Workun managed BW's accounts in a manner that was not suitable for BW and instead reflected the fact that upon BW's passing Workun and Workun's sister would share equally in BW's estate.

7. Workun pursued a high-risk investment strategy which was not suitable for her. It primarily involved high concentration in oil and gas, and mining companies, including many speculative holdings in junior companies. It was a long-term investment strategy that had been used for BW's accounts in the past but not updated or altered as BW's life circumstances changed in her later years.

8. Workun also engaged in discretionary trading in BW's accounts without being authorized and approved to do so.

9. In addition, Workun signed his mother's name on client forms in August 2015 as a matter of convenience because of his mother's failing health status. This was a one time occurrence and done as a matter of expediency. At the time, Workun was primarily responsible for managing all of his mother's affairs including all financial affairs, arrangements with her care facility, and ensuring all of her medical needs were met.

10. Over a four-year period, BW's accounts sustained a total net loss of $617,740, or 91% of her portfolio.

Registration History

11. Workun first became a Registered Representative in 1985 and worked with several Dealer Members. He has worked in the Calgary branch of Leede since 2003. In 2007, he became Assistant Branch Manager, and in 2012, he became Branch Manager. His duties also included options supervisory duties, including acting as the firm's Assistant Registered Options Principal (AROP) since January, 2013.

Client – BW

12. The late BW, Workun's mother, was born on December 30, 1931. She passed away in Calgary on April 1, 2016. His father had passed away in 2000. Workun has one sister, DR, who also lives in Calgary.

13. On April 3, 2007, BW executed her Last Will and Testament indicating her intention to divide the residue of her estate between Workun and DR, in equal shares.

14. On November 6, 2007, she executed an Enduring Power of Attorney (the "EPA") naming Workun, and DR, as her joint attorneys. Workun did not notify Leede of the EPA. Workun advised Staff that it was never invoked and stated that he did not rely on it.

15. BW was a retired widow who had previously worked in various jobs, including in an administrative capacity at a school, as a farmer, and with her late husband in their oil and gas service business. Her retirement income consisted of government pensions, and some variable oil and gas royalties from an Alberta property. She also relied on funds from her investment accounts, which were handled entirely by Workun.

16. BW and her late husband held accounts with Workun for many years at each of his employer firms. In general, the investment strategy employed in his mother's accounts was concentrated in resource companies, and in particular, oil and gas, and mining.

Ignoring Key Aspects of his Client

17. In November 2003, BW opened accounts with Workun at Leede. At the time, she was 71 years old and

the accounts contained 15% high-risk tolerance.

18. In February 2006, her accounts were updated with the high-risk tolerance increased from 15% to 25%.

19. In May 2007, BW moved from her family home to a single detached home within a seniors' care complex in Calgary. She received minimal care and lived on her own independently.

20. In October 2007, her accounts were updated again. The accounts' stated high-risk tolerance was increased from 25% to 50%. In addition, the stated investment objectives were changed to allow 40% short term speculation and 40% venture speculation.

21. During the Relevant Period, BW held seven accounts:

    (a) Canadian cash account;

    (b) Canadian margin account;

    (c) Canadian margin options account;

    (d) US margin options account;

    (e) TFSA;

    (f) RRIF; and

    (g) RESP.

22. With the exception of the TSFA (which contained little value), the New Client Account Forms (the "NCAFs") for the accounts all contained the same information:

    - Age 75, described as retired widow;
    - Estimated Net Worth: $1,700,000 ($1,250,000 liquid and $450,000 fixed);
    - Annual income $70,000;
    - Investment Objectives: Income 5%; Long Term Growth 15%; Short Term Speculative 40%; Venture Speculative 40%;
    - Risk Factors: Low 0%; Medium 50%; High 50%;
    - Investment Knowledge: Good; and
    - Investment Experience: 21 years.

23. The NCAFs were signed by BW, as well as Workun as the investment advisor (and who was then the Assistant Branch Manager), and approved by the Branch Manager.

24. In April 2009, BW moved to other living accommodations in the same seniors' care complex. These accommodations provided some assisted living care options.

25. On June 10, 2009, Workun stated in an email to his sister, DR, that one of his main investment goals for BW was to generate the income necessary to help pay for her living expenses and medical care. He further stated that BW should be invested in "quality investments", and that "there will be no further junior share purchases unless excess funds are used and it is agreed upon". He further referred to the importance of "safety of principal".

26. In September 2009, Workun attended a meeting with BW and DR, to discuss BW's investments. The meeting and additional discussions were followed by a November 23, 2009 written statement, purportedly signed by BW, Workun and DR. It stated in part:

> My children and I met in September, 2009, to discuss my investment interests. At

> this time we all agreed to meet every 2 months to discuss my financial and personal needs. We all agreed to an investment strategy that all three felt was fair. At that time we agreed to invest a maximum of 10% into high risk investments. The rest on [sic] my money was to be invested into stocks that present strong safe growth. I would like to reconfirm my wishes at this time.

27. In August 2011, Alberta Health Services conducted an "Annual Interprofessional Team Client Conference and Medication Review" of BW, in which Workun was present. This review outlined, among other things, concerns of memory loss and elopement risk. It concluded with a recommendation that BW be placed in a secure seniors' care facility.

28. In December 2011, BW moved to other living accommodations in the same seniors' complex, which was a secure facility with 24 hour medical care, and intended for patients exhibiting decreased cognitive abilities and risk of elopement.

29. Workun stated that he visited BW weekly through her time in the three different living accommodations within the seniors' care facility. In late 2011, he began to notice signs that BW was forgetful, and having "trouble navigating home" on long walks. However, he says she never got lost, was still able to make decisions, and he did not notice any drastic changes in her memory loss.

30. In an interview with Staff on November 29, 2017 (the "Staff Interview"), Workun stated that as of late 2011, he believed his mother was "still good with me providing her with advice", and at no point did she tell him to stop providing her with investment advice. Workun told Staff that it was not until an undefined point in 2014 that he believed that BW was no longer able to make financial decisions and understand investment recommendations.

31. In September 2012, BW's options account was approved by the Leede AROP to allow Level 4 options trading. This was the highest risk level for options trading, as it allowed both covered and uncovered options positions. At this time, BW was 80 years old and she had been living in a seniors' secured facility for 9 months.

32. In August 2015, BW's accounts were updated again. At the time, she was 83 years old, and continuing to reside in the secured senior care facility. Further, Workun was of the view that BW was no longer able to make financial decisions. These are the account update forms referenced in paragraph 9 of this Settlement Agreement.

33. At this time, the Leede NCAFs no longer provided for percentage investment objectives/risk allocations. Instead, they provided for individual investment objective categories. Her investment objectives were indicated as "Type C – Growth".

34. During the Relevant Period, Workun knew, or ought to have known, that BW did not always have the capacity to make financial decisions and understand investment recommendations. Further, since at least September, 2009 onward, he was aware of her specific instructions for investments that provided strong, safe growth, and to limit high-risk investments to 10% of her portfolio.

35. During the Relevant Period, the stated investment objectives of her accounts were not appropriate for BW, who was vulnerable, with the need for steady, consistent income to help pay for medical care and living expenses.

36. During the Relevant Period, Workun established the stated investment objectives and risk tolerance parameters in BW's accounts without regard for her age, life circumstances, financial situation, investment knowledge, actual investment objectives and actual risk tolerance.

37. Workun admits that the investment objectives and risk tolerance parameters indicated on BW's accounts were a result of the fact that upon his mother's passing, the assets in BW's accounts would be

shared equally between Workun and DR.

Suitability

38. Staff reviewed Workun's handling of BW's accounts for the Relevant Period.

39. BW was a vulnerable client who relied on Workun for investment advice and recommendations.

40. Through Workun's own research, investment ideas and trading activities, he pursued a high-risk investment strategy consisting of highly concentrated purchases of resource companies, particularly in the mining and oil and gas sectors. Many of these securities were in high-risk junior companies.

41. From June 1, 2008 until the start of the Relevant Period, BW's total portfolio contained a minimum concentration of 18.5% in mining and oil and gas sector securities. However, during the Relevant period BW's portfolio contained a minimum concentration of 59%, and a maximum concentration of 99% in mining and oil and gas sector securities. In 24 of the months during the Relevant Period, there was at least 90% concentration in mining and oil and gas securities. This high degree of concentration greatly increased the risk level in the accounts. These investments were not flagged by compliance.

42. In addition, Workun used various options strategies in BW's accounts, which involved short-term, speculative strategies, such as writing uncovered puts, and writing covered calls in order to generate income in BW's accounts. Writing uncovered puts is a complex strategy which increased the risk level in the accounts.

43. In addition, the use of margin increased the cost of investment, and the associated risk level in the accounts.

44. The use of these speculative strategies increased the volatility in her accounts, which in turn increased the risk level.

45. In addition, as BW did not have the capacity to make financial decisions and understand investment recommendations, she was not able to understand and appreciate the high-risk level in the accounts.

46. During the Relevant Period, the total value of BW's accounts declined from $679,220 to $12,773. Net cash withdrawals totaled $48,706. Factoring in the net cash withdrawals, BW experienced a total net loss of $617,740, or 91% of her portfolio. BW paid commissions in the total amount of approximately $43,624.

47. During the same time period, the S&P TSX Composite Index increased by 6.6%.

48. The holdings in her accounts were speculative, and in combination with the high level of mining and oil and gas concentration, presented a high level of risk. As such, these recommendations were not suitable for BW in light of her age, employment status, life circumstances, investment knowledge and experience.

49. Workun states that throughout the Relevant Period he provided monthly disclosure of BW's accounts to DR, including a list of all holdings and trades in BW's accounts and that DR had online access to BW's accounts. Workun did not hide or conceal the holdings or strategies used in BW's accounts.

Discretionary Trading

50. Workun did not have written authorization for discretionary trading in any of the accounts, and the accounts were not designated as discretionary by Leede.

51. In his Staff Interview, Workun stated that in weekly visits with BW, he would discuss with her what securities to buy and sell in her accounts, and in what amounts. He admitted that he used timing and price discretion when enacting these trades.

52. In his interview with Staff, Workun also stated that he did not believe that his mother had the capacity

to make financial decisions in her accounts from an undefined point in 2014 onward.

53. However, as stated above, there were concerns about BW exhibiting signs of dementia in 2009. In November 2009 BW signed a statement in which she stated that she had been diagnosed with Alzheimer's disease, and she did no longer understand the consequences of signing legal documents. This statement was also signed by Workun himself.

54. In 2011, an AHS review recommended BW be moved to a secured seniors facility. During the Relevant Period, BW resided in an area of a seniors' complex, which was a secure facility and designed for patients exhibiting decreased cognitive abilities and risk of elopement.

55. Workun knew, or ought to have known, that BW did not always have the mental capacity to agree to investment recommendations during the Relevant Period.

56. During the Relevant Period, Workun engaged in discretionary trading with respect to BW's accounts without being properly authorized and approved to do so contrary to Dealer Member Rule 1300.4.

Workun Payment to DR

57. Following the death of his Mother, a dispute arose between Workun and DR relating to Workun's handling of BW's accounts. That dispute was resolved pursuant to an agreement between Workun and DR under which DR received compensation for the reduced value of her share of BW's estate (the "Settlement"). Workun has provided IIROC Staff details of the Settlement, which are attached as Schedule A [redacted by the panel; see paragraph 6 of Reasons for Acceptance of Settlement].

Workun Financial Hardship

58. Workun provided Staff with a Financial Statement of Debtor and related source documentation regarding his assets. Staff is satisfied that in his family's circumstances, a higher penalty or longer suspension from registration in any capacity would result in Workun and his immediate family not being able to meet their basic living expenses.

59. If it were not for financial evidence of inability to pay, which has been provided to Staff, the Respondent and Staff acknowledge that the amount of the fine set out in this Settlement Agreement would have been greater.

Workun's Internal Leede Suspension

60. Workun has been suspended by Leede from his Branch Manager position since October 15, 2019.

No Other Client Complaints

61. Staff is unaware of any other complaints from any of Workun's clients throughout his career.

PART IV – CONTRAVENTIONS

62. By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC's Rules:

    (a) Between approximately November 2011 and December 2015, the Respondent failed to use due diligence to ensure that recommendations were suitable for the accounts of his client BW, contrary to Dealer Member Rule 1300.1(q); and

    (b) Between approximately November 2011 and December, 2015, the Respondent engaged in discretionary trading with respect to the accounts of BW, without being authorized and approved to do so, contrary to Dealer Member Rule 1300.4.

PART V – TERMS OF SETTLEMENT

63. The Respondent agrees to the following sanctions and costs:

(a) A fine in the amount of $40,000;

(b) A 60 day suspension from registration in any capacity with IIROC;

(c) A suspension from acting as a Branch Manager for 1 year;

(d) Workun will re-write the Conduct and Practices Handbook; and

(e) Costs in the amount of $2,500.

64. If this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees to pay the amounts referred to above within 30 days of such acceptance unless otherwise agreed between Staff and the Respondent.

PART VI – STAFF COMMITMENT

65. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against the Respondent in relation to the facts set out in Part III and the contraventions in Part IV of this Settlement Agreement, subject to the provisions of the paragraph below.

66. If the Hearing Panel accepts this Settlement Agreement and the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Rule 8200 against the Respondent. These proceedings may be based on, but are not limited to, the facts set out Part III of this Settlement Agreement.

PART VII – PROCEDURE FOR ACCEPTANCE OF SETTLEMENT

67. This Settlement Agreement is conditional on acceptance by the Hearing Panel.

68. This Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing in accordance with the procedures described in Sections 8215 and 8428, in addition to any other procedures that may be agreed upon between the parties.

69. Staff and the Respondent agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing, unless the parties agree that additional facts should be submitted at the settlement hearing. If the Respondent does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.

70. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights under the IIROC Rules and any applicable legislation to any further hearing, appeal and review.

71. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement or Staff may proceed to a disciplinary hearing based on the same or related allegations.

72. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.

73. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full of copy of this Settlement Agreement on the IIROC website. IIROC will also publish a summary of the facts, contraventions, and the sanctions agreed upon in this Settlement Agreement.

74. If this Settlement Agreement is accepted, the Respondent agrees that neither he nor anyone on his behalf, will make a public statement inconsistent with this Settlement Agreement.

75. The Settlement Agreement is effective and binding upon the Respondent and Staff as of the date of its

acceptance by the Hearing Panel.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

76. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.

77. A fax or electronic copy of any signature will be treated as an original signature.

DATED this "30th" day of "July", 2020.

"Wayne Frederick Workun"

Respondent

"Andrew Wilson"

Andrew Wilson

Enforcement Counsel on behalf of Enforcement Staff of the Investment Industry Regulatory Organization of Canada

The Settlement Agreement is hereby accepted this "21" day of "August", 2020 by the following Hearing Panel:

Per: "Eric Spink"

Panel Chair

Per: "David Johnson"

Panel Member

Per: "William Welton"

Panel Member

Schedule A: Settlement Payments by Workun to DR

[Redacted by the Panel; see paragraph 6 of the Reasons for Acceptance of Settlement Agreement]