Re Armstrong

IN THE MATTER OF:

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

and

Norman Robert Todd Armstrong

2015 IIROC 34

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

Heard: September 29, 2015 at Toronto, Ontario
Decision: September 29, 2015
Written Reasons: October 5, 2015

Hearing Panel:
Susan Lang, Chair; Zahra Bhutani and Peter Dymott
Appearance:
Robert DelFrate, Enforcement Counsel
Norman Robert Todd Armstrong, Respondent (absent)

REASONS FOR THE DECISION RENDERED AT THE CONCLUSION OF THE HEARING

Introduction

¶ 1 This is a disciplinary proceeding in which IIROC alleges that Norman Robert Todd Armstrong engaged in unauthorized trading and refused to cooperate fully in its investigation. During the period under investigation, Mr. Armstrong was employed first at Raymond James and then at Mackie Research. Although he initially cooperated in the investigation, that cooperation ended following an initial interview. Mr. Armstrong did not respond to subsequent communications from IIROC to resume the interview, to produce documents or to appear at the hearing.

¶ 2 After considering the record and hearing submissions from Enforcement Counsel concerning the allegations, we concluded that Mr. Armstrong had engaged in unauthorized trading between December 2009 and February 2013 in the account of SM, who was a client while Mr. Armstrong was with Raymond James. We also concluded that, beginning on May 20, 2014, Mr. Armstrong failed to cooperate with the investigation. We then heard Enforcement Counsel's submissions on sanctions. In the result, the panel placed a permanent bar on Mr. Armstrong's approval with IIROC; imposed a global fine of $50,000, ordered disgorgement of commissions in the amount of $3,979.89 and awarded costs of $50,000. These are the reasons for our findings and sanctions.

Hearing in Respondent's Absence

¶ 3 Although he chose not to appear, we are satisfied that Mr. Armstrong was aware of the misconduct allegations against him because he was personally served with a copy of the Notice of Hearing on August 4, 2015. In addition, when Mr. Armstrong was initially cooperating with the investigation, he attended for an

approximate one-day interview during which he answered questions asked in relation to the investigation, including questions about trades in the account of his client SM. That interview, which took place on April 29, 2014, ended for the time being when Mr. Armstrong decided to consult counsel before answering more questions. The next day he resigned from Mackie Research. He has not since worked in the investment industry.

¶ 4 Rule 7.2 of IIROC's Rules of Practice and Procedure permits a hearing to proceed in the absence of the respondent if the respondent fails to serve a Response to the Notice of Hearing. In that circumstance under Rule 7.2(1)(b), the panel may "accept as proven the facts and violations alleged [by IIROC] in the Notice of Hearing, and may impose penalties and costs." Rule 13.5 permits the hearing to proceed in the absence of the respondent. As well, upon accepting the facts and violations alleged, the panel "may immediately hear submissions" regarding penalty and impose the penalty. In addition, Rule 13.4 allows a hearing panel to permit the evidence of a witness to be given by sworn statement.

Standard of Proof

¶ 5 The onus is on IIROC to establish its case on the one civil standard of the balance of probabilities. As the Supreme Court of Canada said in *F.H. v. McDougall*, 2008 SCC 53, at para 46, "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."

Standard of Conduct

¶ 6 IIROC Dealer Member Rule 29.1 imposes a duty on a registered representative to: (i) observe high standards of ethics and conduct in the transaction of their business; (ii) not engage in business conduct or practice which is unbecoming or detrimental to the public interest; and (iii) be of such character and business repute that is consistent with the standards outlined in (i) and (ii).

¶ 7 Although terms such as "business conduct or practice unbecoming" and "high standards of ethics" are not specifically defined in the Dealer Member Rules, they are concepts familiar to the industry. As the hearing panel observed in *Peroni (Re),* [2006] I.D.A.C.D. No. 27 at para 60: "At the very least, basic honesty is required. People who work in the investment industry have occasion to control other people's money. The most fundamental expectation is that they do so honestly." *Little (Re)*, [2007] I.D.A.C.D. No. 24 at para 42, put it this way:

> It is our view that transgressions must be looked at in the light of the reputation which the investment industry must maintain in the eyes of the public and the effect which the transgression could have upon that reputation. The public interest demands that Members of the industry, and their employees, be held to a very high standard of financial probity. They must be trusted because they handle other people's money. They must be seen to be trustworthy. If conduct could even appear to cast doubt upon that probity, then it could be detrimental to the public interest and constitute conduct unbecoming.

The Allegations

Unauthorized Trades

¶ 8 In the Notice of Hearing, IIROC alleges that Mr. Armstrong, a registered representative, "regularly entered trades in the account of his client without first obtaining that client's consent." As set out in the Notice of Hearing, the following are the circumstances surrounding the unauthorized trades allegation relied upon by Enforcement Counsel:

- SM became a client of the Respondent in or around 2004. SM was introduced to the Respondent through the Respondent's assistant, whom he had known for several years.
- In or around June 2008, when the Respondent moved to Raymond James, SM moved his account

as well.

- At the time, SM completed a New Account Application Form indicating:
  1. SM was 44 years old and was employed as a technician;
  2. SM had an annual income of approximately $42,000 and net liquid assets of $50,000;
  3. His investment knowledge was recorded as "Good" and he had "Moderate" experience investing in GICs, bonds, income trusts, common shares and mutual funds.
  4. His risk tolerance level was recorded as 100% "Medium" and his investment objectives were recorded as 100% "Growth".
- At no time had SM given the Respondent authority to enter trades on a discretionary or unauthorized basis and the accounts had not been designated nor approved as discretionary accounts. Nonetheless, between December 2009 and February 2013, the Respondent made at least 18 trades in SM's account that were not authorized or consented to by SM prior to the trades being entered.
- The Respondent earned commissions on these unauthorized transactions totaling over $3,900.00. In some instances, SM incurred a deferred sales charge (DSC) fee on the sale of units of mutual funds.
- The Respondent did not discuss these trades with SM prior to the trades being entered, nor did he advise SM that, in some cases, DSC fees would be incurred as a result of the sale of units of mutual funds.

¶ 9 We accept these facts as proven by virtue of Rule 7.2 and Rule 13.5. We also observe that the allegations were supported by the affidavit of the IIROC investigator and the exhibits to that affidavit, including the interview of SM. We had no reason to question the veracity of the evidence presented.

¶ 10 The Conduct and Practices Handbook (Handbook) sets out the Canadian Securities Industry's Code of Ethics and Standards of Conduct for registrants. IIROC Dealer Member Rule 1500.1(a) requires all registrants to read the Handbook, including any updates. Standard C (Professionalism) of the Handbook requires that "every client order must be entered only at the client's direction unless the account has been properly constituted as a discretionary or managed account". The Handbook also requires the registered representative to "obtain the specifics of price, quantity, security and timing of the order from the client." Although temporary discretionary authority can be granted to a registered representative, the Handbook sets out certain required steps that were not taken in this case. SM did not grant discretionary authority over his account to the Respondent. The Handbook further notes that "unauthorized discretionary trading is one of the most common reasons for disciplinary action" and that "disciplinary measures for this type of infraction are appropriately severe".

¶ 11 We concluded that the Respondent, who was required to be familiar with the duties set out in the Handbook, repeatedly entered trades in SM's account without first having discussed those trades with SM. Such unauthorized trading constitutes conduct unbecoming contrary to Dealer Member Rule 29.1 and is a serious violation. See *Harding (Re),* 2011 IIROC 65 at paras 28-38; *Beck (Re),* 2012 IIROC 41 and *Wilson (Re),* 2011 IIROC 47.

Failure to Cooperate

¶ 12 The second count against the respondent alleges:

> Commencing on or about May 20, 2014, the Respondent refused and failed to attend and give information in respect of an investigation being conducted by Staff, contrary to IIROC Dealer Member Rule 19.5.

¶ 13 IIROC Dealer Member Rule 19.5 requires a registered representative to produce documents and attend and give information in the course of an investigation. The Notice of Hearing in this case alleges facts to establish a lack of cooperation by the respondent after his initial participation in an interview by the IIROC investigator.

¶ 14 The history of the investigation shows that in December 2013, the respondent was advised by registered mail of the investigation, including allegations of unauthorized trading in SM's account. As a result of subsequent communications with the IIROC investigator, the respondent attended at IIROC's offices to be interviewed on April 29, 2014. He did not bring counsel to the interview although the investigator had told him that he had the right to counsel. The interview was halted after several hours when the respondent indicated he then wanted to consult counsel. The next day, the respondent resigned his position with Mackie Research and left the industry.

¶ 15 On May 8, the IIROC investigator wrote the respondent reminding him that he continued to be subject to IIROC jurisdiction and asking him for certain documents with a production deadline of May 23. While the May 8 registered letter was returned "unclaimed", the May 8 email was "collected" by the respondent on May 9 at 11:10 am. On May 20, 2014 the Respondent sent an email to the investigator attaching one document that he had referenced during the interview. The IIROC investigator wrote the respondent again on May 20, 2014 both by letter and by email requesting the continuation of his interview. The respondent "collected" the email the same day at 11:59 am, but did not respond. On June 2, the respondent collected an email of the same date seeking the other nine requested documents. On June 3, the respondent collected an email of the same date asking him for dates for continuation of his interview. The email also advised him that he would be compelled to attend if he did not respond by June 17. He did not respond. On June 18, the investigator wrote compelling the respondent to attend for a continuation of the interview on August 19 but several attempts to serve the letter on the respondent personally did not succeed. A copy of the letter was sent to the respondent by email on June 23, but he did not collect that email. Similarly, the respondent did not reply to an August 8 letter. Neither did he attend for the continuation of the interview on August 19. The investigator also tried to contact the respondent by telephone on numerous occasions but he was unsuccessful in doing so. As a result of the respondent's failure to attend, the investigator attests that he was unable to complete his investigation.

¶ 16 We accept these facts as proven and observe they are also supported by various parts of the record filed by IIROC. On the basis of these facts, we found that, from May 20, 2014, the Respondent contravened IIROC Dealer Member Rule 19.5, which requires a registered representative to produce documents and attend and give information. This type of a failure to cooperate, particularly after being given a number of opportunities to do so, is serious for several reasons, particularly the importance of regulating registered representatives in the public interest.

Sanctions

¶ 17 IIROC sought the following sanctions:

1. a permanent bar on the respondent's approval with IIROC;
2. a global fine for both violations in the amount of $50,000; and
3. disgorgement of commissions in the amount of $3,979.89.

¶ 18 In determining the appropriate sanctions to impose on the Respondent, we considered the IIROC Sanction Guidelines, the objectives of securities regulation, and the cases referred to by Enforcement Counsel.

¶ 19 Counsel argued that the requested sanctions are in keeping with the seriousness of the respondent's conduct, will serve the principles of general, including industry deterrence, as well as specific deterrence. As well that they are in keeping with IIROC's mandate to set and enforce regulatory and investment industry standards, protect investors and strengthen market integrity while maintaining efficient and competitive capital markets and to foster public confidence in the securities industry.

¶ 20 The IIROC Sanction Guidelines, which came into effect in February 2015, recognize that the determination of sanctions is both fact specific and discretionary to the panel. That said, the Guidelines set out certain helpful general principles to promote consistency, fairness and transparency and to reflect their primary purpose of disciplinary proceedings "to maintain high standards of conduct in the securities industry and to protect market integrity".

¶ 21 We find the following principles and key factors relevant in considering the appropriate sanctions:

- specific and general deterrence particularly in protecting the investing public, strengthening market integrity and enforcing appropriate standards and practices
- the more than 18 transactions at issue in SM's account over more than three years of trading activity;
- the intentional nature of the respondent's conduct as he knew or should have known of the requirements for obtaining trading authorizations as well as his obligation to cooperate with the investigation;
- the respondent's almost $4,000 financial benefit from commissions as a result of the unauthorized trading;
- the lack of acceptance of any responsibility by the respondent who decided to evade the investigation and absent himself from the hearing, and apparently to walk away from his professional obligations as a registered representative;
- on the other side of the coin, the absence of a prior discipline record since the respondent became a registered representative in 2001; and
- sanctions imposed in similar cases.

¶ 22 For the purposes of sanction, Enforcement Counsel relied on additional evidence that was not recited in the Notice of Hearing and accordingly required supporting evidence. The additional facts relate to an allegation that the respondent intentionally "created" notes to support his position that he had consulted SM, particularly with respect to a specific trade on December 27, 2012. When asked about this trade, the respondent initially attested in his interview to discussing it with SM at a Christmas party but then added that he confirmed the trade with a December 27 telephone call with SM. The respondent admitted in his interview that he did not have SM's work number. In his interview, SM denied any such conversation and said that the respondent could not have spoken with him on that date because he was at work and not at the home number that the Respondent said he called. Further, SM checked his cell phone records for that day and there was no call from the Respondent.

¶ 23 In addition, the respondent's notes indicated this trade was "unsolicited". All the evidence, including SM's lack of investment sophistication makes it unlikely that SM would have initiated this trade or indeed any trade. This additional evidence means that the respondent likely fabricated his notes after the fact in a misguided attempt to cover up his misconduct. Such a cover up raises various concerns, particularly concerns about whether the respondent can ever be trusted to act in an honest and fair manner in his dealings with clients. It is an important circumstance to take into account in imposing appropriate sanctions.

¶ 24 We find the respondent's conduct to be serious and deliberate and repeated. We consider it important to deter this type of behaviour as well as to encourage cooperation with investigations. We impose the following sanctions:

1. a permanent bar on the Respondent's approval with IIROC;
2. a fine for unauthorized trades and failure to cooperate with the investigation payable by the respondent in the global amount of $50,000; and
3. disgorgement of commissions by the respondent in the amount of $3,979.89.

¶ 25 IIROC also seeks costs of $73,518.50. However, Enforcement Counsel did not direct us to any authorities where such an amount of costs was awarded in similar circumstances. In our view, the costs award should be reduced to an amount in keeping with the cases to which we were referred. Costs are awarded to IIROC payable by the respondent in the amount of $50,000.

Dated at Toronto, Ontario this 5th day of October, 2015

Susan Lang, Chair

Zahra Bhutani

Peter Dymott