

Re Wong

IN THE MATTER OF:

**THE DEALER MEMBER RULES OF THE
INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA**

AND

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

HECTOR WONG

2010 IIROC 50

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

Hearing: September 29, 2010 in Toronto Ontario
Decision: October 29, 2010
(50 paras.)

Hearing Panel:

Paul M. Moore, Q.C (Chair), Hugh McNabney, Robert Guilday

Appearances:

Natalija Popovic & Milton Chan, Counsel for IIROC Staff

Hector Wong, Respondent

Steven H. Goldman & Stephanie Mandin, Respondent's Counsel

DECISION AND REASONS AS TO PENALTY

Background

¶ 1 On June 16, 2010 we issued our decision and reasons on the merits in this matter.

¶ 2 We concluded that the respondent engaged in business conduct or practice which is unbecoming or detrimental to the public interest in that he misappropriated funds from his member firm employer by executing transactions in US treasury bills which had the net effect of generating profits in two of his personal accounts at the expense of the inventory account of his member firm employer, contrary to IIROC Rule 29.1.

¶ 3 We found that the respondent's actions were intentional, deceitful, and intended to transfer to his account funds that did not belong to him. He knew what he was doing and the consequences of his actions.

Decision

¶ 4 We order that the respondent be permanently suspended and barred from further registration in any capacity with IIROC.

¶ 5 We order that the respondent pay IIROC a fine of \$100,000.

¶ 6 We order that the respondent pay IIROC \$25,000, being approximately 50% of the costs incurred by IIROC up to but not including the date of the penalty hearing.

Reasons

¶ 7 The respondent gave testimony at the penalty hearing. We were advised that the respondent's income in 2006 was \$180,000 per annum, that he was single and had never married and that he had a frugal lifestyle. We were also advised that his net worth in 2006 was about \$900,000, mostly in accounts at his firm and in bank accounts. We were advised that the respondent had handed over to his firm \$1,051,365.07 and that the respondent was now out of work and searching for work through an agency. We were advised that the respondent had completed a compliance officer course.

¶ 8 The respondent did not submit any substantive documentation such as tax returns or other financial statements to support his suggestion that he was impoverished.

Respondent's Submissions

¶ 9 Respondent's counsel submitted that several mitigating factors should be taken into account in assessing the appropriate sanction. First, Mr. Wong had no prior disciplinary record. Secondly, he never dealt with clients and did not trade on clients' accounts. Thirdly, he engaged in transactions which, on their face, were financially complex. Fourthly, he engaged in what he thought were transactions that were legal and that he was entitled to the profits from them. He believed that the monies and the securities he was trading on were monies that he owned, that belonged to him. Fifthly, upon being confronted by his firm, he immediately tried to explain precisely what he had done although no one listened to him. Sixthly, he should not be penalized for asserting that what he did was right. In other words, he should not be penalized for defending himself, whether or not his actions amounted to misappropriation. Seventhly, he voluntarily repaid the funds he allegedly misappropriated, and more. He should be given credit for a voluntary rehabilitative effort. Eighthly, there was no evidence that his firm ever suffered any loss. Ninthly, the additional \$350,000 paid to his firm over and above the amount (\$700,000) that his firm alleged was its loss should be taken into account, to obviate the need for a fine, because, in a way, the \$350,000 payment can be described as a penalty.

¶ 10 Counsel for the respondent submitted that under the circumstances, a reprimand should be the only sanction plus a requirement that in order to be reregistered the respondent should be required, perhaps, to rewrite his examination if a suspension is imposed.

¶ 11 Respondent's counsel reviewed much of the evidence on which we based our findings of fact, arguing, contrary to our findings of fact, that what the respondent did was not wrong, or if it was wrong, was not something that he believed was wrong. Counsel argued that the respondent was subject to coercion in repaying moneys.

¶ 12 We reminded counsel that the penalty hearing was not for the purpose of opening up our findings of fact, or of deciding new issues not before us.

¶ 13 Some of the respondent's counsel's arguments were inconsistent. On the one hand, he argued that repayments were voluntary and that the respondent should be given credit for them as rehabilitative efforts on the part of the respondent. And yet, he argued the repayments were made because he was coerced.

¶ 14 Staff only alleged and proved misappropriation of \$210,000. Yet respondent's counsel referred to payments above \$700,000 (i.e. \$350,000) as payments that were made without justification, suggesting to us by implication that the respondent had in fact [although not alleged and proved] misappropriated \$700,000 and not just \$210,000.

¶ 15 In the last analysis, we declined to reopen the issues of the amounts, purposes of and motivation for repayments that the respondent had made.

Staff's Submissions

¶ 16 Staff referred us to several precedents.

¶ 17 In *Re McCrea*, [2000] I.D.A.C.D. No. 1, McCrea abused his backroom operational support role at his firm and conducted numerous transaction in his firm's inventory and error accounts, and inflated share prices for his personal benefit. The hearing panel in that case imposed a permanent prohibition, a fine in the amount of \$100,000 and required McCrea to pay staff's costs. McCrea held a comparatively more junior role than the respondent, and his profit was substantially smaller, only causing "minor losses to the firm's inventories and gains in his personal account."

¶ 18 In *Re Tang*, [2003] I.D.A.C.D. No. 25, Tang was in a position to set the foreign exchange rate for specific transactions, like the respondent. Tang applied rates that were inordinately more favourable than regular rates in trades conducted in the accounts of her family members and made an unjustified profit of \$925,000. The hearing panel imposed a permanent prohibition, a fine in the amount of \$150,000 and awarded costs against Tang. Tang admitted to her wrongdoing as soon as her misconduct was discovered, and fully reimbursed the losses incurred by her firm.

¶ 19 In *Re Mangin*, [2005] I.D.A.C.D. No. 9, Mangin misappropriated money that belonged to his firm by redirecting a cheque payable to the firm to his own account, and by assigning losses to a firm inventory account. His misconduct resulted in an unjustified profit of \$207,000. The hearing panel imposed a permanent prohibition, a \$150,000 fine for the specific counts of misconduct, costs and disgorgement of profit against Mangin. Mangin made admissions to staff during the investigative stage and acknowledged his wrongdoing.

¶ 20 In *Re MacKay*, [2005] I.D.A.C.D. No. 14, MacKay misappropriated \$138,373 from two internal suspense accounts at his firm. The hearing panel imposed a permanent prohibition, a fine of \$100,000, and costs. MacKay admitted to his wrongdoing.

¶ 21 We were advised by staff that of the 46 reported IDA/IIROC cases involving misappropriation, a permanent prohibition was imposed in 44 of the cases. Exceptions were made in two cases where the respondents misappropriated nominal amounts from family members or friends.

¶ 22 Staff submitted that the respondent had shown no appreciation for the egregious nature of his misconduct and no remorse. Staff submitted that the fact the respondent had no prior disciplinary record with IIROC or the IDA, and that he cooperated somewhat throughout the investigation, were outweighed by numerous aggravating factors.

¶ 23 Staff submitted that harm to employers is inherent in any misappropriations. The amount of misappropriated funds from his firm, as claimed and proved by staff, was \$210,088. This caused financial harm to the firm during the period. Staff submitted that the fact the firm recouped those monies after the fact does not diminish the fact that harm is inherent in such misconduct.

¶ 24 Staff submitted that misappropriation undermines the foundations of trust between a registrant and his employer which is essential to the securities market and, in that sense, such misconduct has caused great harm to the securities market.

¶ 25 Staff submitted that the respondent's repayment to his firm could not be considered a voluntary rehabilitative effort. He claimed repeatedly that he was bullied into making those payments after his misconduct and it is disingenuous for counsel to claim the respondent to be a victim while at the same time demanding credit for voluntary rehabilitative effort.

¶ 26 Staff observed that under the IIROC sanction guidelines, the financial condition of a respondent could be taken into account in setting a fine, but that tax returns, or reliable financial statements should be submitted in evidence as a basis to establish lack of net worth.

Analysis

¶ 27 We agree with respondent's counsel that the respondent had a right to vigorously defend himself against the allegations and that he should not be penalized in any way for his defense. However, the issue before us is not whether the respondent should be penalized because the respondent defended himself and denied the charges against him, but, rather, whether there are any mitigating circumstances that would support no

suspension, or a lesser suspension than a permanent ban, and no fine, or a lesser fine than the one we would otherwise impose.

¶ 28 We have previously found that there has been misappropriation; it was egregious; it was deliberate and deceptive. It is fully within the rights of the respondent not to agree with the findings of fact of this panel and our decision on the merits. Indeed, it is fully within the rights of the respondent to appeal our decision on the merits. If he is successful on the appeal, our decision as to penalty will fall by the wayside. However, it is one thing not to impose greater penalties than might otherwise be the case, just because the respondent vigorously defends against the allegations against him. This does not prevent us from concluding that we are unable to find mitigating circumstances in this case that might otherwise lead us to lesser sanctions as appropriate for the respondent.

¶ 29 To achieve both general and specific deterrence, the penalties imposed must be appropriately unpleasant to the respondent taking into account the respondent's specific misconduct, and must also be in line with industry expectations. As stated in *Re Mills*, [2001] I.D.A.C.D. No. 7 at p.3:

Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for conduct under consideration, it may undermine the goals of the Association's disciplinary processes; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Counsel in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is preventative rather than punishment.

¶ 30 As demonstrated by his penalty submissions, the respondent has shown no appreciation for the egregious nature of his misconduct. Further, he has shown no remorse for any of his conduct.

¶ 31 A registrant is bound to act in an ethical manner. Misappropriation is related to theft and is one of the most serious regulatory offences; the penalty upon conviction is generally a permanent ban.

¶ 32 The respondent's deceitfulness towards his member firm strikes at the heart of the principles of trust and full disclosure upon which the investment industry is built. As stated in *Re Furevick*, [2007] I.D.A.C.D. No. 30, at para 6:

That the respondent lied to his employer is a serious matter. We note that the whole industry is built on trust, and that if an employer cannot have confidence in its employees, it undermines the ability of the firm to ensure that its business is handled in a proper and ethical manner.

¶ 33 The seriousness of the respondent's dishonest conduct is exasperated by the number of times it was repeated during the period in question.

¶ 34 The IIROC dealer member disciplinary sanction guidelines, at section 1.4, recommend a permanent prohibition in almost every case of misappropriation. Only in cases where extensive mitigating circumstances exists would a permanent prohibition be replaced with a lengthy suspension.

¶ 35 We carefully reviewed the cases referred to us by both counsel. There exists in the case before us no distinguishing factor that would justify less than a permanent ban under the circumstances.

¶ 36 A clear message must be sent to the industry and to the respondent that misappropriation is a serious matter. Anything less than a permanent ban in this case would undermine industry expectations and imperil the trust and confidence in securities markets that is shaken when this kind of misappropriation occurs.

¶ 37 Staff submitted that a fine of \$100,000 was appropriated under the circumstances. The IIROC sanction guidelines suggest amounts of up to three times the amount misappropriated as a fine.

¶ 38 We heard no cogent evidence as to the respondent's current net worth and are uncertain as to his ability to pay monetary sanctions. He has already found approximately \$1 million to repay his firm.

¶ 39 Nevertheless, as observed by the British Columbia Court of Appeal in *Hogan v. British Columbia*

Securities Commission, 2005 BCCA 53 at paragraph 17, allowing the amount of penalty to be commensurate with a respondent's ability to pay would undermine the general deterrent effect of the penalty, as it would encourage those with difficult financial circumstances to engage in similar misconduct thinking that they will face no real sanction.

¶ 40 IROC hearing panels have ruled that a respondent's present ability to pay a fine should not be an important factor in determining whether a fine should be imposed, and, if so, in what amount. Panels, however, have considered the respondent's financial circumstances in determining the payment schedule of monetary sanctions. The respondent must, however, furnish adequate evidence in support of his claim for precarious financial circumstances [see *Re Aloni* [2008] IROC No. 10 at para 44].

¶ 41 A fine must have some significance. It should not appear to be a slap on the wrist. The very minimum for an appropriate fine in this case is \$100,000.

¶ 42 We were not requested by staff to issue a disgorgement order because the respondent had repaid to his firm the \$210,000 misappropriate. A disgorgement order is not necessary in the circumstances.

Costs

¶ 43 Staff submitted an affidavit and bill of costs. Staff's evidence suggested that total costs of staff's counsel and IROC's investigation up to but not including the time of the penalty hearing amounted to approximately \$60,000 although staff requested a costs award of \$50,000.

¶ 44 Respondent's counsel suggested that he had not had an opportunity to examine this matter. He suggested that under the circumstances a costs award of no more than \$10,000 may be appropriate.

¶ 45 We recommended to counsel that respondent's counsel carefully review the docket entries and affidavit evidence supporting staff's claim for costs. We also suggested that we would await a written submission from the respondent as to appropriate costs. We suggested that if respondent's counsel wished to cross-examine the deponent of staff's affidavit or to submit further evidence to this panel as to costs, we would be prepared to reconvene and to continue the hearing as to penalty.

¶ 46 Dates were agreed by which respondent's counsel would make a submission on costs in writing and staff would respond or comment on the submission. Further submissions were received which we reviewed carefully. They added nothing to what we had already heard and reviewed in the hearing as to penalty.

¶ 47 Determining a costs award is more an art than a science. In the case before us, we have no evidence to suggest that staff's costs were unreasonably high.

¶ 48 However, it is not unusual for a costs award to be less than costs incurred.

¶ 49 In the circumstances of this case, we have found that the conduct of the respondent was egregious. We have also heard some indications that the respondent has suffered financial consequences as a result of his action.

¶ 50 Balancing all factors, we determine that a costs award of \$25,000, being approximately one-half of the costs claimed by staff, is appropriate.

Dated at Toronto this 29th day of October, 2010.

Paul M. Moore, Q.C.

Hugh McNabney

Robert Guilday