

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Insurance Act*, R.S.O. 1990, c. 1.8, as amended (the "Act");

IN THE MATTER OF a decision of the Executive Director, Licensing and Market Conduct Division of the Financial Services Commission of Ontario, to revoke the Level II life insurance agent's licence of Arun Shrivastava;

AND IN THE MATTER OF a hearing in accordance with sections 17 and 393(10.2) of the Act.

BETWEEN:

ARUN SHRIVASTAVA

Appellant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Colin H.H. McNairn
Chair of the Tribunal

APPEARANCES:

For the Appellant:
Mr. Glenroy Bastien

For the Respondent:
Ms. Larissa Easson

HEARING DATE:

November 3, 2006

REASONS FOR DECISION ON APPLICATION FOR STAY

The Executive Director, Licensing and Market Conduct Division of the Financial Services Commission of Ontario (“FSCO”) made an order, under the *Insurance Act*, dated August 4, 2006 (the “Order”) revoking the Level II life insurance agent’s licence held by Arun Shrivastava. Mr. Shrivastava appealed that Order to this Tribunal. He then made application to the Tribunal, pursuant to s. 17(6) of the *Insurance Act*, for a stay of the Order pending the disposition of the appeal. The Tribunal directed that a hearing be held on that application, over which I presided as a single-member panel of the Tribunal.

I have decided to dismiss the stay application on the basis that the risk of harm to the public if the application were to be granted exceeds the risk of harm to Mr. Shrivastava if the application were to be denied.

The Prior Proceedings

The Executive Director made the Order, under delegated authority from the Superintendent of Financial Services, following a hearing by a three-member Advisory Board. Upon the conclusion of the hearing, the Board made a written recommendation to the Director, with supporting reasons, that Mr. Shrivastava’s licence be revoked. The Director adopted that recommendation in making his Order.

The Test for Granting a Stay

The Tribunal has set out a three-pronged test for deciding whether to grant a stay of an order under appeal in the case of *Rendall v. Superintendent of Financial Services* (FST Decision No. 10087-1999-1). According to that test, which I adopt for the purposes of this application, positive answers to all of the following questions are required before a stay will be granted:

- Is there a serious (as opposed to a frivolous or vexatious) question to be tried on the appeal?
- Would the appellant suffer irreparable harm if the request for a stay were to be denied?
- Is the risk of harm to the appellant if the request were to be denied greater than the risk of harm to the public if the request were to be granted?

The Admission of New Evidence on the Stay Application

On an appeal from an order made under the *Insurance Act* when there has been a hearing before an Advisory Board, the Tribunal would not normally entertain new evidence that had not been put to the Board (see Rule 43.03 of the Rules of Practice and Procedure before the Financial Services Tribunal). However, in applying the *Rendall* test, on an application for a stay of such an order, the questions to be addressed are not the same as those that must be addressed in assessing the merits of the appeal. Bearing this in mind, I ruled that I would hear the oral evidence of Fred Hollis, an investigator for FSCO, who was put forward by counsel for the Superintendent, provided that his evidence was confined to addressing certain allegations, evidence or findings as to the harm that would be suffered by Mr. Shrivastava for so long as his licence was lifted. The nature and extent of that harm is directly relevant to this application, although it is likely to be of limited or no relevance when the Tribunal comes to decide whether to allow the appeal.

The reasons of the Advisory Board, supporting its recommendation to the Executive Director, recite the fact that Mr. Shrivastava testified that he was under a good deal of financial pressure and that he had to support two adult children attending university. Those reasons also include a finding that Mr. Shrivastava “was driven by greed and the necessity of earning commissions to support himself and his children who were in university and whose education [he] was financing”. The grounds for the present application, which Mr. Shrivastava sets out in his written notice of application, include the claim that he is well qualified and his life agent business “has been the only means to earn his living and support his family”. Finally, the Advisory Board had documentary evidence before it, which is now before me on this application, of Mr. Shrivastava’s then current errors and omissions insurance coverage and of his brokerage agreement with Unity Life of Canada, which contained a provision to the effect that the agreement would be automatically cancelled should Mr. Shrivastava lose his life agent’s licence.

Mr. Hollis gave evidence at the hearing on this application that in the month or so before this hearing, he had;

- been in contact with Anurag Shrivastava, the youngest (23 years of age) of Mr. Shrivastava’s two children, who told Mr. Hollis that he had left university in June of 2006 and was employed as a life insurance agent by Primerica Financial Services, and that he was living at home with his

parents but covering his own expenses such as the cost of cable and internet services;

- learned from Anurag Shrivastava that his older brother, who also lived with their parents, had graduated from Ryerson in 2005 and had been working for the Royal Bank of Canada since then;
- obtained an Equifax credit report, dated October 31, 2006, on Anurag Shrivastava, which was admitted in evidence on this application, showing that he had a number of credit cards and a generally good credit rating;
- contacted the broker through which the appellant, Arun Shrivastava, had obtained his errors and omissions insurance to advise of the licence revocation and been subsequently provided with a copy of a letter from the broker advising Mr. Shrivastava of the cancellation, effective August 4, 2006, of his insurance, which letter was admitted in evidence;
- contacted Unity Life of Canada to advise of the licence revocation and been subsequently advised that Unity Life had sent Mr. Shrivastava notice of cancellation of his brokerage agreement.

In cross-examination by counsel for Mr. Shrivastava, Mr. Hollis conceded that;

- the Equifax report did not indicate the extent to which Anurag Shrivastava might be supported by his father,
- while holding a Level II life agent's licence, Arun Shrivastava could contract with various insurance companies and did not need to be sponsored by a single company, and
- although a life agent was required to have errors and omissions insurance, it was not clear that Mr. Shrivastava would be unable to obtain such insurance should the revocation of his licence be stayed.

Mr. Shrivastava did not put forward any evidence on this application. I accept the evidence-in-chief of Mr. Hollis as truthful and reliable, even though it is to some extent hearsay evidence. I also accept the limitations on the implications that can be drawn from Mr. Hollis' evidence that were conceded in cross-examination. To the extent that Mr. Hollis' evidence is inconsistent with any of Mr. Shrivastava's evidence on the record of the proceedings before the Advisory Board, I prefer Mr. Hollis' evidence as he had no apparent motivation to be less than truthful and his evidence was not challenged by any evidence put forward by Mr. Shrivastava on this application.

The Application of the Test for Granting a Stay

The First Limb of the Test

Mr Shrivastava has challenged the Order revoking his licence on the basis that the conclusions of the Advisory Board about his conduct were wrong and inconsistent with the evidence, that the proceeding to revoke his licence arose out of a conspiracy among several life insurance companies to put him out of business,

that most of the evidence against him was fabricated by one or more of those companies and that the Advisory Board had failed to make an impartial determination on the facts before it. I do find it necessary to decide whether a serious question is raised by these grounds of appeal since I have concluded that the risk of harm to the public, if a stay of the Order were to be granted, exceeds the risk of harm to Mr. Shrivastava, if the stay were to be denied (see below). In other words, I have concluded that the third limb of the three-part test has not been satisfied.

The Second Limb of the Test

I have no doubt that Mr. Shrivastava would suffer some harm if the request for a stay were to be refused in the sense that he would be denied the opportunity to earn a livelihood as a life agent during the period up to the disposition of his appeal. That harm would be irreparable in that he would have no right to compensation for any loss of income (unless, perhaps, he can establish a wrongful conspiracy against him, on the part of various insurance companies, in separate proceedings). The evidence of Mr. Hollis indicates that the harm to Mr. Shrivastava, attributable to any refusal to grant a stay of the Order, would be less severe than the record of the proceedings up to the hearing of this application might suggest. I do not, however, find it necessary to decide whether Mr. Shrivastava would suffer the degree of irreparable harm necessary to satisfy the second limb of the three-part test since I have concluded that the third limb of that test has not been satisfied (see below).

The Third Limb of the Test

The risk of harm to the public if the Order were to be stayed is evident from the findings of fact and the conclusions that were drawn from those facts by the Advisory Board. The Board found, among other acts of misconduct, that Mr. Shrivastava had, on several occasions;

- ◆ represented to targeted prospects that he was either a consultant for their current insurer or their current insurance agent, when that was not the case, and that he wished to review their current policy although he then proceeded to attempt to sell them additional or replacement life insurance coverage with another insurer;
- ◆ referred targeted prospects to confidential information about them, which was on his notebook computer, that he had no authority to use or possess;
- ◆ failed to disclose or consider the appropriateness or suitability of the policies he was marketing for his targeted prospects.

The Board also found that Mr. Shrivastava had carried on a life agency business for a period of time when he did not have the required errors and omissions insurance. Such insurance coverage provides some recourse for members of the

public who have suffered loss as a result of the negligent conduct of an insured agent.

The Board came to a number of conclusions, based on its findings of fact, including the following;

- ◆ the conduct of Mr. Shrivastava suggests a shortfall in his character that made him the subject of appearances before FSCO on a regular basis over the past ten years and that "this character deficit is both perpetual and pervasive";
- ◆ "there is no hope of rehabilitation or that [Mr. Shrivastava] will mend his ways";
- ◆ "the evidence is overwhelming that the public is at risk by allowing ... Mr. Shrivastava to continue soliciting insurance business"; and
- ◆ "the probability of recidivism, as demonstrated by past conduct, is absolute".

When the risk of harm to the public should the request for a stay of the Order be granted, as revealed by the findings and conclusions of the Advisory Board, is set against the risk of harm to Mr. Shrivastava, as described under the previous sub-heading of these Reasons, should the request for a stay be denied, the risk to the public clearly outweighs the risk to Mr. Shrivastava.

Disposition

Therefore, I refuse Mr. Shrivastava's application for a stay of the Order revoking his Level II life insurance agent's licence.

DATED at Toronto this 8th day of November, 2006

"Colin H. H. McNairn"

Colin H.H. McNairn
Chair of the Tribunal