THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: FSP49/2020

In the matter between:

ALISHA GOVENDER APPLICANT

and

KING PRICE INSURANCE COMPANY LIMITED RESPONDENT

Summary: Debarment of FSR under sec 14 of the FAIS Act – FSP may not determine period – FSR may apply after twelve months

DECISION

[1] The applicant seeks the reconsideration of her debarment as a financial service representative in terms of sec 14 of the FAIS Act 37 of 2002 by her employer, the respondent, who is a financial service provider. The present application is under sec 230 of the Financial Sector Regulation Act, 2007.

[2] The parties have waived their right to a formal hearing and agreed that the matter may be decided on the papers and with reference to their heads of argument.

[3] The applicant was found guilty of misconduct during a disciplinary hearing and the chair of the hearing (Seele Mokwena) recommended that her employment be summarily terminated by the employer. The employer accepted the recommendation and pursuant

thereto instituted debarment proceedings against the applicant and having considered her submissions debarred her.

[4] The FSP indicated that the debarment is for one year. That is incorrect. Debarment under sec 14 is debarment, and the FSP is not entitled to place a time limit on the debarment. The FSR may, under DETERMINATION OF REQUIREMENTS FOR REAPPOINTMENT OF DEBARRED REPRESENTATIVES, 2003 published under Board Notice 82 in Government Gazette 25299 of 8 August 2003, apply after twelve months for re-admission.

[5] The debarment is formally in order, but the applicant alleges that she was not guilty of the complaint laid against her. Her case is that the chair failed to apply her mind to the applicant's evidence. This requires a reconsideration of the factual findings of the chair because there are no new facts on which reliance is or could be placed and because the applicant's defences are the same as those before the chair and, subsequently, by her employer, the FSP.

[6] The applicant commenced her employment during March 2015 and was dismissed on 17 June 2020. At the time of her dismissal, she held a managerial position as a Team Leader: Sales. Her daily duties included the facilitation payments of referral fees to sale advisors and compiling statistical reports confirming the sales to notify the respondent's advisors of the number of successful refers which would entitle the advisor to payment of referral fees.

[7] The charge at the disciplinary hearing, and the basis of her subsequent debarment, was that she acted dishonestly "in that for the period July 2019 to January 2020, as the

Team Leader in Sales entrusted to the administer referral fees, you dishonestly inflated the referral fees paid to employees."

[8] It is not disputed that she did so, and the only question was whether she had done so dishonestly. Her case, according to the heads of argument, is in essence the following:

> The Applicant was working under the supervision of a certain Mr. Daniel Dan, the Respondent's General Manager: Sales.[1]
>
> From time to time, the Applicant was approached by her line managers with instructions to add amounts to the referral fees. It was explained to the Applicant that these additional amounts were in respect of errors, short payments and incentives on the mid-month commission pay runs that needed to be rectified. The Applicant accepted the instructions, which were not manifestly wrongful, and complied with them.
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> The Applicant copied several functionaries in electronic mail messages sent to the finance department in respect of these payments. This shows that the Applicant never intended to deceive the Respondent.
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> The Applicant acknowledges that referral fees payable to employees were indeed increased solely because she was instructed to add amounts to the referral fees due to employees which amounts were (as explained to the Applicant) in respect of underpayment to employees of other amounts/benefits due to them.
>
> The Campaign Manager in the Sales Department (who is also the Commission Manager) also instructed the Applicant by WhatsApp messages to make similar payments and the Applicant acted in good faith when she obeyed the said instructions.

[1] The submission that the emails from Mr Dan were ignored by the chair is wrong. See the first sentence under the summary of her evidence.

> The Applicant asked the Respondent's human resources representatives for standard procedures for payment of referral incentives and the Applicant was informed that the Respondent had no such procedures.

[9] The chair dealt with these defences fully and rejected them. It is accordingly unfair and groundless to allege that the chair did not apply her mind to the evidence of the applicant. To dispel the argument, I quote at length form the decision:

> Firstly, if she regarded this as an instruction considering that the general manager was her superior and the head the sales department, the employee is reasonably expected to have been aware that the instruction was not only unreasonable but also unlawful.
>
> She was therefore under no obligation to carry out such an instruction. This assertion is based on the fact that the employee was aware of the criteria which qualified sales advisors to be paid referral fees. To this extent, she regularly sent a statistical report to the sales advisors to notify them of the number of successful referrals each advisor had for the month before she compiled a request for the payment of the referral fees to the advisors who qualified in terms of the criteria. Contrary to this procedure of which she was the administrator, she would draw up and submit a payment request to the finance department for payment of referral fees to advisors who did not qualify in terms of the set criteria.
>
> The employee, like some of the witnesses, indicated that she did not question her superiors. This is contrary to a version she put to Burness that she always had arguments with the general manager about payment of commission to team managers. If she could query such impermissible payments with the general manager it implies that she was aware that such payments were wrong.

Therefore if the general manager did not listen to her concerns, one would reasonably expect her to bring this to the attention of the general manager's superiors. It was her fiduciary duty as an employee and her responsibility as a manager to report such wrongdoing.

It is for these reasons that I assert that even if the employee acted on the instruction of her superior to add advisors and team managers who did not qualify on the payment request, she was aware that such instruction was unreasonable and unlawful and ought to have refused such instruction.

The second factor that I need to deal with in relation to the employee's justification of her conduct is her contention that she was not aware that the general manager or his conduct was wrongful. Part of this justification is that there were no standard procedures for payment of incentives. Whereas the absence of standard operating procedures in organizations lead to haphazard execution of tasks and lack of uniformity, in the circumstances the employee had guidelines of who qualified to be paid and the amounts payable in accordance with those guidelines. Hence she was able to provide the sales advisors with their referral statistics before she allocated the incentives to qualifying advisors. Thus her justification does not hold water. Considering her level of responsibility as a team manager with the duty to manage the payment of referral fees to sales advisors in accordance with the criteria she clearly knew and understood, one can conclude that she was not an average employee. Therefore if she knew and understood this criteria for the payment of referral fees, it is not persuasive nor is it acceptable that she would claim not to have been aware that the general manager's conduct to instruct her to pay referral fees to non-deserving sales advisors was wrong.

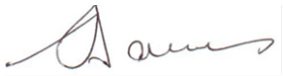
Her conduct was therefore dishonest because she identified in her statistical report the sales advisors who qualified for the referral fees but submitted a misrepresented request

for payment to the finance department which included sales advisors who did not meet the incentive criteria.

[10] The chair in the introductory part of the decision made some assumptions in favour of the applicant which, on the face of it may have gone in another direction. In short, the applicant had a fair hearing, and the decision of the chair was fully justified on the evidence. The decision to debar her for lack of honestly was, accordingly, also justified and, in fact a necessary corollary.

[11] The application is dismissed.

Signed on behalf of the Tribunal on 14 December 2020



LTC Harms (deputy chair)