

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: FSP53/2023

In the matter between:

GADIJA DAVIDS

Applicant

and

DISCOVERY CONNECT DISTRIBUTION SERVICES (DCDS) LTD

Respondent

Tribunal Members: G-M Goedhart SC (Chairperson),
KE Moloto-Stofile, SM Maritz

Appearance for the applicant: In person

Appearance for the respondent: Mr B Bleazard

Date of hearing: 27 March 2024

Date of decision: 23 April 2024

Summary: application for reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 ("FSR Act") of decision to debar a representative in terms of section 14(1)(a) of the Financial Advisory and Intermediary Services Act 37 of 2002 ("FAIS") regarding compliance with the fit and proper requirements, specifically the character qualities of honesty and integrity.

DECISION

Introduction

1. The applicant was employed as a telesales representative (Insure Sales Consultant) by the respondent, Discovery Connect Distribution Services Ltd (“the respondent”/“Discovery”). The applicant was employed from 1 February 2016 until 30 August 2023.
2. The applicant was charged with the manipulation of 19 quotes on policies activated during the period May 2022 to November 2022, thereby causing financial loss to the respondent in the amount of R94 929.¹
3. The charges against the applicant were made following an internal actuarial investigation into premium manipulations. The investigation identified two methods by which the identified Discovery agents² were able to force the Discovery quoting system to calculate a moderation discount,³ resulting in lower premiums. The first was through a change in the voluntary excess on specific benefits and the second was through a change in the licence details for the primary driver of a vehicle.

¹ Whilst the letter of 10 July 2023 reflects that the respondent suffered a financial loss of R94 929 monthly, an averment also repeated in the disciplinary proceedings (Part B, p18), in the proceedings before the Tribunal the respondent contended that it suffered a total loss of R94 929.

² 69 agents were identified, but 12 (including the applicant) were charged.

³ A moderation discount is a discount that is calculated within the Discovery premium calculation system typically without any user intervention.

4. The respondent's investigation concluded that the applicant's conduct amounted to a total of six instances which impacted the excess field button, and a total of 16 instances where the license field button was adjusted multiple times based on when the client acquired their driver's license as pulled from the Transunion database. The Transunion database is a database used universally by all insurance companies.
5. The respondent averred that the applicant's conduct resulted in the client's premiums being reduced and not being aligned to the client's risk profile, and this impacted on the client's ability to make an informed decision with regard to the affordability of a higher excess amount linked to the policy in the event of a claim.
6. The way in which details were changed allowed agents to save the lower premium without having to change the details on the quoting database.
7. The process involved manually exiting the screen with the quote, re-entering and re-opening the quote. This would be done a number of times and resulted in lower premiums and higher sales volumes for agents.
8. The respondent's contention is that the repeat behaviour demonstrated an intent to change premiums, and that it was not a once-off incident. The conclusion was that it was an intentional act by the applicant, because the behaviour was not present across all agents.

9. The applicant received the notice to debar on 10 July 2023.
10. A disciplinary inquiry was held on 21 July 2023 to determine if the applicant was guilty of misconduct and if she possessed the requisite characteristics of honesty, integrity, conduct and good standing as a financial adviser and as a Discovery employee.
11. Mr Moodley, the chairperson, recommended a debarment of the applicant pursuant to the inquiry.
12. The applicant received the recommendation for her debarment on 19 August 2023.
13. The application for a reconsideration of the debarment was brought on 18 September 2023.
14. The applicant submitted a request to adduce further evidence under oath as contemplated by section 232(5) of the FSR Act on 22 February 2024 and the respondent responded thereto on 7 March 2024. The further evidence was accepted by the Tribunal.

Basis for reconsideration

15. The applicant avers that the disciplinary proceedings were both substantially and procedurally unfair in that:

- 15.1. evidence was ignored;
 - 15.2. she was not automatically afforded the opportunity to present her evidence and the chairperson moved into closing statements soon after the data analyst presented their evidence; and
 - 15.3. the chairperson was biased.
16. The applicant's answer to the complaint against her is that there was a systems fault which meant that she had to go back into the system multiple times in an effort to correct the systems fault to correctly reflect the client's details.
 17. Where clients had two licences they were given the benefit of recording the earlier licence obtained on the system.
 18. According to the applicant, she would go into the system to save the correct (earlier) year that the client had obtained their licence. The system would keep reverting back to the incorrect license date year, resulting in her having to go back into the system repeatedly in an attempt to correct it.
 19. The applicant's answer to the complaint of manipulation of excesses is that the Discovery policies have a flexible excess.

20. The respondent did not dispute that there was a systems fault, and that the systems fault had been brought to the respondent's management's attention in April 2022. The systems fault was only repaired by way of a "management override" in November 2022. The respondent's case is that whilst there was a systems error, the error was deliberately exploited by the applicant.
21. According to the applicant, she had reported the systems error to her team leader, Mr Clint Groenewald. The applicant was told to work around the system's fault. She was not permitted to call Mr Groenewald during the disciplinary proceedings as apparently the agents who were not implicated were not permitted to interact with the implicated agents, including the applicant.

Legal framework

22. Section 13(2)(a) of the FAIS Act provides in as follows:

“(2) An authorised financial services provider must—

(a) at all times be satisfied that the provider's representatives, and the key individuals of such representatives, are, when rendering a financial service on behalf of the provider, competent to act, and comply with—

(i) the fit and proper requirements; and

(ii) any other requirements contemplated in subsection (1)(b)(ii).”

23. Section 14(1)(a) of the FAIS Act provides:

“14. Debarment of representatives. —

(1)

(a) An authorised financial services provider must debar a person from rendering financial services who is or was, as the case may be —

(i) a representative of the financial services provider; or

(ii) a key individual of such representative,

if the financial services provider is satisfied on the basis of available facts and information that the person —

(iii) does not meet, or no longer complies with, the requirements referred to in section 13(2)(a); or

(iv) has contravened or failed to comply with any provision of this Act in a material manner.”

24. Section 6A(2)(a) of the FAIS Act provides that:

“(2) Fit and proper requirements may include, but are not limited to, appropriate standards relating to –

(a) personal character qualities of honesty and integrity.”

25. Section 7(1) of Board Notice 194 of 2017 provides that fit and proper requirements relating to honesty, integrity and good standing apply to all

financial services providers like the applicant who was a representative of Discovery, a registered financial services provider.

26. Section 8(1)(a) of the Board Notice states that a person referred to Section 7(1) must be a person who is honest and has integrity.
27. The consequences of a debarment are far reaching. In *Barthram*,⁴ the Supreme Court of Appeal set out the consequences of a failure to meet the requirements of honesty and integrity as follows:

*“... a representative who does not need those requirements lack the character qualities of honesty and integrity or lacks competence and thereby poses a risk to the investing public generally. Such a person ought not to be unleashed on an unsuspecting public and it must therefore follow that any representative debarred in terms of Section 14(1), must per force be debarred on an industry wide basis from rendering financial services to the investing public.”*⁵

28. The respondent bears the onus to prove the facts it relied upon to debar the applicant on a balance of probabilities.

The respondent's reply

29. The transcript of the disciplinary proceedings of 21 July 2023 was provided.⁶

⁴ *Financial Service Board v Barthram and Another* [2015] ZASCA 96; 2018 (1) SA 139 (SCA).

⁵ *Ibid* at para 16.

⁶ Part B, CN5, p17.

30. It appears from the transcript that the internal investigation identified 19 quotes where there was potential manipulation, but one was singled out for specific evidence.⁷ The applicant originated 17 of the 19 identified quotes.
31. The applicant's evidence was that it was a systems issue and that she had reported it to her manager, who had advised her to exit and reload because it is a systems issue.
32. The transcript confirms that there was a systems issue which had been identified in April 2022. In November 2022, following an investigation, 9 agents were identified as having manipulated the system. It was also reported that there had been instances where the Transunion information did not pull through to the respondent's system.
33. The transcript does not indicate any bias on the part of the chairperson. However, the Tribunal considers that relevant evidence may have been overlooked as set out below. The Tribunal also noted with concern that the applicant's evidence was that other agents were advised not to speak to the applicant and so she was not in a position to call witnesses.
34. The respondent provided the sales call transcript (CN7, p71), but was unable to link the policy extracted as the example policy (CN3, p10) with the transcript

⁷ Part B, CN5, p19.

for the call. This meant that whilst *prima facie* the transcript did not appear to make any mention of the year 2013 which appears on CN3, it was not objectively possible to link the recorded conversation (CN7) to the example policy. Further, the identity number of the caller on the transcript (CN7, p72) made no sense. The Tribunal was advised that the driver's information would not pull through from the Transunion database if an incorrect identity number for the driver was provided.

35. Whilst it may be so that the manipulation behaviour was not present across all Discovery agents, it is still incumbent upon the respondent to prove deliberate manipulation behaviour on the part of the applicant with due regard to the record provided by the respondent in support of the debarment decision.
36. At the Tribunal hearing, the respondent initially sought to present additional oral evidence. However, the respondent failed to provide the necessary affidavit, as outlined in Rule 22 of the Financial Services Tribunal Rules. Consequently, the respondent did not persist with its request to present oral evidence.
37. The respondent provided its debarment policy. The debarment policy must be read in conjunction with section 14 (2)(a) of the FAIS Act. Section 14(2)(a) of the Act requires that an FSP, before effecting a debarment in terms of subsection 1, must ensure that the debarment process is lawful, reasonable and procedurally fair. Guidance Note 1 of 2019 records that a debarment

decision by an FSP constitutes the exercise of administrative action and it is required of FSPs in exercising their debarment powers to act reasonably, rationally and fair.⁸

38. The requirements of *audi* are contextual and relative.⁹

39. In this case, the applicant was given timeous notice and was heard during the 21 July 2023 proceedings.

40. However, as set out above, the transcript of the call relating to the example policy selected by the respondent could not objectively be linked to the example policy (CN3, p10). The respondent was unable to prove the link in the proceedings before the Tribunal. It is also of concern that the applicant was charged with having caused a monthly loss of R94 929,¹⁰ whereas before the Tribunal the respondent submitted that the loss was an (overall) total amount of R94 929.

41. The respondent has failed to discharge the burden of proof, on a balance of probabilities, that the applicant intentionally manipulated the 19 quoted policies with which she was charged.

⁸ Guidance Note 1 of 2019, para 2.3; *Associated Portfolio Solutions (Pty) Ltd v Basson and others* 2020 3 All SA 305 (SCA) at para 25.

⁹ *Chairman, Board on Tariffs and Trade v Brenco Inc.* 2001 (4) SA 511 (SCA) at para 19.

¹⁰ Part B, p18.

42. In the circumstances, we make the following order:

42.1. The debarment is set aside, and the debarment decision is remitted to the respondent for reconsideration.

Signed on behalf of the Tribunal on 23 April 2024.



G-M Goedhart SC

(Tribunal Chairperson)