IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Salina v. Investors Group Financial Services Inc.,* 2023 BCSC 86

Date: 20230118
Docket: S184687
Registry: Victoria

Between:

Sergio Salina

Plaintiff

And:

Investors Group Financial Services Inc.

Defendant

Before: The Honourable Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:	R.W. Cooper, K.C. S. Stephenson
Counsel for the Defendant:	T.J. Moran D. Poulin
Place and Date of Hearing:	Victoria, B.C. January 11, 2023
Place and Date of Judgment:	Victoria, B.C. January 18, 2023

Introduction

[1] There are two applications before the court requiring determination in this wrongful dismissal action:

a) that of the defendant, Investors Group Financial Services Inc., filed November 14, 2022, for an order striking paragraphs 31 to 71 of Part 1 and paragraphs 8, 12, and 13 of Part 3 of the Amended Notice of Civil Claim filed May 14, 2021 ("ANoCC"), pursuant to Rules 9-5(1)(a) and (d) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 [*Rules*] as well as special costs of the application; and

b) that of the plaintiff, Sergio Salina, filed October17, 2022, for an order that the defendant produce Mark Kinzel, the defendant's Executive Vice-President of Financial Services, for examination for discovery at a time and place to be decided by counsel for the parties.

[2] By order of Master Hughes dated November 16, 2022, the plaintiff's application was to be heard "at the same time or after the determination of the defendant's application." Because the hearing of the defendant's application occupied the full day that had been scheduled for the applications, the re-scheduling of the plaintiff's application will be left to counsel. I am not seized of it.

Background

[3] From February 8, 1991 to May 28, 2018, the plaintiff was engaged by the defendant and its predecessors in the capacity as a "consultant investment advisor". There is a dispute between the parties as to whether the relationship was one of employer/employee or independent contractor.

[4] In 2002, the defendant became a member of the Mutual Fund Dealers Association of Canada ("MFDA"). The MFDA is a self-regulatory body for mutual funds dealers statutorily created pursuant to the *Securities Act*, R.S.B.C. 1996, c. 418, s. 24 [*Act*]. The *Act* and the MFDA's bylaws provide a robust regime through which the MFDA carries out its mandate of regulating the operations, standards of

practice and business conduct of its members or participants, and the representatives of its members or participants, in accordance with its bylaws, rules or other regulatory instruments, including with regard to investigations, disciplinary hearings and settlement of disciplinary proceedings.

[5] Thereafter, the defendant and the plaintiff entered into a consulting agreement dated August 6, 2002 ("Consulting Agreement"). The Consulting Agreement expressly incorporated the MFDA's Rules ("MFDA Rules") as a term. It also stipulated that the plaintiff was engaged by the defendant as an independent contractor to act as the defendant's agent to arrange for the distribution of financial products and services offered or sponsored by the defendant and/or its affiliates to clients. As mentioned above, despite the language of the Consulting Agreement, the plaintiff disputes that his relationship with the defendant was that of an independent contractor. Rather, he says that the relationship was one of employee/employer.

[6] On December 5, 2016, the MFDA initiated an investigation of the plaintiff relating to the provision by him of certain investment consultation services to one of the defendant's clients, Florence Day (who passed away on January 25, 2016 at the age of 95), and into other acts and omissions of the plaintiff ("Salina Investigation"). The purpose of the Salina Investigation was to determine whether the plaintiff had violated the MFDA Rules. As part of the Salina Investigation, the defendant's oversight of various transactions undertaken by the plaintiff and another of its financial advisors was examined as part of a separate investigation ("IG Investigation").

[7] On April 11, 2018, the MFDA appointed enforcement counsel in respect of the Salina Investigation.

[8] On May 28, 2018, the plaintiff's 27-year relationship with the defendant was terminated without notice by the defendant for cause.

[9] On November 1, 2018, the plaintiff commenced this action. The defendant filed its response to the claim on January 22, 2019.

[10] In June 2019, the defendant and the MFDA entered into a settlement agreement in respect of the IG Investigation. At the time of that settlement, defendant's counsel acknowledged to the MFDA Hearing Panel that the defendant's misconduct arose from a failure to adequately query the suitability of the recommendation and sale of a particular mutual fund product that the plaintiff had sold to Ms. Day. The defendant admitted to an absence of documentation concerning a review of the trade in question and had no record of how it had determined that the trade had been suitable.

[11] On May 20, 2020, the plaintiff examined for discovery Kate Schroeder as a representative of the defendant for approximately four-and-a-half hours ("First Examination"). During the First Examination, Ms. Schroeder deposed that, on or about April 16, 2018, she met with members of the defendant's senior management, including Mr. Kinzel, to discuss the plaintiff's compliance history and the final recommendation from the defendant's compliance investigations department that the plaintiff be terminated. At Mr. Kinzel's request, Ms. Schroeder prepared a memorandum with an overview of the plaintiff's compliance history. She deposed that, thereafter, she was not involved in the decision to terminate the plaintiff except to answer questions regarding her memorandum. She was unable to provide evidence as to how, why, or when the decision to terminate the plaintiff was made. She also deposed that she had not attempted to inform herself specifically about why or how the decision to terminate the plaintiff was made.

[12] On May 14, 2021, the plaintiff filed, by consent, the ANoCC. The ANoCC raised various new allegations, including that the plaintiff suffered loss and damages as a result of the defendant's negligent investigation and that the defendant was negligent both in gathering of information as part of its investigation and in the supply of that information to the MFDA. The plaintiff pleads, *inter alia*, that the

defendant breached the duty of care it owed to him to conduct its investigation and report to the MFDA with reasonable competence, thoroughness, and objectivity.

[13] On May 19, 2021, the defendant filed, by consent, its amended response to civil claim as well as a counterclaim, alleging breach of contract, breach of fiduciary duty, and breach of duty of good faith.

[14] On July 22, 2021, the plaintiff brought an application for an order entitling him to conduct an examination for discovery of Mr. Kinzel as a second representative of the defendant. The application was dismissed by Master Harper on the basis that it was premature. She gave the plaintiff leave to renew the application if, after a continuation of Ms. Schroeder's examination for discovery, she was unable to adequately inform herself.

[15] The plaintiff continued the examination for discovery of Ms. Schroeder on November 25, 2021, by which time she was no longer employed by the defendant.

[16] A first appearance before the MFDA Hearing Panel relating to the Salina Investigation took place on February 22, 2022. A MFDA Hearing Panel process is quasi-judicial. The subject of the investigation has the right to appear at the hearing, to be represented by counsel and to call, examine, and cross-examine witnesses and present evidence and submissions. The plaintiff was represented by counsel. A hearing on the merits was scheduled for three days, commencing July 25, 2022.

[17] On July 12, 2022, the plaintiff and the MFDA entered into a settlement agreement in respect of the Salina Investigation ("Settlement Agreement"). As part of the Settlement Agreement, the plaintiff made a number of admissions ("Admissions"), including the following:

a) that in July 2014, the plaintiff recommended for the account of Ms. Day a switch of approximately $498,511 from a no-load mutual fund to the same mutual fund which was subject to a seven-year deferred sales charge schedule, generating a commission for the plaintiff to which he would not otherwise have been entitled, thereby giving rise to a conflict or potential

conflict of interest that the plaintiff did not address by the exercise of responsible business judgment influenced only by the best interests of the client, contrary to the defendant's policies and procedures and MFDA Rules 2.1.4.1, 2.1.1, 1.1.2, and 2.5.1;

b) that between March 2016 and November 2016, the plaintiff failed to disclose to the defendant that he had been named as a beneficiary in the will of a deceased client (i.e., Ms. Day), thereby failing to disclose a conflict or potential conflict of interest to the defendant, contrary to the defendant's policies and procedures and MFDA Rules 2.1.4, 2.1.1, 1.1.2, and 2.5.1; and

c) that between 2010 and 2018, the plaintiff obtained and possessed 24 pre-signed account forms in respect of 13 clients, contrary to the defendant's policies and procedures and MFDA Rule 2.1.1.

[18] On July 27, 2022, a MFDA Hearing Panel accepted the Settlement Agreement and, on August 30, 2022, released its Reasons for Decision with regard to the plaintiff's misconduct stating, *inter alia*, that "there can be no doubt that the facts admitted by the [plaintiff] constitute misconduct". It also described certain aspects of the plaintiff's behaviour as "serious misconduct".

[19] MFDA Bylaw No. 1 stipulates that the MFDA Hearing Panel's acceptance of the Settlement Agreement is final and is not subject to appeal or review.

[20] The trial of this action is scheduled to commence on May 1, 2023 for ten days.

Analysis

The Defendant's Application

[21] The plaintiff pleads that the defendant's Compliance Department "negligently conducted their investigation into the plaintiff" and, thereafter, "reported inaccurate information about the plaintiff to the MFDA". The defendant submits that these

pleadings should be struck out on the basis that they disclose no reasonable claim and are bound to fail and/or that they are an abuse of process as they amount to a collateral attack on the MFDA process.

[22] The plaintiff concedes that no duty of care was owed by the defendant to him in respect of information provided to the MFDA as part of the defendant's regulatory reporting obligation. He does not resile from the Admissions or seek to retract from the outcome of the Salina Investigation, which is now complete. Rather, he maintains that none of the Admissions nor anything that was uncovered as part of the Salina Investigation amounted to just cause for his termination.

[23] However, he maintains that a duty of care was owed to him to meet the standard of care expected of the defendant in the circumstances regarding the obtaining of information that formed the basis of the decision to terminate him.

The Impugned Pleadings

ANoCC, Part 1: Paragraphs 31 to 57; 59 to 67

[24] I agree with counsel for the plaintiff that paras. 31 to 57, inclusive, and paras. 59 to 67, inclusive, of the ANoCC allege facts that are capable of supporting the plaintiff's claim in wrongful dismissal. I am not satisfied that any basis has been shown for an order that they be struck out.

ANoCC, Part 1: Paragraph 58

[25] Paragraph 58 of the ANoCC alleges that the defendant negligently conducted its internal investigation of the plaintiff and provides particulars of that alleged negligent conduct.

[26] The law is clear that, for public policy reasons, there is no liability in tort for an employer conducting a negligent internal investigation into an employee's conduct: *Correia v. Canac Kitchens*, 2008 ONCA 506 at paras. 71–75; *Lee v. Magna International Inc.*, 2022 ONCA 32 at para. 10; *Luan v. ADP Canada Co.*, 2020 ABQB 387 at paras. 79, 158; *Hildebrand v. Fox*, 2008 BCCA 434 at paras. 32–40, leave to appeal to SCC ref'd, 32951 (26 March 2009).

[27] Nevertheless, counsel for the plaintiff submits that the circumstances of this case are such that the claim against the defendant for negligent conduct of its investigation is not bound to fail. He points to the decision of the Supreme Court of Canada in *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, which recognized the tort of negligent investigation as applied to police officers. The Court held that the police owed a duty of care in negligence to suspects being investigated.

[28] Counsel for the plaintiff submits that the circumstances of this case are similar to those in *Hill* because the investigation in question was in support of a quasi-judicial proceeding, where a statutory body, the MFDA, was engaged in the regulation of a mutual fund dealer and its designates who were compellable to testify at a hearing and were disciplined as a result of a breach of its rules and policies. He submits that, because the MFDA regulates in furtherance of the public interests with investigative and enforcement powers, it is not plain and obvious that the reasoning in *Hill* will not extend to the circumstances in this case.

[29] The test for determining whether a duty of care is owed by one person to another is well known. It was set out in *Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492 (H.L.) and was accepted by the Supreme Court of Canada in countless decisions, including *Cooper v. Hobart*, 2001 SCC 79 and *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35. The test involves two questions:

a) does the relationship between the plaintiff and the defendant disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care?

b) if so, are there any policy considerations that should nevertheless negate or limit that duty of care?

[30] It is conceded by the parties in this case that it was reasonably foreseeable that the plaintiff could face discipline and other financial consequences as a result of a negligently conducted investigation.

[31] Accordingly, whether the plaintiff's claim in the tort of negligent investigation can succeed turns on whether policy considerations negate the existence of a duty of care. That precise issue was determined by the Ontario Court of Appeal in *Correia*.

[32] In *Correia*, the employer, Canac Kitchens, retained a private investigation firm to investigate its suspicions of theft and drug dealing at its plant. The investigation firm kept the local police informed of the investigation. As a result of a negligently conducted investigation by the firm, the plaintiff, Mr. Correia, a long-time employee of Canac Kitchens, was erroneously accused, dismissed, and arrested by the police.

[33] The Ontario Court of Appeal held that the investigation firm could be held liable in tort for negligent investigation because it was in the "business of investigation, performing functions analogous to those performed by the police": *Correia* at para. 71. However, the court held that "different considerations apply when considering the potential liability of an employer […] even one that embarks upon a criminal investigation of its employee": *Correia* at para. 71.

[34] In the course of its finding that no duty of care was owed to an employee by an employer who conducts a negligent investigation of the employee's conduct, the court stated in *Correia* at para. 73:

> The Supreme Court, for policy reasons explained in *Wallace*, has refused to recognize an action in tort for breach of a good-faith and fair-dealing obligation. In this case, Canac fired the plaintiff for cause. It concedes that it was wrong in doing so and it may have been negligent. But, in our view, to recognize a tort of negligent investigation for an employer would be inconsistent with the holding in *Wallace* where the reason for the dismissal was an allegation of criminality. We can see no principled reason for so doing.

[35] The Ontario Court of Appeal recognized that public policy favours the reporting of wrongdoing even where such reporting may be mistaken, *Correia* at para. 74:

> The second reason that we would not recognize a duty of care on Canac lies in the potential chilling effect on reports of criminality by honest citizens to the police. Unlike Aston [the investigation firm], Canac was not in the business of

> investigation. It was in many ways in the same position as any other citizen who reports criminal activity to the police. Public policy favours encouraging the reporting of criminality to the police. Someone not in the business of private investigation who honestly, even if mistakenly, provides information of criminal activity should be protected. [Citations omitted.]

[36] The reasoning in *Correia* was again adopted by the Ontario Court of Appeal in *Lee*, a case that involved the discipline of an employee after an employer's investigation of a harassment complaint in accordance with its statutory obligations under health and safety legislation. The court reiterated that "there is no liability in tort for employers conducting internal investigations of their employees' conduct": *Correia* at para. 10.

[37] The British Columbia Court of Appeal in *Hildebrand* at paras. 32–40 accepted that *Correia* stands for the proposition that an employer does not owe a duty of care to an employee in connection with a criminal investigation leading to the termination of the employee (although the court found that the policy considerations negating a duty owed by an employer did not necessarily apply to an individual decision maker alleged to have been guilty of malicious investigation).

[38] I conclude that I am bound by the decisions in *Correia* and *Hildebrand* referred to above. I note that in the case before me, there are no allegations against an individual decision-maker alleged to have been guilty of misconduct which stands in contrast to *Hildebrand.* Given the foregoing, I find that, in law, there is no duty of care owed to an employee by an employer who conducts a negligent internal investigation of the employee.

[39] Accordingly, the plaintiff's claims against the defendant in respect of a negligent investigation of his conduct disclose no reasonable cause of action and are bound to fail. Paragraph 58 of the ANoCC is struck out pursuant to Rule 9-5(1)(a) of the *Rules*.

ANoCC, Part 1: Paragraphs 68 to 71

[40] Paragraphs 68 to 71 of the ANoCC allege that the defendant was negligent in its provision of inaccurate information to the MFDA as part of the Salina Investigation.

[41] A person giving or tendering evidence to a court or an adjudicative tribunal enjoys an absolute immunity for a suit in respect of the evidence, even if what is said is false or made with malicious intent: *Lefebvre v. Durakovic*, 2018 BCCA 201 at paras. 19–22; *Oei v. Hui*, 2020 BCCA 214 at para. 46.

[42] The protection afforded by absolute privilege is not confined to court proceedings—it attaches to communications made in respect of complaints and regulatory proceedings carried out by self-regulating bodies, including to all preparatory steps and statements contained in documents used in the course of the proceedings. In particular, a complaint made to a regulatory body in a confidential way concerning a member's conduct is absolutely privileged: *Hung v. Gardiner*, 2003 BCCA 257 at paras. 1, 6–8, 30–34; *Hamouth v. Edwards & Angell*, 2005 BCCA 172 at para. 23.

[43] A pleading that is predicated on a statement or statements made on an occasion protected by absolute privilege may be struck as disclosing no reasonable claim: *Hamouth*, at paras. 1, 3, 40–41; *McDaniel v. McDaniel*, 2009 BCCA 53 at paras. 17, 42; *Durkin v. Crease Harman LLP*, 2020 BCSC 642 at paras. 17–19; *Hansra v. Joss*, 2021 BCSC 805 at paras. 58–60.

[44] Here, the MFDA was a public body exercising quasi-judicial functions. The plaintiff has specifically pled, at para. 35(c) of the ANoCC, that the defendant was "obligated to report, *inter alia*, any contraventions and potential contraventions of legal and regulatory requirements, disciplinary actions by Members against Approved Persons, and investigations into same" to the MFDA. The plaintiff was one such "Approved Person". There is no suggestion in the ANoCC that the information provided by the defendant to the MFDA was other than as part of the Salina Investigation. There is no plea that it was provided with malicious intent.

[45] I am persuaded by the submissions of counsel for the defendant that the communications between the defendant and the MFDA in the context of the Salina Investigation are protected by absolute privilege and, as such, cannot give rise to a civil liability.

[46] The plaintiff's claims against the defendant in respect of the negligent provision of information by the defendant to the MFDA as part of the Salina Investigation disclose no reasonable cause of action and are bound to fail. Paragraphs 68–71, inclusive, of the ANoCC are struck out pursuant to Rule 9-5(1)(a) of the *Rules*.

ANoCC, Part 3: Paragraphs 8, 12 and 13

[47] Finally, the defendant submits that paragraphs 8, 12 and 13 of "Part 3 : Legal Basis" of the ANoCC should be struck out as disclosing no reasonable claim. Those paragraphs alleged as follows:

> 8. Further, the plaintiff has suffered damages as a result of the bad faith and negligence exhibited by the defendant.
>
> […]
>
> 12. The defendant committed the tort of unlawful interference with economic relations and negligent or fraudulent misrepresentation.
>
> 13. The defendant committed the tort of negligent investigation.

[48] The plaintiff submits that the impugned paragraphs of the ANoCC go beyond the plaintiff's claims of negligent investigation and/or negligent reporting and that the defendant is mischaracterizing the plaintiff's case against it. He submits that the claims are not based on the MFDA's involvement in the events in question.

[49] During argument, counsel for the plaintiff conceded that the claims in paragraph 12 of "negligent or fraudulent misrepresentation" cannot stand. Accordingly, the claims in relation to negligent or fraudulent misrepresentation in paragraph 12 are struck out.

[50] In light of my findings regarding the plaintiff's claims in negligent conduct by the defendant of its investigation and supply of information to the MFDA, the claims in negligence set out in paragraphs 8 and 13 of Part 3 of the ANoCC cannot stand.

[51] However, in my opinion, it is not plain and obvious that the plaintiff's claims in the torts of "bad faith" at paragraph 8 and "unlawful interference with economic relations" at paragraph 12 are bound to fail. They are unrelated to the impugned claims in negligence. Accordingly, I decline to order these claims to be struck out.

The Plaintiff's Application

[52] As already mentioned, the scheduling of a hearing of the plaintiff's application will be left to the parties.

Conclusion

[53] Pursuant to Rule 9-5(1)(a) of the *Rules*, the following paragraphs of the ANoCC are struck out:

a) Part 1: paragraphs 58 and 68 to 71, inclusive;

b) Part 3:

i. the claim in negligence contained in paragraph 8;

ii. the claims in negligent or fraudulent misrepresentation contained in paragraph 12; and

iii. paragraph 13.

Costs

[54] The parties are at liberty to speak to the issue of costs.

"G.C. Weatherill J."