CITATION: Jarvis v The Toronto-Dominion Bank 2023 ONSC 3853
COURT FILE NO.: CV-21-662305
MOTION HEARD: 20240703

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Gordon Jarvis, Plaintiff

AND:

The Toronto-Dominion Bank, Defendant

BEFORE: Associate Justice Jolley

COUNSEL: Gregory Graham, counsel for the moving party plaintiff

Gillian Round, counsel for the responding party defendant

HEARD: 3 July 2024

REASONS FOR DECISION

[1] The plaintiff has sued the defendant for wrongful dismissal. The defendant pleads that the plaintiff was dismissed for cause, relying on its investigation into three complaints made by other employees about the plaintiff's conduct.

[2] On 24 June 2021 the plaintiff sent a request to inspect the complaints from TD employees, the whistleblower complaint and the investigator's investigation report which were referenced in the statement of defence.

[3] The defendant delivered each of the requested documents, but redacted them to remove the names and other identifying information concerning the complainants and other individuals mentioned. The plaintiff seeks production of the unredacted documents on this motion.

[4] The law is clear that documents incorporated by reference into a pleading, such as the ones in question, are not to be redacted, as the entire document is deemed relevant by operation of law. It is also impermissible to redact portions of a relevant document on the basis that those portions are not relevant. (see *Rath v Tanzanian Gold* 2022 ONSC 5184 at paragraph 30 and *McGee v London Life Insurance Company Limited*, 2010 ONSC 1408 at paragraph 8).

[5] The court has discretion to permit a redaction where disclosure of the full documents could cause considerable harm and serve no legitimate purpose in resolving the issues (*McGee, supra* at paragraph 9.) A party seeking to avoid full disclosure bears the onus of establishing both that the redactions are irrelevant (*i.e.*, serve no legitimate purpose in resolving the

issues) and that their disclosure could cause considerable harm to the producing party or would infringe public interests deserving of protection.

[6] The responding affidavit did not comment on the relevance of the redactions, other that to argue that it "appears to [the defendant's deponent] that the plaintiff was able to identify the individuals" whose names were redacted. There is no evidence that this is correct or that it covers all of the redactions, including those individuals who were interviewed, as part of the investigation. The defendant did not attach the unredacted versions of the documents so that the court could assess the relevance of the redacted material. As such, I am not in a position to judge the relevance or irrelevance of the redactions.

[7] Even if I were to accept that the redactions were irrelevant, I find that the defendant has not established that disclosure could cause considerable harm to the defendant or would infringe an interest deserving of protection.

[8] The test to establish a qualified privilege against disclosure is set out in *Wigmore on Evidence*: (1) The communications must originate in a confidence that they will not be disclosed; (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

[9] I do not doubt that the complainants and the whistleblower delivered their complaints expecting them to remain confidential. The whistleblower used a process created by the defendant that specifically allowed complaints to be made anonymously. The fact that the information might later be disclosed by court order does not negate the fact that the communication was made with the expectation of confidentiality (*A.M. v Ryan* [1997] 1 S.C.R. 157 at paragraph 24).

[10] But a promise of confidentiality does not protect the communication from disclosure (*Robinson v London Life* 2017 ONSC 5587 at paragraph 15). Further, in some workplace-related scenarios, confidentiality is not something an employer can or should promise. In this case, the defendant has chosen to rely on the complaints made and the conclusion of their investigation into those complaints to support its for cause termination of the plaintiff. That choice not only makes the complaints about the plaintiff relevant, it might also require the defendant to disclose the names and addresses of the complainants as persons who might reasonably be expected to have knowledge of transactions or occurrences in issue, pursuant to rule 31.06(2). An employer that intends to rely on complaints made to it about another employee to support a termination for cause will need to think carefully before assuring complainants that their complaints can and will be kept confidential.

[11] The defendant argues that disclosure may cause harm to the complainants and may also damage the trust needed between an employee and the employer for a workplace to function and to allow an employer to address unacceptable behaviour. On the first issue, while the complainants wrote that it was difficult for them to come forward, given their

fear of reprisal, more than four years has passed since the complaints were made and the plaintiff has been fired. There is no affidavit evidence to suggest that the complainants continue to fear reprisals.

[12] On the second issue, while trust is important to the proper functioning of the workplace, an employer has a choice to keep the complaints and complainants confidential and terminate an employee without cause or rely on the complaints and terminate that employee for cause. If it chooses to terminate an employee for cause, it would be unfair for the terminated employee not to know the case he has to meet by obtaining disclosure of who made the allegations against him and what they were.

[13] In considering the nature of the relationship, these complaints were made and the investigation done in the context of a workplace review. In my view, that workplace relationship does not give rise to a particularly strong public interest at stake in the litigation, to adopt the language of Master Muir in *Robinson*.

[14] The court in *Hacock v Vaillancourt* 1989 CanLII 5250 (B.C.C.A.) had this to say about the relationship to be fostered and the importance of confidentiality in the employment context:

> [22] The appellant asserts again, as a matter of public policy, that the relation between employees and a municipality as their employer is so important that it ought to be assiduously fostered. Thus, when information is revealed about a fellow employee, if legal proceedings ensue the employer should not be compelled to disclose such communications.
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> [23] In this context, the appellant is not in any different position to any other employer. The head of the corporation will be concerned about the conduct of its employees in the course of carrying out their duties. The concept that an employee can go to his supervisor and complain about the activities of another employee with the result that the other employee may be jeopardized with his employer is not a basis for conferring on that other employee or the employer a right to suppress the communication. To encourage such a conclusion would be to unsettle the relationship among the employees and to afford an employee protection which is unnecessary if the employee speaks the truth. Nor will such a conclusion unreasonably impede investigations carried out by officials of the municipality into the conduct and activities of employees of the municipality.

[15] Those sentiments are equally applicable in this instance.

[16] In considering the Wigmore rules as guidelines, courts have noted that the "real test should be whether the public interest in the proper administration of justice outweighs in importance any public interests that might be protected by upholding the claim for privilege." (see *Hacock, supra* at paragraphs 10 and 11). Even though the employer had promised the employees who provided statements that their comments would be treated in confidence and would be used for personnel purposes only, the court in *Hacock* concluded that "this is not the type of communication which should attract protection from disclosure

upon the basis of public policy. The public interest in the proper administration of justice outweighs in importance any public interest that might be protected by upholding this claim (*Hacock, supra* at paragraph 24). The statements were ordered disclosed.

[17] As Master Muir noted in *Robinson*, "Fairness requires that the plaintiff be given an opportunity to test the information that may have been provided to [the investigator] by the [complainants]. The plaintiff has no other way of identifying the [complainants] other than through disclosure by [the employer] and production of [the investigator's] file. Their evidence is relevant and important. [The employer] has pleaded very specific facts about the plaintiff's interaction with the [complainants] and comments he allegedly made about other LHSC employees. Fairness requires that the plaintiff be given a full opportunity to respond these allegations." (*supra*, paragraph 18).

[18] This was also the conclusion of the court in *Cadillac Fairview Corp. v Standard Parking of Canada Ltd.* [2004] O.J. 37 when it ordered disclosure of the names of corporate whistleblowers in an investigation report, stating at paragraph 38: "In my view, in the circumstances of this case, the benefit gained in getting at the truth and correctly disposing of the litigation by disclosing the identities of the informants far outweighs the benefit to the interests served by protecting their identities from disclosure."

[19] I am not satisfied that disclosure would cause considerable harm or would infringe public interests deserving of protection. Like *Robinson,* I find that in the circumstances of this action, the public interest in the correct outcome of the litigation outweighs any interest in protecting the identity of the complainants and other employees who were interviewed or referenced in the complaints and the investigation report.

[20] I also find that the *Personal Information Protection and Electronic Documents Act*, SC 2000, c.5 ("PIPEDA") is not a bar to disclosure, as subsection 7(3) permits disclosure without the knowledge or the consent of the individual where necessary to comply with the rules of the court.

[21] The defendant proposed in the alternative that the names of any other employee against whom an allegation of wrongdoing is made in the complaints be redacted. Given the plaintiff's allegation that "he was made the scapegoat for wrongs committed by his superiors", I find the names of those others to be relevant and producible.

[22] In conclusion, the defendant is to produce in unredacted form the complaints, the whistleblower complaint and the investigation report.

[23] The parties have indicated that they wish to attempt to resolve the issue of costs. Unless they advise my assistant trial coordinator by August 9 that they have been unable to come to a resolution, I will assume that issue has been settled.

Associate Justice Jolley

Date: 5 July 2024