February 2014 Newsletter Case Summary

Justified Dismissal of Investment Advisor for Discretionary Trading: *Saturley v. CIBC World Markets Inc.*, 2013 NSSC 300

In a rare decision upholding an employer's termination of an employee for cause, the Nova Scotia Supreme Court recently dismissed the claims of investment advisor Frederick Saturley against CIBC Wood Gundy for wrongful dismissal. A significant factor was the industry involved, as the judge highlighted the vulnerability of clients to their advisors in the financial services sector and noted the importance of maintaining client protections in this type of industry.

This case involved the plaintiff, Mr. Saturley, who was an experienced and successful investment advisor and had been with CIBC for several years prior to the events underlying the claims. He had overseen impressive returns for his clients using a strategy he referred to as a "strangle", which involved coordinated selling of put and call options on the same security. All was well with this strategy until the particular emerging markets fund favoured by Mr. Saturley underwent a three for one stock split in July 2008. The third party retained by CIBC to calculate clients' margin failed to take this stock split into account, which resulted in inflated calculations of available margin for a number of Mr. Saturley's clients.

These inflated margins resulted in CIBC issuing margin calls later than it would have, which, during the market decline of Fall 2008, had disastrous results. In October 2008, Mr. Saturley became concerned with the high volume of margin calls on his client accounts and realized the margin calculation error. He immediately reported the error to his branch manager at CIBC. However, he then subsequently contacted a number of clients to explain the margin error and advised he would be willing to support them in a claim against CIBC if they chose to make a complaint.

In the investigation of Mr. Saturley's trading practices, CIBC discovered that Mr. Saturley had not been sufficiently diligent in obtaining client instructions before making trades on behalf of his clients. The court reviewed evidence in detail showing that based on the volume of trades, Mr. Saturley would have had to contact his clients to obtain instructions dozens of times over short periods of time. Mr. Saturley was not able to adduce evidence that he had made many of the required contacts, and in many cases the transactions were made on days when CIBC could prove the clients were unavailable to provide instructions due to travel.

Effecting transactions without explicit client authority to do so constitutes discretionary trading, for which Mr. Saturley did not have the requisite license. Accordingly, after discovering this pattern of trading without instructions, CIBC terminated Mr. Saturley's employment for cause.

Legal Arguments

Mr. Saturley first made the evidentiary argument that he was not required to prove that all necessary client contacts had been made (and, in particular, that no adverse inference should be drawn due to his failure to call as a witness an assistant who allegedly accepted client instructions on Mr. Saturley's behalf), because the burden rested on CIBC as his employer to justify the termination. The court disagreed, finding that the lack of evidence of client instruction raised an inference that none was

obtained, and that Mr. Saturley had a "practical" burden of proving why the adverse inference should not be drawn.

Mr. Saturley next asserted that CIBC had not adduced sufficient evidence to prove he had engaged in discretionary trading. However, the court underwent an in-depth review of the trades made on behalf of twelve of Mr. Saturley's clients and found that, by virtue of client testimony and lack of any records to prove otherwise, CIBC had carried its burden to prove that Mr. Saturley had consistently failed to obtain instructions from seven of those clients. Three of those clients had made complaints to CIBC about Mr. Saturley regarding their losses.

In the alternative, Mr. Saturley claimed that CIBC had been aware of his exercise of trading authority and had condoned it. However, the evidence showed that CIBC had undertaken a review of Mr. Saturley's trading practices in 2007 and expressly found that he had *not* been engaged in discretionary trading. At this time CIBC also provided Mr. Saturley with a compliance bulletin describing discretionary trading as a "serious offence". The court accordingly rejected the condonation argument.

Finally, Mr. Saturley's argument that dismissal was too harsh a penalty for discretionary trading also failed. Mr. Saturley's failure to admit his culpability in engaging in discretionary trading, coupled with the seriousness of the misconduct (made known to him by CIBC via the compliance bulletin in 2007 as well as a letter or reprimand and a fine for discretionary trading in 2004) justified the employer's decision to sever the employment relationship. Again, this decision was made in the context of the need for client protection in the financial services industry.

Conclusion

This case is significant for its pro-employer result in an area of the law where employees typically have the advantage. Courts are reluctant to find justification for summary dismissal, often finding that other less-harsh penalties might have sufficed. The burden to justify dismissal is so extensive that even physical violence in the workplace is not always sufficient cause. (*E.g.*, *Shakur v. Mitchell Plastics*, 2012 ONSC 1008.) However, as mentioned above, the judge seemed struck by the fact that this is a highly-regulated industry in which clients must be protected and it may be this concern for protection that led to this decision. Even though no disciplinary proceedings were instituted by IIROC against Mr. Saturley, the evidence of discretionary trading without the proper license is clearly the basis for finding just cause for his dismissal.

It is also worth noting that in reaching this conclusion, the court shifted some of the burden onto the employee to prove the absence of his own misconduct – this is in conflict with the weight of authority that rests the burden with the employer to prove sufficient misconduct to warrant dismissal.

We have been advised that, surprisingly, no appeal of this decision has been filed and the appeal period has now expired. We can expect this decision to be highly cited by employers in future wrongful dismissal cases.