B.C. Supreme Court Rules That Firms Cannot Be Liable For Internal Investigations Into Misconduct

written by Conner Lantz | September 27, 2023

Effective compliance processes can be the most successful risk management tool that businesses and their leaders have in their tool boxes. Compliance programs are expected to detect legal or regulatory shortcomings promptly and to take all necessary steps to understand their scope and magnitudes properly, so that appropriate remedial steps are taken to best ensure against them reoccurring. Often, this requires firms to take proactive steps to investigate thoroughly, properly and fairly when a matter or situation demands it. Pursuing an investigation in these circumstances is not without its own risks. We have previously written about the need for investigations to be appropriately pursued and processes followed.

A recent decision out of British Columbia highlights some of these risks, and has clarified that investment firms that properly respond to known or suspected non-compliance cannot be sued for their internal investigations into alleged misconduct by employees, or for providing information they uncover to regulators. In a preliminary decision as part of an ongoing wrongful dismissal action, on January 18, 2023, the British Columbia Supreme Court (the Court) struck down pleadings against a registered dealer (the Dealer) brought by a former representative, Sergio Salina (Salina), in connection with its role in an investigation by the Mutual Fund Dealers Association of Canada (MFDA) (now integrated in the new Self-Regulatory Organization) into alleged misconduct by Salina.

Background

Salina was engaged with the Dealer as a consultant investment advisor from 1991 to 2018. In late 2016, the MFDA initiated an investigation of Salina, relating to the provision by him of certain investment consultation services to a client and into other acts and omissions. The purpose of the investigation was to determine whether Salina had violated the MFDA Rules (the Salina investigation). The MFDA also examined the registered dealer's oversight of various transactions undertaken by Salina and another of its financial advisors and opened a separate investigation. In 2018, Salina was terminated without notice, for cause.

After admitting to supervisory violations involving both Salina and another advisor the Dealer agreed in 2019 to pay a penalty of $150,000and costs of $15,000 to resolve the Self-Regulatory Organization (SRO)'s allegations. In 2022, Salina agreed to pay a

$30,000 fine and $5,000 in costs for his actions.

In the meantime, Salina sued the Dealer for wrongful dismissal, alleging that the Dealer "negligently conducted its internal investigation" and provided inaccurate information to the MFDA as part of its investigation. Salina asserted that that the Dealer breached the duty of care owed to him to conduct its investigation and report to the MFDA with reasonable competence, thoroughness and objectivity.

The Dealer's application

Two applications came before the Court requiring determination. First, Salina brought an application to order the Dealer to produce an individual for examination for discovery; however, this matter was left to scheduling at a later date. The second application and focus of the decision was the Dealer's application to strike out various paragraphs of Salina's pleading on the basis that they disclose no reasonable claim and are bound to fail and/or an abuse of process.

The impugned pleadings pertained to

1. Salina's claim in wrongful dismissal
2. Salina's allegation that the Dealer negligently conducted its internal investigation of Salina
3. Salina's allegation that the Dealer was negligent in its provision of inaccurate information to the MFDA as part of the Salina investigation
4. Salina's claim that Salina has suffered damages as a result of the bad faith and negligence exhibited by the Dealer, and that the Dealer committed the tort of unlawful interference with economic relations, negligent or fraudulent misrepresentation and the tort of negligent investigation

The findings

The Court struck Salina's allegations regarding negligent investigation and negligent provision of information, leaving Salina's wrongful dismissal suit and allegations of bad faith and unlawful interference with economic relations to stand.

No viable negligent internal investigation

The Court struck Salina's allegations of negligent internal investigation. Relying on decisions from the Ontario Court of Appeal and British Columbia Court of Appeal, as well as by applying the Anns/Cooper test to evaluate the existence of a potentially novel duty of care on the facts of the case, the Court found that in law, and for public policy reasons, there is no duty of care owed to an employee by an employer who conducts a negligent internal investigation of an employee.

While all parties conceded that it was reasonably foreseeable that Salina could face discipline and other financial consequences as a result of a negligently conducted investigation, policy reasons – such as the reporting of wrongdoing even where such reporting may be mistaken – favoured against the finding of such a duty.

No viable negligent provision of information to the MFDA

Salina also alleged that the Dealer was negligent in its provision of inaccurate information to the MFDA as part of the Salina investigation. The Court struck these allegations as well, due to the protection afforded to a person giving or tendering evidence to a court or an adjudicative tribunal, even if what is said is false or made with malicious intent. In particular, a complaint made to a regulatory body in a confidential way is absolutely privileged.

Since the MFDA is a public body exercising quasi-judicial functions, the Dealer had an obligation to report any contraventions of legal and regulatory requirements to the MFDA. The Dealer had relevant information to provide to the MFDA regarding the Salina investigation. Therefore, the communications between the Dealer and the MFDA in the context of the Salina investigation were protected by absolute privilege and, as such, could not give rise to a civil liability, making the pleadings bound to fail.

Takeaways

In an increasingly multifaceted business environment, situations arise daily that may require internal investigations on possible wrongdoing by an employee. While the case law surrounding internal and external investigations continues to develop, employers or officers who determine that an investigation is necessary by virtue of a whistleblower compliant or otherwise should commence an internal investigation in a prompt, thorough and unbiased manner.

Employers should be aware that while liability may attach to external investigators or individual decision-makers who commit independent torts under other contexts, this decision indicates that courts will be reluctant to find that there is a duty of care owed to an employee by an employer who conducts a negligent internal investigation of an employee. It also signals that adjudicators are likely to consider important policy considerations related to reporting wrongdoing.

This decision also provides comfort that those who provide information to regulators like the MFDA will be protected, since such communications made for the purposes of compliance with a regulated entity's obligations to its regulator will be protected by absolute privilege. This finding is consistent with the whistleblower programs of multiple SROs, which similarly generally provide for confidentiality to the extent possible and protection from reprisal.

Finally, this decision has signalled that the courts consider investigations, particularly those by regulated entities of very high value. Whether it be compliance with the investigation itself or communication of findings related to it, firms will enjoy some immunity from liability so long as their actions are initiated and conducted in good faith and are aligned with the regulatory objectives.

As legal and regulatory standards and expectations relating to investigations continue to develop in Canada, it is important to be mindful of the liability that investigators may face when carrying out their duties. Further, employers should strive to implement and maintain best practices in order to stay ahead of the curve as a matter of good governance. Contact Osler's Risk Management and Crisis Response team to learn more about your organization's obligations with respect to internal and external investigations, including to strengthen policies and crisis response plans to mitigate risk and to assist with designing an investigation plan and supporting investigations should the need arise.

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