

CANADA / JUDGMENT

Carias v. CIBC

2003 BCSC 587

COURT

Supreme Court of British Columbia

DECIDED

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2003BCSC0587

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cesar Carias v. CIBC,

2003 BCSC 587

Date: 2003-04-30

Docket: S017129

Registry: Vancouver

Between:

Cesar Carias

Plaintiff

And

Canadian Imperial Bank of Commerce

Defendant

Before: The Honourable Mr. Justice Taylor

Reasons for Judgment

Counsel for the plaintiff:

S.A.S. Ali

Counsel for the defendant:

K.J. Heller and

J.L. McPherson

Date and Place of Hearing:

2003-03-14 and 15

Vancouver, B.C.

- [1] This is an application brought by the defendant, Canadian Imperial Bank of Commerce ("the Bank") pursuant to Rule 18A to dismiss the plaintiff's claim for wrongful dismissal. The plaintiff says that this matter is not suitable for disposition under Rule 18A as credibility is an issue.
- [2] While there are conflicts in the evidence regarding the events of December 8, 2000 and the days that followed, such conflicts, in my view, do not convince me that this matter should not be determined pursuant to Rule 18A.
- [3] The matter is not complex, and the amount of money in terms of damages is not substantial. There is, in my view, no genuine issue of credibility in this case given my conclusions about the plaintiff's conduct and the evidence of the audit trail involving the plaintiff's assertions that the proscribed inquiries were made at lunch time. The plaintiff's assertions in this regard are simply too incredible to be accepted and therefore, the issue of credibility does not arise on the evidence. See *Irving Ungerman Ltd. v. Galanis* [1991] 4 OR (3d) 545 c.552.
- [4] The plaintiff was hired by the Bank in 1993 and worked there until 1995 when he temporarily left its employ. He was re-engaged by the Bank in August 1996 and shortly thereafter signed an employment agreement. He was dismissed from that employment on December 14, 2000.
- [5] In March 1998, he was employed at the 13th and Granville Street branch of the Bank, where he remained until December of 2000, except for a brief period spent at another branch. His position at both branches was as a personal banking representative. As such, he was assigned a computer user I.D. number being CC00720. The plaintiff also had a confidential computer password that he himself created, and which he was required to change every 31 days.
- [6] The plaintiff's evidence is that he changed his password by alternating between two passwords.
- [7] Customer information at the Bank is contained in two data banks. The first is in the Bank's on-line information network system ("COINS") and the second, the customer information files ("CIF").
- [8] COINS information contained descriptions of accounts, transactions such as direct deposits (including payroll deposits), withdrawals and account balances.
- [9] CIF information contained personal data including the addresses and accounts of Bank customers.

- [10] Access to COINS or CIF is restricted to Bank employees on a "need to know" basis. The Bank's policy, which is known to all of its employees, including the plaintiff, prohibits any non-essential inquiries, such as "surfing" accounts out of curiosity.
- [11] Access to these data bases can only be made by the simultaneous use of the identification number and the password on one computer at any given time.
- [12] The Bank has the ability to track any inquiries made with regard to these data bases, to reveal which ID number and password were used to gain access, the time and nature of the inquiry, and what information was provided as a consequence of the inquiry.
- [13] These data banks are maintained at the Bank's Toronto terminals and all times are recorded as Eastern Standard Time ("EST"). Vancouver is in the Pacific Standard Time zone and is three hours behind EST.
- [14] The plaintiff, while engaged at the 13th and Granville Street branch, was provided with his own office.
- [15] In March of 2000, the plaintiff became aware that he was infected with Hepatitis B. He did not at that time inform the Bank's staff of the precise nature of his illness out of a concern that he would not receive the promotions he expected to receive upon his return from sick leave.
- [16] While there is some dispute in the various affidavits regarding when the plaintiff's illness with Hepatitis B became known to other Bank employees, it is clear on the plaintiff's own evidence that by the summer of 2000, the Bank staff had become aware that the plaintiff suffered from an undisclosed illness and had been cautioned to take care of his health. He had been on sick leave and had returned to work on the 21st of August 2000.
- [17] In his affidavit No. 1, the plaintiff says that at a post-work social meeting, which occurred every second Friday, he told staff that he had Hepatitis B. This is denied by the staff members whose affidavits were filed in these proceedings. They say that while they were aware that the plaintiff could not drink alcohol, they only knew it was because of a liver ailment. They deposed that they were not aware he had Hepatitis B.
- [18] To the extent that it is necessary to determine what the Bank and its staff knew of his illness, I am satisfied that by the fall of 2000, they were aware of the specific nature of the plaintiff's illness. I am of the view that the plaintiff's illness is irrelevant to the determination of whether the defendant had cause to terminate the plaintiff from his employment, or that it affected its determination to make that decision. There is simply no evidence to support the plaintiff's belief that his illness was the reason for his termination or had anything to do with it.

- [19] The Bank alleges that on or about December 8, 2000, the plaintiff made unauthorized use of his authority to retrieve information from the Bank's data base COINS, and that he subsequently deceived the Bank when asked about these unauthorized inquiries. The Bank also alleges that he sought to have others deceive the Bank regarding his retrieval of information.
- [20] The Bank argues that any of these circumstances are sufficient to find just cause for the plaintiff's summary dismissal from his employment, as his conduct was incompatible with his continued employment as a Bank employee.
- [21] The affidavit evidence pertaining to what occurred on December 8th, 2000, can be divided into two aspects. The first is of a technical nature, consisting of records from the Bank's data base. The second is the deposition evidence of the plaintiff and others, relating their version of what occurred on December 8th, 2000 and the days that followed.
- [22] The more technical evidence is found in affidavits no. 1 and 2 of Kien Chang, and the plaintiff's affidavit no. 1.
- [23] Mr. Chang is employed in the defendant's corporate security department.
- [24] He deposes that he searched for all customer-related information inquiries that were accessed by the plaintiff's user ID number on December 8, 2000.
- [25] He retrieved an audit trail of inquiries made under the plaintiff's ID number on that day. His uncontroverted evidence is that the record of the timing of such inquiries is shown in EST.
- [26] Attached to his affidavit are ten pages of printouts showing all inquiries made on December 8, 2000 under the plaintiff's I.D. number, commencing at 11:41:11:99, and ending at 19:27:46:13 hrs, the latter being the last entry or inquiry on that day. Those times, converted to Pacific Standard Time and in lay terms, would be from 8:41 a.m. to 4:27 p.m.
- [27] Based upon the coding that appears in the audit trail, Mr. Chang deposes there were two types of inquiries. One type, a "00", indicates inquiries into the balance of an account. The second is called a "20", which constituted an inquiry as to the most recent transactions. The latter included several transactions, approximately eight in number, occurring within the specific account being searched.
- [28] The audit trail also reveals which accounts, by number and name, were inquired into, as well as the nature of the information provided, whether a "00" or a "20" inquiry.
- [29] The inquiries that occurred from 8:40 a.m. to 9:15 a.m. P.S.T. were as follows:

8:41-8:45

Six inquiries of the plaintiff's own account

9:04

One inquiry of Sony Mannis' account

9:05

2 inquiries of the plaintiff's own account

9:06

One inquiry of a Jason Cohen's account as to transaction

9:07

Four inquiries of Aldina Graziano's account as to balance

9:08-9:09

Three inquiries of Cathy Wylde's account, two as to balance, one as to transaction

9:09-9:10

Five inquiries of Melanie Hamael's accounts, four as to balance, one as to transactions

9:12

Three inquiries of Gatelf McFarlane's accounts, two as to balance, one as to transaction

9:14

One inquiry of Diane Kristensen's account as to transaction

All of these inquiries were about the accounts of Bank employees who were also customers of the Bank.

[30] There is no evidence that any of the account holders, other than the plaintiff, consented to these inquiries or that the inquiries were made for the Bank's purposes.

[31] The "need to know" access policy is found in the defendant's "Principles of Business Conduct" pamphlet, which emphasizes the importance of insuring the confidentiality of information about the defendant's customers, and employees as customers.

[32] I am satisfied that the plaintiff was aware of this policy, given his answers on his examination for discovery at questions 57 and 58 and 67 and 68.

Q. Thank-you. Now, you understand, sir, that CIBC is legally required to preserve confidentiality of customer information?

A. Most definitely.

Q. And, in fact, it is written up in the Bank's principles of business conduct, correct?

A. Correct.

Q. And you also knew that computer information about accounts is to be looked at only on a need-to-know basis?

A. That's correct.

Q. And you also know and I think would agree that an employee is accountable for all computer activity initiated under that employee's pass word or identity number?

A. Yes, I do understand.

[33] The plaintiff's explanation for the unauthorized access to the accounts is contained in his affidavit no. 1. This affidavit was sworn after the plaintiff had been provided with all of the affidavits filed by the defendant, with the exception of Sarina Kalsi and a responding affidavit of Mr. Chang.

[34] In essence, the plaintiff says two things in terms of these inquiries.

[35] First, the plaintiff infers that one of the defendant's employees who was in the plaintiff's office when the inquiries were made, Ms. Mann, had made the inquiries herself, as he deposed at paragraph 23:

I note that Ms. Mann denied using my password on December 8, 2000 to access staff accounts but does not deny that she knew my computer password.

[36] This is to be read in conjunction with his denial of making the inquiries himself. While he does not directly accuse Ms. Mann of making these inquiries he infers, by the assertion that she knew his password, that she had done so.

[37] He also suggested at paragraph 58 that Ms. Kalsi, whose affidavit he had not read at the time of the swearing of this affidavit, may have been told his password by Ms. Mann. In his second affidavit he specifically says that he believed that Ms. Kalsi made the inquiries.

[38] The second significant thrust of his evidence is also contained in paragraph 58 when the plaintiff deposes:

... I note that all of the inquiries in question occurred during my lunch hour, 12 - 1 p.m. I did not remain at the Bank during my lunch.

And at paragraph 71 where he deposes:

I believe that Ms. Kalsi performed these transactions while I was at lunch during December 8, 2000. Ms. Kalsi was asking me that morning specifically how much various employees got paid at the Bank.

He does not deny that these inquiries were made as deposed to by Mr. Chang.

[39] The plaintiff makes no reference to what he may or may not have done between the hours of 8:40 a.m. and 9:15 a.m., during which time, I am satisfied the inquiries of the accounts of other staff members were made.

- [40] This whole period of time is simply not addressed by the plaintiff, even though it is a significant period of time, and it was at that local time that the inquiries were made, not at the noon hour local time.
- [41] I will now review the affidavits of the employees who were in the plaintiff's office between 8:40 a.m. and 9:15 a.m. on December 8th, 2000.
- [42] Those are the affidavits of Sony Mann, Melanie Hamael, Sarine Kalsi and Diane Kristensen.
- [43] The affidavit of Ms. Mann states that shortly before 9:00 a.m. on December 8th, 2000, she went to the plaintiff's office with Ms. Kalsi.
- [44] Ms. Mann says that she could not see the plaintiff's computer screen but she was aware that he was accessing staff Bank accounts. This, she said, is because the plaintiff told her and Ms. Kalsi that the same amounts had been deposited to the accounts of Cathy Wylde, the Branch Manager, and Melanie Hamael, the Customer Service Leader.
- [45] Ms. Mann deposes that she recalls him being angry at the fact that others were being paid more than he was.
- [46] Ms. Mann also deposes that at about 9:00 a.m., Ms. Kristensen came into the plaintiff's office while she and Ms. Kalsi were still present.
- [47] At that point, Ms. Mann says that the plaintiff commented on the salaries of others and Ms. Kristensen told the plaintiff, Ms. Mann and Ms. Kalsi that what they were doing "was not very good."
- [48] This is confirmed in the affidavit of Ms. Kristensen. Ms. Kristensen deposes that after Ms. Hamael entered the office to drop off some documents she left with her. Ms. Mann and Ms. Kalsi remained in the plaintiff's office.
- [49] Ms. Kalsi also confirms what Ms. Mann and Ms. Kristensen say occurred during time that Ms. Kristensen was in the office. She also says that before this, the plaintiff commented on the salaries being paid to various Bank employees and what each of those employees had deposited to their accounts.
- [50] She was unable to see the plaintiff's screen but concluded that he was making these inquiries from what the plaintiff said and his apparent anger when he realized that others were being paid more than he was.
- [51] Ms. Kalsi denies ever knowing or using the plaintiff's password.
- [52] While Ms. Mann does not deny knowing the plaintiff's password, she does deny any use of it on December 8th, 2000 or "at any time."
- [53] The affidavit of Ms. Kristensen states that she came into the plaintiff's office between 9:00 and 9:10 a.m. Ms. Mann & Ms. Kalsi were also present in his office.

- [54] Her evidence is that she saw him accessing staff accounts on his computer and she specifically recalls that the account of Gatelf McFarlane was being viewed by the plaintiff.
- [55] She deposes that he commented on the salaries being paid to others and was upset at the salary being paid to Jason Cohen.
- [56] She commented to those present that what they were doing was "not very good."
- [57] Shortly thereafter, Ms. Hamael came into the plaintiff's office, left some documents and Ms. Kristensen left with her. She later told Ms. Hamael about the plaintiff accessing the accounts. Ms. Hamael confirms receiving this information from Ms. Kristensen.
- [58] The plaintiff, at paragraph 17 of his affidavit no.1, makes a curious averment. After he denies looking at other employee's deposits and after he asserts that any such inquiries must have been made by other employees while he was at lunch, he then confirms that when Ms. Mann and Ms. Kalsi were in his office he "looked up positions on the intra-net where salaries are listed and identified, including the salary range for Ms. Kalsi."
- [59] If he is correct, his computer, which requires the use of his password, was engaged to do this search at the same time the prohibited inquiries were being made. A user ID or password can only be used to sign on to one computer at a time. Thus, such double inquiries were impossible to make at the same time.
- [60] On December 12th, both Ms. Mann and Ms. Kalsi were asked by the manager, Ms. Wylde, if they were aware that the plaintiff had been accessing staff accounts while they were in his office. Ms. Hamael was present at the time Ms. Wylde made this inquiry. Both Ms. Mann and Ms. Kalsi depose that they lied to Ms. Wylde about the plaintiff's inquiries. Ms. Mann sets out her reasons for doing so at paragraph 4 of her affidavit.
- [61] Both apparently reconsidered their statements and later that day, each returned to speak to Ms. Wylde. Both, according to their affidavits, admitted lying to her about their knowledge of what they had observed the plaintiff doing.
- [62] Ms. Wylde then spoke in person to the plaintiff in the latter part of December 12th and asked him if he had made such inquiries. The plaintiff, according to Ms. Wylde, denied making the inquiries and demanded to know who said that he had done so.
- [63] On the evening of December 12th, Ms. Mann deposes that the plaintiff called her at her home and that he told her to deny everything that had happened on December 8th or to say that she could not remember. Ms. Mann said that the plaintiff told her that they would all be fired if the Bank found out what had happened and that she should speak to Ms. Kalsi to the same effect. The evidence of Ms. Mann is that he repeated this message on December 13th by typing it on his computer screen when Ms. Mann and Ms. Kalsi came to his office that morning.

- [64] Ms. Kalsi makes no reference to the plaintiff typing on the computer screen, but says that on December 13th the plaintiff told her to deny what had happened if asked by Ms. Wylde. Ms Kalsi deposes that she told the plaintiff that she had not yet spoken to Ms. Wylde, which was untrue.
- [65] The plaintiff deposes he did not tell Ms. Mann to "deny everything" but says that he called her as a friend in order to have a personal discussion. He says that they did not discuss the incident. He also denies typing anything on his computer screen and says that after December 8th, neither Ms. Mann nor Ms. Kalsi ever attended at his office.
- [66] The evidence of Ms. Wylde is that following these various meetings, she prepared notes of her discussions with the staff members involved. While these notes are not evidence to what staff members saw or heard, they are consistent not only with the sequence of events as described by the various employees, but also with what they said they told Ms. Wylde.
- [67] It is a fundamental tenet of employment with the defendant that the confidentiality of customer (including staff as customers) account information must be maintained.
- [68] While staff has the ability to access such information through either of the two data bases maintained by the Bank, the plaintiff clearly understood that such access is on a "need to know basis" only. Not only was the plaintiff aware of this but had acknowledged, in writing, that he was responsible for all computer activity generated under his password.
- [69] Notwithstanding the plaintiff's denials contained in his two affidavits, he does not have an answer to the compelling evidence that between 8:40 a.m. and 9:15 a.m., a series of prohibited inquiries were made of various staff members' Bank accounts, and that these inquiries were made under the plaintiff's personal identification number and password.
- [70] The plaintiff's only answer to that is that somebody else did it while he was at lunch some three hours later.
- [71] However, the inquiries were not made at lunch, as the evidence of Mr. Chang unquestionably establishes. They were made between 8:40 a.m. and 9:15 a.m. when the two other employees depose they were in the plaintiff's office.
- [72] When confronted about these inquiries on December 12th, before Ms. Wylde had the audit trail, the plaintiff denied any knowledge of them.
- [73] He admitted to telephoning Ms. Mann that evening, but he denies the nature of the conversation as deposed to by Ms. Mann. He says nothing of what was discussed.
- [74] The description of the events of the morning of December 13th by Ms. Mann, Ms. Kalsi and the plaintiff simply give further credence to the complaint that the plaintiff failed to give a proper and truthful accounting of what had occurred on December 8th. The events of the evening of December 12th and the morning of December 13th are also consistent with the evidence of Ms. Kristensen, that being that as she left the Bank after work on December 12th, the plaintiff told her that Ms. Wylde was blaming him for looking into staff accounts

and that he was "pissed off and stressed out."

- [75] In my view, these affidavits do not raise an issue of credibility worthy of committing this matter to trial. The plaintiff simply does not answer the evidence that these inquiries were made by him between the hours of 8:40 a.m. and 9:15 a.m. Rather, he suggests that they were made by others between 11:40 a.m. and 12:15 p.m. when he was not in the Bank.
- [76] I am satisfied that the plaintiff made the prohibited inquiries and when given the opportunity on the 12th of December to "come clean", he retreated into a web of deception in which he subsequently sought to enlist others.
- [77] Quite apart from the initial wrongful inquiries, his failure to accept responsibility and his attempt to enlist others in his deception are, as suggested by defence counsel, strong indications of character incompatible with that required and expected of a Bank employee.
- [78] As observed by Proudfoot J. in *Stock v. Bank of Nova Scotia* (1988), 22 C.C.E.L. 217 at 223:
- There were several occasions that the plaintiff could have made a clean breast of this whole matter. Had that been done he may have been reprimanded or even demoted but likely not dismissed as he was. The admission to an aberration at the first possible opportunity would, I am convinced, have produced quite a difference result.
- [79] The plaintiff was an employee who, according to his personal records, was highly regarded, showed promise, and had gone beyond expectations in terms of his service to the Bank up to that point. His illness had been compassionately dealt with by the Bank, and the plaintiff had received generous sick leave.
- [80] Yet, rather than admit to what was subsequently established by the audit trail as a serious misconduct, and show a contrite and rehabilitated attitude, he sought to hide behind obfuscation, and even sought to engage others in his deceit.
- [81] In my view, this conduct reveals a character flaw that goes to the fundamental requirements of a Banker - that being integrity and high moral character. The plaintiff's conduct is incompatible with the Bank's requirement for employment, requirements known to the plaintiff from the commencement of his re-employment with the Bank in 1996.
- [82] The role of a banker is different from even other forms of employment where honesty may also be held in high regard.
- [83] As Finch J. (as he then was) observed at paragraph 27 in *Ennis v. Canadian Imperial Bank of Commerce* (1986), 13 C.C.E.L. 25, the standard by which the conduct of an employee will be judged will vary with the types of business being conducted:

The exact standard of misbehaviour required to be shown varies with the nature of the business engaged in by the employer, and with the position of responsibility and trust held by the employee. Real misconduct or incompetence must be demonstrated. The employee's conduct, and the character it reveals, must be such as to undermine, or seriously impair, the essential trust

and confidence the employer is entitled to place in the employee in the circumstances of their particular relationship. The employee's behaviour must show that he is repudiating the contract of employment, or one of its essential conditions. It must be conduct to which the employer could point as a good reason for having lost confidence in the employee's ability faithfully to discharge his duties. The employer may rely on misconduct discovered by him after the contract of employment has been terminated.

[84] The standard of employee conduct in the context of Banking is adequately described in *Vaillancourt v. National Bank of Canada* (February 1984) referred to within *Evans and Royal Bank of Canada* [1996] C.L.A.D. No.1125 (QL) where the adjudicator noted:

The world of Banking is very different from other areas because it requires at all levels absolute transparency, unimpeachable financial morality and complete objectivity.

In banking, an employee who steps outside these bounds sets out on a winding and dangerous road from which, at a certain point, there is no turning back.

The respective bank regulations, in the case of a Bank employee, are the equivalent of the respect of a trust account in the case of professionals who receive sums of money to be distributed among their clients.

In either of the two fields, any exception is unpardonable for the extremely important reason that the relationship of trust is broken.

[85] This is not a case of an employee who, unaware of the standards expected of him, transgresses some undefined rule of conduct. Nor can the plaintiff's situation be compared to that of an employee who, having had such conduct go uncorrected by his employer in the past, would be entitled to a caution or warning: see *McCarthy v. O'Brien Material Handling Ltd.* (1999), 219 N.B.R. (2d) 82.

[86] The plaintiff was well aware of the standard of conduct required of him as an employee of the defendant's Bank.

[87] I conclude that as a result of his initial transgression in making the prohibited inquiries, he breached the confidentiality required of him in terms of access to customer and employees' accounts. He then compounded this error with his subsequent conduct and dealings with his manager and fellow employees. He demonstrated a character incompatible with the faithful discharge of his duties. As such, his summary dismissal was justified.

[88] The Bank's application is allowed.

[89] Costs were not argued and counsel may set that matter down for submissions if they cannot resolve that issue.

"J.D. Taylor, J."

The Honourable Mr. Justice J.D. Taylor

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