

CANADA / JUDGMENT

Findlay v. Alibhai

2006 BCSC 666

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 666 Findlay v. Alibhai

IN THE SUPREME COURT OF BRITISH COLUMBIA

Re: The Legal Profession Act, SBC 1998, c. 9

Citation:

Findlay v. Alibhai,

2006 BCSC 666

Date: 20060426

Docket: L052176

Registry: Vancouver

Between:

THE LAW OFFICE OF BARBARA FINDLAY QC

SOLICITOR

And

MALEK ALIBHAI

CLIENT

Before: District Registrar Sainty

Reasons for Decision

Appearing in Person

b. findlay, Q.C.

Appearing in Person

M. Alibhai

Date and Place of Trial/Hearing:

April 18, 2006

Vancouver, B.C.

- [1] This matter comes before me as a review of a lawyer's bill pursuant to the Legal Profession Act (the "LPA"). The client seeks a review of a series of accounts totalling some \$29,906.94 issued by the solicitor to the client during the retainer which commenced in December 2001 and terminated in October 2004. The client paid the solicitor the sum of \$28,124.03 during the retainer. The solicitor advised at the hearing that she has written off the balance due of \$1,782.91 such that no funds are due from the client to the solicitor.
- [2] The client first met with Ms findlay in December 2001. At that time, she was seeking counsel in regard to the termination of her employment with the Royal Bank in July 2001 in circumstances which the client believed were motivated partly by her race and ethnic origin. Ms findlay had (successfully) acted previously for two of Ms Alibhai's colleagues who had also lost their employment with the bank.
- [3] At their initial interview, Ms findlay advised the client that she had two potential remedies: (a) a complaint to the human rights commission (the "CHRC"); and (b) a wrongful dismissal action. She suggested that the client file both a Supreme Court action and a human rights complaint and see what might happen, i.e., how vigorously the bank might defend the matter and, as well, how strong the bank's case might be in defense.
- [4] Ms findlay testified that she originally suggested pursuing the human rights complaint as one remedy the client was seeking was to get her job back. That was not possible through an action in the Supreme Court (as the remedy there was damages) but was possible through a human rights complaint as the CHRC has the jurisdiction to restore a terminated employee to her lost position.
- [5] Ms Alibhai signed a retainer agreement effective October 2001. She instructed Ms findlay to go ahead with the Supreme Court action and the human rights complaint. The retainer agreement confirmed Ms findlay's hourly rate to be \$180 per hour (which Ms findlay testified was reduced from her normal rate of \$200 per hour due to Ms Alibhai's reduced circumstances) and provided for payment of a \$1,000 retainer by the client. That retainer agreement also provided:

Review of Account

12. Under section 78 of the Legal Profession Act, after receiving a bill for services or disbursements, I may apply to a registrar, before or after payment of the bill, for an appointment to review the bill to determine the fairness of the bill.

- [6] Ms findlay then prepared and filed a complaint with CHRC alleging discrimination by the Royal Bank and, particularly, by Ms Munsie, the client's direct supervisor. No response was ever received to that complaint. In fact, at the hearing, the client said that the complaint had never been sent and therefore she should not have to pay Ms findlay for her work in drafting it. The client was in error on this point. Ms findlay filed as an exhibit in this hearing the complaint with service acknowledged thereon by the CHRC (as at February 18, 2002).
- [7] On March 19, 2002, Ms findlay filed a writ of summons and statement of claim in this court claiming damages for the client from the bank and Ms Munsie.
- [8] Sometime in March or April of 2002, Ms findlay received instructions from the client not to pursue the human rights complaint when, following research by Ms findlay, it became clear that, while the CHRC has the ability to return a person to her employ, practically, that was not the reality. The client and Ms findlay agreed that the better course was to pursue the Supreme Court action.
- [9] Following commencement of the action, Ms findlay examined two of the bank's witnesses for discovery, including Ms Munsie. She also prepared comprehensive interrogatories to which the bank responded (and attached documents).
- [10] Ms findlay testified that examining Ms Munsie was difficult and frustrating as Ms Munsie seemed incapable of answering a question directly. Almost three days of discovery were necessary. Ms Alibhai agreed that Ms Munsie was a difficult witness and that several days of discovery were likely needed to get any reasonable answers. In the end, on discovery, Ms Munsie agreed that:
- (a) she had reduced the client's performance rating (subjectively) by 15 points thus placing Ms Alibhai at or near the bottom of her workgroup;
 - (b) she had relied on that reduction in deciding to terminate Ms Alibhai's employment.
- [11] Following the discoveries, Ms findlay pressed the defendants to provide additional documents. She and the client discussed her options and Ms findlay recommended that they proceed by way of a summary trial under Rule 18A of the Rules of Court, rather than a trial, because of the amount at stake and the length of time it could take to secure a trial date. Ms findlay wrote Ms Alibhai a lengthy letter on May 22, 2003 explaining how the court system works and outlining the client's options. The client instructed Ms findlay to proceed by way of a summary trial. Ms findlay commenced preparation of the affidavit materials necessary to put the client's case before the court.

- [12] In early November 2003, the defendants made an offer to settle the lawsuit on payment to the client of an additional 6 months salary. Ms findlay strongly recommended to the client that she settle on the basis of that offer. The client refused and instructed Ms findlay to proceed to take the case to court. Ms findlay then wrote a letter to the client confirming her advice (to settle) and the client signed that letter noting: "I understand what you have told me but I want to take my chances with the judge."
- [13] The defendants forwarded nine affidavits in response to the client's materials. The client and her daughter spent a great deal of time reviewing the responsive materials and providing Ms findlay with information from which she might prepare a response. Ms findlay prepared and brought an application to strike certain paragraphs of the defendants' affidavits as being based on hearsay evidence. She was not successful on that application as it was held that the application was better heard by the judge hearing the Rule 18A summary trial application.
- [14] The summary trial was set for late April 2004. Due to an error in Ms findlay's office, Mr. Marshall (counsel for the defendants) was not advised of the date selected for the hearing and the summary trial was adjourned to July 29 and 30. The day before the hearing, Mr. Marshall alleged that the Notice of Hearing had not been properly delivered. Ms findlay, while she believed the documents had been properly delivered was unable to swear to that and the matter was once again adjourned. Because of these errors, Ms findlay told Ms Alibhai that she would not charge her for the two days set for the summary trial.
- [15] The matter proceeded before Allan, J. on October 4, 5 and 6, 2004. Her Ladyship reserved her judgment until October 21, 2004 (see *Alibhai v. Royal Bank of Canada*, [2004] B.C.J. No. 2615, 2004 BCSC 1360). The client was not successful. The action was dismissed. The head note for the case states:

HELD: Action dismissed. The case was suitable for summary disposition as even if all the conflicts in the evidence were resolved in the employee's favour, her causes of action on the tortuous [sic] claims could not succeed. The manager's assertion that the employee was unsuited for work as a supervisor was insufficient to ground a claim of intentionally interfering with contractual relations. The employee had not established that the Bank's conduct was flagrant and extreme and calculated to produce harm. There was no evidence to support the employee's claims of discrimination. There was no basis to the employee's tortuous [sic] claims. The notice period, equivalent to 16 months, given to the employee was appropriate.

- [16] Ms findlay billed the client regularly throughout the retainer. Ms Alibhai was a good client - she paid most bills promptly and maintained a retainer account with the solicitor. Most of the accounts were based on Ms findlay's hourly rate times the number of hours expended by her on the client's matters. The account of October 7, 2004 (which includes the time for preparation for and attendance at the summary trial application) includes a notation: "hours worked but not billed total \$4,518". Ms findlay did not bill for time expended in:

- organizing materials for the hearing (2.8 hours on August 29);

- reviewing the materials for chambers (1.5 hours on September 28);
- preparing for the trial (4.3 hours on October 1); and
- attending at the first two days of the hearing (9.4 hours on October 2 and an additional 6.3 hours on October 3).

[17] Ms Findlay did bill for the time she spent preparing the client's written argument and attending the third day of the hearing on October 4 - 12.3 hours (total \$2,214). I should note that, by my calculations, the time worked but not billed actually equals \$4,374, not \$4,518 as noted on the account.

[18] The client's main complaints with the accounts are:

- The solicitor failed to get documents from the defendants which had been promised and which, if disclosed, would have benefited the client's case;
- The client should be refunded the \$10,000 she paid to the solicitor after December 2003 as the solicitor had advised that sum was for the trial and the solicitor told the client she was not to be billed for the trial because of the errors in her office relating to setting the summary trial down for hearing;
- The solicitor should not have proceeded by way of an 18A summary trial - she should have set the matter for a full blown trial as that was the only way the client's case could be properly put before the court;
- The solicitor did not adequately argue the client's case at the summary trial; particularly, the solicitor failed to point out inconsistencies in Ms Munsie's evidence which, had she done so, would have resulted in the client's application being successful;
- She should not pay anything for the CHRC complaint as it was never sent and did not result in anything for the client;
- She was charged twice for the same letter to Mr. Corwin - 2.1 hours on May 6, 2002 and 2.3 hours on June 3, 2002;
- She was charged \$234.00 on April 10, 2004 for "prepare questions for Lilly; write to Sheppard", which was not related to her matter. Ms Findlay agreed and advised that the accounts should be reduced by that amount.

[19] Ms Findlay's argument is understandably quite the opposite. Firstly she says that the client should not be entitled to have the accounts reviewed as they are each "final accounts" within the meaning of the Legal Profession Act (the "LPA") and are thus not reviewable, the appointment for review being filed well out of time.

[20] Section 70 of the LPA provides that lawyer's bills must be reviewed:

- (a) if unpaid, within 12 months of being delivered; or

- (b) if paid, within 3 months of payment.
- [21] Ms findlay submits that each account sent was a final account and none of them are reviewable as the appointment for review was filed outside the time limits in s. 70 of the LPA.
- [22] I must, therefore, first decide which of the accounts, if any, are reviewable, before proceeding further with this review.
- [23] In support of her argument, Ms findlay refers me to Morin, Grant v. Olsson, [1994] B.C.J. No. 2526 (S.C.). In that case, Hood, J. held that each account rendered during a retainer constituted a "lawyer's bill" within the meaning of the LPA and, absent special circumstances, was not reviewable as the appointment for review was not filed within the time limits set out in the LPA.
- [24] Ms findlay argues that Ms Alibhai had notice of the finality of each of the accounts and of her rights for review as this was set out in the retainer agreement signed by her early in the retainer. This was not, she argues a retainer to complete an entire piece of litigation. The client hired her to, firstly, determine what her remedies might be; secondly to prepare the CHRC complaint, the writ of summons and statement of claim; thirdly to conduct the examinations for discovery; and finally, to conduct the summary trial application. Each of these represents a piece of the litigation and the accounts relating to same are final bills and not reviewable.
- [25] In addition, Ms findlay submits, this was a straight hourly rate retainer - the client was to pay her by the hour for the work performed. Ms findlay reserved no rights to herself to charge a bonus for success - she simply agreed to work for an hour fee.
- [26] I do not agree. Generally speaking, absent an express agreement, the law is that periodic statements of account rendered during the course of carrying out an entire contract for a particular piece of work by a solicitor for a client are interim statements of account only, and are not bills within the meaning of the LPA. See *Ace Asphalt & Maintenance Ltd. v. Goodfellow MacKenzie* (1984), 56 B.C.L.R. 169 (C.A.). While there is some evidence supportive of Ms findlay's claim that the retainer was for "pieces" of litigation, Ms findlay billed the client on a very regular basis - not after each "piece" of work was done. Nor did she, at the time she sent each account, remind the client that the account was to be considered "final" and thus not reviewable if paid promptly. In my view, I can therefore only conclude that the accounts sent were "interim" accounts, not final "bills" when sent.
- [27] Ms findlay next submits that, even if I find (which I have) that the accounts are interim, the client is still prevented from reviewing the accounts as all of the accounts were paid within three months of being rendered and, as the appointment was filed 11 months after the final account was rendered, the client is still out of time.

- [28] Again, I cannot agree. Ms Findlay is not correct in saying that all of the accounts have been paid. There remained outstanding as at the date of the final account the sum of \$1,782.91. Ms Findlay has written that amount off and is not seeking that it be paid. Nonetheless, she was not able to advise me if she ever told the client that the outstanding balance was written off. In my view, the client would never have been aware that Ms Findlay was not seeking to be paid that amount. Ms Findlay cannot, in my opinion, subject the client to a limitation period without clearly advising her of the limitation. Writing off an outstanding account without telling the client cannot, in my view, lead to a limitation period by which the client (who knew nothing about it) ought to be bound.
- [29] Accordingly, all of the accounts are reviewable.
- [30] The registrar's function on a review of a lawyer's bill is to hear the evidence and submissions of both parties and, considering factors that are set out in s. 71(4) of the LPA, determine the reasonable fees payable by the client for the work done.
- [31] The factors to be considered are:
- (a) the complexity difficulty or novelty of the matter;
 - (b) the skill, specialized knowledge and responsibility required of the solicitor;
 - (c) her character and standing in the legal profession;
 - (d) the amount involved in the proceeding;
 - (e) the time reasonably expended by the lawyer on the client's matters;
 - (f) if the parties have agreed to an hourly rate, whether the lawyer's hourly rate is reasonable;
 - (g) the importance of the matter to the client; and
 - (h) the results achieved.
- [32] This matter was not particularly complex, difficult or novel. The solicitor did note that she had at the time of the retainer been successful in respect of wrongful dismissal claims for two of Ms Alibhai's colleagues. She believed that the bank "pulled out all the stops" on this case, partly because they had lost twice before and because of the allegations (of racism) being made. In addition, the evidence indicated that the solicitor and the client had some difficulties communicating one with the other - specifically, the client believed that her case was strong and refused to believe the solicitor's advice regarding the weaknesses in her case. The only "extra-ordinary" aspect of the matter was the need for such lengthy examinations for discovery of Ms Munsie (and the client agreed that those were necessary).

- [33] Ms findlay has the necessary skill level to undertake this matter for the client. She was called to the Bar of British Columbia in 1977. She has maintained a general practice, including civil litigation, since 1993. I have no reason to believe that Ms findlay is anything other than a member in good standing of the Bar of British Columbia. In fact, Ms findlay was designated as "Queen's Counsel" in 2001, which designation is a positive measure of her integrity and character (see *Hill v. Gibbs* (2003), 127 A.C.W.S. (3d) 160, 2003 BCSC 1563 (Registrar)).
- [34] The client contends that Ms findlay lacked skill in discharging her duties in this matter. In fact, she filed a complaint with the Law Society about Ms findlay. That complaint was resolved in Ms findlay's favour (although the client testified that she did not respond further to the Law Society when asked to do so as she was tending to her ailing mother).
- [35] It is always easy, with the benefit of hindsight, to say that counsel did not exercise appropriate skills in a matter where counsel has been unsuccessful. However, a registrar, conducting a review under the LPA, should be cautious about reducing a lawyer's bill on the basis that some other lawyer might have conducted the case somewhat differently perhaps with different results: *D. Brent Adair Law Personal Corp. v. Warren*, [1996] B.C.J. No. 2818 (S.C.) at ¶22 (Q.L.).
- [36] Here Ms findlay told the client prior to proceeding to court on the summary trial application that she was not likely to be successful. In fact, she strongly recommended that the client settle the matter for an additional six months salary, as offered. The client instructed her to proceed in the face of that advice.
- [37] Ms findlay went to court and argued the client's case. She prepared a comprehensive, reasoned and well-drafted written argument. That argument was considered by Allan, J. in her reasons for judgment.
- [38] The client suggested that Ms findlay failed to point out inconsistencies in the defendants' affidavits and should have proceeded to trial, rather than a summary trial. It is up to counsel to determine how to conduct a client's case, based on that client's instructions. Here, Ms findlay clearly explained to the client the pros and cons of proceeding by way of a full blown trial or by summary trial. The client, based on Ms findlay's advice, chose to proceed by way of a summary trial. Allan, J. in her reasons concluded that that the matter was suitable for disposition by way of a summary trial. At ¶21 she notes [my emphasis]:
- [21] Rule 18A(11) provides that judgment may be granted generally or on an issue unless the Court is unable to find the necessary facts to decide the issues of fact or law or it would be unjust to decide the issues summarily. There are additional factors to consider in this case. Even if the plaintiff were successful, the amount involved is not large. The fact that the parties have already spent one day in chambers on the plaintiff's motion to strike out portions of the defendants' affidavits, and three days on the plaintiff's application for summary trial, makes it probable that, if this matter were sent to the conventional trial list, the litigation costs would be exorbitant in relation to any possible award.

- [39] As for the inconsistencies, Ms findlay testified that she explained to the client, more than once, the difference between knowing someone is being untruthful and proving that someone is being untruthful. There were, she advises me difficulties in proving the inconsistencies. Additionally, according to Ms findlay, the veracity of the witnesses was not the issue on which the client's matter was to be decided. The issue was whether or not the defendant's actions caused the plaintiff to suffer damage.
- [40] Based on all of the evidence before me, I do not agree with the client's submissions that Ms findlay did not adequately her in this matter. In my view she did exercise some considerable skill in arguing the client's case.
- [41] I am unable to say with any certainty what amount of money the client was seeking. Neither Ms findlay nor Ms Alibhai testified as to a number that was sought. The client could have received an additional six months salary had she accepted the bank's offer in November 2003.
- [42] Ms findlay's hourly rate of \$180 an hour (as agreed to in the retainer agreement) is well below what one might expect to have been charged by counsel with similar experience for comparable work.
- [43] As for the time that was recorded to the file, I reviewed each of the accounts which note the hours expended on each item described in the accounts. I queried Ms findlay at the hearing regarding the time expended by her on affidavit materials - both as prepared for the client and as received from the defendants and reviewed with Ms Alibhai as I found it to be somewhat high. Ms findlay was able to satisfy me that the time expended was necessary. Particularly she noted that it was difficult to "pin down" Ms Alibhai such that her account of matters might be reduced to a linear and coherent accounting of the facts. Further, I was advised that Ms Alibhai spent an extraordinary amount of time reviewing and commenting on the affidavit materials sent by the defendants. Those comments were then provided to Ms findlay who had to consider them on a paragraph by paragraph basis. The client's observations were not always of assistance to Ms findlay and Ms findlay ended up spending a great deal of time with the client explaining the rudiments of evidence. This appears to have been a very time consuming process.
- [44] There were some difficulties with setting a date for a hearing. When the matter did proceed, it was set for two days but occupied three days of court time. Ms findlay, in accordance with her advice to Ms Alibhai, did not charge Ms Alibhai for the time expended in preparing for the hearing or for the first two days.
- [45] The client was not "double-billed" as claimed for correspondence with Mr. Corwin. That contention is not borne out by the evidence. The client was, however, billed some \$234 (plus tax) for time on April 10, 2004 which was recorded to her file in error.

- [46] The client suggested that she should not be required to pay anything for the CHRC complaint as it went nowhere. I do not agree. The client instructed Ms findlay to prepare the complaint then later instructed her not to pursue it. Ms findlay did the work as instructed and is entitled to be paid a reasonable amount for that work.
- [47] This matter was clearly of great importance to the client, as are all matters involving a person's livelihood.
- [48] The results were not good for the client - she was unsuccessful in her claim and costs were awarded against her. She did however have an opportunity to settle the matter but wanted to proceed to court.
- [49] Results are simply one of the factors I must consider. Each factor I have set out and on which I have made comments must be considered and no one factor should be given more weight than any of the others. In my view, Ms findlay should not be precluded from receiving reasonable fees simply because the trial was not successful. Ms findlay had the opportunity, after doing the discoveries, receiving the defendants' affidavits and conducting some research, to assess the strength of the client's case. Her assessment was that the case was not strong and that the client ought to settle. She should not now be disentitled to being paid a reasonable amount for her services because she was unsuccessful at trial, particularly in the face of her advice to the client that she ought to settle rather than litigate.
- [50] The client suggested that funds should be returned to her. She believed that the \$10,000 paid by her "before the trial" should be refunded as she was not to be billed for the trial. The evidence discloses that, in November 2003, Ms findlay's assistant wrote Ms Alibhai asking that \$10,000 be paid before the trial (as it was Ms findlay's practice to secure her fees up front). Around the same time the letter was written, the client paid her outstanding invoices in the amount of \$3,055.42 and provided a \$7,000 retainer shortly thereafter. From December 2003 through March 2004, Ms findlay continued preparation of the materials for the summary trial application and prepared an application to the court to strike certain paragraphs of the defendants' affidavit materials. By the end of February 2004, Ms findlay had billed the client some \$7,182.41 in fees, disbursements and taxes related to her work for that period of time. In March 2004, the client provided Ms findlay with an additional \$5,000 retainer. That retainer appears to have been applied to payment of a small accounts receivable balance, the account respecting the court application and the final account for the actual summary trial. There is no money to "refund" to the client. The amounts paid by her were applied to accounts rendered from time to time relating to this matter. Had Ms findlay not written off the time expended in preparing for the summary trial and attending on the first two days of the hearing, the client would, subject to any reduction I might make to Ms findlay's accounts on this review, owe Ms findlay additional funds.
- [51] As I have noted, in determining the reasonable fees that ought to be paid by the client for the work done, I must consider all of the LPA factors which I have set out above. According to the client ledger, Ms Alibhai was billed a total of \$21,117 in fees, disbursements of

\$3,555.18 and taxes of \$3,451.85 for a total of \$28,124.03. This amount takes into account I understand the \$1,782.91 written off of the last account by Ms findlay. In addition to that write off, the client received a further "discount" of \$4,374 in respect of the account for the summary trial. The work done by Ms findlay effectively was comprised of:

- (a) preparation and sending of a complaint to the CHRC;
- (b) preparation and service of a writ of summons and statement of claim;
- (c) conducting three and a half days of examinations for discovery;
- (d) an application to court relating to the defendants' affidavit materials;
- (e) preparation and arguing of the plaintiff's summary trial application (including a comprehensive written argument) over a three day period.

[52] In my opinion, had Ms findlay charged all of her time in relation to the summary trial, I likely would have found that the accounts were somewhat on the high side. However, in my view any "excess" in fees was more than taken into account by Ms findlay not billing for preparing for or attending two days of hearing and, further, by the additional reduction taken in the way of the write off of the accounts receivable. Accordingly, it is my view that the fees are reasonable in the circumstances and should be upheld. No issue was taken with respect to the disbursements and I will uphold them as presented.

[53] Section 72 of the Legal Profession Act provides as follows:

72 (1) Costs of a review of a lawyer's bill must be paid by the following:

- (a) the lawyer whose bill is reviewed, if 1/6 or more of the total amount of the bill is subtracted from it;
 - (b) the person charged, if less than 1/6 of the total amount of the bill is subtracted from it;
 - (c) a person who applies for a review of a bill and then withdraws the application for a review.
- (2) Despite subsection (1), the registrar has the discretion, in special circumstances, to order the payment of costs other than as provided in that subsection.

[54] I have upheld the accounts in their entirety. Accordingly the solicitor is entitled to her costs of this matter.

[55] Section 72(2) of the Legal Profession Act, *supra*, provides:

(2) On a review under this Part, the registrar may

...

- (b) summarily determine the amount of the costs of the review and add it to or subtract it from the amount shown on the certificate.

- [56] In order to assist with the final resolution of this matter and to avoid an additional court appearance to assess costs, I am summarily fixing the solicitor's costs of this review at the sum of \$450.
- [57] The accounts have been paid by the client and therefore no interest is accruable on any amount.
- [58] There remains, however, the matter of the \$234 (plus tax) billed on the April 27, 2004 account for "prepare questions for Lilly; write to Sheppard". Ms findlay agreed at the hearing that this amount should not have been billed to the client and I direct the amount of \$266.76 be deducted from the costs amounts such that the client is responsible for paying Ms findlay the sum of \$183.24.
- [59] If required, the solicitor may prepare a certificate and forward it to me for my signature.
- "District Registrar K. Sainty"

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