

Unjust Dismissal Hearing Interrupted Over Privilege Challenge

Quoting Erin R. Kuzz

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The federal Cour says issues of litigation and solicitor-client privilege trump the interests of an individual seeking the completion of his unjust dismissal hearing.

In late May, the court heard an application for judicial review in *BMO v. Sasso* seeking to set aside the order of an adjudicator made during a hearing under the provisions of the Canada Labour Code that dealt with documents the Bank of Montreal claimed were privileged.

The hearing concerned a complaint by a BMO investment specialist, Gianni Sasso, that he had been unfairly let go by the bank.

A customer of BMO claimed another employee at the institution named Gregory Rao had viewed his account, and that he had misappropriated funds from that account. (Rao was the customer's brother-in-law.) It was later alleged Rao had defrauded other BMO clients of millions of dollars and BMO and Nesbitt Burns initiated proceedings against Rao.

The bank's client brought an action against BMO saying he told Sasso about his suspicions regarding Rao's activity.

"The allegation is my client dealt with it on a low level and didn't escalate it to a manager. There's no suggestion he was involved in any fraud," says Sasso's counsel Danny Kastner of Paliare Roland Rosenberg Rothstein LLP.

BMO retained external counsel from Norton Rose Canada LLP to conduct an investigation, including an interview with Sasso, and to provide legal advice.

Sasso was dismissed by BMO as a result of the internal investigation. His lawyer then sought to have BMO produce various documents emerging from the investigation including notes made by Norton Rose lawyer Jeremy Devereux from the interviews with Sasso.

However, BMO's lawyers claimed two forms of privilege on the information — solicitor-client privilege and litigation privilege. Kastner argued neither applied.

"We said even if privilege did apply it was waived by the fact they were going to put their own lawyer on the stand to testify about what happened during the investigation," he says.

The adjudicator agreed privilege didn't apply but the issue was escalated by BMO to the Federal Court for judicial review.

Lawyers for BMO were contacted by *Canadian Lawyer InHouse* for this story but declined comment. The Federal Court decision states they argued the circumstances were “exceptional” and the adjudicator’s order would require BMO to disclose documents “it truly believes are subject to privilege.”

The judge asked the adjudicator to reconsider the analysis of the information — some 30 documents.

Judge Roger T. Hughes noted the Supreme Court of Canada has stated that where a claim for privilege has been raised, the documents should be examined by the decision-maker, or the decision-maker should be satisfied on reasonable grounds, as to the interests at stake.

“Given the relatively few documents at issue, it was a fundamental procedural error for the Adjudicator not to examine the documents before making a ruling. I am advised by Counsel for BMO that a booklet containing copies of these documents had been offered to the Adjudicator for this purpose,” wrote Hughes.

It was determined the adjudicator dealt with the litigation privilege issue but not the solicitor-client privilege.

“What the Federal Court judge has said is not that the adjudicator was wrong, but that some of her analysis was problematic and she needs to re-do the analysis and come to a new conclusion,” says Kastner. “The judge didn’t ultimately say her conclusion was wrong.”

Kastner says the adjudicator took only a “description” of the documents from BMO and did not read them.

“So the judge said given there weren’t that many documents she should have looked at them herself first before making a finding about privilege,” says Kastner.

That leaves Sasso in limbo because there has not been a definitive pronouncement on whether privilege does in fact apply to the documents in question.

“We were still in the middle of our administrative proceeding — the unjust dismissal proceeding — this was just a preliminary issue of production and normally the principle is you don’t get to interrupt an administrative proceeding and go up to court for judicial review in the middle of it,” says Kastner. “Otherwise what you get is this incredibly fragmented process for an individual going up against a bank. What the bank is now able to do is bring endless proceedings interrupting it on the privilege issue.”

Until now, Kastner says there weren’t any cases from the Federal Court about whether an administrative proceeding can be interrupted for a judicial review regarding privilege determinations.

While it may be unusual for a reviewing court to step in at the stage this one did, Erin Kuzz, of Sherrard Kuzz LLP, says in this case it made sense.

“The situation should be pretty rare when you can review during a proceeding, but when you have a situation where if the adjudicator had said, ‘turn over the documents,’ and the adjudicator had turned them over — you can’t un-see those,” she says. “When you’re dealing with situations where there are elements of adjudicating a case that are so critical that they can’t be undone — you can’t un-ring the bell.”

Kuzz says she was “pleased” to see the court was prepared to look at the issue midstream.

“It’s one of those things where privilege is so sacrosanct — it would have to be the most extraordinary of circumstances for privilege to not hold. No matter what side of adjudication you’re on, privilege is critical. I’m quite comforted the court took it as seriously as it did and was prepared to step in at the stage that it did,” she says.

When the issue of privilege was reviewed shouldn't have mattered.

“At the end of the day protecting something like privilege takes precedent over any individual's interest in any specific matter and has to,” she says.

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