

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Erik C. Napp

Case Number: 19-01077

vs.

Respondent
BGC Financial, L.P.

Hearing Site: New York, New York

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

Nature of the Dispute: Associated Person vs. Member

REPRESENTATION OF PARTIES

For Claimant Erik C. Napp: Brian Kennedy, Esq., Law Office of Brian Kennedy, New York, New York.

For Respondent BGC Financial, L.P.: Nirav S. Shah, Esq., BGC Financial, L.P., New York, New York.

CASE INFORMATION

Statement of Claim filed on or about: April 19, 2019.
Erik C. Napp signed the Submission Agreement: April 18, 2019.

Statement of Answer filed by Respondent on or about: June 28, 2019.
BGC Financial, L.P. signed the Submission Agreement: June 28, 2019.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: wrongful termination; breach of expressed, implied and/or quasi contract; violation of New York Labor Law; defamation per se; and expungement of Form U5.

Unless specifically admitted in the Statement of Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested: compensatory damages for wrongful termination in the amount of at least \$2,000,000.00; compensatory damages for breach of contract or quasi-contract in the amount of at least \$2,000,000.00; statutory liquidated damages and statutory attorneys' fees under New York Labor Law §198(1-a) in an amount equal to 100% of unpaid compensation; expungement of Form U5; compensatory damages for appropriate severance, deferred compensation, and/or partnership units; punitive damages in the amount of at least \$2,000,000.00; and such other and further relief as deemed just and proper including but not limited to attorneys' fees; statutory interest; and reimbursement of all filing fees, disbursements, and expenditures.

In the Statement of Answer, Respondent requested that Claimant's Statement of Claim be dismissed in its entirety; attorneys' fees; costs; and expenses.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

The Award in this matter may be executed in counterpart copies.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and any post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent is liable for and shall pay to Claimant the sum of \$280,000.00 in compensatory damages.
2. Respondent is liable for and shall pay to Claimant statutory interest on the above-stated sum at the rate of 9% per annum from November 4, 2018, until the award is paid in full.
3. Respondent is liable for and shall pay to Claimant the sum of \$36,564.00 in attorneys' fees pursuant to New York Labor Law §198(1-a).
4. Claimant's request for expungement of his Form U5 is denied.
5. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, are denied.

PANEL'S EXPLANATION OF DECISION

Claimant knew or had reason to know of the scheme perpetrated by senior manager O and senior manager C to print fake trades and disseminate false trading information to the marketplace. While he was clearly not the instigator of the scheme, he was complicit and while perhaps uncomfortable, knowingly participated. Further, he made the decision not to report the activity to the Compliance Department as clearly required in the Employee Handbook.

In the course of the investigation, given the subtleties and ambiguities of terms like “printing trades,” while it is unclear if Claimant explicitly lied to internal investigators, he appeared to hide behind these ambiguities. At a minimum he was clearly not fully forthcoming with what he knew regarding activities on the desk, thus potentially hindering the investigation. While we acknowledge he was under pressure to be ‘vague’ and not volunteer information by senior manager O and senior manager C, the Panel finds this to be an unacceptable excuse.

The Panel thus finds Claimant’s ultimate termination was justifiable. The Panel further finds the language the Respondent placed on his Form U5 form to be accurate and defensible.

Further Findings

In the midst of the internal investigation, in February 2018, Claimant tendered his resignation to Respondent. A Senior Managing Director (“SMD”) asked Claimant to reconsider his decision, as there were developments in progress that could make his future with Respondent substantially more appealing and profitable. Over the following days, Claimant and the SMD negotiated terms that would be sufficient to entice Claimant to stay at the firm. These included an increase in salary, the assignment to Claimant of a number of bigger and more active accounts, a cash payout of a portion of Claimant’s partnership units (“PSU”), and an increase in his percentage commission payout rate. Such changes were to go into effect on March 1, 2018.

Prior to this negotiation, it is clear that Claimant was an “at will” employee. Should this new contract be approved, however, it would change his status to a contract employee. The SMD communicated to Claimant that did he not have the exclusive power to approve such a contract, but he would advance the recommendation to the appropriate internal authorities and advocate for its approval. This he did on the Contract Request form dated February 26, 2018, signed by the SMD and Respondent’s Executive Managing Director (“EMD”).

In April 2018, Claimant was interviewed by internal investigators for the 4th time. At this interview, he was confronted with the existence (and misuse) of a “TD button” that existed on the computers of senior manager O and senior manager C. This button did not in fact represent TD Bank, which was at the time an inactive account. It was rather used inappropriately to print fake trades and disseminate false information to the marketplace.

Claimant contends that his prior limited disclosure to firm investigators that on occasion the desk had printed fake trades (specifically when Respondent’s framed prices were paired against customer orders) was sufficient. In spite of his knowledge, he never disclosed (and arguably withheld) information regarding the existence of the TD button and its blatant and clearly illegal misuse. It was for this egregious violation that Respondent was ultimately fined \$15 million by regulatory authorities.

At some point between that interview in April and June 2018, Respondent’s internal investigators concluded that Claimant had not been forthcoming in his interviews and had knowingly participated in the illegal scheme. It was acknowledged by the head of compliance that it was then clear to the firm that Claimant would ultimately be fired. The decision was made, however, to keep Claimant employed while new personnel was hired to fill out the desk so as not to unnecessarily damage the firm’s business prospects in the emerging market currency options business.

Clearly, however, this information was hidden from Claimant. Over the next five (5) months, whenever Claimant enquired about the status of his contract, he was told it was “tied up in legal.” The Panel finds this explanation disingenuous. Respondent was clearly misleading Claimant about his future prospects at the firm while continuing to keep him employed temporarily for their own purposes.

For this, the Panel finds that Respondent in effect created the existence of a “quasi-contract”. Thus, the Panel finds that from the date of March 1, 2018, until Claimant’s termination on November 4, 2018, Respondent is bound by the terms of that contact.

The Panel further finds that, while Respondent had a longstanding policy that employees are not paid (and in effect, do not earn) commission payments until the 45th day after the end of a calendar quarter, in this case the company was guilty of a willful manipulation, deciding on the November 4, 2018 termination date explicitly to avoid paying Claimant’s legitimately earned bonus for the period between July 1, 2018, and November 4, 2018. In the interest of fairness and equity, the Panel has awarded such compensation, including double damages under New York Labor Law.

The Panel also finds that given the broad nature of FINRA’s Arbitration guidelines, PSU fall within the jurisdiction of this arbitration. The Panel finds further that BGC Holdings, LP, while not a FINRA member, is subject to this arbitration by nature of its relationship to the parties in dispute. The Panel thus finds that Claimant is entitled to the redemption of 50% of the PSU’s that were in existence in February at the time of his negotiation with the SMD. As PSU’s are equity and not wages, they are not subject to doubling under New York Labor Law.

FEES

Pursuant to the Code of Arbitration Procedure (“Code”), the following fees are assessed:

Filing Fees

FINRA Dispute Resolution Services assessed a filing fee* for each claim:

Initial Claim Filing Fee = \$ 2,250.00

**The filing fee is made up of a non-refundable and a refundable portion.*

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge = \$ 3,600.00

Member Process Fee = \$ 6,800.00

Postponement Fees

Postponements granted during these proceedings for which fees were assessed or waived:

January 11-15 & 19-21, 2021, postponement requested by the parties Waived

June 7-11, 2021, postponement requested by the parties Waived

December 16, 2021, postponement requested by Respondent = \$ 1,500.00

Total Postponement Fees =\$ 1,500.00

Pursuant to the parties' agreement, the Panel has assessed the total postponement fees to Respondent.

Last-Minute Cancellation Fees

Fees apply when a hearing on the merits is cancelled within ten calendar days before the start of a scheduled hearing session:

December 16, 2021, cancellation requested by Respondent =\$ 1,800.00

Total Last-Minute Cancellation Fees =\$ 1,800.00

Pursuant to the parties' agreement, the Panel has assessed the total last-minute cancellation fees to Respondent.

Hearing Session Fees and Assessments

The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the Arbitrators, including a pre-hearing conference with the Arbitrators, which lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) pre-hearing session with a single Arbitrator @ \$450.00/session =\$ 450.00
Pre-Hearing Conference: May 5, 2020 1 session

Six (6) pre-hearing sessions with the Panel @ \$1,500.00/session =\$ 9,000.00
Pre-Hearing Conferences: August 20, 2019 1 session
April 1, 2020 2 sessions
October 20, 2020 1 session
April 6, 2021 1 session
September 24, 2021 1 session

Seventeen (17) hearing sessions @ \$1,500.00/session =\$ 25,500.00
Hearings: December 6, 2021 2 sessions
December 7, 2021 2 sessions
December 8, 2021 2 sessions
December 9, 2021 2 sessions
December 10, 2021 2 sessions
December 13, 2021 2 sessions
December 14, 2021 2 sessions
December 15, 2021 1 session
December 17, 2021 2 sessions

Total Hearing Session Fees =\$ 34,950.00

The Panel has assessed \$17,175.00 of the hearing session fees to Claimant.

The Panel has assessed \$17,775.00 of the hearing session fees to Respondent.

All balances are payable to FINRA Dispute Resolution Services and are due upon receipt.

ARBITRATION PANEL

Rory M. McLaughlin	-	Public Arbitrator, Presiding Chairperson
Lorraine Marie Brennan	-	Public Arbitrator
Steven Bauer Malkenson	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument, which is my award.

Concurring Arbitrators' Signatures

Rory M. McLaughlin

Rory M. McLaughlin
Public Arbitrator, Presiding Chairperson

02/25/2022

Signature Date

Lorraine Marie Brennan

Lorraine Marie Brennan
Public Arbitrator

02/24/2022

Signature Date

Steven Bauer Malkenson

Steven Bauer Malkenson
Non-Public Arbitrator

02/25/2022

Signature Date

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February 25, 2022

Date of Service (For FINRA Dispute Resolution Services use only)