Federal Court  Cour fédérale

Date: 20190924

Docket: T-1841-18

Citation: 2019 FC 1226

Montréal, Quebec, September 24, 2019

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

GEORGE KOURIDAKIS

Applicant

and

CANADIAN IMPERIAL BANK OF COMMERCE

Respondent

and

MARK ABRAMOWITZ

Mis en cause

JUDGMENT AND REASONS

I. Overview

[1] Mr. Kouridakis seeks judicial review under subsection 18(1) of the *Federal Courts Act*, RSC 1985, c F-7, of the decision dated September 18, 2018 of Mr. Mark Abramowitz

[Arbitrator] finding that Mr. Kouridakis had been unjustly dismissed but that the proper remedy was severance compensation rather than reinstatement [the Arbitral Decision].

[2] Mr. Kouridakis submits that the Arbitrator's conclusions that reinstatement was not a viable option and that he was only entitled to severance compensation were unreasonable. Mr. Kouridakis further submits that the affidavit of Ms. Moussa filed by the Canadian Imperial Bank of Commerce [CIBC] in response to the present application is not admissible.

[3] CIBC submits that the Arbitrator reasonably found that, in the circumstances of this case, reinstatement was not appropriate and that the nature of the compensation was justified.

[4] I would dismiss the present application for the reasons set out below.

II. Background

[5] Mr. Kouridakis was employed by CIBC from October 2000 to June 2016. He held various positions with the bank and received many certificates of appreciation, pay increases and bonuses. He, however, was terminated on June 14, 2016.

[6] During his time at CIBC, Mr. Kouridakis also received various letters about his conduct. The most significant letter was a final disciplinary warning letter from his manager, Ms. Annie Dumaine, dated July 14, 2015. The letter noted that CIBC continued to have concerns about his behaviour at work and referred to an incident on July 3, 2015, when Ms. Dumaine had found Mr. Kouridakis socializing with colleagues during work hours. The letter also expressed

concerns about Mr. Kouridakis's time logs, suggesting that Mr. Kouridakis was somehow conducting personal business on company time.

[7] Mr. Kouridakis contested the letter, explaining that he had been invited by a colleague to share some cake and had gone as he was on lunch break. He asserted that two colleagues who were new at their jobs had asked him for help and that he had spent about 20 to 30 minutes helping them. Ms. Dumaine had come downstairs along with her superior, Mr. Sébastien Gravel, and had yelled at Mr. Kouridakis in front of the other employees. Mr. Kouridakis had tried to explain what he was doing but Ms. Dumaine would have none of it.

[8] The letter of July 14, 2015 also indicated that the incident would affect Mr. Kouridakis's performance review and other incentives. Mr. Kouridakis subsequently received a performance review where it was stated he "did not meet expectations". He did not receive any bonuses that year.

[9] The Arbitrator found that the tension between Ms. Dumaine and Mr. Kouridakis continued unabated thereafter. In a team meeting on April 6, 2016, Mr. Kouridakis stated that he disagreed with some of Ms. Dumaine's suggestions and would take the matter up with her manager. A few days later, Mr. Kouridakis spoke to Ms. Dumaine about the incident. The conversation became heated, and Ms. Dumaine left in tears. Mr. Kouridakis insists that he followed her to the elevator to apologize, and touched her arm, saying that he wanted to talk to her. Ms. Dumaine stated the following loudly: "Don't touch me." Following what has been

described as the “Elevator Incident”, Mr. Kouridakis began to feel unwell and went on sick leave.

[10] On May 4, 2016, while on sick leave, Mr. Kouridakis met with CIBC’s medical expert, who concluded, amongst other things, that Mr. Kouridakis was fit to participate in a meeting with CIBC’s corporate security group, but recommended that such meeting take place after he meets with his supervisor or superior as part of the applicable process.

[11] On May 26, 2016, Mr. Kouridakis filed a bullying and harassment complaint against Ms. Dumaine. In his email to human resources, Mr. Kouridakis (whose email pseudonym was George Chrysler) set out at length a series of incidents where, according to him, he was reprimanded, yelled at, humiliated, made to feel inadequate, accused of tampering with corporate records and lying, and he went on to describe how his anxiety in what he perceived as being an unhealthy work environment reached its pinnacle with the Elevator Incident, and ended with him having to go on sick leave.

[12] CIBC asked Mr. Kouridakis to attend a meeting. He assumed the meeting was about his return to work, however, when he arrived on June 14, 2016, he was taken to meet with corporate security. He was asked about the Elevator Incident. Mr. Kouridakis learned that Ms. Dumaine had complained that he had grabbed her on two occasions and had prevented her from leaving her desk. Mr. Kouridakis had not spoken to anyone else from CIBC about this incident.

[13] Following the meeting with corporate security, Mr. Kouridakis was dismissed. That evening, clearly upset, Mr. Kouridakis sent another email to a top executive at CIBC reiterating his accusations against Ms. Dumaine. Several days later Mr. Kouridakis received a termination letter. The termination letter was silent on the reasons for dismissal. Mr. Kouridakis proceeded to file a complaint for unjust dismissal shortly thereafter pursuant to the *Canada Labour Code*, RSC 1985, c L-2 [Code].

[14] In August 2016, Labour Canada sent Mr. Kouridakis a letter setting out that his termination was due to "violent and inappropriate behavior towards [Mr. Kouridakis's] manager, Annie Dumaine as well as non-described past episodes of unprofessional and inappropriate behaviour in the workplace" for which he had received warnings.

[15] The hearing before the Arbitrator lasted eight days. The Arbitral Decision dated September 18, 2018 is the subject of the present application for judicial review.

III. The Arbitral Decision

[16] The Arbitrator discussed Mr. Kouridakis's work and disciplinary history in detail. He noted that Mr. Kouridakis knew of the warnings and had not contested them, which suggested that he knew that they would be part of his file. He found that Mr. Kouridakis's disciplinary record was applicable in considering whether the culminating incidents justified the dismissal.

[17] Turning to the Elevator Incident, the Arbitrator found that the touching of Ms. Dumaine's arm was not workplace violence but that the disciplinary measures resulting from that incident

were perhaps appropriate because of the manner in which Mr. Kouridakis earlier criticized his manager. He stated that he would consider whether the incident could be considered a culminating one in view of Mr. Kouridakis's prior behaviour.

[18] The Arbitrator then set out the parties' positions. CIBC had argued that the dismissal was justified given Mr. Kouridakis's unacceptable and insolent challenges to authority, inappropriate acts, and lack of appreciation for consequences. Mr. Kouridakis had argued that his past behaviour had been tolerated or condoned and that a suspension without pay for one month would have been a more appropriate disciplinary measure.

[19] The Arbitrator stated that the previous incidents had not been condoned by the bank given their inclusion in Mr. Kouridakis's employment file. However, he found that the behaviour had been nonetheless reluctantly tolerated given the quality and value of Mr. Kouridakis's work. The Arbitrator accepted Mr. Kouridakis's version of the events that occurred on July 3, 2015, noting that, as Ms. Dumaine had asked her supervisor to accompany her, she had made up her mind that Mr. Kouridakis had engaged in misconduct before even confronting him. The Arbitrator further found that Ms. Dumaine had provoked Mr. Kouridakis when he confronted her on April 6, 2016. Nonetheless, the Arbitrator found that Mr. Kouridakis's behaviour did have a negative impact on the manager-employee relationship.

[20] The Arbitrator agreed with CIBC that reinstatement was "untenable". He noted that he had wide latitude to determine the appropriate remedy and found that it was necessary to remove Mr. Kouridakis from the workplace to ensure a harmonious work environment, given that the

"potential for his rehabilitation in this regard appears unlikely given its long term existence." The Arbitrator concluded that although CIBC had not made out a case for dismissal for just cause, termination was necessary and severance compensation was the appropriate remedy.

[21] Finally, the Arbitrator reserved jurisdiction on the severance compensation owing to Mr. Kouridakis pending the scheduling of a date for the hearing on quantum, which has yet to take place.

IV. Relevant Law

[22] The relevant sections of the Code read as follows:

240(1) Subject to subsections (2) and 242(3.1), any person	240 (1) Sous réserve des paragraphes (2) et 242(3.1), toute personne qui se croit injustement congédiée peut déposer une plainte écrite auprès d'un inspecteur si :
(a) who has completed twelve consecutive months of continuous employment by an employer, and	a) d'une part, elle travaille sans interruption depuis au moins douze mois pour le même employeur;
(b) who is not a member of a group of employees subject to a collective agreement,	b) d'autre part, elle ne fait pas partie d'un groupe d'employés régis par une convention collective.
may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.	
241(1) Where an employer dismisses a person described in subsection 240(1), the person	241(1) La personne congédiée visée au paragraphe 240(1) ou tout inspecteur peut demander

who was dismissed or any inspector may make a request in writing to the employer to provide a written statement giving the reasons for the dismissal, and any employer who receives such a request shall provide the person who made the request with such a statement within fifteen days after the request is made.

par écrit à l'employeur de lui faire connaître les motifs du congédiement; le cas échéant, l'employeur est tenu de lui fournir une déclaration écrite à cet effet dans les quinze jours qui suivent la demande.

242(1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

242(1) Sur réception du rapport visé au paragraphe 241(3), le ministre peut désigner en qualité d'arbitre la personne qu'il juge qualifiée pour entendre et trancher l'affaire et lui transmettre la plainte ainsi que l'éventuelle déclaration de l'employeur sur les motifs du congédiement.

. . .

[…]

(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall

(3) Sous réserve du paragraphe (3.1), l'arbitre :

(a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and

a) décide si le congédiement était injuste;

(b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

b) transmet une copie de sa décision, motifs à l'appui, à chaque partie ainsi qu'au ministre.

. . .

[…]

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to	(4) S'il décide que le congédiement était injuste, l'arbitre peut, par ordonnance, enjoindre à l'employeur :
(a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;	a) de payer au plaignant une indemnité équivalant, au maximum, au salaire qu'il aurait normalement gagné s'il n'avait pas été congédié;
(b) reinstate the person in his employ; and	b) de réintégrer le plaignant dans son emploi;
(c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.	c) de prendre toute autre mesure qu'il juge équitable de lui imposer et de nature à contrebalancer les effets du congédiement ou à y remédier.
243(1) Every order of an adjudicator appointed under subsection 242(1) is final and shall not be questioned or reviewed in any court.	243(1) Les ordonnances de l'arbitre désigné en vertu du paragraphe 242(1) sont définitives et non susceptibles de recours judiciaires.

V. Issues

[23] The application raises the following issues:

1. Was the Arbitrator's finding that Mr. Kouridakis's reinstatement was untenable unreasonable?

2. Was the Arbitrator's finding that Mr. Kouridakis was only entitled to severance compensation unreasonable?

3. Is the affidavit of Ms. Moussa of CIBC admissible?

VI. Standard of Review

[24] The parties agree that the reasonableness standard applies to the decisions of labour adjudicators interpreting statutes within their expertise (*Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at paras 15–16, 32 [*Wilson*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). I agree. This is especially clear from the privative clause in section 243 of the Code.

[25] In addition, in *Payne v Bank of Montreal*, 2013 FCA 33 [*Payne*], the Federal Court of Appeal [FCA] stated that subsection 243(1) "reinforces the conclusion that Parliament intends [arbitrators'] decisions to be judicially reviewed on a deferential standard" and that "[w]hether a dismissal is 'unjust' calls for a careful examination of the entire context", an exercise which would engage "an [arbitrator's] experience and appreciation of the realities of the employment relationship" (see *Payne* at para 33).

VII. Analysis

A. *Overview of unjust dismissal under the Code*

[26] The Code addresses unjust dismissal in sections 240 to 246. These sections apply to non-unionized employees who have completed 12 consecutive months of continuous employment and are not subject to a collective agreement (subsection 240(1) of the Code). An employee can make a complaint to an inspector if he or she considers the dismissal to be unjust (subsection 240(1)). The inspector attempts to settle the complaint, failing which he or she refers

the matter to the Minister of Labour, who can appoint an arbitrator to hear the complaint (subsections 241(2), 241(3) and 242(1)).

[27] The arbitrator's mandate is to determine whether the dismissal was unjust (subsection 242(3)). If so, the arbitrator can order the employer to:

> i pay the person compensation not exceeding an amount equal to the remuneration that would, but for the dismissal, have been paid to the employee;
>
> ii reinstate the employee in his or her employ; or
>
> iii do any other like thing that is equitable to require the employer to do in order to remedy or counteract the consequence of the dismissal (subsection 242(4)).

[28] In *Wilson*, a case that dealt with whether an employer can avoid a debate on just cause firing by simply paying the employee damages, the Supreme Court of Canada discussed the purpose of the unjust dismissal provisions in detail. The Court found that the provisions were meant to prevent employees from being dismissed without cause and that an employer could not dismiss an employee without cause and pay the employee severance in lieu (*Wilson* at paras 39 and 46).

[29] The Code contains a strict privative clause in section 243 pursuant to which an arbitrator's decision is final and shall not be questioned by any court. This Court and the FCA have accordingly confirmed that a high degree of deference is owed to labour arbitration decisions (*Payne*; *Atomic Energy of Canada Ltd v Sheikholeslami*, [1998] 3 FC 349 at para 9 (FCA) [*Sheikholeslami*]; *Transport Dessaults Inc v Arel*, 2019 FC 8 at para 83 [*Arel*]).

B. *Principles relating to reinstatement*

[30] Before dealing with the principles relating to reinstatement, during the hearing before me counsel for Mr. Kouridakis raised the issue of the appropriateness of the Arbitrator having looked into the conduct of Mr. Kouridakis as a contributing factor supporting his conclusions and the remedies he was to award. Counsel stated that it was unclear from the Arbitral Decision whether Mr. Kouridakis was unjustly terminated or whether he was partly responsible for his actions. From my review of the matter, it seems that both were the case.

[31] Counsel refers to *Maheu, Noiseux & Associés c Roneo Vickers Canada Ltd*, 1988 CanLII 780 (QCCA) [*Maheu*] in support of the proposition that once an arbitrator states that the employment was unjustly terminated, he must move to the issue of whether to reinstate or not reinstate; in other words, the arbitrator cannot find that the employee was unjustly terminated and then give reasons as to why the employee was partly responsible for the termination.

[32] I cannot agree. The situation in *Maheu* did not involve the prospect of reinstatement. Rather, the issue was whether a court (not an arbitrator), having found that the dismissal of an employee was not justified, can then look to reduce the amount of severance that it would have otherwise awarded because of what was felt was disloyal conduct on the part of the employee.

[33] In the present case, I see nothing wrong with the Arbitrator finding, firstly, that CIBC did not properly make out a case for dismissal with cause, and also then articulating reasons which go to show that Mr. Kouridakis was partly to blame for the disruption in the employer-employee

relationship—something which, I believe, may well be important on the issue of whether reinstatement is an appropriate remedy.

[34] On the issue of reinstatement, counsel for Mr. Kouridakis states that where there is unjust dismissal, the following four principles apply:

i Reinstatement is the norm, not the exception;

ii The Arbitrator was required to exercise his discretion judicially;

iii The onus of proving that reinstatement is not the appropriate remedy is borne by the employer; and

iv The Arbitrator was required to consider whether Mr. Kouridakis could be reinstated into a different position.

C. *Whether the Arbitrator must order reinstatement once the dismissal is found to be unjust*

[35] On the first principle—whether reinstatement is the norm and not the exception—counsel for Mr. Kouridakis says that once the Arbitrator found that Mr. Kouridakis was fired without cause, he should have been automatically reinstated. I asked counsel whether there could ever be the possibility of an arbitrator finding that an employer has not made out a case for just cause, but at the same time being justified in not reinstating the individual. Counsel for Mr. Kouridakis agreed that there may possibly be such a case, and conceded that it would come down to the facts of the matter.

[36] In this case, it seems to me that the Arbitrator did just that: he took the facts into consideration and applied them to the issue of whether reinstatement was a viable option.

[37] Counsel for Mr. Kouridakis points to the arbitral decision *Charles and Lac La Ronge Indian Band*, [1998] CLAD No 709 [*Lac La Ronge*] for the propositions that the proper application of subsection 242(4) of the Code required the Arbitrator to take a "make whole" approach to the termination of Mr. Kouridakis, that reinstatement is the primary remedy under that subsection of the Code, and that the employer bears the burden of establishing why reinstatement is not appropriate.

[38] First of all, *Lac La Ronge* involved a situation where an arbitrator found that although there was some underlying conflict between the employees who filed the complaint and various members of the employer band, not reinstating the employees would be tantamount to discrimination on account of their religious beliefs. That issue is not part of the factual matrix in the present case.

[39] In any event, I agree with counsel for CIBC that the reasoning in *Lac La Ronge* has been overtaken by more recent jurisprudence. The FCA has clearly held that reinstatement is not a right; it is simply one of the remedies available to an arbitrator (*Sheikholeslami* at paras 11 and 12; *Bank of Montreal v Sherman*, 2012 FC 1513 at para 17 [*Sherman*]; *Defence Construction Canada Ltd v Girard*, 2005 FC 1177 at para 66). Arbitrators have full discretion to choose amongst the remedies listed in subsection 242(4) of the Code, which include compensation and reinstatement (*Sheikholeslami* at para 12).

[40] Mr. Justice Manson in *Sherman* summarized the seven generally accepted circumstances which would justify a decision not to reinstate an employee as follows:

> 1. The deterioration of personal relations between the complainant and management or other employees.
>
> 2. The disappearance of the relationship of trust which must exist in particular when the complainant is high up in the company hierarchy.
>
> 3. Contributory fault on the part of the complainant justifying the reduction of his dismissal to a lesser sanction.
>
> 4. An attitude on the part of the complainant leading to the belief that reinstatement would bring no improvement.
>
> 5. The complainant's physical inability to start work again immediately.
>
> 6. The abolition of the post held by the complainant at the time of his dismissal.
>
> 7. Other events subsequent to the dismissal making reinstatement impossible, such as bankruptcy or lay-offs.

[41] In *Payne*, the FCA made it clear that the arbitrator has full authority as regards reinstatement, and pointed out that one of the critical questions for reinstatement, set out in *Sherman*, is whether the arbitrator looked forward to determine whether or not the employee could be reintroduced into the workplace (*Payne* at para 88).

[42] In this case, the Arbitrator did look forward in making that assessment. He considered the historical relationship of the parties and the incidents that culminated in the breakdown of the employer-employee relationship and concluded that reinstatement was untenable given that considerations of a harmonious workplace necessitated that Mr. Kouridakis not return to his former position.

[43] I agree with counsel for CIBC that Mr. Kouridakis may well have said he will try to make things better, but that his insubordination was serious. Simply asking for forgiveness does not always make things right.

[44] In fact, arbitrators have erred when treating reinstatement as a presumptive right (*Sherman* at para 19). An arbitrator can order compensation if he or she is of the view, for example, that trust in the employer-employee relationship cannot be restored (*Sheikholeslami* at para 12). Indeed, an arbitrator has wide discretion as to what remedy is appropriate (*Arel* at paras 74 and 83).

[45] The fact that reinstatement may have been determined to be the appropriate remedy more often than not does not mean that it becomes the norm or somehow becomes the standard to be deviated from only in exceptional circumstances. I do not accept that, as a matter of law, reinstatement is the default position which should be ordered unless the employer shows, on the balance of probabilities, that such reinstatement is inappropriate. Reinstatement is but one of a number of remedies which, like any other, is open to the arbitrator to order either on its own, in conjunction with other monetary compensation, or not at all, even where the dismissal is found to be unjust (*Sheikholeslami*; *Payne*).

D. *Whether the decision not to reinstate was determined judiciously and followed logically from the findings of fact made by the Arbitrator*

[46] On the second principle elaborated by counsel for Mr. Kouridakis—that the Arbitrator must act judicially—I agree.

[47] In fact, the FCA looked at the issue at length and confirmed this principle in *Chalifoux v Driftpile First Nation* (1999), 169 FTR 143 at para 9 (TD) [*Chalifoux*]. As explained in *Chalifoux*, this requires the arbitrator to weigh the considerations for and against an award of reinstatement and to consider the nature of the relationship between the employee and employer (*Chalifoux* at para 9).

[48] However, I cannot see here where the Arbitrator has not acted judicially, as I see no suggestion in his decision of any bias, breach of natural justice, or of any fettering of his discretion in the rendering of his decision. The Arbitral Decision was very thorough. It set out Mr. Kouridakis's past employment and disciplinary history in detail, considered the employer's behaviour, and found that reinstatement would not be viable. The Arbitrator clearly considered the matter fully and acted judicially.

[49] Counsel for Mr. Kouridakis says that the period between 2006 and 2014 would tend to show that Mr. Kouridakis was a good employee. CIBC says that he was not, however, in 2014, Mr. Kouridakis was given a permanent full-time position as a quality monitor, so clearly things at that time were not that bad.

[50] I tend to agree that things did not seem to be that bad, however, as found by the Arbitrator, CIBC seems to have tolerated Mr. Kouridakis's behaviour because he was generally good at his job. I must say, however, that even that has its limits.

[51] Counsel for Mr. Kouridakis says that if you read the Arbitrator's Decision as regards the Elevator Incident, the Arbitrator found that Mr. Kouridakis was not at fault and that all Mr. Kouridakis was trying to do was to make a "peace offering". Counsel for Mr. Kouridakis questions how the Arbitrator can then say that reinstatement was unreasonable. Again, I think the simple answer is that the Elevator Incident, and the events leading up to it, was just another incident in a series of incidents involving Mr. Kouridakis which, coupled with what the Arbitrator found with respect to his conduct, attitude and past behaviour, caused the Arbitrator to decide that reinstatement was untenable. I see nothing unreasonable in that decision.

[52] Counsel for Mr. Kouridakis makes several other arguments in support of his client's position, which I will summarize as follows:

i The Arbitrator cited *Sauvé c Banque Laurentienne du Canada*, 500-09-000865-949 (QCCA) [*Sauvé*], but did not appreciate its significance. He also states that CIBC condoned Mr. Kouridakis's behaviour and that Mr. Kouridakis was offered a full-time position in 2014. If there were serious concerns with Mr. Kouridakis's behaviour, it is difficult to reconcile why CIBC offered him a full-time position and thanked him for his service and dedication only months before his termination.

ii The Arbitrator stated that CIBC tolerated Mr. Kouridakis's conduct only until July 3, 2015, when in fact Mr. Kouridakis received a certificate of appreciation in October 2015.

iii The Arbitrator recognized Ms. Dumaine's behaviour and how she was responsible for the events in 2015 and 2016. Logic therefore dictates that Mr. Kouridakis

should have been reinstated. The decision to refuse reinstatement is irrational, unsound, and patently unreasonable.

iv At the hearing, Mr. Kouridakis expressed his desire to be reinstated. There is no evidence that his position was abolished, so he should be reinstated.

[53] There is no doubt that the employment history between Mr. Kouridakis and CIBC had its ups and downs. However, I am satisfied that the Arbitrator reviewed the matter at length and came to a decision that was open to him to make. In any event, there is considerable discrepancy in the recollection of both counsel on whether Mr. Kouridakis, when asked during the arbitral hearing whether he wanted to be reinstated, answered simply "yes" or "yes, but not in that position." The issue of Ms. Moussa's affidavit aside, no certified tribunal record was ordered, and the parties have not provided a transcript of the hearing. It is therefore difficult to say what Mr. Kouridakis actually requested on the issue of reinstatement.

E. *Whether the employer has the burden to show why reinstatement is not possible*

[54] On the third principle—whether the burden rests with the employer to show why reinstatement is not a viable option—counsel for Mr. Kouridakis states that this onus has not been met primarily because the only person who spoke or gave testimony on the issue of reinstatement was Ms. Dumaine. No other employee gave any testimony or offered any opinion on the reinstatement of Mr. Kouridakis, and counsel for Mr. Kouridakis suggests that it was insufficient to deny reinstatement on the strength of only one employee out of eight witnesses for the bank during the arbitral hearing stating that she would be afraid if Mr. Kouridakis returned to his position, especially considering the accusation of bullying that was made against her. Given

his experience and acknowledged excellent service, Mr. Kouridakis could easily have been returned to his previous position.

[55] However, the Arbitrator not only looked at the testimony of Ms. Dumaine in isolation, but at all of the testimony and evidence, much of which was reproduced in his decision. It is difficult to put myself in the shoes of the Arbitrator, and I need not do so.

[56] In any event, although only Ms. Dumaine spoke against the reinstatement of Mr. Kouridakis, it seems to me that as his superior, it would be Ms. Dumaine who would have to deal with the consequences of reinstatement on a day-to-day basis. I can certainly see her opinion being given more weight than others who would not otherwise have direct dealings with Mr. Kouridakis if he was to be reinstated.

[57] As a matter of law, I disagree that there is a burden of proof at all. The *Maheu* decision does not speak of the burden of proof, and from what I can tell, the decision on whether or not to reinstate is to be made by an arbitrator weighing all the evidence.

[58] In addition, it seems to me that once we have determined that reinstatement is not a right but simply one of the remedies open to an arbitrator under the circumstances, the issue of reinstatement is no longer one of a “burden of proof”, but rather one of an arbitrator weighing the evidence following a proper consideration of all the facts, taken as a whole.

F. *Was the Arbitrator obliged to consider reinstatement in a different position?*

[59] As regards the fourth principle—whether an arbitrator has the power to reinstate an employee into a different position—I cannot see how an arbitrator has this power.

[60] Counsel for Mr. Kouridakis states that the Arbitral Decision is manifestly unreasonable as it failed to consider whether Mr. Kouridakis could be returned to work on a different floor or in a different department. Counsel for Mr. Kouridakis provided no authority to support the proposition that reinstatement in a different position was a viable option. In fact, the decisions in *Royal Bank of Canada v Cliche*, [1985] FCJ No 424 (QL) [*Cliche*] and *Sherman* suggest otherwise.

[61] In *Cliche*, the FCA found that an arbitrator acting under section 61.5(9) of Division V.7 of Part 3 of the Code (a precursor to subsection 242(4) of the present Code but with similar language) did not have jurisdiction to order reinstatement into a different position. The FCA came to the conclusion that the phrase that now forms part of paragraph 242(4)(b) of the Code dictates that an arbitrator can only reinstate an employee in the same position he or she held at the time of dismissal.

[62] In considering the issue, Mr. Justice Marceau, speaking for the FCA, stated the following at page 3 of the decision:

> Not only para (a) but para (b) may be ruled out at once. The language used, both in the French version, “réintégrer dans son emploi”, and in the English version, “reinstate in his employ”, leaves no doubt that the remedy authorized is returning the person

> to the positon in which he was before the dismissal: return to the status quo ante.

[63] In addition, the FCA found that the phrase that now forms part of paragraph 242(4)(c) of the Code can only be meant to apply to remedying the incidental consequences of a dismissal and could not form the basis of an award of reinstatement to another position.

[64] That said, however, in *Bank of Nova Scotia v Randhawa*, 2018 FC 487, Mr. Justice Pentney cast some doubt as to whether this remains an accurate statement of the law. In that case, the determinative issue related to procedural fairness. However, Mr. Justice Pentney discussed in obiter the question of whether an arbitrator could order reinstatement into a different position, and concluded that: " I find it is difficult to reconcile its approach to the remedial provisions of the Code with the subsequent decisions in *Banca Nazionale Del Lavoro of Canada Ltd v Lee-Shanok* (1988), 87 NR 178, [1988] FCJ No 594 (CA) (QL) [*Lee-Shanok*]; *Murphy v Canada (Adjudicator, Labour Code)*, [1994] 1 FC 710 (CA); and *Wilson*."

[65] Although I agree with Mr. Justice Pentney that the language used in some of the decisions referred to seems to suggest that a larger view be taken as regards remedial measures, none of the decisions squarely deal with the issue of whether an arbitrator has the jurisdiction to reinstate an employee in a different position than that which he or she occupied at the time of dismissal.

[66] The decision in *Sprint Canada v Lancaster*, 2005 FC 55, did not deal with the issue of reinstatement in another position in the traditional sense, but rather the possibility of

reinstatement in a job which, because of last-minute corporate reorganization, may have been modified. Mr. Justice Phelan found that the arbitrator's decision to reinstate the employee in what actually was his previous position was reasonable. The Court also found that the displacement of an incumbent employee, while a factor, is not a bar to the remedy of reinstatement, and that the issue of then dealing with the incumbent employee was one for the employer to deal with.

[67] In *Sherman*, the employer conceded that the termination of the employee, Ms. Sherman, was in fact unjust, thus limiting the issue in arbitration to the proper remedy. Ms. Sherman had in fact requested during the arbitration hearing to be reinstated with the bank at a different branch within a certain radius (a request which may or may not have been made by Mr. Kouridakis in this case). The issue before the Court in *Sherman* was whether it was reasonable for the arbitrator to reinstate Ms. Sherman to another BMO branch when the evidence showed that this would cause an innocent third party employee to lose his or her job.

[68] The Supreme Court of Canada's *Wilson* was a case regarding the standard of review. Although there was some discussion regarding remedial measures, I cannot see anything in the decision which directly displaces the rule set out in *Cliche*.

[69] In *Banca Nazionale Del Lavoro of Canada Ltd v Lee-Shanok* (1988), 87 NR 178, [1988] FCJ No 594 (CA) (QL), the FCA dealt with a situation where the employee was actually reinstated into his former position. The issue in appeal was whether the arbitrator had jurisdiction to so reinstate the employee when there was no evidence given at the arbitral hearing on whether

his former position was still available. In this context, the FCA discussed the remedial aspects open to an arbitrator under what is today paragraph 242(4)(c) of the Code.

[70] In *Murphy v Canada (Adjudicator, Labour Code)*, 1993 CanLII 3009 (FCA), [1994] 1 FC 710 (CA), the FCA dealt with a situation where an employee was ordered to be reinstated in his former position but with certain conditions of employment attached to the order. The issue before the FCA was the jurisdiction of the arbitrator to place such conditions on the return to work of the employee. The nature of the remedial measures under paragraph 242(4)(c) were discussed, and it was made clear that the underpinning of subsection 242(4) is a make-whole philosophy which would allow an arbitrator to tailor a remedy to fit the circumstances.

[71] Although Mr. Justice Manson in *Sherman* referred to the decision of the FCA in *Cliche*, he did so in relation to the issue of the possible negative impact that reinstatement may have on an innocent third party employee.

[72] Other than in *Cliche*, at no point in any of the decisions discussed above was the issue of whether an arbitrator has the jurisdiction to reinstate an employee who has been unjustly terminated in a different position ever directly addressed other than in passing. Under the circumstances, I see nothing to suggest a departure from the principle clearly set down by the FCA in *Cliche* that the remedy authorized by subsection 242(4) of the Code is returning the person to the position in which he or she was before the dismissal, and not to a different position.

G. *The issue of Mr. Kouridakis not having been treated fairly following the Elevator Incident*

[73] On April 7, 2016, the day following the Elevator Incident, Mr. Kouridakis went on medical leave, although his health issues existed from the previous December. He was terminated while he was on sick leave.

[74] On May 4, 2016, Mr. Kouridakis visited the CIBC medical specialist, who reported that Mr. Kouridakis was fit to meet with corporate security after meeting with his boss or his superiors. The doctor also said that he would be ready to return to work within two months.

[75] On May 26, 2016, Mr. Kouridakis filed a bullying complaint against Ms. Dumaine.

[76] Mr. Kouridakis was invited to go to the bank. Rather than meeting with his superiors or bank management as set out in the medical evaluation, he ended up meeting with corporate security straight away, and was informed that he was being dismissed. According to counsel for Mr. Kouridakis, no one asked Mr. Kouridakis for his version of the events until his meeting with CIBC corporate security on June 14, 2016, and, in fact, even after his meeting with corporate security, Mr. Kouridakis still did not know why he was being dismissed until he received the letter from Labour Canada in August 2016.

[77] Counsel for Mr. Kouridakis says that bypassing a meeting with his superiors and having Mr. Kouridakis proceed immediately to a meeting with corporate security was nothing short of retaliation on the part of the bank.

[78] I am not ready to jump to that conclusion. It seems to me that it may well have been the bank's initial intention prior to May 26, 2016 to have Mr. Kouridakis meet with his superiors, a decision that may have changed abruptly following receipt of the May 26, 2016 email from Mr. Kouridakis.

[79] I can certainly see the May 26, 2016 email possibly being, from the perspective of CIBC, the final straw regarding Mr. Kouridakis's behaviour. In any event, even if it was as counsel for Mr. Kouridakis suggests, no doubt it was considered by the Arbitrator in his determination of whether the dismissal was justified, and whether reinstatement was a viable option.

[80] I must say, however, that the May 26, 2016 email does add more colour to the relationship between Mr. Kouridakis and his superior, as well as to Mr. Kouridakis's perspective regarding his employment environment. I am of the opinion that the fact that CIBC could have handled the situation at the time a little more delicately does not change anything regarding the decision of the Arbitrator not to reinstate Mr. Kouridakis, and in fact that it may have strengthened the Arbitrator's resolve not to reinstate Mr. Kouridakis

H. *Is the finding of the Arbitrator reasonable?*

[81] Counsel for Mr. Kouridakis says that under the circumstances, the decision of the Arbitrator was too harsh. Counsel for Mr. Kouridakis points to a number of other arbitral decisions that he says suggest that a less onerous punishment for Mr. Kouridakis would have been more appropriate and in line with the prevailing thought amongst labour arbitrators.

[82] From what I can tell, it is up to the arbitrators to decide on the extent of the sanctions, or the availability of remedies, in each circumstance after having heard the witnesses, reviewed the evidence, and considered the representations of counsel. In essence, counsel for Mr. Kouridakis is asking that I substitute my views on the matter for that of the Arbitrator without the benefit of having seen the witnesses or heard all the testimony. I am not prepared to do that.

[83] Overall, I consider the decision on reinstatement to be justified, transparent, and intelligible. The Arbitrator set out the facts in great detail and found that reinstatement was not appropriate under these circumstances. This conclusion was open to him to make and authorized by the Code. Further, the Arbitral Decision was consistent with the *Sherman* principles, especially factor 1 (the deterioration of personal relations between the complainant and the employer) and factor 4 (the attitude of the complainant). These factors are clearly applicable here and seem to me to be valid reasons for denying reinstatement.

[84] Counsel for Mr. Kouridakis briefly makes two other arguments on the issue of reinstatement. He first argues that the Arbitrator did not sufficiently consider *Sauvé*. In my view, that decision is easily distinguishable as it was not decided under the Code and the employee in that case had no disciplinary record.

[85] He also argues that the Arbitrator erred by giving little weight to the bank's conduct. I do not agree. While the Arbitrator did find that Mr. Kouridakis was not in the wrong in the Elevator Incident, he made a clear finding that his behaviour was not condoned, but only reluctantly

tolerated. It was squarely within the Arbitrator's expertise and discretion to find that, based on the record, reinstatement was not viable.

[86] Finally, counsel for Mr. Kouridakis takes issue with the fact that, at paragraph 26 of the Arbitral Decision, the Arbitrator discussed issues justifying dismissal in the context of deciding on reinstatement. I accept that at paragraph 26 the Arbitrator dealt with incidents going to the issue of unjust dismissal, but again it does give colour to context, and the Arbitrator had to consider the work environment in determining whether reinstatement of Mr. Kouridakis was justified. As stated by Mr. Justice Evans of the FCA in *Payne*, "[t]he contextual factors to be considered in determining whether a dismissal is unjust overlap to a considerable extent with those relevant to deciding if reinstatement is appropriate" [*Payne* at para 88].

[87] On the whole, Mr. Kouridakis merely disagrees with the Arbitrator's conclusion on reinstatement. This is insufficient to render the decision unreasonable.

I. *The decision on quantum was reasonable*

[88] Counsel for Mr. Kouridakis states that at the end of the hearing, the Arbitrator mentioned that he would only deal with two matters, that of reinstatement and of unjust dismissal. In fact the directive to the tribunal was only to deal with those two issues. However, the Arbitral Decision dealt with three issues: unjust dismissal, reinstatement and the consideration regarding severance compensation. Counsel for Mr. Kouridakis mentions that no evidence was submitted on quantum, but the Arbitrator nonetheless dealt with determining that only severance, as opposed to general compensation, was necessary.

[89] Counsel for Mr. Kouridakis says that his client should have the right to make the case for back pay, group insurance, benefits, and any other claim so that he is "made whole". As it stands, he argues that Mr. Kouridakis is not benefiting from having to set out quantum and does not know why he is only being awarded severance as the Arbitrator did not give reasons as to why he is limiting compensation to severance as opposed to general damages.

[90] Paragraphs 49 and 50 of the Arbitral Decision read as follows:

> 49. Accordingly, I find that although the dismissal for just cause based on the faulty acts of Mr. Kouridakis has not been sufficiently made out by the employer. However, under the particular circumstances of this matter, termination was necessary and severance compensation is due to him. In this regard the words of Brown and Beatty are applicable:
>
> > […] in exceptional circumstances, where an arbitrator concludes that an employee is incapable of learning from and correcting past behaviour and/or a viable employment relationship cannot be restored, the arbitrator may limit relief to ordering the employer to pay compensation in lieu of reinstatement event where the discharge was otherwise without just cause.
>
> 50. Jurisdiction on the quantum of severance compensation due to Mr. Kouridakis is, therefore, reserved pending the scheduling of a convenient date of hearing for this purpose to which the parties will be convoked in due course by the undersigned.
>
> [Emphasis added.]

[91] First of all, it seems to me that it was open to the Arbitrator to have said after the hearing that he reserves jurisdiction on the issue of compensation, and to ask the parties to return for a further hearing on quantum. Compensation is a corollary issue stemming from the decision that reinstatement was not appropriate. The Arbitrator's statement should not stop him from deciding corollary issues such as the nature of the compensation to be awarded.

[92] In any event, the use of the word “severance” was unfortunate, as I do not read the Arbitral Decision in the same manner as does counsel for Mr. Kouridakis. Although the Arbitrator mentioned that he was ordering “severance compensation”, he went on to cite a passage from Brown and Beatty’s *Canadian Labour Arbitration* that uses only the words “compensation in lieu of reinstatement”. It seems to me that the Arbitrator was not using the word “severance” in the sense normally used for dismissal cases such as in section 235 of the Code. My reading of paragraphs 49 and 50 of the Arbitral Decision suggests that the Arbitrator was using the word “severance” in the more colloquial sense, as in the “severing of the relationship” between Mr. Kouridakis and CIBC. That being said, it is only the Arbitrator who knows what he meant, but I do not think I need come down one way or the other at this stage.

[93] The purpose of a monetary remedy under the Code is to place the complainant in the same position as he or she would have been in but for the unjust dismissal (Ball & Braithwaite, *Canadian Employment Law*, s 21:110.2). As Mr. Kouridakis points out, the aim is to make the complainant “whole” (*First Nation Sipekne’katik v Paul*, 2016 FC 769 at para 98; *Slaight Communications Inc v Davidson*, [1985] 1 FC 253 at pages 257 and 260 (CA), upheld [1989] 1 SCR 1038).

[94] In fact this Court has held that in this context, it is an error to limit the amount of damages to the amount of severance pay as provided for in section 235 of the Code: *Wolf Lake First Nation v Young* (1997), 130 FTR 115 at paras 51 and 53 (TD). As stated by Mr. Justice Nadon, as he then was, at paragraph 51:

> [51] Subsection 242(4) of the **Code** is clear in its application; it is designed to fully compensate an employee who is unjustly

> dismissed. It is not limited to the amount of severance pay to which the employee is entitled. It is not calculated by determining the notice period which should have been given to the employee. In **Davidson v. Slaight Communications Inc.**, [1985] 1 F.C. 253; 58 N.R. 150 (F.C.A.), affd. [1989] 1 S.C.R. 1038; 93 N.R. 183, Mahoney, J.A., stated at p. 260:
>
> > "The intent of s. 61.5(9) (now 242(4)) is to empower the adjudicator, as near as may be, to put the wronged employee in the position of not suffering an employment related disadvantage as a result of his unjustified dismissal."
>
> Although the section places a ceiling on the amount of damages that may be awarded, the amount is not linked to the amount of severance pay awarded to the employee. Limiting the amount of damages for unjust dismissal to the amount of severance pay or on the basis of the common law is clearly an error. Support for this proposition is found in **Canadian Imperial Bank of Commerce v. Boisvert**, [1986] 2 F.C. 431; 68 N.R. 355 (F.C.A.) . . . .

[95] The Arbitrator's reference to "severance" is not ideal, however, in my view, a reading of the decision as a whole leads me to believe that the Arbitrator meant that the next hearing would determine what compensation was owed under paragraph 242(4)(a) of the Code on account of the rupturing, or "severance", of the employer-employee relationship.

[96] Without a decision on the actual amount that was awarded, I cannot consider that the Arbitrator rendered an unreasonable decision on quantum as such would be premature. The parties will have to wait for the decision on quantum to determine whether the Arbitrator was correct in his decision on compensation.

J. *Admissibility of Ms. Moussa's affidavit*

[97] Given my findings, I do not rely on the affidavit of Ms. Moussa, and thus need not deal with its admissibility.

VIII. Conclusion

[98] I would dismiss the application, with costs of $1,000 payable to CIBC.

JUDGMENT in T-1841-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. Costs in the amount of $1,000 are to be paid by the Applicant to CIBC.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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