Federal Court of Appeal | Cour d'appel fédérale

Date: 20110628

Docket: A-367-09

Citation: 2011 FCA 216

CORAM: **NOËL J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

JACYNTHE DESCHÊNES

Appellant

and

CANADIAN IMPERIAL BANK OF COMMERCE

Respondent

Heard at Montréal, Quebec, on March 21, 2011.

Judgment delivered at Ontario, Ontario, on June 28, 2011.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a decision of Martineau J. of the Federal Court (the "judge"), 2009 FC 799, in which he dismissed the appellant's application for judicial review of a decision dated June 28, 2007, rendered by Jacques Bélanger (the "adjudicator/referee"), the adjudicator/referee appointed under the *Canada Labour Code*, R.S.C., 1985, c. L-2 (the "Code").

[2] Specifically, the adjudicator/referee dismissed two complaints filed by the appellant against her employer, namely the respondent, the Canadian Imperial Bank of Commerce (the

"Bank"), following the termination of her employment on January 26, 1998. The appellant's first complaint was that she was unjustly dismissed by the Bank, while in the second, she claimed unpaid commission and overtime pay, as well as a performance bonus and stock option certificates from her employer, to which she felt she was entitled.

FACTS

[3] A brief summary of the facts will assist in understanding the issues.

[4] The appellant was employed by the Bank from September 1989 until January 25, 1998. As of 1995, she worked as an investment specialist.

[5] Investment specialists were paid in the following manner. In addition to a base salary, they were paid commission based on the total sales volume attributable to them. In other words, the cornerstone of the compensation package was an incentive system. Specifically, investment specialists received commission if they made $17.5 million in gross sales, involving "new money" from other financial institutions.

[6] Investment specialists had two objectives in selling this amount: investing $11 million of this outside money by selling the Bank's "non-money market" products, and investing $6.5 million of this money in Bank products described in a document entitled *Régime de rémunération lié aux résultats* [*Performance Pay Plan*]. Investment specialists who achieved these objectives were awarded a $12,000 bonus and an increase in the percentage of the commission payable on sales beyond $11 million. Some also received an end-of-year bonus.

[7] A crucial element governing the work of investment specialists was that, after planning with the client and obtaining the client's consent to transfer his or her money to the Bank, they had to ensure that the money had been received by the Bank and invested as agreed with the client. Once this task was completed, investment specialists had to produce a sales report in accordance with the instructions in a document entitled *Sales Reporting and Measurements*.

[8] In carrying out their work, investment specialists were subject to professional conduct rules set out in a document entitled *Politiques et procédures de déontologie à l'intention des spécialistes en placements* [*Professional Conduct Policies and Procedures for Investment Specialists*]. At paragraph 27 of his reasons, the adjudicator/referee had the following to say about the principles of professional conduct by which investment specialists had to abide:

> [TRANSLATION]
> **27.** In her new position as an investment specialist, the complainant was subject to rules of professional conduct set out in a document entitled *Politiques et procédures de déontologie à l'intention des spécialistes en placements* [*Professional Conduct Policies and Procedures for Investment Specialists*]. She signed a declaration on April 6, 1997, indicating that she had read and accepted the contents of that document. Article 4 of the document states that investment specialists have to act in good faith, honestly and fairly toward clients. They also have to respect the confidentiality of purchasers' transactions and act in purchasers' best interests. Finally, they have to avoid being in a conflict of interest with clients or CIBC. All of this is explained more fully in Appendix IV of the document. Moreover, the role of investment specialists in planning investments and maintaining accounts is explained, and Appendix II contains a list of approved products for specialists.

[9] As indicated earlier, the appellant's employment with the Bank was terminated on January 26, 1998. This event took place in the following circumstances.

[10] On December 11, 1997, the appellant learned that the Bank had undertaken to have all her 1997 transactions audited and that over 80% of these transactions were being questioned. A $1.2 million sale appearing in the appellant's sales report for October 1997 (client: Samuel W.) was the factor that triggered the Bank's audit. According to the appellant's sales report, the sum in question had been invested in government bonds by her client. Given the size of the investment and the fact that it could not be traced by the Bank, Bank managers at the Toronto head office decided to carefully review all the appellant's sales reports for 1997.

[11] In the course of its audit, the Bank asked the appellant to explain the many errors appearing in her sales reports. In early January 1998, in light of the appellant's precarious situation, Gilbert Aura, her immediate superior, advised her to focus on 1997 so that she would be able to satisfactorily explain the errors discovered by the Bank. Mr. Aura also counselled the appellant not to meet with new clients for the time being.

[12] On January 26, 1998, dissatisfied with the appellant's explanations, the Bank, through Mr. Aura, terminated the appellant's employment and asked her to reimburse the commission payments the Bank found it had overpaid her, namely $24,000 gross or $10,000 net. Three days later, the appellant repaid the Bank $10,000.

[13] On March 20, 1998, the appellant filed a complaint for unjust dismissal under section 240 of the Code, and on December 18, 1998, she asked the Minister of Labour to appoint an

adjudicator. On February 8, 1999, the adjudicator/referee was appointed to act as adjudicator and to hear the appellant's unjust dismissal complaint.

[14] On July 3, 1998, the appellant filed a claim for unpaid commissions and other premiums and, on March 17, 1999, asked that this claim also be referred to adjudication. Regarding this claim, an inspector from Human Resources Development Canada (the "inspector") issued a payment order in the amount of $46,617.38 against the Bank on March 17, 1999, and the Bank remitted this amount to the Receiver General for Canada on the same day.

[15] In September 1999, the parties agreed that the adjudicator/referee hear both complaints filed by the appellant.

Adjudicator/Referee's Decision

[16] On June 26, 2007, following a 90-day hearing at which 30 witnesses testified – 26 of which at the appellant's request – and 350 documents were submitted, the adjudicator/referee rendered a decision of 251 pages (1673 paragraphs) supporting the validity of the appellant's dismissal and dismissing the monetary claim (*Deschênes v. Banque canadienne impériale de commerce*, 2007 DATC 215).

[17] Following a brief introduction, the adjudicator/referee summarized the relevant facts at paragraphs 9 to 61 of his reasons. From paragraph 62 to paragraph 351, he reviewed the evidence submitted by the employer and the testimony of the following persons: Jacynthe Deschênes,

Maura Levine, Elizabeth Marshall and Gilbert Aura. Then, the adjudicator/referee reviewed the appellant's evidence, namely the testimonies of 26 witnesses, three of whom testified twice.

[18] From paragraph 721 to paragraph 859, the adjudicator/referee focussed on the cross-examination of the appellant. Subsequently, at paragraphs 860 to 1105 of his reasons, he described the reply evidence filed by the appellant.

[19] Having completed an in-depth, thorough review of the evidence presented by the parties, the adjudicator/referee provided a detailed summary of the appellant's and the Bank's arguments at paragraphs 1106 to 1356 of his reasons before starting his analysis.

[20] From paragraph 1357 to paragraph 1438, the adjudicator/referee dealt with the appellant's first complaint, the one concerning her dismissal. Following a detailed analysis of the evidence and the applicable principles, he concluded at paragraph 1438 that the bond of trust between the Bank and the appellant had been irreparably broken and that, consequently, the dismissal complaint had to be dismissed.

[21] From paragraph 1439 onwards of his reasons, the adjudicator/referee considered the appellant's second complaint. More particularly, at paragraphs 1487 to 1672, he examined in detail all the sales for which the appellant claimed she was entitled to commission. At paragraph 1670, the adjudicator/referee determined that the Bank had overpaid the appellant the amount of $19,385.53, writing as follows:

> [TRANSLATION]
> **1670.** Exhibit **E-33** indicates the uncontested advance payment of $33,835.24 in commissions made to the complainant in November 1997. The calculations made after adjustments in the Schedule to **E-33** show that the complainant was owed $9,185.65 in commissions. When $5,264.06 is added to these commissions, there is a new total $14,449.71 owed in commissions. If one deducts the $14,449.71 owed in commissions from the $33,835.24 paid to the complainant, the result is an overpayment to the complainant of $19,385.53. Once the 50% in taxes payable on this type of income are deduced, one is left with $9,692.77, owed by the complainant to CIBC. CIBC had calculated very fairly in 1998 when it asked the complainant to pay it $10,000 in overpaid commissions.

[22] At paragraph 1671 of his reasons, the adjudicator/referee disposed of the appellant's claim for overtime pay and Bank stock option certificates in the following terms:

> [TRANSLATION]
> **1671.** With respect to the complainant's other requests for overtime pay and CIBC stock option certificates, there is nothing in the evidence before me to justify the legitimacy of these requests. In addition, the stock option certificates relate to what is called the "*Prix du Président*" [President's Prize] and are at the employer's discretion like any other similar benefit in a company.

[23] Lastly, at paragraph 1673 of his reasons, the adjudicator/referee dismissed the appellant's two complaints. He also cancelled the payment order imposed by the inspector on March 17, 1999, and ordered that the Bank be reimbursed the money it had deposited with the Receiver General for Canada.

Decision of the Federal Court

[24] The judge dismissed the appellant's application for judicial review. His reasons for that conclusion can be summarized as follows.

[25] Relying on the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 (*Dunsmuir*), the judge was of the view that the appropriate standard was reasonableness (paragraphs 12 and 13).

[26] Having determined the appropriate standard, the judge dealt with the appellant's dismissal complaint. In his opinion, the adjudicator/referee's decision was reasonable (paragraph 18).

[27] After noting the principle that a breach of the relationship of trust between an employer and its employee could justify the employee's dismissal, the judge indicated that, aside from fraud, there were other circumstances, such as gross negligence, where the relationship of trust could be broken. According to the judge, each case had to be judged on its own merits, and the adjudicator/referee had to determine, in consideration of the circumstances, what the appropriate finding was (paragraph 19).

[28] At paragraph 24 of his reasons, the judge reviewed the adjudicator/referee's determination according to which the numerous errors discovered by the Bank in the appellant's 1997 sales reports, despite the absence of fraud on the part of the appellant, were, in the circumstances of the case, the result of the appellant's carelessness, negligence and denial of responsibility. Moreover, the judge noted that because of this determination, the adjudicator/referee had concluded that the relationship of trust between the Bank and the appellant had been irretrievably broken.

[29] After making this observation, the judge examined the reasons supporting the adjudicator/referee's finding. He noted that the adjudicator/referee had undoubtedly fully considered all of the evidence submitted by the parties. He also remarked that the adjudicator/referee had performed a thorough and detailed analysis of this evidence. In addition, he noted that the adjudicator/referee's determination that the relationship of trust had been irretrievably broken relied in large part on the fact that the appellant's 1997 sales reports contained numerous errors and that the reports were erroneous, unfounded and exaggerated or had been submitted past the deadlines prescribed by the Bank without any explanation from the appellant for the delay.

[30] Lastly, the judge found that the adjudicator/referee's analysis ". . . reveal[ed] no unreasonable conclusion on this crucial point" (paragraph 26).

[31] At paragraphs 27 to 36 of his reasons, the judge carefully reviewed the adjudicator/referee's process, which he described as careful and exhaustive, writing the following at paragraph 35:

> [35] This brief summary of the adjudicator's approach reveals his thorough analysis and careful consideration of the evidence submitted by both parties. Consequently, the adjudicator's conclusion that the relationship of trust was broken, and rightly so, is amply supported and cannot under any circumstances be found to be unreasonable, even if this Court could come to a different conclusion based on the evidence noted by the adjudicator. In short, the adjudicator's assessment of the facts needs only to be rationally based on the evidence submitted. In this case, the adjudicator's in-depth and reasoned review in the impugned decision satisfies me that he made no reviewable error.

[32] At paragraphs 36 and 37 of his reasons, the judge found that the adjudicator/referee had properly understood and applied the relevant case law on breaches of the relationship of trust between an employer and its employee. In addition, the judge reviewed the case law according to which the relationship of trust was particularly important in banking and finance. At paragraphs 36 and 37, he commented as follows:

> [36] This leads to the second ground of review submitted by the applicant, that the adjudicator erred in his interpretation of the principles of case law applicable to the field of banking that would allow him to uphold a dismissal for breach of the relationship of trust in the absence of progressive discipline. On this point, in the impugned decision, the adjudicator correctly cites *Banque de Montréal (Saint-Hubert) v. Saint-Michel*, 1999 D.A.T.C. No. 480; *Forget v. Banque Laurentienne du Canada*, [2001] D.A.T.C. No. 39 and *National Bank of Canada v. Lepire*, 2004 FC 1555 (*NBC v. Lepire*). These decisions all highlight the importance of the relationship of trust and the seriousness of a violation of the rules of conduct for employees of financial institutions.
>
> [37] The Court should not intervene on this point, and the adjudicator's conclusion again seems reasonable given the state of the law on this issue. It is important to highlight paragraphs 1126 and 1127 of the impugned decision, where the adjudicator noted the evidence of [TRANSLATION] "an honour system in which tremendous trust was required between the investment specialist, the accounts directors and the team in Toronto", with the result that [TRANSLATION] "the investment specialist had to show exemplary integrity".

[33] Lastly, at paragraph 40, the judge wrote that the errors made by the appellant over an extended period of time, errors that she had not explained, could not be characterized other than by their seriousness. This led the judge to conclude that the adjudicator/referee's conclusion had been reasonable and that there was no reason for him to intervene.

[34] Then, the judge examined the appellant's second complaint, namely her monetary claim for unpaid commissions and other premiums to which she claimed she was entitled under the

Bank's administrative rules applicable at the time. The judge began his analysis by reviewing the appellant's submission that the adjudicator/referee had failed to rule on 16 files. According to the judge, the appellant's submission had no merit since the adjudicator/referee had incontestably considered ". . . all of the files supposedly omitted" (paragraph 44).

[35] Regarding the appellant's arguments relying on the document she had prepared and filed as Exhibit E-39, namely, *CORE Products Audit Fiscal 1997*, which concerns investments that entitled her to bonuses and a commission premium if she reached the $6.5-million level, the judge found that the document had been prepared for the hearing before the adjudicator/referee and that the adjudicator/referee had not been bound by the figures in this document. The judge added that the adjudicator/referee had undoubtedly considered the document when he analyzed the transactions on which the appellant relied in support of her claim. At paragraph 47 of his reasons, the judge wrote the following:

> [47] In short, after assessing each of the files upon which the applicant's monetary claim was based, the referee dismissed the claim because there was no evidence to support the claim, the transaction was not a sale eligible for commission or the applicant was shown to have already been paid the commission claimed.

[36] At paragraph 48 of his reasons, after noting that the adjudicator/referee dismissed all the claims for which, in his view, the appellant could provide no documentary evidence confirming ". . . that the sale for which a commission was claimed had been made and was eligible for this commission", the judge examined the appellant's submission that the adjudicator/referee had breached a rule of procedural fairness ". . . in requiring that she provide documentary evidence of these claims, which she was unable to do, since the documents were in the possession of the

respondent". According to the judge, an adjudicator appointed under the Code has the power to control the evidence and the procedure; consequently, the adjudicator could require commencement of proof in writing in order to admit the testimonial evidence intended to prove the accuracy of the claims. At paragraph 50 of his reasons, the judge reproduced paragraph 1488 of the adjudicator/referee's reasons, where the adjudicator/referee wrote as follows:

> [TRANSLATION]
> [1488] At the outset, I wish to point out that with respect to this monetary complaint, the complainant has the burden of proving that the commissions are owing to her. The testimonial evidence is insufficient to prove her sales; she must file documents from CIBC which could serve as a commencement of proof in writing.

[37] Lastly, at paragraph 57 of his reasons, the judge considered the appellant's argument that some of the adjudicator/referee's comments gave rise to a reasonable apprehension of bias. The judge had the following to say:

> [57] At the hearing, the applicant also questioned the neutrality of the adjudicator/referee. This extremely serious accusation was neither alleged nor elaborated on in the prior proceedings. Essentially, the applicant accuses the adjudicator/referee of making derogatory comments about her in the impugned decision, such as the applicant's being in the [TRANSLATION] "warmth of her home", the [TRANSLATION] "applicant's excuses" and her [TRANSLATION] "incredible attitude" regarding her dismissal. That said, an allegation of bias is very serious one way or the other and not something to be trifled with. The question is whether this objectively gives rise to a reasonable apprehension of bias in the eyes of a properly informed person. I am not of the opinion that this is the case here, considering the approximately 500-page decision as a whole. There may have been certain unfortunate comments, but that is not enough in this case to give rise to a reasonable apprehension of bias.

[38] At paragraph 58 of his reasons, the judge dismissed, with costs, the applicant's application for judicial review.

Issues

[39] This appeal raises the following issues:

1. Did the judge err in concluding that the adjudicator/referee's decision concerning the unjust dismissal complaint was reasonable?
2. Did the judge err in concluding that the adjudicator/referee's decision to reject the appellant's monetary claim was reasonable?
3. Did the judge err in dismissing the appellant's claims that the adjudicator/referee's conduct during the course of the hearing gave rise to a reasonable apprehension of bias?

Analysis

[40] As I indicated earlier, the judge, relying on the Supreme Court's decision in *Dunsmuir*, determined that the appropriate standard of review in this matter was reasonableness. In my opinion, given the privative clauses found in the Code and the expertise of the adjudicator/referee appointed under the Code, and given that the issues before the adjudicator/referee were mainly questions of fact, there can be no doubt that the judge did not err in finding as he did. Consequently, the issues before us, other than the issue concerning the reasonable apprehension of bias, are reviewable on a standard of reasonableness.

[41] I would add that our role as an appellate court sitting in review of a judge's decision on an application for judicial review is as this Court defined it in *Canada Revenue Agency v. Telfer*, 2009 FCA 23 (*Telfer*), at paragraph 18, where our colleague Evans J.A. wrote as follows:

> [18] Despite some earlier confusion, there is now ample authority for the proposition that, on an appeal from a decision disposing of an application for

> judicial review, the question for the appellate court to decide is simply whether the court below identified the appropriate standard of review and applied it correctly. The appellate court is not restricted to asking whether the first-level court committed a palpable and overriding error in its application of the appropriate standard.
>
> [Emphasis added]

[42] Before dealing with the appellant's arguments, it is important to recall the principles enunciated by the Supreme Court in *Dunsmuir*, which must govern our approach in a matter such as the one before the Court. Specifically, at paragraph 47 of its reasons, the Supreme Court had the following to say about the standard of reasonableness.

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [Emphasis added]

[43] In my opinion, despite the use of words that may leave the reader perplexed, namely the fact that the reasonableness of a decision can be determined by "the existence of justification, transparency and intelligibility within the decision-making process", what *Dunsmuir* requires of the decision maker is that he or she make a decision the reasons for which explain in an understandable manner why he or she arrived at a particular conclusion and why this conclusion is "possible" in light of the facts in the case and the applicable law.

[44] I will now look at the first issue before the Court.

1. Did the judge err in concluding that the adjudicator/referee's decision concerning the unjust dismissal complaint was reasonable?

[45] The judge concluded that the adjudicator/referee's decision was reasonable. In my opinion, he did not err in so concluding. The adjudicator/referee satisfactorily explained why he concluded that the unjust dismissal complaint had to be dismissed and, more importantly, his conclusion was amply supported by the evidence and the applicable law.

[46] The adjudicator/referee set out his analysis at paragraphs 1393 to 1438, some 45 paragraphs. In his analysis, the adjudicator/referee essentially concluded that the Bank had ample reason to dismiss the appellant since it had lost confidence in her because of the numerous mistakes discovered in her sales reports for 1997 (adjudicator/referee's reasons, paragraph 1405). Errors such as those found in the appellant's sales report are particularly worrying in the banking and finance industry (adjudicator/referee's decision, paragraph 1427). Consequently, the Bank was entitled to expect not only good faith and honesty of its employees, but also that their conduct be above reproach in all respects. These expectations are set out in the document *Professional Conduct Policies and Procedures for Investment Specialists*, which the appellant had to comply with.

[47] According to the adjudicator/referee, there was no doubt that the appellant's conduct, in light of the errors found in her sales report, could not satisfy the Bank's policy governing, among

other things, the professional conduct requirements. According to the adjudicator/referee, these errors resulted in a breach of the relationship of trust between the Bank and the appellant and, consequently, justified her dismissal. At paragraphs 1434 and 1437 of his reasons, the adjudicator/referee wrote as follows:

> [TRANSLATION]
> **1434.** This led to an investigation, as we know, and the discovery of numerous errors made throughout the entire year. CIBC was right to argue that the discovery of so many errors throughout 1997 exacerbated the complainant's situation. These errors were not simple administrative errors in that they demonstrated several failures on the part of the complainant, who was unable to meet deadlines, who produced duplicate sales reports, who did not verify whether the funds were actually invested in the product claimed before making her sales reports, and who made numerous errors in codes, classifications, account numbers and amounts in her sales reports. As a result, she was able to obtain one commission twice, commission to which she was not entitled and commission on a greater amount than the actual sale.
>
> . . .
>
> **1437.** In one way or another, the relationship of trust was irretrievably broken. However, I want to reiterate that the evidence does not support the idea that the complainant intentionally produced false sales reports in order to receive commission payments to which she was not entitled. The evidence shows an excellent CIBC salesperson who was struggling to meet all the requirements of her job but who, unfortunately, in the circumstances and because of her excessive pride and ambition, was not honest enough to admit that she was out of her depth at the time.

[48] Furthermore, to justify his conclusions, the adjudicator/referee relied on various elements of the evidence before him. For example, at paragraphs 1421 to 1423, he explained the main error made by the appellant, concerning the $1.2 million sale to client Samuel W. More particularly, the adjudicator/referee explained that in October 1997, the appellant reported this sale even though it never took place. Here is how the adjudicator/referee dealt with the matter:

[TRANSLATION]
1421. What caught the attention of the Toronto auditors at the beginning of November 1997 were eight (8) questionable sales from her October report. But particularly a $1.2 million sale reported as code 50 (Government of Canada bonds) for client Samuel W. The complainant testified that she prepared her October sales report at the last minute at home, at around 8 or 9 p.m. on the evening of October 31, even though Exhibit E-15B indicates October 27. We know that there never was a sale of $1.2 million of Government of Canada bonds for this client. The evidence shows that there was no other sale for this client in 1997, as his funds were transferred to Wood Gundy in the summer of 1997. The evidence also shows that the complainant knew this client very well and that she had encouraged him to transfer his funds to CIBC in 1996. She met him several times, often at his home, with GRACE LUTFY, an agent from Wood Gundy. How could the complainant have made such an error on a substantial amount for a client she knew so well?

[1422] All of the witnesses agreed that, when an investment specialist makes a sale of $1 million, it is an extraordinary event which does not go unnoticed. Moreover, the established rules require that the manager be notified of such a sale when it is made. The complainant did not advise GILBERT AURA of this alleged sale of $1.2 million that she classified as code 50. This report of a sale which never took place, coming from an employee who had been assessed as being among CIBC's best investment specialists, was disturbing for the employer when it became aware of the situation in November 1997.

1423. I must confess that I am still puzzled by what the complainant did in the quiet of her home on the evening of October 31. We know that she was misled by a document that did not report the right figures and that it was rather a $10,000.00 sale, not in Government of Canada bonds, but in mining bonds. That is no excuse for falsely reporting a sale in Government of Canada bonds. However, the evidence as a whole does not suggest that the complainant's intention was dishonest when she produced this sales report. She knew that these reports were reviewed in Toronto and believed that the worst that could happen was that this sale would be refused. However, this still shows the complainant's extreme carelessness regarding her sales reports and the minimal attention she devoted to this important part of her work.

[Emphasis added]

[49] At paragraphs 1424 and 1425 of his reasons, the adjudicator/referee reviewed the appellant's attempts to deny responsibility for the errors she made. The adjudicator/referee

concluded at paragraph 1426 that the appellant's [TRANSLATION] "incredible" attitude towards her dismissal was typical of the attitude of [TRANSLATION] "carelessness, negligence and denial of responsibility" she exhibited [TRANSLATION] "before being dismissed on January 26, 1998".

[50] In my opinion, the adjudicator/referee's analysis clearly and understandably explains the basis of his decision. In fact, there can be no doubt about the adjudicator/referee's conclusion, namely that the Bank had ample reason to dismiss the appellant because of the many errors in her 1997 sales reports since these errors had resulted in undermining the Bank's confidence in the appellant. In light of the arbitral case law (see *Banque de Montréal (St. Hubert) v. St. Michel*, 1999 D.A.T.C. No. 480; *Forget c. Banque Laurentienne du Canada*, 2001 D.A.T.C. No. 39; and *National Bank of Canada v. Lepire*, 2004 FC 1555 (*NBC v. Lepire*)), according to which the relationship between an employer and its employee in the banking and finance industry is of great importance, the adjudicator/referee's conclusion, having regard to the specific circumstances of the case, seems entirely reasonable.

[51] The arguments put forward by the appellant to challenge the adjudicator/referee's decision do not persuade me that we must intervene. I turn now to those arguments.

[52] First, the appellant argues that the Bank dismissed her for fraud, but that, subsequently, the Bank attempted to change the reasons for the dismissal, the whole contrary to case law (Appellant's Memorandum, paragraphs 5 and 30). This argument results from a misunderstanding of the Bank's letter informing the appellant of her dismissal.

[53] Jean-Pierre Paiement, the Bank's labour relations advisor, testified that the letter template used, namely letter No. 14, is a letter used for dismissing employees for professional misconduct, including fraud. There is no reason to impose progressive disciplinary action in such cases since, from the Bank's perspective, they entail intentional misconduct and, consequently, a breach of the relationship of trust.

[54] It should be noted that the letter terminating the appellant's employment dated January 26, 1998, signed by Mr. Aura, does not use the word [TRANSLATION] "fraud" as a reason for her dismissal. The first paragraph of the letter (Appeal Book, Vol. I, page 65) reads as follows:

> [TRANSLATION]
> To follow up on our meeting today, we confirm that, given the results of our recent investigation (and for the reasons we mentioned at our meetings), your employment with CIBC is hereby immediately terminated for just cause, and without pay.

[55] I am therefore confident that the Bank did not waver in its position, namely that it had lost confidence in the appellant because of the numerous serious errors she had made throughout 1997.

[56] Second, the appellant alleges that the Bank's actions played a significant part in her errors. She specifically refers to the instructions given in respect of sales reporting (Appeal Book, Vol. 1, page 100) which she had to comply with. In her opinion, the majority of the errors attributed to her resulted from her having strictly followed these rules and from clients often taking months to decide how to invest their money (Appellant's Memorandum, paragraph 18).

[57] In my view, these excuses are without merit. The instructions issued by Mr. Aura were not ambiguous in that they stipulated that investment specialists should not report a sale [TRANSLATION] ". . . as long as the conversion into long-term products has not been made or if the client has decided to remain in the money market". These instructions cannot justify the majority, if not all, of the appellant's errors, including the times when she reported the same sale twice (Adjudicator/referee's decision, paragraph 1360).

[58] It is possible that some clients took several months before making a final decision on their investments, but, in my opinion, that in no way excuses the sales specialist who had to report a sale only when it had been finalized, with the right amounts. At paragraph 1408 of his reasons, the adjudicator/referee made the following observation about the appellant's attitude towards the errors discovered by the Bank:

> [TRANSLATION]
> **1408.** . . . An evasive and negative attitude was also noted on the part of the complainant, who denied responsibility by shifting the blame to assistants or account managers. This specific concerned the managers and was one of the reasons that led to the decision to dismiss her.

[59] In my opinion, in light of the evidence, this conclusion is entirely reasonable.

[60] Third, the appellant alleges that the Bank's in-house policies were ambiguous and that they had contributed to her errors (Appellant's Memorandum, paragraphs 19 and 46). With respect, there is no support for this argument in the evidence. The Bank's compensation scheme for payments and commission is very detailed and provides a number of examples to explain

how commissions should be calculated (Appeal Book, Vol. I, at pages 73 to 83). In addition, following its disclosure of the compensation scheme to the investment specialists, the Bank answered a number of the questions raised by the investment specialists (Appeal Book, Vol. I, at pages 84 to 90). In my opinion, the document suggests that the Bank attempted to establish an intelligible compensation scheme and answer the questions of those the scheme applied to. Consequently, I have no doubt in the circumstances that if the appellant had had questions about the compensation scheme, she could have referred them to the Bank, which would have attempted to clarify matters.

[61] I therefore cannot see how the Bank can be held responsible for the errors made by the appellant.

[62] According to *Dunsmuir*, the judge had to ensure that the adjudicator/referee had made a reasonable decision based on the evidence before him. His role did not allow him to substitute his assessment of the evidence for that of the adjudicator/referee. As the respondent submits at paragraph 37 of its Memorandum:

> [TRANSLATION]
> 37. The Adjudicator/Referee's reasoning was analysed at great length by the trial judge, who found that his decision could in no way be deemed unreasonable despite the Adjudicator/Referee's decision that the evidence did not support the fact that the complainant had intentionally produced false sales reports. . . .

[63] As to the appellant's arguments that the adjudicator/referee did not consider all the mitigating factors and evidence she submitted and that he did not consider all of the testimony

adduced by both parties, it is my view that, given the length of the adjudicator/referee's decision and the thoroughness with which he reviewed all of the evidence, these arguments have no merit.

[64] Consequently, the judge did not err in concluding that the adjudicator/referee's decision concerning the unjust dismissal complaint was reasonable.

2. Did the judge err in concluding that the adjudicator/referee's decision to reject the appellant's monetary claim was reasonable?

[65] Before this Court, as she did before the judge, the appellant submits that the adjudicator/referee failed to rule on a certain number of files and that, had it not been for this error, he would have concluded that she had achieved the sales volume required to entitle her to additional earnings of $40,000. At paragraph 44 of his reasons, the judge addressed this issue as follows:

> [44] The applicant submits that the referee failed to rule on 16 files. In this regard, the applicant refers the Court to the *CORE Products Audit Fiscal 1997* statement, filed before the referee as E-39, concerning the investments that gave rise to bonuses and a commission premium for investment specialists who reached the $6.5-million level. This exhibit was prepared specifically by the witness Élizabeth Marshall for the hearing before the referee. The referee took it into account and referred to it extensively, according to the parties' submissions, but he conducted his own analysis of each of the files in turn (impugned decision, at para. 1495). The impugned decision refers to all of the files supposedly omitted, and there is therefore no need to intervene on this point. In fact, the referee incontestably considered all of the documentary evidence submitted.

[66] The appellant has not satisfied me that the adjudicator/referee did, as she alleges, fail to rule on certain files. I completely agree with the judge's comments at paragraph 44 of his reasons. There is no doubt from reading the adjudicator/referee's decision, with due respect for

the contrary opinion, that the adjudicator/referee performed an exhaustive analysis of all the appellant's sales files. After this analysis, the adjudicator/referee found that some of the appellant's sales files should be rejected, for three reasons: in some cases, because there was insufficient evident to support the claim; in other cases, because the transaction was not a eligible sale for obtaining a commission; and, in still other cases, because she had already been paid the commissions in question by the Bank.

[67] I therefore cannot accept the appellant's argument that the adjudicator/referee refused or failed to rule on some of her files.

[68] The appellant also submits that the adjudicator/referee breached a rule of procedural fairness when he required documentary evidence from her before considering her testimony on certain claims for which she alleged to be unable to provide documentary evidence since, according to her, the relevant documents were in the Bank's possession.

[69] The judge found that the adjudicator/referee, as the person in control of the evidence and procedure, could look to the rules of civil law in requiring the appellant to provide commencement of proof in writing. The judge wrote the following at paragraph 52 of his reasons:

> [52] … I am of the opinion that it was reasonable for the referee to require a commencement of proof in writing proving the claims made, especially in circumstances where the accuracy of these claims needed to be reviewed in light of the many errors attributed to the applicant in her sales reports. Moreover, the referee breached no rule of procedural fairness. As he had the power to control the

> procedure and the evidence submitted, it was open to the referee to impose certain formal requirements and to draw conclusions from the lack of evidence.
>
> [Emphasis added]

[70] That conclusion is unassailable.

[71] It is therefore my view that the adjudicator/referee's decision on the appellant's monetary claim for unpaid commissions was reasonable and that it meets the reasonability test set out in *Dunsmuir*. Consequently, I find that the judge did not err.

[72] As regards the appellant's claim for overtime pay and Bank stock option certificates, which the adjudicator/referee dismissed on the grounds that there was no evidence before him [TRANSLATION] "to justify the legitimacy of her requests" (adjudicator/referee's decision, paragraph 571), the appellant has not satisfied me that the judge erred in concluding that there was no reason to intervene.

3. Did the judge err in dismissing the appellant's claims that the adjudicator/referee's conduct during the course of the hearing gave rise to a reasonable apprehension of bias?

[73] The appellant takes issue with the adjudicator/referee's neutrality (Appellant's Memorandum, paragraphs 66 to 75). Briefly, she relies on certain passages in the adjudicator/referee's decision, which she considers to be derogatory towards her, in support of her argument that the adjudicator/referee's conduct gave rise to a reasonable apprehension of bias. In *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R.

369, at page 394, the Supreme Court of Canada set out the test to be applied by the courts in determining whether a decision maker's conduct gave rise to a reasonable apprehension of bias. The test was described by Justice de Grandpré (even though Justice de Grandpré was dissenting in that case, the test he formulated was subsequently adopted by the Supreme Court), as follows:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically–and having thought the matter through–conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[74] At paragraph 57 of his reasons, the judge reviewed the adjudicator/referee's comments that, according to the appellant, call into question the adjudicator/referee's neutrality. Even though the judge found that some of the comments might have been "unfortunate", he was of the opinion that a properly informed person would not find that they gave rise to a reasonable apprehension of bias.

[75] In my view, the judge was not wrong in concluding as he did. Other than the comments of the adjudicator/referee reported by the judge, there is no evidence before us that would lead a reasonable and judicious person to conclude that the adjudicator/referee's conduct could give rise to a reasonable apprehension of bias. Consequently, it is my opinion that the judge did not err in rejecting the appellant's argument to that effect.

Decision

[76] I would therefore dismiss the appeal with costs.

"M. Nadon"

J.A.

"I agree.
Marc Noël, J.A."

"I agree.
J.D. Denis Pelletier J.A."

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD:

DOCKET:	A-367-09
STYLE OF CAUSE:	JACYNTHE DESCHÊNES v. CANADIAN IMPERIAL BANK OF COMMERCE
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 21, 2011
REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	NOËL J.A. PELLETIER J.A.
DATED:	June 28, 2011

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