Federal Court Cour fédérale

Date: 20090805

Docket: T-1848-07

Citation: 2009 FC 799

Ottawa, Ontario, August 5, 2009

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

JACYNTHE DESCHÊNES

Applicant

and

CANADIAN IMPERIAL BANK OF COMMERCE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Jacynthe Deschênes (the applicant) is challenging the legality of a decision dated June 28, 2007, by an adjudicator/referee appointed under the provisions of Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code), dismissing her unjust dismissal complaint and her monetary claim for commission and other premiums, both against the Canadian Imperial Bank of Commerce (the Bank or CIBC).

I. GENERAL BACKGROUND

[2] The applicant worked for CIBC from September 1989 to January 26, 1998. From 1995 on, she held various positions, including that of investment specialist (the specialist). Her pay was then

based on a new incentive system, where specialists were paid commissions based on the volume of total sales attributable to them. Here, only the aspects necessary to assess the grounds of review submitted by the applicant will be discussed. The applicant is representing herself today.

[3] The following are some of the conditions specialists had to meet to receive commissions in 1997:

- Prepare and submit sales reports in accordance with the directives in *Sales Reporting & Measurement*;
- Achieve $17.5 million in gross sales involving “new money” from other financial institutions: $11 million from sales of “non-money market” CIBC products and $6.5 million from [TRANSLATION] “sales of specific CIBC products”, as described in the *Régime de rémunération liée aux résultats* [*Performance Pay Plan*]; and,
- Comply with the professional conduct rules set out in the *Politiques et procédures de déontologie à l'intention des spécialistes en placements* [*Professional Conduct Policies and Procedures for Investment Specialists*].

[4] The circumstances that formalized the applicant’s dismissal are not challenged.

[5] Suffice it to say, in November 1997, the applicant’s October 1997 sales report indicated a sale of $1.2 million (client Samuel W.). Such a large amount immediately attracted the attention of management in Toronto, who then decided to conduct an in-depth review of the applicant’s reports

for the 1997 fiscal year. Other errors in the applicant's favour were discovered. More than 80 transactions were called into question.

[6] The applicant was suspected of having inflated the sales figures reported in November and December 1997. She was immediately asked to provide explanations, as her job was in jeopardy. On January 26, 1998, dissatisfied with the applicant's answers and behaviour, management decided to dismiss her and claim from her repayment of the $24,000 gross or $10,000 net that she had been overpaid in commission. Three days later, she had a bank draft issued for $10,000.

[7] On March 20, 1998, Human Resources Development Canada received an unjust dismissal complaint made by the applicant against the Bank under section 240 of the Code. On July 3, 1998, the applicant filed a second complaint with an inspector, this time claiming from the Bank unpaid commission and overtime pay, as well as the performance bonus and CIBC stock option certificates to which she felt she was entitled (the applicant's monetary claim).

[8] On March 17, 1999, the inspector issued a payment order against the Bank, which appealed that decision. The Minister of Labour therefore referred the applicant's unjust dismissal complaint and the Bank's appeal against the monetary claim to adjudication. Both matters were heard simultaneously by Jacques Bélanger, acting as both adjudicator and referee.

[9] The adjudicator/referee heard 30 witnesses, including 26 called by the applicant, reviewed more than 350 documents filed over approximately 90 days of hearings and examined both parties'

written submissions. On June 28, 2007, he rendered a detailed, 1673-paragraph decision upholding the validity of the applicant's dismissal and dismissing her monetary claim: see *Deschênes v. Banque Canadienne Impériale de Commerce*, [2007] D.A.T.C. No. 215 (impugned decision).

II. ISSUES

[10] The applicant submits two main grounds for quashing the adjudicator's dismissal of her unjust dismissal complaint. I would state these grounds as follows:

(a) The adjudicator based his decision on an erroneous finding of fact that he made in a perverse manner in upholding her dismissal for breach of the relationship of trust, even though the evidence in the record showed that there had been no fraud; and

(b) The adjudicator otherwise erred in law or made an unreasonable decision in failing to apply the principle of progressive discipline and substitute a lesser penalty than dismissal, given that the applicant had no disciplinary record and had received no warning before her dismissal.

[11] As for her monetary claim, the applicant raises the following three grounds of review:

(a) The referee failed to rule on all of the aspects of her monetary claim;

(b) The referee made a reviewable error of law, breached a principle of procedural fairness or acted unreasonably in determining that the testimonial evidence was insufficient and that the applicant had the burden of proving the commissions

claimed by filing documents from the Bank that would serve as a commencement of proof in writing; and

(c) The referee based his decision on an erroneous finding of fact that he made in a perverse manner in dismissing the applicant's monetary claim in the files where the evidence shows that the investment had been deposited in a temporary account, thereby erroneously interpreting the rules on retention money and new money.

III. STANDARD OF REVIEW

[12] In practice, the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 49; [2008] 1 S.C.R. 190 (*Dunsmuir*) did not substantially change the applicable standard of review for decisions made by an adjudicator or referee appointed under the Code. In fact, the privative clauses at subsections 243(2) and 251.12(7) of the Code for unjust dismissals and monetary claims, and the purpose and expertise of the adjudicator or referee continue to command a very high degree of deference (*Alberta Union of Provincial Employees v. Lethbridge Community College,* [2004] 1 S.C.R. 727 at para. 48; *Bitton v. HSBC Bank Canada*, [2006] F.C.J. No. 1690 at para. 29).

[13] Overall, for questions of fact, this Court will only intervene if the adjudicator/referee's decision was based on an erroneous finding of fact that was made in a perverse or capricious manner, or if the decision was made without regard for the material before the adjudicator/referee: (paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (*Khosa*) at para. 46. It should also be noted that, according to

Dunsmuir, 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 (*Dunsmuir* at para. 47; *Khosa* at para. 59).

IV. UNJUST DISMISSAL COMPLAINT

[14] The grounds of review submitted by the applicant essentially reiterate her arguments before the adjudicator.

[15] While she admits that she may have made some errors in her 1997 sales reports, the applicant submits that she was never guilty of serious misconduct, that she never defrauded the Bank, that no Bank client was prejudiced and that she received no written or verbal warning before being dismissed. The applicant states that, on the contrary, her previous evaluations show her excellent performance and competence in the field of investments. Nor is there any indication that she was in a conflict of interest. In short, neither her integrity nor her honesty is at issue here, and this is therefore a constructive dismissal.

[16] The applicant submits that the impugned decision is unreasonable because the adjudicator's conclusion that the breach of the relationship of trust justified the applicant's dismissal in this case is based on a finding of fact that fails to take into account all of the evidence and the reason for her dismissal on January 23, 1998, which was fraud. The applicant submits that 50% of the errors alleged by the Bank are unfounded and that the rest are merely [TRANSLATION] "administrative

errors". These administrative errors were the result of poor organization of work, in circumstances where the Bank's directives and systems were unclear (in particular regarding new money versus retention money). These errors occurred in a context of new procedures, a large number of clients and the employer's disorganized work procedures.

[17] Alternatively, the applicant submits that, if there was misconduct, which she denies, the applicable disciplinary action must be proportional to the misconduct proved by the employer. In this regard, the applicant submits that the Bank had practices that were poorly documented (for example, for transferring new money into *parking places*) or that were contrary to her pay contract. Some inconsistencies in this area were noted by the adjudicator himself. Therefore, it was the Bank's responsibility to implement an adequate control system to assess its specialists' needs and diligently check transactions to quickly identify its specialists' reporting problems. These factors weighed in favour of a prior warning rather than a dismissal.

[18] The grounds of review raised by the applicant are unfounded. The impugned decision seems reasonable in all respects and is based on both the evidence and applicable law.

[19] Clearly, an employer's discovery of fraud affects the relationship of trust that may exist between the employer and the employee, and justifies the immediate dismissal of the employee. However, aside from fraud, there are other circumstances, such as gross negligence, where the relationship of trust may be irrevocably broken. Each case must be judged on its own merits, and the adjudicator must consider the overall situation before reaching a conclusion. See *Durand v. Quaker*

Oats Co. of Canada (B.C.C.A.), [1990] B.C.J. No. 725; *Wilson v. Cornwall Publishing Co*., [1997] B.C.J. No. 2189 at paras. 22-26; *Denhamer v. RBC Dominion Securities Inc.*, [2000] A.J. No. 1116 at paras. 41-44; *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 at paras. 51-57 (*McKinley*); *Christensen v. McDougall*, [2001] O.T.C. 697 at para. 71; *Bracken v. Banque Royale du Canada*, [2002] D.A.T.C. No. 465 at paras. 76, 77 and 81; *Yeung v. HSBC Bank Canada*, [2006] C.L.A.D. No. 175 at para. 147; *Plotogea v. Heartland Appliances Inc.*, [2007] O.J. No. 2717; *Groulx v. Centre de Sport Alary inc*., [2008] D.C.R.T.Q. No. 537 at paras. 87, 89 and 92.

[20] The breach of the relationship of trust should also not be confused with an employee's alleged incompetence. In the case of incompetence, when an employer finds an employee's performance to be unsatisfactory, the justification for the employee's dismissal meets objective criteria that have nothing to do with the relationship of trust, as this relationship is presumed (see *Re Edith Cavell Private Hospital and Hospital Employees' Union, Local 180*, [1982] B.C.C.A.A.A. No. 495 (*Re Edith Cavell Private Hospital*); *Alberta Union of Provincial Employees v. Lethbridge Community College,* [2004] 1 S.C.R. 727 at paras. 42-45).

[21] The Court must consider the principles of progressive discipline that would allow a lesser penalty to be substituted for the dismissal, or for the dismissal to be quashed and payment of compensation ordered instead of reinstatement, because an adjudicator hearing an unjust dismissal complaint under Part III has broad remedial powers under subsection 242(4) of the Code. This provision is similar to other federal and provincial arbitration provisions.

[22] In this case, the adjudicator had to ask whether the applicant was indeed responsible for the errors alleged by the employer. Next, to determine whether the applicant's dismissal was justified, the adjudicator had to ask whether the evidence in the record supported a finding that the relationship of trust had been irrevocably broken, based on the principles of case law that are applicable to such cases. The adjudicator must also ask whether in this case such a breach of trust justified imposing the ultimate punishment, which is dismissal, or whether other disciplinary measures were appropriate under the circumstances (*Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487; *Heustis v. New Brunswick (Electric Power Commission)*, [1979] 2 S.C.R. 768).

[23] In the case at bar, the adjudicator stated that he was satisfied, in light of all of the evidence in the record, that there had been an irreparable breach of the relationship of trust justifying the dismissal (impugned decision, para. 1357). As a result, the adjudicator dismissed the applicant's submissions that she had been constructively dismissed and that, as there had been no fraud, the errors in her sales reports were not such as to cause a loss of confidence. The evidence in the record shows that the applicant was indeed guilty of serious misconduct and that the relationship of trust truly was irrevocably broken.

[24] The adjudicator's determination that the applicant's employment was terminated when numerous errors were discovered in her 1997 sales reports was based on circumstantial evidence of the events leading to the dismissal. However, the adjudicator recognized that, in this case, there was no dishonest intention or evidence of fraud in the applicant's behaviour. Thus, [TRANSLATION] "the

evidence does not support the idea that the complainant intentionally produced false sales reports in order to receive commissions that were overpayments”. However, the adjudicator found that the applicant had demonstrated [TRANSLATION] “carelessness, negligence and denial of responsibility”, such that the Bank correctly determined that the relationship of trust with the complainant had been irretrievably broken (impugned decision, paras. 1426, 1436 to 1438).

[25] On this point, the adjudicator relied on the testimony of Ms. Marshall, who aptly summarized the Bank’s position at that time in this statement:

> [TRANSLATION]
> Either we are dealing with someone who intentionally produced false reports in order to receive commissions or a very disorganized individual whom we would not want to represent us to our best clients (impugned decision, para. 1436).

[26] I have no doubt here that the adjudicator considered each party’s entire testimony about the particular circumstances and the real reasons for the dismissal. In this respect, the adjudicator’s conclusion that the dismissal was justified under the circumstances was based on a thorough analysis of the evidence submitted by both parties. The adjudicator found that the employer had indeed completely lost confidence in the applicant because, over the course of a year, she had submitted numerous sales reports that she had been unable to justify, most of which turned out to be erroneous, unfounded, exaggerated or submitted past the deadlines set out in the rules for investment specialists. The fact of the matter is that the scope of the adjudicator’s analysis reveals no unreasonable conclusion on this crucial point. The adjudicator’s process was careful and exhaustive and turned on a three-step methodology (impugned decision, at para. 1393).

[27] First, the adjudicator identified the regulatory and professional ethics body that governs the applicant as an investment specialist. More specifically, he examined the rules that apply under the *Politique et procédures de déontologie*, *Régime de rémunération liée aux résultats* and *Sales Reporting & Management*, which established the rules to follow for sales reports (impugned decision, at paras. 1393-1403).

[28] Next, the adjudicator listed the sales reports for the 1997 fiscal year according to the errors that the applicant had allegedly committed: sales reports made before the investment; sales reported as "new money" even though they involved retention money rather than new money; reported sales that did not exist or could not be found; amounts in sales reports that exceeded the actual sale amounts; the sale of products that were unauthorized for investment specialists; products sold that were different from the ones reported; two sales reports filed for the same sale; errors in the account number, class or code; failure to advise Gilbert Aura of a sale over $500,000; use of a re-balancing method that violates the rules because a sale cannot be claimed for a balance of a statement minus the sales already reported (impugned decision, at para. 1406).

[29] Lastly, the adjudicator considered the reasons given by the applicant when initially questioned about these errors. He examined the applicant's duties and responsibilities and the way in which she carried them out in 1997 compared with the practice of another investment specialist, Mr. Di Nardo, whose work was highly regarded by both the applicant and the respondent. On this point, he noted that the work of investment specialists involved an unusual amount of pressure (impugned decision, at para. 1413). However, he did not believe that this was enough to justify the

applicant's desire to maximize the number of sales, sometimes at the expense of the drafting of her sales reports: [TRANSLATION] "As a result, not only was this part of her work poorly done, but some methods developed by the complainant to deal with her lack of time were questionable" (impugned decision, at para. 1417). As such, he also stated that, contrary to the established rules, the applicant sometimes produced a second sales report for the same sale: [TRANSLATION] "This procedure ensured that she would be paid at least once if not twice, reflecting her total disregard for the fact that she might confuse or mislead the auditors in Toronto" (impugned decision, at para. 1418).

[30] In addition to all this, there is also the annual review that the applicant made of her sales at the end of the fiscal year:

> [TRANSLATION]
> [1419] . . . Certainly she cannot be faulted for this action alone. However, claiming a sale on the balance of the statements by subtracting all of the sales already reported from the total of a given client's statements, shows to what extent the complainant may have been disorganized throughout the year. The evidence as a whole indicates that it is highly likely that the cause of the complainant's actions was not that the auditors in Toronto forgot to register the reported sales. Rather, it was the complainant who forgot to report certain sales or who made numerous errors in her sales reports. The evidence shows that she thought she could reconcile everything at the end of the year without even asking for permission from her manager.
>
> [1420] At the end of 1997, her motivation for this annual review was not merely to correct her errors and omissions during the year. She was ambitious and determined to receive the bonus and excellence award. While her sales figures were very close to the target objectives, in order to reach them she had to report sales that had possibly been omitted during the year.

[31] In addition to these problems, there were also those caused by the sale of $1.2 million in Canada bonds for the client Samuel W. This sale was indicated in the applicant's October 1997

sales report, aroused the suspicion of auditors in November 1997 and led to the review of all of the applicant's 1997 sales reports. The adjudicator himself recognized that the applicant had been misled by a document issued by one of the respondent's subsidiaries, Investor's Edge, which had not reported the right figures, and that the evidence as a whole did not suggest that the applicant had had any dishonest intention when making this sales report (impugned decision, at para. 1423).

[32] Despite the explanation provided on this matter, the adjudicator pointed out that such a major error, even though based on faulty data, should have been noted by the applicant:

> [TRANSLATION]
> [1421] . . . 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] . . . 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.
>
> [1424] This also shows the complainant's constant attitude of denying responsibility in the face of clear facts. Despite her clear

> error of a false sale in the wrong product, in her opinion, the fault lies with Investor's Edge, which gave her a report with incorrect numbers. She goes so far as to claim that there is a plot against her to dismiss her because of her unpaid mortgage, a theory unsupported by the evidence. It is also mainly the fault of the Toronto auditors who are poorly organized and who fail to register some sales. She is under too much pressure; her assistant is poorly trained because she lacks the time; the account managers gave her incorrect information, etc.

[33] Lastly, the adjudicator noted the applicant's [TRANSLATION] "attitude of . . . avoidance and denial of responsibility" before being dismissed on January 26, 1998. The adjudicator asked the following question: [TRANSLATION] "But does that justify such a serious decision by CIBC regarding one of its best salespersons?"

[34] Relying on the case law, the adjudicator upheld the dismissal for irreparable breach of the relationship of trust, despite the fact that there had been no progressive disciplinary measures (impugned decision, at paras. 1427-1438).

[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.

[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".

[38] Incidentally, I note that, at paragraph 26 of *NBC v. Lepire*, to which the adjudicator referred, Justice Blais wrote that the breach in the relationship of trust results in most cases from the attitude, deeds and actions, reluctance, lack of frankness and conduct of the employee (impugned decision, at para. 1432). As can be seen, this case law supports the adjudicator's finding that, here, the applicant's attitude of carelessness, negligence and denial of responsibility justified the lack of

trust in the applicant, which led to the investigation that was conducted in December 1997 and January 1998.

[39] The facts in this case can also be distinguished from those considered in *Sauvé v. Banque Laurentienne du Canada*, J.E. 99-256 (*Sauvé*), cited by the applicant. In that decision, the evidence showed that the bank had previously condoned a non-conforming practice that was inconsistent with the bank's code of ethics: a branch manager had advanced funds to himself from an administrative account. The dismissal was found to be wrongful, since the uncontradicted evidence showed that the appellant's practice had previously been condoned by the bank (*Sauvé* at para. 17), which is not the case here, according to the evidence noted by the adjudicator in the impugned decision. It should not be forgotten that the adjudicator concluded in this case that the "rebalancing" technique was not recognized or accepted by the Bank. Here, there was a period of five months during which the sales reports had not yet been audited. However, as the adjudicator noted at paragraph 1126 of the impugned decision, [TRANSLATION] "As regards compensation, specialists were paid first, and then the sales reports were sporadically audited".

[40] There is no question here of re-analyzing each and every one of the applicant's alleged errors and re-evaluating whether a penalty that was proportionate to the gravity of the impugned act should have been imposed. In short, it was the seriousness of the errors, their recurrence over an extended period of time and the absence of any possible justification, rather than the number of errors, that led the respondent to conclude that the relationship of trust had been broken, despite all of the applicant's success. Consequently, there is no reason for this Court to intervene.

V. APPLICANT'S MONETARY CLAIM

[41] As regards the applicant's monetary claim, the referee had to ask whether the evidence in the record supported a conclusion that the applicant was entitled to the commissions and other premiums claimed under the Bank's administrative rules applicable at the time.

[42] The referee decided the respondent's appeal, made under section 251.11 of the Code, of a payment order issued against the respondent following the applicant's claim for unpaid commission, overtime pay, a performance bonus and her CIBC stock option certificates.

[43] At paragraph 1156 of the impugned decision, the referee wrote the following:

> [TRANSLATION]
> In spite of a lack of evidence on record from the complainant, the inspector rendered a decision that was unfounded in fact and in law, indiscriminately ordering the payment of the full amount of $46,617.37, including a bonus of $14,000.00, commissions increased to $25,230.19, commissions for the cases of Dat H. and Lo. and Co. of $3,198.00 and commissions for November, December and January for $4,189.19. According to the employer, this decision is a gift for the complainant, who had stated that she was unsatisfied with the details given by the employer. The employer wrote to the Honourable CLAUDETTE BRADSHAW on March 22, 1999, noting that it believed that the inspector had exceeded his jurisdiction. The employer appealed this decision on April 1, 1999.

[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* (CORE) 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.

[45] As for the 1997 list of sales of eligible CORE products, that is, products giving rise to a bonus when total sales exceed $6.5 million, the applicant submits that the referee erred in using $4,410,514 as the total amount of CORE product sales reported by the applicant and accepted by the respondent for the 1997 fiscal year, rather than the $4,302,594.29 indicated at Exhibit E-39:

> [TRANSLATION]
> [1666] Exhibit P-13 reports a total of $4,410,514.00 in CORE products for October 1997, to which $1,194,570.00 is added for a total of $5,605,084.00 in CORE products for 1997 (this total does not include later adjustments). Since the complainant did not reach the $6.5 million of sales required, she is not entitled to the bonus and increased rate for commissions received for her sales over $11 million.

[46] Similarly, since Exhibit E-39 had been prepared for the hearing before the referee, he was not bound by the figures in this document. The referee considered this exhibit just as he reviewed all of the documentary evidence submitted, and he conducted his own analysis of the transactions to be reviewed.

[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.

[48] The referee dismissed the claims for which the applicant could provide no documentary evidence confirming that the sale for which a commission was claimed had been made and was eligible for this commission. These prerequisites are established by the very terms of the *Régime de rémunération liée aux résultats* and *Sales Reporting & Measurement,* according to which investment specialists must submit a sales report to receive the commission associated with the sale made (impugned decision, at paras. 1401-1402, 1460, 1462). Today the applicant submits that the referee 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.

[49] An adjudicator appointed under the Code has the power to control the evidence and the procedure. The adjudicator can look to the rules of civil law, but he or she is not bound by the same formalism as a judge of a court of law (*Cogeco Radio-Télévision inc. v. Croteau*, [2000] D.A.T.C. No. 366). In this regard, paragraph 242(2)(*b*) of the Labour Code provides as follows:

> (2) An adjudicator to whom a complaint has been referred under subsection (1)
>
> . . .
>
> (*b*) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; . . .

[50] In this case, the referee required the applicant to provide commencement of proof in writing in order to admit the testimonial evidence intended to prove the accuracy of the claims:

> [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.

[51] In doing so, the referee relied on a civil standard of proof for proof of a juridical act (article 2862 of the *Civil Code of Québec*, S.Q. 1991, c. 64). Since there was insufficient evidence, the referee dismissed the applicant's claims. The referee also refused to proceed with the accusations that the respondent knowingly refused to make the relevant documents available to the applicant and thus prevented her from preparing her case.

[52] Today, the referee's conclusions on this subject based on the evidence submitted do not need to be reviewed. 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.

[53] The applicant also submits that the referee erroneously interpreted the rules and time limits for retention money and new money. The applicant refers to the directive regarding funds put in a

parking place (i.e. specialists' practice of using a temporary account, commonly referred to as a "parking place", where funds are deposited while waiting to be invested on a long-term basis), and the rules to follow in sales reports to distinguish between new money and retention money. In doing so, the referee would give the respondent the right to unilaterally modify, through a directive, the remuneration contract binding both parties. The applicant submits that the referee also acknowledged that the directives and systems were unclear regarding this question. Thus, according to the interpretation suggested by the applicant, there is no time limit imposed on specialists for funds deposited in a temporary account, the so-called *parking place*. The only time constraint in this regard is the one imposed for reporting sales. Specialists had two months to report final investments, but there was no time limit for money placed in temporary accounts.

[54] Again, the referee's analysis on this point seems reasonable. Regarding the distinction between the sources of the funds sold, that is, retention versus new money, the referee used the exact words of the *Régime de rémunération liée aux résultats* (Exhibit E-2A, p. 3) (impugned decision, at para. 1463). As for the distinction between retention and "parking place" situations, that is, the unwritten rule that funds placed in a temporary account for more than two or three months become a permanent investment and that the subsequent transfer is considered to be a retention and no longer eligible for a commission, the referee referred to the testimonial evidence confirming the parameters of this rule, in spite of the applicant's submissions (impugned decision, at paras. 1466-1473). Lastly, the referee also referred to the clarification dated July 7, 1997, which states that sales reports must be made only after the final investment and which was intended to clarify the situation of temporary investments eligible for conversion. The referee noted the

difficulties in implementing these rules and the respondent's [TRANSLATION] "open attitude" regarding the time limits imposed on specialists. The referee concluded as follows:

> [TRANSLATION]
> [1485] Therefore, I do not see why a reasonable request for an extension of time limits made by the complainant for certain sales would be refused, when the evidence shows that the delay was not due to her negligence. I shall consider her claim with the same open-mindedness that she enjoyed when she was employed by CIBC.

[55] Similarly, the applicant submits that the referee's analysis to determine which of the applicant's sales were considered to be new money and therefore eligible for commission was flawed by the lack of evidence establishing the source of the money. As a result, the referee allegedly erroneously described as retention certain sales where the applicant invested funds for several months but later made a final investment without being able to justify the duration of the temporary investment. On this point, it was not for the referee to determine the soundness of the respondent's procedure, according to which only the final investments should be included in sales reports. Since specialists need to get authorization or justify the duration of the temporary investment, it was reasonable for the referee to require evidence of these actions to analyze the sales in question. Moreover, the July 1997 directive is consistent with the procedure in *Sales Reporting and Measurement*, which states that "the monthly sales reporting process . . . begins with the completion of the sales. . . . A sales transaction is considered to be complete when the new or converted funds are invested in the instrument that is going to be claimed as the sale".

[56] For the foregoing reasons, and since the impugned decision is in all respects reasonable in the circumstances, there is no basis for this Court to intervene.

[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.

[58] The application for judicial review must therefore be dismissed with costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed with costs.

"Luc Martineau"

Judge

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1848-07
STYLE OF CAUSE:	**JACYNTHE DESCHÊNES v. CANADIAN IMPERIAL BANK OF COMMERCE**
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	June 8, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	MARTINEAU J.
DATED:	August 5, 2009

APPEARANCES:

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SOLICITORS OF RECORD:

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