Federal Court  Cour fédérale

Date: 20180508

Docket: T-307-17

Citation: 2018 FC 487

Ottawa, Ontario, May 8, 2018

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

THE BANK OF NOVA SCOTIA

Applicant

and

MANINDERPAL RANDHAWA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of an Adjudicator's award upholding the complaint of unjust dismissal of Maninderpal Randhawa against the Bank of Nova Scotia under Part III of the *Canada Labour Code*. The Adjudicator ordered that the Respondent be reinstated to a different position at one of the Applicant's branches following a one-week unpaid disciplinary suspension, and also directed that the Applicant pay her legal costs on a substantial indemnity basis.

[2] The Adjudicator found that while the Applicant had grounds to discipline the Respondent, it did not have justification for an immediate termination without notice, and that its actions were tainted by an element of reprisal for her involvement in the internal whistleblower complaints that were filed against the branch manager. The Applicant argues that the Adjudicator's decision is unreasonable, and that it was denied procedural fairness in relation to the remedies awarded.

I. Background

[3] The Respondent was employed as a Customer Service Representative ("CSR", formerly known as a teller) from 2003 until 2011, when she was promoted to the position of Customer Service Supervisor. In her role as Supervisor, the Respondent was responsible for ensuring that the CSR employees who worked in her area complied with the Applicant's policies and procedures. She did not have a history of disciplinary infractions, and her performance appraisals over the years rated her as a "quality" employee, which is a generally positive rating.

[4] In July 2014 while the Respondent was away on medical leave, the Bank conducted a regular audit of operational risk at the branch where the Respondent worked. The audit identified a number of deficiencies, including in areas for which the Respondent was responsible, such as observing the limits on amounts of money in CSR's cash drawers, following proper procedures for posting transactions, and ensuring that the security rules were followed when cash is moved or counted in the branch. The audit report was provided to branch management, with an action plan that required that remedial measures be taken and that tasked the managers with continuing

to monitor the employees' compliance with the policies. The branch manager was required to provide a progress report within 60 days.

[5] The Respondent returned to work in early August 2014. On her first day back, she met with her direct supervisor as well as the branch manager to review the findings of the audit and the action plan that was being implemented. The details of the crucial events that resulted in the dismissal are reviewed in greater detail below. In summary, the Adjudicator found that the managers' follow-up on the audit over the following weeks identified a number of failings by the Respondent, and further that she had a tendency to deny these errors until confronted with evidence. During this same period, a series of complaints were made to the internal whistleblower line alleging that the branch manager was breaching bank policies, and the Respondent was involved in at least some of these complaints.

[6] The Adjudicator found that the branch managers became aware of these complaints and rapidly escalated the discipline to dismissal without following the Applicant's policies on progressive discipline, in part as an act of reprisal against the Respondent for her part in the whistleblower complaints. The Adjudicator concluded that the Applicant's claim that it had just cause to dismiss the Respondent because of her failure to ensure bank policies were followed and her dishonesty in denying these lapses when confronted by management was not supported by the evidence, and that their failure to follow the bank's internal discipline policies further undermined their claims.

[7] The Adjudicator concluded that while the summary dismissal was an excessive penalty, the Applicant did have good reasons for discipline. The Adjudicator ruled that the Respondent

should receive a one-week disciplinary suspension without pay, following which she was to be appointed to a lower-level (non-supervisory) CSR position, either in the branch where she had previously worked or another branch close to it, and he awarded her legal costs to be paid on a substantial indemnity basis. That award is the basis for this application for judicial review.

II. Issues and Standard of Review

[8] There are two issues:

A. Is the Adjudicator's decision that the dismissal was unjust unreasonable because it failed to take into account the higher standard of honesty expected of bank employees?

B. Was the remedy awarded, reinstatement to a different position, and legal costs on a substantial indemnity basis, unreasonable, beyond the Adjudicator's jurisdiction, or done in breach of procedural fairness?

[9] The standard of review of the Adjudicator's decision regarding whether the dismissal was unjust, and in relation to the appropriate remedy, is reasonableness: *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at para 15 [*Wilson*]; *Yue v Bank of Montreal*, 2016 FCA 107 at para 5; *Payne v Bank of Montreal*, 2013 FCA 33 at paras 32-34 [*Payne*]. The standard of review regarding procedural fairness is correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 36-37.

[10] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*], the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> 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.

[11] The Supreme Court of Canada has ruled that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*].

III. Analysis

A. *Is the Adjudicator's decision on unjust dismissal unreasonable?*

[12] The Applicant argues that the decision should be set aside because the Adjudicator failed to follow the long-standing principle that a higher standard of honesty applies to bank employees or to explain why he was departing from that rule, and thus it is not clear whether the proper legal test was applied.

[13] The Adjudicator's task in a complaint of unjust dismissal under the *Code* is to apply the test set out in *McKinley v BC Tel*, 2001 SCC 38 [*McKinley*] to the facts. This involves an assessment of: (a) whether the evidence establishes, on a balance of probabilities, that the misconduct which forms the basis for dismissal actually occurred, and (b) if so, whether the

nature and degree of misconduct warranted dismissal. As explained in *McKinley*, both branches of this test involve a factual inquiry. In this decision, the Supreme Court of Canada expressly rejected a "categorical" approach to cases of dismissal based on allegations of employee dishonesty, and instead found that all cases of misconduct should be assessed in context.

[14] This was applied to the banking sector in *Payne*. In that case, the Court cited *McKinley*, and expressly endorsed the contextual approach:

> [46] The importance of *McKinley* is that it rejects a categorical approach to determining whether an employee's misconduct warrants dismissal. With limited exceptions, the category of misconduct involved, including dishonesty, is not determinative. Instead, a careful assessment of all the circumstances of the particular case is required, in order to ensure that the punishment imposed on the employee is proportionate to the gravity of the misconduct. Underlying this principle is the recognition of the importance of work in the lives of individuals, and of the power imbalance inherent in the employment relationship (at paras. 53 and 54).
>
> …
>
> [48] It is clear from *McKinley*, and from the subsequent jurisprudence to which counsel referred us, that this test is not easily satisfied. Dismissal for cause is rarely found to be just in the absence of prior warnings and the imposition of lesser penalties for similar misconduct.

[15] The Applicant argues that *McKinley* does not displace the higher standard of honesty for bank employees endorsed by the line of cases originating with *Ivanore v Canadian Imperial Bank of Commerce*, 1983 CLB 9357, [1983] CLAD No 68 (QL) [*Ivanore*], as applied in *Evans v Royal Bank of Canada*, [1996] CLAD No 1125 (QL), and *Teti v Canadian Imperial Bank of Commerce* (2010), 86 CCEL (3d) 98, [2010] CLAD No 392 (QL). It contends that the following statement of the law from *Ivanore* remains the governing authority:

> [60] Generally I consider the standards of honesty and integrity the community expects in its dealings with a bank must be reflected in bank employees' behaviour with customers and the handling of customer funds and those the bank uses for profitable purposes. That standard is a strict one. A serious deviation from it causing loss of trust could properly be treated as just cause for dismissal.

[16] On this point, the Applicant argues that the Adjudicator's failure to apply this higher standard, or to explain why he was departing from it, means that the decision is unreasonable. I disagree.

[17] The Adjudicator's decision is lengthy and thorough, and it examines the facts and the law in some depth. The starting point for the Adjudicator's analysis is the following paragraph, which refers to the Respondent and her two supervisors at the branch (para 85):

> As is apparent from the summary of the evidence above, there are significant credibility issues in this case. After a careful review of the evidence of Ms. Randhawa, Ms. Ewan and Ms. Mong, I have concluded that none of these three witnesses was honest in her testimony.

[18] This is the Adjudicator's overall assessment of the credibility of the key witnesses, and it flows from the detailed summary of the evidence provided earlier in the decision. It is not necessary to review all of the details of the evidence in support of this conclusion because this is treated in such depth by the Adjudicator – a summary of the essential elements will suffice.

[19] The Applicant contends that it had just cause to dismiss the Respondent. As noted earlier, the context for the key events was that the branch manager (who had recently taken over the branch, but who also had a long service record with the bank) was tasked with implementing

improvements to ensure that the branch employees were correctly following bank policies and procedures regarding the handling of cash and security procedures for transferring or counting cash, in order to address the shortcomings identified by the operational risk audit. This audit had occurred while the Respondent was away on leave. On the first day she returned to work, the Respondent met with her immediate supervisor as well as the branch manager to review the findings and to outline the remedial steps that fell within her responsibility. This was followed by a written confirmation a few days later.

[20] In the weeks that followed, the managers observed a series of failings on the part of the CSRs, and a number of meetings were held with the Respondent to review these shortcomings and to seek improvements. As the Adjudicator noted, a pattern emerged whereby the Respondent initially denied any errors but, when confronted with evidence, she would admit that she had not ensured that proper procedures were followed and then promised to improve. This gave rise to two concerns on the part of her managers: (a) that the Respondent was either unable or unwilling to undertake the necessary supervision of the CSR employees, and (b) that she repeatedly denied the lapses in implementing the correct procedures or to take responsibility for these errors.

[21] The Adjudicator found the Respondent's evidence to be lacking credibility in several areas. For example, the Adjudicator noted that the Respondent testified that she had never received an informal memorandum from her immediate supervisor which outlined these concerns in some detail, and which signalled to the Respondent that this was a very serious matter that she needed to take action to address. The difficulty with her denial was that the copy of the memorandum provided in evidence included the Respondent's signature next to an acknowledgement that she had read the document. In addition, the Respondent denied that she

had a meeting with her supervisor and the branch manager to discuss her performance shortcomings shortly before her dismissal, but the Adjudicator found that it had happened, on the basis of the detailed notes of the discussion tendered into evidence by the supervisor. Both of these findings support the Adjudicator's conclusions regarding the credibility of the Respondent.

[22] The Adjudicator found that these concerns gave rise to a legitimate basis for discipline of the Respondent, but did not justify her immediate termination. In part, this was because the Adjudicator found that the Respondent had no previous record of disciplinary offences, and the nature of her shortcomings did not warrant immediate dismissal without notice.

[23] In addition, the Adjudicator found that the Applicant did not follow its policy of inviting the employee to respond to allegations regarding potential discipline in relation to the final incidents which gave rise to the dismissal. The sequence of events is telling: the branch manager expressed concerns about the Respondent's performance to the Bank's human resources department on September 30, 2014, noting that she thought that a performance improvement plan was warranted. She was advised to obtain the Respondent's comments on these matters. The Respondent sent her response to these concerns on October 4, which was conveyed to the human resources department on October 6. In this response, the Respondent admitted her failings, took responsibility for them, and promised to improve her performance. On October 7, the branch manager expressed further concerns about the Respondent's performance to the human resources department, based on incidents observed on October 2 and 7. This resulted in the recommendation to terminate the Respondent's employment, but she was never provided an opportunity to respond to these concerns, nor was she given a chance to demonstrate that she

would live up to her promise to improve prior to the termination meeting on October 15. The Adjudicator questioned why matters progressed so quickly.

[24] The Adjudicator also found that the supervisor and the branch manager had not been fully honest in their testimony, and this undermined the Applicant's claim of just cause for dismissal. This relates to two key elements of their narrative: (a) the timing of the negative performance evaluation of the Respondent, and (b) whether they were aware of the whistleblower complaints when the disciplinary steps were taken.

[25] In regard to the timing of the negative third quarter performance appraisal (covering the three-month period ending July 31, 2014), the Adjudicator found that the explanation of when it was provided to the Respondent did not withstand scrutiny. The supervisor and branch manager both testified that the appraisal had been discussed with the Respondent upon her return to work in early August, following her leave, but on the evidence it was clear that this was an impossibility in view of the time it usually takes to complete a performance review following the end of each quarter. The Adjudicator concluded that the supervisor and branch manager had come up with this story in order to establish that the Respondent had received the negative performance appraisal prior to the initiation of the disciplinary measures.

[26] The evidence of the timing of the delivery of the performance appraisals was contradictory and confusing; it is not my role, however, to try to clear up this confusion. The issue is whether the Adjudicator's finding falls within the range of reasonable alternatives in light of the evidence. I find that there was some evidence to support the Adjudicator's conclusion that the managers concocted their story on when the negative performance appraisal was

discussed with the Respondent. I find the Adjudicator's conclusion on this point to be reasonable, particularly in view of the clear evidence that the preparation of the performance appraisals took some time following the end of each quarter, and the Applicant's failure to provide evidence to support an alternative explanation of the timeline in this particular instance.

[27] The second contradiction in the evidence relates to when the branch manager became aware that whistleblower complaints had been made against her, and that the Respondent may have been involved in these complaints. Again, it is not necessary for me to recite in detail all of the evidence on this point since it is thoroughly canvassed by the Adjudicator. There was evidence from the Respondent that she had spoken on several occasions with her immediate supervisor about her concerns regarding the actions of the branch manager, and the Respondent testified that her supervisor had advised her that the proper response was to file a complaint with the internal whistleblower line. There was evidence that the supervisor had spoken with the branch manager about these complaints, and the Respondent's involvement in them. There was also evidence from the Applicant's records that confirmed that complaints about the branch manager were made to the whistleblower line during the relevant period, and that the branch manager was to be spoken to about ensuring compliance with Bank policies.

[28] The Adjudicator concluded that the branch manager's testimony that she was not aware of these complaints at the time she initiated the disciplinary actions against the Respondent was not credible, in light of the totality of the evidence. While I find that the evidence on this point is somewhat confusing, I can find no error in the conclusion of the Adjudicator that the managers were aware of the whistleblower complaints and either knew or suspected that the Respondent was involved in them. This falls well within the "range of reasonable alternatives" in light of the

law and the evidence. And again, the Applicant did not introduce evidence which could have perhaps provided more clarity on exactly what steps were taken to inform the branch manager of these complaints, and when these occurred. The conclusions drawn by the Adjudicator were fully open to him on the evidence.

[29] The Adjudicator's analysis of the evidence led him to the conclusion that the Applicant had good grounds to discipline the Respondent, in light of her failure to ensure that the employees she supervised followed proper procedures as well as her repeated denial of these lapses and unwillingness to take responsibility for them. As noted above, this finding is supported in the evidence. However, the Adjudicator also found that the Applicant did not have grounds for immediate dismissal, and that this rapid escalation of discipline was tainted by an element of reprisal against the Respondent for her part in the whistleblower complaints. This too is supported in the evidence before the Adjudicator.

[30] The Adjudicator's analysis of the law is based on the key cases on unjust dismissal under the *Code*, including *Wilson*, *Payne* and *McKinley*. He found that the Applicant's failure to consider progressive discipline was not justified on the facts of this case. And, on the issue of whether the Respondent's dishonesty formed a basis for dismissal, the Adjudicator ruled at para 101:

> Termination where there is no prior discipline, especially for an employee with significant service such as Ms. Randhawa, must be reserved for those egregious situations where a single incident has ruptured the employment relationship to a point where it cannot be salvaged. To the extent that Ms. Randhawa's conduct can be said to have been dishonest – a key part of the bank's case – that 'dishonesty' did not involve any deception regarding clients (unlike in the cases cited by the bank) but rather a failure to take full responsibility for procedural breaches mainly committed by

> the employees she was charged with supervising, denial of some of those breaches in the face of clear evidence, and a pattern of somewhat exaggerated assertions that procedures were always being followed. While the importance of the bank's policies was not disputed, it is also not disputed that the breaches involving Ms. Randhawa and her tellers did not cause any actual harm. Furthermore, much of Ms. Randhawa's initial resistance to acknowledge any problems was cured when she was asked for a written response; for much of the rest, Ms. Randhawa was never given an opportunity to explain – or to show that she could improve her performance – before the bank moved to terminate her employment.

[31] Having reviewed the evidence, and the arguments presented on this issue, I can find no error in this analysis. In particular, I find that the failure of the Adjudicator to deal expressly with the *Ivanore* line of cases does not, in the circumstances, constitute a reversible error. First, the Adjudicator acknowledged the importance of the bank's policies, and given the evidence and argument presented to him, this must include the policies relating to the handling of money, as well as the policy regarding ethical conduct. Second, the Adjudicator noted that the Respondent was dismissed on the basis of her failure to enforce these policies and her dishonesty when confronted with her performance failings as a supervisor; this is unlike many of the precedents cited by the Applicant where dishonesty related more directly to the handling of customer's money. In some respects, this case is closer to the factual situation in *Payne*, where the bank dismissed the employee for breaches of internal personnel policies, and for failing to be honest when these were brought to his attention.

[32] In the case before me, I find that the Adjudicator properly considered the lack of progressive discipline by the Applicant. It is now confirmed that the doctrine of progressive discipline is part of the law under Part III of the *Code*, and that this applies to the banking sector:

Wilson and *Payne*. This generally requires employers to provide notice to the employee of his or her shortcomings, and an opportunity to correct the behaviour, before moving to termination. The reference by the branch manager to a "performance improvement plan", noted earlier, is an indication that the Applicant follows this approach. Such a plan will put the employee on notice that if they do not improve there will be disciplinary consequences; it may include a reference to the possibility of termination, but it also sets out the steps the employee must take to meet the performance expectations of their position, and a time-frame within which to meet them. It may include measures (such as training, mentoring, etc.) to support the employee along the way.

[33] The Applicant argued that progressive discipline is not applicable to "immutable character traits" such as dishonesty. I disagree. This is exactly the type of "categorical" approach that was rejected by the Supreme Court of Canada in *McKinley*. A contextual approach is required, and while dishonesty is obviously a particular concern in the banking sector, each case must be examined on its merits. I find that this is what the Adjudicator did here.

[34] Third, an experienced adjudicator is presumed to be aware of the leading decisions and general principles in the area, and it is not necessary "to examine case law which simply reiterates the general principles applicable to the case": *Patanguli v Canada (Citizenship and Immigration)*, 2015 FCA 291 at paras 21-22 [*Patanguli*]. In *Patanguli*, the Court quoted an oft cited passage from the Supreme Court's decision in *Newfoundland Nurses*, where Madam Justice Abella, writing for the Court, stated:

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each

> constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[35] The decision-maker is presumed to be aware of the key governing decisions, and if the reasons allow, as these reasons do, a reviewing court to understand why the adjudicator came to this conclusion, the court is able to conduct a proper analysis of whether or not a decision falls within a range of reasonable, acceptable outcomes. On this point, I would observe that the Adjudicator referred to the key decisions in his summary of the positions advanced by the parties, and then tracked the key elements of the precedents in his analysis. I have already cited the Adjudicator's discussion of whether the Respondent's dishonesty merited dismissal, and the reasoning in that part of the decision reflects both the high standards expected of bank employees, as outlined in the *Ivanore* line of cases, as well as the contextual approach and progressive discipline required by *McKinley* and *Payne*. I can find no error in this analysis.

[36] I find that the reasons of the Adjudicator on this issue are reasonable and intelligible; I can follow the analysis and it is well grounded in the facts and the law. The Adjudicator's conclusions on the *McKinley* test are reasonable. I would also note that the decisions of adjudicators are entitled to significant deference, since findings of whether a dismissal is "unjust" fall within the core expertise of the decision-maker who heard the evidence and observed the testimony of the witnesses: see subsection 243(1) of the *Code*.

B. *Did the Adjudicator err in awarding reinstatement and costs?*

(1) Did the Adjudicator err in ordering reinstatement?

[37] The Applicant argues that the Adjudicator erred in ordering reinstatement of the Respondent for three reasons: (a) the remedy is unreasonable on the facts and the law, (b) reinstatement to a different, lower-level position is beyond the scope of the Adjudicator's jurisdiction under subsection 242(4) of the *Code*, and (c) it was denied procedural fairness in that it had no opportunity to lead evidence or make submissions in relation to this remedy. In view of my findings on the procedural fairness arguments, it is not necessary for me to address the first issue raised as to the reasonableness of the award.

(a) *Is reinstatement to a different position beyond the jurisdiction of the adjudicator?*

[38] The Applicant submits that the award of reinstatement to a different, lower-level position is beyond the jurisdiction of the Adjudicator under subsection 242(4) of the *Code*. The Applicant relies on the Federal Court of Appeal decision in *Royal Bank of Canada v Cliche*, [1985] FCJ No 424 (QL) [*Cliche*] for this proposition. The facts in the *Cliche* case are quite similar to the facts before me: an adjudicator found that the bank had cause to be concerned that the respondent had not followed certain regulations regarding banking operations and more generally had failed to perform her duties as "accountant or chief administrator". The adjudicator concluded, however, that the bank did not have sufficient cause for dismissal, and ordered a six-month suspension following which the respondent was to be reinstated as a "regular teller", plus an award of lost wages. The bank argued that in reinstating her to a different position, the adjudicator exceeded the scope of his powers under the remedial provisions of the *Code*. The Federal Court of Appeal

allowed the appeal, on the basis that the order of reinstatement to a different, lower-level position, was beyond the jurisdiction of the adjudicator under subsection 65.1(9) (now subsection 242(4)) of the *Code*.

[39] Subsequent to this decision, however, there have been a number of decisions of labour adjudicators and courts dealing with reinstatement to other, often comparable, positions. Many of these decisions accept that an adjudicator has jurisdiction to reinstate the complainant to a different position, and they turn on the question of whether there was a factual finding that a position was available, or the related question of whether implementing the order would displace an incumbent who occupied the other position: see, for example, *Bank of Montreal v Sherman*, 2012 FC 1513 [*Sherman*]; *Sprint Canada v Lancaster*, 2005 FC 55; *Winchester v Bank of Nova Scotia*, [1997] CLAD No 174 (QL). Furthermore, in *Magas v Westcom Radio Group Ltd*, [1993] CLAD No 333 (QL), the complainant was ordered reinstated but demoted given the evidence of her deficiencies as a manager. In some of these cases it appears that *Cliche* was not argued, and in the *Sherman* decision at para 24, Justice Michael Manson referred to the *Cliche* decision solely on the question of whether it was an error to order reinstatement "because of the negative impact the order would have had on an innocent third-party employee...".

[40] In view of my conclusion on the procedural fairness issue, it is not necessary for me to rule on the question of jurisdiction here. I would observe, however, that the *Cliche* decision appears not to represent the consensus approach of expert adjudicators under Part III of the *Code*, or of the courts on judicial review of these decisions. 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*.

(b) *Was there a denial of procedural fairness?*

[41] The Applicant's final argument on the issue of reinstatement is that it was denied procedural fairness because it was never given an opportunity to lead evidence or make representations on the question of reinstatement to a different position. It argues that this specific remedy was not asked for by the Respondent, and the failure by the Adjudicator to indicate he was considering it and to allow the Applicant to lead appropriate evidence and to make submissions amounted to a denial of procedural fairness.

[42] The Respondent submits that the issue of reinstatement was addressed by both parties in their final submissions, as indicated in the Adjudicator's decision and that if the Applicant wished to lead evidence or to make submissions on this issue it had every opportunity to do so. In particular, the Respondent notes that the Applicant put into evidence that it had eliminated the CSR Supervisor positions in the bank, including the one formerly occupied by the Respondent, and so it cannot claim to be surprised that the Adjudicator took this into account in fashioning an appropriate remedy.

[43] The requirements of procedural fairness are not in dispute: the framework set by the Supreme Court of Canada in *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*] remains the governing law. In this case, the key considerations are the nature of the decision-making process, its importance to the parties, and the legislative scheme. While adjudicators are given broad discretion in regard to the procedure to follow in managing the

hearing, they must ensure that it is fair to both parties: see *Jennings v Shaw Cablesystems Ltd*, 2003 FC 1206 at para 21; *Curtis v Bank of Nova Scotia*, 2017 FC 380 at paras 168-174.

[44] It is clear from *Baker* (at para 23) that a process that more closely resembles a civil or criminal trial will entail a higher standard of procedural fairness: see also *Moreau-Bérubé v New Brunswick (Judicial Council)*, [2002] 1 SCR 249 at para 75; *Canada (Attorney General) v Timson*, 2012 FC 719 at para 14. An adjudication of a complaint of unjust dismissal under Part III of the *Code* involves a dispute between two parties about events which occurred in the past and an assessment of whether the employer's actions violated the rights of the complainant under the law, and if so, what remedy ought to be awarded to the individual. This process is a less formal, alternative remedy to a civil trial: *Wilson* at paras 46 and 50. It involves significant interests for both parties, and practice over the years has reinforced an expectation that these hearings will be relatively formal and follow an adversarial process broadly similar to a trial, where it is generally left to the parties to lead their evidence and make their submissions to an adjudicator.

[45] This is reinforced by the requirements set out in subsection 242(2) of the *Code*, which provides in part:

Powers of adjudicator	**Pouvoirs de l'arbitre**
242(2) An adjudicator to whom a complaint has been referred under subsection (1)	**242(2)** Pour l'examen du cas dont il est saisi, l'arbitre :
…	…
(b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present	**b)** fixe lui-même sa procédure, sous réserve de la double obligation de donner à chaque partie toute possibilité de lui

evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and	présenter des éléments de preuve et des observations, d'une part, et de tenir compte de l'information contenue dans le dossier, d'autre part;
…	…

[46] Procedural fairness is not to be considered in the abstract; each case will turn on its particular facts. I find that in this case the Applicant was denied procedural fairness, because the Adjudicator awarded a remedy that was not sought by the Respondent, and on which no evidence or argument had been advanced beyond the general fact that the position she formerly occupied had been eliminated.

[47] This is not similar to a situation where an adjudicator disagrees with both parties and awards lost wages or other damages either above or below the range suggested by either side. In that circumstance neither party can claim to have been taken by surprise.

[48] In *Sherman* (at para 20), the Court adopted the "seven generally accepted circumstances which would justify a decision not to reinstate an employee", which include the abolition of the position formerly held by the individual at the time of dismissal as well as other events such as lay-offs by the employer (adopting the factors summarized in *Yesno v Eabametoong First Nation Education Authority*, [2006] CLAD No 352 (QL)). This was specifically cited with approval by the Federal Court of Appeal in *Payne*, at para 88. These factors have been accepted as the guiding authority on this question.

[49] The failure to make the factual findings necessary to underpin an assessment of these factors has been found to be an error resulting in the decision being overturned on judicial review: *Lee-Shanok*. These factors call for evidence, and the denial of the opportunity to lead such evidence may amount to a breach of procedural fairness.

[50] In *Lam v Canada (Attorney General)*, 2009 FC 913, this Court overturned an adjudicator's decision which had found a dismissal was unjustified, but refused to order reinstatement. The Court's finding is applicable here:

> [4] …[I]f an adjudicator can legally refuse to order reinstatement, he or she must have given each party to the grievance the opportunity to be heard on this issue. In this case, the parties found out by reading the impugned decision that reinstating the applicant was not a "reasonable or viable option in the circumstances", but this crucial issue was not raised or argued at the hearing. This is a very significant breach of procedural fairness.

[51] The Court remitted the matter back to the same adjudicator, with directions. The decision was reversed by the Federal Court of Appeal, but only in relation to the directions provided to the adjudicator; the substance of the ruling on procedural fairness was not disturbed: *Lam v Canada (Attorney General)*, 2010 FCA 222. See, to a similar effect, *Lahnalampi v Canada (Attorney General)*, 2014 FC 1136.

[52] In this case, I find that the Applicant was denied procedural fairness in relation to the particular remedy ordered by the Adjudicator because the remedy was not asked for by the Respondent and it was not canvassed as a possibility by the parties or the Adjudicator during the hearing. Prior to awarding reinstatement the Adjudicator was required to make several factual

determinations, but the evidence to support such findings was absent because the Applicant was never provided the opportunity to know this aspect of the "case to meet."

(2) Did the Adjudicator err in awarding costs?

[53] The Applicant mounts a two-pronged argument in respect of the costs award: (a) that the Adjudicator lacked jurisdiction to make such an award, and (b) that there was a breach of procedural fairness because they were not provided an opportunity to make submissions on the issue.

(a) *Did the Adjudicator have jurisdiction to award costs?*

[54] It has long been the law that an adjudicator has the power under the *Code* to order costs in appropriate circumstances. The leading decision is *Lee-Shanok*, where the Federal Court of Appeal ruled that costs could be awarded under paragraph 61.5(9)(c) of the *Code* (now paragraph 242(1)(c)). The Applicant argues that this line of authority is no longer good law in light of the Supreme Court of Canada's decision in *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 [*Mowat*] which held that human rights tribunals did not have the authority to award costs under the remedial provisions of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*]. The relevant provisions of the *CHRA* provide that a tribunal may "compensate the victim" for lost wages or additional costs or expenses incurred as a consequence of the discriminatory practice. The Supreme Court of Canada ruled that this did not give tribunals jurisdiction to award legal costs to the victims of discrimination, based on the wording of the statute and its particular context, including the legislative history of the *CHRA*, as

well as the opinion on the point expressed by the Canadian Human Rights Commission, the expert body charged with administering the *Act*.

[55] The Applicant submits that this decision is applicable to adjudicators under the *Code*, especially since the remedial powers given to adjudicators under subsection 242(4) is worded even more narrowly than its equivalent provision under the *CHRA*. It argues that it is fundamentally unfair that adjudicators can only award costs against the employer.

[56] The Respondent submits that the long-standing jurisprudence that labour adjudicators have jurisdiction to award costs in appropriate cases is still good law, and that there was no unfairness in this case because the Applicant was aware of the requests for costs and other remedies at the hearing and did not ask for an adjournment or for a further opportunity to file supplementary submissions.

[57] The Respondent argues that subsequent to the *Mowat* decision, it has been held that labour adjudicators still have the jurisdiction to award costs: *Munsee-Delaware First Nation v Flewelling*, [2012] CLAD No 33 (QL) [*Munsee-Delaware*]; *Pare v Corus Entertainment Inc*, [2015] CLAD No 118 (QL). It points to the more recent decision in *Wilson*, which specifically noted the open-ended nature of the remedial authority of adjudicators under the *Code*.

[58] On this point, I agree with the Respondent. The *Mowat* decision is not binding authority that overturns the years of accepted jurisprudence which has established that adjudicators can award costs in appropriate cases. *Mowat* is based on a different legislative scheme, which is administered by a different expert administrative agency and with an entirely different legislative

history. I agree with the reasoning on this point set out by the adjudicator in the *Munsee-Delaware* decision.

(b) *Was there a denial of procedural fairness?*

[59] The Applicant argues, in the alternative, that it was denied procedural fairness because the Adjudicator did not provide any opportunity for it to make submissions on the award of costs on a substantial indemnity (or solicitor-client) basis.

[60] There are two guiding principles in regard to the award of costs on a solicitor-client basis. First, as stated by the Supreme Court of Canada in *Young v Young*, [1993] 4 SCR 3 at p 134: "Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties." This is confirmed in relation to labour adjudicators by the Federal Court of Appeal in *Lee-Shanok*: "An extraordinary award of this kind ought only to be made in circumstances that are clearly exceptional, as would be the case where an adjudicator wished thereby to mark his disapproval of a party's conduct in a proceeding."

[61] The second guiding principle is that where such extraordinary awards are made, the decision-maker must explain the basis for doing so under the principles established in *Lee-Shanok,* and the failure to offer such an explanation can constitute a reversible error: *Alberta Wheat Pool v Konevsky*, [1990] FCJ No 877 (CA); *First Nation Sipekne'katik v Paul*, 2016 FC 769 at paras 97-101. See also *Fraser v Bank of Nova Scotia* (2000), 186 FTR 225, aff'd 2001 FCA 267, where the Court ruled that the principles had been properly stated and applied.

[62] I find that while the Adjudicator had the jurisdiction to award costs, including solicitor-client costs, his failure to explain the basis for making such an extraordinary award renders this aspect of the award unreasonable. This is precisely the type of situation where the absence of reasons is fatal, because I am left to speculate as to why the Adjudicator made such an award (*Newfoundland Nurses*; *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at para 121).

[63] This is even more perplexing in light of the Adjudicator's rejection of the Respondent's claim for aggravated and punitive damages, as explained at para 113 of his decision:

> While I agree that this award warrants an order for legal costs, I have concluded that this is not a case for aggravated or punitive damages. Despite the sometimes overheated language in the complainant's written argument ("deliberately fabricated evidence, "sinister attempt to concoct evidence", "lied repeatedly", etc.) I have found that the bank had adequate basis to impose discipline on Ms. Randhawa, and I have found Ms. Randhawa's evidence lacking in truth on some matters. While the dismissal cannot be upheld, I find that the "egregious display of bad faith" (*Honda v Keays*, paragraph 34) necessary for an award of aggravated damages has not been established in this case.

[64] The explanation for not awarding aggravated or punitive damages in this case is concise, grounded in the proper legal principles, and based on the facts before the Adjudicator. This stands in stark contrast to the absence of any explanation for an award of legal costs on a substantial indemnity basis, in particular given the Adjudicator's findings on the credibility of the Respondent as well as the two key witnesses for the Applicant, and the absence of any finding of delay or procedural misconduct by the Applicant during the hearing.

[65] I find that this aspect of the decision is unreasonable because it lacks any explanation of the reasoning that must be applied, in light of the *Lee-Shanok* decision.

IV. Costs

[66] Each party asked for its costs in this application. In view of the divided result, and in exercise of my discretion under Rule 400 of the *Federal Courts Rules*, SOR/98-106, each party shall bear its own costs in relation to this judicial review.

V. Conclusion

[67] In summary, I find that:

- The findings of the Adjudicator on the evidence, and in particular his findings relating to the credibility of the key witnesses, are reasonable.
- The conclusion that the dismissal was unjust is reasonable because it is grounded in the facts and the law, and properly takes into account the standard of conduct expected of bank employees.
- The Applicant was denied procedural fairness in relation to the award of the remedy of reinstatement to a different, lower-level, position, because it was never provided notice that this was a possible remedy, nor given an opportunity to lead evidence or to make submissions in relation to it. I underline here that this finding relates only to the order of reinstatement to a different, lower-level CSR position, either at the Respondent's former branch or one nearby.

- The award of costs on a substantial indemnity basis is unreasonable because it is not explained, and therefore it is not clear whether it was awarded in accordance with the principles stated in the *Lee-Shanok* decision.

JUDGMENT in T-307-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed in part.

2. The matter is remitted back to the same Adjudicator only in relation to the remedy award and costs, to be decided in accordance with these reasons.

3. Each party shall bear its own costs in relation to this application.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-307-17
STYLE OF CAUSE:	THE BANK OF NOVA SCOTIA v MANINDERPAL RANDHAWA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 15, 2017
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	MAY 8, 2018

APPEARANCES:

Richard Charney Rebecca Liu	FOR THE APPLICANT
Kenneth A. Krupat	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Norton Rose Fulbright Canada Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Kenneth A. Krupat Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT