Federal Court  Cour fédérale

Date: 20090918

Docket: T-351-08

Citation: 2009 FC 933

Ottawa, Ontario, September 18, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

LI MIN ("AMANDA") WU

Applicant

and

ROYAL BANK OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application in respect of the decision of an adjudicator ("the adjudicator"), appointed by the Federal Minister of Labour, under Division XIV of Part III of the *Canada Labour Code* 3, R.S. Can. 1985, c. L-2, dated February 1, 2008. The decision dismissed the applicant's complaint against the respondent for unjust dismissal.

[2] The applicant makes application for:

1. An order quashing the decision which dismissed the complaint of the applicant against the respondent for unjust dismissal;

2. An Order referring the applicant's complaint with directions, to an adjudicator under Division XIV of Part III of the Code, for a new determination; and

3. Any other order that this honourable Court considers appropriate; and

4. Costs of this proceeding.

Background

[3] Ms. Li Min Wu's (the applicant) first language is Mandarin; she was born in China. She was immediately employed when she came to Canada first with H&R Block and JP Morgan Chase. The applicant had multiple accounts with the respondent and had become a client of the respondent soon after she came to Canada.

[4] The applicant was hired as a customer care agent in the respondent's Visa centre on May 9, 2005. After one year, the applicant became a Credit Adjudication Agent. When she was initially offered employment, she was asked by the respondent to sign a disclosure and consent for pre-employment screening. As a term of her offer of employment, she was to read, acknowledge and comply with the "Code of Conduct" (Code) of the respondent. Her employment came with the benefit of staff banking privileges including no fees on transfers between accounts.

[5] The applicant received six weeks of initial training including a test on the Code in which she scored 30 points out of a possible 33. All employees of the respondent are required to complete the Code eLearning Program every one to two years. Sections of the Code with a double asterisk signify violations that result in immediate dismissal. One of these violations is “misappropriation”. One form of misappropriation can be described as “kiting”.

[6] The applicant stated in her testimony that she remembered the Code as part of the package on her first day of employment but was not sure she read it or paid attention to it. She also did not recall receiving any training regarding kiting, misappropriation or fraud during her employment. She stated that there was little mention of the Code during her employment, thought it was mentioned at least briefly in her quarterly performance evaluations.

[7] The respondent acknowledged that the applicant was a good employee.

[8] As part of the applicant’s duties as a Credit Adjudication Agent, the applicant had a familiarity with cardholder credit limits. There is a “buffer zone” or “pad” of usually 5 to 10% but sometimes even 100% by which cardholders can exceed their credit limits. The “buffer zone” is determined by a number of factors referred to as TRIADS and includes, credit rating, debt to asset ratio, income, account history, and history of dealings with the bank.

[9] The applicant and her husband had a number of accounts with the respondent including a Royal Credit Line (RCL) which was secured against their home.

[10] In 2005, the applicant was approved for a Platinum Visa card with the respondent. The initial credit limit was $14,500 but it was raised in 2006 to $29,500. The applicant states that she saw the July 2003 cardholder agreement when she received the card, instead of the November 2005 cardholder agreement. This was noted because the credit limit under the November 2005 cardholder agreement is “the maximum amount which we will allow you to charge to your Visa account to cover purchases, cash advances, interest and fees”. The agreement also provided that the respondent may allow the amount you owe to exceed your credit limit by authorizing transactions in excess of your credit limit. The agreement also stated that the respondent may refuse to authorize transactions that exceed a client’s credit limit, require payment, and charge an over limit fee. The agreement permits the respondent to take money out of client’s other accounts to pay the amounts owed on the card and the agreement also proscribed making payments “in excess of your credit limit unless the amount you owe at the time of payment is more than your specified limit”. The 2003 cardholder agreement does not have this limitation.

[11] On June 22, 2006 the respondent’s Enterprise Anti-Money Laundering and Terrorism Unit (“EAMLAT”) advised the respondent’s Corporate Investigations Services (CIS) that the applicant had been advancing large amounts from her 1.9% Visa account to her RCL which carried a variable interest rate. EAMLAT stated that funds “go in circles through her accounts to save interest”.

[12] CIS assigned an investigator to conduct an investigation. The investigator assigned a CIS analyst to review the accounts since January 2006. The investigator prepared a spreadsheet which showed the movement of funds between the applicant’s staff account, Visa account and RCL.

[13] The investigation revealed the following pattern of transactions. On May 29, June 1, June 8, June 12, June 15, June 22, June 27 of 2006, the applicant did similar actions: the applicant would deposit three handwritten Visa cheques in amounts that were anywhere from $25,000 to $39,500 into her staff account totaling anywhere from $84,500 to $110,500 (the cheques were deposited through an automated banking machine (ATM) sequentially and were substantially in excess of the credit limit on the Visa account; the cheques would then clear the Visa account anywhere from three to seven days later; in the mean time the applicant would transfer the cheque amounts from her staff account into her RCL account reducing the outstanding balance and as such, interest paid to the respondent; finally the applicant would transfer large funds into her Visa account.

[14] The respondent contends that the transactions constituted kiting, contrary to the respondent's Code.

[15] The investigator noted that the applicant was depositing handwritten Visa cheques into her staff account drawn on her Visa. Handwritten cheques, as opposed to pre-printed account numbers, delay clearance by several days because they go through a key punching process in Toronto. The transfers, on the other hand, were conducted quickly, generally by way of electronic transfer.

[16] The use of the Visa cheques are governed by the cardholder agreement. The cheques also have a disclosure statement attached to the cheques which stated that Visa cheques may not be used to pay any RBC Visa accounts and if a Visa cheque exceeds Visa accounts' available credit, it will be declined.

[17] On June 28, 2006, the respondent restrained the applicant's accounts. When the cheques settled, the applicant had a credit balance of $55,272.49 on her Visa card and a debit balance in the staff account of $74,664.40. The respondent used the credit balance to offset the negative balance in the staff account, leaving a debit in the staff account of $19,391.91 which was paid off by the applicant on July 19, 2006.

[18] On July 10, 2006 the investigator arranged a meeting with the applicant and the applicant's superior, Mr. Calabrese at the Visa centre where the applicant worked. The applicant was very upset during this interview and particularly that the investigator had come to her place of work. The applicant signed a form acknowledging that she had been explained certain rights during the meeting and that she was free to leave at any time.

[19] The applicant was told she was being investigated for misappropriation and kiting. She said that she had never heard of those terms but readily acknowledged that she had been transferring funds between accounts to save interest. The applicant stated that she was taking money from her Visa account but was always paying it back, that this had nothing to do with her work, and that the respondent allowed her to do it by making the funds available. She stated that if she should not be transferring funds then she would stop doing it.

[20] After the interview, the applicant was suspended. On July 12, 2006 the respondent's Advisory Services Group (ASG) recommended termination of the applicant's employment because: the transfers were methodical and calculated, the transfers were in excess of the authorized credit

limit, the applicant utilized cheques and ATMs to take advantage of the time delay in clearing cheques, that as an employee, the applicant had knowledge of the banking system, that the applicant gained a financial benefit of approximately $14 a day, and the transactions placed the bank in a position of risk. The respondent terminated the applicant that day stating that it had lost confidence in her "honesty and integrity" and that she had failed to provide a satisfactory explanation for her transactions.

[21] On March 19, 2007 an adjudicator, Ib S. Petersen, was appointed by the Federal Minister of Labour to hear a complaint by the applicant that she was unjustly dismissed by the respondent on July 12, 2006.

[22] The issue in the hearing was whether the respondent had just cause for the termination of the applicant for kiting or misappropriation of funds and if not, what remedies the applicant was entitled to for wrongful dismissal.

Adjudicator's Decision

[23] The adjudicator found that there were serious credibility issues throughout the applicant's testimony. The applicant's claim to have limited awareness of the Code, kiting and misappropriation was seen as implausible given that there were many instances where she would have come across these concepts and guidelines in the course of her employment. The lack of awareness was also problematic as the applicant had passed a test on the Code scoring 30 out of 33

marks and one of the questions answered correctly asked what constituted kiting. He also found it difficult to accept the applicant's testimony that she read the portions of the Code involving stock trading and conflict of interest but did not read about misappropriation and kiting because "it did not relate to her". Finally, the adjudicator noted that the applicant is bright and ambitious, transitioning from China as an immigrant to immediate employment and when she worked for the respondent she scored highly on her exams. Her answers were contradictory to these observations.

[24] In regards to the merits of the complaint, the adjudicator found that the applicant's work for the respondent cannot be so easily separated from her relationship as a client. The adjudicator looked to *DS v. ReMax United Ltd*., [1992] NJ No. 157 for the premise that an employer's ability to discipline depends on whether conduct is work related, whether it detrimentally affects the employer's business, or renders the employee unable to properly discharge employment obligations. The adjudicator then identified the question as whether the applicant's conduct, in the circumstances, is cause for discipline. He noted that the applicant's job offer, disclosure and consent form make reference to compliance with the Code which was signed by her as well as quarterly job evaluations which were also signed by the applicant. The adjudicator rejected the argument that the applicant can rely on her ignorance of the Code as a consequence. Even if the applicant was not aware of the contents of the Code, it was her duty to read and comply with it.

[25] The adjudicator then turned to the issue of just cause and used the test adopted in *Kelowna Flightcraft Air Charter Ltd. v. Kmet*, [1998] F.C.J. No. 740 (F.C.T.D.) in the non-union context:

> First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's

> decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

[26] The adjudicator found that the applicant was not kiting as defined in the Code or the RBC's intranet as those definitions included transferring funds between financial institutions. However, in the adjudicator's view, the conduct nevertheless constituted kiting insofar as she misappropriated bank funds to her own benefit which reduced the amount owed to the bank. To do this, the applicant manipulated the "bank float" and falsely inflated the balances of her Visa and staff accounts.

[27] The transactions were conduct warranting discipline. The cheques the applicant wrote were far in excess of the buffer zone normally allowed cardholders over their approved credit limit. As a Visa employee and customer care agent, the applicant would have been aware of credit limits. Further, the transactions constituted misappropriation.

[28] The applicant's argument that her conduct was unintentional was also rejected. While the adjudicator found that she may not have had the intent to commit a "criminal wrong", her conduct was "planned, deliberate, repetitive, and calculated" and "aimed at manipulating accounts to save interest". The adjudicator went further as to suggest that there may have been a fraudulent intention when the applicant deposited three envelopes with three cheques in the same ATM on the same occasion.

[29] The adjudicator then turned to the question of whether termination was excessive. The adjudicator noted that the respondent's Code states that misappropriation or kiting "would most likely result in immediate dismissal" but stated that he is not bound by the respondent's view in this regard.

[30] *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, guided the adjudicator on whether dismissal was excessive. The adjudicator also noted that the circumstances of the dismissal must be considered including:

1. the seriousness of the offence;
2. the premeditated and repetitive nature of the offence;
3. the employee's length of service and discipline record;
4. failure of earlier discipline to correct the problem;
5. consistency of the employer's discharge policy.

[31] The adjudicator concluded that termination was not excessive in all the circumstances. In the adjudicator's view the applicant's misconduct was serious. He also found that it was "premeditated, repetitive, deliberate, calculated and occurred over a long period of time…". He also found that she obtained a benefit from the transactions. He considered that she was a "…good and dedicated employee with a discipline free record…", but noted that dismissal for her actions was consistent with the respondent's policies, and that she had not been singled out. Finally, he found troubling the applicant's "continued failure to appreciate the nature of her conduct and to take any responsibility

for it. [The applicant] continued to deny that she had engaged in any wrongdoing and, instead, blamed the bank for 'allowing' her to do what she did".

Issues

[32] The applicant submitted the following issues for consideration:

1. Did the adjudicator act without jurisdiction by upholding the termination of the applicant:
    (a) for non-work related conduct;
    (b) contrary to the respondent's policies, practices, and guidelines for discipline.
2. Did the adjudicator fail to observe the principles of natural justice or procedural fairness by:
    (a) upholding the dismissal of the applicant, who is a person of Asian descent, whose place of origin was China, and whose first language was not English, by treating the applicant's dismissal differentially based on those grounds, in contrast to comparable discipline in similar circumstances give to employees who are persons of Asian descent, whose place of origin was China, and whose first language was not English;
    (b) failing to provide an interpreter;
    (c) failing to allow the applicant, while under cross-examination to consult with her counsel before the document entered into evidence as Exhibit 7 which counsel had not seen before, and about whether the applicant's statements

that she did not want to work for the respondent constituted a withdrawal of reinstatement as a remedy sought; and

(d) failing to allow the applicant time to compose herself and to seek counsel about whether the applicant's statements that she did not want to work for the respondent constituted a withdrawal of reinstatement as a remedy sought.

3. The adjudicator erred in law in making the decision or order, whether or not the error appeared on the face of the record, contrary to paragraph 18.1(4)(c) of the *Federal Courts Act*, R.S. Can. 1985, c. F-7 (the Act) including by upholding the dismissal of the applicant:

(a) despite the applicant having a clean disciplinary record, with no previous warnings or discipline regarding the applicant's conduct;

(b) for conduct implicitly or expressly approved by the respondent or its representatives, by which approval and actions the respondent is estopped from disciplining or dismissing the applicant;

(c) when the applicant was induced into the alleged misconduct by actions or representations of the respondent or its representatives;

(d) when the respondent did not suffer damages due to the applicant's actions; and

(e) based on errors of law on the meaning of kiting and misappropriation.

4. Based on its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner without regard to the material before it, contrary to s. 18.1(4)(d) of the Act, including by upholding the dismissal of the applicant:

(a) despite the applicant having a clean disciplinary record, with no previous warnings or discipline regarding the applicant's conduct;

(b) for conduct implicitly or expressly approved by the respondent or its representatives, by which approval and actions the respondent is estopped from disciplining or dismissing the applicant;

(c) when the applicant was induced into the alleged misconduct by actions or representations of the respondent or its representatives;

(d) when the respondent did not suffer damages due to the applicant's actions;

(e) based on mixed errors of law and fact on the meaning of kiting and misappropriation; and

(f) based on erroneous findings of fact including on the applicant's reasons for the transactions, the cost to the respondent of the applicant's transactions, the respondent's Code of Conduct and its cheque holding policy, the overdraft limits on the applicant's accounts, the applicant's knowledge of the respondent's Code of Conduct and its cheque holding policy.

[33] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the adjudicator have jurisdiction?
3. Did the adjudicator breach procedural fairness?
4. Did the adjudicator err in upholding the dismissal of the applicant?

Applicant's Submissions

[34] The applicant had a clean disciplinary record with no previous warnings or discipline regarding the applicant's conduct. The respondent's representations or actions induced the applicant into the alleged misconduct. As a result, the respondent is estopped from disciplining or dismissing the applicant. As well, the decision to uphold the dismissal of the applicant was based on erroneous findings of fact regarding the applicant's reasons for the transactions, the respondent's Code and its cheque holding policy, the overdraft limits on the applicant's accounts and the applicant's knowledge of the respondent's Code of Conduct. Further, errors of law based on the meaning of kiting and misappropriation were the basis of the adjudicator's decision. The applicant felt that the use of her Visa and accounts was governed by her client relationship with the Bank rather than that of an employee. Her conduct had nothing to do with her employment. Finally, the respondent did not suffer damages as a result of the applicant's conduct.

[35] The adjudicator unreasonably accepted the spreadsheet submitted by the respondent by the investigator, Mr. Montgomery. The adjudicator accepted that there was a $14 per day loss without illustrating how this conclusion could be made.

[36] The manner in which the applicant was terminated was never properly addressed by the adjudicator. The applicant was denied counsel and the right to leave the interview room on two separate occasions.

[37] The applicant also takes issues with the manner in which her self-represented status was handled by the adjudicator. The adjudicator did not appreciate the challenges for the applicant in this regard even though *Wagg v. Canada*, [2003] F.C.J. No. 1115, states that "(t)here is authority to the effect that a trial judge who is faced with an unrepresented litigant has an obligation to direct that litigant's attention to salient points of law and procedure."

[38] The applicant was a dedicated and honest employee. She was terminated shortly after the first indication she had that she was suspected of impropriety. The applicant finds it unreasonable that the adjudicator found that her actions were intentional because she performed the action of moving money around in her accounts to save interest. The adjudicator was unreasonable to find that she may not have had a "criminal motivation" but at the same time find her actions worthy of the most severe form of discipline available to the respondent.

[39] The applicant submits that there were mitigating factors in relation to the misconduct. The applicant's training on the matters which led to her termination was not sufficient, she received no warnings, she was a dedicated and proud employee, she sought to remedy the alleged misconduct and she was forthright and honest about the activity at all times. The adjudicator gave no weight to any of these factors and his analysis was unreasonabley one-sided.

Respondent's Submissions

The Standard of Review

[40] The standard of review is reasonableness (see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190). Decisions of an adjudicator made pursuant to the *Canada Labour Code* R.S.C. 1985 c. L-2 (the Code) are given the highest degree of deference by the courts. The privative clause in the Code indicates that the particular expertise of adjudicators is not to be ignored and courts have responded accordingly (*North v. West Region Child and Family Services Inc*., 2005 FC 1366 at paragraph 16 and *Kelowna Flightcraft Air Charter v. Kmet*, [1998] 149 F.T.R. 246). Courts are not to reweigh evidence. As long as there was evidence on the record that supports the adjudicator's conclusions, the Court should not intervene on judicial review.

Transactions Linked to Employment

[41] The adjudicator correctly concluded that the applicant's actions with her personal accounts could not be separated from her employment. The applicant took advantage of her knowledge with respect to the time required for a cheque to clear to act in her own financial interest and contrary to the Bank's interest. There was a clear nexus between the conduct and the employment relationship.

[42] A cornerstone running through the respondent's Code of Conduct is trust and the requirement to avoid actions that may bring "honesty, integrity, or trustworthiness" into question. In

M. v. Royal Bank of Canada, [2000] C.L.A. D. No. 149 at paragraph 56 and *Fawson v. Bank of Montreal*, [1996] C.L.A.D. No. 527, adjudicators have upheld decisions to terminate bank employees for conduct related to their own personal banking.

[43] The applicant was not "entitled" to make the transactions she made. The fraud detection system flagged the applicant's transactions which were in violation of the November 2005 Visa agreement.

Dismissal Contrary to Policy

[44] The dismissal was not as the applicant suggests contrary to the respondent's own policy. The Code of Conduct included the sections identified with a double asterisk which identified grounds for immediate dismissal. The adjudicator's findings of fact here are entitled to significant deference.

Procedural Fairness

[45] The respondent submits that if the applicant felt that she was not being afforded procedural fairness, she was obligated to raise the issue as soon as "reasonably possible". Counsel for the applicant did not raise any concerns that the applicant was "being subject to differential treatment on the basis of her race or ancestry" by the respondent or the adjudicator. Therefore, the respondent finds no basis for judicial review based on a lack of procedural fairness. Notwithstanding, there is

no basis for an allegation of bias. There was no evidence that the applicant was treated differently by her employer and the adjudicator found in his decision that there was sufficient evidence to conclude that the applicant understood the proceedings as well as the rules and policies established by the respondent related to her employment with the bank.

[46] There is also no basis for judicial review based on a lack of language interpretation for the applicant. The applicant did not raise the issue during the hearing and there was no evidence to support that assistance was needed for the applicant.

[47] Finally, the respondent submits that a duty of fairness was not breached in relation to an adjournment for the applicant. The applicant was given an adjournment earlier in the hearing when it was sought by her counsel.

Decision to Uphold Dismissal Reasonable

[48] In respect to the adjudicator's decision to uphold the dismissal of the applicant, the respondent submits that there was no error in fact and law.

[49] Progressive discipline by the respondent is appropriate where the employment relationship can "viably subsist" (see *Cowan v. Royal Bank of Canada*, [2003] C.L.A.D. No. 292 (Blaxland)). A banking employer must feel that there has been acceptance of responsibility but also behaviour that

indicates that the dishonesty or breach of trust will not happen again (see *Ivanore v. Canadian Imperial Bank of Commerce* (1983) 3 C.C.E.L. 26).

[50] The adjudicator did not ignore the length of service and previous good record of employment of the applicant. These factors however, did not outweigh the seriousness of the transactions and the applicant's failure to appreciate the seriousness of her misconduct. Balancing factors such as these is a task within the expertise and jurisdiction of the adjudicator.

[51] Honesty and integrity are essential for banking employees. *Cowan* above, states that "[d]ishonesty amongst bank employees would generally warrant more severe discipline than, for example, kiting done by a warehouseman in the supermarket…". The basis for this is the trust relationship that banks have with their employees.

[52] The respondent points out that labour arbitrators have generally upheld dismissal for misappropriation including kiting.

Credibility

[53] The credibility findings of the adjudicator related to the applicant's knowledge of the Code of Conduct were also reasonable. The respondent submits that a reasonable assessment of the evidence led the adjudicator to conclude that the applicant lacked credibility when she claimed that she had limited knowledge of the Code of Conduct.

Transactions Approved by Bank

[54] The transactions were not implicitly or explicitly allowed by the bank and they were flagged by the fraud department as a result. The manner in which the applicant transferred funds - by using personal touch banking with handwritten cheques deposited separately - is another indication that the bank would not condone these transactions.

[55] The applicant is inconsistent in her explanations of the transactions. During testimony, on one hand, she stated that she was taking advantage of a “loophole” in the system when she discovered that she could transfer Visa funds to inflate the balance on her line of credit. On the other hand, the applicant claims that her conduct was encouraged or approved by the respondent.

[56] The applicant’s assertion that the funds were available to her in her bank account after transferring from her Visa account is not unlike depositing an empty envelope into a personal banking machine and then claiming a deposit of $500. The bank approved the transaction at the time but would later find that the funds were not deposited and as such, not available. Similarly, funds were showing available prior to her Visa cheques clearing but the applicant’s funds were in excess of her Visa credit limit.

[57] The respondent does not accept that the transactions were not improper because the applicant had actual assets, such as her mortgage, that could have covered the Visa amount. This

argument is irrelevant because the money available to the applicant is not a deposit but funds loaned by the bank on terms that she would pay interest.

Misappropriation and Kiting

[58] The respondent states that the adjudicator's finding that the applicant had misappropriated funds is crucial to the decision. The adjudicator concluded that although the applicant's transactions did not constitute "kiting" in the Code of Conduct as it did not involve two or more financial institutions, it nevertheless constituted misappropriation under the Code of Conduct and as defined in Black's Law Dictionary. Black's Law Dictionary has been applied by courts and adjudicators and relying on it was not unreasonable (see *Lifemax Natural Foods Ltd. (Trustee of) v. Sahota*, [2003] O.J. No. 5016).

[59] The adjudicator concluded that the transactions took advantage of time delays required for cheques to clear. These findings led the adjudicator to conclude that funds were misappropriated as defined by Black's Law Dictionary. Further, the adjudicator concluded that although the transactions were not between two or more financial institutions, it nevertheless constituted kiting because kiting does not "require depositing cheques at different institutions". This was not unreasonable submits the respondent.

Blameworthiness

[60] The respondent disagrees with the applicant's submission regarding her blameworthiness. Separately depositing three envelopes with Visa cheques at the same location was an indication that the applicant knew the transactions were not allowed by the bank.

[61] The respondent then turned to the jurisprudence on termination and whether the dismissal was excessive. The conclusions of the adjudicator in this regard were not one-sided and he properly balanced the factors as in *McKinley* above.

[62] The respondent is not required to establish that there were actual damages for a dismissal to be reasonable. The important issue is that her actions violated the high standards of honesty and integrity required of employees in the banking industry.

[63] The adjudicator's findings on credibility were based on carefully considered evidence including the applicant's testimony. These findings are at the heart of an adjudicator's role and as such, the court should be reticent to interfere. It was reasonable for the adjudicator not to accept the applicant's explanations that she did not read the information on kiting and misappropriation and that her successful answer on the test regarding kiting was a fluke. Further, other arbitral decisions have not accepted ignorance of a Code of Conduct that an employee is required to know as a defence for actions outside of the Code of Conduct.

Alleged Factual Errors

[64] The factual errors alleged are not serious to the extent that paragraph 18.1(4)(d) of the Act requires. The Court should not reweigh evidence.

[65] The applicant submitted that the adjudicator made errors based on a reliance on the investigator's spreadsheet. The respondent submitted that the adjudicator did not rely solely on the spreadsheet and considered all of the banking documents. The timelines of the applicant's transactions as found by the adjudicator were correct. The adjudicator did not make an unreasonable finding on the dollar number of loss incurred by the bank. While the adjudicator made mention of the bank's investigator's estimation of loss at $14 per day, he did not base his decision on it.

Analysis and Decision

[66] **Issue 1**

What is the appropriate standard of review?

The issues before me are mainly questions of fact or questions of law and fact save for the question of procedural fairness. The question of jurisdiction is generally a question of law; however, the manner in which the applicant is referring to jurisdiction in her submissions is a question of fact and law. The remaining issues address how the adjudicator considered and assessed the evidence before him. Factual findings are to be reviewed in accordance with *Dunsmuir* above, as well as paragraph 18.1(4)(d) of the Act which provides this Court may grant relief where an erroneous

finding of fact was made in a perverse or capricious manner or without regard to the material before it. Findings of fact command the highest degree of deference from the Court (see *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793).

[67] *Dunsmuir* above, provides the approach to be taken with regard to the standard of review. First, I must determine whether the jurisprudence has already determined the degree of deference required for the question before me. If it does not, then I am required to conduct a contextual analysis to determine the appropriate standard.

[68] In *Bank of Nova Scotia v. Fraser*, [2000] F.C.J. No. 773, Mr. Justice Campbell found that the standard of review is that of patent unreasonableness noting the existence of a strong privative clause in section 243 of the Code.

[69] *Dunsmuir* above, collapsed the standards of reasonableness *simpliciter* and patent unreasonableness into a single standard of reasonableness. Therefore, patent unreasonableness, as the standard determined to apply before *Dunsmuir* above, will now be considered to be a reasonableness standard.

[70] Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. 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* above).

Procedural Fairness Issues

[71] **Issue 2**

Did the adjudicator have jurisdiction?

As I mentioned above, the issues the applicant raises are not jurisdictional questions under subsection 18.1(4) of the Act. The adjudicator had jurisdiction to hear the complaint as an appointee of the Federal Minister of Labour. In *Syndicat des Employes de Production du Quebec v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412, the Supreme Court of Canada stated that jurisdictional error applies to excesses of power whether committed at the outset of the hearing, during the hearing, or at the conclusion of the hearing in the orders made by the tribunal.

[72] I can only conclude that there was no jurisdictional error on the part of the adjudicator. The questions regarding non-work related conduct and the respondent's policies are central to the expertise given to the adjudicator tasked with decision making by the Canada Labour Code.

[73] I would therefore not allow the judicial review on this ground.

[74] **Issue 3**

Did the adjudicator breach procedural fairness?

There are a number of procedural fairness questions the applicant raises. In the written submissions, the applicant stated that she was treated differentially because she is Asian, originally from China and her first language was not English. Counsel arguing before me noted that the

written submissions had been completed by different counsel and that he wished to focus on the aspects of the applicant's background as outlined below.

[75] The respondent argued that the applicant provided no evidence of differential treatment and as such, there was no basis for this argument. Further, the respondent stated that if the applicant is alleging bias, then it was incumbent upon the applicant to raise this issue before the decision was released.

[76] An analysis of procedural fairness is only concerned with issues of fairness in relation to the administrative decision. Matters raised by the applicant regarding her treatment during the respondent's investigation and the manner of her termination are more appropriately raised in the *McKinley* test which I consider in Issue 4.

[77] I agree with the respondent and therefore do not see a basis for finding that the applicant was not afforded procedural fairness at the administrative hearing stage. I also agree with the respondent that there is no evidence in the decision to suggest differential treatment or bias and that the applicant should have raised this issue before the adjudicator.

[78] The applicant also argued that she should have been provided an interpreter. However, absent some evidence that assistance is needed, there is no positive obligation on a tribunal to inform an individual of her right to an interpreter during a proceeding (see *Garcia v. Canada (Attorney General)*, [2001] F.C.J. No. 1001). *Garcia* also notes, however, that the Supreme Court of

Canada in *R v. Tran*, [1994] 2 S.C.R. 951 was not unequivocal in attributing rights to an interpreter in the criminal sphere noting that there could be "future consideration whether different rules should be developed in other situations" such as administrative tribunals. However, the Federal Court of Appeal in *Garcia*, intelligibly guided this issue and I am not persuaded that this case is markedly different on the facts. In *Garcia*, the applicant was found to have "proceeded in English in each step on the way to the Board hearing without mentioning any language difficulties". This case was no different. There was no indication that the applicant required an interpreter and she did not request one. I therefore do not find that the hearing lacked procedural fairness in this regard.

[79] The applicant raised the issue that having to disclose her notes during her cross-examination was a breach of procedural fairness. Frustrating the applicant further, the adjudicator failed to allow the applicant time to compose herself and to speak to her counsel regarding the applicant's statement in the notes.

[80] The respondent replied that it is a well established principle that counsel cannot speak to a client undergoing cross-examination save for consent of the Court or opposing counsel. Therefore, there was no breach of any procedural right. Further, the applicant's counsel had the opportunity to address the information that came to light in the note being entered into evidence in the applicant's re-direct or closing submissions by the applicant's counsel.

[81] I concur with the respondent in respect to these matters. The applicant's notes were admitted into evidence as ordered by the adjudicator and the applicant's counsel had the opportunity to

respond to the request for production by the respondent before hand. This is consistent with the rules of evidence. Closing submissions provided an opportunity for counsel to address the information in these notes.

[82] With respect to the adjudicator's denial of an adjournment, *Wagg v. Canada*, [2003] F.C.J. No. 1115 is informative. Paragraph 19 states:

> "[i]t is trite law that the decision as to whether to grant an adjournment is a discretionary decision, which must be made fairly (see *Pierre v. Minister of Manpower & Immigration*, [1978] 2 F.C. 849, at p. 851, cited with approval in *Prassad v. Canada (MEI)*, [1989] 1 S.C.R. 560, at para. 17). There is no presumption that everyone is entitled to an adjournment. The Court will not interfere in the refusal to grant an adjournment unless there are exceptional circumstances (see *Siloch v. Canada*, [1993] F.C.J. No. 10 (F.C.A.)).

[83] I do not find that there were exceptional circumstances rendering the adjudicator's decision to proceed reviewable. It was not as if the adjudicator was against granting adjournments. An adjournment had been granted for the applicant earlier in the hearing. In this case, the adjudicator felt it was not warranted and this was a decision he was entitled to make. There was no breach of procedural fairness in this regard.

[84] The applicant submits that there is a duty of a judge or adjudicator to direct the unrepresented litigant's attention to salient points of law and procedure (*Wagg* above). I did not find this to be the overriding premise gleaned from this case. *Wagg* above, involved an applicant who alleged that the judge coerced him into signing a consent to judgment and failed to grant him an adjournment and as such, the procedures in the case lacked fairness and adherence with principles

of natural justice. In any case, the applicant does not argue that the adjudicator did not direct her to law or procedure but that the adjudicator did not ensure that she was represented.

[85] The applicant also stated that she was precluded from procedural fairness when the adjudicator indicated that she could not seek an adjournment to find counsel.

[86] The *Wagg* decision states in part, at paragraph 36:

> The burden of dealing with unrepresented litigants falls most heavily on trial courts. Courts of appeal should be careful not to make this task even more difficult by being overly critical of attempts to assist the litigants and to move the process along. The trial judge's overarching responsibility is to ensure that the trial or hearing is fair. If, after taking into account the whole of the circumstances, the reviewing court is satisfied that the trial was fair, it ought not to intervene simply because the trial judge departed from the standards of perfection at one point or another…

[87] In the dissent in *Wagg* above, Mr. Justice Isaac notes that the matter before him was not a case "of a litigant who simply underestimated the complexity of his case".

[88] However, it appears that this was what happened with the applicant in this case and as such, she hired counsel ten days before the hearing. She submits, however, that the damage had already been done.

[89] I can appreciate that the applicant may have felt disadvantaged by not having representation. However, the choice as to whether she hired counsel was hers to make. The adjudicator did not err

by not ensuring that the applicant was properly represented. I can also appreciate the relative resources and power imbalance that present with a complaint filed against a large bank.

[90] I will not allow judicial review on the basis of a breach of procedural fairness for the reasons above.

[91] **Issue 4**

Did the adjudicator err in upholding the dismissal of the applicant?

The applicant raised a number of issues and delineates them as errors of law and errors of fact. I have joined these issues as questions of fact and questions of fact and law as they fall under issues that are reviewed on the standard of reasonableness.

[92] The adjudicator begins his decision with his findings on credibility. I will begin my analysis here because it underscores each of the issues that have been raised by the applicant in regards to the preservation of her dismissal by the adjudicator.

[93] The adjudicator states that he found serious credibility issues with respect to the applicant's testimony. First, the adjudicator stated that the applicant's testimony on her knowledge of kiting and misappropriation was implausible and inconsistent. He suggested that her responses to the investigator at the initial interview could have been attributed to the surprise of the interview and the intimidating nature of it. He could not reconcile, however, the inconsistencies and explanations she provided during the hearing.

[94] The applicant questions such a stern conclusion on her testimony when she points out many inconsistencies in the respondent's witnesses were not mentioned by the adjudicator. The respondent states that the adjudicator's conclusions came well within what was reasonable.

[95] It is well settled law that the assessment of a witness' credibility is, as the respondent submitted, "at the very heart of an adjudicator's role as trier of fact". I find that the adjudicator supported his findings with reasonable explanations. For example, he found that the applicant's explanation on having knowledge of kiting and misappropriation were unbelievable given her access to this information in her initial training and the Code of Conduct. I have not had the benefit of hearing the testimony first hand and have no grounds to intervene.

[96] I now turn to the error in fact alleged by the applicant.

[97] The applicant does not dispute the facts but the interpretation of the facts by the adjudicator.

[98] One, the Code of Conduct was misinterpreted in two respects. It was unreasonable for the adjudicator to conclude that the applicant was aware of the Code of Conduct. The respondent offered no evidence that the applicant received training beyond her initial training or specifically on kiting or misappropriation. What's more, the Code of Conduct does not encapsulate the transactions she conducted in its definition of "kiting" and "misappropriation".

[99] Two, the adjudicator erroneously relied on the $14 a day loss indicated by the investigator who later admitted that the calculations were done by someone else, Lawrence Kwai, and the manner of arriving at that figure was never disclosed by the respondent. There were no losses according to the applicant because there were always funds to cover the accounts.

[100] Three, the adjudicator faulted the applicant with transactions that were "implicitly or expressly" approved by the respondent and she was induced into the alleged misconduct. Further, the applicant argued that there were contradictions in the investigators evidence and errors. I am of the view that the findings on fact by the adjudicator were not in error. As I mentioned above, findings of fact attract the highest deference (see *Dunsmuir* above).

[101] The findings on kiting and misappropriation were reasonable. Although kiting was defined in the Code of Conduct as transactions that extended beyond one banking institution, I find that it was reasonable for the adjudicator to conclude that the transactions completed by the applicant were nevertheless misappropriation. Misappropriation was defined broadly under the Code and included kiting. Reliance upon Black's Law Dictionary to further enunciate misappropriation was not misplaced and as the respondent points out, is often used in jurisprudence to delineate legal concepts.

[102] Further, the definition of kiting in the Code makes mention of transactions that are conducted between more than one financial institution, which was not done here, but also mentions that kiting involves using the time delay required for a cheque to clear.

[103] I also do not find it unreasonable that the adjudicator found that the applicant must have been aware that she was exceeding the "buffer zone" beyond her credit limit in her transactions as a Visa employee. This includes the applicant's claim that she was not aware that the November 2005 Visa agreement prohibits overpayment unlike her July 2003 agreement. Again, it was reasonable to conclude that as a Visa agent, the applicant would have been aware of the provisions in these agreements.

[104] The adjudicator's conclusion in regard to the applicant's knowledge of the Visa agreements and nature of misappropriation led him to conclude that the transactions of the applicant, "had no valid *bona fide* purpose or reason". Particularly salient for the adjudicator was the fact that "[k]ey to the understanding of the transactions is that the transfer of funds from the Visa account were by way of handwritten cheques, deposited via ATM, taking between four and six days to clear" and the transfer of funds back to the respective accounts, instantaneous as they were conducted "online".

[105] The adjudicator stated that this was akin to ATM deposits of empty envelopes. The conclusion that this constituted misappropriation followed.

[106] The adjudicator reiterated some of the text of the hearing in which these issues are canvassed. I cannot second guess these findings and am precluded from doing so by law. I am of the view that the adjudicator offered a detailed examination of the transactions and why they fit within the definition of misappropriation.

[107] The further submissions by the applicant regarding errors of fact in regards to the calculated loss to the bank were considered. However, I agree with the respondent in that the $14 a day cited by the adjudicator was not material to his ultimate decision. The adjudicator stated that the amount of interest owed to the Bank was reduced “by some amount, according to the Bank, $14.00 a day”. This does not suggest to me that the adjudicator relied on the exact figure but on the premise that the transactions were conducted to save interest and by doing so, the bank lost interest. This is an intelligible conclusion.

[108] Finally, I am of the view that the applicant’s argument that the bank incited her to commit the transactions lacks merit. The applicant may have been able to do the transactions but this does not suggest that they were condoned by the bank. The adjudicator found that the Code of Conduct, RBC Intranet and Visa agreement all suggested that the manner of these transactions were in contradictions with bank policy.

[109] I now turn to one of the main thrusts of the applicant’s argument, particularly in oral submissions before me. The applicant argued that dismissal was excessive and that a contextual approach as required in *McKinley* above, was not truly applied.

[110] The applicant argued a number of mitigating factors against dismissal were ignored by the adjudicator, unreasonably considered and/or given inadequate weight to the extent of being in error.

[111] The applicant first argued that the adjudicator committed an error of fact and law in upholding the dismissal of the applicant despite the applicant's clean disciplinary record, with no previous warnings or discipline regarding the applicant's conduct. She received no warnings about her conduct. Further, she attempted to remedy the alleged misconduct and was forthright and honest with the respondent about her activity.

[112] Other mitigating circumstances argued by the applicant are that she was new to Canadian culture and did not realize that she was doing something wrong. The applicant stated that she had found a way to save interest but she always had funds that were fully secured to cover the debts in the transactions. And, ultimately the applicant did not do anything illegal which would constitute just cause for the termination of her employment. As well, the applicant submitted that there was no loss to the Bank.

[113] The applicant also does not want the manner in which she was dismissed to be inconsequential. She was brought into an interview with an ex-police officer. As mentioned above, the applicant had a different regard of police authority coming from China and as such, the meeting was particularly distressing for her. The applicant feels that she should have been given the opportunity to leave as she had requested twice. The investigator's lack of response to her request for a lawyer was "clear oversight on his part", as he said in his testimony, but a mistake that should not have gone unnoticed by the adjudicator.

[114] Her request for counsel should also not have gone unheeded. The explanation by the investigator, Mr. Montgomery, that he mistakenly brought an outdated form to the interview that did not have as a "bullet" the right to contact legal counsel was a mistake that he had not made before but on this occasion did, goes further to her overall harsh treatment and oversights that should have warranted consideration by the adjudicator. Further, the mitigating factors were turned into factors that were used against her by the adjudicator. The applicant submits that the adjudicator's one sided analysis was patently unreasonable.

[115] The applicant never concealed the fact that she was transferring funds between her Royal Bank accounts. However, the adjudicator stated that the applicant failed to "appreciate the nature of her conduct" and instead blamed the respondent for ""allowing" her to do what she did".

[116] The balancing of the factors is as the respondent submitted, "a task that is squarely within the expertise and jurisdiction of the adjudicator" (see *Green v. Canada (Treasury Board)*, [2000] F.C.J. No. 379 (C.A.)). I do not find that the adjudicator ignored the applicant's good work record. Further, the adjudicator may not have found the conduct of the initial interview germane to the issues before him. On the other findings, it was clear that the adjudicator disagreed with the applicant and as such, they were not considered to be mitigating factors to weigh against dismissal. The regard this Court must have for the balancing of factors has been made clear by the Federal Court of Appeal in *Green* above:

> 13 It is equally clear that the adjudicator did not accept that the length or quality of Mr. Green's work record outweighed the egregiousness of the abandonment of his post for 35 minutes. The weighing and balancing of opposing considerations is a task that is

> squarely within the expertise and jurisdiction of the adjudicator. Her treatment of Mr. Green's employment record discloses no error that warranted intervention by the Judge.

Therefore there is no error in this respect.

[117] According to the applicant, the adjudicator's decision failed to address the principle of proportionality as set out in *McKinley* above. The Supreme Court of Canada states that when dealing with issues of employee honesty, a contextual approach must be applied: something, according to the applicant, that the adjudicator failed to do.

[118] The most persuasive of the arguments before me submitted by the applicant was that the adjudicator erred in not finding that dismissal was excessive in this case.

[119] The adjudicator noted that he was referred to a number of cases but chose two in particular to guide his analysis. First, the adjudicator looked at *Fawson v. Bank of Montreal*, [1996] CLAD No. 527 (Demont) for the proposition that a loss of trust in a bank employee is significant because of the "handling of customer funds and those the bank uses for profitable purposes". In *Fawson* above, the standard is a strict one and allows for little deviation from standards of honesty and integrity. In the adjudicator's view, the conduct of the applicant caused the bank to lose its confidence in her honesty and integrity as an employee.

[120] Second, the adjudicator looked at *Banque Laurentienne du Canada* (1994), 40 LAC (4th) No. 342 (Frumkin), as submitted by the applicant. In *Banque Laurentienne* above, an employee had

improperly obtained a few days credit in her account by depositing a cheque in the amount of $320, into an ATM, in anticipation that she would be depositing a cheque to cover those funds within days. The adjudicator noted that in that case, the employee had a relatively long service record and she did not have a clear intent to deprive the bank of funds. However, the adjudicator found that in this case, the applicant's actions were far more egregious:

> In my view, Ms. Wu's misconduct was very serious. Unlike the circumstances in Banque Laurentienne, Ms. Wu's misconduct was premeditated, repetitive, deliberate, calculated, and occurred over a long period of time, several months, in fact. There is also no question that she obtained a benefit from her circulation of funds, according to the Bank approximately $14.00 per day. It cannot be characterized as a "momentary and emotional aberration." While Ms. Wu for all intents and purposes was a good and dedicated employee with a discipline free record, she was also a short-term employee. The dismissal of Ms. Wu is consistent with the Bank's policies, and there is nothing to suggest that she was singled out for any special or harsh treatment. In this context I also consider Ms. Wu's continued failure to appreciate the nature of her conduct and to take responsibility for it. Ms. Wu continued to deny that she had engaged in any wrongdoing and, instead, blamed the Bank for "allowing" her to do what she did. In short, I am unable to conclude that termination was excessive in all of the circumstances.

[121] In my view, the conclusions of the adjudicator were such that termination seemed the only outcome. My concern is that the adjudicator's evaluation of the misconduct of the applicant may have gone too far given the circumstances of the impugned transactions. As he stated, "Ms. Wu's misconduct was premeditated, repetitive, deliberate, calculated, and occurred over a long period of time, several months, in fact." It is true that the applicant would have thought about the transactions before she conducted them and that they would have been deliberate but I fail to see how any transactions would have been conducted otherwise. The tenor of this statement implies that she was

shady or fraudulent in her intent, which the adjudicator claimed himself was not the case. There was no criminal mind and the applicant was clearly taken aback by the allegations and resulting dismissal.

[122] Further, the adjudicator made much of the applicant's lack of contrition regarding the transactions. While this has been a factor in jurisprudence, it is not an easy issue to gauge. The expectation of "taking responsibility for one's actions" is complicated when the applicant felt that she had a legal basis for challenging her dismissal and felt her treatment unfair.

[123] The applicant's counsel argued that the respondent may have an internal policy that such conduct warrants dismissal but the "law of the land" demands that the bank not unilaterally opt out of *McKinley* considerations. I am in agreement.

[124] As stated in *McKinley* above, and the adjudicator's decision, dishonest misconduct no longer provides automatic cause for dismissal. The question, according to *McKinley* above, is whether the employment relationship can continue to exist.

[125] I will first deal with the case law submitted on this issue by the respondent. I will not address the tribunal decisions but note that the cases put forward indicated the importance of the trust relationship between employer and employee and the stricter standards and more harsher punishments that flowed from a breach of trust in these circumstances.

[126] The decision of *Lepire v. National Bank of Canada*, [2004] F.C.J. No. 1886 as cited by the respondent states the importance of the relationship between banks and their employees. However, the facts of the case are much different. *Lepire* above, involved a 31 year service employee who breached the code of ethics of the bank by granting a loan to her mother and breaching policy by later opening an account with her husband. The adjudicator overturned the dismissal and noted that the employee had not committed theft or embezzlement or serious fraud. Mr. Justice Blais overturned the adjudicator's decision noting that the facts involved a conflict of interest which was especially troublesome for an employee holding a position in a bank. Mr. Justice Blais states:

> 15 A careful reading of the adjudicator's decision leads us to conclude that he based himself essentially on the decision of the Supreme Court of Canada in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161.
>
> 16 It appears that in the *McKinley* decision, *supra*, the Supreme Court spelled out the circumstances in which an employer would be entitled to summarily dismiss an employee because of the latter's dishonest conduct.
>
> 17 It is my unequivocal opinion that this decision must be distinguished from the present case because it is much too restrictive and inapplicable. It seems to me that an employee's dishonesty, irrespective of the employee's level in relation to his employer, must be treated differently from that of an employee who would knowingly put himself in a conflict of interest situation, which is the situation in this case.

[127] This is a trial level decision and as such, I am not bound by it. In any case, the facts are dissimilar. I now turn to *McKinley* above, and the most salient aspects of the decision to the case at bar:

Applicable Standard for Assessing Whether and in What Circumstances Dishonesty Provides Just Cause

48 In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

49 In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.

. . .

53 Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, where Dickson C.J. (writing in dissent) stated at p. 368:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

This passage was subsequently cited with approval by this Court in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002,

> and in *Wallace*, *supra*, at para. 95. In *Wallace*, the majority added to this notion by stating that not only is work itself fundamental to an individual's identity, but "the manner in which employment can be terminated is equally important".
>
> . . .
>
> 57 Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

[128] I am obliged to give deference to the adjudicator's finding of fact and credibility. He concluded that the applicant was dishonest and knew that the transactions were against the Code of Conduct and against her Visa agreement, particularly the 2005 agreement. He also concluded that she would have known that her transactions exceeded the buffer zone allowed credit card holders over the credit limits proscribed. I also find the adjudicator's findings on kiting and misappropriation as having been encompassed by the Code of Conduct as reasonable.

[129] The facts in this case are also that the applicant was dismissed based on conduct related to her personal banking accounts. She did not steal, embezzle or commit fraud. The adjudicator acknowledged that she did not have a criminal intent.

[130] I reiterate the statement in *McKinley* above, about proportionality. Mr. Justice Iacobucci states in part at paragraph 53:

> Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed.

[131] I find that there was no proportionality shown in the dismissal of the applicant or the adjudicator's evaluation of it. I acknowledge that both respondent and adjudicator saw the employer-employee relationship as irretrievably broken but I do not find this conclusion reasonable. The fact that the activities in question occurred after work hours and in the applicant's capacity as a customer, should have been considered a mitigating factor. What's more, the applicant was given no warnings and no suspensions or other punishment. Nor was there any conclusive evidence of any significant loss or risk to the bank; only its estimate that it lost $14 a day. Nor did the respondent seem to have a consistent definition of what it viewed as kiting. These mitigating factors, together with the respondent's treatment of the applicant during the investigation and the applicant's vulnerable state cannot be ignored. Yet there does not seem to be any mention or consideration of these aspects in the adjudicator's ultimate decision. Instead of looking at any of the mitigating factors, he emphasized the applicant's lack of remorse, which as stated above, was an unfair consideration since the applicant was simply attempting to defend the case against her.

[132] As the applicant noted, "work is one of the most fundamental aspects of one's life". This dismissal was clearly traumatic for the applicant and from the initial meeting with the investigator

and her supervisor, the “unequal bargaining power” of the employer-employee relationship governed.

[133] Because of the nature of the proportionality analysis, the decision by the arbitrator was not justified and I do not find that it “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” as in *Dunsmuir* above, and in light of *McKinley*’s guidance on dismissal and proportionality. The proportionality analysis was not complete.

[134] I therefore allow the judicial review on this ground.

[135] The application for judicial review is therefore allowed and the matter is referred to a different adjudicator for redetermination.

[136] The applicant shall have her costs of the application.

JUDGMENT

[137] **IT IS ORDERED that:**

1. The application for judicial review is allowed and the matter is referred to a different adjudicator for redetermination.

2. The applicant shall have her costs of the application.

"John A. O'Keefe"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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