

**IN THE MATTER OF AN AJUDICATION UNDER DIVISION XIV- PART III OF
THE CANADA LABOUR CODE, R.S.C. 1985, c. L-2, AS AMENDED
AND IN THE MATTER OF THE COMPLAINT OF JACK RODA RESPECTING
ALLEGED UNJUST DISMISSAL**

BETWEEN

JACK RODA

(the "Complainant")

and

BANK OF MONTREAL

(the "Respondent")

ADJUDICATOR: John Stout

APPEARANCES FOR THE COMPLAINANT:

Kevin Fox, Counsel

APPEARANCES FOR THE EMPLOYER:

Malcolm MacKillop, Counsel

HEARINGS HELD IN TORONTO, ONTARIO ON MAY 10, 25 and JUNE 1, 2012

AWARD

INTRODUCTION

[1] This is a complaint by Jack Roda pursuant to Section 240 of the *Canada Labour Code*, R.S.C. 1985 c.L-2 (hereinafter the “Code”). Mr. Roda claims that he was unjustly dismissed from his employment as a Branch Manager with the Respondent, the Bank of Montreal (“BMO”).

[2] BMO maintains that it had just cause to dismiss Mr. Roda on June 15, 2010 because he engaged in repeated and serious misconduct, which was either intentional or grossly negligent.

[3] On October 6, 2011, I issued a preliminary award addressing BMO’s objection to my jurisdiction to hear and adjudicate the complaint. BMO submitted that Mr. Roda was not an employee, but rather he was a “manager” for the purposes of Division XIV of the *Code*. After considering the evidence and submissions of the parties, I found that Mr. Roda was not a manager within the meaning of subsection 167(3) of the *Code* and that Division XIV applied in these circumstances.

[4] This award addresses the issue of whether Mr. Roda was unjustly dismissed from his employment with BMO.

THE EVIDENCE

[5] Three witnesses provided oral testimony at the hearing. Ms. Carole D’Avolio, who was Mr. Roda’s Area Manager at the time of his termination, testified for BMO. Mr. Roda testified on his own behalf. In addition, Mr. Roda’s Counsel had a summons issued to a customer named Darlene Parks. Ms. Parks testified

about US dollar exchange transactions made on her behalf by Mr. Roda utilizing his employee preferential rate.

Background

[6] At the time of his termination Mr. Roda was 40 years old and single.

[7] Mr. Roda finished his high school education in late 1988 and applied to University. Unfortunately, Mr. Roda's father became ill and therefore he could not afford to attend University. Instead, Mr. Roda embarked on a career in banking with BMO.

[8] Mr. Roda commenced his employment with BMO on June 14, 1988. Mr. Roda was initially hired as a part-time employee, but later became a permanent full-time employee around 1989.

[9] During his employment with BMO, Mr. Roda worked his way up the ranks starting as a Customer Service Representative (Teller or CSR), Senior Customer Service Representative, Assistant Branch Manager, Financial Services Manager (FSM) Tier 2, 3 and 4, and finally at the time of his termination a Branch Manager.

[10] In 1989, while employed with BMO, Mr. Roda met fellow employee Milva Di Nicola. Mr. Roda and Ms. Di Nicola worked together for approximately one year at BMO's Maple Branch.

[11] Later in 2002/2003 Mr. Roda and Ms. Di Nicola had the opportunity to work together again. By this time Ms. Di Nicola was a Branch Manager and Mr. Roda was an FSM 4 at the North York Sheridan Mall Branch.

[12] While working at the North York Sheridan Mall Branch, Ms. Di Nicola introduced Mr. Roda to a customer named Raymond Commisso. Mr. Roda

assisted Mr. Commisso with a mortgage and a line of credit. Later, Mr. Roda assisted Mr. Commisso by initiating a loan application to purchase an investment property. However, this file was ultimately transferred to an Investment Advisor who completed the transaction.

[13] On June 21, 2004, Mr. Roda was promoted to the position of Branch Manager. Mr. Roda was Branch Manager of the Yorkgate Mall Branch from November 13, 2006 until he was terminated by BMO.

[14] The Yorkgate Mall Branch is located in the Jane and Finch neighbourhood of Toronto. It is a large complex branch with the highest mortgage book in the Etobicoke North Area. The Yorkgate Mall Branch was a high-risk branch for fraudulent transactions, including empty envelopes, NSF cheques and customer impersonation. However, there is no history of mortgage fraud at the Yorkgate Mall Branch.

[15] As Branch Manager of the Yorkgate Mall Branch, Mr. Roda reported to Ms. D'Avolio, the Personal Banking Area Manager for Etobicoke North.

[16] In my October 6, 2011 award, I reviewed Mr. Roda's duties as Branch Manager at the Yorkgate Mall Branch. I will not repeat all the evidence set out in my earlier award, although I did consider all of this evidence in making my decision.

[17] For the purposes of this award, it is useful to note that Mr. Roda was responsible for the operation of the Yorkgate Mall Branch. His responsibilities included the supervision of approximately twenty (20) employees. Mr. Roda was the highest level of management at the Yorkgate Mall Branch. He was paid at grade 37, which is the top grade for a Branch Manager. Mr. Roda has a very high level of knowledge and experience in lending. Mr. Roda is ALD - Automatic Loan Decisioning – Certified. Mr. Roda was also the Yorkgate Mall Branch Compliance Officer.

BMO First Principles

[18] The banking industry is a highly regulated industry. BMO employees are governed by specific policies and procedures. In his role as Branch Manager, Mr. Roda was responsible for ensuring that he and all employees complied with BMO policies and procedures.

[19] BMO has a code of conduct and ethics entitled *First Principles*. The *First Principles* provide as follows:

“BMO’s policy framework is designed to ensure that our actions are consistent with applicable legal and regulatory requirements and industry standards. We recognize our responsibility to understand and comply with the policies that affect how we do our work.”

[20] All BMO employees are required to review and acknowledge their understanding of the *First Principles* in each year of their employment. Employees are also tested each year on their understanding of the *First Principles*. The test given to employees is administered on a computer and employees are required to take the test until they have a passing score of 80%.

[21] A number of Mr. Roda’s test scores were produced at the hearing. The following scores were produced:

- 2007- Failure (20%)
- 2008 – Pass (80%)
- 2009 – Failure (33%)
- 2010 – Pass (83%)

The Investigation

[22] There is no dispute that prior to the 2010 incidents, Mr. Roda was regarded as a good employee and a good lender. In addition, Mr. Roda had no prior disciplinary record.

[23] The issues that gave rise to the termination of Mr. Roda were discovered as a result of an investigation surrounding another Branch Manager, Ms. Di Nicola, and her relations with Mr. Commisso. During the investigation of Ms. Di Nicola, five issues came up relating to the conduct of Mr. Roda. The five issues were as follows:

- Acting as a lender and funder on a loan application;
- A breach of privacy involving the disclosure of client personal information to a third party;
- A suspended mortgage payment for a customer related to Ms. Di Nicola;
- A real estate appraisal sent to Ms. Di Nicola by email;
- Providing the employee preferred US Dollar exchange rate privileges to third parties.

[24] On May 18, 2010, Mr. Roda's Area Manager, Carole D'Avolio, called him to a meeting at her office. In attendance at the meeting were two members of BMO Corporate Security. Ms. D'Avolio did not stay for the meeting.

[25] The meeting on May 18, 2010 lasted from approximately 10:00 am to approximately 4:00 pm. According to Mr. Roda, he was questioned about his interaction with Ms. Di Nicola and the relationship between Ms. Di Nicola and Mr. Commisso. Mr. Roda also said he was extensively questioned about the five issues relating to his conduct. According to Mr. Roda, he did not deny any of the

allegations, although he did provide explanations for his conduct. Those explanations were consistent with the explanations he provided at this hearing. BMO presented no evidence to contradict Mr. Roda on this point.

[26] Mr. Roda was suspended with pay at the end of the first meeting.

[27] While on suspension, Mr. Roda had a conversation with Ms. D'Avolio about his employment status. Mr. Roda testified that Ms. D'Avolio advised him that he would be disciplined but not terminated. Furthermore he was advised that he would be staying at the Yorkgate Mall Branch and not be awarded a posting he applied for at another branch. In her evidence, Ms. D'Avolio said that she does not recall this part of her conversation with Mr. Roda. However, Ms. D'Avolio admitted that she did advise Mr. Roda that his best scenario involved a corrective action 3 (discipline but not dismissal).

[28] A second meeting was held on June 7, 2010. This meeting lasted approximately 90 minutes. Ms. D'Avolio attended this meeting as an observer and Ken Jameson from BMO Corporate Security questioned Mr. Roda.

[29] Ms. D'Avolio has no clear recollection of the specifics of the second meeting. However, Ms. D'Avolio does recall that BMO Corporate Security had documents to support the allegations against Mr. Roda, but the documents were not shown to him during the meeting. During the meeting, Mr. Roda admitted to all the misconduct based on the allegations alone.

[30] Mr. Roda was handed a letter of termination and dismissed during a brief meeting on June 15, 2010.

The Misconduct

i) The loan application

[31] Prior to 2009 a Branch Manager could act as both a lender and a funder in a loan transaction. However, the rules changed in 2009 and BMO issued a policy entitled “Funder Process” that prohibited employees from acting as the lender and the sole funder on any loan application.

[32] The “Funder Process” policy in effect on September 1, 2009 indicated as follows:

“Where a funder is also completing the lending transaction with the customer, the file must be reviewed and advanced by another designated funder after the completion of the file review activities described in File review and advance of funds/account set up process.”

[33] On March 1, 2012, after Mr. Roda’s dismissal, the policy was amended to include the following elaboration:

“Specifically, a lending qualified employee cannot act as a funder if they were involved in the following:

- The lending conversation with the customer (excluding side by side coaching)
- Input of customer data to CCAPS (CUS, EMP, AST, and LIA screens)
- Entering the verified satisfactory (VF S) code or clearing a duplicate application (CD) activity codes as part of an application investigation
- Obtaining customer signatures on lending documents

- Satisfying of terms and conditions”

[34] Ms. D’Avolio testified that the purpose of the policy is to provide a check and balance to ensure that loan applications cannot be approved by only one individual. The idea is to minimize the possibility of both error and fraud on loan applications, which in turn protects BMO against losses.

[35] In February 2010, Mr. Roda completed a loan application for BMO clients RA and DA. There is no dispute that Mr. Roda acted as both the lender and the funder on this loan application in violation of BMO’s policy. In addition, Mr. Roda failed to obtain the signature of both clients on the documents authorizing the loan application.

[36] The loan application was initially approved. However, after the application had been approved, BMO’s fraud and electronic monitoring department reviewed it. During the review, it was determined that the loan application had the following deficiencies:

- The loan application reported that the clients were employed with the company J&E Construction. In fact RA was the owner of J&E Construction.
- The income reported on the loan application was not accurate.
- A site address was done and J&E Construction’s address was found to be a post office box. No information was obtained about the action location of J&E Construction operations.

[37] As a result of the review, a hold was placed on the loan and BMO engaged in a post approval verification process.

[38] On March 10, 2010, Ms. D’Avolio wrote to Mr. Roda questioning why these errors occurred. Mr. Roda wrote back by email on the same date and indicated as follows:

“This client has been a BMO client since 2006 and his mortgage is with us for his primary residence, has 3 BMO accounts, has PCR on his bank account, has a BMO MasterCard, has a secured homeowner’s line on his home, has a homeowner’s line of credit on his rental property and has a BMO loan for his mobile home ...

This client has everything with BMO ... we are his primary banker ...

So what happened client wanted to increase his existing homeowner’s line of credit which the limit was at \$160,000 to 236,000. Therefore when I keyed the application, I just pre-filled the application as previous and updated the application by using BMO customer connect and forwarded to credit department for approval which they did approve ... Everything seemed correct and everything on the credit bureau did match what was inputted until I got an email saying that he could be business for self, so I called the client last week and he informed me his is business for self since 2007 and in fact his business account is with BMO as well which I did then confirm that in fact his business account is with BMO ...So I have already started to key a new application as a review and client has brought me personal income tax returns and just waiting for some more info that the accountant will provide me ... as well I have temporarily blocked the line ... the client has been informed already that the line has been blocked ... as per email below, the client the address is where the mail goes for the business but there is actually an address So when we advance the funds we used what we had before on file since it was back in early 2007...

Next steps: Line is currently blocked til I finish my investigation and review of file which will have to be approved by credit dept...

Thanks...

[39] Mr. Roda testified that after the loan application was reviewed, he obtained updated information from the clients and sent it to Ms. D’Avolio. The updated information included confirmation that the clients’ income was actually higher than had earlier been recorded. Ultimately the information was verified and the loan approved.

[40] Despite knowing that Mr. Roda had made errors in the loan application, Ms. D'Avolio and BMO did not take any further action until after Mr. Roda was interviewed on June 10, 2012.

[41] During the June 10, 2010 investigation meeting, Mr. Roda was questioned by Ms. D'Avolio and BMO Corporate Security about the loan application. Mr. Roda admitted that he did not meet with the clients when the loan application was processed and he did not properly update the information BMO had on file with the clients.

[42] Mr. Roda openly admitted that he made mistakes in this transaction and ought to have been more careful in filling out the loan application.

[43] In terms of acting as lender and funder, Mr. Roda testified that the September 2009 policy was not as specific and detailed as the more recent policy. As a result, Mr. Roda did not feel that he had breached the policy at the time of the transaction. Mr. Roda candidly admitted that his actions did breach the current policy.

ii) The breach of privacy

[44] BMO has policies with respect to protecting the privacy of clients. BMO first principles state:

“We will safeguard the confidentiality of non-public information of BMO, its customers, employees and suppliers and protect BMO's systems and other assets from improper use.”

[45] BMO policy “Privacy of Personal Information about an Individual Customer” provides as follows:

“The Bank has an obligation not to disclose a customer's personal information without the customer's consent, except in certain circumstances ...

At any time when the Bank is required to disclose a customer's personal information to a third party for non-routine purposes, you must record when, why and to whom the personal information was disclosed. Place this record in the customer's file, as well as a copy of any legal documentation that may have been provided."

[46] On March 6, 2010, Mr. Roda sent an email to a real estate agent advising that a client had a poor credit rating and two collection items, which were major, so he would not be approved for credit. In the email, Mr. Roda also indicated that he would speak to the real estate agent later about the issue.

[47] Mr. Roda explained that the client came to him in search of obtaining a mortgage as a referral from the real estate agent. Mr. Roda described the client as "Russian with very poor English" language skills. Mr. Roda went on to explain that he met with the client and the real estate agent together and during the meeting the real estate agent acted as a translator for the client. Mr. Roda believed that that he had authority to speak with the real estate agent about the credit rating because the client had met with him and the real estate agent together and she had translated their discussion for him.

[48] There is no dispute that Mr. Roda did not record when, why and to whom the information was disclosed, nor did he place any record in the client's file. In addition, Mr. Roda did not obtain a written authorization to provide credit information of the client to the real estate agent. However, the "Privacy of Personal Information about an Individual Customer" policy does not specifically provide that written consent is required from a client.

[49] Mr. Roda testified that when BMO Corporate Security interviewed him on May 18, 2010, he explained the circumstances surrounding the disclosure. BMO Corporate Security then inquired if Mr. Roda had a written consent. Mr. Roda indicated that he did not have anything in writing. Thereafter, BMO Corporate Security advised him that in the future he should get authorization in writing for the file.

iii) The suspended mortgage payments

[50] BMO has a program entitled “Family Care and Take a Break Options” that permits mortgage holders to suspend mortgage payments subject to specific conditions. In order to qualify for the family care option, a customer must be on family leave from employment. The policy also indicates as follows:

“At the lending qualified employee’s discretion a confirmation letter from the customer’s employer **may** be requested.” (emphasis added)

[51] On March 22, 2010, BMO customer LD emailed Mr. Roda inquiring as to whether BMO would provide “the opportunity to hold back a couple of months worth of mortgage payments as it is tight for us to make the mortgage payments.”

[52] LD was at the time the sister-in-law of Ms. Di Nicola. She was also a senior underwriter at TD Canada Trust and sent the email from her work email address.

[53] Mr. Roda responded to LD’s email on the same day indicating that the client would be permitted to skip one monthly payment and that she could also lower the payments to about \$1,000.00 afterwards. Mr. Roda also indicated that another option would be to withdraw from the mortgage cash account and deposit the cash into a bank account where the payments come out and that would cover approximately seven payments. In response, the client requested to come into the branch for a meeting.

[54] On March 27, 2010, Mr. Roda processed a deferral for the client of two monthly mortgage payments. Mr. Roda did not obtain the signature and approval of the guarantor, the client’s husband, Ms. Di Nicola’s brother.

[55] Mr. Roda testified that he had set up the mortgage for LD and her spouse. Mr. Roda explained that after the email exchange, he had met with LD and she raised the issue of the family care option. He further understood that LD had afforded herself this option on a number of prior occasions. Mr. Roda advised that usually customers are not aware of this option. Therefore, in the normal course, a client would use the mortgage cash account or the “take a break” option.

[56] Mr. Roda said it was his understanding that LD was taking a leave from work to spend time with her children as her family was having a difficult time due to the break up of her marriage.

[57] Mr. Roda indicated that he believed he had discretion not to require a letter confirming that LD took a leave from her work place. Mr. Roda explained that because LD worked for another bank and he knew her sister-in-law was a BMO Branch Manager, he did not think he would need to get a confirmation letter.

[58] Mr. Roda testified that BMO Corporate Security asked him during his interview about this incident. Mr. Roda indicated that he advised BMO Corporate Security of the circumstances surrounding the suspension of mortgage payments for LD. He also admitted that he was negligent in failing to obtain the signature of the spouse, who was the guarantor.

[59] When Mr. Roda testified, he was very candid that he had made a mistake, that he should have obtained the signature of the spouse and been more vigilant in scrutinizing whether LD qualified for the suspended mortgage payments.

iv) The real estate appraisal

[60] BMO has a policy with respect to real estate appraisals. The policy provides as follows:

“Providing reports to applicants. A paper copy of the property appraisal report may be provided to applicants when all of the following conditions are met:

- The appraiser’s written consent is held. The customer has paid the appraisal fee. The customer who has not paid for the appraisal may request a copy of the report if agreed to by the lending qualified employee has an exception and provided all other conditions have been met
- ...
- The Bank has advanced the mortgage funds, or declined the application.

Do not provide electronic appraisal reports or the appraisal review to customers.”

[61] Ms. D’Avolio explained that BMO does not provide the full electronic appraisal reports to customers because the report is designed for BMO’s internal use only. Ms. D’Avolio also indicated that the information contained in the appraisal is considered confidential. In addition, Ms. D’Avolio pointed out that mortgage appraisals could be used for committing fraud.

[62] On March 20, 2010, Mr. Roda emailed a copy of a real estate appraisal to Ms. Di Nicola. There is no dispute that this was a violation of BMO policy.

[63] Mr. Roda explained that he had prepared the mortgage application for Ms. Di Nicola and ordered the real estate appraisal because Ms. Di Nicola was going to purchase the real estate from her sister-in-law. Mr. Roda candidly admitted that he had sent the appraisal to Ms. Di Nicola without thinking that in this situation she was a customer and not an employee of BMO.

[64] Mr. Roda indicated that during his first interview, he was asked about this incident and admitted that he had sent the email with the appraisal.

v) The preferred US dollar exchange rate transactions

[65] As an employee of BMO, Mr. Roda and other employees are entitled to certain banking privileges. One of the employee banking privileges is a preferred exchange rate on US dollar transactions for travel.

[66] BMO has a policy respecting employee banking, which clearly provides that an employee's banking privileges are for an employee's use only. Employees are not permitted to extend these privileges to friends and clients. The policy also clearly indicates that the preferred exchange rate is only for use when the employee is travelling and cannot be used to trade currency on financial markets. The policy indicates that a violation of the policy will lead to disciplinary action.

[67] There is no dispute that Mr. Roda extended his employee preferred US dollar exchange rate to a number of clients. There is also no dispute that by conferring the employee preferred exchange rate to clients; BMO suffered a financial loss on the exchange rate. Furthermore, on one occasion, Mr. Roda had a financial loss.

a) The US dollar purchase for GC

[68] On June 19, 2009, Mr. Roda purchased one thousand two hundred (\$1,200.00) US dollars for a client (GC) using his preferred US dollar exchange rate. Mr. Roda received funds from the client and deposited those funds into his own personal account in order to obtain the employee preferred exchange rate.

[69] According to Mr. Roda, GC is a long time client of BMO in his mid-seventies. Mr. Roda indicated that he had no personal relationship with GC. Mr.

Roda indicated that GC attended at his branch and was upset about a payment to the Canada Revenue Agency (CRA) being wrongly credited. Mr. Roda said that he and the client spent an hour on the phone with CRA. Mr. Roda went on to explain that GC was very irate about the mistake and mentioned he was going to the Turks and Caicos to sell a property. According to Mr. Roda, he gave the client his preferential rate in order to make the client happy. He also hoped that the client would invest the money from the property he was selling in the Turks and Caicos with BMO.

[70] During the meeting with BMO Corporate Security, Mr. Roda was questioned about this transaction. Mr. Roda indicated that he had advised BMO Corporate Security of the circumstances involving the irate client. According to Mr. Roda, BMO Corporate Security did not raise any issue with the fact that he had put client's money in his own account in order to provide the preferred employee rate.

b) The purchase for MG

[71] On February 4, 2010, Mr. Roda received an email from MG advising that he had sent a cheque for Two Thousand (\$2,000.00) Dollars to Mr. Roda and requested that it be converted to Canadian dollars at "the rate plus your discount".

[72] Ms. D'Avolio and BMO Corporate Security questioned Mr. Roda about this email during the second investigation meeting. Mr. Roda indicated that he had not yet received the cheque. However, he also admitted that he had provided the client with his US dollar preferred exchange rate on a prior occasion. Mr. Roda indicated that he gave the preferred exchange rate to MG to build a relationship and encourage him to bring his assets to BMO.

[73] Mr. Roda testified that MG was a male friend who he had met in 1999 or 2000. At the time that they first met, MG was not a client of BMO. MG later

became a client of BMO in late 2004. Mr. Roda did not recall receiving a cheque from MG. However, Mr. Roda indicated that he did provide MG his preferred US dollar exchange rate a few years prior. According to Mr. Roda, he permitted MG to use his preferred US dollar exchange rate in order to build a business relationship with him as a client.

[74] In cross-examination, Mr. Roda admitted that when he first met MG they had an intimate sexual relationship. He described the sexual relationship as casual and short-lived indicating that they had only had sex on two occasions. The sexual relationship was prior to MG becoming a client of BMO.

[75] Mr. Roda agreed that he had not told BMO Corporate Security that he had had a sexual relationship with MG.

[76] Also during cross-examination, a transaction record was put in front of Mr. Roda showing a deposit of a cheque in the amount of two thousand (\$2,000.00) dollars US. Mr. Roda indicated that he did not recall receiving the cheque but that it appeared that this was a transaction involving the cheque that was the subject matter of the earlier email.

[77] There was no dispute that the transaction record confirms that \$2,000.00 was deposited into a US account and then transferred to a Canadian account. The accounts listed are not Mr. Roda's accounts and the employee preferred US dollar exchange rate was not provided to MG for this transaction.

c) The purchases for Darlene Parks

[78] On April 14, 2009, Mr. Roda purchased one thousand three hundred (\$1,300.00) US dollars for a client named Darlene Parks ("Parks") using his employee preferred US dollar exchange rate. In order to provide Ms. Parks with the preferred US dollar exchange rate, Mr. Roda accepted funds from Ms. Parks

and deposited them into his own account so that he could withdraw \$1,300.00 US dollars at the preferred employee exchange rate.

[79] On February 12, 2010, Mr. Roda received an email from Ms. Parks requesting that he provide her with his preferred US dollar exchange rate for her upcoming vacation. Mr. Roda responded by email on February 16, 2010, indicating that he could provide his preferred rate. On February 16, 2010, Mr. Roda purchased One Thousand Six Hundred (\$1,600.00) Dollars US for Ms. Parks at the preferred employee rate. In order to complete the transaction, Mr. Roda received Canadian Dollars from Ms. Parks and deposit the amount into his own personal account. Mr. Roda then withdrew the US Dollars at the preferred employee exchange rate.

[80] Between March 19 and March 22, Mr. Roda and Ms. Parks exchanged a number of emails. The first email was from Ms. Parks to Mr. Roda indicating that she would like to open a US dollar account and transfer some money into the account when the US dollar gets to the point where Mr. Roda could purchase it at par. Mr. Roda opened up a US dollar account for Ms. Parks on March 22, 2010. On April 6, 2010, Ms. Parks emailed Mr. Roda indicating that she wanted to buy Five Thousand (\$5,000.00) Dollars US when the rate reached par. On April 16, 2010, Mr. Roda purchased Three Hundred (\$300.00) Dollars US for Ms. Parks at his employee preferred US dollar exchange rate. On the same day, in a separate transaction, he also purchased Two Thousand Five Hundred (\$2,500.00) Dollars US for Ms. Parks at the employee preferred exchange rate. Once again, Mr. Roda received the funds from Ms. Parks and deposited them into his own account in order to obtain the employee preferred exchange rate.

[81] Mr. Roda testified that Ms. Parks was a client and he had no other relationship with her. Mr. Roda indicated that the April 2009 transaction occurred because he had neglected to return a number of voicemails left for him by Ms. Parks. Mr. Roda explained that he felt guilty for not returning the phone calls and

because Ms. Parks was going on a holiday, he extended to her his preferred US dollar exchange rate.

[82] Mr. Roda indicated that the February 16, 2010, transaction occurred as Ms. Parks came back to him and asked if he could provide her with the preferred exchange rate. Mr. Roda was caught in an awkward situation since he had previously provided Ms. Parks with his preferred rate. As a result, he processed the transaction.

[83] In terms of the emails in March of 2010, Mr. Roda indicated that he had spoken with Ms. Parks and advised her that he could no longer provide her with his preferred exchange rate. He went on to advise her that if she opened a US dollar account, she could get a better rate than the rate provided to regular customers. That is why he opened up the US dollar account for Ms. Parks.

[84] Mr. Roda indicated that the April 16, 2010 transactions came about because Ms. Parks attended at the branch and was upset when she was notified that a US postal money order she had deposited with BMO was counterfeit. Ms. Parks explained to him that she had received the US postal money order from selling a table and chairs online. Ms. Parks claimed that the Teller at BMO advised her that the US Money order was good when she deposited it. Ms. Parks went on to explain that she was given the money order for Seven Hundred Fifty (\$750.00) Dollars and the table and chairs were Two or Three Hundred Dollars. The purchaser asked that Ms. Parks send the difference back to them. Mr. Roda explained that he told Ms. Parks that this is a common scam and he felt sorry for her situation. Mr. Roda indicated that he gave Ms. Parks the employee preferred exchange rate on April 16, 2010 because of the complaint she made regarding a Teller advising her that the US postal money order was good.

[85] Ms. Parks testified at the hearing and confirmed that she had no relationship with Mr. Roda outside being a client at BMO. Ms. Parks testified that the US dollar transactions were undertaken by her in order to obtain US funds for

her yearly trip to Myrtle Beach, South Carolina. Ms. Parks confirmed that the first incident occurred after Mr. Roda did not return a number of her calls promptly. Ms. Parks also confirmed that she opened the US dollar account after Mr. Roda advised her that he could no longer provide her with his preferred US dollar exchange rate. Ms. Parks also confirmed the April 16, 2010 transaction occurred after she complained about a Teller at the Yorkgate Mall Branch advising her that a US postal money order was good when she deposited it into her account. As a result of being told by the Teller that the money order was good, Ms. Parks incurred a loss.

THE SUBMISSIONS OF THE PARTIES

[86] The parties made detailed submissions at the hearing. BMO also provided written submissions to compliment their oral argument. I shall not repeat all of the submissions made by the parties in any great detail. Instead, I shall summarize the position of each party and set out the authorities they relied upon to support their position. I have reviewed and considered all the evidence and submissions submitted in this matter when making my decision.

[87] BMO counsel argued that this matter must be decided within the context of the banking industry. It is submitted that the banking industry is a highly regulated industry and the banks must be able to rely on the honesty and integrity of their employees to protect the client's and bank's assets and confidential information. BMO emphasized that Mr. Roda is a senior employee in a large complex branch where he supervised a number of employees and acts as the Branch's Compliance Officer. BMO counsel suggested that the evidence is overwhelming that Mr. Roda played fast and loose with the bank's policies. BMO counsel emphasized that as a supervisor, Mr. Roda is held to a higher standard. It is suggested that as a supervisor, Mr. Roda had responsibility to set the standards for the more junior employees.

[88] BMO counsel argued that Mr. Roda breached a number of rules on a number of occasions causing the bank to incur a financial loss. Mr. Roda misused his employee benefits by providing them to clients and acquaintances. BMO stressed that the trust relationship between BMO and Mr. Roda had been fractured beyond recovery and therefore BMO had just cause to dismiss Mr. Roda.

[89] BMO's counsel relied on the following authorities: *MV Royal Bank of Canada*, [2000] CLAD No. 149; *Toronto Board of Education v. Ontario Secondary School Teachers Federation District 15*, [1997] 1 SCR 487; *United Freight Services Limited v. Therriault*, [2006] AJ No. 125; *Karmali v. Toronto Dominion Bank*, [2003] CLAD No. 384; *Bannister v. General Motors of Canada Limited*, [1998] OJ No. 3402; *Blane v. Canadian Depository for Securities Limited*, [1993] OJ No. 1892; *Ivanore v. CIBC* (1983), 3 CCEL 26 (Dorsey); *Evans and Royal Bank of Canada*, [1996] CLAD No. 1125 (Fagan); *Aikens v. Royal Bank of Canada*, [2003] CLAD No. 362 (Samuels); *Bank of Nova Scotia v. Webster*, [2006] CLAD No. 344 (Snow); *Banach v. Bank of Nova Scotia*, [1995] OJ No. 1255 (OCJGD); *Rowe v. Royal Bank of Canada*, [1991] BCJ No. 2542; *Bank of Montreal v. Mark Payne*, [2012] FC 431 (CanLII); *Lorie Chatten and Linamar Transportation*, July 14, 2011, Unreported (Rose); *Terravain v. Bank of Montreal*, [2002] CLAD No. 67 (Jolliffe); *Dorrian and Canadian Airlines International Limited*, [1997] CLAD No. 601 (Valentine); *Woodwards (Furniture Fair) Ltd. and Retail Clerks Union Local 1518* (1976), 14 LAC (2d) 242 (Monroe); *Re Visa Centre – Canadian Imperial Bank of Commerce and United Steelworkers of America, Local 2104(B)* (2002), 102 LAC (4th) 193 (Brandt); *McKinley v. BC Tel*, [2001] SCJ No. 40; *Hallingham and Royal Bank of Canada*, [1995] CLAD No. 535 (Oakley); *Death v. Canadian Imperial Bank of Commerce*, [2006] CLAD No. 342 (Betcherman); *Dowling v. Ontario (Workplace Safety & Insurance Board)* (2004), 192 OAC 126 (OCA).

[90] Counsel for Mr. Roda indicated that despite a very aggressive cross-examination, Mr. Roda has told the same story that he explained to BMO Corporate Security when he was initially interviewed. Mr. Roda had agreed that he committed serious breaches of BMO policy. He was upset, embarrassed and saddened by his actions. Mr. Roda's counsel characterized the misconduct of Mr. Roda as errors in judgment and simple mistakes, but not fraudulent or theft. It was pointed out that Mr. Roda was remorseful and has displayed a clear understanding that his actions were wrong. It was suggested that Mr. Roda has been candid with BMO about all his errors. Counsel specifically pointed out that BMO had very little evidence with respect to the transaction involving MG, yet Mr. Roda freely admitted that he had previously provided MG with his preferred US dollar exchange rate.

[91] Mr. Roda's counsel argued that progressive discipline should be applied and that the ultimate penalty of dismissal is reserved for only the most egregious conduct. It is acknowledged that Mr. Roda was guilty of misconduct that would give rise to discipline. However, it was submitted that Mr. Roda demonstrated that the relationship could be rehabilitated. In these circumstances, counsel suggested that the dismissal was unjust and alternative discipline ought to have been applied.

[92] Mr. Roda's counsel relied on the following authorities: *DeSouza v. Bank of Montreal*, [1998] CLAD No. 457 (Armstrong); *Hallingham and Royal Bank of Canada*, [1995] CLAD No. 535 (Oakley); *Royal Bank of Canada and Price*, [1998] CLAD No. 676 (Aggarwal); *Soplet v. Bank of Nova Scotia*, [2007] CLAD No. 97 (Marvy); *Monteith v. Bank of Montreal*, [2001] CLAD No. 203 (Armstrong); *Teti v. Canadian Imperial Bank of Commerce*, [2010] CLAD No. 392 (Monteith); *Lokanc v. Bank of Montreal*, [2012] CLAD 114 (Howes); *Karmali v. Toronto Dominion Bank (TD Investment Services Inc.)*, [2003] CLAD No. 384 (Shackell); *Simard St. Jean v. Royal Bank of Canada*, [1999] CLAD No. 375 (Betcherman); *Nandkeshwar and Royal Bank of Canada*, [1995] CLAD No. 250 (Levinson);

Canadian Broadcasting Corp. v. Canadian Union of Public Employees (Sgrignuoli Grievance) (1980), 23 LAC (2d) 227 (Arthurs); *Minaker v. Toronto Dominion Bank*, [2003] CLAD No. 39 (Liang); *Chisholm and Bank of Nova Scotia*, [1997] CLAD No. 495 (Carrier); *Evaniuk v. TD Bank Financial Group*, [2002] CLAD No. 520 (Teskey); *Laurentian Bank of Canada and Greco*, [1995] CLAD No. 927 (Stanley); *Ivanore v. Canadian Imperial Bank of Commerce* (1983), 3 CCEL 26 (Dorsey); *Lozon v. Messenger Delivery Service of St. Thomas Ltd.*, [2008] CLAD No. 345 (Waddingham); *Nootkamegwanning First Nation v. Gauthier* (2000), 1 CCEL (3d) 252 (Aggarwal); *Roberts v. Bank of Nova Scotia*, [1979] CLAD No. 11 (Adams); *Banque Laurentienne du Canada and Syndicat des Employees et Employes Professionnels-Les et de Bureau, Locale 434* (1994) 40 LAC (4th) 342 (Fromkin); *United Steelworkers of America, Local 3257 v. Steel Equipment Co. (Unjustified Discharge Grievance)* (1964), 14 LAC 356 (Reville).

DECISION

[93] The issue to be determined in this matter is whether or not the dismissal of Mr. Roda was unjust. The established approach followed by adjudicators in the determination of cause under the *Code* is to seek assistance from the common law standards developed in wrongful dismissal cases and from arbitral jurisprudence developed in labour relations dismissal cases, see *MV Royal Bank of Canada, supra* at para. 31.

[94] In *Toronto Board of Education v. Ontario Secondary School Teachers Federation District 15, supra* at para. 49, the Supreme Court of Canada set out the three-part test for determining whether an employee has been dismissed for just cause. The three-part test is as follows:

1. Whether the employee is actually responsible for the misconduct alleged by the Employer;
2. Whether the misconduct gives rise to just cause for discipline;

3. Whether the disciplinary measures selected by the Employer are appropriate in light of misconduct and the other relevant circumstances.

[95] There is no dispute that BMO has proven that Mr. Roda is responsible for the alleged misconduct.

[96] Mr. Roda acted as both the lender and funder on a loan application. Mr. Roda was negligent in filling out the loan application form by utilizing the pre-filled loan application process and failing to obtain the signature of both clients on the loan application.

[97] Mr. Roda admitted to this misconduct both to BMO and at the hearing. Mr. Roda agreed that he was negligent in his conduct with respect to the loan application.

[98] I accept Mr. Roda's explanation that BMO's policy, as it was stated in February of 2010, was not as clear as the more recent 2012 version of the policy. In addition, BMO was aware of the facts surrounding this incident in March 2010, but took no action until after they questioned Mr. Roda on June 10, 2010. In my view, the delay in BMO's action indicates that they or at least Ms. D'Avolio, did not view his conduct as very serious in this situation.

[99] There is no dispute that on March 27, 2010, Mr. Roda processed a deferral of two (2) months of mortgage payments for LD's mortgage. Mr. Roda was negligent in obtaining the approval of the guarantor.

[100] I accept Mr. Roda's explanation that the customer, being an employee of TD Canada Trust and the sister of a BMO Branch Manager, lead him to believe that she qualified for the family care option available under BMO policy. That is not to say that the customer did in fact qualify by taking a leave from work. In fact, the evidence of emails seems to point in the opposite direction. However, I

have no direct evidence that the customer did not take a leave, as she represented to Mr. Roda.

[101] There is no dispute that on March 20, 2010, Mr. Roda emailed an electronic copy of a mortgage appraisal to Ms. Di Nicola. Mr. Roda agrees that he made an error and violated BMO policy. However, I accept Mr. Roda's explanation that in this case he thought of Ms. Di Nicola as a fellow employee who was a Branch Manager with BMO.

[102] There is also no dispute that on March 6, 2010, Mr. Roda provided information regarding the poor credit rating of a client to a real estate agent. I also accept Mr. Roda's explanation that he believed he had the consent of the client to release this information because the real estate agent acted as a translator for the client at the time that they had met. Mr. Roda accepted that he ought to have obtained written confirmation of the consent and that he was negligent in not doing so.

[103] The most serious allegations in this matter are with respect to Mr. Roda providing his preferred US Dollar exchange rate to non-employee clients. There is no dispute that Mr. Roda provided his employee preferred US dollar exchange rate to clients of BMO on a number of occasions.

[104] I accept the explanations given by Mr. Roda for why he gave clients the preferred employee exchange rate. That is not to say I condone his conduct. Rather, I understand that he was trying to please customers and entice MG to bring his assets to BMO. His actions were misguided and inappropriate but not for personal gain. In fact, Mr. Roda did not personally gain from any of these transactions. Instead, it appears that on one occasion, Mr. Roda actually incurred a loss in the April 14, 2009 transaction involving Ms. Parks.

[105] There is also no dispute that Mr. Roda did not have a personal relationship with either GC or Ms. Parks.

[106] Ms. Parks clearly took advantage of Mr. Roda's goodwill and sought to have Mr. Roda provide his preferred exchange rate on an on-going basis. I accept that Mr. Roda realized his error in providing Ms. Parks with his preferred exchange rate and attempted to avoid the problem in the future by assisting her in opening her own US dollar account.

[107] Mr. Roda did have a personal relationship with MG. Mr. Roda acknowledged that MG was a friend during his evidence in chief. When questioned in cross-examination, he admitted that he had sex with MG on two (2) occasions.

[108] BMO counsel suggested that Mr. Roda was not being truthful about his relationship with MG. I find that Mr. Roda was being truthful. Mr. Roda certainly was not entirely candid in disclosing his relationship with MG. However, it does not surprise me that Mr. Roda did not disclose all the particulars of his relationship with MG. Most people do not normally go around discussing the intimate details of their sex lives unless asked specifically. Once Mr. Roda was asked specifically, he openly admitted to the sexual liaison, which occurred before MG became a client.

[109] It is clear that Mr. Roda repeatedly violated BMO's policies and procedures. As such, BMO had just cause to discipline Mr. Roda. The only issue really in dispute is whether or not BMO had just cause to dismiss Mr. Roda.

[110] The authorities are clear that a breach of rules is cause for imposing discipline; see *Banach v. Bank of Nova Scotia, supra* at paras. 15-27.

[111] Arbitrator Reville's award in *Steel Equipment Co., supra* is most frequently cited for enumerating ten (10) key factors for consideration in determining what is a just and reasonable penalty. Those 10 key factors are as follows:

1. The previous good record of the employee;
2. The long service of the employee;
3. Whether or not the offence was an isolated incident in the employment history of the employee;
4. Provocation;
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses or whether the offence was pre-mediated;
6. Whether the penalty imposed has created a special economic hardship for the employee in light of his particular circumstances;
7. Evidence that the company rules of conduct, either unwritten or posted have not been uniformly enforced thus constituting a form of discrimination;
8. Circumstances negating intent, e.g. likelihood that the employee misunderstood the nature or intent of an order given to him, and as a result disobeyed it;
9. Seriousness of the offence in terms of company policy and company obligations;
10. Any other circumstances which the Board should properly take into consideration, e.g. whether the employee apologized, explained or denied the allegations.

[112] In the seminal decision of *Roberts v. Bank of Nova Scotia, supra*, Adjudicator Adams indicated that by making the unjustness of dismissal under the *Code* subject to review, Parliament must have intended to provide unorganized employees with just cause protection similar to unionized employees under collective agreements. The very basis of “justness” under a collective agreement includes the concept of progressive discipline. The decision of Adjudicator Adams, and those that have followed him, stands for the proposition that the concept of progressive discipline should be considered and applied in appropriate circumstances to matters of unjust dismissal under the *Code* including cases in the banking industry, see *Simard St. Jean v. Royal Bank of Canada, supra*.

[113] The theory of progressive discipline is a corrective approach to discipline that focuses on rehabilitation. The theory is based on the premise that discipline will better achieve its corrective purpose if penalties are imposed on a progressive basis, from less severe for initial offences and more severe for repeated and more serious misconduct. Applying progressive discipline avoids situations where an employee may claim that they were surprised or not forewarned that they may be disciplined for misconduct. The theory of progressive discipline provides that dismissal, the ultimate sanction, is reserved for the most serious of offences and in situations where after being given an opportunity to correct their behaviour, an employee cannot learn from any discipline because they will not alter their behaviour and reinstatement will be futile.

[114] Progressive discipline is to be applied in a flexible manner, having regard to the nature of the offence, the employee's previous record as well as the aggravating and mitigating circumstances surrounding the incident. Progressive discipline does not require that discipline always begin with warnings prior to the imposition of suspensions, demotions, or discharge. Many offences justify a more severe penalty for the first offence, particularly acts of dishonesty. Discharge may be appropriate even in situations where an employee does not have any prior discipline on their record if the offence is egregious and it is found that there is no reasonable prospect that the employment relationship can be rehabilitated.

[115] I agree with the authorities submitted by Mr. Roda's counsel that dismissal must be justified as the last and most serious step in an employer's disciplinary process, see *Lozon v. Messenger Delivery Service of St. Thomas Ltd.*, *supra*, at para. 27.

[116] It is well accepted by the authorities that a very strong mitigating factor is the existence of a long and unblemished employment record, see *Bank of Nova*

Scotia v. Webster, supra, at para. 98. Mr. Roda is a long service employee with no previous record of discipline.

[117] The misconduct in this case is not an isolated incident, but a repeated number of violations of very important employer policies. Furthermore, the extending of the preferred employee US Dollar exchange rate to non-employees was clearly pre-meditated conduct. However, I agree with counsel for Mr. Roda that the other misconduct were errors in judgment and acts of negligence on the part of Mr. Roda.

[118] I agree with BMO that as a Branch Manager, Mr. Roda is expected to show leadership and the bank must be able to rely on him being trustworthy, exercising good judgment and being a role model. Mr. Roda was the Compliance Officer at the branch and as such, his violations of important company policies are serious offences that justify a serious disciplinary response.

[119] I accept that Mr. Roda's intentions were to please clients of BMO. Mr. Roda extended his employee preferred US dollar exchange rate to clients in a misguided attempt to appease them and or obtain additional business for BMO.

[120] I recognize that BMO lost money as a result of Mr. Roda's actions. However, Mr. Roda did not profit and in fact it appears he lost money on one of the transactions. If Mr. Roda had profited from his misconduct, then I would have no hesitation in finding his dismissal just.

[121] Mr. Roda never denied the allegations made against him. In fact, he admitted to additional misconduct unknown to BMO. Mr. Roda was also cooperative during the investigation by BMO Corporate Security.

[122] After considering all the relevant aggravating and mitigating factors, I have been persuaded that the employment relationship between BMO and Mr. Roda is still viable. Both before his dismissal and during these proceedings, Mr.

Roda consistently accepted responsibility and did not deny that he committed the misconduct alleged by BMO. During his cross-examination, Mr. Roda openly admitted that he committed what were termed “cardinal sins”. Mr. Roda did not deflect blame. Instead, Mr. Roda explained his conduct openly acknowledging that he had made many mistakes. Mr. Roda was negligent and he clearly was too willing to please and too trusting of fellow employees and clients.

[123] I am of the opinion that BMO should have applied progressive discipline in these circumstances. Such progressive discipline could have included a lengthy suspension or demotion from the position of Branch Manager. BMO did not have just cause to summarily dismiss Mr. Roda.

[124] Accordingly, I find that the dismissal of Mr. Roda was unjust.

[125] Mr. Roda has been subjected to extensive questioning about his sexual relations and personal life during these proceedings. Mr. Roda was candid and remorseful. At the end of his cross-examination, Mr. Roda appeared to be a broken man. I am of view that he has clearly learned his lesson and if reinstated could be a good and valuable employee.

[126] During the final argument, BMO requested the right to make further submissions with respect to the appropriate remedy, mitigation and costs. Mr. Roda’s counsel was agreeable to this request. Accordingly, I remit the issue of the appropriate remedy to the parties to discuss and resolve. I remain seized to address the issue if the parties cannot agree.

Dated at Toronto, Ontario this 22nd day of July, 2012.



John Stout