

**IN THE MATTER OF AN ADJUDICATION 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

HEARING HELD IN TORONTO, ONTARIO ON SEPTEMBER 26, 2012

AWARD

A. INTRODUCTION

[1] This matter concerns a complaint by Jack Roda pursuant to Section 240 of the *Canada Labour Code*, R.S.C. 1985 c.L-2 (hereinafter the “Code”). This is the third award that I have issued in this matter addressing Mr. Roda’s claim that he was unjustly dismissed from his employment as a Branch Manager with the Respondent, the Bank of Montreal (“BMO”).

[2] My first award was issued on October 6, 2011, addressing BMO’s preliminary 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.

[3] On July 22, 2012, I issued an award addressing the issue of whether Mr. Roda was unjustly dismissed from his employment with BMO. After carefully considering the evidence and submissions of the parties, I found that Mr. Roda was unjustly dismissed from his employment by BMO. In accordance with the request of counsel, I remitted the matter of remedy, mitigation and costs to the parties to discuss and resolve. Unfortunately, the parties were unable to agree to the resolution of these issues.

[4] At the hearing on September 26, 2012, counsel advised me that there was no issue arising with respect to Mr. Roda’s efforts to mitigate his damages. BMO accepted that Mr. Roda made diligent efforts to mitigate his damages. Accordingly, remaining outstanding issues involve determining the appropriate remedy and costs.

B. FACTS

[5] At the September 26, 2012 hearing, counsel provided me with an Agreed Statement of Damages, which I attach as an Appendix to this award. No additional evidence was tendered by the parties.

C. SUBMISSIONS OF THE PARTIES

[6] Counsel 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 counsel. Rather, I shall summarize the position of each party and set out the authorities they relied upon to support their position. In making my decision, I have reviewed and considered all of the evidence in this matter and the submissions of counsel.

i) Submissions on behalf of the Complainant

[7] Mr. Roda's counsel reviewed a number of the facts which he deemed were important factors to consider with respect to remedy. In particular, counsel noted that Mr. Roda is currently 42 years old. Mr. Roda only has a high school education and his other skills are specific to the banking industry.

[8] At the time of his termination, Mr. Roda had 22 years of service, which amounted to his entire adult working career with BMO. Mr. Roda was a solid performer who rose up through the ranks to become a Branch Manager.

[9] Mr. Roda's counsel also pointed out that Mr. Roda has mitigated his damages but such mitigation is still only about half of what he was earning when he was employed by BMO.

[10] Mr. Roda's counsel acknowledged that serious misconduct did occur involving repeated violations of important BMO policies. However, counsel also

pointed out that Mr. Roda was candid and admitted to the misconduct. Mr. Roda appreciated the harm associated with his misconduct and was remorseful. According to Mr. Roda's counsel, he had learned his lesson, owned up to his errors and did not try to deflect blame. Mr. Roda's counsel suggested that the relationship of trust can be rehabilitated and that reinstatement is appropriate.

[11] Mr. Roda's counsel suggested that the appropriate penalty would be a suspension of three (3) to six (6) months. In addition, counsel requested an order that Mr. Roda be paid back pay from the end of his suspension until his reinstatement, less mitigation and any employment insurance repayment obligations. Mr. Roda's counsel also submitted that costs on a partial indemnity basis are usually awarded in these circumstances.

[12] Mr. Roda's counsel relied on the following authorities to support his argument: *Slaight Communications Inc. v. Davidson*, [1985] 1 FS 253 (F.C.A.); *Slaight Communications Inc.*, [1989] 1 SR 1038; *Wolfe Lake First Nation v. Young* (1997), 130 FTR 115; *Manitoba Association of Native Firefighters Inc. v. Perswain* (2003), FCT 364; *George Willberg and Jo-Ann Trucking Limited, Brooks, Alberta*, Unreported Award dated November 10, 1982 (England); *Hollett v. Air Atlantic Limited*, [1994] CLAD No. 668 (Alcock); *Larocque v. Louis Bull Tribe* (2006), 50 CCEL (3d) 177 (Dunlop); *Sherman v. Bank of Montreal*, [2011] L.V.I. 3954-2 (Murray); *Naothkamegwanning First Nation v. Gauthier* (2000), 1 CCEL (3d) 252 (Aggarwal); *Roberts v. Bank of Nova Scotia* (1979), 1 LAC (3d) 259 (Adams); *Symcor Services Inc. v. Rousseau* (2000), 4 CCEL (3d) 184 (Barrett); *Eissfeldt v. Pacific Coastal Airlines* (2007), 61 CCEL (3d) 14 (Love); *Scarfe and Saskatchewan Indian Cultural Centre*, [1996] CLAD No. 1088 (Ball); *Banca Nazionale del Lavoro of Canada Limited v. Lee-Shanok*, [1988] FCJ No. 594.

ii) Submissions on behalf of BMO

[13] BMO's counsel submitted that reinstatement is not the appropriate remedy. Counsel suggested grounds for refusing reinstatement include the disappearance of a relationship of trust and confidence between BMO and Mr. Roda. Counsel emphasized that Mr. Roda was a supervisor who committed serious violations of BMO policies. BMO counsel argued that this is a contributory factor that should be assessed in determining the appropriate remedy.

[14] Counsel emphasized that the banking industry is highly regulated, which necessitates the highest possible level of trust between BMO and their employees. BMO counsel pointed out that Mr. Roda was the Compliance Officer for his branch. BMO counsel also pointed out that Mr. Roda works primarily without supervision and BMO can no longer trust him.

[15] BMO counsel submitted that a reasonable suspension of one (1) year should also be imposed. In addition, counsel for BMO suggested that the appropriate remedy also should include monetary compensation in lieu of reinstatement. BMO counsel argued that Mr. Roda ought to be compensated with common law notice with a discount for contributory fault. Counsel suggested a notice period equal to twelve (12) months salary, less mitigation, and any employment insurance overpayment.

[16] BMO counsel took the position that no costs ought to be ordered in these circumstances. However, counsel acknowledged that I have the authority to award costs in appropriate circumstances. Counsel agreed that if costs were to be awarded, they ought to be awarded on a partial indemnity basis.

[17] BMO counsel relied on the following authorities to support his argument: *Sheikholeslami v. Atomic Energy of Canada Limited*, 1998 Carswell NAT 278 (CA); *Larocque v. Louis Bull Tribe*, 2006 Carswell NAT 1130 (Dunlop); *Ivanore v.*

CIBC (1983), 3 CCEL 26; *Edmonds and Royal Bank of Canada*, [1996] CLAD No. 1125; *Unified Freight Services Limited v. Therriault*, [2006] HA No. 125; *Karmali v. Toronto Dominion Bank*, [2003] CLAD No. 384; *Bannister vs. General Motors of Canada Limited*, [1998] OJ No. 3402; *Lane v. Canadian Depository for Securities Limited*, [1993] OJ No. 1892 Aff'd [1997] OJ No. 2102 (C.A.); *Akins v. Royal Bank of Canada*, [2003] CLAD No. 362; *Burgess v. Halifax Grain Elevator Limited*, [2005] CLAD No. 199; *Banca Nazionale del Lavoro of Canada Limited v. Lee-Shanok* (1988), 22 CCEL 59; *Bardal v. Globe and Mail Limited*, [1960] OJ No. 149; *Chapman v. Unique Personnel Canada Inc.*, [2003] CLAD No. 368; *Dickinson v. Radio Atlantic (CNFB) Ltd.*, [1991] NVJ No. 1147; *McDonald v. Woodward Stores Limited*, [1991] BCJ No. 2578; *Cox v. Royal Trust Corp. of Canada* (1989), 26 CCEL 203; *Lee v. Parking Corp. of Vancouver* (1998), 56 BCLR (3d) 170; *Hummelle v. Montana Tribe* (2007), 60 CCEL (3d) 285; *Hummelle v. Montana Tribe*, [2005] CLAD No. 247; *Michaels v. Red Deer College* (1976), 2 SCR 324.

D. DECISION

[18] The issues to be determined are as follows:

- a) what is the appropriate remedy in this matter where I have found that Mr. Roda's dismissal was unjust? and
- b) should costs be awarded to Mr. Roda?

[19] The relevant section of the *Code* is subsection 242(4) which provides as follows:

"Wherein an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to:

- a) Pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to person;
- b) Reinstatement the person in his employ; and
- c) Do any other like thing that is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.”

[20] The leading case regarding remedies under subsection 242(4) of the *Code* is *Sheikholeslami v. Atomic Energy of Canada Limited*, *supra* where the majority stated at paragraphs 12 and 13 as follows:

“The unfair dismissal provisions for non-unionized employees in the *Canada Labour Code* no doubt represent a statutory modification of the traditional rule that an employment contract will never be specifically enforced. But they certainly do not, and even could not, go so far as to create a right in the person of the wrongfully dismissed employee. It would be contrary to the common sense that precisely supports the traditional rule. They simply provide for reinstatement as a possible remedy that may be resorted to in proper situations. It is often said that, in practice, it is the remedy favoured by adjudicators in their efforts to "make whole" an employee's real-world losses caused by dismissal. It is undisputable, however, on a mere reading of subsection 242(4) of the *Code*, that an adjudicator is given full discretion to order compensation in lieu of reinstatement, if, in his opinion, the relationship of trust between the parties could not be restored.

I do not see how it can be disputed that the Adjudicator here acted within his jurisdiction, that he exercised his remedial authority as contemplated by Parliament, and that the conviction on the basis of which he made his decision was drawn from totally legitimate factors. Again, if evidence of facts arising after dismissal cannot be relevant to the issue of unjust dismissal itself, it may be quite relevant to the fashioning of a proper remedy. A look forward, and not backward, is then implied.”

[21] It is also generally accepted that adjudicators have wide discretion under the *Code* to fashion a remedy, but no one remedy is to be preferred; all are

possible and must be considered, see *Larocque v. Louis Bull Tribe*, *supra* at paragraph 17.

[22] The authorities are also clear that the purpose and scope of subsection 242(4) of the *Code* is not limited to payment of monies in lieu of reasonable notice as provided under common law.

[23] A review of the authorities provided by counsel indicates that the provision has been recognized as providing the power to “make whole” a complainant, see *Jo-Ann Trucking Limited, Brooks, Alberta*, *supra*.

[24] Reinstatement is viewed by adjudicators as the primary remedy for an unjust dismissal under the *Code*. It is accepted as usually being the starting point, unless there are reasons not to reinstate the employee. While a number of adjudicators have outlined factors that might affect the refusal to reinstate, those factors are generally related to determining whether or not the relationship of trust between the parties can be restored, see *Sheikholeslami v. Atomic Energy of Canada Limited*, *supra*.

[25] In my opinion, determining whether the relationship of trust between the parties can be restored is not a matter of determining whether or not one party subjectively feels that the relationship of trust cannot be restored. Rather, the test is an objective one based on all the evidence to determine whether the relationship of trust can be restored.

[26] In my July 22, 2012 award, I applied a contextual approach to assessing whether Mr. Roda’s dismissal was unjust.

[27] I found that Mr. Roda’s admitted misconduct justified a serious disciplinary response. Applying the principle of proportionality, I found that dismissal was too severe and unjust. Instead, I found that it would be more appropriate to apply progressive discipline in these circumstances. I went on to

note that such progressive discipline could have included a lengthy suspension or demotion from the position of Branch Manager.

[28] I specifically found that the employment relationship was still viable. I was of the opinion that Mr. Roda had learned his lesson and if reinstated could be a good and valuable employee.

[29] During the hearing with respect to remedy, both parties submitted that a demotion would not be appropriate. In light of that submission, I do not believe it would be appropriate for me to reinstate Mr. Roda into a position other than his former position of Branch Manager. Therefore, the issue remains whether or not I should reinstate Mr. Roda into his position of Branch Manager.

[30] BMO suggests that reinstatement is not appropriate in this case because of the following reasons:

- a) The nature of Mr. Roda's position – a position of authority in the highly regulated banking industry – necessitates the highest possible level of trust between the parties;
- b) Mr. Roda engaged in serious and repeated misconduct worthy of serious discipline;
- c) M. Roda's actions destroyed the necessary relationship of trust between Mr. Roda and the Employer;
- d) Mr. Roda was Compliance Officer for the Branch;
- e) There were multiple breaches of several Employer policies;
- f) Mr. Roda worked primarily without supervision.

[31] After considering all the evidence and submissions, it is my view, that the relationship of trust can be restored.

[32] BMO's counsel pointed out that Ms. D'Avolio testified that she could no longer trust Mr. Roda. However, it should be noted that in cross-examination, Ms. D'Avolio admitted that she had told Mr. Roda prior to his termination that the best scenario for him involved a Corrective Action III (discipline, but not dismissal). In my opinion, if the relationship of trust were truly irreparably broken, then discipline short of dismissal would not have been contemplated by BMO.

[33] Moreover, objectively I find that the relationship of trust has not been irreparably broken. As indicated in my July 22, 2012, award, Mr. Roda never denied the allegations made against him. He even admitted to misconduct unknown to BMO. Mr. Roda was cooperative during the investigation by BMO Corporate Security. Mr. Roda has accepted responsibility and did not deflect blame.

[34] I acknowledge the concerns of BMO. However, they had the option to demote Mr. Roda if they felt he could no longer perform in the Branch Manager position. Furthermore, I noted in my July 22, 2012 award that I am of the view that Mr. Roda has clearly learned his lesson. I continue to believe that Mr. Roda can be a good and valuable employee if reinstated.

[35] I believe a lengthy suspension recognizes the seriousness of the offense in relation to Mr. Roda's position and responsibilities while at the same time taking into consideration the mitigating factors of Mr. Roda's long and unblemished employment record, frank acknowledgement and rehabilitative prospect. In my view, a suspension between June 15, 2010 (the date of discharge) and December 30, 2010 (just over six (6) months) would best balance the competing interests and be just.

[36] I note that the outcome of this matter would have been different had I found that Mr. Roda had profited from his misconduct or not acknowledged his misconduct and been remorseful. While I have reinstated Mr. Roda, he should understand this will be his final opportunity to demonstrate that he can be a reliable employee who will adhere to BMO's policies. Any further acts of serious misconduct most certainly will result in BMO discharging Mr. Roda. In such circumstances, it will be extremely difficult, if not impossible for Mr. Roda to convince an adjudicator to give him another chance.

ORDER

[37] After carefully considering the submissions of counsel and for the reasons I have noted above, I order and direct as follow:

- a) Mr. Roda was unjustly dismissed by BMO. BMO is to substitute the dismissal with a suspension from June 15, 2010 to December 30, 2010.
- b) Mr. Roda is to be reinstated in his position as a Branch Manager with no loss of service or benefits.
- c) Mr. Roda shall be entitled to damages from December 30, 2010 until his date of reinstatement, less mitigation and any employment insurance repayment obligation. I remit the quantum to the parties for resolution. If the parties cannot agree to the quantum, then they are to submit to me written submissions within thirty (30) days.
- d) BMO is to pay costs to Mr. Roda on a partial indemnity basis. I remit the quantity to the parties to resolve. If the parties cannot resolve the quantum, then they are to file written submissions to me within thirty (30) days.

[38] I remain seized to address the issues of quantum and any other issue that may arise with respect to the implantation of my orders.

Dated at Toronto, Ontario this 18th day of October, 2012.

A handwritten signature in purple ink, consisting of stylized, overlapping letters that appear to be 'J' and 'S'.

John Stout - Adjudicator

APPENDIX

IN THE MATTER OF an arbitration under Section 167, Part III, Division XIV of the *Canada Labour Code* (the “Code”) of Alleged Unjust Dismissal

BETWEEN:

JACK RODA

Complainant

- and -

BANK OF MONTREAL

Respondent

AGREED STATEMENT OF DAMAGES

Date	Notice Period	Mitigation Income	BMO Compensation	Total Damages
June 15, 2010	0 Months (termination date)	\$0.00	\$95,000.00 total compensation	
December 30, 2010	6 Months	\$1,025.26	\$47,500.00	\$46,474.74
March 15, 2011	9 Months	\$6,467.14	\$71,250.00	\$64,782.86
June 18, 2011	12 Months	\$13,179.15	\$95,000.00	\$81,820.85
September 16, 2011	15 Months	\$15,975.17	\$118,750.00	\$102,774.83
December 16, 2011	18 Months	\$26,536.58	\$142,500.00	\$115,963.42
March 16, 2012	21 Months	\$37,149.16	\$166,250.00	\$129,100.84
June 15, 2012	24 Months	\$47,905.75	\$190,000.00	\$142,094.25
July 22, 2012	25 Months (date of decision)	\$51,388.71	\$197,916.67	\$146,527.96