Federal Court  Cour fédérale

Date: 20240226

Docket: T-2033-22

Citation: 2024 FC 311

Ottawa, Ontario, February 26, 2024

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

JAMIE MORTON

Applicant

and

THE ROYAL BANK OF CANADA
ATTORNEY GENERAL OF CANADA
CANADA INDUSTRIAL RELATIONS BOARD

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Jamie Morton seeks judicial review of a decision by Adjudicator Frank S. Borowicz, KC [Adjudicator] appointed under Division XIV, Part III of the *Canada Labour Code*, RSC, 1985, c

L-2. The Adjudicator upheld Ms. Morton's termination for cause from her employment with the Royal Bank of Canada [RBC].

[2] Ms. Morton was employed by RBC for approximately 18 years. In 2017, RBC discovered that she had completed numerous transactions with clients' money that contravened RBC's policies and resulted in overpayments of fees, bonuses, and commissions totalling almost $100,000.

[3] On July 26, 2018, RBC terminated Ms. Morton's employment with immediate effect. She brought a claim for unjust dismissal before the Canada Industrial Relations Board.

[4] The Adjudicator found that Ms. Morton had been lawfully dismissed. To the extent notice was required, the Adjudicator found that sufficient notice of her termination had been given.

[5] While the warnings given to Ms. Morton respecting her ongoing employment may have been ambiguous, the Adjudicator's determination that her misconduct warranted immediate termination was reasonable. The application for judicial review is dismissed.

II. Background

[6] Ms. Morton began her employment with RBC in 2000 as a Customer Service Agent. She eventually became an Investment Retirement Planner [IRP]. She was a registered representative of RBC, licensed to manage mutual funds.

[7] The compensation of IRPs is dependent on fees, bonuses and commissions calculated according to RBC's "Investment & Retirement Planning Performance & Incentive Guide" [Compensation Guide]. IRPs must provide an annual written attestation that they have read the Compensation Guide and agree to abide by its terms. IRPs are given additional written guidelines and training regarding pay mechanisms and procedures. There is also a Conduct Code that sets ethical standards for all RBC employees, including IRPs.

[8] Under the Compensation Guide, IRPs receive commissions for sales, in particular the acquisition and consolidation of client assets, only if they are external to RBC. Internal sales are not compensable. One kind of internal sale is "rebalancing", which involves reallocating client assets from one fund to another. Sales must be submitted for compensation within 45 days. Any overpayment of compensation must be repaid within 30 days.

[9] The Conduct Code imposes a number of obligations and values on RBC employees. These include: obedience to laws, regulations, and RBC policies; honouring the trust that clients place in RBC and its employees to manage their money; and keeping accurate books and records. According to the Conduct Code:

> […] overstating an amount on an expense report or falsifying a sales record in order to exceed a target would be a serious violation of RBC's trust in us and the Code. […] False statements such as these are never tolerated, no matter how small the amount or the reason behind the action.

[10] In 2017, Ms. Morton performed numerous rebalancing transactions in which she manually redeemed existing client investments for cash, and then used the cash to purchase new investments. IRPs were expected to use an automated process called CART, which sorts transactions into compensable and non-compensable categories. Ms. Morton did not use this process.

[11] If an IRP did not use CART for transactions, then it was necessary to notify payroll of any transactions that were non-compensable. Ms. Morton did not report her non-compensable transactions, and repeatedly received unauthorized commissions from internal rebalancing of clients' funds.

[12] In June 2017, Michael Sider, Branch Compliance Officer, sent an email message to Ms. Morton reminding her to use CART when rebalancing client funds. In her reply, Ms. Morton confirmed she would use CART in the future. However, she continued to rebalance client funds without using CART and to receive unauthorized compensation.

[13] In early 2018, a Payroll Verification and Control Officer with RBC conducted an audit of Ms. Morton's transactions. Initially, the audit revealed 138 transactions for which Ms. Morton received unauthorized compensation, totalling over $29,000. When this was brought to her attention, Ms. Morton agreed that RBC could correct the overpayments on her next payroll.

[14] In June 2018, a second audit revealed that Ms. Morton had collected more than $70,000 in additional unearned commissions due to rebalancing in 2017 and early 2018. These audits triggered the involvement of RBC's Corporate Investigation Services [CIS].

[15] CIS interviewed Ms. Morton and issued a report of its findings. Given the gravity of the findings, RBC prepared a Dismissal with Cause summary. Ms. Morton's employment was terminated on July 26, 2018.

[16] RBC subsequently conducted an exit audit of Ms. Morton's transactions. It concluded that she had been overpaid a total of $98,173.67.

III. Decision Under Review

[17] The Adjudicator made the following findings of fact:

> In November of 2017, the payroll system was changed so that IRP sales automatically defaulted to being non-compensable. To make a sale compensable, an IRP needed to log into the system and manually change it to the compensable option, which the Complainant did for multiple sales.
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> In January of 2018, RBC conducted a partial audit of the Complainant's internal sales transactions. It revealed that, during fiscal year 2017 and the early part of fiscal year 2018, the Complainant claimed compensation she was not entitled to for 67 different clients in 138 sales, including internal rebalance transactions in which she redeemed existing client investments to cash and then purchased new investments for them in the same amount. The audit concluded that the Complainant had been paid $29,210.87 in unearned commissions, fees, and bonuses. The Complainant acknowledged the errors and authorized RBC to recover the amount she had been overpaid from her next payroll

> payment. Her total employment income for 2017 was slightly less than $500,000.
>
> In April of 2018, the Complainant went on medical leave and thereafter did not return to work.
>
> In June of 2018, RBC conducted a second audit of the Complainant's external sales transactions. It revealed that during fiscal year 2017 and part of fiscal year 2018, the Complainant wrongfully claimed compensation:
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> a. for approximately 60 internal sales which she posted as external;
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> b. for the same sale twice; and
>
> c. for sales she backdated to appear as if they were claimed within the 45 day commission window which she had missed.
>
> The second audit concluded the Complainant had been paid over $70,000 in additional unearned commissions, fees, and bonuses which she had wrongly submitted. A subsequent exit audit revealed further overpayments and concluded that RBC had paid a total of $98,173.67 to the Complainant in unearned compensation, which the Complainant has not repaid to RBC.

[18] RBC argued that Ms. Morton's behaviour was neither trivial nor occasional, but a deliberate course of conduct repeated over a hundred times with many clients for personal gain. As a long time employee of RBC, and as a licensed securities professional, she knew or should have known this was fundamentally dishonest, and contrary to RBC's Conduct Code and her obligations under the Compensation Guide, to which she had agreed annually. RBC maintained that Ms. Morton had exposed clients to significant risk.

[19] Ms. Morton did not deny her conduct and acknowledged she was not entitled to the unearned commissions. However, she accepted no responsibility. She said the errors were RBC's fault, because RBC should have detected them sooner.

[20] The Adjudicator found that the admonishment Ms. Morton received from Mr. Sider in June 2017 was sufficient warning that her employment was in jeopardy. This communication made clear that the proper method for converting assets from one fund to another was to use the CART process. The email message read as follows:

> Just an FYI for future consolidation to IAA. We have the ability to roll over Series A to Series F without triggering a capital gain or taking the clients out of the market. Rather than selling funds in A and repurchasing in IAA you can submit a consolidation via CART.

[21] Ms. Morton said this email message was permissive, not prescriptive. Rather than being a warning, it conveyed to her that use of the CART process was discretionary, giving her permission to continue rebalancing internal funds without using the CART process. She responded to the email message with the following:

> We can??? OMG that's awesome! I don't move clients that much – mostly new contributions and this one was waaaay to much work.
>
> Appreciate the heads up!

[22] The Adjudicator acknowledged that, standing alone, there might have been ambiguity in the wording of Mr. Sider's email message. Nevertheless, Ms. Morton's reply clearly confirmed that she understood the CART process was the correct way to rebalance internal funds going forward.

[23] When Ms. Morton met with her direct supervisor in January 2018 to discuss the results of the first audit, she was informed that "termination could be on the table". The Adjudicator was

therefore satisfied that, "to whatever extent a legal requirement of a warning may in the circumstances be applicable, it was manifestly and completely satisfied".

[24] The Adjudicator concluded that:

> […] in all the circumstances RBC was entitled to lose confidence in the trustworthiness of the Complainant and to conclude that her conduct irreparably destroyed the heart of their employment relationship, which at its essence required honesty, integrity and trust. The Complainant's misconduct was serious and fundamental. It broke the trust that was required for her employment to continue and justified immediate termination. All the more so because she was employed by a financial institution and dealt with millions of dollars of client money for which she and RBC were responsible.
>
> [Emphasis added.]

[25] The Adjudicator continued:

> The Complainant's obligation to RBC was to put the interests of its clients first and to comply with the policies and conditions of the Conduct Code and the Compensation Guide. The nature of her employment responsibilities and her entitlement to compensation were clearly expressed in the Code and the Guide, which she confirmed annually that she had read and understood. Instead, she chose to carelessly and recklessly disregard the Code and Guide and to put her own interests first. The evidence of the manner in which she did it also makes clear that, to actually do what she did required a sophisticated awareness of the RBC payroll and compensation system, which reveals she must have known and understood what she was doing. The evidence also disclosed no other apparent purpose for intentionally misrepresenting her sales other than to deceive RBC to increase her compensation contrary to the Code and the Guide.

[26] The Adjudicator found no mitigating circumstances. At no time did RBC condone Ms. Morton's behaviour, and she was treated fairly throughout. She blamed her colleagues, superiors,

and RBC generally. In addition to being unsupported and uncorroborated, Ms. Morton's testimony was cavalier, disingenuous, and unresponsive. Her answers to questions were evasive and contrived, and she was wholly devoid of credibility.

IV. Issue

[27] The sole issue raised by this application for judicial review is whether the Adjudicator's decision was reasonable.

V. Analysis

[28] Reasonableness is the presumptive standard of review for administrative decisions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 25). The Court will intervene only where "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[29] The criteria of "justification, intelligibility and transparency" are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[30] Ms. Morton emphasizes the Adjudicator's characterization of Mr. Sider's email message as an "admonishment", and the acknowledgment that its wording was ambiguous. She maintains that an ambiguous admonishment cannot constitute adequate warning that an employee's employment is in jeopardy.

[31] Ms. Morton says she should have been given a clear warning that she had done something wrong, and if she did not improve then her employment would be terminated. She maintains that she should have been given an adequate opportunity and assistance to improve after being told that her employment was in jeopardy (citing *Rodrigues v Shendon Enterprises Ltd*, 2010 BCSC 941 [*Rodrigues*] at para 38).

[32] According to Ms. Morton, Mr. Sider's email message in June 2017 amounted to condonation of her behaviour. If her behaviour were clearly prohibited, then Mr. Sider would have said so.

[33] The admonishment resulted from Mr. Sider's review of a limited number of transactions involving the same client. There was evidence before the Adjudicator that, despite the warning, Ms. Morton continued to process 62 reallocation transactions incorrectly, without using CART, involving $4 million in client funds. Ms. Morton had reassured Mr. Sider that she did not "move clients that much", but in fact she did so 76 times between November 2016 and June 7, 2017. Mr. Sider would not have been aware of the full extent of Ms. Morton's misconduct, which was only revealed in two audits conducted in January and June 2018 respectively. His email message cannot reasonably be characterized as condonation.

[34] An employee may be dismissed for cause without a record of progressive discipline where the termination is a proportionate response to egregious misconduct (*McKinley v BC Tel*, 2001 SCC 38 [*McKinley*] at para 51; *Deschênes v Canadian Imperial Bank of Commerce*, 2009 FC 799 [*Deschênes*] at para 19, aff'd, 2011 FCA 216; *Keith Muckler v TTK Transport Inc*, 2020 CIRB 943 at para 40). In *Ashkanizadeh and Canadian Imperial Bank of Commerce, Re*, [2018] CLAD No 68, immediate termination was found to be justified despite the absence of any disciplinary record. The employee in that case breached the bank's policies and lied to her manager during a subsequent investigation.

[35] RBC notes that *Rodrigues* involved poor performance, not breach of the bank's policies. The British Columbia Supreme Court implicitly recognized in *Rodrigues* that some misconduct may be sufficiently serious to justify summary dismissal without warning (at paras 9, 38).

[36] Termination without a record of progressive discipline is limited to cases of egregious misconduct, *i.e.*, that which goes to the root of the employment contract. Such misconduct can be described as "incompatible with the employment relationship" (*McKinley* at para 58; *Mak v Coastal Pacific Aviation Ltd*, 2022 CIRB 1036 at paras 26, 132), or creating a situation "where the relationship of trust may be irrevocably broken" (*Deschênes* at para 19).

[37] The Adjudicator made numerous factual findings regarding the nature and extent of Ms. Morton's misconduct. The Court must exercise restraint and deference with respect to the Adjudicator's decision and recognize his area of expertise. This consideration is particularly

important where (a) the Adjudicator saw and heard the witnesses in person, and (b) there is no recording or transcription of the hearing (*Giffen v TM Mobile Inc*, 2023 FC 1666 at para 90).

[38] The Adjudicator reasonably assessed the requirements of the Compensation Guide and Conduct Code, both of which addressed the seriousness of the misconduct in issue. Ms. Morton was responsible for managing millions of dollars of client money. She received nearly $100,000 in unearned compensation, and refused to accept responsibility for her actions.

[39] Ms. Morton has not demonstrated any shortcomings in the Adjudicator's conclusion that her misconduct was "serious and fundamental. It broke the trust that was required for her employment to continue and justified immediate termination". The evidence supported the Adjudicator's conclusion that "in all the circumstances RBC was entitled to lose confidence in the trustworthiness of the [Applicant] and to conclude that her conduct irreparably destroyed the heart of their employment relationship." The Adjudicator found no mitigating factors. Ms. Morton still has not fully repaid RBC for her overcompensation.

[40] The Adjudicator was not obliged to cite all of the jurisprudence relied upon by Ms. Morton. The legal principles underlying his decision are readily discernable (*Hussey v Bell Mobility Inc*, 2022 FCA 95 at paras 107-108).

VI. Conclusion

[41] The application for judicial review is dismissed. Costs are awarded to RBC in accordance with the mid-range of Column III of Tariff B.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs are awarded to the Respondent Royal Bank of Canada in accordance with the mid-range of Column III of Tariff B.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2033-22
STYLE OF CAUSE:	JAMIE MORTON v THE ROYAL BANK OF CANADA, ATTORNEY GENERAL OF CANADA AND CANADA INDUSTRIAL RELATIONS BOARD
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 29, 2024
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	FEBRUARY 26, 2024

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