

Date: 20080807

Docket: T-351-08

Citation: 2008 FC 935

Vancouver, British Columbia, August 7, 2008

**PRESENT: Roger R. Lafrenière, Esquire
Prothonotary**

BETWEEN:

LI MIN ("AMANDA") WU

Applicant

and

ROYAL BANK OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

LAFRENIÈRE P.

[1] The present motion arises in the context of an application for judicial review in respect of the decision of Adjudicator Petersen made pursuant to the *Canada Labour Code* dismissing the Applicant's complaint that she was unjustly dismissed by the Royal Bank of Canada (RBC). The Applicant seeks an order compelling answers to written cross-examination questions that were refused by RBC on the grounds of relevance.

Background

[2] The Applicant's employment as a credit adjudication agent with RBC was terminated on July 12, 2006 based on allegations of misappropriation of funds. The Applicant filed a complaint of unjust dismissal and the matter proceeded to adjudication over a period of six days in July 2007. Adjudicator Petersen heard the evidence of a number of witnesses, including the Applicant, who testified on her own behalf. In a 24 page decision dated February 1, 2008, Adjudicator Peterson dismissed the Applicant's complaint.

[3] The Applicant filed a Notice of Application on March 3, 2008 for an order quashing the Adjudicator's decision and referring the matter back for redetermination. Four main grounds are cited. First, the Adjudicator acted without or beyond jurisdiction by upholding the Applicant's dismissal for non-work-related conduct and contrary to RBC's policies, practices and guidelines for discipline. Second, the Adjudicator failed to observe the principle of natural justice and procedural fairness, and in particular failed to provide an interpreter. Third, the Adjudicator erred in law in making his decision. Fourth, the Adjudicator based his decision on erroneous findings of fact made in a perverse or capricious manner.

[4] The Applicant filed an affidavit in support of her application on March 28, 2008. Paragraphs 2 to 28 of the affidavit consist of facts leading to the Applicant's dismissal. It is unclear whether these facts were before the adjudicator, or whether the Applicant is attempting to introduce new evidence. At paragraphs 31 to 35, the Applicant complains about the conduct of the hearing before the Adjudicator. She says that an interpreter was not provided to her at the hearing. She also claims that she was visibly stressed and anxious during cross-examination by RBC's counsel. She further

alleges that she was denied an opportunity to speak to her lawyer before the Adjudicator ruled that the speaking notes which she was referring to during her testimony should be entered into evidence.

[5] RBC responded by filing the affidavits of Joan Nicholson, Jennifer Roper and Bob Montgomery. In the last four paragraphs of her two page affidavit, Ms. Nicholson, Manager of Cards Contact Centre with RBC in Vancouver, addresses four matters raised in the Applicant's affidavit. First, she states that the Applicant was not promoted to the Visa Credit Department, as asserted by the Applicant, but rather that it was considered a lateral move. Second, in response to the Applicant's assertion that she received no warning that money transferring activity was grounds for discipline, Ms. Nicholson points to the RBC Code of Conduct, which refers specifically to misappropriation. Third, in answer to the Applicant's assertion that she was denied progressive discipline, Ms. Nicholson declares that RBC has a consistent practice of terminating employees immediately in cases of misappropriation or dishonesty. Fourth, Ms. Nicholson observes that the Applicant did not appear to have any difficulty understanding the proceedings before the Adjudicator.

[6] Ms. Roper, who was co-counsel for RBC at the hearing before the Adjudicator, filed an affidavit to respond to the Applicant's allegations of procedural unfairness. She declares that at no time during the hearing before the Adjudicator did the Applicant request the assistance of an interpreter. Ms. Roper states that she did not observe the Applicant experiencing any difficulty in understanding the proceeding because of language issues. Ms. Roper also fleshes out the facts leading the Adjudicator's decision to admit the Applicant's speaking notes into evidence.

[7] The Applicant served the Respondent with written cross-examination questions. There are 84 questions addressed to Ms. Nicholson and 37 questions to Ms. Roper. On June 27, 2008, Ms. Nicholson and Ms. Roper provided their written responses to the written cross-examination. In a cover letter to the written responses, counsel for the Respondent objected to a number of the Applicant's written examination questions and advised that she had instructed Ms. Nicholson and Ms. Roper to not answer the objectionable questions.

[8] By this motion, the Applicant seeks an order compelling Ms. Nicholson to answer questions 1, 2, 3, 9, 12, 13, 20, 27, 28, 29, 30, 31, 32, 33, 40, 41, 42, 45, 47, 49, 51, 53, 55, 56, 57, 58, 81, 82, 83, and 84, and an order compelling Ms. Roper to answer questions 1, 2, 6, 7, 8, 9, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, and 37, as set out in the two Written Examinations dated June 23, 2008. In response to the motion, RBC conceded that certain questions initially refused were proper cross-examination questions and provided answers by

supplementary affidavits sworn by Ms. Nicholson and Ms. Roper. It maintained its objections regarding the balance of the questions.

Analysis

[9] The Applicant submits that the questions posed in the written cross-examinations are directed to facts sworn by the affiants in their affidavits, and are factually relevant to the judicial review application. RBC counters that the Applicant is attempting to re-litigate her claim, and many of the questions posed to its two affiants are outside the proper scope of cross-examination. It submits that even when a fact has been sworn to in a proceeding, it does not have legal relevance unless its existence or non-existence can assist in determining whether or not the remedy sought can be granted: *Merck Frosst Can. Inc. v. Canada (Min. of Health)* (1997), 80 C.P.R. (3d) 550 (T.D.); affirmed (1999), 3 C.P.R. (4th) 286 (Fed. C.A.) (“*Merck*”).

[10] The affidavit material in an application for judicial review should be aimed at providing the reviewing court with a record of the proceedings before the Adjudicator, and at supporting an argument going to procedural fairness or jurisdiction. The purpose of a judicial review is to review the decision on the basis of the record before the tribunal, and not to determine, by trial *de novo*, questions that were not fully canvassed in evidence before it. In *Ochapowace First Nation v. Canada (Attorney General)*, 2007 FC 920, the Court described the rationale for this purpose as follows:

[10] The rationale for that rule is well known. To allow additional material to be introduced at judicial review that was not before the decision maker would in effect transform the judicial review hearing into a trial *de novo*. The purpose of a

judicial review application is not to determine whether the decision of a tribunal was correct in absolute terms but rather to determine whether its decision was correct on the basis of the record before it: *Chopra*, at para 5; *Canadian Tire Corp. v. Canadian Bicycle Manufacturers Assn.*, 2006 FCA 56 (CanLII), 2006 FCA 56 at para 13.

[11] Upon carefully reviewing the parties' affidavits, I conclude that many of the Applicant's cross-examination questions go beyond testing the affiant's credibility, beyond establishing the record below for the reviewing court, and beyond the issues of procedural fairness. A party is not entitled to exploit cross-examination in order to correct deficiencies in the evidence before the decision-maker.

[12] Bearing these principles in mind, I now turn to the questions addressed to Ms. Nicholson and Ms. Roper.

Written Examination of Ms. Nicholson

Questions 1 to 4

Ms. Nicholson has provided a response to these questions in her affidavit sworn on July 21, 2008. No further response is required.

Question 9

Ms. Nicholson has provided a response to this question in her affidavit sworn on July 21, 2008. No further response is required.

Questions 12 and 13

Ms. Nicholson has provided a response in her affidavit sworn on July 21, 2008.

Question 20

According to the Applicant, this question seeks to determine “what the Applicant knew, how she knew it, and when she knew it” with regard to misappropriation and kiting. The question is not formally relevant since no deponent has sworn any facts on this issue, or questioned the evidence that was before Adjudicator Petersen with respect to whether the terms of misappropriation and kiting were thoroughly explained to Ms. Wu.

Questions 27 and 28

The questions are not formally relevant since no deponent has questioned the evidence that was before Adjudicator Petersen with respect to the definitions of “kiting” contained in the Code of Conduct.

Questions 29 and 30

The questions are not relevant. Cross-examination on an affidavit is limited to the facts sworn to by the deponents. Ms. Nicholson’s Affidavit does not contain any facts relating to Ms. Wu’s money transferring activities. In addition, Ms. Wu, in her affidavit, does not

take issue with the evidence before Adjudicator Petersen on whether her money transferring activities resulted in money being transferred to another banking institution.

Questions 31 and 32

Adjudicator Petersen's decision sets out the record of the evidence before him on the issue of kiting, misappropriation and the reasons for the Applicant's termination of employment. The questions are not legally or formally relevant.

Question 33

The question is irrelevant as it does not go to facts sworn to by Ms. Nicholson or the deponent of any other affidavits filed in the proceeding.

Questions 40 to 42, 45, 47 and 49

Ms. Nicholson has provided a response to these questions in her affidavit sworn on July 21, 2008 outlining the evidence that was before Adjudicator Petersen. No further response is required.

Question 51

The Applicant inquires whether RBC terminates all employees who are guilty in situations of misappropriation (emphasis added). The question should be answered in light of the assertion made by Ms. Nicholson at paragraph 6 of her affidavit that RBC has a consistent practice of termination. The ultimate relevance of the question and answer should be left to the judge hearing the application.

Question 53

The question is not formally relevant since no deponent has questioned any evidence that was before Adjudicator Petersen with respect to comparing Ms. Wu's termination for misappropriation with the discipline of other employees caught in situations of misappropriation. The question also goes beyond the proper scope of cross-examination and is an attempt to re-litigate Ms. Wu's dismissal.

Questions 55 to 58

The questions are not legally or formally relevant. On the face of the decision, Adjudicator Petersen noted that the Applicant had been summarily terminated for cause and based his decision on whether or not the Respondent had grounds for summary termination.

Questions 81 to 84

The questions are improper since they have no bearing on Ms. Nicholson's ability to observe whether Ms. Wu had difficulty understanding the proceedings. Question 83 is also irrelevant relevant. Question 84 has already been answered in Ms. Nicholson's Answers to Written Examination dated June 26, 2008.

Written Examination of Ms. Roper

Questions 1, 2 and 23:

With respect to question 1, the issue of the pre-hearing applications is only relevant in so far as they relate to whether Ms. Wu required an interpreter. As such, the nature of the other pre-hearing applications has no bearing on the outcome of the litigation. This question is nothing more than a fishing expedition. As for questions 2 and 23, they are irrelevant.

Questions 6 and 7:

The questions are irrelevant to the judicial review proceedings since the answer to these questions do not assist in determining whether or not the remedies sought by the Applicant can be granted.

Questions 8 and 9:

The questions have no bearing on Ms. Roper's ability to comment on her observations while in attendance at the hearing. Whether Ms. Roper herself has ever learned a foreign language has no bearing on the issue of whether Ms. Wu had difficulty understanding the proceedings, and no bearing on whether an interpreter should have been provided.

Questions 11 to 15:

The application for judicial review does not allege that Adjudicator Petersen's alleged failure to provide equal time to the parties breached the Applicant's right to procedural fairness or breached the principles of natural justice. On that basis, the questions are not relevant.

Questions 17 to 21:

This question asks Ms. Roper to comment on what factors led to her concerns regarding Ms. Wu's capacity to understand English. Ms Roper does not depose that she herself expressed any concern. Question 17 is therefore not relevant since it is outside the facts sworn to by Ms. Roper. Questions 18 to 21 have been answered in Ms. Roper's Answers to Written Examination dated June 27, 2008.

Question 24:

The Respondent concedes that this is a proper cross-examination question. Ms. Roper has now provided an answer to this question in her Affidavit sworn on July 18, 2008. No further response is required.

Questions 26 to 29:

Ms. Roper answered these questions in her Answers to Written Examination dated June 27, 2008. No further response is required.

Questions 30 to 34:

The general nature of the questions asked of Ms. Wu is not relevant. Questions 32 is improper because it calls for a conclusion or opinion. Question 33 is irrelevant.

Questions 36 and 37:

The questions are improper as they go beyond the facts sworn to by Ms. Roper or the deponent of any other affidavits filed in the proceeding. In any event, the question appear to be irrelevant to any issues in the application.

Conclusion

[13] The Respondent does not object to the Applicant filing a supplement to the Applicant's Record, provided any supplement is limited to the answers sought in this Motion. In the circumstances, the Applicant is granted leave to serve and file a Supplementary Applicant's Record.

[14] In light of the divided success of the parties, in that RBC conceded that certain questions refused should be answered, and has been ordered to answer an additional one, I conclude that the parties should bear their own costs on this motion.

ORDER

THIS COURT ORDERS that:

1. Ms. Joan Nicholson, affiant of the Respondent, Royal Bank of Canada, shall answer question 51 of the Applicant's written examination within 10 days of the date of this Order.
2. The Applicant is granted leave to serve and file a Supplementary Applicant's Record, limited to the additional answers provided by the Royal Bank of Canada, within 20 days of service of the answer to question 51 of Ms. Nicholson's written examination.
3. The Respondent shall serve and file the Respondent's Record within 20 days of service of the Applicant's Supplementary Record, or the expiration of the time for doing so, whichever is earlier.
4. The motion is otherwise dismissed, without costs.

"Roger R. Lafrenière"
Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-351-08

STYLE OF CAUSE: LI MIN (“AMANDA”) WU v.
ROYAL BANK OF CANADA

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: August 7, 2008

**REASONS FOR ORDER
AND ORDER:** LAFRENIÈRE P.

DATED: August 7, 2008

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