

IN THE MATTER OF THE *CANADA LABOUR CODE, PART III*

-and-

IN THE MATTER OF AN ADJUDICATION

BETWEEN:

BANK OF NOVA SCOTIA
- The Employer

-and-

SHANE WEBSTER
- The Complainant

AND IN THE MATTER OF the Complainant's dismissal from employment

Adjudicator: Howard Snow

Appearances:

On behalf of the Employer:

Peigi Ross - Counsel
Lucy Djelalian - Manager of Employee Relations

On behalf of the Complainant

Shane Webster - Complainant

Hearing held October 26 and 27, 2005, January 10, 11, and 12, and March 20, 2006, in London, Ontario.

AWARD

I. INTRODUCTION

This award deals with the Complainant's unjust dismissal complaint lodged under the *Canada Labour Code*. The Complainant sought damages in the amount of \$50,000 rather than reinstatement.

II. THE EVIDENCE

Shane Webster, the Complainant, began work with the Bank of Nova Scotia, the Employer, May 6, 2002, and was dismissed October 14, 2004. He worked as a financial advisor in the Montgomery Place branch in London, Ontario.

The Complainant's primary responsibility as a financial advisor was to serve customers in their credit requests, that is their requests for loans, mortgages, lines of credit, etc. The Complainant was to sell those items and he had sales targets which he was expected to meet. The sales targets related to new business such as new mortgages or new loans, and the new sales business was the key factor in employee evaluations and year-end bonuses. In addition, the Complainant was to assist the Employer in retaining existing business by, for example, facilitating mortgage renewals. Finally, the Complainant was required to comply with Employer policies and procedures, the contents of which were readily available to the Complainant.

The Employer's first witness was Ann Ciuciura who was Assistant Manager in the Montgomery Place branch during the Complainant's employment. She testified that the Complainant had reported to the branch manager, Brian Illman, but she said that coaching the Complainant had been delegated to her. She said that she coached the Complainant

weekly regarding sales and had coached him on technical skills. She said she reviewed many of the Complainant's credit files and, in so doing, instructed him on the Employer's policies and procedures.

Ms Ciuciura testified that the Complainant had no "lending limits," that is he had no authority to approve any customer credit application. She said that after two years of employment it was unusual for a financial advisor to have no authority to approve credit applications. She said the branch manager assigned credit limits but that none had been assigned to the Complainant as the manager was concerned about the Complainant's ability. The Complainant was required to refer all credit matters for approval to either the manager or to her as assistant manager.

Ms Ciuciura said that the Employer had determined the Complainant had violated the Employer policies and the Employer issued a Performance Improvement Program (commonly known as PIP) Advice to the Complainant several months prior to the dismissal. That February 2004 PIP Advice constituted a Final Conduct Warning under the Employer's Performance Improvement Program. I refer to the PIP Advice as a written warning. The written warning noted that the Employer required immediate improvement from the Complainant and stated that any recurrence or other violation of policy or procedure would result in further discipline which might include dismissal. The written warning indicated that the Complainant had misused a "RSP Catch Up LOC" (i.e., a retirement saving plan catch up line of credit) by allowing a loan at the prime interest rate to be used for loan consolidation purposes rather than for a Registered Retirement Saving Plan (RRSP). The written warning noted that the Complainant said he had done this because the customer had promised to move all his banking business to the Employer. The warning also stated that the Employer had rejected the Complainant's explanation.

At the end of the written warning is a note by the Complainant as follows:

I believe this is not the complete picture of what happened and I will maintain in my opinion I was creating a win-win situation for the customer and Scotiabank. I was never misleading or dishonest about this deal. I understand that this is a conduct PIP and will not affect my Performance Review or ability to post for other positions. I am aware however that if this happens again I may be fired.

Ms Ciuciura testified further about the incident which led to the issuing of the written warning referred to above. She said that the matter had initially been drawn to her attention by another employee. The customer had been in the branch to pay credit card balances and was told he could not have access to the funds in his account as they were advanced from a line of credit provided solely for RRSP purposes. Ms Ciuciura identified an Employer document which makes it clear that the RSP Catch-Up Line of Credit was to be used strictly for the purpose of the purchase of an RRSP.

Ms Ciuciura noted that the written warning was given for conduct, as distinct from performance, and that immediate improvement was required.

Ms Ciuciura testified that prior to February 2004 when the Complainant had received the written warning, the Complainant had been give a verbal warning for having a husband sign an Employer document on his wife's behalf. She noted that the Employer needed to keep accurate files and that employees were required to act honestly and with integrity and that having one person sign for another was a violation of Employer policy.

Ms Ciuciura then testified about the events following the written warning which led to the Complainant's termination. She said the Employer's automated on-line computer system - referred to as Sales Builder - was used for recording all customer interactions such as meetings, telephone calls, and sales. All sales officers recorded their own sales and, while other employees could review the entries, no other person had access to make entries in, or changes to, an employee's computer file. Each sales officer had a sales goal and the entries

in Sales Builder were relied upon by the Employer in assessing progress toward the individual's sales goal. The Employer had a document called "What Counts" which provided a detailed description of how and when to record sales. She said she had reviewed all the Complainant's entries on a weekly basis for the purpose of coaching the Complainant and she had concluded that the Complainant had recorded sales improperly in the system.

Ms Ciuciura then reviewed several of the Complainant's entries. Many of those actions were recorded in the Employer's files and I was provided with copies of items from those files, including documents indicating the names of the customers involved. As there is no need to identify those customers by name, I have used only the customers' initial in identifying the files.

In the J file, Ms Ciuciura noted that in August 2004 the Complainant had recorded a sale of a new mortgage for a couple, both of whom previously had individual mortgages with the branch. The new mortgage was less than the two old mortgages which were closed when the customers took the new mortgage. In the net result she said the Employer suffered a loss of some \$20,000 in assets from this transaction. Ms Ciuciura testified that this should have been recorded as the retention of existing business, rather than as the sale of new business. She said recording it as a sale of new business was inaccurate and was contrary to the Employer guidelines requiring employees to act with honesty and integrity.

Ms Ciuciura then testified about the A file. In September 2004 there were entries for a sale of both a mortgage and a line of credit. She said that it had come to her attention from another employee, Cathy Hathaway, that the Complainant had inquired as to whether a customer received a statement after a line of credit was established when no money was advanced. In addition, Ms Ciuciura said she was advised by Ms Hathaway that when making that inquiry the Complainant had stated that he needed to pad his totals. On investigating,

Ms Ciuciura said she learned that customer A sought only a mortgage and took only a mortgage, although it had been noted on the credit agreement that the customer could have been approved for credit to a total of \$135,750. She said that the Employer had approved only a mortgage to a maximum of \$70,000 and that a mortgage of \$67,000 was actually taken by the customer. The Complainant properly recorded a sale of the mortgage for \$67,000 but Ms Ciuciura said the Complainant had also improperly recorded a sale of a line of credit for \$68,800, a line of credit which was not sought, not approved, and not granted. Ms Ciuciura said recording this as a sale of a line of credit was inaccurate and was a violation of the Employer's guidelines which called for all employees to be accurate, honest, and act with integrity.

Ms Ciuciura then testified about the S file. In this case, she said that in June 2004 the Complainant had recorded as a new sale a deposit which customer S had made to an existing account. She said the Employer policy was clear that only the initial deposit to an account was to be counted in Sales Builder. There was to be no such claim for deposits made to existing accounts.

On the issue of deposits made to existing accounts such as had occurred in the S file, Ms Ciuciura testified that she had previously reviewed the Employer policy on entries with the Complainant. At that time she had made it clear to the Complainant that deposits to existing accounts were not to be entered as new sales.

Ms Ciuciura testified about other incidents involving the Complainant which the Employer considered misconduct.

As for the B file, Ms Ciuciura said the documents indicated that customer B had sought a mortgage for \$65,000. A mortgage for \$65,000 was approved by Mr. Illman, the branch

manager, although the credit agreement noted that the customer could have been approved for credit to a maximum of \$82,500. Ms Ciuciura testified that in August 2004 the Complainant had indicated in Sales Builder that, in addition to the mortgage, the customer was also awarded a \$12,500 line of credit and a \$5,000 Visa credit card. She noted that the Complainant had no lending authority and said that neither the line of credit nor the Visa were approved by the manager nor by anyone else. Ms Ciuciura said it was a serious matter for an employee to approve credit when that employee had no authority to do so. She noted that the Employer was bound by the credit given.

As for the P file, Ms Ciuciura testified that customer P was another employee in the branch. She testified that a Decision and Verification Worksheet which had been submitted for approval disclosed that in September 2004 the Complainant had sought approval for a mortgage for P in the amount of \$100,800. That worksheet listed the customer's down payment and stated that the customer's gross monthly income was \$2,000. Another employee in the branch, Luke Harvey, was given as the contact person for the verification of income. Ms Ciuciura testified that Mr. Harvey was not in a position to know or verify P's salary and that the salary listed for P was inaccurate. However the Complainant's worksheet indicated that the salary had been verified. Ms Ciuciura testified about the Employer's guidelines for verifying income and she testified that relying on either Mr. Harvey or the customer for income verification was a violation of those guidelines.

Ms Ciuciura also testified about an incident in which the Complainant sought her approval for a loan for a self employed customer but the Complainant had not obtained verification of the customer's income for the two previous years as was required by the Employer. Ms Ciuciura said she refused to approve the credit without the necessary income verification. She testified further that she and the Complainant had an exchange in which the Complainant claimed he could get the credit approved at another branch and noted that he had sales goals.

As the Complainant was leaving she said he “muttered the word ‘fuck’” which she believed was directed toward her. Ms Ciuciura felt this was inappropriate workplace behaviour. Ms Ciuciura said she spoke to Mr. Illman, the branch manager, and to the Employer’s employee relations staff about the Complainant’s use of profanity. She said a meeting was held October 12, 2004, at which time the issue of the Complainant’s profanity with her was discussed and the Complainant admitted referring to her as a “fucking bitch.” She said that other matters, such as the Complainant’s profanity with another employee, Julie Farquhar, and the problems with the A file, were discussed. At the end of the meeting Mr. Illman suspended the Complainant with pay pending an investigation.

The Employer terminated the Complainant’s employment by letter October 14, 2004.

In his cross examination of Ms Ciuciura, the Complainant raised the issue of coaching and suggested that he had not been coached. Ms Ciuciura repeated that coaching had been delegated to her and she had coached the Complainant on a regular basis. She noted that from the time Mr. Illman, the manager, delivered the written warning in February 2004 until the dismissal in October 2004 Mr. Illman had also coached the Complainant. Ms Ciuciura said that even during that period she had continued with day to day coaching. Several other issues were raised with Ms Ciuciura with a suggestion that other witnesses would testify differently. On those matters Ms Ciuciura was invited to change her testimony but she did not do so.

Cathy Hathaway was a Customer Support Supervisor at the Montgomery Place branch during the time the Complainant worked there. She described the relationship between Ms Ciuciura and the Complainant as one involving friction. Ms Hathaway said Ms Ciuciura was direct with the Complainant, advising him what information was required in a credit file. She said that Ms Ciuciura had described some things which the Complainant had done as “dumb.”

Ms Hathaway testified about the A file. She said the Complainant had come to her office and asked whether the customer A would get a statement if a ScotiaLine line of credit were activated. She said she had replied yes. The Complainant then inquired about whether there would be a statement in a differing fact situation and she again replied that the customer would get a statement. The Complainant advised Ms Hathaway that the customer was “OK with him opening a credit line” even if it was not used. She said she asked the Complainant why he was inquiring and he replied that he had to pad his totals. Ms Hathaway said she could not believe what the Complainant had said, that she could not believe he would say it out loud. She said she reported the conversation to Ms Ciuciura and then to Mr. Illman, the manager.

Ms Hathaway also testified about the R file. She had advised the Complainant that the file needed a signature from customer R. She said the file was returned within five minutes with the file signed in the Complainant’s writing. She said that she could not believe what the Complainant had done and advised the manager.

Julie Farquhar was the Employer’s final witness. She was a Customer Service Manager at the branch during the Complainant’s employment. She testified about an incident October 12, 2004, when she had approached the Complainant about seeing a customer. As Ms Farquhar recorded in a note made that day, the Complainant said to her “Ann’s [a reference to Ms Ciuciura] a fucking bitch! She should just mind her own fucking business! Fuck!” Later in that interaction he “gave the finger” and said “Oh fuck! Just send the client in. Yes I do want to talk to him. Fuck!” Ms Farquhar said she did not think the Complainant’s words and actions were called for and that she reported the matter to both Ms Ciuciura and Mr. Illman, the manager.

Luke Harvey was the Complainant’s first witness. Mr. Harvey had been a Senior Personal

Banking Officer at the branch during the final months of the Complainant's employment there. Mr. Harvey said he began working at the branch in February 2004 and he described his position as identical to the Complainant's position. Mr. Harvey said he had found the Complainant to be honest and well liked by his clients. Mr. Harvey said he was unaware of the Complainant being coached by Ms Ciuciura, although he knew that the Complainant was coached by Mr. Illman.

As for the P file, Mr. Harvey said it was really his deal rather than the Complainant's deal, although he then said that it was not really a deal at all. Mr. Harvey said that P had approached him to inquire as to whether P could afford a mortgage. Mr. Harvey said that although the form used was for a mortgage approval, the true purpose was for a mortgage pre-approval. Mr. Harvey said he was unsure as to how the Complainant had been involved in this matter.

In cross examination, Mr. Harvey agreed that all his information about the Complainant came from the Complainant himself. Mr. Harvey agreed that, in the context of the P file, if the Complainant had filled in a mortgage form he was responsible for ensuring that the form was accurate and complete. Mr. Harvey agreed that the Employer had at least three other ways to obtain information regarding pre-approvals of mortgages, but he said that the information generated using the other three ways was not as accurate as doing a mortgage pre-approval as though a request for the approval of a mortgage.

Finally, Mr. Harvey testified that the mortgage form in the P file was a form in which the name of the branch contact person (where the Complainant's name appeared in the Exhibit) changed every time the computer file was checked.

Cristine Fekete was a financial advisor in this same branch. She said she could not recall Ms

Ciuciura coaching the Complainant. She said that Ms Ciuciura had often spoken negatively about the Complainant.

In the context of the P file, Ms Fekete said the name of the branch contact person in the mortgage application (in the exhibit in evidence the Complainant's name) was automatically filled in when the file was first opened and that the only way to later change it was to deliberately delete the name and type a new name in its place.

Sandra Marie Hanson was a Customer Relations Representative at this bank branch. She testified that she had access to all employees' Sales Builder entries as part of her job in making appointments for customers to meet with sales staff. She said that she could not recall seeing any appointments in Sales Builder for the Complainant to be coached by Ms Ciuciura.

Shane Webster, the Complainant, was the final witness. The Complainant represented himself at the hearing and when he testified about the concerns raised by the Employer, his evidence was frequently in the nature of argument rather than evidence and it was not responsive to the Employer's evidence. I attempted to assist him with the difficult job of simultaneously being advocate and witness but had little success. The Employer then noted that this adjudication was designed to be adversarial in nature and requested that I resume a more neutral stance.

The Complainant testified about the written warning (PIP Advice) and said that he had been unclear about the meaning of that warning and as to the follow up that would occur. He noted that the Employer policy provided for follow up for an employee with performance problems. He said that the Employer had not done as its policies required in terms of following up on employee performance problems. As for the actual deal referred to in the

written warning, he said he had simply done as he had seen his manager do in the past.

As for the J file, the Complainant said he had not been dishonest about it. He said he recorded all such deals in this same manner.

As for the A file, the Complainant said he had not been coached on it nor told that his actions were wrong prior to his dismissal.

As for the S matter, the Complainant said he had no memory of it. He said that he had not been coached on this issue while an employee.

As for the B file, the Complainant said Mr. Illman, the manager, had approved everything he had done on the file.

As for the P file, the Complainant said it was not his deal, and that it was not a real deal. He said he had been asked to do a mortgage pre-approval. He said he had done nothing wrong on that file.

As for the R file referred to by Ms Hathaway, the Complainant said he had never heard of the matter until it was raised in the hearing.

In general terms, the Complainant testified that he was not coached by Ms Ciuciura. On those occasions when he dealt with Ms Ciuciura the Complainant said it was only because Mr. Illman was unavailable. The Complainant testified that he had never been dishonest, nor had he breached any guidelines regarding integrity. He said he had recorded sales in the same way that he had seen other employees record sales. He noted that in August 2004, after the written warning, Mr. Illman had given him approval to take an Employer course and the

Complainant queried why he would have been approved if there had been a problem with his conduct.

The Complainant then testified about the damages he had incurred as a result of his dismissal. After the dismissal he said he was told he might not be able to sell mutual funds. He indicated that the sale of mutual funds was a matter of considerable concern to him as he had spent time and energy becoming licensed to sell mutual funds and he felt that his career was in jeopardy if he was unable to sell them. However, he noted that the Ontario Securities Commission had later agreed to reinstate his mutual fund licence as the Commission had concluded that he had done nothing wrong.

Following his dismissal, the Complainant said he had a tentative offer of employment from the Canadian Imperial Bank of Commerce but that the offer was withdrawn after a negative reference from the Employer. He said he then worked for Desjardins Credit Union but he had left Desjardins, as it did not sell mutual funds, to work for TD Canada Trust where he was again able to sell mutual funds.

In cross examination, the Complainant agreed that he had learned from Mr. Illman when he took files to him for approval. He agreed that the Employer expected all employees to learn about Employer policies and procedures and that he had access to these policies and procedures. He agreed that the written warning indicated that he could be fired for further misconduct. He agreed that his written warning had been given for conduct, not for performance, and that it called for immediate improvement. He agreed that he had signed the Employer's Guidelines for Business Conduct and that he had indicated that he followed those guidelines during his employment. He agreed that those Guidelines called for employees to conduct themselves "honestly and with integrity".

As for the J file, the Complainant agreed that at the end of the day the Employer had less business.

With respect to the S file, the Complainant said he only did as the manager directed and as he had observed others do.

As for the B file, the Complainant agreed that he had no lending authority and for him to have approved credit would have been a serious violation of Employer guidelines. However, he said that the manager had approved all credit. As for the evidence of Ms Hathaway, above, he said he thought she had been testifying about the A file instead of this B matter.

As for the P file, the Complainant agreed that he was responsible for the accuracy and completeness of the file when it was submitted. However he asserted that the manager, Mr. Illman, had advised him it was proper to simply take the information provided by the customer in a mortgage pre-approval and he repeated that this was intended as simply a pre-approval.

The Employer then put to the Complainant signature cards in another file, the H file, in which it appeared the Complainant had not secured a customer's signature, allowing someone else to sign. The Employer suggested to the Complainant that this was further evidence that he had not followed the Employer guidelines and had not always acted honestly and with integrity.

Finally, the Employer reviewed his damage claim with the Complainant.

In re-examination, the Complainant repeated that in the B file the manager had approved everything he had done, that he had done nothing wrong in the P file, and that in the H file

he had done nothing wrong. He said that at no time did he allow a person to sign on another's behalf nor did he forge a customer's signature.

III. PROVISION OF THE *CANADA LABOUR CODE*

The following is the key provision of the *Code*:

PART III

...

DIVISION XIV

UNJUST DISMISSAL

240. (1) . . . any person

(a) . . .

(b) . . .

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

The *Code* then contains provisions for the investigation and adjudication of such a complaint.

IV. EMPLOYER POSITION

It was the Employer's position that there was just cause for the Complainant's dismissal.

The Employer submitted that the duty to act with honesty and integrity was at the heart of this employment relationship. That duty should be construed strictly - a violation of the duty to act with honesty and integrity was a violation of a fundamental aspect of the employment relationship.

The Employer said the Complainant had been warned of the consequences of his actions and had been given a final written warning - PIP Advice - in February 2004. The written warning

clearly indicated the Employer view and it noted that further misconduct might lead to dismissal. The written warning was for misconduct, not poor performance, and required immediate improvement. The Complainant had engaged in further misconduct which justified dismissal.

The Employer submitted that the most serious misconduct and main ground for dismissal was the fabrication on the computer tracking system - Sales Builder. The evidence outlined how entries were made and included a document - What Counts - which detailed what could be claimed as a sale. The Complainant's entries amounted to serious policy violations and his conduct was, in addition, a violation of one of the Employer's policies - Guidelines on Business Conduct - and a violation of the requirement to act with honesty and integrity.

In the alternative, the Employer submitted that the Complainant had engaged in other types of misconduct such as failing to verify income and approving credit although he had no authority to do so. This misconduct was in violation of Employer rules and it also warranted termination.

The Employer noted that the Complainant's case appeared to rely on his not having been coached. The Employer submitted that he had been coached on a regular basis every time he brought a file for review. He was able to learn from each such file. Moreover, he had access to all Employer policies and was able to review them and comply with them.

Whether the Complainant was coached or not, there was no justification for dishonesty in the computer entries. Similarly there was no justification for the policy violations in not verifying income in loan requests, not ensuring the accuracy of documents, and in approving a loan when he had no authority to do so.

The Employer should not be required to specifically warn employees of the need to act honestly. In any event, the Employer had provided a written warning which made it clear that further misconduct could lead to termination.

In addition, the Employer said that any personality clash the Complainant may have had with Ms Ciuciura did not justify misconduct or dishonesty.

The Employer then reviewed the various incidents in detail and urged me to come to the same conclusions which the Employer had reached.

The Employer asked me to prefer the evidence of the Employer witnesses where there was conflict in the evidence. The Employer said the Complainant's evidence lacked candour and had been self-serving, and the Employer reviewed various aspects of the Complainant's testimony which it said supported that position. As a result, the Employer said that on many issues the Complainant's testimony was not credible.

In summary, the Employer said that the Complainant's termination had been just. After he had been given a final written warning, the Complainant had not acted with honesty and integrity, especially in his computer sales entries. The Complainant had engaged in continued misconduct such that termination was warranted under the concept of progressive discipline.

If the dismissal were found to be without just cause, the Employer noted that reinstatement had not been sought and submitted that the damages would be much lower than claimed. The Employer noted that the Complainant had been unemployed for only a short time. The Complainant had been re-employed by Desjardins shortly after his dismissal at a higher salary than he had received from the Employer. The claim for damages arising as a result

of his having quit that higher paying job should not be allowed. In addition, the claim for damages for mental distress was not supported on the evidence.

The Employer asked me to conclude that the Complainant had been terminated for just cause and that there was no violation of the *Code*.

The Employer relied upon the following authorities: *Ivanore v. Canadian Imperial Bank of Commerce* (1983) 3 C.C.E.L. 26 (Dorsey); *Evans and Royal Bank of Canada* [1996] C.L.A.D. No. 1125 (Fagan); *Hallingham and Royal Bank of Canada* [1995] C.L.A.D. No. 535 (Oakley); *Chisholm and Bank of Nova Scotia* [1997] C.L.A.D. No. 495 (Carrier); and *Tarrabain v. Bank of Montreal* [2002] C.L.A.D. No. 67 (Jolliffe).

V. COMPLAINANT POSITION

The Complainant submitted that his dismissal had been unjust. He submitted that he had always acted with honesty and integrity. He noted that neither he, nor any of his witnesses, testified about any actions on his part that were in conflict with his submission that he had acted with honesty and integrity. Moreover, he asserted that the customers and other staff members liked him.

As for falsifying entries in the Employer computer system, the Complainant said he never did anything he was not authorized to do. He submitted that he had never fabricated entries nor put himself ahead.

The Complainant submitted that two of his witnesses, Mr. Harvey and Ms Hanson, testified that they believed the Complainant was to be coached by the branch manager, Mr. Illman, but that they never actually saw the Complainant being coached by Mr. Illman. The

Complainant said there was no evidence he was coached by Mr. Illman and there was no evidence that Mr. Illman ever objected to what he did other than in the February 2004 written warning. He noted that there was no documentary evidence that he had ever been coached by Ms Ciuciura.

The Complainant reviewed some of the files which had been relied upon by the Employer and critiqued the Employer evidence on those matters. The Complainant noted other potential witnesses whom the Employer had not called to testify. He asked that I find he had done nothing wrong on those files.

In summary, the Complainant submitted that there was no proof that he had acted dishonestly. He submitted that he and his witnesses had testified that he had acted with honesty and integrity.

As for remedy, the Complainant sought \$50,000 in damages for lost wages and benefits. He noted that he had been unemployed for four months. Then he had obtained employment with Desjardins at a higher salary than he had received while with the Employer, but he had later quit that job in order to take a third job where he could sell mutual funds. That third job paid less than he made when working for the Employer and he asked to be compensated for that difference in pay.

VI. CONCLUSIONS

The nature of the dismissal

There are two types of dismissal which may be just under the *Code*.

The first and more common type of dismissal involves employees who engage in misconduct for which they are responsible. That misconduct is said to be culpable, or blameworthy, and it is accepted that such misconduct by employees may be corrected. In such cases both employers and adjudicators commonly use progressive discipline. That is, before the dismissal of such an employee can be said to be just, the employer may be required to attempt to correct the employee's behaviour through lesser forms of discipline - such as verbal or written warnings or unpaid suspensions from work - designed to bring home to the employee that the misconduct is unacceptable and will not be tolerated. The Employer's actions in this case fall within this type of dismissal and the verbal and written warnings given for misconduct clearly constituted progressive discipline.

The second type of dismissal involves employees who are simply unable to do their job. Those employees are not to be blamed for their job failings and there is no expectation that lesser forms of discipline, such as warnings and suspensions, will cause the employees to improve their job performance. If an employee is unable to perform the work required then the dismissal of that employee may be just under the *Code*. In such a case the Employer may be required to first clearly instruct and re-instruct, or in the context of this case "coach", the employee as to the proper manner of doing the job and then to allow the employee adequate time to demonstrate improvement in job performance.

In this case, the Employer's Performance Improvement Program contemplates both types of dismissals and, in particular, indicates the steps the Employer will take in the second type of situation, i.e. poor performance, in terms of the help to be provided the employee in meeting the Employer's job expectations and the time frame for moving from one step of that program to the next.

I raise this distinction because the Complainant made several suggestions during the evidence

and submissions which would have been helpful to his position if the Employer had been following the second basis of dismissal. However, the written warning made it clear that the Employer's concerns involved the Complainant's misconduct, a point which the Complainant clearly acknowledged in his note on the warning itself, and the written warning further stipulated that immediate correction was required from the Complainant. In this case the Employer dismissed the Complainant because of his misconduct - the first of the two approaches outlined above - and as a follow up to the final written warning given for misconduct. Given that the Employer's concerns were clearly related to the Complainant's misconduct, those Employer policies addressing employees who are struggling in the performance of their duties do not apply in this case.

Did the Complainant's actions justify a disciplinary response?

I turn to the incidents which the Employer relied upon for the termination.

As for the J file, the Complainant claimed a sale of a new mortgage in a situation in which he was aware that two previous mortgages were closed and that the amount of the new mortgage was considerably less than the two closed mortgages. The Complainant acknowledged that this resulted in a decrease of net assets for the Employer. I find it difficult to accept that a person whose job was primarily to sell new business would think that this transaction was the type of transaction that the Employer wanted and for which it would reward employees. Although the Complainant asserted that he had recorded all similar deals in the same manner, even assuming that he did as he asserted, that does not make his actions proper. I conclude that the Complainant's actions in recording this as new business were contrary to the Employer's policy and, apart from that, were inconsistent with the basic nature of his job. I conclude the Complainant's actions justified discipline.

In the A file, the Complainant recorded a sale of a mortgage and of a line of credit although the line of credit was not sought and was not approved. Ms Hathaway testified that this was the file which the Complainant had inquired about, asking about situations in which the customer would get a statement if a line of credit was opened. It seemed clear that the Complainant was seeking a way to set up the line of credit without the customer making inquiries about credit which had not been sought. I conclude that the Complainant's motivation can be found in his comment to Ms Hathaway that he needed to pad his totals.

As for the S file, the Complainant recorded as a sale a deposit to an existing account. Although the Complainant initially said he had no memory of this matter, he later testified he only did as the manager directed and as he saw others do. I note regarding this file that Ms Ciuciura testified about having reviewed with the Complainant this issue of recording deposits to existing accounts in the computer tracking system before the S incident and that her testimony was uncontradicted. In any event, I find that the claim for this deposit in Sales Builder was a violation of policy.

As for the B file, the Complainant claimed that the manager had approved everything he had done, but there were no indications in the file to support that claim. On the contrary, the documents in the file seek approval for only the mortgage and the manager's signature and initials on the file clearly suggest that only the mortgage was actually approved. I reject the Complainant's claim that the manager approved the other credit. As in the A file, I conclude that the Complainant was attempting to pad his sales totals.

Turning to the P file, there was considerable conflicting testimony about this matter. What was clear was the documents on their face seek approval for a mortgage. It was also clear that the Employer had other ways for a sales officer to obtain a mortgage pre-approval. The Complainant and Mr. Harvey both said that the other ways of getting a pre-approval were not

as good, but it was not clear from their testimony why they thought that to be the case. In any event, the Complainant clearly knew there were other approaches designed by the Employer for the very purpose and, instead of using one of those methods, he submitted the mortgage application without verifying the information and without making any note that it was not actually a request for a mortgage approval. Although no obvious harm came from this misleading action, it was clear that the Complainant did not follow the basic Employer guideline requiring employees to ensure honesty and integrity in all their dealings, and he did not verify the income as he claimed he had done.

Looking at the above five files generally, I find that the Complainant's actions in the various files were similar in the sense that the Complainant was playing "fast and loose" with the Employer rules and his actions were ones which benefited him.

I note that there was no evidence nor submission that any of the Complainant's actions in the above files were the result of innocent mistakes on his part. Instead the evidence persuades me that the actions were deliberate. I conclude that the Complainant's actions in the above files - that is the J file, the A file, the S file, the B file, and the P file - each were acts of misconduct which justified a disciplinary response.

Finally, I accept that the Complainant used profanity and that in this work environment the use of profanity was inappropriate. I do not, however, think that the Complainant's use of profanity weighed very heavily in the Employer's decision to dismiss the Complainant. In any event, I place very little weight on this issue.

The Complainant's record of discipline

In determining whether the dismissal was a just response to the Complainant's misconduct,

it is necessary to assess his prior disciplinary record.

There does not appear to have been a mechanism for the Complainant to have contested either the verbal or the written warning before a third party decision maker had he wished to do so. Because of this, before placing any weight on those warnings, I examine them to ensure that they were given for cause.

Notwithstanding that there was no way to contest the warnings, I accept Ms Ciuciura's uncontradicted evidence that the Complainant had been given a verbal warning prior to being given the written warning. On the uncontradicted evidence that the Complainant had allowed one customer to sign on behalf of another, I accept that the verbal warning was justified.

Ms Ciuciura testified about the events leading to the written warning (an RSP Catch-up Line of Credit given for the purpose of debt consolidation) and her evidence was not disputed by the Complainant. In addition, I note the Complainant's written comment included on the written warning in which he did not dispute the facts. Instead, he simply asserted that he had done nothing wrong and had created a win-win situation. However, it was clear on the documents in evidence that the RSP Line of Credit was only to be used for RRSP's. I therefore accept that the written warning was given for cause.

Was dismissal too severe a penalty?

Although the Complainant did not seek reinstatement, in order to award him damages I would first have to find that the dismissal was too severe a penalty for what I concluded above was misconduct justifying a disciplinary response.

In assessing whether a dismissal is just under a system requiring just cause, it is necessary

to consider at least three factors. First it is necessary to assess how serious the wrong was, as minor misconduct would ordinarily merit mild discipline and serious misconduct would ordinarily merit greater discipline. Secondly, the discipline must be related to the employee in the sense that a particular form of misconduct might lead to a just dismissal for an employee with only a short period of employment or with a record of discipline, whereas that same misconduct might not justify the dismissal of a long serving employee or an employee with no prior discipline. Finally, it is necessary to keep in mind that systems of discipline for just cause should be corrective in nature and, if the employee can learn from the mistake(s), dismissal is generally viewed as too severe a form of discipline.

I consider first the nature of the misconduct. The Employer deals with money. A person in a financial advisor position, such as the Complainant's, primarily sells credit, or access to the Employer's money. In the banking industry honesty and integrity in dealing with the product being sold - access to money - is central to the employment relationship. I agree with the authorities cited by the Employer in which other adjudicators have indicated a similar view. Employees in this industry, including employees in the Complainant's job, are required to act with honesty and integrity and repeated deviations from that standard can properly lead to dismissal. The Complainant's misconduct was not only repeated but the misconduct involved an issue which was central to his employment.

Secondly, the misconduct needed to justify the dismissal of a long serving employee is greater than the type of misconduct required to justify the dismissal of an employee with only a short period of employment. Here I note that the Complainant was a relatively junior employee who had been employed for under two and one half years. In addition, I note that the Complainant had a record of discipline in the form of the two warnings.

Finally, turning to the corrective nature of just discipline, I note that the Employer first gave

the Complainant a verbal warning. The Employer next imposed the written warning. Both warnings were provided for misconduct of a similar nature - situations in which the Complainant had taken liberties with the Employer's rules. The Complainant had acknowledged in the written warning that he knew further violations could lead to his dismissal. It is difficult to determine the motivation for the Complainant's actions after the written warning. The Complainant seemed to behave as though he should not have to follow the rules applicable to all employees. It would appear that he was padding his totals in many files, as he expressed it to Ms Hathaway in their discussion about the A file. The earlier discipline appeared to have had no impact - his misconduct continued. There was nothing in the evidence to suggest that the two warnings made any improvement in the Complainant's conduct. Had there been evidence of improvement, that evidence might have led to a conclusion that the Complainant could have learned from a lesser form of discipline.

None of the above three factors suggest that the dismissal was too severe a penalty.

Nevertheless, I have considered the possibility that dismissal was too severe and that a lesser penalty might be substituted for the dismissal. But I have rejected that possibility of substituting a lesser penalty as there was nothing in the evidence that suggested the Complainant acknowledged his misconduct, nor that he was motivated to improve, nor that he might have changed his ways if he had been given another chance. In all the circumstances I conclude that the penalty of dismissal was justified in this case.

Summary

I find that the Employer had cause to terminate the employment of the Complainant. The termination was not in violation of the *Code*.

The complaint is dismissed.

Dated in London, Ontario, this 11th day of August, 2006.

Howard Snow, Adjudicator