

IN THE MATTER OF AN ADJUDICATION under Division XVI, Part III of the Canada Labour Code

AND IN THE MATTER OF a complaint of alleged unjust dismissal

BETWEEN:

P.D.

(the Complainant)

AND:

The Bank of Nova Scotia

(the Respondent)

HRSDC File No. YM2707-11294

BEFORE:

Susan D. Kaufman, Adjudicator

APPEARANCES:

FOR THE COMPLAINANT:

Stephen LeMesurier, Counsel, Monkhouse Law
Lisa Sangermano, Paralegal, Monkhouse Law
P.D., Complainant

FOR THE RESPONDENT:

Shane McNaught, Barrister & Solicitor, Senior
Legal Counsel
Jason Joseph, Student-at-Law, Legal Services
Jacqueline Ting, Student-at-Law, Legal Services

Heard at Toronto, Ontario on October 16, November 2, 8, 9, 14, 19, December 10, 11, 2018 and January 17 and 18, 2019

Written Submissions received January 25, February 28 and March 18, 2019

Date of Decision: May 31, 2019

Decision

This decision is in respect of the complaint of alleged unjust dismissal brought by P.D. arising from the Bank of Nova Scotia's termination of her employment as a Customer Service Representative (or Teller) on June 15, 2017.

The Minister of Labour appointed me under s.242 of the *Canada Labour Code*, R.S.C. 1985, c. L-2, as Adjudicator to hear and decide this complaint. It was not in dispute that as of the date of her complaint, June 19, 2017, P.D. had completed twelve consecutive months of continuous employment with the Bank of Nova Scotia (hereinafter "the Bank"), and was not a member of a group of employees subject to a collective agreement. Her complaint had been made within ninety days of the date of her dismissal. There were no objections to my jurisdiction to hear and decide her complaint and I am satisfied that I have jurisdiction to do so.

Background:

It was not in dispute that P.D. started her employment with the Bank on October 12, 2012 as a casual Teller and in July 2013 became a permanent part-time Teller (CSR) at a branch in the Greater Toronto Area, and that it was from the latter status and branch that her employment was terminated.

The Bank's June 15, 2017 termination letter (Ex. 1, Tab 11) referenced that P.D. had been advised on June 8, 2017 of her "immediate suspension, with pay, pending the outcome of [the bank's] investigation into your involvement in irregular practices." It stated, "We advise that we have now completed our investigation into these matters and are terminating your employment, for cause, effective June 15, 2017." Those were the stated reasons for the termination of her employment.

It was not in dispute that the primary and operative reason P.D.'s employment was terminated was that the Bank had concluded that she had "misappropriated" i.e. stolen, \$1000.00 from the Bank on March 30, 2017. It was also not in dispute that the "irregular practices" attributed to P.D., absent the alleged theft, would have resulted in discipline of some kind, but not termination of her employment.

The Evidence:

The Bank entered into evidence, on consent, two Books of Documents (Ex. 1 and 3) and two DVDs or CD-ROMs. One CD-ROM (now identified as Ex. 5) contains reproductions of video surveillance taken by the Bank's permanently installed security cameras, primarily of P.D. and another Teller at their adjacent wickets (identified in the video clips as stations 5 and 6) at five selected times on March 30, 2017. The other CD-ROM (now identified as Ex. 6) contains an audio reproduction of an interview of P.D. conducted by the Senior Investigator, Corporate Security, an Investigator in orientation, Corporate Security, and the Manager of Employee Relations on June 8, 2017. The Bank also provided for convenience of reference a typed or word-processed transcription of the June 8, 2017 interview, at Ex. 3, Tab 12.

Aside from the complainant P.D., the witnesses will be identified in this Decision only by their position title as of March 30, 2017. It was also agreed by counsel for both parties that the customer involved in the transaction of interest to the Bank on March 30, 2017 would be identified in this decision as "Mr. X."

In the DVD or CD-ROM (Ex. 5) the video surveillance clips are identified as:

Video 1	Teller 5-6	11:32-11:33
Video 2	Teller 5-6	11:33-11:35
Video 3	Teller 5-6	13:45-13:49
Video 4	Teller 5-6	13:54-14:06
Video 5	Teller 5-6	15:40-15:42

According to the Small Business Advisor, there are four surveillance cameras trained on the Tellers at the branch. The video surveillance cameras in Video clips 1 – 5 (Ex. 5) were behind the Tellers at wickets 5 and 6, such that a Teller's face could only occasionally be seen, when they turned sideways or toward the camera. The Tellers, and particularly P.D., generally faced toward the counters of their wickets, their backs to the cameras, and the customers, when present, could generally be seen facing the Tellers across the counter of their wicket. The Video clips were silent; sound was not recorded. It was not in dispute that on March 30, 2017, P.D. was stationed at wicket 5, which appears to the left in the Video clips (Ex. 5), and wicket 6 appears to the right.

The Acting Teller Supervisor (ATS) on March 30, 2017 and the branch Small Business Advisor (SBA) were present at the branch on March 30, 2017. The branch Manager of Customer Service (MCS), who filled that position during the period April 3 to May 2 or 8, 2017, was not present at the branch on March 30, 2017. The ATS, SBA and MCS gave evidence with regard to the placement or position of locked and unlocked drawers at the Tellers' wickets at the branch, as well as their function, supplemented by a photograph of the drawers (Ex. 3, Tab 2), about which there was no disagreement among them. Their detailed description of the function, etc. of each drawer will not be set out in this Decision.

They stated that this branch uses a "team" cash system, wherein at the end of each business day a balance is done on the cash and digital or computer inputs of the team or group of Tellers who has worked that day, as opposed to each Teller having to do a separate individual balance. The SBA acknowledged that in the context of the team cash system, she had seen a Teller take cash from her own cash drawer and walk it over to a colleague Teller who needed more cash than was in her own drawer for a customer transaction.

They each described the protocol the Tellers are expected to follow when handling and counting cash, particularly dollar bills, which is to be paid out to the Bank's customers. They were in agreement that without exception, the Teller must count out the bills by hand, whether in front of the customer at their wicket, or, if the customer objects to the bills being counted by hand in front of them, the count is to be done to the side. A bill counting machine can be used to supplement or doublecheck the hand count. The MCS (April 3 to May 2 or 8, 2017) described the process for handling cash as follows:

The Teller would receive instructions from customer as to the amount of money they want.

Teller removes the cash from the drawer, counts the # of bills to make e.g. \$200.00.

Teller would then key the denomination and number (of bills) into the computer. We count the cash three times:

1. when we remove it from the drawer and key it in;
2. again, on top of the counter
3. count it out to the customer.

When customer doesn't want cash to be counted on the counter, we do it to the side.

With respect to the bill counting machine, the MCS stated:

It's a digital machine. You key in the quantity and put in the bills. The machine will stop counting when it has processed the number of bills the Teller has keyed in. The rest can be returned. We use the machine to bundle money into hundreds. The machine cannot differentiate denominations. That's what the extra counts are for.

The ATS, SBA, MCS (Apr. 3 to May 2 or 8, 2017) and the Teller Supervisor (TS) also said that there is a protocol with regard to how Tellers are to respond to a claim by a customer that s/he (the customer) did not receive the full amount of cash in a previous transaction, i.e. when a customer claims to have been "shorted." They said that the customer must be told that their complaint or concern will be taken into consideration at the end of the business day, when a balance is done, the customer's name and phone number is taken, and the customer is told that the branch will contact the customer the next day and if the balance indicates that the customer was not paid the correct amount, the bank will address that issue.

The March 30, 2017 ATS stated the protocol to be:

Take down the customer's name and number.
Tell customer the Manager will contact them next day after doing a balance.
Never give the customer cash, refer it to management.

The SBA stated the protocol to be:

Typically the customer would go to the Teller who had helped him.
The Teller would refer to the Supervisor.
The instructions given by the Supervisor would be we would need to balance at the end of the day to determine if we were short or over.
If we'd short-changed the customer, once that happened we would notify the customer of the outcome.
This protocol is communicated to branch staff during training, when they first start working, and during regular meetings with Tellers.

Regarding the protocol as to how to respond to a claim by a customer of having been "shorted," the MCS from April 3 to May 2 or 8, 2017 stated, "If it's written, I couldn't tell you." The Branch Manager said that the Protocol "might be in the Job Aides," and added, "we have thousands."

P.D. did not dispute that she had read the bank's Code of Conduct (Ex. 1, Tab 2) and the passage at p. 15 under the heading "Improper transaction prevention" which states:

All transactions must be authorized and handled in an approved manner, and must adhere to applicable standards for knowing your customer. Do not undertake, participate in or facilitate any customer transactions that are prohibited by law, regulation or policy or that, by Scotiabank's standards, could be considered improper or suspect.

No written protocol or policy dealing with how a Teller is to proceed if a customer claims to have been shorted in a transaction was produced in evidence.

The evidence did not establish that the above protocol was communicated to P.D. during training when she first started working and during regular meetings with Tellers, or at any time before March 30, 2017. P.D.'s undisputed evidence was that her training for her Teller duties was received by way of computer tutorials which she completed by herself.

The ATS and the MCS stated that in the process of doing the end of day balance, the team cash is counted and re-counted if necessary, and checked against the digital record of inputs to ensure there has been no error.

The evidence of the Teller Supervisor (TS), who had not been at the branch during the events of March 30, 2017, added, with respect to the process of doing the end of day balance, that "ordinarily at the end of day," if the "balancing Teller" determines that the branch is "short," after the cash is counted and an imbalance is confirmed, the "balancing Teller" views the video surveillance of the day to try and find out when and how the imbalance occurred.

It was not in dispute that the role of "balancing Teller" is rotated among each of the Tellers at the branch, and that on March 30, 2017, P.D. was the "balancing Teller". It was also not in dispute that the "Closing Cash Balance Recap" for March 30, 2017, also referred to as "the card," (Ex. 3, Tab 1) and the FFT Daily Exception Report for March 30, 2017 (Ex. 1, Tab 15) indicated a cash shortage of \$995.45 at the end of the day. The evidence did not indicate that P.D. was asked or directed, as balancing Teller, at any time, to view the video surveillance of the day, nor did P.D. ask to view the video surveillance.

The Branch Manager stated that asking or directing P.D. to view the video surveillance would not have been appropriate in the circumstances.

The Evidence of bank witnesses re their interaction with P.D. at the branch on March 30, 2017:

It must be noted that each of the witnesses who gave their evidence did so in late 2018 and early 2019, some 18 months and more after the events in question. I observed that none of them were giving their evidence refreshed by or directly from handwritten notes made by them contemporaneously with or shortly after the events which they were being asked to recall in detail. Their evidence was given sincerely and to the best of their ability. However, some of their statements were lacking in essential detail and some of their own statements were contradictory, which affected the weight their evidence can be given.

The Acting Teller Supervisor (ATS) stated that she had not seen Mr. X at the branch on March 30, 2017. In direct, the ATS agreed that at the end of the day, P.D. had spoken to her “about a customer who had claimed not to have received enough cash.” Asked to explain what P.D. had told her then, the ATS replied that P.D. had said, “I think I know what it might be.” She said that P.D. had told her that Mr. X had been given \$5000.00 cash and he came in and said he had been given only \$4000.00, that she (P.D.) had been told he was a good customer, so she gave him \$1000.00 in cash. In direct, the ATS said in response to hearing this from P.D. that she had then told P.D. “what you do with a customer dispute about cash, take down the customer’s name and number.”

(It should be noted that the ATS was testifying without notes taken by her contemporaneously, and it is likely that she misstated the amounts Mr. X received on each visit. It was not in dispute, as evidenced by the Teller Transaction Log, (Ex. 1, Tab 4) that the intended transaction had been for Mr. X to receive \$6000.00 in cash. In the June 8, 2017 interview and in her evidence, P.D. stated that Mr. X returned to the branch and claimed to her that he had received only \$5,000.00 in cash, and that although she thought she had given him the correct amount, \$6,000.00, in the first transaction, she began to doubt herself and gave Mr. X a further \$1,000.00.)

In direct, the ATS said that her “next steps” had been that she did a full cash count, “to ensure we were out that amount,” that she checked the Teller wickets and garbage and that no cash had been found in the bandit boxes, and that she advised the Branch Manager regarding the cash shortage and told him what P.D. had told her. In cross, she agreed that she had advised both the SBA and the Branch Manager regarding the cash shortage. She said, “I reported to the next person and left it there.” Later in cross, she said, “I spoke to [the SBA] first. She spoke to the Branch Manager. I wasn’t involved.” Asked whether anything else happened, the ATS replied, “I talked about what [P.D.] said. I told her the procedure.” She continued, “I spoke to [the Branch Manager]. Then ‘the two of them’ spoke.” Asked whether she had observed a conversation between the SBA and the Branch Manager, the ATS replied, “After she put the card in, she walked off.”

Asked in cross if she remembered exactly what she said when P.D. spoke to her about the shortage, the ATS replied, “She said, ‘I think I know what it might be. I can explain.’ I was surprised. She told me what happened with [Mr. X]. She told me she gave him \$1000.00 when he claimed to be short.”

The ATS acknowledged in cross that she understood P.D. to have said to her that she gave Mr. X \$1000.00. Asked whether she understood P.D. to be saying she thought Mr. X had the missing \$1000.00, the Acting Teller Supervisor repeated her statements, i.e. “She said, ‘I think I know what it might be. I can explain.’ I was surprised. She told me what happened with [Mr. X]. She told me she gave him \$1000.00 when he claimed to be short.” The ATS agreed in cross that P.D. had not suggested that she, P.D., had taken some money.

In cross, the ATS said that she “did not recall” Mr. X coming into the branch that day, and agreed that she was familiar with Mr. X. She volunteered that she did not speak with Mr. X that day, and that if she had, she would have told him the protocol.

The Small Business Advisor (SBA) said that she had started at the branch in January of 2017 and had known P.D. for about 3 months by March 30, 2017. She was asked to describe her working relationship with P.D. In response, she described her interactions with the Tellers in general, and did not describe her working relationship with P.D. She said that on March 30, 2017 her shift had been from 8:30 a.m. to 5 p.m.,

that she had been advised of the shortage “probably, maybe, 4:10 or 4:15 p.m.” She said that she had been told “that the team was out \$1,000.00” by a person she said she could not remember. She agreed that the ATS had been working that day. In cross, she agreed that she had learned of the shortage “from one of the Tellers” after the branch had closed.

The SBA said that on being told that the team was out \$1,000.00, she had gone over to P.D., that P.D. had done the balance, asked P.D. if she had counted her cash to ensure all cash had been counted correctly, told P.D. the cash would have to be counted, verified. She said that P.D. mentioned that a customer had come in, that there was a discrepancy, that she had short-changed him a thousand dollars, and that P.D. had identified the customer as Mr. X. She said, “I pulled her profile,” then corrected herself, and said that she got P.D. to pull the profile [of Mr. X]. The SBA was asked, “What happened after she pulled the profile?” “I asked her,” she replied, “she told me the customer came in, she did the transaction, he left the branch, he came back in and told her he was short \$1000.00. I asked her what she did. She indicated she’d given him the money. I asked her why she did that without referring, as the policy, any discretion re shortages we wait till the end of the day and balancing and depending on the outcome we would call and inform the customer of the outcome of the balancing.” The SBA said that P.D. had said to her “she didn’t know that.” The SBA was asked, “Did you respond?” “I told her that was the policy,” she replied.

The SBA said that she, the SBA, had counted and verified the team’s cash and that the information in the “Closing Cash Balance Recap” (also referred to as “the card”) (Ex. 3, Tab 1) was correct.

The MCS advised that all the work processed in the balancing function leaves the branch for the Central Accounting unit in a courier bag.

In cross, the SBA was asked, “Do you recall at any point on March 30 or after, telling P.D. not to speak to Mr. X about the cash shortage?” The SBA said that she did not recall. When she was advised that P.D.’s evidence would be that she had told P.D. not to speak to Mr. X, she replied, “Possibly.” She said that she did not recall whether P.D. had explained to her that Mr. X did not like it when Tellers counted his cash by hand.

In cross, the SBA agreed that on March 30, 2017, she had “relayed the sequence of events of Mr. X’s two visits” to the Branch Manager, and that that had been the first

time he learned of it. The SBA said that the Branch Manager had not asked her to look at the video surveillance. She then volunteered, “I offered to call Mr. X, and [the Branch Manager] accepted my offer.”

It was not in dispute that on either March 31, 2017, or the following week, the SBA instructed the branch Tellers, including P.D., that cash which is to be paid out to customers must in every case be counted out by hand before being given to the customer.

The Branch Manager agreed that the SBA had informed him of the shortfall on March 30, 2017. He agreed that he had advised the SBA to contact Mr. X, and added, “when I became aware of the customer claiming the shortfall.” The Branch Manager also said that he had asked the SBA to review the video surveillance, and that he did not recall having asked her to do so “the same day [March 30, 2017].” The Branch Manager stated that in contacting customers regarding possible overpayments or shortages it was necessary that inquiries be “delicate,” that the SBA was to find out the facts, and what had transpired each time Mr. X came in. He said that he had not received a report from the SBA as to what she had said to Mr. X and what Mr. X had said to her.

The Branch Manager’s evidence, which was not in dispute, was that the Bank made only “delicate” inquiries of customers who claim a shortfall, in order to protect the Bank from appearing to have made a mistake, and to avoid “reputational risk,” which phrase I understood meant to avoid undermining its clients’ confidence and trust in the Bank.

The SBA stated that she had called Mr. X “the next morning.” She said that he thereafter came into the branch to introduce himself to her. The date on which she called Mr. X and the date he came into the branch to introduce himself to her was not established in evidence. However, nothing turns on that. The SBA advised that in her phone call she had asked Mr. X to let her know what had transpired when he had come to the branch the first and second time, and said that he had told her that he didn’t want to get anyone into trouble, that he had wanted to withdraw \$5000.00 and had had a cheque for \$1000.00 that he had wanted to cash. She said that he told her that he’d left the branch, and when he got home there was only \$5000.00 in the envelope, and he’d given a \$1000.00 cheque to make it six thousand, and had returned to the branch because he was short \$1000.00. [Although the SBA’s re-statement of Mr. X’s statement of what had

taken place was hearsay, the \$1000.00 cheque and \$5000.00 withdrawal correspond with P.D.'s March 30, 2017 digital entries pertaining to Mr. X on the Bank's system at 13:58, of a \$1000.00 cheque and a \$5000.00 withdrawal from his account, and payment of \$6000.00 in "bank notes" (Ex. 1, Tab 4)] The SBA said that she thanked Mr. X for his information and reported the conversation to "the Manager." She did not indicate whether she was referring to the Branch Manager or the MCS, but later stated that she did not report her conversation with Mr. X to the MCS. The SBA said that she had had no further involvement with the March 30, 2017 incident, and thereafter did not speak to Mr. X or to P.D. about it. She said that Employee Relations and Corporate Security had not spoken to her.

The SBA stated that she thought it unlikely that Mr. X had either been mistaken or had scammed the bank, because she had reviewed his assets. She stated that Mr. X "has money," and had no reason to scam. She agreed that she could not remember the conversation with him verbatim and that she was unable to recall with certainty exactly what Mr. X had said as to when he had counted the money. She denied having thought P.D. had stolen \$1000.00. Asked whether, when she called Mr. X, she had been suspicious that he had misappropriated \$1000.00, she initially replied indirectly. She was asked the question again, and replied, "It could be. I wasn't thinking that." She agreed that she "understood it was one possibility."

The SBA said initially that "the next day" she went to the video room and watched the video alone, in the morning. She later said, "I believe it was the Monday and the Tuesday." It was agreed that March 30, 2017 had fallen on a Thursday. If the SBA watched the video on the Monday and Tuesday immediately following Thursday, March 30, 2017, she had watched it Monday, April 3 and Tuesday, April 4, 2017. She said she had only watched the video which had been recording the actions at P.D.'s wicket or station and that it had taken her two days to review it. She said that another Teller was also seen in the video surveillance which she had watched. The SBA did not state that she had initially watched it with anyone else. She said she "then" showed and/or reviewed "certain sections" with the MCS and the Branch Manager.

The incoming Manager Customer Service (MCS) initially advised that she functioned in that position at the branch from April 3 until May 2, 2017. In cross she

said, "I was only there till May 8." She said she first learned of the March 30, 2017 shortfall between April 5 and 11, 2017, when a monthly document from Central Accounting Unit came to her attention. She said that she spoke to the Teller Supervisor who told her the short was attributable to a customer of P.D. who had claimed to be short \$1000.00. The MCS was asked in cross whether the SBA had told her about the \$1,000.00. "I don't think so," she replied.

The Teller Supervisor's evidence was that she first learned of the shortage about two weeks after March 30, 2017 when she overheard some of the Tellers speaking to one another about the incident involving Mr. X and P.D. She said that no one at the branch had mentioned it to her before that occasion.

The MCS advised that the "next step" after learning of the cash shortage was "used our video camera system" and "identified the short-changed customer by the time on the log, and went to the video section for that time." The MCS said that the SBA at the branch had previously been an MCS, and because the SBA had "the same background" as her, she (the incoming MCS) had asked the SBA to review the video surveillance with her.

In cross, the MCS was asked whether the SBA had approached *her* to watch the video. "I don't recall," the MCS replied. Asked whose responsibility it was to look at the video, the MCS said that it wasn't necessarily the SBA's responsibility, but because the SBA was "the previous MCS," she said, "I just wanted someone to watch it with me."

Later in cross, the MCS agreed that she had viewed the video footage over several days.

The SBA agreed that she had brought the video surveillance she considered "suspicious" to the attention of the MCS and the Branch Manager and that she "had no further involvement." The SBA did not specifically identify any of the above-mentioned five video clips. She was asked what she had said to the MCS and the Branch Manager. "'I see something unusual, can you come and take a look at it?'" she replied. She said that it had not been her job to find anything unusual, and referenced her "experience." She then said that the Branch Manager had asked her to look at the video.

The Branch Manager acknowledged that the SBA and the MCS had advised him "what they had found." He said that they told him that they were not able to locate the

source of the shortfall, couldn't find evidence of a shortfall, they had reviewed the videos and asked him to review the footage of P.D. and Mr. X. The Branch Manager did not identify which, if any, of the above video clips he reviewed.

The MCS said "the next day" she told the Branch Manager that she saw P.D. remove cash from a drawer [presumably in a surveillance video] and discussed escalating those concerns to Employee Relations. The Branch Manager said that his advice "re the next step" had been "to escalate the matter to head office." The MCS said that she did not speak with P.D. before she sent the April 20, 2017 email (Ex. 1, Tab 7, p. 21 of 43). The MCS said, "I spoke to the Manager. We didn't feel it was a discussion to be had." The content of the conversation between the MCS and the Branch Manager did not form part of the evidence.

The MCS sent the following email, subject titled "Teller difference March 31, 2017" dated April 20, 2017, addressed to the Manager, Employee Relations, (hereinafter Mgr. ER), and one of the Mgr. ER's colleagues, and copied to the Branch Manager (Ex. 1, Tab 7, p. 21 of 43). It is reproduced not for its accuracy or inaccuracy, but to set out the information which was conveyed to and preceded the conclusions of the decision makers at the Bank which resulted in the dismissal of the Complainant:

Good afternoon,

Further to our phone conversation yesterday, ([Mgr. ER] and I)

We have a teller difference from March 30, 2017 that we have not been able to locate. Here are the details on what happened. There was a customer that came in to the branch/make a withdrawal in the amount of \$5k dollars, this was at 1:58 PM. He left the branch and came back later to advise us that he was shortchanged by \$1K.

The teller that served him just gave him the \$1K right away not advising the customer that we would have to balance first.

We were reviewing the video in order to confirm that we indeed had short changed the customer but were not able to confirm. We continued looking through other transaction for the same employee and found an incident that seemed unusual.

Earlier in the morning we watched her log off her computer and reach for her bottom drawer with her right hand and pull out what looked like a bunch of 50 dollar bills, and she locked her wicked (sic) and walked away with the money in her hand. She was gone for approximately 4 minutes and returned with no money.

About an hour or so later she grabbed her purse put her phone in it and again walked away from her wicket. This time she was gone approximately 40 seconds. She then came back put her purse away and started working again.

We feel that this warrants further investigation. (sic)
Please advise on how to proceed.
Thank you.
... (name)
Manager Customer Service

The evidence did not establish what information, if any, the MCS conveyed to the Mgr. ER and what, if any, statement(s) the Mgr. ER made to the MCS over the telephone on April 19, 2017.

The Branch Manager said that he did not believe he had had any involvement with the case between April 20 and June 6, 2017.

In response to an April 27, 2017 email from the CIS Manager – Central Intake Services, on May 2, 2017 (possibly the MCS' last day at the branch) the MCS sent him the following message in a reply email (Ex. 1, Tab 7, p. 17 of 43):

I will send you the outstanding difference report in a separate email.

The branch reviewed the camera for possible location of difference and reviewed some sessions. Counted all the cash in detail.

The customer's name that reported the shortage of 1M is Mr. [X], the branch only knows him as a regular customer. I don't believe that the employee knows the customer personally. He was concerned that she would get in trouble and asked if there were cameras that we could look at. We did look at the camera but she only ran the money through the counter and not out to the customer.

The employee was spoken to on April 3, because the CSS was on vacation when it happened. There was no one present. She was told that we need to balance first before we can give out any money. She told the CSS that she felt the customer was being honest, therefore gave him the money.

The camera is Teller station 5,6 for all four instances.

The time of the 5M withdrawal is 13:58

The time that the employee walked away with the 50s was 11:33:00

The time that she left with her purse was 1:46:03 and back at 1:47:01

The time the customer comes back to get his 1M was at 13:40:11 and he stands at the empty wicket to her right. At one point she is on the other side of the counter where he is talking to her. She then returns, counts out money and gives it to him.

...
MCS

On May 12, 2017 the CIS Manager – Central Intake Services, in an email copied to the Mgr. ER, identified the person who had been assigned as Senior Investigator of this case, (Ex. 1, Tab 6, p. 16 of 43).

The Senior Investigator, Corporate Security Investigations, stated that before March 13, 2017, she had been an Investigator for four years in Corporate Security with the Bank and that she had been promoted to Senior Investigator on March 13, 2017. She said that her qualifications include “Certified Anti-Money Laundering Specialist (C.A.M.S)” and “Certified Financial Crime Specialist designation (C.F.C.S.).” She said that she could not identify the body or association which had provided her certifications.

In cross, the Senior Investigator volunteered, “The assigned investigator needs to reach out to Employee Relations. I was looking at documents.” Asked to identify the documents to which she had referred, she replied, “I don’t know what I was looking at.” Asked to describe her “process to develop an interview process,” she stated, “collect information such as video footage, review P.D.’s position, H.R. profile, a cursory review of activities, reviewing the initial issues.”

The Senior Investigator agreed that in the file she received, there had been video evidence of P.D. from the branch, and added, “but we obtained it from our own devices.” Asked how Corporate Security obtained the video, she replied, “We have a program which enables us to access all Scotiabank cameras in Canada.” She agreed that “Corporate Security pulled the branch video from its own dept.” She then said, “No, the branch did not send us the video.” She agreed that she was referring to the video of “the whole day.”

Later in direct the Senior Investigator agreed that after viewing the video and before meeting with the Mgr. ER, “Corporate Security” edited the video. The Senior Investigator said, “yes, my colleague did,” and said the video had been “edited to everything only pertaining to [P.D.]” She then said, “No, not [P.D.], only pertaining to Teller activity.” She said that for example, a customer putting coffee on the front desk would be “taken out.” She agreed that she and her colleague had “all the video of all the Tellers in the branch that day” and described it as “one long video.” She said, “We broke it down to 5 or 6 bits which dealt with this specific case,” and agreed she was referring to “bits” in which P.D., as opposed to other Tellers, appeared. She said that there had been

video of other Teller wickets, and said, "All Tellers are viewed." Asked what of P.D.'s actions at her Teller wicket raised concerns for Corporate Security, she stated, "When the branch is empty, I remember, she appeared to take money out of the bandit box and there's no customers. I don't see what was done. I don't know what happened with that." She said, "Giving the customer the money, without counting it." She said that she could not recall "right now" anything else that raised concerns for Corporate Security.

In cross, the Senior Investigator said that in preparation for interviewing P.D. she had pulled the footage for the entire day and reviewed it, and reviewed the information in the email, specifically the email at Ex. 1, Tab 7, p. 17 of 43 (set out above), and looked at the H.R. profile, length of employment, "things like that." "I would look at all the Tellers, to make sure someone isn't being picked on," she stated. She said that she believed there were two cameras behind the Tellers, and agreed that she had watched the footage from both cameras. "I decide what's relevant," she said. Asked to describe the process to select the video clips (Ex. 5 and 6), the Senior Investigator said, "Me and my colleague viewed all Tellers, the entire day, anything that appeared suspicious, that was saved."

Aside from "anything that appeared suspicious," the evidence did not establish the criteria which the Senior Investigator (or her colleague) used to determine the relevance or lack thereof of any parts of the video surveillance of the branch that had been available for March 30, 2017.

The Senior Investigator's questions at p. 30 of the interview transcript (Ex. 1, Tab 12) indicate that as of June 8, 2017, neither she nor the Mgr., ER knew the identity of the person who had been Acting Teller Supervisor on March 30, 2017 and knew what P.D. had told the Acting Teller Supervisor on March 30, 2017 regarding Mr. X's two visits to the branch and her explanation to the Acting Teller Supervisor as to why the team cash did not balance, nor that P.D. had stated to the Acting Teller Supervisor that she had not known the protocol as to how to respond to a customer who claims to have been shorted.

The Senior Investigator's questions at page 73 – 75 of the transcript indicate that as of June 8, 2017, neither she nor the Mgr. ER, knew the identity of the SBA and that on March 30, 2017, the SBA had been filling in for the Teller Supervisor as well as for the new MCS who did not come to the branch until April 3, 2017, and that the SBA had also

been involved in the closing balance, and had instructed P.D. not to discuss anything with Mr. X.

In direct, the Mgr. ER was asked, regarding the period before the June 8, 2017 interview of P.D., “during this period, did you do any investigative background research re P.D.?” “No,” she replied. She was then asked, “Had you seen the video prior to the June 8 interview?” “No,” she replied.

On June 6, 2017, the Mgr. ER emailed P.D.’s Branch Manager the following message:

We would like to interview [P.D.] on Thursday, June 8, 2017, at 10:00 a.m. at the ... branch. Please advise her of this meeting when she arrives at work on Thursday. Should she ask the reason advise her that we are looking into a matter and we believe that she may have information that could help it. Please confirm her attendance. Thank you.
(name) Manager Employee Relations

It is not in dispute that between about 10:04 and 11:49 a.m. on June 8, 2017, an investigative interview of P.D. was conducted by the Mgr. ER, the Senior Investigator, Corporate Security, and the Investigator in orientation (Ex. 3, Tab 12 and Ex. 5).

The Senior Investigator was asked to describe P.D.’s facility with the English language in the interview. She initially said that P.D. could “communicate her point well,” but then agreed that P.D. was having trouble expressing herself in English during the interview. The Mgr. ER and the Investigator in orientation did not dispute that P.D. spoke English with an accent, but did not agree that P.D. had been having trouble expressing herself in English during the interview.

On June 14 or 15, 2017, the Mgr. ER, prepared the following Final IP Report (Ex. 1, Tab 7, p. 11-12 of 43:

Overview

On April 20, 2017, [name] former Manager Customer Service, advised Employee Relations (ER) that at the end of day, March 30, 2017, there was an un-located Team cash difference of \$1,000.00. [The former MCS] reviewed the video feed which revealed some unusual behaviour from [P.D.], Customer Representative (CR), who had served customer, [Mr. X]. This behavior (sic) led [the former MCS] to suspect that [P.D.] had misappropriated funds (\$1,000.00) from the Bank.

Specifically, on March 30, 2017, [P.D.] served a customer, [Mr. X], who withdrew \$5,000.00 from his account and cashed a cheque in the amount of

\$1,000.00. The Forms Free Teller (FFT) journal indicated that [P.D.] recorded 60 x \$100 on the Journal. She counted these funds on the cash counter and 'gave the funds' to [Mr. X], who left the branch.

Corporate Security and ER reviewed the video feed for March 30, 2017, and discovered that [P.D.] engaged in suspicious activity while at her wicket. At approximately 11:35am, there is no customer at her wicket; however, she is seen reaching into her bandit box, then bending below her wicket clutching something red in her right hand (an enhanced photo shows red paper, fanned out at the edge of her hand). [P.D.] then turns off her monitor and leaves her workstation, returning three minutes later. At approximately 1:45 pm, she takes her handbag and leaves her workstation then returns one minute later.

At 1:54 pm, the footage shows [Mr. X] coming to the branch to withdraw funds. [P.D.] completes the transaction, shows the customer the reading from the cash counter but does not count the bills, then gives him the cash. At 3:40 pm, [Mr. X] returns to the branch to complain that his withdrawal was short \$1,000.00. [P.D.] did not notify her supervisor of the customer's complaint or balanced her cash, as per policy. Instead she is seen having a discussion with [Mr. X], leaving her workstation and going around to the general customer area to talk to him. He has the envelope in his hand but [P.D.] does not look in the envelope. Immediately following that interaction, [P.D.] returns to her workstation and while she had another customer there, she takes cash out of her wicket and goes to the empty wicket next to hers and gives that cash to [Mr. X] without counting it. [Mr. X] also placed the envelope on the counter and again [P.D.] does not look in it.

Employee Explanation:

On June 7, 2017, [Senior Investigator and Investigator (observer)] Corporate Security and [Manager, ER] interviewed [P.D.]

[P.D.] admitted that she processed [Mr. X's] transaction, stating that she gave the customer his cash in \$50s and \$100s. She stated that he does not like the CRs to count his cash by hand, therefore, she counted it using the cash counter. When asked why she did not wait until the end of the day to balance and, if she was over by \$1,000.00 then give the cash to [Mr. X], she stated, "He came at 3:00 pm. I know him and I thought I have to give it to him, he is right I made a mistake....It is my fault I gave him \$1,000.00". She subsequently changed her statement to say that in her heart she felt that she had given him the correct amount the first time he visited the branch earlier in the day. [P.D.] stated that she is aware of Bank policy to report such an incident to her supervisor and then close and balance her cash; however, she stated that she did not follow this procedure in this case, and could not explain why she failed to look at the contents of the envelope that [Mr. X] brought back to the Bank, but simply took for granted that his cash was short by \$1,000.00, adding that it was the first time that a customer had complained that she had not given him the correct amount.

[P.D.] denied taking the cash and when she was shown the video feed from March 30, 2017, she stated that the red item in her hand was a sanitary napkin; stating that she had given [Mr. X] 50s and 100s at the time of withdrawal; however, when she was advised that the FFT Journal indicated that she had recorded 60x \$100s she was unable to provide an explanation stating that she may have given him 20s and 50s and 100s. [P.D.] repeatedly stated that [Mr X] is honest and when asked if he had taken the money and fabricated a story that he did not get the \$1,000.00 she refused to answer.

[P.D.] was asked what denominations she had given to [Mr. X] the second time he visited the branch; she stated that she gave him 50s or 100s, she was then asked if she had counted it for him to which she replied 'yes'; however, the video feed shows that [Mr. X] again presented the envelope on the counter and [P.D.] placed the \$1,000.00 (\$100.00 bills) on the counter without counting it for him or looking in the envelope; he then took the cash and left the branch.

At the conclusion of the interview, and with the approval of the District Vice President, [P.D.] was suspended with pay pending further investigation.

Summary and Recommendations:

[P.D.] has been employed with the Bank for almost 4 years and has acknowledged the Code of Conduct (COC), confirming that she has read and understands the COC and agrees to be bound by it.

While [P.D.] admitted that she failed to follow bank policy and procedure when she gave a customer \$1,000.00 after he had complained that she short changed him, she denied taking the funds. Based on her actions it is the investigators' opinion, based on a balance of probabilities, that [P.D.] misappropriated the cash earlier that day from her wicket, and tried to cover her misappropriation by short changing a customer and then returned it to the customer when he came back to the branch to make a complaint. Her actions represent a serious breach of Scotiabank's Code of Conduct by:

- Failure to conduct herself with honesty and integrity when she:
- Misappropriated funds from the bank;
- Was not truthful to the investigators;
- Failing to Ensure the Accuracy and Integrity of Transactions and Records, when she:

- Incorrectly recorded cash denominations on the FFT journal;

- Failed to follow applicable, policies, procedures and processes to ensure that transactions are properly authorized; when she gave [Mr. X] \$1,000.00 without consulting her supervisors;

- Placing the bank at financial risk.

- The Employment Law Group has been consulted.

May we have your authorization to proceed as recommended?

[...] Manager / Shared Services / Employee Relations Human Resources

By email dated June 15, 2017, time stamped 11:42 a.m., the District Vice President authorized the Mgr. ER, to “proceed,” i.e. to terminate P.D.’s employment (Ex. 1, Tab 7, p. 10 of 43). By email dated June 15, 2017 time stamped 12:10 p.m., subject-titled “[P.D.] – Termination Documents” the Mgr. ER wrote to the Branch Manager and the then former MCS:

...District Vice President has given his authorization to terminate [P.D.]’s employment effective immediately. Here are the termination documents to assist you. Please contact her today and have her come to the branch at the end of the day for the termination meeting.
Please contact me if you have any additional questions.

It can be seen from the above emails that the Bank was of the view that the evidence and/or information it had gathered by June 14 or 15, 2017 had met the legal threshold of proof on the balance of probabilities.

The Law:

a) The law pertaining to the “balance of probabilities:”

In 2008, the Supreme Court of Canada expressed its views regarding the civil standard of proof, i.e. the “balance of probabilities” in *F.H. v. McDougall* [2008] 3 S.C.R. 41; 2008 S.C.C. 53. In *F.H.*, Rothstein J. wrote:

¶41 Since *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154, at pp. 158-64, it has been clear that the criminal standard is not to be applied to civil cases in Canada. The Criminal standard of proof beyond a reasonable doubt is linked to the presumption of innocence in criminal trials. The burden of proof always remains with the prosecution. ...

¶42 By contrast, in civil cases, there is no presumption of innocence. As explained by J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed, 1999), at p. 154:

Since society is indifferent to whether the plaintiff or the defendant wins a particular civil suit, it is unnecessary to protect against an erroneous result by requiring a standard of proof higher than a balance of probabilities.

It is true that there may be serious consequences to a finding of liability in a civil case that continue past the end of the case. However, the civil case does not involve the government’s power to penalize or take away the liberty of the individual.

¶43 An intermediate standard of proof presents practical problems. As expressed by Rothstein, Centa and Adams, at pp. 466-67:

As well, suggesting that the standard of proof is “higher” than the “mere balance of probabilities” inevitably leads one to inquire: what percentage of probability must be met? This is unhelpful because while the concept of “51 percent probability” or “more likely than not” can be understood by decisionmakers, the concept of 60 percent or 70 percent probability cannot.

¶44 Put another way, it would seem incongruous for a judge to conclude that it was more likely than not that an event occurred, but not sufficiently likely to some unspecified standard and therefore that it did not occur. As Lord Hoffmann explained in *In re B* at para. 2:

If a legal rule requires a fact to be proved (a “fact in issue”) a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

In my view, the only practical way in which to reach a factual conclusion in a civil case is to decide whether it is more likely than not that the event occurred.

¶45 To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. ...

¶46 Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. ...

¶47 Finally there may be cases in which there is an inherent improbability that an event occurred. Inherent improbability will always depend upon the circumstances. As Baroness Hale stated in *In re B* at para. 72:

Consider the famous example of the animal seen in Regent’s Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions’ enclosure when the door is open, then it may well be more likely to be a lion than a dog.

¶48 Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffman observed at para. 15 of *In re B*:

Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.

It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.

¶49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities.

b) The distinction between direct evidence and opinion evidence

In this case, no live witness directly observed P.D.'s conduct at the branch which appeared suspicious to some, and no live witness directly observed what transpired between P.D. and Mr. X on March 30, 2017. A video surveillance camera recorded some of P.D.'s actions and some of the interaction between P.D. and Mr. X. It is the best evidence, and the only direct evidence, in this case, as to what occurred of concern to the Bank on March 30, 2017.

The evidence of the SBA, the MCS from Apr. 3 to May 2 or 8, 2017, the Branch Manager, the Senior Investigator, Corporate Security, the Investigator in orientation, and the Mgr. ER as to what they observed on the surveillance videos, whether their observations were confined to the video clips produced in evidence, or surveillance not produced in evidence, can only be characterized as secondhand to the primary source, the video clips, and as statements of their own opinions of what was observed and observable in the video clips. None of them were qualified as experts in either determining what constitutes suspicious behaviour, or as experts in objectively describing what is observable in the five video clips (Ex. 5).

The initial function of an Adjudicator is to determine the facts, based on the evidence presented. Once that is accomplished, the Adjudicator is to make a determination as to whether the evidence has satisfied the burden of proof on each party.

Bearing that in mind, I turn now to the content of the video clips (Ex. 5).

Video Clip 1:

Video Clip 1 starts at 11:32:35 and ends at 11:33:50. P.D. is visible from behind, blonde, wearing a gray sweater and eyeglasses. There is a customer across from her at

the counter of her wicket, doing a pinned transaction. A cash drawer is open to P.D.'s right. Blue \$5.00 bills, purple \$10.00 bills, green \$20.00 bills and pinkish-brownish bills, which are possibly \$50.00 bills, are observable in separate bundles or stacks in the open drawer. P.D. walks off-screen with a document, possibly 8" or 9" x 14," which she has received from the customer. Video Clip 1 ends at that point.

Video Clip 2:

Video Clip 2 is a continuation of Video Clip 1, starting at 11:33:50. A woman customer can be seen walking in front of the counters from wicket 5, which is to the left, toward wicket 6, to the right of the screen. There is another Teller, not P.D., at wicket 6. At about 11:33:56 the top of P.D.'s head appears on-screen in the lower right-hand side of the screen behind the Teller at wicket 6. P.D. can be seen walking toward her chair at wicket 5, and as she walks toward her chair the back of her head and shoulders are visible. At about 11:33:57 P.D.'s left arm can be seen reaching toward the chair at her wicket. At about 11:34:00 P.D. can be seen from behind pushing the chair at wicket 5 toward the counter of wicket 5. At about 11:34:03 P.D. can be seen moving forward, away from the camera, her back to the camera, toward the counter of wicket 5. At about 11:34:06, P.D. can be seen pushing the chair at wicket 5 away from the drawers between wicket 5 and wicket 6. At about 11:34:08, P.D. can be seen moving slightly to the left, behind her chair, the left side of her head off-screen. At about 11:34:10 P.D. can be seen turning to her right. At about 11:34:11 P.D.'s head and shoulders can be seen bending down from her waist, her back still to the camera. At about 11:34:12 P.D. can be seen continuing to bend forward, her right arm and hand also lowering with her, her back to the camera. At about 11:34:13 P.D.'s right hand is not visible onscreen, it has been lowered out of camera range. At about 11:34:14 P.D.'s head is below the level of her top drawer and about level with the top of the second drawer between wicket 5 and 6. The first and second drawers are closed. Using the frame by frame function, at about 11:34:14, P.D. can be seen bending lower beside the drawers. Her right shoulder is visible, but her right arm and right hand are not visible. At about 11:34:15 P.D. can be seen bending further forward and downward, her back to the camera. At about 11:34:16, P.D. can be seen rising up from the bend she has been in. At about 11:34:17, the upper part of P.D.'s right arm can be seen in front of her chest, P.D. faces slightly to the right,

and the open bottom drawer of her set of drawers is observable at the bottom of the screen. At about 11:34:18, P.D. can be seen closing the open bottom drawer with her right arm. At about 11:34:19, P.D. can be seen straightening her back, and as she does, she raises her right arm.

At about 11:34:19, something brownish in colour can be seen between P.D.'s thumb and the forefinger of her right hand, which is palm side down. What is in between her thumb and forefinger is not discernible. Using the frame by frame function, at about 11:34:19 the right side of P.D.'s hand faces downward. In the next frame, P.D. extends her right arm toward her monitor, which is in front of her on the counter of her wicket. As P.D. extends her right arm toward the monitor, the left side of her right hand becomes observable, and at the last frame of 11:34:19 something pinkish brownish appears, extending about ¼ inch or less from the left side of her right hand, which is facing down. The object in her hand is visible from just below the joint of her "pinky" finger to about an inch above her wrist. In the next frame of 11:34:19, the object, which is slightly visible from the left side of her right hand, takes on a bright pinkish orange colour with white spots.

At about 11:34:20 P.D.'s forefinger of her right hand is extended toward the computer monitor at her desk/counter at wicket 5. P.D. turns off her monitor with the forefinger of her right hand. The object in her right hand can be seen extending from her hand about 1 inch from the left side of her right hand, which faces downward. At that point, it appears bright pinkish orange closest to her hand. Irregular white areas appear in the pinkish orange area which is farther from her hand, and two corners can be seen on the object. P.D.'s hand is curled around the object. In about the next frame at 11:34:20, P.D.'s finger can be seen touching the monitor, and the object, still visible on the right side of her hand facing downward, remains bright pinkish orange with irregular white areas at the outer edges. In the next two frames at 11:34:20, the object appears more orange than pink. In the next frame at 11:34:20 P.D. can be seen removing her finger from the monitor and the monitor screen becomes dark. P.D. can be seen drawing her right arm and hand away from the computer monitor. The object on the right side of her right hand, face down, appears pinkish orange with white spots on it, and on the left side

of her hand, between her thumb and forefinger, a smaller area, brownish beige in colour, appears.

At about 11:34:21 P.D. can be seen withdrawing her right arm from the computer monitor toward herself, and something pinkish orange can be seen between her thumb and forefinger. The object appears solid. At the next frame at 11:34:21 the right side of her right hand faces downward and is not visible. In the next frame at 11:34:21 P.D.'s right hand can be seen, closer to her chest, and the object between her thumb and forefinger of her right hand is blurred. In the next frame at 11:34:21, P.D. turns to her right, and both her hands appear together, in front of her chest. The object between her thumb and forefinger of her right hand can be seen, and appears reddish orange at this point, and is otherwise indistinct. The right side of her right hand faces downward and cannot be seen. In the next frame at 11:34:21 P.D.'s hands are apart, and a small rounded area of pinkish orange can be seen between the thumb and forefinger of her right hand, but the image is indistinct and undiscernible.

In the next frame, 11:34:22, P.D.'s right hand is offscreen. At 11:34:23, P.D. walks from her wicket toward the right of the screen, and continues off-screen. At about 11:35:08, some blonde hair, the top of someone's head, appears in the lower right corner of the screen. The face of the person to whom the top of the blonde head belongs, is not visible, nor is any other part of that person. Video Clip 2 ends at that point.

To recap:

Video clip 2 was used to support the claim that in the period of time represented by this clip, P.D. had stolen a roll of \$50.00 dollar bills, (20 x \$50.00 = \$1,000.00) from her bandit box. On June 14 or 15, 2017, the Mgr. ER had written, in support of termination:

Corporate Security and ER reviewed the video feed for March 30, 2017, and discovered that [P.D.] engaged in suspicious activity while at her wicket. At approximately 11:35am, there is no customer at her wicket; however, she is seen reaching into her bandit box, then bending below her wicket clutching something red in her right hand (an enhanced photo shows red paper, fanned out at the edge of her hand). [P.D.] then turns off her monitor and leaves her workstation, returning three minutes later.

I find as follows:

Video clip 2 confirms that there was no customer at P.D.'s wicket at approximately 11:35 a.m. It does not support that P.D. is seen reaching into her bandit box at any time. The bandit box is a locked box in which some of the Bank's cash is stored. It is located well above the bottom drawer.

It was not in dispute that the bottom drawer is the drawer in which the Tellers store their purse while they are working. The open bottom drawer was visible in the video at 11:34:17. It is only after P.D. is seen bending low to reach into the bottom drawer, and after she is seen closing that bottom drawer, that P.D. is seen with something in her hand. No enhanced photo showing "red paper, fanned out at the edge of her hand" was produced in evidence.

It is not in dispute that Canadian fifty dollar bills are pinkish brown and have a reflective strip on them. The item in P.D.'s hand changed colour somewhat from frame to frame in the video, from brownish to pink to bright pinkish orange to less bright pinkish orange. The image of the object in her hand was indistinct at all times, in part due to her hand being in motion, and in part because most of her hand covered the object in her hand. I observed no reflective strip, or reflection of light off such reflective strip, in any of the frame to frame images which I observed, and I observed all of them in Video Clip 2.

The surveillance camera did its best to record P.D.'s movements and the image of what was in her hand. However, it appears that when someone is moving with an object in their hand, almost entirely covered by their hand, the camera has difficulty catching a distinct image of the object, which sometimes appeared blurred, and the camera has difficulty catching the exact colour of the object, which colour also changed slightly from frame to frame. The surveillance camera did not catch a discernible image of a \$50.00 bill in Video 2, did not catch an image of a roll of \$50.00 bills and did not catch an image of "red paper fanned out at the edge of her hand."

The evidence of P.D. was that on June 8, 2017, she had whispered to the Investigator, because she was too embarrassed to be recorded saying out loud that on March 30, 2017, she had reached into her purse or bottom drawer and had taken out a pad (Ex. 3, Tab 12, p. 56, line 5 was unfinished in the June 8, 2017 transcript, marked by

dots). I conclude that the transcriber could not hear what P.D. said at that point, which supports P.D.'s recollection of how and what she communicated was in her hand. P.D.'s evidence was that on June 8, 2017, she did not know the term "sanitary napkin." The June 8, 2017 transcript records P.D. as shortly after referencing "when you see like I grab my hand, like bend it, it was a pad..." (Ex. 3, Tab 12, p. 57, lines 17-19). I understood her to be saying that she had folded the pink to orange wrapped sanitary napkin in her hand.

The Mgr. ER stated to me in evidence that she did not believe P.D.'s claim that she had taken out a sanitary napkin from her purse or drawer, because, in her view, P.D. had returned to her wicket in too short a time to have changed her napkin.

Video clip 2 establishes that P.D. left her wicket at about 11:34:23 with the "item in dispute" in her hand and went offscreen at that moment. Video clip 2 does not show the face of the blond person whose hair appears in the far right corner of the screen at 11:35:08 in Video clip 2. The clip ends abruptly at that point. In the first frame of Video clip 4, another blond woman, presumably a bank employee, who is not P.D., can be seen behind the wickets. There is no evidence to establish that the blond head which appears at 11:35:08 in Video clip 2 was P.D.'s head. The evidence is just as consistent that the blond head which appears at 11:35:08 was the head of the blond woman who appears in Video clip 4 as it is consistent with the assumption that it is P.D.'s blond head.

I also note that 11:35:08 is not three minutes after 11:34:23. There is no clear evidence as to when, after 11:34:23, P.D. returned to her wicket. There is no evidence to support the statement that P.D. returned 3 minutes later, i.e. at 11:37:23. There is no reliable evidence that P.D. returned to her wicket after 11:34:23 in too short a time to have changed her sanitary napkin.

P.D. produced two samples of wrapped sanitary napkins, one pink and the other orange (Ex. 4), which she said she believed she had in her hand when she took one out of her purse on March 30, 2017. She was unable to state the name of the brand. The pink wrapper was marked with a pattern of triangles and circles in a deeper shade of pink. The orange wrapper was marked with a pattern of triangles, some of which were darker orange, some of which were white, and circular shapes in a darker orange, and quarter-moon shapes in pale orange. P.D.'s inability to identify the brand name of the napkin,

though she referenced, “maxi,” was consistent with her limited (but sufficient) vocabulary in English, which is her second language. I was urged to conclude from P.D.’s inability to identify the brand name as evidence that she had been fabricating her claim that it was a sanitary napkin in her hand. I find it inherently more probable that her inability to identify the brand name was a result of her anxiety as a witness as well as her lack of familiarity with brand names of the various products of this type and purpose. Asked in evidence why she had not taken her entire purse with her to change her napkin, presumably to protect her modesty, P.D. said that that wasn’t necessary. As the item in her hand was barely discernible in Video Clip 2, it was barely discernible at the branch. I therefore see no reason to dispute her statement that it wasn’t necessary, or to doubt it.

The District Vice President stated that he had previously worked with the Mgr. ER and had complete confidence in her judgment and had had no hesitation in supporting her recommendation to terminate. He said that he did not believe P.D.’s explanation that she had had a sanitary napkin in her hand because he lives with his wife and two daughters and had not seen such items in his household. I gather that he was generalizing from his experience in his household to P.D. an expectation that she and perhaps all women would be as modest and as discreet as his wife and daughters and not permit such an item to be seen in their hand, and that therefore P.D. did not have a sanitary napkin in her hand. I do not find his reasoning persuasive.

I conclude that the Bank was mistaken from the outset (see MCS’ 20 April 19 email above) as to the drawer from which P.D. allegedly removed \$1000.00 in fifty dollar bills. If the video clip had shown that P.D. had reached into her bandit box, where the Bank’s cash is kept, the allegation that she took money belonging to the Bank and walked away from her wicket with it in her hand might have become inherently probable. But that is not what is seen in Video clip 2.

In Video clip 2 it is clear that P.D. reached into her bottom drawer, where Tellers keep their purse, and not into her bandit box. That alone renders the Bank’s allegation that she stole \$1000.00 in fifty dollar bills inherently improbable and its evidence neither clear, convincing nor persuasive. The observable evidence that P.D. reached into her bottom drawer, the drawer in which Tellers keep their purse, renders it more inherently probable that P.D. folded a pink or orange-wrapped sanitary napkin, and not the Bank’s

money, in her hand. P.D. has maintained that explanation consistently since June 8, 2017, when she was first asked what had been in her hand on March 30, 2017 in Video clip 2.

I therefore conclude that Video clip 2 does not meet the standard of proof, on balance of probabilities, that P.D. stole \$1000.00 from the Bank at the time that the clip represents. Not to put too fine a point on it, Video clip 2 does not prove that P.D. stole or misappropriated anything at any time.

I now turn to Video Clip 3, which deals with the time from 13:45 to 13:49 on March 30, 2017.

Video Clip 3:

Video Clip 3 starts at 1:45:28. At that point, P.D. can be seen at wicket 5, on the left side of the screen, her back to the camera. The monitor screen on the computer in front of P.D. is blue. P.D.'s right hand is on the keyboard in front of her. Another Teller can be seen at wicket 6, on the right side of the screen. A customer can be seen across the counter in front of the Teller at wicket 6; the customer is looking to the right of the screen. A white document appears on top of P.D.'s closed second drawer.

At about 1:45:29 the screen of the monitor at wicket 5 becomes dark. P.D.'s right hand is on the mouse to the right of the keyboard. At about 1:45:29 P.D.'s right hand rises up from the mouse. At about 1:45:32 P.D.'s hand returns on to the mouse. Between about 1:45:33 and :34, P.D.'s hand remains on the mouse, and P.D.'s head turns to her left, and the left side of her head is partly off-screen. At about 1:45:35 P.D. turns her head so that it faces forward, toward her counter, and she lifts her right hand from the mouse. At about 1:45:36, P.D. pushes her keyboard forward. At about 1:45:37 P.D. turns her head slightly to her right, in the direction of wicket 6. At about 1:45:38, P.D. removes her hands from the keyboard and mouse, toward her chest, and only the top of her right hand is visible near her chest.

In about the next 5 frames, P.D. can be seen turning to the right, and holding a black rectangular object in her right hand. At about 1:45:39 - :40, P.D. places her left hand on the handle of the top drawer and pulls the top drawer out toward her. The white document is still sitting on top of the closed second drawer. At about 1:45:40 - :41, P.D. pulls her top drawer open with her left hand, and places the black rectangular object from

her right hand to her left hand and with her left hand, places it in the right-hand corner of the open top drawer.

At about the 6th frame at 1:45:41, P.D. starts to close the top drawer. In the next frame, the top drawer is closed. Over the next 50 frames, at about 1:45:43 – 45, P.D. picks up the white document or documents that were on top of the closed drawer of the second drawer in her right hand. At about 1:45:47 P.D. moves to her left with the document(s) still in her right hand. At about 1:45:48 - :49, P.D. picks up a stapler from the left side of her wicket in her left hand, and places the documents back on the closed top of her second drawer. At 1:45:50 P.D. places the stapler in her right hand, picks up the documents from the closed top of her second drawer, and staples them. From about 1:45:51 - :52, over about 10 frames, P.D. puts the stapler on top of the closed top of her second drawer, and faces toward the customer across the counter at wicket 5 with the stapled documents in her hands. At about 1:45:52, P.D. moves to her left and places the stapled documents on top of the closed top of her second drawer. At about 1:45:52 - :54, P.D. moves her right hand toward the lower right side of her monitor. At about 1:45:55, P.D. steps back from her counter and keyboard, and looks down to her right.

At about 1:45:56 P.D. bends down from her waist to her bottom drawer, and reaches down with her right arm. Her bottom drawer can be seen being opened. Over about 6 frames, and at about 1:45:58, P.D. lifts a black purse up with her right arm. At about 1:45:59, P.D. pulls out the drawer beneath her keyboard with her left hand, while her purse is in her right hand, and she pushes the bottom drawer closed with her leg. At about 1:46:00 P.D. moves toward the drawer under her keyboard, which she has pulled out, and her purse is still in her right hand. At about 1:46:01 she places the purse on the closed top of her second drawer. At this point she has a grey rectangular object in her hand (possibly a cell phone, it's about that size). Over about the next 15 frames, at about 1:46:02 - :03, P.D. places the grey rectangular object in her purse with her left hand. From about 1:46:04 - :10, about 41 frames, the lips of the customer at wicket 5 are moving, and P.D. is looking in his direction and is zipping her purse closed. At about 1:46:10 P.D. looks toward her purse and clutches her purse with both hands. Over the next 6 frames, P.D.'s head turns, facing toward the counter of wicket 5. At about 1:46:10 - :13 P.D. lifts her purse up to her right shoulder. At about 1:46:13 - :16 P.D., in about

30 frames, P.D. lifts the purse strap over her right shoulder. At about 1:46:17, over about 12 frames, P.D. touches her hair on the back of her head with her right hand. At about 1:46:19 - :20 P.D. leans to her left, facing her keyboard and counter; the left side of the back of her head is offscreen.

At about 1:46:20 - :22, P.D. pulls the drawer under her keyboard open toward herself. At about 1:42:23, P.D. closes that drawer. At about 1:42:24 P.D. opens the drawer. At about 1:46:25 - :26 she lifts a tube-shaped object about 4 – 5 inches in length, holds it at each end in her right and left hand, and looks right toward wicket 6. At about 1:46:26, P.D. holds the tube up for a moment in her right hand, still looking toward wicket 6. At about 1:46:28, P.D. lowers the tube and puts it in her left hand. About 9 frames later, P.D. raises the tube in her right hand, and her left hand can be seen palm open below her right hand. At about 1:46:29 the tube is in her right hand, almost horizontal, and her left hand is palm up at the other end of the tube. Over about the next 10 frames, P.D. looks further to her right, tube still in her right hand, her left hand palm up at the other end of the tube. Over the next two frames, P.D. takes a step back, toward the camera, and is still facing toward her right. In the next four frames, P.D. moves her left hand back toward her chest and her right hand, with the tube in it, follows toward her left hand. In the next frames, P.D. raises her right hand with the tube in it. In the next frame PD. lowers her right hand with the tube toward her left hand, which is still palm up.

At about 1:46:30, a dark-haired head appears behind the Teller at wicket 6. Over the next two frames, the dark-haired person, a woman, approaches P.D.'s drawers, and P.D. turns slightly to her (P.D.'s) left, the tube still in her hands. In the next four frames, the dark-haired woman reaches across P.D.'s drawers to her top drawer. At about 1:46:33, and over the next ten frames, the dark-haired woman pulls the top drawer at P.D.'s wicket out, while P.D. stands at her wicket to the woman's left, with the tube still in P.D.'s right hand. Over the next six frames, the dark-haired woman moves to the left, partly behind P.D. P.D.'s top drawer is open. P.D. faces the counter of her wicket. At about 1:46:35, and over about 4 frames, the dark-haired woman continues to the left behind P.D. and disappears offscreen. P.D. moves forward toward her wicket counter, her right hand just behind the blue mouse pad. Over about the next 10 frames, P.D.

moves to the left, the left side of her head is partly offscreen, and her purse strap is over her right shoulder.

At about 11:46:38, P.D. moves to her right, facing the counter of her wicket, her hands in front of her chest, palms together. Over the next few frames, P.D. moves to her right, and her hands are wrapped around one another. At about 10:46:40, and over about 10 frames, P.D. moves further to her right, her hands wrapping around one another, suggesting she is applying hand cream. Over the next about 11 frames, P.D. continues moving toward the right, until her head disappears from the screen behind wicket 6 at about 1:46:42. The other Teller is still at her wicket 6. Over about the next 24 frames, the customer at the other Teller's wicket 6 leaves wicket 6, and the Teller at wicket 6 rises from her chair and walks off to the right and at about 1:46:46 is offscreen.

At about 1:46:56 P.D.'s head reappears in the lower right hand side of the screen behind the chair at wicket 6. P.D. walks toward her wicket 5. At about 1:47:00 the Teller who had been at wicket 6 appears in the lower right-hand side of the screen. At about 1:47:02, P.D.'s purse can be seen over P.D.'s shoulder as she approaches her chair at wicket 5. The wicket 6 Teller is behind her chair at wicket 6. Over about the next five frames, P.D. approaches her chair at wicket 5. In the next frame, at about 1:47:03, the dark-haired woman appears behind P.D., to P.D.'s left. P.D. continues walking toward her chair. The dark-haired woman walks behind and to P.D.'s right side, between P.D. and P.D.'s drawers, at about 1:47:04, and bends forward beside P.D.'s drawers. P.D. moves back to the left, partly offscreen, wrapping her hands around one another, while the dark-haired woman remains bent forward beside P.D.'s drawers. At about 1:47:07, both P.D.'s hands are at her (P.D.'s) face, most of the back of P.D.'s head is offscreen for about 13 frames, and the dark-haired woman remains bent forward besides P.D.'s drawers. At about 1:47:13 P.D. can be seen to the left, partly off screen, wrapping her hands around one another. The dark-haired woman turns from the drawers to the left and walks to the left.

At about 1:47:13 -:15, P.D. walks toward her drawers, and facing the teller at wicket 6, opens and closes her left hand. At about 1:47:16, PD. gestures to herself with her left hand, and opens and closes her left hand twice. At about 1:47:17 P.D. turns to her left. At about 1:47:18 P.D. turns to her right toward the Teller at wicket 6. At about

1:47:19, P.D. pulls her purse strap off her right shoulder. At about 1:47:20, P.D. lifts the strap of her purse from her right shoulder. At about 1:47:21, P.D. puts her purse in her left hand. At about 1:47:22 - :23, P.D. reaches down and pulls out her bottom drawer with her right hand, bends forward, and puts her purse in the bottom drawer. At about 1:47:24 - :25, P.D. rubs her hands together, raises both hands to her face, her back to the camera. Over about the next 32 frames, P.D. smooths her hair back from her face with both hands, then brings both hands to her face and hair at times, and at times the left side of the back of her head is off camera.

At about 1:47:33 - :35 a woman customer approaches wicket 5. At about 1:47:35 - :42 the customer's lips are moving, and P.D. responds, gestures with her right hand. The customer leaves wicket 5 and walks to the right. At about 1:47:46 P.D. is seen rubbing her hands together, then looks to the right. For about the next 37 frames, P.D. continues to look to the right. At about 1:47:52, P.D. walks to the right offscreen without her purse. The Teller at wicket 6 remains at wicket 6. At about 1:48:13 - :18, P.D.'s head reappears in the lower right of the screen, and she walks to her wicket 5, pulls out her chair and sits at her wicket. At about 1:48:20 a woman customer appears at P.D.'s wicket, places her purse on the counter, and reaches into her purse. At about 1:48:24 P.D. has a small white paper document in her hand. At about 1:48:28 the customer walks away from wicket 5. At about 1:48:31 the woman customer returns to wicket 5. The woman customer's lips are moving. At 1:48:38 the customer places a grey metallic object on the counter at wicket 5. P.D. reaches toward the monitor with her right hand. At 1:48:39 a blue colour appears on the lower half of the monitor. At about 1:48:40 P.D. pulls her keyboard out toward herself. At about 1:48:42 the customer leans over the counter, her lips can be seen moving. At about 1:48:48 the customer coughs, then her lips move. At about 1:48:57 the Teller at wicket 6 leaves her chair and moves to the right. At 1:48:58, P.D.'s monitor appears entirely blue. At about 1:49:00 the customer keys in at the counter of wicket 5.

At about 1:49:03 - :04, the woman customer hands something indiscernible to P.D., which P.D. takes in her left hand. In the first frame of 1:49:04, it appears rectangular, pinkish red. In the second frame of 1:49:04 it appears brownish. In the third frame of 1:49:04 it appears reflective in P.D.'s left hand. In the fourth frame, it appears

greenish in colour, and a reflective glint appears in front of P.D.'s head. In the fifth frame, no colour or reflective glint appears at all. In the next five frames, P.D.'s head turns left, and is partly offcamera, and her left hand is not visible. Over the following 5 frames (now at about 1:49:06) the left side of P.D.'s head, and her left arm and hand are not visible. P.D.'s head turns to her right. At about 1:49:07 the Teller at wicket 6 moves offscreen. P.D. reaches into her top drawer and pulls out an indiscernible object which she holds in front of herself, her back to the camera, and then brings forward. At 1:49:11 P.D. can be seen putting on her eyeglasses.

At 1:49:12 P.D.'s right hand can be seen on her mouse. Something green and shiny can be seen in her left hand. The woman customer at P.D.'s wicket looks away, to her right. At 1:49:14 the woman customer's lips can be seen moving and at this point, Video 3 ends.

To recap:

The final report of the Mgr. ER referenced the content of Video clip 3 as follows:

At approximately 1:45 pm, she takes her handbag and leaves her workstation then returns one minute later.

Some evidence was heard from the Bank's witnesses about the possibility that when P.D. left her wicket with her purse at this point, she had the Bank's \$1000.00 in her purse, or had already hidden it, and/or was about to hide it.

P.D.'s explanation for having left her wicket with her purse and having returned to her wicket and resumed Teller duties so shortly thereafter was that she had placed her cellphone in her purse and had intended to leave her station for lunch, but that she was told that someone else had taken lunch at the same time and that the bank was short-staffed at that moment and needed her to remain at her wicket, so she returned to her wicket.

I find as follows:

Video clip 3 indicates that P.D. left her wicket and the screen with her cellphone and her purse at 1:46:42 and returned at 1:46:56.

As found above, there is no evidence that she stole \$1000.00.

The Bank's evidence or position is that when P.D. left her wicket with her purse in Video clip 3, she had the Bank's \$1000.00 in her purse, or had already hidden it, and/or was about to hide it. This is theoretical and purely speculative in nature. There is no evidence to support it.

P.D.'s uncontradicted evidence was that her lunch break did not occur at a fixed time and could be taken as late as 2 to 3 p.m., depending on the number of Tellers and the number of customers in the branch at any given time. P.D.'s explanation of her less than one minute hiatus from her wicket at 1:46 p.m., was that when she tried to leave for lunch she was asked to return to her wicket and serve customers. As she is seen dealing with a customer shortly thereafter, P.D.'s evidence is credible and inherently probable.

I turn now to Video Clip 4, which deals with the approximately 12 minutes between "13:54 - 14:06" on March 30, 2017, about 6 minutes after Clip 3. It was referred to in evidence as Transaction 1.

Video Clip 4:

The clip opens at 1:54:51. P.D. is seen seated at wicket 5, the screen of her monitor is blue. P.D. is facing toward her right. Wicket 6 is empty. The head of a woman with blond, longer than shoulder-length hair is seen at P.D.'s drawers between wickets 5 and 6. From about 1:54:52 - :53, P.D. and the woman appear to be talking. At about 1:54:53, P.D.'s jaw can be seen dropping. From about 1:54:53 to :56, Mr. X. appears on the right side of the screen, behind wickets 5 and 6, and walks from the right to the left side of the screen. At about 1:54:56 - :57, the blond woman moves to the left, behind P.D. The closed top of P.D.'s second drawer can be seen; a stapler and a white document are resting on top of the closed second drawer. Mr. X places his left hand on the counter of wicket 5 and looks to his right, away from the wicket 5 counter. At about 1:54:58 - :59, the blond woman moves to the right, P.D. continues to look to her right, Mr. X turns toward wicket 5, and can be seen smiling at P.D. P.D. turns, looking away from the woman, and faces Mr. X. The woman is still behind P.D., at P.D.'s drawers. Mr. X removes his hand from the counter, leans to his right (the camera's left) and is partly offscreen. The blond woman steps back.

At about 1:55:00 - :01 P.D. and the blond woman lean to the left. P.D. is partly offscreen, as is Mr. X. The blond woman points ahead and to her right with her right hand and arm (about 8 frames). At about 1:55:01 - :02, Mr. X is in full view at wicket 5, facing P.D. The woman partly withdraws her right hand and arm, while Mr. X looks to his left (the camera's right) in the direction toward which the woman had been pointing. At about 1:55:02 - :03, the woman draws both her hands toward her chest, steps in front of P.D.'s drawers, Mr. X looks to his left, behind him, away from wicket 5, the woman walks to the right side of P.D.'s drawers and moves further toward the right. Mr. X turns toward P.D.'s wicket. At about 1:55:04 the blond woman's head is visible only at the lower right corner of the screen. Mr. X's right hand is on P.D.'s counter, his left hand is in front of his chest. Mr. X lowers his left hand below the wicket counter, then raises his left hand to his chest. P.D. is seated facing Mr. X. Only about half of the back of her head, the right side of her head, is onscreen. Mr. X moves his left hand across his chest on his left side, and looks down. From about 1:55:05 - :06, P.D. raises her right hand, Mr. X smiles, raises his left hand above his shoulder at the left side of his head. At about 1:55:07, Mr. X brings his left hand forward, over the wicket 5 counter, at shoulder level, then lowers his left hand down to the counter of wicket 5. At about 1:55:08 Mr. X is seen leaning on the counter of wicket 5 on his left forearm, smiling. At about 1:55:09 - :10, Mr. X appears to have something in his right hand, he turns directly toward the counter of wicket 5, holds the object in both hands in front of him, looks down at it. P.D. raises and lowers her right hand. At about 1:55:10 - :12, Mr. X continues to look down at the object in his hands on the counter, P.D. leans back in her chair, her head almost entirely offscreen, then leans forward, extends her right arm and hand, then withdraws it back to her face, then moves her head forward, at which time her right arm is obscured by her head. P.D.'s left side is offcamera. At about 1:55:12 - :14, Mr. X continues to look down at the object in his hands at wicket counter 5, P.D. remains seated, her back to the camera, facing Mr. X. At about 1:55:14 - :15, Mr. X looks up at P.D., gestures with something in his right hand. P.D. swings to the left in her chair, and is partly offscreen, the right side of her back and right shoulder still visible onscreen. Mr. X places a white square object on the green portion of the counter of wicket 5 with his right hand.

At about 1:55:15 - :16, Mr. X is seen holding another object in both his hands, turns to his right, slightly away from the wicket 5 counter, P.D. is in her chair, facing left, her head almost entirely offscreen. At about 1:55:17, Mr. X places the object in his right hand in his right pocket. At about 1:55:18, P.D. turns slightly to her left in her chair, and Mr. X looks at the white square object he had placed on the wicket 5 counter. At about 1:55:19, Mr. X is seen looking toward his right, leaning on the counter of wicket 5 on his left forearm. At about 1:55:20, P.D. moves forward to her right, her right side becomes more visible onscreen, her left side remains partly offscreen. At about 1:55:21, Mr. X moves his right hand and arm toward the white object on the counter of wicket 5. At about 1:55:21 - :22, P.D. picks up the white object, and the other side of the object, which is red, can be seen (it was identified in oral evidence as a passbook).

From about 1:55:23 - :25, P.D. holds the passbook open in her right hand, lowers it in front of her, raises it and opens it again, holds the book in her left hand and moves her right hand toward her mouse. At about 1:55:26 - :28, P.D.'s right hand is on her mouse, Mr. X's lips are seen moving, P.D. gestures with the passbook in her left hand toward Mr. X. At about 1:55:28 Mr. X holds something white in his right hand. At about 1:55:28 - 31, Mr. X gestures with his right hand toward P.D., the object in his hand is blurred during motion. Mr. X turns toward P.D. and touches the object in his right hand with his left hand. P.D. is holding the passbook open with her left hand and her right hand is on her mouse. She moves her right hand off her mouse and moves her right hand over her keyboard. Mr. X leans closer toward P.D., with the white object in both his hands. P.D.'s right hand moves toward her mouse, then back over to her keyboard, then back toward her mouse. Mr. X opens or unfolds the white object in his hands toward P.D. At about 1:55:32 Mr. X looks at the white object in his hands, P.D.'s right hand is on her mouse, the passbook is in her left hand above the counter and keyboard. Mr. X again opens out the white item in his hands, and moves it toward P.D. Mr. X. places the white item on the wicket 5 counter, P.D. takes her right hand off her mouse and moves it above her keyboard toward the item.

At about 1:55:33, Mr. X pushes the white item across the counter of wicket 5 toward P.D., picks up something offscreen to his right, something can then be seen in his right hand, and he leans over the counter of wicket 5. At about 1:55:34, Mr. X is seen

leaning further over the counter, holding the white item with his left hand, he leans over it with his right hand and P.D. is holding up the passbook. At about 1:55:34 - :36, Mr. X appears to be writing with something in his right hand on the white item on the counter of wicket 5, then moves his right hand and arm partly offscreen. P.D. is seen holding the passbook in her left hand, her right hand over her keyboard. At about 1:55:37 - :38, P.D. is seen moving her right hand to her mouse. At about 1:55:39, Mr. X leans forward at the counter, still has his left hand on the white item on the counter (which was identified in evidence as the \$1000.00 cheque he was seeking to cash as part of the transaction), lowers his head once. At this point and until 1:55:56, only the right half of P.D.'s head, shoulders and right arm are in view of the camera. Her left side is offscreen.

At about 1:55:40 - :42, Mr. X steps back slightly from the counter, lifts his left hand from the cheque on the counter, gestures toward it with his left hand, P.D.'s right hand is on her mouse, her left hand holds the passbook, Mr. X leans onto the counter again, and P.D. gestures with the passbook in her left hand. At about 1:55:43 - 44, the passbook is still visible in P.D.'s left hand, her right hand is on her mouse, P.D. draws the passbook toward her chest. From about 1:55:45 - 48 Mr. X appears to be conversing with P.D. At about 1:55:48 - :54, Mr. X places his right hand on the cheque on the counter, his lips can be seen moving, P.D. lifts her right hand off her mouse, places it on the passbook, moves the passbook toward her chest. At about 1:55:54 Mr. X's lips can be seen to be moving. At about 1:55:56, Mr. X picks up the cheque from the counter in his right hand, moves his right arm forward with it and drops it on the counter closer to P.D. At about 1:55:57, Mr. X pushes the cheque across the counter and points to it, while his lips are moving. At about 1:55:58 - :59, Mr. X points to the cheque, then to something on it, then moves it again on the counter. P.D. reaches over to the cheque.

At about 1:56:00 P.D. takes the cheque in her right hand. At about 1:56:01, P.D. can be seen with the passbook and cheque in both her hands above her keyboard. Mr. X leans across the counter, then steps back from the counter, and P.D. rolls her chair backwards. At about 1:56:02-:04, P.D. places the cheque in the cheque processing machine at her wicket with her right hand, while still holding the passbook in her left hand. From about 1:56:05 to :17 P.D. and Mr. X remain in place, from time to time Mr. X's lips can be seen moving. At about 1:56:17 Mr. X gestures, raising both his hands to

his chest, P.D.'s right hand remains on her mouse. At about 1:56:18 - :22, P.D. takes her right hand off her mouse, moves back from her counter slightly, Mr. X.'s lips can be seen moving. At about 1:56:23, Mr. X can be seen gesturing, both hands on his chest, P.D.'s right hand on her mouse. From about 1:56:18 - :22, P.D. takes her right hand off her mouse, moves backward, and Mr. X's lips can be seen moving. At about 1:56:23, Mr. X gestures with both hands toward his chest, P.D.'s right hand remains on her mouse. At about 1:56:23 - :26, Mr. X gestures with both hands behind his back. At about 1:56:28, P.D. removes her right hand from her mouse, moves her right hand in front of her chest, her left hand is holding the passbook. At about 1:56:29 - :34 Mr. X appears to be chatting with P.D. At 1:56:33 P.D.'s right hand is on her mouse, and Mr. X leans on his left arm on her counter. At about 1:56:35 - :36, P.D. takes her hand off her mouse, moves her hand to her right side, then toward her cheque processor.

At about 1:56:37, P.D. places her right hand on her mouse. Mr. X's lips are seen moving. At about 1:56:39 - :40 Mr. X gestures with his left hand, then points the forefinger of his left hand toward P.D., then points upward twice. At about 1:56:42 P.D. is seen with the passbook in her left hand, she gestures toward Mr. X with the passbook, then draws the passbook toward herself, in front of her chest, so it is not visible to the camera. At about 1:56:42 - :45 P.D. leans back in her chair, hand off her mouse, Mr. X's lips moving, P.D. gestures with her right hand. At about 1:56:45 - :47, Mr. X steps back from the counter, P.D. leans forward toward her counter, her right hand moving toward the right side of her head, Mr. X's lips moving, gesturing with both hands at his chest, looks to his right. At about 1:56:48 - :50, Mr. X faces P.D., his hands at his chest, then extends his hands toward P.D., his lips moving, P.D. seated, passbook visible in front of her. At about 1:56:50, Mr. X can be seen with his hands at the sides of his chest. At about 1:56:51 - :56, P.D. raises her right hand, extends it upward, the passbook can be seen in her left hand, P.D. gestures to herself with her right hand, waves the passbook toward herself with her left hand, Mr. X's lips can be seen moving, P.D. gestures again with her right hand.

At about 1:57:00 - :08, P.D. puts her hand on her mouse, waves the passbook. At about 1:57:08 - :18, P.D. touches her hair with her right hand, places her right hand on her mouse, Mr. X's lips can be seen moving, P.D. remains seated, her right hand on her

mouse. At about 1:57:19 - :20, P.D. gestures twice with the passbook in her left hand, Mr. X's lips are seen to be moving, P.D.'s right hand on her mouse. At 1:47:23 - :28, P.D. enters something on her keyboard with her right hand, then returns her right hand to her mouse. At about 1:57:29, P.D. can be seen holding the passbook toward Mr. X in her left hand, then gesturing with her open right hand toward herself. At about 1:57:29 - :32, Mr. X's lips can be seen moving from time to time. At about 1:57:31, P.D. puts her right hand on her mouse, the passbook is open in her left hand above her keyboard. At about 1:57:31 - :51, Mr. X's lips are seen moving, he is gesturing with his hands, P.D. takes her right hand off her mouse, gestures toward her chest. At about 1:57:52 - :53, Mr. X leans across the counter of wicket 5, smiling. At about 1:57:54 P.D. places her right hand on her mouse. From about 1:57:54 - :58, Mr. X's lips appear to be moving, P.D. remains seated facing him, right hand on her mouse. At about 1:57:58, Mr. X reaches across his chest with his left arm to his right shoulder, P.D.'s right hand on her mouse.

At about 1:58:00 - :02, Mr. X leans on his left forearm on the counter of wicket 5. At about 1:58:00 - :02, Mr. X's lips are seen moving, P.D. remains seated, her right hand on her mouse. At about 1:58:03, P.D. gestures with her right hand. At about 1:58:04 - :06 P.D. touches her keyboard with her right hand, then returns her right hand to her mouse. At about 1:48:07 - :08, P.D. touches her keyboard with her right hand, then gestures with her right hand. At about 1:58:10 - 17, P.D. places her right hand on her mouse, and Mr. X's lips can be seen moving. At about 1:58:17 - :22, P.D. lifts the passbook up in her left hand, lowers it, Mr. X's lips can be seen moving, P.D. rolls back her chair slightly. At about 1:58:23, P.D. rolls her chair forward and places her right hand on her mouse, at 1:58:24 P.D. removes her hand from the mouse, at 1:58:25 she touches her keyboard with her right hand. At about 1:58:26 - :31 P.D. is holding the passbook in front of her, then moving it, then moving her right hand over the passbook, then moves her right hand from the passbook to her mouse. At about 1:58:33 - :35, P.D. rolls her chair back from the wicket 5 counter, turns to her right, gets up from her chair with the passbook in her left hand, turns her face toward the camera, walks to her right (screen left) and disappears from the screen at 1:58:35.

At about 1:58:35 - :47, Mr. X moves from wicket 5 counter to wicket 6, which is empty. At about 1:58:49, Mr. X leans over the counter of wicket 6 and looks toward his

left (screen right) and is seen laughing. At about 1:58:51, Mr. X moves back to his right (screen left) toward wicket 5. At about 1:58:53, Mr. X moves back to wicket 6, his lips can be seen moving. At about 1:58:55, Mr. X moves back behind the divider between wickets 6 and 5, only his head is visible. At about 1:58:59, someone in dark clothing appears behind the square pillar on the right side of the screen, and Mr. X looks in that direction, his face not visible.

At about 1:59:00 - :06, Mr. X. moves back and forth between wickets 5 and 6, looking in the direction of the square pillar. At about 1:59:06 P.D. appears in the lower left hand corner of the screen with the passbook in her left hand. P.D. extends her left arm with the passbook in her hand toward the counter of wicket 5. Mr. X walks away from the wickets, his back to the camera, in the direction toward which he had been looking. At about 1:59:10, Mr. X is at a table near the pillar, and waves to the person on the other side of the pillar. At about 1:59:12, Mr. X has turned and is facing toward wickets 5 and 6. P.D. is standing at her drawers and facing right toward wicket 6. At about 1:59:12 - :14, P.D. opens her cash drawer, possibly the second drawer from the bottom, looks at brownish, pinkish bills (possibly 2 are visible) in the drawer and closes the drawer. At about 1:59:14 - :16, Mr. X returns to the wicket 5 counter and places a paper on the counter. P.D. turns toward the camera and walks to the left off screen.

At about 1:59:58, P.D. reappears onscreen on the left with the passbook. At about 2:00:00 P.D. is seen facing Mr. X across the counter from her. At about 2:00:01 - :02, P.D. is seated on her chair and leans toward her left, such that her head is off camera, only her right shoulder and arm and the right side of her head are visible. Mr. X takes his passbook, which was on the counter. At about 2:00:03 - :04, P.D. points to the passbook. Mr. X lifts the passbook with his left hand, toward P.D. At about 2:00:05, P.D. lifts the cheque from the cheque processor with her left hand. At about 2:00:05 - :07, with her right hand, P.D. slides a white sheet of paper, which is on the closed top of her second drawer, toward the camera. At about 2:00:07 - :13, P.D. opens her top drawer with her right hand. Papers are visible, but no coin or bills are visible. P.D. holds something white and beige in both hands in front of her, then places it in the far right-hand side of her top drawer and closes the drawer.

At about 2:00:14 - :17, Mr. X's lips are moving, and he handles the passbook on the counter of wicket 5 (the red of the cover of the passbook is visible in Mr. X's left hand). At about 2:00:17 - :21, P.D. moves her right hand to her mouse, and Mr. X's lips can be seen moving. At about 2:00:21, P.D. raises her right hand toward her face. From about 2:00:21 - :35, Mr. X's lips can be seen moving. At about 2:00:36, Mr. X puts something in his right pocket with his right hand, his lips can be seen moving. At about 2:00:38 - :41, Mr. X's lips can be seen moving, and he points with his right hand two times. At about 2:00:42, Mr. X. can be seen making push and pull gestures with his right hand, while P.D. remains seated facing him at the wicket, her back to the camera. At about 2:00:51 - :56, P.D. gestures with both her hands in front of her. At about 2:00:56 - 2:02:32, Mr. X gestures with his left hand toward himself, and his lips move from time to time.

At about 2:02:32 a blond head appears at the bottom right of the screen, and proceeds to the left offscreen. At about 2:02:34 - :35, P.D. pushes herself back toward the camera in her chair, her head is not visible, she leans to the left offscreen, and her feet are visible under her keyboard. At about 2:01:41 to about 2:03:19, P.D. pulls herself forward, her right side is visible behind her counter, Mr. X's lips moving from time to time, then P.D. pushes her chair back, turns to her left, and at about 2:03:19 P.D. moves to her left offscreen, while Mr. X remains at wicket 5.

At about 2:04:15, P.D. is still offscreen and Mr. X. leaves the screen to his right (screen left). His arm remains visible at the counter of wicket 5. At about 2:04:26 Mr. X. is seen walking backward toward wicket 5. At about 2:04:27, the back of P.D.'s head is visible at about her set of drawers, just left of wicket 6. At about 2:04:28 - :29, P.D. walks up to the drawers at wicket 6, while Mr. X remains at wicket 5. At about 2:04:30, P.D. opens the top drawer of wicket 5, moves to her right, and her right arm is offscreen, her back is to the camera, and her actions at the drawers cannot be seen. At about 2:04:32, P.D. turns to her left, and her left hand is holding a bill or bills. P.D. moves to the right, such that her right half is offcamera. At about 2:04:35 - :41, P.D.'s back is to the camera, she is facing right, and her left hand and arm and what, if anything, is in her left hand is not visible. At about 2:04:42, P.D.'s left hand is seen with pinkish reddish bill(s), number not discernible, in it. At about 2:04:43 P.D. can be seen closing the top of

the second drawer of wicket 6, drawing it toward her. At about 2:04:43 - :44, P.D. walks to her left, toward wicket 5, faces Mr. X at her wicket 5, pinkish brownish bills (possibly 2 or more) reflecting light. The image of the bills is blurred and not discernible, as P.D. is moving.

In the first frame at 2:04:45, P.D. faces left, holds pinkish reddish bills on top in her right hand, under them, brownish bills (number not discernible) can be seen in her left hand, and she walks toward the left, toward wicket 5. At about 2:04:46, P.D. is seen behind her set of drawers, which separate her wicket 5 from wicket 6, bills in hand, her back to the camera, as she walks toward her counter (about 5 frames), while Mr. X is looking at her from the counter of wicket 5. At about 2:04:48 P.D. extends her left arm, brownish bills are visible in her left hand, while Mr. X looks on. P.D. places some pinkish brownish bills on top of a white paper which is on the closed top of her second drawer.

At about 2:04:50 P.D. is seen placing brownish bills in the bill the counting machine at her station, which machine is facing her and the camera, and runs the bills through the bill counting machine. The count, that is, the number of bills counted by the machine is not visible, and the small screen where the count would appear appears illuminated or reflective. At about 2:04:53 the run of the bills is complete and P.D. is facing the screen and at this time Mr. X is looking away to his right (the camera's left). At about 2:04:54, P.D. removes the bills from the counting machine with her right hand.

At about 2:04:55, P.D. reaches with her right hand for the pinkish brownish bills she had placed on the paper on top of her closed second drawer, while Mr. X watches her doing so. At about 2:04:56 P.D. picks up the pinkish brownish bills in her right hand. At about 2:04:57 -2:05:00, P.D. leans to her left and her right arm can be seen moving, from the back, and Mr. X is seen facing her and watching her. At about this point, P.D.'s left side is almost entirely offscreen.,.

At about 2:05:00, P.D. turns to her right, holding a pinkish bill or bills in her right hand. In the next frame P.D.'s right hand moves toward her set of drawers and greenish bills appear in front of her in her left hand. P.D. opens her middle cash drawer with her right hand, and when it opens, bills can be seen in the bottom of the drawer. At this point, something indiscernible is in P.D.'s right hand. At about 2:05:01 - :02, P.D.

reaches into her middle cash drawer with her right hand and places something not yet discernible on top of the bills already seen in the bottom of the drawer. Using the frame by frame function, when P.D. lifts her right hand from the drawer, a pinkish brownish bill or bills appear across and on top of the bills which were seen at the bottom of the drawer. The drawer remains open.

At about 2:05:03, with bills of an indiscernible colour in her left hand, P.D. reaches for the bill counting machine and turns it toward Mr. X, and closes the middle cash drawer with her right hip. At this point pinkish bills, the number of them indiscernible, are visible on her keyboard. At about 2:05:04 the bill counting machine and the screen which indicates the number of bills is facing Mr. X, on an angle away from P.D. At about 2:05:06 - :11 P.D. can be seen placing an indiscernible number of bills in the bill counting machine while Mr. X is looking on, and the bills are run through the counting machine. At about 2:05:22, P.D. pulls the bills which have run through the machine out of the machine and places them in the slot to be run through again. At about 2:05:15, Mr. X can be seen stepping slightly back, continuing to look in the direction of the bill counting machine, and the bills have come through the bill counting machine and they are in P.D.'s right hand.

At about 2:05:17, P.D. can be seen laying the stack of bills from her hand (which now have a greenish brownish tone) onto the counter of wicket 5 in front of Mr. X. At about 2:05:18 - :19 P.D. can be seen placing two pinkish brownish bills on the counter of wicket 5 in front of Mr. X. At about 2:05:19 - :23, Mr. X reaches to his right offscreen. P.D. faces Mr. X at wicket 5, her back to the camera. At about 2:05:23 - :24, Mr. X places a white envelope on the counter of wicket 5, and reaches for the stack of bills. At 2:05:25, P.D. is seen lifting the receipt from the receipt printer while the bills are on the counter. At about 2:05:25 - :30 Mr. X gathers the bills from the counter. At about 2:05:27, the printer can be seen producing a second receipt. At about 2:05:28, P.D. brings the receipt to the counter and offers it to Mr. X.

At about 2:05:32 Mr. X is seen holding the bills on the counter with both hands. Mr. X then moves his left hand from the bills to his left side, and digs into something, possibly a pocket, with his left hand. The item in his left hand, if anything, is not visible. He is holding bills in his right hand at about 2:05:35. At about 2:05:35 - :44 Mr. X is

seen pushing the bills into the envelope. At about 2:05:44 - :46, with his right hand around the envelope, Mr. X places the envelope in the right pocket of his jacket or pants. At about 2:05:43, Mr. X is seen at the counter of wicket 6 and P.D. turns off her monitor.

At about 2:05:46 two white pieces of paper are on the counter of wicket 5. There is a pen to the side of the paper on the right. At about 2:05:50 - :55, Mr. X's right hand is on the counter of wicket 5. Mr. X moves the receipt and pen to his right. Mr. X can be seen reaching toward his left side, possibly a pocket, with his left arm and hand, and another pen appears in his left hand, which he moves to his right hand, and he signs one of the receipts. At about 2:05:57, P.D. takes the signed receipt in her right hand, at about :58, picks up the pen which Mr. X did not use. At about 2:05:59 the receipt can be seen in P.D.'s left hand. At about 2:06:05 P.D. extends the other receipt in her right hand toward Mr. X, who is seen moving away to the right of wicket 5, behind wicket 6. Mr. X approaches wicket 5, then moves back, and P.D. withdraws her right arm. At about 2:06:07 P.D. is seen holding the receipt in her left hand, she places it in her top drawer, walks to the right, and at 2:06:12 is no longer on the screen. At about 2:06:13 the Wicket 6 Teller enters the screen and at about 2:06 21, at wicket 6, the Wicket 6 Teller turns the bill counter which is still facing toward wicket 5, toward the camera.

At 2:06:29 Video clip 4 ends.

I find as follows:

At about 1:55 p.m., Mr. X came into the branch with his passbook and a \$1000.00 cheque and wanted to cash the cheque and receive \$5000.00 from his account, \$6000.00 in total. Six thousand dollars exceeds the amount in cash each Teller receives at her wicket at the start of the day. Tellers on team cash can ask one another to supply the bills and coin they lack for a particular transaction out of one another's supply at their wickets. Mr. X was seen to be quite talkative throughout the transaction. P.D. appears to have responded sociably.

P.D. had checked one of her cash drawers at about 1:59:12 - :14. She did not withdraw anything from it at that point. About 4 minutes later, P.D. was offscreen from 2:03:19 to 2:04:27, having moved to the area occupied by the Tellers adjacent to her left (wickets 3 and 4?). The evidence at hearing did not clearly establish P.D.'s location(s) in the approximately 1 minute between 2:03:19 to 2:04:27. P.D. stated that she believes she

was asking for cash from other Tellers, or waiting for a locked box to become open. She candidly stated in her evidence that she was not sure. It appears from Video Clip 4 that she obtained the greatest amount of the money from wicket 6 but may have obtained some of it from an adjacent Teller or Tellers in the minute or so she was offscreen.

There is no video surveillance evidence that P.D. counted out by hand the bills that went through the bill counting machine. She may have counted some of them when she was off-camera if she obtained bill(s) from the Tellers adjacent to her left, and she may have counted the bills she obtained from wicket 6 while her back was to the camera. Counting them in full view of a camera or cameras would have been the better practice.

At about 2:05:18 - :19 in Video clip 4, P.D. is clearly seen placing two pinkish brownish and therefore probably \$50.00 bills on the counter in front of Mr. X. That meant she needed to provide Mr. X 59 \$100.00 bills to total \$6000.00. Mr. X can be seen looking at the bill counting machine and likely could see the number of bills which the machine indicated it had processed.

Although Mr. X likely saw the count to have been 59, there is a possibility that not all the bills that P.D. ran through the bill counting machine were one hundred dollar bills, though they may have totaled 59. It is possible that some of the bills P.D. obtained from other Tellers were not one hundred dollar bills. There is no evidence establishing that P.D. was aware that they were not one hundred dollar bills, and no evidence establishing that P.D. deliberately substituted bills of a lower denomination than one hundred to put through the bill counting machine and thereby deliberately mislead Mr. X and pay him less than \$6000.00 in Transaction 1. It is even less likely, or, put another way, inherently improbable, that bills of a less than one-hundred dollar denomination that went through the machine resulted in the exactly \$1,000.00 shortfall that Mr. X claimed he did not receive.

In Video Clip 4, Mr. X can be seen signing a copy of the Bank's printed receipt. P.D. can be seen placing the signed receipt in her drawer. (The signed receipt was not produced in evidence.) It is also inherently improbable that Mr. X would have signed a receipt for \$6,000.00 that was incorrect.

After P.D. has placed the bills on the counter of wicket 5, at about 2:05:32 - :35 Mr. X can be seen in Video Clip 4 moving something indiscernible from the counter of

wicket 5 with his left hand to possibly a pocket on his left side. It is just as possible that Mr. X absent-mindedly or deliberately transferred some of the \$100.00 bills, for instance, 10 of them, to his pocket, instead of his envelope, as it is possible that he did not.

I therefore conclude that there is no direct or clear audio-visual evidence in Video Clip 4 that P.D. shorted Mr. X, accidentally, or deliberately.

I therefore conclude that the evidence in the video surveillance and from the June 8, 2017 interview is just as consistent with P.D. having given Mr. X the correct amount during the first transaction as it is consistent that she did not give him the correct amount. Consequently, the Bank's evidence established no more than a 50% likelihood that Mr. X did not receive the correct amount on the first transaction on March 30, 2017.

The Mgr. ER's allegation/finding was that P.D. "tried to cover her misappropriation by short-changing a customer." As stated above, the Bank's evidence did not establish on balance of probabilities that P.D. misappropriated any money. Be that as it may, the onus was on the Bank to establish that it was more probable than not, or with at least 51% probability, that P.D. deliberately withheld \$1000.00 from Mr. X in the first transaction on March 30, 2017.

The evidence in Video Clip 4 (Ex. 5) as to whether Mr. X was in fact short-changed in Transaction 1 was inconclusive. The number and denomination of the bills that were put through the bill counting machine was not ascertainable from the Video Clip. P.D. had leaned offscreen to her left and may have been requesting assistance with bills from her fellow Tellers, and was offscreen to the left of her wicket 6 long enough to have obtained from her fellow Tellers some of the bills required to make up the needed \$6000.00.

The evidence in Video Clip 4 was just as consistent with P.D. having given Mr. X the full \$6000.00, as it was consistent with an error having occurred with the denominations P.D. obtained from the other Tellers and from wicket 6, and that as a result Mr. X was not given the full \$6000.00. It also raised the possibility that Mr. X absent-mindedly or deliberately removed some of the bills from the stack on the counter and placed them in a pocket on his left side. It therefore did not establish on a balance of probabilities that P.D. short-changed Mr. X in Transaction 1.

I turn now to Video Clip 5, which according to the description on the CD-Rom (Ex. 5) deals with the period from about “15:40 – 15:42” on March 30, 2017, about 94 minutes after the conclusion of Video Clip 4. Video Clip 5 was referred to in evidence as Transaction 2.

Video Clip 5:

Video Clip 5 begins at 3:39:20. There are no tellers at wickets 5 and 6. A woman customer can be seen at the counter of wicket 5, facing the camera, with a small rectangular device in her hand. At about 3:39:22, the legs of 2 people can be seen in the central area of the branch, behind the customer at wicket 5, walking toward the customer side of wicket 5 and 6. From about 3:39:22 – 23 P.D. and another woman become visible in the centre area of the branch, behind the customer at wicket 5, and it is clear that those were their legs. The second woman walks to P.D.’s left (the camera’s right), away from P.D. P.D. walks toward her wicket. Something white, a paper, can be seen in P.D.’s hand as she approaches the customer at her wicket 5. At about 3:39:24, P.D.’s face becomes visible in the clip, and she looks toward the woman customer at wicket 5. At about 3:39:25, P.D. approaches the woman at wicket 5 from behind and from the woman’s side, on the customer side of the wicket.. P.D.’s mouth can be seen moving.

At about 3:39:26 -:30, P.D. stands to the woman customer’s left side, such that the view of P.D.’s face is obstructed by a square-shaped object on the counters between wickets 5 and 6. The woman at wicket 5 turns her head toward P.D., then turns her head slightly away from P.D. toward wicket 5, and then turns her head back toward P.D. From about 3:39:30 - :33, the woman turns to her left toward P.D. and the woman’s face is not discernible. From about 3:39:33 - :38, both their faces are obstructed from view for many frames, then the woman turns away from P.D. and faces the counter of wicket 5 with the small rectangular device in her hand. At about 3:39:38 - :40 the woman customer can be seen tapping or pointing to the device in her hand. P.D. turns and walks in front of wicket 6 on the customer side. From about 3:39:40 - :56, P.D. remains at the far right side of the screen, only partly onscreen. At about 3:39:46 - :51, the head of a redheaded person appears at the lower left of the screen intermittently and then disappears offscreen at about 3:39:51.

At about 3:39:54 - :56, P.D. can be seen at the far right of the screen walking backward toward the square pillar in the central area. A hand can be seen at the far right of the screen pointing toward her for about 6 frames. At about 3:39:56 Mr. X's face and jacket can be seen at the far right of the screen. At about 3:39:57 - :58, at the far right of the screen, P.D. can be seen walking forward, toward the hand, then stepping back toward the pillar. The hand can still be seen, gesturing for a few frames, while P.D. walks away from it. At about 3:39:59, P.D. turns around and still on the customer side of the wickets, walks toward the woman customer at the counter of her wicket 5, facing toward the woman customer, smiling.

At about 3:40:00, P.D. turns to her right, her back to the camera, her right arm slightly extended to the right i.e. toward the right side of the screen. Mr. X's face and jacket can be seen at the far right of the screen. At about 3:40:01 Mr. X steps back, his head down, P.D. walks toward him to the right of the screen. At about 3:40:02, P.D. is between the square pillar in the central area and an object on the counter of wicket 6 which obstructs the camera's view of her, and only the top of her head is visible. At about 3:40:03, P.D. bends forward slightly, and Mr. X can be seen at the right of the screen. At about 3:40:04, Mr. X moves forward toward the far side, i.e. the customer side, of wicket 6, and P.D. steps backward and moves to the centre of the customer side of wicket 6, and looks down. Mr. X's head and shoulders are visible. At about 3:40:05, P.D. can be seen still holding the white paper that was seen in her hand at about 3:39:23, and Mr. X is standing in front of the square pillar in the central area. At about 3:40:05 - :06, in about 6 frames, Mr. X's red-covered passbook appears in his right hand and he passes it to his left hand. P.D. can be seen from her hip to her head on the customer side of the counter of wicket 6, looking at Mr. X. Mr. X moves toward the counter of wicket 6, and P.D. steps backwards. Mr. X can be seen holding the passbook in his right hand, and something white, rectangular and flat in his left hand, which he places on the counter of wicket 6. P.D. and Mr. X can be seen moving to the left of the right hand side of the screen, so that both can be seen on the customer side of the counter of wicket 6, P.D. to the left, and Mr. X on the right. At about 3:40:06 - :07, Mr. X holds the passbook in both hands, then opens the passbook. The woman customer has remained at the counter of wicket 5. Mr. X leans on the counter of wicket 6 on his left arm, holding the passbook in

both his hands. P.D. is facing Mr. X, her back to the customer at the counter of wicket 5. At about 3:40:08 - :12, Mr. X is seen opening his passbook, P.D. is seen looking in the direction of the passbook at the counter, customer side, of wicket 6. Mr. X flips through some pages of the passbook, his face is turned toward P.D. P.D. raises her left hand with the paper in it toward Mr. X, then turns toward the woman customer at counter of wicket 5. Mr. X remains at wicket 6.

At about 3:40:13 P.D. moves toward the woman customer and stops at the separation/obstruction on the counter between wickets 5 and 6, such that P.D.'s face cannot be seen. Mr. X remains at the counter of wicket 6, holding the passbook in both his hands. The woman customer at the counter of wicket 5 can be seen looking at and tapping the device in her hand(s). At about 3:40:14 - :15, the woman customer turns her face toward P.D. briefly, Mr. X can be seen looking at his passbook at wicket 6, and P.D.'s face appears slightly, looking toward the woman customer at wicket 5. At about 3:40:15 - :19, the woman customer can be seen pointing or gesturing to something on her device. Mr. X can be seen moving toward the white rectangular object he placed on the counter at wicket 6. At about 3:40:20 - :22, Mr. X picks up the white rectangular object from the counter, the woman customer lifts her device and taps it, points to it, P.D. steps back so that no part of her head can be seen, and Mr. X steps to his left (to the right side of the screen) at wicket 6. At about 3:40:23 - :26, the woman customer can be seen to touch her nose, Mr. X leans on the counter of wicket 6 on his left arm, the woman customer's lips move, Mr. X shifts his position at wicket 6, and the woman customer turns to P.D., and then P.D.'s face becomes visible from behind the obstruction, as she turns toward wicket 6 and Mr. X.

At about 3:40:27, P.D. walks toward Mr. X at wicket 6, Mr. X moves his left hand from the counter to his nose, then mouth. P.D.'s right hand touches Mr. X's right arm as she moves behind him to the far right of the screen. At about 3:40:28 - :29, P.D. walks behind and past Mr. X, who remains standing at wicket 6 and who moves his passbook and the white rectangular object (possibly his envelope), P.D. walks past the square pillar to the far right of the screen and disappears from the screen. At about 3:40:30 - :34 Mr. X lifts the white rectangular object with his right hand above the counter of wicket 6 and drops it onto the counter, and looks to his right (i.e. toward wicket 5 and the left side of

the screen). The woman customer who is still at wicket 5 turns toward Mr. X. At about 3:40:35 - :38, Mr. X, still at wicket 6, looks toward his left (right side of the screen), then puts his passbook on the counter of wicket 6, looks down at it, and then holds the passbook in both hands.

At about 3:40:41, the top of P.D.'s head appears on the Teller side of wicket 6, then her right hand comes into view, her forefinger of the right hand pointing upward. At about 3:40:42 - :43, P.D. can be seen proceeding to the Teller side of wicket 5, her forefinger of her right hand pointing upward. As P.D. arrives at wicket 5, a white paper or document can be seen in her left hand. Her right hand is not visible. At about 3:40:44, P.D.'s left side is off camera. She can be seen showing the white paper or document to the woman customer. P.D.'s right hand is visible but blurred due to the motion of her hand. At about 3:40:45 - :50 P.D. places the paper or document on the counter at wicket 5, and the woman customer is seen looking at it. Mr. X can be seen observing P.D. and the woman customer at wicket 5 from the counter at wicket 6. The woman customer checks the device in her hand, facing P.D., and the woman customer's lips are seen moving. At about 3:40:51 - :57, the woman customer points to the device which is now in her left hand.

At about 3:40:52, Mr. X picks up the white rectangular item and his passbook and looks to the right of the screen. At about 3:40:53, Mr. X walks toward the right of the screen, away from wicket 6. At about 3:40:54, Mr. X turns his back to wicket 6, and steps away from it. At about 3:40:56, Mr. X walks toward the right of the screen, in front of the square pillar in the central area. At about 3:50:57, Mr. X walks to the right offscreen.

At about 3:40:57 – 3:41:00 a red-haired person appears at the bottom left of the screen. Mr. X remains offscreen. The woman customer and P.D. are at wicket 5, the woman customer can be seen holding her right thumb up, and holding her device in her left hand. At about 3:41:01 - :02, P.D. can be seen gesturing with a pen in her hand. At about 3:41:02 - :05, P.D. steps away from the counter of wicket 5 with papers in her hand. At about 3:41 :06 - :08, P.D. steps to her left at wicket 5, so that only part of her right back and shoulder and her right hand, holding a paper, remain onscreen. After about 5 frames, only P.D.'s right side is onscreen, and the woman customer can be seen

on the other side of the counter of wicket 5, her lips moving. At about 3:41:07, P.D.'s right arm appears on screen. At about 3:40:08, P.D. gestures with her right arm toward the woman customer.

At about 3:41:09 - :14, P.D. moves to her right and more of her appears onscreen. P.D. can be seen reaching for her top drawer with her right hand, and pulling it open, and looking inside the top drawer. She does not put anything in it or take anything out of it. At about 3:41:15 she can be seen closing her top drawer. At about 3:41:16 P.D. touches her third drawer and does not open it. At about 3:41:17 - :18, P.D. looks to her right, moves to the back of her drawers, while the woman customer remains at the counter of wicket 5. At about 3:41:18 - :20, P.D. returns to the woman customer at the counter of wicket 5, the woman customer is still dealing with her device.

At about 3:41:21 - 23, P.D. moves to the left at wicket 5, and is almost entirely offscreen. Only the right side of her sleeve on her right arm is onscreen. The woman customer at wicket 5 is seen pointing to her left (the camera's right). At about 3:41:23 - :24 P.D.'s right arm can be seen onscreen. P.D. opens the drawer beneath her keyboard with her right arm. At about 3:41:24 - :29, P.D. can be seen to withdraw something from the drawer beneath her keyboard, and she moves to the left, mostly offscreen, and only her right arm remains in view. At about 3:41:29 - :33 the woman customer at the counter at wicket 5 puts her device in her purse, and only P.D.'s right arm is onscreen.

At about 3:41:34 the woman customer closes her purse. Mr. X appears on the right of the screen, on the customer side of and near wicket 6. At about 3:41:35, P.D. is seen facing her drawers between wicket 5 and 6, and her right arm is extended. At about 3:41:36, P.D. is seen to have something blurred, due to movement, in her hand. At about 3:41:37, P.D. moves back from her drawers, and faces the woman customer at the counter of wicket 5, such that P.D.'s back is to the camera. At about 3:41:37 - :39, the woman customer can be seen gesturing toward P.D. and Mr. X is leaning on the counter of wicket 6 on his left arm.

At about 3:41:39 - :41, P.D. is seen turning a key in her third drawer, she opens the drawer, pinkish brownish bills are visible in the drawer, the number is indiscernible, P.D. leans forward, looking into the drawer. At about 3:41:41 - :44, P.D. can be seen reaching into the right side of the open drawer, at which point the content of the drawer

and her hand cannot be seen, then P.D.'s right hand emerges from the drawer with something greenish in it, and she closes the drawer with her right hip. At about 3:41:44, P.D. can be seen stepping toward her keyboard. The woman customer is still at her wicket 5, facing P.D. P.D.'s back is to the camera, and her arms and hands are not visible on screen. At about 3:41:45 - :52 P.D. appears to be in conversation with the woman customer at her wicket 5, her arms and hands still not visible on screen. At about 3:41:52, a small greenish paper appears in P.D.'s right hand, she looks toward her drawers, at which point the paper in her right hand appears grey.

At about 3:41:53, P.D. pulls her third drawer open, her right hand is over the open drawer, and the paper in her hand is blurred and appears beige. At about 3:41:54, P.D. leans to her right, then turns and faces toward the woman customer at her wicket 5, and a greenish, possibly reflective paper appears in her left hand, as she moves toward the woman customer. At about 3:41:55, P.D. pushes the drawer, which has remained open a few inches, to close it, and faces the woman customer at wicket 5. Mr. X is at wicket 6, looking away, toward the centre area of the bank. At about 3:41:56 - :57, the woman customer is seen gesturing side to side with her right hand, twice. At about 3:41:59, the woman customer is seen talking and P.D. is seen shutting the drawer with her right hand.

At about 3:42:00, P.D. moves to her left, so that her left side is slightly offscreen, and she is facing the woman customer. At about 3:42:01, bills appear in P.D.'s left hand, and she looks to Mr. X at wicket 6. At about 3:42:02, P.D. is seen walking around her drawers to wicket 6 with her left arm outstretched and bills fanned out in her left hand. At about 3:42:03, P.D. is at the Teller's position at wicket 6, her back to the camera, and Mr. X is on the other side of the counter of wicket 6.

At about 3:42:03 - :08 P.D. can be seen, her back to the camera, counting out ten brownish bills on the counter of wicket 6, one at a time, while Mr. X looks on. At about 3:42:08 - :10, P.D. pushes the bills toward Mr. X on the counter of wicket 6, then backs away slightly from the counter, her arms outstretched. Mr. X is seen holding something white in his right hand and has an envelope in his left hand.

At about 3:42:11, Mr. X. places the white item in his right hand on the counter of wicket 6, and the bills P.D. has placed on the counter of wicket 6 remain there. At about 3:42:11 - :12, P.D. gestures or waves and moves further back from the counter of wicket

6 and toward wicket 5. At about 3:42:13 - :14 P.D. moves toward wicket 6, places her right hand on the back of the Teller chair at wicket 6, and Mr. X moves the white item closer to her on the counter of wicket 6. P.D. gestures from behind the chair. At about 3:42:15 P.D. can be seen backing away from the Teller chair at wicket 6, Mr. X can be seen gesturing, pointing over the white item (perhaps it is the envelope into which the bills from Transaction 1 had been placed). At about 3:42:16, P.D. is seen behind her drawers, moving toward her wicket 5, both her hands are in the air, the thumb of her right hand raised upward ("thumbs up" sign). At about 3:42:17, in another frame P.D. holds both her hands up. Mr. X is seen pointing at P.D.

At about 3:42:17 - :18, Mr. X is seen reaching for the bills on the counter with his left hand, and picking them up. At about 3:42:19, Mr. X looks toward P.D., who is now at her wicket, where the woman customer has remained. At about 3:42:20, Mr. X taps the bills on the counter, and with his left hand reaches back to a pocket on his left side. At about 3:42:22 - :25, a black item (possibly a wallet) is seen in Mr. X's left hand, he brings it to the bills, looks inside the black item, and places the bills P.D. had counted out onto the counter of wicket 6 into the black item. At about 3:42:25 - :28, with the black item in his left hand Mr. X reaches back with his left arm and the black item is no longer visible. Mr. X reaches across the counter of wicket 6 with his right arm, and with his right hand picks up the white paper, which, because of a red cover which becomes visible when he has lifted it, appears to be his passbook. At about 3:42:30 - :31, Mr. X is seen picking up the white object, possibly the cash envelope, from the counter of wicket 6 with his left hand, then walking away from wicket 6 to the right of the screen, with his passbook in his right hand and the envelope in his left hand. At about 3:42:33 Mr. X is seen walking past the square pillar and off screen. P.D. remains at wicket 5 with the woman customer.

At about 3:42:35, an unknown person appears from the right and walks across the central area of the bank. P.D. is seen turning on her monitor, which turns blue. The woman customer is still on the customer side of the counter at wicket 5. At about 3:42:38 - :42, P.D.'s monitor screen turns black, P.D. pulls her keyboard towards her, touches her mouse, her monitor screen appears blue, the woman customer is at her counter, P.D. leans to her left, her right hand is seen on her mouse. At about 3:42:42 a redheaded person's

head appears in the lower left hand corner of the screen, and quickly disappears. At about 3:42:42 - :46, P.D. is seen at her keyboard, the woman customer at the counter of her wicket 5. At about 3:42:47 a redheaded person's hair is seen in the lower right hand corner of the screen, moving toward the left of the screen. At about 3:42:48 the back of the redheaded person's head and shoulders are visible behind wicket 6. At about 3:42:49, P.D. can be seen turning toward the redheaded person, and extending her right arm and hand toward the redheaded person. At about 3:42:50, the redheaded person raises her left hand. At about 3:42:51 - :52 P.D. is seen facing the redheaded person, and the redhead is facing P.D.'s drawers. At this point, P.D. is at the left side of her drawers, facing right toward the redheaded person. At about 3:42:53, P.D. turns toward the redheaded person and then back to face the customer at wicket 6. Simultaneously, at about 3:42:50 - :54 a second woman customer is seen crossing from the left in the central area and standing at wicket 6.

Video Clip 5 ends at 3:42:54.

Recap re Video Clip 5:

In her final report, the Mgr. ER wrote:

[P.D.] was asked what denominations she had given to [Mr. X] the second time he visited the branch; she stated that she gave him 50s or 100s, she was then asked if she had counted it for him to which she replied 'yes'; however, the video feed shows that [Mr. X] again presented the envelope on the counter and [P.D.] placed the \$1,000.00 (\$100.00 bills) on the counter without counting it for him or looking in the envelope

The above statement conflates much of the conversation that took place during the June 8, 2017 interview and what can be seen in Video Clip 5. It accurately states that P.D. did not look in Mr. X's envelope in Transaction 2.

However, the statement that P.D. placed the \$1,000.00 (\$100.00 bills) on the counter without counting it for him is contradicted by Video Clip 5, in which, at about 3:42:03 - :08 P.D. can be seen counting out ten bills on the counter of wicket 6, one at a time, while Mr. X looks on.

In her final report, the Mgr. ER also wrote:

while she had another customer there, she takes cash out of her wicket and goes to the empty wicket next to hers and gives that cash to [Mr. X]

without counting it. [Mr. X] also placed the envelope on the counter and again [P.D.] does not look in it.

The above passage inaccurately infers that P.D. neglected another customer in order to give Mr. X money in an unauthorized and unprofessional manner.

It can be seen from Video Clip 5 that a woman customer was at P.D.'s wicket 5 when P.D. approached wicket 5 from the customer side, before Mr. X appeared in the Video Clip, and that the woman customer remained at P.D.'s wicket 5 while P.D. interacted with Mr. X intermittently while attending to the woman customer. In Video Clip 5, from about 3:39:56 to about 3:40:12, Mr. X can be seen interacting with P.D., in all probability claiming to P.D. to have received \$1000.00 less than he thought he was receiving in the first transaction.

P.D. was clear on June 8, 2017 with the interviewers and in her evidence before me that before March 30, 2017 she was acquainted with Mr. X as a regular customer at the branch, and that Mr. X did not want Tellers to count the money he was receiving by hand. Her evidence as to Mr. X's preference for Tellers not to count the money by hand was not disputed.

On June 8, 2017, the interviewers' questions to P.D. as to what denominations she had given Mr. X often did not clarify which transaction, Transaction 1 or Transaction 2, was being referred to (Ex. 3, Tab 12). P.D. mentioned "twenties" when she was giving the interviewers an example of other denominations being substituted when larger bills are not available. On June 8, 2017, P.D. did not state to the interviewers that she had given Mr. X twenties in either transaction.

In the transcript of the June 8, 2017 interview, at p. 92, (Ex. 3, Tab 12) P.D. stated to the interviewers that for Transaction 2 she gave Mr. X \$1,000.00 in one hundred dollar bills, and that she counted it out for him.

In Video Clip 5, at about 3:42:03 - :08, P.D. is clearly seen counting ten one hundred dollar bills on the counter in front of Mr. X. Mr. X is seen offering her the envelope, and she did not look in the envelope.

In the investigative interview which took place on June 8, 2017, P.D. told the investigators/interviewers that when Mr. X returned the second time claiming to be short

\$1000.00 (Video Clip 5), initially she had been certain that she had given him the correct amount the first time.

P.D. also told the investigators/interviewers on June 8, 2017 that until March 30, 2017 she had never encountered a situation in which a customer claimed to have been short-changed, at that time did not know the protocol, and that she started to doubt herself, and so she gave him another \$1000.00 when he returned a second time. It is clear, however, and I conclude that those who interviewed her, and particularly the Mgr. ER, found her statement(s) during the interview difficult to understand and mistook her manner of speaking as indicative of evasiveness and dishonesty.

I have audited the recording of the interview (Ex. 6) and carefully reviewed the transcript of the interview (Ex 3, Tab 12). Having done so, I conclude that P.D.'s statement(s) to the interviewers that when Mr. X returned to the branch the second time (Video Clip 5), she was initially certain that that she had given him the correct amount the first time, that she had never until that date encountered a situation in which a customer claimed to have been short-changed, that at that time she did not know the protocol, and that she started to doubt herself, and so gave him the \$1000.00, were sufficiently clear and understandable.

P.D. had been frank on March 30, 2017, and stated to the SBA and the ATS that she thought the end of day balance was out because she had paid Mr. X \$1000.00 when he came in a second time claiming that she had given him \$1000.00 less than he was entitled to receive from the first transaction. At that point, according to the SBA's evidence, she, the SBA, told P.D. what the protocol was. In her evidence, P.D. testified that she had not known the protocol/policy on March 30, 2017 and that the SBA had told her the protocol/ policy after she, P.D., identified what she thought had caused the shortage in the end of the day balance.

To the extent that the Bank places any importance on P.D.'s failure to look in Mr X's envelope, or relies upon it to establish dishonest intent or complicity on her part, it must be noted that Mr. X had had the envelope for about 94 minutes from the time he left the branch after Transaction 1, until he returned for Transaction 2. In Video Clip 5, at about 2:05:32 - :35 while the money P.D. placed on the counter for him is seen on the counter of wicket 5, Mr. X is seen moving his left hand from the counter to his left side.

Mr. X may have placed some of the bills that were on the counter in his pocket rather than the entire \$6000.00 into the envelope, and he may have forgotten having done so, or may have deliberately taken advantage of having done so. As well, during those 94 minutes, Mr. X could have removed some money from the envelope, or he could have absently placed some of the money in the envelope somewhere else. It is unlikely that if P.D. had looked in Mr. X's envelope, she would have found that the envelope contained \$6000.00.

I conclude that in not looking in Mr. X's envelope, P.D.'s action was more consistent with expressing confidence in the customer and maintaining good customer relations with Mr. X and thereby protecting the Bank's interests in retaining the customer, than it was consistent with a hidden motive or complicity on her part, or that she was trying, as alleged by the Bank, to cover up a prior theft by her from the Bank and a subsequent attempt by her to deprive a customer of the amount she had allegedly stolen, and then a payment to the customer who had discovered her alleged attempt to deprive him of the amount she had allegedly stolen. (June 8, 2017 Transcript (Ex. 3, Tab 12, p. 68, lines 20 – 25, p. 69, lines 1 – 2).

I return now to another part of the Final Report of the Mgr., ER, set out above:

When asked why she did not wait until the end of the day to balance and, if she was over by \$1,000.00 then give the cash to Mr. DJ, she stated, "He came at 3:00 pm. I know him and I thought I have to give it to him, he is right I made a mistake....It is my fault I gave him \$1,000.00". She subsequently changed her statement to say that in her heart she felt that she had given him the correct amount the first time he visited the branch earlier in the day. [P.D.] stated that she is aware of Bank policy to report such an incident to her supervisor and then close and balance her cash; however, she stated that she did not follow this procedure in this case, and could not explain why she failed to look at the contents of the envelope that [Mr. X] brought back to the Bank, but simply took for granted that his cash was short by \$1,000.00, adding that it was the first time that a customer had complained that she had not given him the correct amount.

The statement attributed to P.D. in the Final Report, above:

"He came at 3:00 pm. I know him and I thought I have to give it to him, he is right I made a mistake....

appears to originate in part from page 29-30 of the transcript of the June 8, 2017 interview (Ex. 3, Tab 12). However, the statement attributed to P.D. is not complete and does not correctly and fully inform the reader, who, in this case was the District Vice President, who authorized the termination of P.D.'s employment.

I note that as the transcript was certified on Oct. 25, 2018, the Mgr. ER may have been relying on the audio recording and/or only her notes from the interview.

In the transcript of the June 8, 2017 interview (Ex. 3, Tab 12), P.D. is recorded having stated, p. 29, ll. 19 – 25:

He came around afternoon, like he came around like maybe - - maybe three o'clock, like something close they were balancing, because never - - I swear to my kids, never I had the experience if I had like short money, the customer is coming to give like short. I thought maybe because I know him and everybody knows him so

and P.D. is recorded to have continued on p 30, ll. 1 – 4:

well, and I thought like I have to give it to him, he's right, I made a mistake. Never I faced that situation in my life, like I never had that situation. That's why I didn't know how should I do it. ...

The further quote attributed to P.D. "It is my fault I gave him \$1,000.00" is an approximation of P.D.'s subsequent statement at p. 30, ll. 13 – 16 (Ex. 3, Tab 12):

If you just spoke to her, too, I spoke to [ATS]. I talked to [ATS], like I'm giving to [Mr. X.] \$1,000 one. Like I let them, like one of our co-worker, they know it, but it was my big fault I made it. I should go straight to my supervisor.

The statement in the Final Report of the Mgr., ER, regarding the June 8, 2017 interview

[P.D.] stated that she is aware of Bank policy to report such an incident to her supervisor and then close and balance her cash; however, she stated that she did not follow this procedure in this case,

did not inform the District Vice President that P.D. had stated clearly in the June 8, 2017 interview, that on March 30, 2017 she had been unaware of the policy/protocol.

The statement in the Final Report of the Mgr., ER

when asked if he had taken the money and fabricated a story that he did not get the \$1,000.00 she refused to answer

is not accurate. P.D. was asked many times and in many ways during the June 8, 2017 interview whether she thought Mr. X was dishonest, and she answered in her own way. At no point did she refuse to answer.

For example, at p. 33, ll. 20 – 25 (Ex. 3, Tab 12):

Question: Do you think he has it and he's dishonest or do you think someone took it in the branch.?

P.D.: I don't because honestly, for me, I think so I give the right amount to him.

I find P.D.'s statement "I don't" to more likely be in response to the second option, i.e. "do you think someone took it in the branch," put to her in the preceding question.

A further example at p. 61, ll. 1 – 4 (Ex. 3, Tab 12):

Question: So are you saying that [Mr. X] is dishonest?

P.D.: Yeah, because let me just ...

In the preceding example, P.D. was attempting to respond, and her response was cut off by the questioner.

A further example at p. 70, ll. 5 – 19 (Ex. 3, Tab 12):

Question: I want to know this; is [Mr. X] dishonest or are you dishonest or is somebody in the branch dishonest?

P.D. Both of us, we are honest. He's a nice guy. He's - - like whatever - - let me just explain. I'm so sorry, maybe it's ...

Question: No, I don't want to hear that. I want to hear who is dishonest...

P.D. I'm honest

Question: ...you or him?

P.D. I'm honest, and he's...

Question: So he's dishonest?

P.D. I don't know. What should I say about him?

Question: There's two things that day. There's two things that happened and only two outcomes, only two. The first option, [Mr. X] is dishonest and has an extra \$1,000 and he did not return the money.

P.D. Money is - - I don't

Continuing on p. 71, ll. 1 – 4 (Ex. 3, Tab 12):

Question: know what to - - like I don't know - - I'm honest. I'm talking about ...
Please, I'd like to finish by 5:00.

A further example at p. 71, ll. 6 – 24 (Ex. 3, Tab 12):

Question: Okay. So option one, [Mr. X] is dishonest.

P.D. Hm-hmm.

Question: [Mr. X] stole \$1,000 from you and used your trust in him to steal \$1,000.00 Option two: You or one of your colleagues stole 1,000. There is only two options. What happened? Tell me your opinion.

P.D. Okay.

Question: Who took it?
P.D. Okay.
Question: You or another - - or another co-worker, or did [Mr. X] take it?
P.D. From my side, from my heart, from my family life, I'm honest person [for you] (words in square brackets can be heard in digital recording, but were not included in the transcript).
Question: Who took it, your team or him. I want your opinion on this who took it.
P.D. I don't know. [Mr. X], I don't know, the team, I don't know honestly.

Another example at p. 72, ll. 14 – 25 (Ex. 3, Tab 12):

Question: So [Mr. X] is dishonest? There's only two options. Pick one. I want to know what you think.
P.D. Just yes or not, or just let me explain it to you?
Question: I want to hear either you're dishonest or I want to hear [Mr. X] is dishonest.
P.D. I'm honest.
Question: So [Mr. X] is dishonest?
P.D. It means if he come and tell me he's sure, maybe he's dishonest. Maybe he's dishonest for me.

And a final example p. 105, ll. 8 – 17, (Ex. 3, Tab 12):

Question: Did [Mr. X] take the thousand or did you take the thousand?
P.D. Myself, I'm 100 percent clear
Question: So I want to hear you say that [Mr. X] took it then.
P.D. My side, I'm 100 percent. [Mr. X], if he made a mistake, it's from [Mr. X], but I can't - - what should I say about him? I can't...

I conclude from the preceding passages of the June 8, 2017 interview that P.D. was uncertain as to whether Mr. X had deliberately deceived the bank, or whether he had been mistaken in his belief that she had not given him the full \$6000.00 in the first transaction, and had not realized that he was mistaken, and consequently she was not prepared to state that Mr. X was "dishonest."

I find that P.D. had and has an indirect manner of speaking, which, coupled with her struggle with the English language, clearly from time to time frustrated those who were interviewing her. I find, from a careful review of the audio recording (Ex. 6) and of the transcript of the June 8, 2017 interview (Ex. 3, Tab 12), that at times P.D. was confused by the interviewers' questions, and that at times, they were confused by P.D.'s answers.

It is evident from the Final Report of the Mgr. ER above, that she concluded from P.D.'s answers on June 8, 2017 that P.D. was being evasive and dishonest. I conclude that that impression informed her misperception of what could be seen in the Video Clips (Ex. 5). I further conclude that she did not review the Video Clips very carefully, and that that is why she misstated in her Final Report what could be seen in them.

I conclude that the evidence, taken as a whole, does not support the conclusion of the Mgr. ER that P.D. failed to conduct herself with honesty and integrity. I conclude that the Bank's evidence has not established on a balance of probabilities

- a) that P.D. misappropriated funds from the bank, and
- b) that P.D. was not truthful to the investigators.

In so concluding, I find that the Bank's witnesses were honestly mistaken in their statements as to P.D. misappropriating the Bank's money in the video surveillance.

I conclude, based on P.D.'s statements during the June 8, 2017 interview, when her memory was fresher, and her evidence in the course of this hearing, when it was less fresh, and given that it is not in dispute that on March 30, 2017 she had had no prior experience of any customer of hers having claimed that she had "shorted" them, that when Mr. X returned to the branch the second time claiming to have received \$1000.00 less than he had negotiated for with her in Transaction 1 that day, initially P.D. was certain she had given Mr. X the correct amount in Transaction 1, but she felt stressed and panic and began to doubt herself, and not knowing the Bank's protocol of telling the client to wait until the end of day balance is done in order to ascertain whether his claim was correct, decided that Mr. X must be correct in his claim, and gave him a further \$1,000.00 in ten one hundred dollar bills, which she counted out for him on the counter.

Counsel for each party presented written argument and case law to support their positions, which I have carefully considered. The case law submitted included *McKinley v. BC Tel*, 2001 SCC 38, 2001 CSC 38, 2001 CarswellBC 1335, [2001] 2 S.C.R 161; *Ivanore v. Canadian Imperial Bank of Commerce*, 1983 CarswellNat 101, [1983] C.L.A.D. No. 68, 3 C.C.E.L. 26; *Nickerson v. Bank of Nova Scotia* 2007 CarswellNat 6522, [2007] C.L.A.D. No. 322; *National Bank of Canada v. B.*, 1996 CarswellNat 3291, [1996] C.L.A.D. No 341 (Haefling, Adjud.); *Devereaux v. Royal Bank*, 1996 CarswellNat

485 (Fagan, Adjud.); *Karmali v. Toronto Dominion Bank*, 2003 CarswellNat6512, [2003] C.L.A.D. No. 384 (Shackell, Adjud.); *Red Deer College v. Michaels* [1976] 2 S.C.R.324; *Bauer v. Seaspan International Ltd.*, 2005 F.C.A. 292 (CanLII); 339 N.R. 269; [2005] F.C.J. No. 1531 (QL); *Continental Insurance Co. v. Dalton Cartage Company Ltd. et al.*, 1982 CarswellOnt 372, 1982 CarswellOnt 719, [1982] 1 S.C.R. 164; *Scarfe and Saskatchewan Indian Cultural Centre (Re)*, 1996 CarswellNat 3885, [1996] C.L.A.D. No. 1088 (D.P. Ball); *Marcil c. Autocar Connaissanceur Inc.*, 1996 CarswellNat 2344, A.C.F. No. 1439, [1996] F.C.J. No. 1439, 123 F.T.R. 304, 68 A.C.W.S. (3d) 659; *Ruston v. Keddco MFG. (2011) Ltd.*, 2019 ONCA 125; *Gauthier and National Bank of Canada*, 2008 FC 79; *Baldrey v. H & R Transport Ltd.*, 15 August 2002, D.B. Hepburn, Arbitrator; *Continental Insurance Co. v. Dalton Cartage Company Ltd., et al.* 1982 CarswellOnt 372, 1982 Carswell Ont 719, [1982] 1 S.C.R. 164, [1982] I.L.R. 1-1487; *Banca Nazionale del Lavoro of Canada ltd. v. Lee-Shanok*, 1988 CarswellNat 254, [1988] F.C.J. No. 594, 22 C.C.E.L.59 (F.C.A. – Appeal Div.); *Rosettani v. Bank of Nova Scotia*, 2010 CarswellNat 3755; [2010] C.L.A.D. No. 278 (E.J. Noonan Adjud.).

Conclusions:

It is incontrovertible that Bank employees are held to a high standard of trustworthiness, honesty and integrity: *Ivanore v. Canadian Imperial Bank of Commerce*, 1983 CarswellNat 101, [1983] C.L.A.D. No. 68, 3 C.C.E.L. 26. That standard applies to Branch Managers, the MCS, the SBA, the ATS, the TS, Corporate Security, the Mgr. ER and the District Vice President, as well as to Customer Service Representatives. They are all human, and I conclude that those of them who gave evidence as to what they observed in the Video Clips and concluded from them were honestly and sincerely mistaken. (The TS did not state an opinion regarding the content of the Video Clips, and characterized what had transpired on March 30, 2017 involving P.D. as possibly “an honest mistake.”)

I conclude that once the Mgr. ER and Corporate Security formed the honest, sincere, but mistaken opinion that Video Clip 2 showed that P.D. had stolen \$1,000.00 in ten fifty dollar bills from the bandit box, a drawer in which the Bank’s money was generally located, their perception of P.D.’s answers during the June 8, 2017 interview became fixed upon the probability that she was covering up a theft.

It was not in dispute in the evidence that on March 30, 2017, P.D.

- 1) failed to amend the FFT Journal (Ex. 1, Tab 4) after her initial entry that she would pay out 60 one hundred dollar bills, after she had paid Mr. X two fifty dollar bills and likely the rest in one hundred dollar bills, as she believed;
- 2) failed to consult with her supervisor before paying Mr. X the money he alleged he had been shorted.

On March 30, 2017, after P.D. had done the end of the day balance as Balancing Teller, and after she had stated to the ATS and possibly directly to the SBA that she thought the shortage was due to her having given Mr. X \$1000.00 when he came back a second time claiming to have been shorted, the SBA told her that the policy when a customer claims to have been shorted is to advise the supervisor, take the customer's name and number, and ask the customer to wait until the end of day balance is done and that the client will be contacted. On March 30, 2017, P.D. acknowledged that she had not consulted with her supervisor before paying Mr. X \$1000.00 when he returned to the bank a second time. She acknowledged it on June 8, 2017 and she acknowledged it in her evidence before me in early 2019. In her evidence before me she did not dispute that she had not amended the FFT Journal.

I note, however, that as the Tellers at this branch operate on a team cash, that if P.D. had not paid Mr. X the \$1000.00 he alleged he had been shorted on March 30, 2017, at the end of the day the branch's cash probably would have balanced, and the entry in the FFT Journal that P.D. had paid out 60 one hundred dollar bills in the first transaction with Mr. X would not have been considered a "falsified statement" or an indication of a lack of trustworthiness, honesty and integrity on her part. There was no evidence that P.D. had been reproached by anyone at the branch about not having amended the FFT Journal.

After the March 30, 2017 incident, the SBA instructed P.D. and the other Tellers, that in every transaction involving cash, they were to do a hand count of the money, and that if the customer objected to the hand count being done at the counter, that it was to be done to the side of the counter. There was no evidence that thereafter P.D. had not complied with that instruction.

P.D.'s evidence was that after March 30, 2017 and until she was suspended at the end of the interview on June 8, 2017, her duties at the branch remained the same. Her evidence in this regard was uncontradicted. This raises a reasonable inference that in the

intervening two months and one week before June 8, 2017, when P.D. was suspended with pay, her Teller Supervisor and the Branch Manager did not consider her untrustworthy, dishonest or lacking in integrity so as to justify modifying her Teller responsibilities in any way or degree.

The Branch Manager's evidence was that he had no knowledge of the outcome of the investigation until he received the termination letter. He had not done a termination interview before, and had no idea how to approach the matter, other than, on the instruction of the Mgr. ER, to have a witness present. When P.D. arrived, he simply read the first paragraph of the termination letter to her, and not surprisingly, given P.D.'s "bubbly" (as described by her Teller Supervisor) but also emotional nature, she reacted with shock and anger which she directed toward the Branch Manager. Having no experience with such a reaction from an employee, the Branch Manager consulted the Mgr. ER, who recommended to him in a June 16, 2017 email to "obtain a security person at the branch for the next week or two." (Ex. 1, Tab 7, p. 8 of 43). It appears, from Ex. 2, Tab 8, that P.D. also received a Notice under the Trespass to Property Act, dated June 19, 2017, instructing her that she was not to enter the branch without written permission.

I conclude that P.D. was dismissed from her employment based upon the unfounded belief and suspicion that she had stolen \$1000.00 from the Bank, that she had attempted to hide her theft by shorting a customer that amount, and then, without supervisory authorization, had paid the customer the amount which she had allegedly stolen in order to cover her theft. The evidence did not establish those allegations as facts on a balance of probabilities.

For all the above reasons, I conclude that the termination of P.D.'s employment by the Bank of Nova Scotia was an unjust dismissal.

Tying off a few loose ends:

Some evidence was given pertaining to whether the SBA had harassed P.D. The evidence strongly suggested that there had been some tension between P.D. and the SBA in the few months that the SBA had been working at the branch prior to March 30, 2017. However, the evidence was not sufficient to support the allegation of harassment, and not sufficient to establish a motive for the SBA to have misstated the contents of the video

surveillance or to establish that the SBA had had any impact on the decision to investigate what had transpired at the branch on March 30, 2017.

Some evidence was given pertaining to whether on March 30, 2017 P.D. had been encouraged or authorized by the ATS to pay out to Mr. X the money he claimed to have been shorted. P.D.'s evidence as to what she thought transpired between herself and the ATS around the time that Mr. X returned to the branch the second time was insufficiently detailed. The ATS's evidence was that she had had no knowledge of Mr. X having returned to the branch a second time until P.D. told her about it when the end of day balance did not balance. I find the evidence as to whether P.D. had any conversation with the ATS on March 30, 2017 regarding Mr. X before the end of day balance inconclusive.

During cross-examination of P.D., the negative balance in P.D.'s savings account record (Ex. 2, Tab 17) on March 24, 2017 was drawn to her attention in an effort to suggest that that negative balance constituted a motive for her to have misappropriated the Bank's money. It was P.D.'s undisputed evidence that the balance in her account rose and fell from time to time, all within whatever overdraft protection she was permitted. While P.D.'s account balance may have given rise to suspicion on the part of Corporate Security and/or the Mgr. ER as to her having had a motive to steal, there was no evidence that the deposit made to her account on March 30, 2017, which brought her balance out of a negative position, (Ex. 2, Tab 17) had any connection to the \$1000.00 of concern to the Bank in this case.

Remedy:

Having concluded that the termination of P.D.'s employment was unjust, s. 242(4) of the *Canada Labour Code* applies. It provides:

- (4) Where 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 the person;
 - (b) reinstate the person to his employ; and
 - (d) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

I have found that the allegation of theft was not supported by the evidence on a balance of probabilities, and was therefore unfounded.

It was not in dispute that but for the alleged theft, the “irregular practices” of not amending the FFT journal and of paying out the \$1000.00 to Mr. X without consulting her supervisor would have attracted discipline of some sort, but not dismissal.

There is no evidence that P.D. had ever been instructed as to the precise policy or protocol around responding to a customer who claims to have been shorted before the end of the day on March 30, 2017. Almost immediately after P.D. did the end of day balance on March 30, 2017, she spontaneously told the ATS that she thought that her payment of \$1000.00 to Mr. X when he attended the branch the second time accounted for the shortage in the balance. Shortly after P.D.’s disclosure on March 30, 2017, the SBA instructed P.D. and the other Tellers to always count the cash by hand, and count it by hand to the side if the customer objects to it being counted in front of them. There is no evidence that P.D. failed to comply with that instruction thereafter. The uncontradicted evidence of P.D. is that her duties at the branch between March 30, 2017 and June 8, 2017 did not change. From the foregoing, I conclude that until June 15, 2017 the bond of trust between P.D. and her Supervisor(s) and the Branch Manager had not been broken.

I therefore conclude that this is an appropriate set of circumstances in which to exercise my discretion to order reinstatement. However, in view of the emotional events which occurred as a result of the termination meeting, it is clear that P.D. displayed some mistrust of the Branch Manager, and the feeling may be mutual. This is unfortunate, but must be taken into consideration.

In view of the foregoing, I order the Bank of Nova Scotia to reinstate P.D. to a permanent part-time position as Customer Service Representative or Teller in a branch within a reasonable distance from her residence.

Mitigation:

The Bank took the position that P.D. had failed to mitigate her damages and that she could have obtained employment in a non-bank position which entailed customer service functions.

The evidence established that P.D. was diagnosed medically as suffering anxiety and depression following the termination of her employment, and that this condition had continued since the dismissal. As late as early 2019 P.D. was unable to control her emotions at times during the hearing of her complaint; this necessitated several recesses to permit her to recover from bouts of uncontrolled crying, in order for the hearing to continue.

P.D.'s undisputed evidence was that after the dismissal she had been invited by HR at Bank of Nova Scotia to apply for another position, but her efforts to do so did not, quite understandably in all the circumstances, result in a job offer at Bank of Nova Scotia. She attempted to find a position with other banks, again without success, because, according to P.D.'s uncontradicted evidence, their representatives inquired as to why she was no longer with the Bank of Nova Scotia and she was obliged to explain her circumstances. She clearly made some effort to find another position at other banks, but was unsuccessful in those efforts.

I conclude that in all the circumstances of this case, P.D. experienced a severe blow to her self-esteem and to her feelings of self-worth. She experienced deep humiliation and dishonour at having been wrongly accused of theft and dishonesty. She was deprived of her self-identity as a responsible and trustworthy bank employee. She was shamed and humiliated by the Bank having issued her a trespass notice not to enter the branch without permission. It was undoubtedly a deeply painful experience for her. She was misled, perhaps not deliberately, but inadvertently, by HR at the Bank that her applications for other positions would be considered.

In all the circumstances of this case, I do not think it appropriate to have expected and required P.D. to have picked herself up, "dusted herself off," perked up, and found herself another job in "customer service."

The onus was on the Bank to establish on a balance of probabilities that P.D. could have found a "customer service" position, and that she could have functioned in it, given how wounded she felt.

The Bank provided no evidence of specific customer service positions that had been available and within a reasonable distance of P.D.'s residence, for which she likely

would have been a successful applicant. Consequently, the Bank did not discharge the onus upon it.

As well, counsel for the Bank expressed doubt that P.D. is currently in a sufficiently strong emotional state to assume a position at the Bank, if reinstated. The Bank cannot have it both ways. It cannot argue that P.D. failed to mitigate her damages by not finding other work since her dismissal, implicitly inferring that she is in sufficiently strong emotional health to find and maintain that other work, and argue that P.D. is not in sufficiently strong emotional health to assume duties as a Teller.

If, once reinstated, P.D. has difficulty for emotional reasons carrying out her Teller functions, she may be entitled to access short-term or long-term disability benefits, should that be appropriate.

I find in all the circumstances of this case that P.D. made sufficient efforts to mitigate her damages.

In view of all of the foregoing, I order the Bank of Nova Scotia to pay P.D. compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, it would have paid her until the date of reinstatement, as well as compensation for the loss, if any, of benefits, together with interest, and without loss of seniority. The parties are expected to work out the manner in which Employment Insurance benefits are to be repaid.

I will remain seised with respect to the amount of compensation and interest and the implementation of this order, in the event that the parties are unable to agree.

An adjudicator has the authority under s. 242 (4) to “do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequences of the dismissal.” The section affords an adjudicator a broad discretionary authority to fashion a remedy to address the consequences of the dismissal.

One of the consequences of the dismissal is the current state of P.D.’s personnel record and other electronic as well as written records with the Bank.

To remedy or counteract that consequence of the dismissal, I order the Bank to remove all reference to the dismissal and the alleged reasons for it from P.D.’s personnel record, both hard copy and electronic, and remove all emails and written material

pertaining to the events of March 30, 2017 from its records, including records of any security personnel attending at the branch following June 15, 2017, and records pertaining to the Trespass Notice. Reference to the non-amendment of the FFT Journal may remain in her personnel record. I also order the Bank to remove any “do not rehire” notification which may be in its records, digital, or electronic, or in letters or other written material. I order the Bank to confirm to P.D. in writing when it has complied with this order.

Punitive Damages:

Counsel for P.D. requested that P.D. be awarded punitive damages and moral/aggravated damages.

The law pertaining to punitive damages was considered by the Supreme Court of Canada in *Whiten v. Pilot Insurance Company*, 2002 S.C.C. 18 (CanLII) and in *Hill v Church of Scientology of Toronto*, 1995 CanLII (S.C.C.), [1995] 2 S.C.R. 1130.

In *Hill*, supra, under the heading “(4) Punitive Damages (a) *General Principles*” the court stated:

[196] Punitive damages may be awarded in situations where the defendant’s misconduct is so malicious, oppressive and high-handed that it offends the court’s sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. ... meant to act as a deterrent to the defendant and to others from acting in this manner.

...

[199] ...The most effective means of protection [of a person’s reputation] will be supplied by the knowledge that fines in the form of punitive damages may be awarded in cases where the defendant’s conduct is truly outrageous.

I conclude that the conduct of some of the Bank’s witnesses in these circumstances was lacking in carefulness and objectivity in assessing its own evidence (the video surveillance and the June 8, 2017 interview). However, the evidence did not establish that the Bank was aware of its witnesses’ misperception of the contents of the video surveillance until their evidence was tested at the hearing before me. I conclude

that the witnesses were sincere and not deliberate in their misperception of the contents of the video surveillance and sincere in their conclusions, however mistaken.

Although P.D. was subjected to unsubstantiated allegations which amounted to an assault on her character, the facts of this case are not comparable to those in *Whiten* and in *Hill*, supra. There is no evidence before me of maliciousness, high-handedness or oppressiveness comparable to the conduct described in *Whiten* and *Hill* and *Wallace*, supra, on the part of the decision makers in this case.

Consequently, I conclude that this is not an appropriate case for punitive damages.

Moral Damages:

In *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362, 2008 SCC39 (CanLII), Bastarache, J., writing for the majority on the subject of aggravated damages or moral damages wrote:

[55] Thus, in cases where parties have contemplated at the time of the contract that a breach in certain circumstances would cause the plaintiff mental distress, the plaintiff is entitled to recover (*Fidler*, at para. 42; *Vorvis*, at p. 1102). This principle was reaffirmed in para. 54 of *Fidler*, where the court recognized that the *Hadley* rules explains the extended notice period in *Wallace*:

It follows that there is only one rule by which compensatory damages for breach of contract should be assessed: the rule in *Hadley v. Baxendale*. The *Hadley* test unites all forms of contractual damages under a single principle. It explains why damages may be awarded where an object of the contract is to secure a psychological benefit, just as they may be awarded where an object of the contract is to secure a material one. It also explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law: see *Wallace v. United Grain Growers Ltd.*, 1997 CanLII332 (SCC), [1997] 3 S.C.R. 701. In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. [Emphasis deleted.]

[56] We must therefore begin by asking what was contemplated by the parties at the time of the formation of the contract, or, as stated in para. 44 of *Fidler*: “[W]hat did the contract promise?” The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological

damage resulting from the dismissal since the dismissal is a clear legal possibility. *The normal distress and hurt feelings resulting from dismissal are not compensable.* (emphasis added)

[57] Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is ‘unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive’ (para. 98)

[58] ... In *Wallace*, the Court held employers “to an obligation of good faith and fair dealing in the manner of dismissal” (para. 95) and created the expectation that, in the course of dismissal, employers would be “candid, reasonable, honest and forthright with their employees” (para. 98) At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. ...

[59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between “true aggravated damages” resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. ... Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee’s reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99 – 100)

In her evidence, P.D. acknowledged that she had entered into a contract of employment with the Bank (Ex. 3, Tab 3) dated July 17, 2013. Appended to the offer of employment, on which her signature appears, confirming her acceptance of the offer, were two pages of terms, which included the following:

1. Basic Terms

- a) I agree that I have read and will comply with the provisions of Scotiabank’s Guidelines for Business Conduct, including rules pertaining to honesty, integrity, confidentiality, non-discrimination and nonviolence as they may be amended by Scotiabank from time to time, and further, to attest to my compliance with these guidelines on an annual basis;

b) I agree to comply with all other rules, guidelines, policies or procedures required by Scotiabank from time to time;

...

Scotiabank is committed to treating all current and potential employees and customers fairly and maintaining an inclusive work environment that supports the productivity, personal goals, dignity and self respect of all our employees.

I conclude from the contents of Ex. 3, Tab 3 that when P.D. signed the offer of employment, her reasonable expectation from the resulting contract of employment was, among other things, that the Bank would conduct itself in a manner that would treat her fairly and support her personal goals, dignity and self-respect. I conclude from the contents of Ex. 3, Tab 3, that it was in the reasonable contemplation of both P.D. and the Bank that if the Bank did not treat P.D. in that described manner, that she, as any other employee, would likely experience mental distress.

It is an accepted principle of employment law that “the normal distress and hurt feelings resulting from dismissal are not compensable.” P.D.’s claim for moral damages is not for the normal distress and hurt feelings resulting from dismissal.

P.D.’s claim for moral damages is not a civil claim for wrongful dismissal. It is brought under the authority of s. 240 et. seq. of the *Canada Labour Code*. As I have ordered that she be reinstated within my authority and discretion under s. 242, the approach of extending the notice period as compensation for moral damages is not applicable.

P.D.’s claim for moral damages is based upon the mental or emotional distress she experienced resulting from the employer’s conduct in the manner of dismissal.

The Mgr. ER had not seen the Video clips before the June 8, 2017 interview. There is no evidence that she reviewed the content of the Video Clips, carefully or otherwise, at any other time except the June 8, 2017 interview. She arrived at and maintained an incorrect conclusion as to which drawer P.D. went into in Video Clip 2, and arrived at and maintained an unsupported conclusion that P.D. was “clutching something red in her right hand (an enhanced photo shows red paper, fanned out at the edge of her hand)” and that a roll of fifty dollar bills totaling \$1000.00 was in P.D.’s hand. That was the belief with which the Mgr. ER and Corporate Security Investigators

confronted P.D. in the June 8, 2017 interview, and I find that nothing P.D. said in that interview (Ex. 3, Tab 12 and Ex. 6) altered that belief.

P.D. was suspended with pay at the end of the June 8, 2017 interview and was terminated on June 15, 2017 without being given an opportunity to learn the reason behind the termination before it was decided upon, other than what was read to her from the termination letter at the meeting with the Branch Manager to which she had been called.

In not informing her of the specific outcome of the investigation and the reason for the decision that her employment was to be terminated, and providing her with an opportunity to respond, I conclude that the Bank was not treating P.D. fairly, and with dignity and respect, and that this caused her intense emotional and mental distress.

The termination letter (Ex. 1, Tab 11) was prepared by Employee Relations to appear as though it had been written by the Branch Manager. The Branch Manager simply read the first paragraph of the termination letter to her at the termination meeting, without prior discussion.

I conclude that the Bank was, in its manner of dismissal, treating P.D. callously, however inadvertently, and without dignity and respect. She was thereby informed that she was being terminated “for cause” following reference to the conclusion of an investigation into “irregular practices.” I conclude that the Bank thereby was not being “candid, reasonable, honest and forthright” in stating to P.D. its reasons for the dismissal and that this too caused P.D. intense mental and emotional distress.

The undisputed evidence was that P.D. immediately collapsed in the presence of the Branch Manager and the witness, that she fell to the side of her chair, lost control of her emotions, and was shortly thereafter removed by paramedics to an ambulance, and was taken to hospital and was released from hospital the next day.

I conclude that P.D.’s reaction was not to the dismissal itself, but a reaction to the unsubstantiated accusation of theft that had been leveled at her just a week earlier, along with the manner in which she was being dismissed. As well, her reaction was to the Bank not having treated her with dignity and respect by having previously made that accusation and for not being “candid, reasonable, honest and forthright,” and not treating her with dignity and respect at the June 15, 2017 termination interview. The Bank was,

put simply, leveling an unfounded accusation at P.D. that she was a thief, however indirectly, and this quite understandably caused her shock and great mental distress.

Thereafter, P.D. received a Notice of Trespass document. This action of the employer undoubtedly contributed to her emotional and mental distress.

P.D.'s undisputed evidence was that after the dismissal she contacted the Bank and was invited by HR to apply for other positions at the Bank, and was not told that she was not eligible for re-hiring. That is a form of deceptive practice, however innocent or inadvertent on the part of the individual who invited her to apply. I conclude that such conduct also was not treating P.D. with dignity and respect and caused her further emotional and mental distress.

I was informed at the hearing and it was not disputed that unspecified action taken by the Bank after the dismissal enabled P.D. to receive Employment Insurance benefits in 2017 following the dismissal (Ex. 1, Tab 12, Ex.. 2, Tab 4). That action should be taken into consideration.

As stated above, the purpose of an award for moral damages is compensatory, to compensate for the mental distress experienced by the employee. It is not awarded for the purpose of punishing the employer. As such, an award for moral damages can be seen to fall within the description of doing "any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal."

I turn now to consider an appropriate amount of compensation for the mental distress P.D. experienced in this case.

There is no actual amount of compensation that P.D. is likely to consider "equitable to require the employer" to pay which will "remedy or counteract" the mental distress she has experienced.

In *Marcil c. Autocar Connaissanceur Inc.*, 1996 CarswellNat 2344, [1996] A.C.F. No. 1439, [1996] FCJ. No. 1439, 123 F.T.R. 304, the Federal Court of Canada judicially reviewed an Adjudicator's decision in which the Adjudicator had concluded that the allegations of "dishonesty in the course of your duties as a motor coach driver" had been unfounded and had awarded the complainant as well as compensation for lost pay and the impossibility of reinstating him and costs, moral damages of \$1000.00,.

Dubé J. stated, at para. 7 of the decision:

...It even seems to me that this sum is minimal as compensation for the damage to the reputation of a person falsely accused of dishonesty. It is not a question here of exemplary damages, which the adjudicator has already denied the respondent because there was no evidence of malicious intent on the part of the employer, but of moral damages for the harm done to the employee's reputation by his employer.

The most valuable asset an employee can have is her reputation, her good name. P.D. was deprived of that reputation and her good name by the hasty observations, suspicion and speculation of some of the employer's witnesses, from March 31, 2017 up to June 15, 2017 and subsequently.

P.D. was, I conclude, mortified, shamed and humiliated, by the Bank's conduct and actions in the manner of the dismissal and continued to experience intense mental distress as a result of that mortification, shame and humiliation from June 15, 2017 up to and including the hearing of her complaint.

I therefore conclude that P.D. is entitled to more than "minimal" compensation as described in *Marcil*, supra.

In view of all of the foregoing, I order the Bank to pay P.D. moral damages in the amount of \$5,000.00 as compensation for the mental distress she experienced.

Costs:

Counsel for the Bank requested that in the event that I conclude that P.D. was unjustly dismissed, and as legal costs at some level are generally being awarded in such circumstances, that I reserve on the issue of costs and request that the parties submit separate written submissions on the subject of costs.

Counsel for the Bank has requested that in such a case, I direct "disclosure of a detailed pro-forma legal invoice pertaining to the legal fees incurred pertaining to the adjudicative matter." I am not entirely certain of the precise nature of the disclosure the Bank is requesting.

Counsel for P.D. has not indicated any opposition to the Bank's request that I reserve on the issue of costs and receive separate written submissions on the subject.

Costs generally fall within the description "any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the

dismissal.” An employee who is found to have been unjustly dismissed and who has incurred the expense of legal representation to obtain that finding, is entitled to be compensated for that expense, more or less, to counteract a consequence of the dismissal. Not to place the unjustly dismissed employee in the same or a similar financial position as she or he was in before the dismissal would be considered inequitable.

However, many issues can arise around the appropriateness of certain aspects of a claim for costs. It is therefore reasonable for full disclosure to be provided.

I will reserve and remain seized with respect to the issue of costs and receive the written and/or further oral submissions of counsel on that subject. Counsel may provide me by email, by June 30, 2017, a proposed timetable for those submissions.

In the meantime, I encourage P.D.’s counsel to provide counsel for the Bank a Statement of Account or Accounts, or other similar document(s) containing details of the legal costs or fees charged to P.D. and stating the dates of and the services provided for those costs and fees, and including the details of any charges for specific disbursements and/or interest for which P.D. is responsible as a result of having to pursue her complaint of unjust dismissal with the assistance of counsel.

It may be useful to restate the Orders I have made:

1. I order the Bank of Nova Scotia to reinstate P.D. to a permanent part-time position as Customer Service Representative or Teller in a branch within a reasonable distance from her residence.
2. I order the Bank of Nova Scotia to pay P.D. compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, it would have paid her until the date of reinstatement, as well as compensation for the loss, if any, of benefits, together with interest, and without loss of seniority. The parties are expected to work out the manner in which Employment Insurance benefits are to be repaid.
3. I order the Bank to remove all reference to the dismissal and the alleged reasons for it from P.D.’s personnel record, both hard copy and electronic, and remove all emails and written material pertaining to the events of March 30, 2017 from its records, including records of any security personnel attending at the branch following June 15, 2017, and records pertaining to the Trespass Notice. Reference to the non-amendment of


the FFT Journal may remain in her personnel record. I also order the Bank to remove any “do not rehire” notification which may be in its records, digital, or electronic, or in letters or other written material. I order the Bank to confirm to P.D. in writing when it has complied with this order.

4. I order the Bank to pay P.D. moral damages in the amount of \$5,000.00 as compensation for the mental distress she experienced.

5. I will remain seised with respect to the amount of compensation and interest and the implementation of this order, in the event that the parties are unable to agree.

6. I will reserve and remain seised with respect to the issue of costs and receive the written and/or further oral submissions of counsel on that subject. Counsel may provide me by email, by June 30, 2017, a proposed timetable for those submissions.

Dated at Toronto, Ontario this 31st day of May, 2019.



Susan D. Kaufman, Adjudicator