IN THE MATTER OF a Complaint of Unjust Dismissal,
Division XIV – Part III, *CANADA LABOUR CODE*, R.S. 1985, c. L-2;

AND IN THE MATTER OF an Adjudication under section 240 of
the CANADA LABOUR CODE, R.S. 1985, c. L-2;

BETWEEN:

SANDEEP BHUSHAN

- and -

BANK OF MONTREAL

DECISION

APPEARANCES:

Sandeep Bhushan for himself

Jayson A. Rider, counsel for Bank of Montreal
Heena Mistry, representative (Bank of Montreal)

BACKGROUND:

Sandeep Bhushan's employment was terminated by the Bank of Montreal when his position of Financial Analyst for the Enterprise Information Provisioning ("EIP") project was eliminated in October 2008. In its letter of termination, the Bank advised Mr. Bhushan that his role was being eliminated due to "changing business requirements".

Mr. Bhushan disputes that his employment was terminated for business reasons. He contends that he was dismissed because he resisted the pressure imposed upon him by his managers to report financial figures inaccurately, or in a manner that breached the Bank's financial governance rules. It is Mr. Bhushan's view that because he expressed concerns about this pressure, his role was eliminated and his employment with the Bank terminated.

Mr. Bhushan filed an unjust dismissal complaint under Part III of the *Canada Labour Code* ("the *Code*"). Section 242(3) of the Code states –

> Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall
>
> > (a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon;

The Bank contends that I am without jurisdiction to determine whether Mr. Bhushan's dismissal was unjust, pursuant to section 242(3.1) (a) of the Code. It states :

242(3.1) No complaint shall be considered under subsection (3) in respect of a person where

> (a) that person has been laid off because of lack of work or because of the discontinuance of a function;

The Bank takes the position that as Mr. Bhushan's role was eliminated for business reasons, and his duties disbursed among other employees, his termination falls within the "discontinuance of a function" part of section 242(3.1). Counsel for the Bank conceded that if I reject this argument and find that I do have jurisdiction to consider the complaint, the dismissal was unjust and constitutes a breach of the *Code.*

The parties agree that if I find that the Bank's actions breached the *Code,* any evidence or arguments relating to the appropriate remedy to be applied would be deferred until my decision on the 'main issue' is rendered.

The hearing in this matter took eighteen days to complete. I heard detailed testimony from six witnesses, each of whom were cross-examined extensively. A large number of documents were filed and reviewed. The evidence often strayed beyond the issues directly relevant to the key question of why Mr. Bhushan's role was eliminated, such as the length of notice of termination he was provided, and the actions taken by the Bank in response to his complaint to the Bank ombudsman that his termination was carried out in retaliation for his having been a "whistleblower". The Bank's Corporate Audit Department conducted an investigation into his allegations, as did an external investigator retained by the Bank. Both of these reports were filed into evidence and examined in detail.

RELEVANT LEGAL PRINCIPLES:

Ultimately, the Bank bears the onus of proving that the dominant reason for the elimination of the Financial Analyst position occupied by Mr. Bhushan was "the discontinuance of a function", as provided in the *Code.* The parties referred to various decisions by adjudicators and courts that set out certain general principles applicable to cases of this type. The cases hold that an employer is permitted to manage its business in any way that it sees fit, as long as its decision to eliminate an employee's role is made in good faith. While the requirement of good faith does not impose a standard of perfection on an employer, the cases provide that even when there may be legitimate business reasons for functions within a department to be reorganised or positions eliminated, an employer may not rely on the "exclusion" in section 242(3.1) if the employee selected is targeted for reasons unrelated to the business factors in issue.

While each case must be decided on its own facts, and the particular circumstances of each workplace considered, I must apply the above principles when reviewing the evidence presented at this hearing. The question to be answered is – when the decision was made to eliminate Mr. Bhushan's position, was the Bank acting in good faith for valid business reasons, or was the elimination of his role either a disguised form of discipline, or motivated by the desire to eliminate his input into the process of how costs were reported and benefits tracked in the EIP project?

I now turn to an analysis of the evidence, with that focus in mind.

THE EVIDENCE:

EIP Project and Mr. Bhushan's duties:

Sandeep Bhushan began his employment with the Bank of Montreal in November 1999. He worked in various finance-related roles prior to accepting the job of Project Financial Information Analyst for the EIP Program in late May 2007. This program was described as one of the key initiatives of the Technical & Operations division, in the Corporate Technical Development area of the Bank's Information Management ("IM") department. The anticipated duration of the project was for five years, from 2007 to 2011.

The Bank's witnesses explained that the initial focus of the program was to simplify the processes by which various departments within the Bank send information to the IM department, in order to effect cost savings. Specifically, the intention was to 'rationalize' the twenty-four data marts that the IM department hosted into one large computer called the Enterprise Data Warehouse ("EDW"), so that all of the information would be stored in one place. It was hoped that this would result in reduced costs for maintenance and overhead expenses, such as hardware and software upgrades. The evidence indicated that the costs associated with the program were expected to be approximately $40 million and that it promised to deliver $80 million in benefits.

Sherry Smeaton was the Bank's vice-president of Information Management at the time of Mr. Bhushan's termination. Ms. Smeaton assumed that role in February 2008, and was the executive who made the decision to eliminate his role. Ms. Smeaton explained that in order to secure approval for funding for the EIP project's work, an annual business case or Investment Decisioning Process ("IDP") would be prepared and submitted to the Finance Group for the division, and then on to senior management. Mr. Bhushan was closely involved in this process, and also audited, verified and reported the various costs incurred by the program.

Mr. Bhushan was also required to gather and document financial information for Ms. Smeaton's monthly report to the Management Committee, comprised of senior executives at the Bank. This review process was referred to as Investment Spend Optimisation ("ISO") reporting, and was a program instituted by the Bank to evaluate the manner in which larger, business-wide projects spend the funds that they are provided with. In order to ensure that a project will either generate revenue or reduce costs, a "roadmap" is implemented and the costs and savings figures are inputted and closely monitored. It was common ground that the EIP Project was the only project for which Ms. Smeaton had prime responsibility that was subject to ISO reporting requirements.

As the evidence emerged, I came to understand a few important things about the EIP project. As a 'discretionary' (i.e. not compulsory or regulated by statute) project, it was required to compete with other Bank projects for funding. Essentially, the senior management group would consider whether an 'investment' in the project would pay an acceptable 'return', as compared to other programs. That system created an inherent tension between the project's management – who want to show low costs and high benefits – and those involved in the details of financial reporting, who are required to ensure that all costs are reported appropriately and that all benefits claimed can be confirmed by supporting documentation.

Bank's evidence - reason for role elimination:

As stated above, the decision to eliminate Mr. Bhushan's role was made by Sherry Smeaton. The EIP project was initiated in 2007, and was managed by Wendy Murphy prior to Ms. Smeaton's arrival in February 2008. Ms. Smeaton began overseeing the program when she assumed her role, and Ms. Murphy resigned within a month or two of that.

Ms Smeaton explained that she chose not to replace Ms. Murphy, as she had decided to change the organisational structure of the program. She testified that three 'Technology Head' positions were created in April 2008, each of whom managed a team of Application and Support Development Managers devoted to a different initiative. The department was also in the midst of a transition from a 'Matrix Organisation' model, which involved having Resource Managers hire employees into the department and manage their performance and career development, to a Functional Management system, in which employees report directly to their Project Managers, with the career development function being assumed by consultants. The adoption of the new model led to the eventual elimination of the Resource Manager positions.

Ms. Smeaton testified that once these larger changes had been implemented, she began to look for other ways in which the department could become more efficient. She explained that the EIP project was the only project that she oversaw that had a 'dedicated finance role', meaning that Mr. Bhushan was the only financial analyst in the department that focused solely on one project. Ms. Smeaton explained that the "spend" on the EIP Program was going down by mid-2008, and that a decision had been made to combine a few years of funding requests into one IDP process or business case. For these reasons, she expected that the finance work required on the project would drop off.

Ms. Smeaton explained that she had previously managed a project in which a dedicated finance role had been cut when the finance work had tailed off, and that this experience led her to conclude that Mr. Bhushan's role could be eliminated. She testified that she thought the work that he did could be absorbed by other employees, stating that that the IDP related tasks could be assumed by the central Finance Group, and that the project managers who performed cost center audits for other cost centers in the department could take on the cost reporting and financial reporting for the EIP project.

Ms. Smeaton was asked to pinpoint the timing of her decision to eliminate Mr. Bhushan's role. She was unable to do so, but stated that she may have started to think about it as early as April 2008. At a later point she responded that it was unlikely to have been considered before June or 'early summer' of 2008. In any event, she testified that she consulted both Steve Ivanic, the Senior Resource Manager for the IM department and Justin Wager, the Technology Head for the EDW platform regarding their views on whether a dedicated finance position was required for the EIP project. She stated that they had both shared her view that the position could be eliminated.

Ms. Smeaton explained that the Bank outsourced aspects of its Human Resources function to Hewitt Associates, one of which was the support around terminations and role eliminations. She stated that she instructed Mr. Ivanic to contact the Human Resources contact at Hewitt and advise that Mr. Bhushan's role should be eliminated. Pursuant to these instructions, Mr. Ivanic sent the following email to Deborah Nott at Hewitt on August 22, 2008, framing the issue as follows:

> *...we started a multi-year program called Datamart Consolidation last year. The leadership at the time felt there would be significant financial tracking and reporting requirements for the program, and that it would warrant hiring a financial analyst, which they did. Around the beginning of this year, we made a significant change in approach to this program, changing the work direction and financial benefits, and the requirement for a financial analyst. We managed to keep him busy for awhile, and gave him some work on other initiatives, but the bottom line is that we no longer have the need for this role in the department, and it's the only one of its kind in our area.*

Ms. Smeaton testified that once she made the decision to eliminate the role and directed Mr. Ivanic to contact Hewitt to effect the change, she had no further involvement in the issue until the termination package was prepared and presented to her for her signature.

She recalled signing the documentation in mid-September and directing Mr. Wager to deliver it to Mr. Bhushan on September 22, 2008. The letter of termination provided for a termination date of October 17, 2008.

Ms. Smeaton testified that she had not been aware of any issues related to Mr. Bhushan's performance when she made the decision to eliminate his role. Further, she denied having any knowledge of the fact that he had raised concerns about financial reporting issues related to the project when she decided to move ahead with the termination, and stated emphatically that these factors had not had any impact on her decision.

Ms. Smeaton acknowledged that she had not had any discussions with anyone regarding the disbursement of Mr. Bhushan's duties, either before deciding to eliminate his role or at the time that his termination took effect. While she had expected that the central Finance Group for the IM department would take on the bulk of his duties, she admitted that she had not discussed this with Danny Somlo, the Division Finance Head. Mr. Somlo stated in his evidence that his department in fact did not take on any of Mr. Bhushan's duties after his departure, and that the level of support that his team provided to the EIP project did not change after Mr. Bhushan left.

Claimant's evidence:

Mr. Bhushan strongly disputed the employer's assertion that his workload was decreasing in the summer of 2008. In contrast, he stated that the volume of work that he was expected to perform had increased over time, as the scope of the EIP project broadened. He argued that there was no evidence to support the Bank's contention that there was not enough work for him to do on the project and contended that his role was eliminated because EIP management wanted to 'get rid of him', as a result of his continued insistence on following financial governance procedures to the letter. He stated that his role as a Financial Analyst required him to do so, and that the IM management came to consider him as a barrier to the success of the EIP project.

Mr. Bhushan also contended that the timing of his termination was suspicious, as his employment came to an end just two weeks before the final business case for the EIP project was due, and four weeks before the deadline for ISO cost reporting for the fiscal year end.

His evidence is best summarised with reference to the following headings – change in workload, resisting direction from managers, raising financial governance concerns, performance issues and timing of termination. I will deal with each of these in turn, followed by a summary of evidence provided by the Bank's witnesses on these points.

(i) Change in workload

As stated above, Mr. Bhushan strongly disputed the Bank's contention that his workload was decreasing through 2008. He testified that various factors contributed to the scope and complexity of the EIP project growing in late 2007 and early 2008, and that this actually caused an increase in his workload. He referred to a comment by Wendy Murphy in an October 2007 email message that "the program has taken on significant new scope for this year and has deferred the originally scoped work until 2009" as corroboration of this point.

Specifically, Mr. Bhushan explained that the requirement for quarterly ISO reporting was instituted after he had been hired into the role, which required him to spend more time tracking and reporting figures. More significantly, new regulatory programs such as 'BASEL' (dictating how much of the Bank's capital must be kept on hand) and 'AML' (anti-money laundering) were instituted after he began working on the project. He stated that these created unexpected changes and required the adoption of a new approach for calculating benefits. Mr. Bhushan testified that as a result of these unexpected changes, the 2008 IDP or business case underwent significant edits and required multiple rewrites.

Despite the above changes, Mr. Bhushan was advised by Ms. Murphy in November 2007 to reduce the time that he worked on the EIP project to 50%, and accordingly, to only "charge" the project for half of his time. He was instructed to devote the other half of his time to another project in the department called the Business Intelligence Center of Competence, managed by Lorraine Burbage. Mr. Bhushan stated that despite being directed to reduce his time on the project by 50%, none of his responsibilities were removed and Ms. Murphy repeatedly requested that he work almost exclusively on the EIP project. Mr. Bhushan reported that he continued to work full-time hours on that project, and was often required to put in additional hours in order to complete his tasks.

Mr. Bhushan's timesheets for the period were filed at the hearing. I heard evidence from both Mr. Bhushan and the Bank's witnesses that the hours inputted by employees on the Matador system (the Bank's time-tracking system) had to be reviewed and approved by their managers. There was nothing to suggest that this was not done in this case. The records show that despite being directed to split his time evenly between the EIP Project and the Business Intelligence project in November 2007, Mr. Bhushan spent at least 80% of his time on the EIP project for the six months that followed. Mr. Ivanic was cross-examined on this point and simply acknowledged the inconsistency between the Claimant having been told to devote half of his time to the EIP project, yet having his managers approve more hours of work on the project in the Matador time-tracking system.

Mr. Bhushan testified that he had been asked by Ms. Murphy to withdraw the business case requesting funding for the project that he had been working on in the fall of 2007 at the last minute, as the impact of the AML and BASEL requirements on the project had to be reviewed and the process for seeking funding reconsidered. He stated that he was scheduled to attend training for three days in December 2007, and that Ms. Murphy asked him to leave the training in order to complete some urgent tasks. The timesheets for this period show that he worked a few hours each day on the EIP project, in addition to attending the training, and that he worked for four hours on the following Sunday.

It was clear that the December 2007 – January 2008 time frame was a busy period on the finance side of the EIP project. Mr. Bhushan explained that the IDP he was working on had to be submitted to the Board of Directors by the end of January. He stated that Ms. Murphy had asked him to defer the start of a vacation that he had booked for the last week of January 2008 one hour before he was scheduled to leave, so that he could complete some important work that had come up. Mr. Wager acknowledged in his evidence that both the call to Mr. Bhushan to stop training and the request to defer his vacation had taken place.

Ms. Murphy was not called by the employer to refute any of the evidence provided by Mr. Bhushan.

Despite the fact that he was unable to complete all of the required EIP–related tasks in 50% of his time as he'd been advised to, Mr. Bhushan was instructed in June 2008 to further reduce his time on the EIP project to 15%. The evidence indicated that Luma Badran, the EIP project manager at that time, had recommended to Ms. Smeaton that this be done for budgetary reasons. When Ms. Smeaton was asked in cross-examination how it would be possible for Mr. Bhushan to complete his work in 15% of the time that it was estimated it would take when he was hired one year prior, with no reduction in his responsibilities, Ms. Smeaton stated that she had not done any assessment of his workload at the time this was recommended and that her approval of the reduction was only a 'forecast'.

Mr. Bhushan explained that the volume of his EIP-related work continued to increase during the summer and early fall of 2008. He stated that the final business case for the project was due to be submitted to the Bank's CEO at the end of October 2008, and that a new approach had been decided upon. He was involved in preparing and revising the business case, and in working on the changes to the ISO "roadmap" that were required. He stated that various meetings took place among members of senior management in September 2008, and that he was called upon to provide details on various items. The Matador timesheets indicate that Mr. Bhushan spent approximately 65% of his time on EIP-related work in September.

Mr. Bhushan raised one further issue challenging the employer's contention that the finance work on the EIP project was tailing off. He referred to a job posting that appeared on the Bank's intranet site in January 2008, inviting applications for the position of a

Finance Consultant in the Technology and Operations group. When the Bank's witnesses were asked why another employee was being sought to do work similar to that being performed by Mr. Bhushan at a time when his workload was apparently dropping off and efforts were being made to find additional work to keep him busy, no one was able to state who had initiated the posting, or explain the rationale behind it. All of the Bank's witnesses denied that anyone had actually been hired into the role.

Mr. Bhushan testified that he had decided to apply for the position, as it was one level higher than his role was rated at the time. He stated that he was told by a Human Resources consultant at Hewitt that his application would not be brought forward to the interview stage. Mr. Bhushan claimed that he was subsequently advised by another employee in the Finance Department that interviews were conducted, and that someone had been hired into the role. He had no personal knowledge of who had been hired, but stated that he began to notice that requests for his assistance in preparing the business case for the Business Intelligence project ceased around February 2008, and so had assumed that someone new had been hired to do that work.

(ii) Resisting direction from managers

Mr. Bhushan explained that the original business case developed to justify the launching of the EIP project was prepared by Ms. Smeaton's predecessor. He stated that he realised after working on the project for a few months that it promised an unrealistic "return", in that the benefits were overstated and the costs understated. He testified that he told Wendy Murphy, who then managed the project, that the forecasts were not realistic. He recalled her responding that it was imperative that the project succeed, as it had been sponsored by a senior level executive and was a key initiative of the Technology & Operations group. Mr. Bhushan noted that the initial forecasts were done before the ISO reporting requirements were implemented, and that once they were instituted in early 2008, the program began to be challenged when the promised benefits were not being delivered.

Mr. Bhushan stated that he began expressing concerns regarding EIP financial reporting in October 2007. He recalled that management had reported a cost savings related to the dismissal of one contractor, as it had committed to do in the first business case filed, but that he was unable to confirm that any contractors had actually left. He made several inquiries, but no one was able to point to a contractor position having been eliminated. Mr. Bhushan testified that Ms. Murphy had directed that the program needed "to show a contractor going", and did not want to accept that the savings could not be found. After a few months of discussion a compromise was reached, and a cost saving was reported relating to the salaries of four full-time employees who had previously been let go. Mr. Bhushan stated that he felt pressured to an uncomfortable degree during this process, and that this incident triggered a pattern of harassment directed at him that continued from that point onward.

Mr. Bhushan described further incidents of this type in January and February of 2008. He alleged that Ms. Murphy advised him at one point to report a 'planned' cost as opposed to an actual cost, which was $400,000 higher. He explained that this was not permitted under the Bank's financial governance rules, and that he had initially resisted, but ultimately succumbed to the pressure to do so. On another occasion, he recalled that Ms. Murphy and Mr. Wager had asked him to report a benefit that he had determined did not exist, relating to the outsourcing of some technical work. He refused to do so, and advised that after a discussion that spanned one to two months, they eventually withdrew the request.

Aside from the situations outlined above, the evidence on this point centred on three main issues - the replacement of IBM contractors, the acquisition of software licences and the purchase of additional system memory. Mr. Bhushan testified that in January 2008 he was asked to report the cost savings resulting from the project having let some IBM contractors go, but was asked not to report the cost of taking on other contractors to do the work. The net savings was calculated to be approximately $1 million dollars. He testified that he was asked to report that figure as a "run-rate", meaning that it would appear as a saving for each year of the project, as opposed to a one-time event. Mr.

Bhushan disagreed with this approach, and escalated the issue to Danny Somlo, the Division Finance Head for the Corporate Technical Development ("CTD") department. Mr. Somlo agreed that the contractor saving should not be reported as a run-rate, but rather as a one-time saving, and directed that a $500,000 cost for replacement contractors be reported.

Mr. Bhushan explained that the new regulatory requirements implemented after the start of the EIP project resulted in an increase in certain maintenance costs. A debate regarding how these unexpected costs should be recorded spanned several months. He stated that a "cost avoidance" benefit had been claimed through the EIP project for the efficiencies provided by the acquisition of database and software licenses known as "'DB2 Licenses". He stated, however, that the project had not reported the $1 to 1.5 million dollar cost related to their purchase. He explained that Ms. Smeaton had expressed the view that this cost should not be solely attributed to the EIP project, given that the licenses would also benefit other programs. Mr. Bhushan stated that all costs and related benefits had to "line up", and that a failure to report the cost of the licenses in the EIP project was a breach of the Bank's financial governance policies.

The evidence indicated that Ms. Smeaton sent an email to Mr. Bhushan on September 17, 2008 asking for his progress in 'chasing after benefit streams' on this issue. In his response, he expressed concern that the related costs were not being reported, stating that he had to ensure that financial governance rules were being observed. The employer contends that this was the first time that Ms. Smeaton became aware of Mr. Bhushan's concerns regarding financial reporting on the project. Mr. Bhushan disputes this. In any event, Ms. Smeaton advised that the software licenses in question had not actually been purchased, so there was consequently no need to report their cost in that fiscal period.

In his testimony, Mr. Bhushan pointed to an invoice for licences dated September 22, 2008, and contended that it confirmed that the licences were purchased. When he referred Ms. Smeaton to this document in her cross-examination, she was unable to explain the discrepancy. He suggested that given the large amounts involved, Ms. Smeaton would have had to approve the purchase, and that her evidence that the licenses either had not been purchased or that she was unaware that they had been purchased should not be accepted.

The same issue presented itself with respect to the purchase of additional system memory for the Enterprise Data Warehouse, at a cost of $700,000. Ms. Smeaton felt that as other programs would benefit from the additional memory, its cost should not be solely attributed to the EIP project. Mr. Bhushan contended that if a benefit was being claimed by EIP, the financial governance rules require that any related cost must be reported by the project. Ms. Smeaton denied that the additional memory had been purchased in the 2008 fiscal year, and its cost was therefore not reported. Mr. Bhushan disputed this statement as well. While much hearing time was devoted to these last two issues, I do not find them to be germane to the question I must decide and will not delve further into the evidence on these points.

Finally, Mr. Bhushan recalled discussions in July 2008 regarding a need to show savings of $1.8 million, and being asked by Mr. Wager to report savings relating to the decommissioning of data marts. He stated that the decommissioning had not actually occurred, and that he was consequently unable to obtain the necessary sign-offs from various departments. The result was that the project was short approximately 3 million dollars in benefits by the end of the 2008 fiscal year, at the point at which the final business case for the program was about to be put forward for approval. He stated that his superiors knew that he was not prepared to 'bend the rules' with respect to financial reporting, and contended that a decision was made to get rid of him prior to the end of the year, so that inaccurate figures that were more acceptable to the Bank's senior management could be reported.

I note that Ms. Smeaton acknowledged in her cross-examination that the concerns raised by Mr. Bhushan regarding the $3 million dollars in benefits that were being claimed on a run-rate basis, totalling $15 million, would have had a significant impact on the EIP Project's rate of return. She denied, however, that this was the reason for his employment having been terminated.

(iii) Raising financial governance concerns

Mr. Bhushan testified that he began raising concerns to his managers in early 2008 about pressure imposed upon him to breach the Banks' financial governance rules. He referred to a series of emails triggered by a note he received from Sukhaina Bhimji in early February 2008. The department was operating under the Matrix model at that time, and Ms. Bhimji was Mr. Bhushan's Resource Manager. Her note confirmed discussions they had had at a recent meeting, at which she advised Mr. Bhushan of some performance concerns that had been raised. One of the points mentioned by Ms. Bhimji was that Mr. Bhushan had not followed specific directions, and had reported costs in the EIP Project that he had been directed not to include.

Mr. Bhushan responded at length by email on February 12th, disputing many of the points that had been raised. He stated that the direction he had received to exclude costs from the business case was in violation of the Bank's financial governance policies, and that directing him to 'misrepresent financials is a very serious breach of financial governance policies'. He expressed frustration about being asked to do so and stated that he felt that his performance was being unfairly targeted. Mr. Bhushan copied Mr. Ivanic on the email, noting that Ms. Bhimji would soon be moving out of her role.

Mr. Ivanic responded a few weeks later, suggesting that Mr. Bhushan meet with both Ms. Murphy and Ms. Burbage (managers of both projects he was supposed to be working on) to discuss their expectations of him, and to then prepare an 'action plan' to review with him. Mr. Bhushan's lengthy response to that message indicates his frustration with both the expectation that he report inaccurate figures, and the fact that he was being asked to spend more time on EIP-related tasks which resulted in having less time to complete the work that he was expected to do on the Business Intelligence project.

Mr. Bhushan testified that he had reviewed the Bank's policy on Whistleblowing and understood that he was required to raise his concerns about being directed to breach financial governance rules to his manager. While it was not clear who his manager was at that point, he felt that it was appropriate to advise Mr. Ivanic. The evidence indicates that Mr. Bhushan and Mr. Ivanic met in late July 2008. Mr. Bhushan stated that he repeated his concerns at that meeting about being asked to report certain figures that were inaccurate, and explained that his position as a Finance Consultant required that he fully abide by the Bank's financial governance rules.

Mr. Bhushan then reiterated these concerns in an email to Mr. Ivanic on September 5, 2008. He referenced a further example of being asked to report a benefit that had not yet been achieved, and noted that whenever he raised these concerns he was threatened with a poor performance review.

Mr. Ivanic testified that he did not pass on any of the above concerns expressed by Mr. Bhushan in February and March 2008, or in their meeting in July 2008 to Ms. Smeaton. Ms. Bhimji was not called as a witness at the hearing.

Mr. Bhushan testified that he had also directly communicated with Ms. Smeaton regarding his financial reporting concerns relating to the project. He recalled having a discussion with her in May of 2008, at which time he advised her that certain costs for hardware and software were required to be reported in the EIP project. She disagreed, and ultimately decided that the costs would not be reported in EIP, as her view was that they were incurred as a result of requirements dictated by the AML program. He noted that this exchange took place prior to Ms. Smeaton's decision to eliminate his role.

He also referred to the September 17, 2008 email outlined above, in which he made explicit reference to the requirement that due diligence be performed and financial governance rules be observed in relation to claiming a benefit for "cost avoidance" relating to hardware and software costs. He acknowledged that this exchange took place well after the decision was made to eliminate his role.

(iv) Performance issues

Both Mr. Ivanic and Mr. Wager testified in some detail about concerns around Mr. Bhushan's performance in the months leading up to his termination. There were many email exchanges that were filed in to evidence, referring to these concerns. Their evidence will be summarised later in the decision.

In his testimony, Mr. Bhushan pointed to an email contained within the stack of documents produced by the Bank prior to the start of the hearing from Wendy Murphy to Steve Ivanic, on January 21, 2008. It follows an exchange between Ms. Murphy and Mr. Bhushan in which she expressed frustration with something he had done, and advised Mr. Bhushan that his understanding of a direction that had been provided was incorrect. Ms. Murphy then wrote to Mr. Ivanic and (referring to Mr. Bhushan) stated – "I think we need to step up the PIP based on our discussion on Friday. Also see note below. Do you think that Debbie needs to be brought in?"

The parties agree that "PIP "is an acronym for Performance Improvement Program, acknowledged to be a formal disciplinary process. All witnesses agreed that the initiation of a PIP is considered to be a serious matter. The 'Debbie' referred to is a Human Resources consultant at Hewitt, to whom the Bank outsources some of its human resources functions. Interestingly, Mr. Ivanic testified that he did not recall either having a discussion with Ms. Murphy about initiating a PIP for Mr. Bhushan, or receiving this note from her. He acknowledged that he had had discussions with Ms. Bhimji, Ms. Murphy and Mr. Wager about performance concerns related to Mr. Bhushan prior to the decision being made to eliminate his role. Ms. Smeaton stated that she had not been advised by anyone that a PIP had been initiated for Mr. Bhushan. As mentioned above, Ms. Murphy was not called to testify.

While it appears that no formal disciplinary process was pursued by the employer, I note that Mr. Ivanic's March 4th email requests that Mr. Bhushan prepare an 'action plan' for a meeting they had scheduled so that they could "talk specifically about what's expected of you and what you plan to do to meet expectations". The Bank's witnesses acknowledged that the usual step following the initiation of a PIP is the creation of an 'action plan'.

Mr. Bhushan claimed that he had previously received favourable performance reviews, and pointed to his October 2007 evaluation, which noted that he was "successfully meeting expectations". He testified that the apparent performance concerns expressed by Ms. Bhimji and Mr. Ivanic arose around the time that he began resisting pressure from his managers to report inaccurate figures that he felt were in breach of the Bank's financial governance rules.

A draft copy of Mr. Bhushan's performance review for the period of June to October 2007 was filed. It was completed by Mr, Wager and is generally favourable, although it outlines an incident between himself and Mr. Bhushan that was escalated to Ms. Murphy that Mr. Wager described as being 'damaging'. Despite several attempts to locate a signed copy of the above document, counsel for the Bank advised that it could not be found. Mr. Bhushan testified that he had recorded his concerns about being asked to ignore financial governance policies on this document, and suggested that the Bank was withholding production of it in order to suppress evidence of his having raised these concerns earlier than they claim he did.

(v) Timing of termination

Mr. Bhushan was provided with notice of his termination by Mr. Wager on September 22, 2008. The letter advised that unless he was able to secure another position with the Bank, his employment would be terminated on October 17, 2008. Mr. Bhushan testified that he found the timing of the termination to be suspicious, as the final business case for the EIP project, covering the last three years of the project, was due on October 31st, the end of the Bank's fiscal year. He stated that he was very involved in the work surrounding this effort in September, and expected that he would have been working on it and reporting the final figures right up until the end of October. He also explained that when his previous roles had been eliminated, he was provided with much lengthier notice periods and had been able to find other positions within the Bank before the expiry of the notice period.

Some notable events occurred during the week prior to Mr. Bhuhan being provided with his notice of termination. He explained that various cost payments were becoming due, and that discussions were ongoing regarding how the unplanned costs for software licenses would be recorded. Ms. Smeaton wrote to Mr. Bhushan on September 17th to inquire about his progress on identifying new benefit streams for the licenses, and as outlined above, Mr. Bhushan expressed his concerns in his reply that costs of $1 to $1.5 million for hardware and software purchased in 2008 were not being reported in the EIP project. Mr. Wager (who had been copied on the email stream) responded tersely that Mr. Bhushan should focus on the benefits he had been asked to obtain, and that decisions related to costs would be decided by management.

Mr. Bhushan was troubled by this exchange, and expressed his concern to Mr. Somlo on September 19th. Mr. Somlo suggested that a meeting be set up with all concerned to discuss the issue. Mr. Bhushan attempted to arrange a meeting, but Mr. Wager declined the invitation. After some fairly strained communication between Mr. Bhushan and Mr. Wager regarding the issue, Mr. Wager scheduled a meeting with Mr. Bhushan on September 22nd, the following Monday.

Mr. Bhushan testified that he had assumed that the purpose of the meeting was to discuss the issues he had raised. Instead, he arrived at Mr. Wager's office and was handed the letter of termination and a termination package. Mr. Bhushan assumed that the ongoing discussions and conflict regarding the reporting of costs had played a role in the decision to eliminate his role, and contacted the Bank's ombudsman. He forwarded a detailed email message to the ombudsman on October 2nd, outlining his concerns and suggesting that the timing of the termination was designed to silence him. He requested that the issues he raised be independently verified by someone outside of the Technology and

Operations group, and that his termination be delayed until after the year-end financial figures were accurately reported.

Various meetings were held over the next few days between Mr. Somlo, Ms. Smeaton and Mr. Wager to discuss the concerns raised by Mr. Bhushan. Mr. Bhushan then met with Ms. Smeaton and Mr. Somlo on October 3rd to discuss the issues. They advised that they were prepared to agree with him on one point and would change the contractor reduction from a "run-rate" to a one-time saving, but insisted that they had not yet paid for the DB2 software licenses and that those costs would not be included in the reporting for the final quarter of 2008. I note that despite Mr. Bhushan's strong views that this approach was improper, Mr. Somlo stated in his evidence that he did not feel that there had been any improprieties with respect to financial reporting on the EIP project.

Mr. Bhushan testified that he had asked Ms. Smeaton to extend his termination date until the ombudsman's investigation was completed, but that she declined to do so.

(vi) Disbursement of duties

Mr. Bhushan explained that he had very little contact with Mr. Wager after he provided him with the termination package, although he acknowledged that Mr. Wager was on vacation for most of the three weeks that followed. He stated that he did not have any detailed discussions with anyone regarding the status of his various tasks, except for a one hour meeting with Mr. Ivanic on his last day. He also testified that Wendy Hunter, another employee in the department with finance responsibilities, had contacted him prior to his departure and advised that she would be taking over the cost center reporting function. Mr. Bhushan recalled that Ms. Hunter specified that she would not be taking over any of the ISO reporting tasks or IDP related work.

(vii) *Post-termination investigations*

Mr. Bhushan also testified at length about his involvement with the ombudsman's office and Mark Moody, the representative from the Bank's Corporate Audit Division. He also met with Christine Tomlinson, an external investigator hired by the Bank to investigate and report on his allegations that his termination was a reprisal for raising financial governance concerns.

I will not outline the evidence relating to these investigations, as in my view, they have no bearing on the key issue of whether the Bank's decision to eliminate Mr. Bhushan's role was made in good faith for valid business reasons. Ms. Tomlinson was not called to testify at the hearing, and given that she had limited contact with Mr. Bhushan, and many of the details contained in her report are inconsistent with the evidence provided by the Bank's witnesses, I place no weight on her findings.

The Bank did not call Mr. Moody as a witness at the hearing. At a few points both prior to and in the midst of the hearing, Mr. Bhushan requested that I issue a Summons to compel Mr. Moody to testify. Counsel for the Bank strenuously objected to a Summons being issued. As stated above, Mr. Moody was assigned to review the allegations made by Mr. Bhushan to the Bank's ombudsman, and in the course of that effort, reviewed the figures reported by EIP through the ISO process for the third quarter of the 2008 fiscal year. He also met with Ms. Smeaton to discuss the issues raised.

I declined to issue a Summons compelling Mr. Moody to testify, as it was clear that he had no input into the decision to eliminate Mr. Bhushan's role. He concluded that there had been some inaccuracies in reporting on the EIP project, but that no wilful attempt had been made to misrepresent project benefits. His report clearly states that his review "did not include any assessment of Mr. Bhushan's claim that he may have been dismissed from the Bank because he challenged management decisions".

After the Bank's witnesses had completed their testimony, Mr. Bhushan renewed his request that I issue a Summons to Mr. Moody. He contended that he should be permitted to cross-examine Mr. Moody in order to determine what documentation Ms. Smeaton had provided to him when they met to discuss these issues. Mr. Bhushan suggested that Ms. Smeaton had withheld certain invoices from Mr. Moody, and argued that her evidence on the issue of whether or when certain items were purchased should not be accepted. Given the length of time expended on the evidence to that point, and the tangential nature of the information, I ruled that I would not reconsider my earlier ruling. I suggested that the Bank call Ms. Smeaton in Reply, so that some of the issues raised by Mr. Bhushan on this point could be clarified. The Bank declined to do so.

Bank's evidence on workload, performance and timing of termination

In her evidence, Ms. Smeaton stated that while she was aware that a final IDP was being prepared for submission in October 2008, she had not considered that fact when she made the decision to eliminate Mr. Bhushan's role. She explained that she had made her decision 'looking to the future' and that she had then simply moved through the usual steps involved in a role elimination, and followed the standard Bank practise at the time of providing thirty days of notice of termination.

Ms. Smeaton acknowledged under cross-examination that while she may have expected that most of Mr. Bhushan's work on the business case would have been completed in September, she knew there would likely be some finance work required on the final IDP until the 'sign off' date of October 31, two weeks after his termination date. She agreed that he was the one with the most knowledge of the IDP from a financial perspective, and several emails were referred to in which many people made various requests to Mr. Bhushan for information or documentation related to the IDP well into October.

Ms. Smeaton also agreed that the final IDP requested funding of between \$14 and \$15 million for the project, and the fact that it was going up to the Bank's CEO meant that approvals were required from many departments and extensive documentation needed to be filed. She acknowledged that the IDP claimed a higher level of benefits than the prior two that had been submitted, in order to cover the increased costs that the project had reported.

Finally, Ms. Smeaton agreed that the ISO reporting for fiscal 2008 was required to be done after the 'year end' date of October 31st, and that the figures submitted in the IDP had to be inputted into the ISO "roadmap". She conceded that Mr. Bhushan would have been in the midst of finalising the reporting of costs and benefits for fiscal 2008 at the point of his termination, and that as the promised benefits had not been achieved, he would likely have been actively involved in finding and documenting new benefits.

Danny Somlo, the Division Finance Head of the CTD department, was also called as a witness by the Bank. He oversaw the financial governance of the EIP project, and had responsibility for reviewing the IDP and advising the Chief Financial Officer for the Technology and Operations group on its approval. Mr. Somlo testified that he only first became aware of Mr. Bhushan's termination on September 23rd, when Mr. Bhushan advised him of that fact. He stated under cross-examination that he was surprised to hear that Mr. Bhushan's role was being eliminated, and that he had also found the timing of his termination to be surprising. He testified that he had not been aware that Mr. Bhushan had been advised to reduce his time spent on the EIP project to 15%.

Justin Wager initially hired Mr. Bhushan onto the EIP project in May 2007, and after the organisational changes outlined above were implemented, became his manager. He stated that while he had been asked to interview Mr. Bhushan, he had not been involved in the creation of his position. Mr. Wager's cross-examination took three days to complete and covered several areas. It was clear from his exchanges with Mr. Bhushan that their relationship while working together was fraught with conflict.

Much of the focus of Mr. Wager's cross-examination was his compliance (or lack of thereof) with various Bank policies that Mr. Bhushan referred to, and the details of the disagreements he had had with Mr. Bhushan regarding the reporting of costs for the EIP project. While Mr. Wager had the most direct interaction with Mr. Bhushan of all of the witnesses called by the Bank, it was clear that he neither suggested nor decided that Mr. Bhushan's role should be eliminated. Keeping the main focus of the inquiry in mind, I will not review all of his evidence in detail, but will highlight the most relevant points and note the inconsistencies between his evidence on key points and that of the other witnesses called by the Bank.

Mr. Wager explained that the original idea behind the EIP project was to consolidate the Bank's servers and databases into one large Enterprise Data Warehouse ("EDW") that would house all of the customer information required by the Bank. He stated that subsequent to the project being launched, anti-money laundering (AML) regulations were brought in that required all Canadian banks to track certain transactions. Management made the decision that this information should be added to the EDW, as the data gathered could be useful for other purposes. Mr. Wager explained that this led to a shift in the EIP project in late 2007, as it changed the manner in which the 'benefits' that the project had undertaken to deliver would be obtained. He stated that it took much thought and additional work to meet the level of benefits that the project had originally committed to, and that Mr. Bhushan was involved in preparing financial forecasts and projections of how potential benefits could be mapped out over the following five years.

Despite the above shift, Mr. Wager stated that he and Ms. Murphy determined in November of 2007 (around the same time) that there was not enough work to keep Mr. Bhushan occupied on a full-time basis with the EIP project, and that he should devote 50% of his time to the Business Intelligence project, where there was a need for a financial analyst. When asked to explain how this decision could be reconciled with the additional work he stated was triggered by the shift in focus of the EIP project, Mr. Wager responded that Mr. Bhushan's job was essentially one of 'data entry' and calculating rates of return for different scenarios that were presented to him, and that it did not involve much work. Mr. Wager acknowledged that the requirement for ISO reporting on the project arose after Mr. Bhushan was hired, but responded that it was fairly straightforward and did not result in much additional work.

Mr. Wager was taken through Mr. Bhushan's timesheets for the period November 2007 to January 2008, after had been told to reduce his time spent on the EIP project to 50%. He conceded that they indicated that Mr. Bhushan had worked much more than half of his time on EIP, and acknowledged that as his manager, he had audited and approved all of these hours in the employer's Matador system. Mr. Wager also agreed that after Mr. Bhushan was advised to reduce his time spent on the EIP project to 15% of his workload in June 2008, his timesheets indicate that he spent 60% of his time on EIP in July 2008, and over 70% of his time in August on that project.

When asked to reconcile these facts, Mr. Wager responded that the fact that an employee reports that he spent time working on a project does not necessarily mean that productive work is being done. He stated that he recalled seeing Mr. Bhushan surfing the internet and doing non-work related tasks while at his desk, and so assumed that there was not enough EIP-related work to occupy him on a full-time basis.

Mr. Wager stated that he was first advised of the decision to eliminate Mr. Bhushan's role by Mr. Ivanic in early August 2008. He testified that Ms. Smeaton had neither discussed the issue with him prior to making her decision, nor had consulted him regarding Mr. Bhushan's workload. He clearly stated that Ms. Smeaton had not sought his input into the decision at all, despite the fact that he was Mr. Bhushan's manager at the time.

I note that Mr. Ivanic also testified that he had not had any input into the decision to eliminate Mr. Bhushan's role. This evidence from Mr. Ivanic and Mr. Wager is at odds with Ms. Smeaton's statement that she had consulted with both of them before making the decision, and that they both shared her view that a dedicated finance position was not required for the EIP project.

Mr. Wager also testified at length about concerns he had regarding Mr. Bhushan's performance. He stated that he began to get frustrated in early 2008, as he often had to follow up with Mr. Bhushan to ensure that reports that he was required to prepare were submitted in a timely fashion. He also acknowledged that once the program shifted its focus, he had many disagreements with Mr. Bhushan regarding financial reporting issues. It was clear from the many email messages referred to in the evidence that Mr. Wager felt that Mr. Bhushan was raising ‘road blocks’ in areas that he thought were the sole domain of management, and that he was annoyed and frustrated by this. He described his working relationship with Mr. Bhushan during this period as “strained”.

Mr. Wager stated that he had not been aware of a Performance Improvement Plan having been implemented for Mr. Bhushan. However, he was not surprised to hear that a PIP had either been contemplated or initiated, as he knew that both Mr. Ivanic and Ms. Murphy had concerns about his performance. In any event, Mr. Wager testified that he had never mentioned any of his concerns regarding Mr. Bhushan’s performance to Ms. Smeaton.

Mr. Wager acknowledged under cross-examination that the viability of the EIP project would be questioned if the benefits committed to could no longer be delivered, and allowed that the project could potentially be cancelled. He stated, however, that the $1.5 million in costs that Mr. Bhushan had been questioning would not have impacted the project if they had been charged to it, as that amount would not be material in the context of a business case with an overall benefit stream of $25 million dollars.

Finally, Mr. Wager explained that he personally took over most of Mr. Bhushan’s duties after his termination took effect. While he acknowledged that he had not had much finance training, he stated that he sought assistance from Kyle Sparkman, who was in charge of the group that tracked financial benefits.

The Bank also called Richard Elliott, the Employee Relations Business Partner at the Bank who was involved in the role elimination and Mr. Bhushan’s termination from employment. His evidence mostly focused on issues that arose after the decision was made by Ms. Smeaton to eliminate the role, and as I do not ultimately find his evidence to be assistive on the main issues raised, I will not set it out.

I note that the Bank did not call any Reply evidence to refute the allegations made by Mr. Bhushan.

<u>PARTIES' ARGUMENTS & ANALYSIS:</u>

The Bank contends that Mr. Bhushan's role elimination was essentially the "discontinuance of a function" and that section 242(3.1) of the *Code* precludes me from considering whether his dismissal from employment was unjust. The Supreme Court of Canada defined that term in *Flieger* v. *New Brunswick* [1993] 2 S.C.R. 651 as follows –

> *...a "discontinuance of a function" will occur when that set of activities which form an office is no longer carried out as a result of a decision of an employer acting in good faith*

In *Royal Bank of Canada v. Lapointe* [2005] F.C.J. No. 784, Justice Beaudry of the Federal Court of Quebec stated that adjudicators who are asked to determine whether an employee has been laid off because of lack of work or the discontinuance of a function must ask themselves...

> *if the employer's decision was based on economic reasons affecting the business or if the lay-off was instead motivated by a consideration directly relating to an employee. In other words, the economic reasons must be real and substantiated and must not be a ruse to disguise the firing of an employee.*

Justice Beaudry also made reference to the "sham test" developed by Adjudicator Swan, which directs adjudicators considering this provision to expand their analyses beyond the issue of layoff or dismissal, and to consider whether the "choice of the person to be laid off was arbitrary, discriminatory, frivolous or dishonest".

It is with these statements in mind that I formulated the question posed at the beginning of the decision. Was the Bank acting in good faith for valid business reasons, or was the elimination of Mr. Bhushan's role either a disguised form of discipline, or motivated by the desire to eliminate his input into the process of how costs were reported and benefits tracked in the EIP program?

After carefully considering the evidence presented over the several days of hearing in this matter, I have concluded that the Bank was not acting in good faith when it decided to eliminate Mr. Bhushan's role. While the decisions in this area stress that an employer is entitled to manage its business and employees as it sees fit, and that there must be room for a decision that may "later be shown to be unwise" (*CIBC v. Muthiah* 2011 F.C.J. No. 90, at para. 12), the evidence in this case persuades me that the decision to eliminate this role was motivated by a combination of factors that lean more toward the arbitrary and insincere than those dictated by changing business requirements leading to the "discontinuance of a function" as provided in the *Code.*

I turn now to the parties' main arguments and my findings on them.

Were there valid business reasons for the role elimination?

Counsel for the Bank contended that the evidence presented satisfies the test for proving the 'discontinuance of a function' as the role occupied by Mr. Bhushan no longer exists, and the duties he performed were re-assigned and performed by other employees in the department. Mr. Rider referred to Ms. Smeaton's statement that she would not have created the role that Mr. Bhushan was hired into if she had overseen the EIP project from the outset, and that that project was the only one in her department with a dedicated financial position. He noted her evidence that once management decided that the final IDP or business case would be submitted in October 2008, she felt that the project would go into "maintenance mode" and that Mr. Bhushan's other two functions could be handled by other employees within the department.

Mr. Rider contended that the evidence regarding the number of hours that Mr. Bhushan spent on the EIP project in the months between February 2008, when Ms. Smeaton assumed the position of VP of Info Management, and August 2008, when HR was advised that management wanted to eliminate the role, was a 'red herring', as Ms. Smeaton had made it clear that she was looking into the future when she made the decision to eliminate the role.

Mr. Bhushan focused his arguments on this point on the fact that the Bank had initially claimed that his role was being eliminated due to 'lack of work', but that their arguments at the hearing focused solely on the 'discontinuance of a function' part of the provision. He contended that the *CIBC* v. *Muthiah , supra,* case stands for the proposition that any evidence provided by an employer "after the fact" to justify an employee's termination should be discounted, and that the Bank in this case should not be allowed to change its rationale after the termination was carried out. He argued that in any event the timesheets filed into evidence disprove the Bank's contention that there was not enough work to occupy all of his time on the EIP project, and that I should not accept that argument.

Mr. Bhushan also highlighted the inconsistent evidence provided by the Bank's witnesses regarding how his duties were to be disbursed, and contended that it was clear that there were no efforts made to have the important functions that he performed for the project 'transitioned properly', as one would normally expect to have happen in a large organisation that had chosen to discontinue the type of role he had held.

While the reasons provided by Ms. Smeaton for eliminating the role may seem theoretically sound, I find her evidence difficult to reconcile with the evidence of other witnesses regarding the status of the EIP project at the relevant time. Ms. Smeaton stated that as she looked ahead, she expected the finance work on the project to tail off, given that the "spend" on the project was going down and that the final IDP would be submitted in October 2008. She referred to her prior experience of having eliminated a dedicated finance role in the BMO Connect program once that finance work had dwindled. However, it became clear through her cross-examination that her statement that the amount to be spent was going down was an oversimplification, and that in any event, that figure did not correlate with the amount of finance work required.

Further, Ms. Smeaton neglected to mention that the final IDP to be submitted in October 2008, two weeks after Mr. Bhushan's termination took effect, was the largest one that had ever been submitted on the project. It was to be reviewed by the CEO of the Bank, and sought $15 million dollars in funding. It also reported an entirely different stream of benefits than had originally been imagined when the project was initiated. The document was edited and redrafted several times, and involved a large amount of 'legwork' and co-ordination by various people, but principally Mr. Bhushan. While Mr. Wager described Mr. Bhushan's job as one involving data entry and calculating rates of return, the reality was that Mr. Bhushan's was a high level analyst, with a total compensation package of just under $100,000. His Job Description outlines important duties such as providing governance and analysis for the project's financial figures, and providing consulting advice on financial business strategies.

Ms. Smeaton also neglected to mention anything in her testimony about the change in focus of the EIP project, necessitated by the institution of the regulatory projects (BASEL, AML) after it had been undertaken. Mr. Wager (and other witnesses called by the Bank) agreed that these changes required the project's anticipated benefits to be re-evaluated, and much time and energy was expended thinking this through and developing a new strategy.

While the strategic direction for these decisions may have come from the management of the project, Mr. Bhushan was responsible for financial forecasting and liaising with various people in other departments in the Bank regarding their changing needs. This often led to debates involving difficult conceptual ideas and requiring complex financial calculations. Mr. Bhushan's timesheets for this period bear out his assertion that his workload actually increased, and it is clear that the direction he received to spend less time on the EIP project was driven by the need to show reduced costs, rather than the amount of work decreasing.

Ms. Smeaton's assertion that her prior experience with eliminating the finance role in the BMO Connect project led her to believe that Mr. Bhushan's role on the EIP project could be eliminated was also successfully challenged on cross-examination. Responding to Mr. Bhushan's questioning, she acknowledged that the earlier position did not have the responsibility for preparing IDPs or performing any ISO reporting. She also stated that the project itself had ended shortly after the position was eliminated, which was not the case in this circumstance.

While I can appreciate that Ms. Smeaton would have been thinking ahead and considering how her department's resources could best match any anticipated changes in workload, I find it difficult to accept that she would not have taken into account the events at play at the time that she made the decision to eliminate Mr. Bhushan's role, and manage the timing of his termination in a more effective way. When she was considering the matter in July or August 2008 and directed Mr. Ivanic to initiate the process of eliminating the role, Ms. Smeaton would have known both that the final IDP was due for submission in October, the end of the Bank's fiscal year, and that Mr. Bhushan would likely be immersed in the work related to that.

Documentation filed at the hearing shows that Ms. Smeaton was involved in discussions and debates about cost reporting and benefits streams being investigated around that time. ISO cost reporting was also required to be completed by mid-November. If she was not certain of the level of Mr. Bhushan's involvement in the redrafting of the IDP, she could have easily consulted Mr. Wager about that, but it is clear from his evidence that she did not do so.

Mr. Bhushan contends that the timing of his termination was suspicious, and that there was an organised, intentional campaign to remove him from his position prior to the submission of the IDP and the deadline for cost reporting so that the project could report figures that breached the Bank's financial governance provisions without consequence. While I am not persuaded from the evidence I heard that this was necessarily the case, it is clear that the timing of Mr. Bhushan's termination from employment was surprising (in Mr. Somlo's words), or awkward at best.

Further, while I would not expect perfect concordance in the evidence of all of the Bank's witnesses on every point, I am troubled by the clear inconsistency or "disconnect" between the evidence of the three key Bank witnesses on the stated reason for Mr. Bhushan's role being eliminated.

Mr. Ivanic's note to Deborah Nott, reproduced above, refers to the project's change in approach as the reason for the financial analyst role no longer being required. He states "we managed to keep him busy for awhile, and gave him some work on other initiatives, but the bottom line is that we no longer have the need for this role in the department". Mr. Ivanic would have known at that point that Mr. Bhushan was unable to complete all of his EIP tasks during that period, let alone lend assistance to the Business Intelligence project as he had been directed to do, and that this was the cause of much conflict within the group. In light of the many emails and timesheets filed showing otherwise, his suggestion that they only 'managed to keep him busy for awhile' is simply untrue. Given his awareness of the issues at the time, Mr. Ivanic's statement can only be characterised as deliberately dishonest and insincere.

More importantly, the comment that the shift in approach of the EIP project reduced the need for a financial analyst is at odds with Mr. Wager's evidence that Mr. Bhushan was required to perform additional financial forecasts, as the whole rationale and benefit stream for the project had to be rethought. While this inconsistency leaves me questioning the veracity of the testimony of both witnesses, it is compounded by the fact that as outlined above, Ms. Smeaton did not even mention the shift in focus of the EIP project when she testified at length about her reasons for eliminating the role. In the end, I am left wondering which, if any, of the rationales provided for eliminating the role are true.

Was Ms. Smeaton aware of performance concerns or that Mr. Bhushan had raised financial governance concerns?

Ms. Smeaton testified that she was unaware of any concerns regarding Mr. Bhushan's performance when she made the decision to eliminate his role, and that she only first heard about his allegations that the Bank’s financial governance rules were not being followed in mid-September, well after she had made the decision.

Mr. Bhushan disputes both of these contentions. He noted that a discussion had clearly taken place among management about initiating a Performance Improvement Program, and argued that Mr. Ivanic would likely have advised Ms. Smeaton of the performance issues that had been discussed over the course of 2008. He also contended that he had indicated his concern to Ms. Smeaton regarding the costs that he felt should be reported on the project in May 2008, and that she had disagreed with him. He stated that the amount in issue was $3 million, and that Ms. Smeaton would have been aware that these significant costs would have to be reported just after the end of the fiscal year in October. He suggested that Ms. Smeaton made the decision soon after their discussion in May to initiate his termination from employment, in order to ensure that he would not be around at the end of the fiscal year to question the figures being reported.

Both Mr. Ivanic and Mr. Wager claimed that they had not discussed any of their concerns about Mr. Bhushan’s performance with Ms. Smeaton. While both of them were unequivocal in their testimony on these issues, I note that at the point at which Ms. Smeaton directed Mr. Ivanic to contact the Human Resources consultant at Hewitt to move forward with the role elimination in August 2008, both men had expressed significant performance concerns and had been involved in discussions with Mr. Bhushan, verbally and in writing, on this issue over the course of the prior six months. Mr. Ivanic had also clearly discussed the initiation of a PIP with Ms. Murphy, although he claimed not to recall having done so in his testimony.

Mr. Ivanic also met with Mr. Bhushan in late July. He acknowledged in his evidence that Mr. Bhushan had clearly spelled out his concerns regarding breaches of the Bank’s financial governance rules at the meeting. Mr. Bhushan had also advised Mr. Ivanic at the meeting that he had felt pressured to an uncomfortable degree by his managers, and had decided to escalate his concerns to Danny Somlo.

Given the above, I have difficulty accepting that Ms. Smeaton was completely insulated from these concerns and discussions, as the Bank's witnesses claimed. I note that when Ms. Smeaton was advised of the nature of the discussions held between Mr. Ivanic and Mr. Bhushan at their July meeting at the hearing, she stated that she *should* have been advised of the discussions that had taken place. It is clear that in the summer of 2008, at the point at which she stated that she made the decision to eliminate Mr. Bhushan's role, debates were taking place around various cost and benefit reporting issues, and EIP project management was facing pressure to meet the targets that had been previously committed to.

Again, there were glaring inconsistencies in the evidence provided by the three key witnesses called by the Bank regarding whether or not Ms. Smeaton had consulted them regarding the decision to eliminate Mr. Bhushan's role. Ms. Smeaton testified that she had consulted both Mr. Ivanic and Mr. Wager, and that they both shared her view that the EIP project did not need a dedicated finance person and that the role could be eliminated. Mr. Wager testified that Ms. Smeaton had never discussed the issue with him, nor asked about Mr. Bhushan's workload. He stated that he only first became aware that the role was being eliminated when Mr. Ivanic advised him of it. For his part, Mr. Ivanic stated that Ms. Smeaton had not sought his input into the decision, but had advised him of it once it was made.

These differences, coupled with the different reasons provided by the witnesses for the rationale underlying the decision to eliminate the role as set out above, lead me to doubt Mr. Wager's and Mr. Ivanic's statements that they did not communicate any of the above concerns to Ms. Smeaton in advance of her making the decision in question.

<u>*Disbursement of Mr. Bhushan's duties:*</u>

An important factor to consider in a case in which the employer alleges that a function is discontinued is how the duties performed by the person occupying the role in question are handled, once the role is eliminated and the employee has left. Counsel for the Bank contended that Mr. Bhushan's duties were distributed among various employees, and that no one new had been hired to replace him. While Mr. Bhushan did not dispute this, he pointed to the inconsistency in the evidence among the Bank's witnesses on a few points related to this issue.

Ms. Smeaton testified that she had thought about who might take on Mr. Bhushan's duties after he left, but that she did not discuss this with anyone either before she made the decision to eliminate the role or once Mr. Bhushan's termination took effect. She stated that Mr. Somlo's Finance team could assist with cost center reporting and provide advice regarding the quarterly financial reporting that was required, but acknowledged that she had never discussed this with Mr. Somlo. In fact, Mr. Somlo testified that the level of support provided by his team to the EIP project did not change after Mr. Bhushan's departure.

While it seems clear that no one new was hired to assume Mr. Bhushan's duties after he left, I find it surprising that Ms. Smeaton would not have discussed how his duties would be disbursed given the magnitude of the project, and the financial work and ISO reporting responsibilities that the position entailed. The evidence suggests that Wendy Hunter, another finance professional in the department, took on the cost center reporting functions, and that Mr. Wager absorbed the rest of the duties that Mr. Bhushan had performed. Mr. Wager admitted in his evidence that he did not have a financial background, and that he had to seek assistance from various people. He also complained that he struggled to find time to complete these extra duties, given his full workload as Tech Head and manager of a large team of employees and consultants.

The EIP project was described in the evidence as a "key initiative" of the Technology and Operations division. Given its scope and importance within the department, and the pressures it faced in delivering the benefits committed to in light of the unexpected changes outlined above, I find it unlikely that the senior executive for the department would have assumed that the work done by Mr. Bhushan would simply be performed by other employees stepping in as the need arose. There was clearly a heightened focus on financial reporting in the weeks that followed Mr. Bhushan's termination, and while I am not prepared to accept Mr. Bhushan's contention that there was a multi-level conspiracy to remove him from his position, I conclude that management took action to eliminate the role in question so that their decisions would not continue to be questioned and challenged.

To this extent, I find that Mr. Bhushan was targeted, either because of actions he took as an individual, or due to the inherent conflict between the finance 'gatekeeping' function that the role entailed and that of project management on the EIP project. In either case, I find that this breaches the requirement in the case law that the alleged "discontinuance of a function" must be made in good faith.

CONCLUSION:

For all of the reasons stated above, I find that the Bank has failed to prove that the decision to eliminate Mr. Bhushan's role was done for valid business reasons and falls within the 'discontinuance of a function' provision in section 242(3.1) of the *Code.* Accordingly, I have the jurisdiction to consider the unjust dismissal complaint brought by Mr. Bhushan. Given the Bank's concession that if I determine that I have the requisite jurisdiction it would not dispute that the dismissal was unjust, I find that the Bank unjustly dismissed Mr. Bhushan from his employment in 2008 and has therefore breached the *Code*.

As agreed, the hearing will reconvene so that the issue of remedy may be addressed. I will have my office contact both sides in order to determine a mutually convenient date at which this can occur.

DATED at TORONTO, ONTARIO this ____23rd____ DAY OF JANUARY, 2012.

Shari L. Novick

Arbitrator