

BETWEEN:

MURUGANANDARAJA MUTHIAH

Appellant

and

CANADIAN IMPERIAL BANK OF COMMERCE and INTRIA ITEMS INC.

Respondent

INTERIM DECISION
Canada Labour Code, s. 242

Adjudicator:

R. Hartman

Appearances:

K. Elson, Counsel for the Appellant
M. Fletcher, Counsel for the Respondent

Dates of Hearing:

August 26, September 28, 29, October 21, 2009

Place of Hearing:

Toronto, Ontario

Date of Decision:

December 9, 2009

PROCEEDINGS

[1] Mr. M. Muthiah claims he was unjustly dismissed on November 3, 2008 contrary to the *Canada Labour Code* ["the Code"] by Canadian Imperial Bank of Commerce and/or Intria Items Inc. ["CIBC/Intria"].

[2] On May 20, 2009, the Minister of Labour, pursuant to the Code, appointed me to adjudicate the above complaint. Hearings were held on August 26, September 28, 29 and October 21, 2009 in Toronto.

[3] In attendance on all dates were: Mr. Muthiah, represented by his counsel, Mr. Elson, and Ms. M. VandenBerg, Senior Employee Relations Consultant with CIBC/Intria, represented by CIBC/Intria's counsel, Mr. Fletcher.

RECORD

[4] The record consisted of the following exhibits:

1. a) Letter of appointment dated May 20, 2009;
b) letter to HRSDC from Mr. Muthiah's counsel on November 7, 2009;
c) complaint registration faxed on November 25, 2009 from Mr. Muthiah's counsel;
d) letter from HRSDC to CIBC/Intria on November 27, 2009;
e) letter from CIBC/Intria to HRSDC on December 22, 2008; and
f) letter from Mr. Muthiah's counsel on February 17, 2009 requesting adjudication;
2. Notice of Hearing for August 26 and September 28, 29, 2009;
3. Respondent's Brief of Documents from CIBC/Intria;
4. a) BCA deposit slip sample;
b) non-BCA deposit slip sample;
5. Mr. Muthiah's Record of Employment dated November 12, 2008.

[5] CIBC/Intria called Ms. T. Maltese, Intria Director of Cheque & Remittance and Mr. R. Sharma, Intria Risk Manager/Senior Consultant, Ontario Region as witnesses for the preliminary issue. Mr. Muthiah testified on his own behalf and called Mr. C., an agency employee with Intria as a witness. All were questioned under oath by counsel who made oral submissions on the record and testimony.

ISSUE

[6] Mr. Muthiah's complaint is that he was unjustly dismissed on November 3, 2008, contrary to the Code and he seeks reinstatement as a remedy.

[7] As a preliminary issue, CIBC/Intria counsel submitted that the complaint was barred under section 242 (3.1) (a) as Mr. Muthiah was "laid off... because of the discontinuance of a function".

[8] This is an interim decision addressing this preliminary issue.

LAW

A. Adjudicative Authority

[9] Under section 242(3) of Division XIV, Part III of the Code, an appointed adjudicator must consider first whether the dismissal of the person who made the complaint was unjust. If it was, the remedies available are set out in section 242(4), as follows:

- (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 in his employ; and
 - (c) 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.

[10] The power given to the adjudicator under section 242(3) is expressly stated to be “subject to subsection (3.1)”, which provides:

242(3.1) *No complaint shall be considered by an adjudicator 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; or*
- (b) *a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.*

[emphasis added]

[11] Part III of the Code contains other exceptions. Division I (hours of work) is by section 167(2) not applicable to employees who a) “are managers or superintendents or exercise management functions” or b) “are members of such professions as may be designated by regulation as professions to which Division I does not apply”. Division XIV (unjust dismissal) does not apply, pursuant to section 167(3), “to or in respect of employees who are managers”.

B. Jurisdiction

1. What is “lack of work” or “discontinuance of a function”?

[12] The language of section 242 (3.1) (a) has been considered in contexts inside and outside the Code.

[13] In *Fleiger v. New Brunswick*, [1993] 2 S.C.R. 651 (SCC) the Supreme Court of Canada interpreted the phrase “discontinuance of a function” under the Civil Service Act of New Brunswick. The province disbanded its highway patrol, which employed Mr. Fleiger, and contracted out its highway patrol duties to the federal RCMP. Writing for the 6-1 majority, Mr. Justice Cory dismissed the appeal, finding that it was a condition of Mr. Fleiger’s employment that 30 days notice was all that was required when his “services are no longer required because of the discontinuance of a function.” In doing so, he wrote that “function” in the employment setting should be interpreted as “office”, which he defined as “the bundle of responsibilities, duties and activities that are carried

out by a particular employee or group of employees”. He reasoned that this “best comports with the environment of the workplace” as “both the employer and the employee will know exactly what is required to perform the activities of the particular office.” This discussion of what is a “function” is often referenced in Code jurisprudence applying section 242 (3.1) (a).

[14] The *Fleiger* dissent judgment by Mme Justice L’Heureux-Dubé also provides useful interpretive guidance for the language of section 242 (3.1) (a). Noting that courts have on occasion given an “overly broad or distorted interpretation” of “discontinuance of a function...driven by an underlying fear that a narrow interpretation would somehow paralyse the government as employer”, she commented that this fear is unwarranted since the “government was and is able to abolish positions, to reorganize and to update administrative procedures” and is “at all times free to contract out”.

[15] Mme Justice L’Heureux- Dubé, after illustrating how the terms “lack of work” and “discontinuance of a function” inform each other and “have a relatively plain meaning”, wrote:

Although this case was argued on the basis of a discontinuance of a function, and it was not suggested that this situation involved “lack of work”, ... the meaning of each may assist in informing the meaning of the other. ...

“Lack of work” is a situation which exists when an employer determines that the work being performed can be performed by fewer people. ...

A “discontinuance of a function” occurs when an employer decides to abolish a service or function in its totality. My colleague uses the term “office” to inform the meaning of “function”. I do not find this term to provide much in the way of guidance...[and it] may detract from the central issue which is the existence of the “function”. ...

While the bundle of tasks performed by a specific employee must be considered, *the appropriate focus must also account for the larger context and for the work in which the employer is engaged*. This larger focus simplifies the task of assessing whether employees have been let go because of either the lack of work or the discontinuance of a function.

...

It is not my intention to conclusively define all the possible scenarios or situations which will arise. Furthermore, though *the terms “lack of work” and “discontinuance of a function” can be kept conceptually distinct, they are not rigid categorizations and there may well be some fluidity between the terms*. There will undoubtedly be business reorganizations which may be capable of more than one characterization. Clearly, the practical application of these terms to specific business problems may on occasion be quite complex. However, *a focus on the larger perspective can reduce many of the problems of characterization*.

[emphasis added]

[16] There is no dispute in Code jurisprudence that employers are similarly free to contract out and reorganize the workplace and procedures. Section 242 (3.1) recognizes an employer’s right to lay off employees for economic, financial and cost-cutting reasons as long as the decision is “genuine and made in good faith” and to reorganize the workforce and reassign the duties of the employee laid off. (See *Assembly of First Nations v. Rachel Prud’homme* [2002] L.V.I.3306-8 (Can.Arb.Board) and *McMurtry v. Air Canada* (November 7, 2002), Doc. YM 2707-5730 (Can.Arb.Board) 196 F.T.R. 12.)

[17] The need for a “larger perspective” when considering application of the terms used in section 242 (3.1) (a) has been discussed in a variety of ways. In *Steinhauer v. Whitefish Lake First Nation* [2007] C.L.A.D. No. 471, Adjudicator Hall commented that “an employer wishing to terminate an unwanted employee can allege lack of work or arrange for the discontinuance of a function when in fact the real reason for dismissal is unrelated” and looked at Mr. Steinhauer’s “position within the context of the whole firefighting operation”, rather than just his particular job at the time of termination. After doing so, the Adjudicator found there was no “lack of work” but a “discontinuance of a function”.

2. Evidentiary Onus

[18] It is incumbent on the employer to establish that a particular lay-off falls within section 242 (3.1) regarding “discontinuance of a function” for the Code not to apply. (See *Maritime Telephone & Telegraph Co. v. Howard* [2000], 5 C.C.E.L. (3d) 210 (Fed.T.D).)

[19] The decentralization, by assignment to others, of duties formerly done by the holder of a position that no longer exists can be a “discontinuance of a function”. (See *Fleiger*, supra, *Atomic Energy of Canada Ltd. v. Jindal* [1998] 98 C.L.L.C.220-047 (Fed.C.A.) and *Bank of Nova Scotia v. Mathur* [1997] F.C.J. No. 1188.)

[20] Demonstrating that the lay-off of the particular employee was because of discontinuance of a function “cannot be done by the use of vague language” or action taken “after the date of termination”. While reasons can be given later, they must be “in accord with the earlier reasons”, i.e. those given orally or in writing at the time of lay-off. (See *Howard v. Maritime Telephone & Telegraph Co.* [2000], 5 C.C.E.L. (3d) 210 (Fed.T.D) para.33-36.)

[21] The question to be asked is “whether the actual operative and dominant reason for the termination” was the statutory provision of “lack of work”. (See *Sedpex, Inc. v. Canada* [1989] 2 F. C. 289.)

[22] In *Ritter v. Shaw Cablesystems G.P.* [2002] C.L.A.D. No. 295 Adjudicator Sims declined jurisdiction, concluding that an employer’s decision to make a part-time position full-time was a discontinuance of a function and that this was the “actual operative and dominant reason” for the termination of employment.

[23] An employer must show economic justification and give a reasonable explanation for the choice of employee to be laid off before the onus shifts to the applicant/employee to show bad faith (See *Thomas v. Enoch Cree Nation Band* [2003], 227 F.T.R. 236 (Fed T.D.), affirmed on appeal.)

[24] In considering whether a dismissal or lay-off was done in good faith, the adjudicator assesses the evidence presented to determine whether there was a “mixed” or “ulterior” motive. If the lay-off was done in good faith, the adjudicator is without jurisdiction to consider the merits of the lay-off or dismissal. (See *Rogers Cablesystems Ltd. v. Roe* [2000], 193 F.T.R. 240.)

[25] In *Symcor Services Inc. v. Rousseau* [2000] C.L.A.D. No. 362, Adjudicator Barrett found the employer had not presented sufficient evidence for the selection of the employee to bar application of the Code. Noting as “suspicious” the fact that there was

“no direct evidence of the Company’s motivation for the cuts” or “written directive justifying the cuts”, the Adjudicator wrote:

...In each case where downsizing or budget reduction is cited as the reason for the discontinuance of a function, substantial evidence was led to show the rationale and necessity for cost reductions and the very specific reasons certain individuals were selected for termination.

[26] An “entirely arbitrary decision” or a decision to eliminate a position “without any investigation or knowledge as to what the duties and responsibilities of the Band administrator and the Band Manager were, or what the incumbents...actually did on a daily basis...was...not a decision that was made on a good faith basis”. It was not necessary “to prove the employer had a malicious intention in order to establish that bad faith may have existed.” (See *Jackson v. Washagamis Bay First Nation* [1999] C.L.A.D. No. 360.)

[27] An employer cannot use the “discontinuance of a function” exception to negate an employee’s ability to challenge a termination contrary to the legislative intent. In *Mathur v. Bank of Nova Scotia* [2001], 12 C.C.E.L. (3d) 280 and [2002], 18 C.C.E.L. (3d) 150, the Adjudicator took jurisdiction on the basis that the reorganization had not been done in good faith. In that case, there was a “discontinuance of a function” but the evidence presented showed that the dominant motive for the reorganization was a preoccupation with removing an unmanageable employee. In other words, the reorganization was effectively engineered to prevent a challenge to the dismissal under the Code.

REASONS

A. Background

1. Employment Relationship

[28] After discussions prior to and at the commencement of the hearing regarding who was the employer, both counsel agreed that the employer could be jointly identified as CIBC/Intria for the purposes of this decision.

[29] CIBC operates its branch network and another division called Global Operations. Intria was part of CIBC’s Global Operations.

[30] Within Intria there were three national business lines: Cheque Remittance, Currency Operations, and IMDS, a printing function.

[31] Ms. Mary Proc, Senior Manager, was in charge of Ontario Currency Operations, which had two locations: Toronto and Mississauga.

[32] The Toronto location processed deposit slips for more than one bank. CIBC slips were done during the day/afternoon, and non-CIBC banks done on the night shift. The processing details, addressed in testimony at some length, are set out later to the extent necessary. The Toronto location operated Monday to Friday with somewhat overlapping shifts arranged roughly around the clock, i.e. 8 a.m.-4 p.m. (day), 2 p.m.-10-12 a.m. (afternoon) and 10-12 a.m.-8 a.m. (night). There were occasional Sunday shifts and the Monday shifts became Tuesday shifts after holiday Mondays.

[33] Ms. Sharon Gordon was Senior Manager, Deposit Processing, at the Toronto location. She went on medical leave in June 2008 and other than a day or two did not return to the position until January 2009. From June to December 2008, Mr. Sharma, Intria Risk Manager, Ontario, assumed the additional role of Acting Senior Manager, Deposit Processing.

[34] Mr. Muthiah joined CIBC/Intria as a casual employee on May 13, 1998, in the position of Processing Officer (Job Level 1) at \$10 hourly, reporting to the Manager of Currency Operations at Toronto. On February 1, 1999, he became a full-time employee in the position of Control Officer at \$22,000 yearly (Job Level 2), reporting to the Internal Auditor of Currency Operations at Toronto.

[35] On October 7, 2008, Ms. Mary Proc in a letter to Mr. Muthiah advised:

This letter confirms that as a result of restructuring, your position is being eliminated and your employment with CIBC will be terminated effective November 03, 2008 (the "termination date"). In order to assist you in your transition to new employment, CIBC is prepared to offer you the payments and benefits set out in this letter, (the "Severance Package") on the terms and conditions outlined below.

...

[36] CIBC/Intria indicated on November 12, 2008 in Mr. Muthiah's Record of Employment that termination was for "shortage of work".

[37] On November 7 and 25, 2008, Mr. Muthiah initiated his complaint of unjust dismissal under the Code.

[38] On December 22, 2008, Ms. Vandenberg replied on behalf of CIBC/Intria that Mr. Muthiah's "employment was terminated due to position elimination" and therefore there was "no jurisdiction to consider this unjust dismissal complaint as Mr. Muthiah's [sic] was terminated as a result of a lack of work or discontinuance of function."

[39] Counsel for CIBC/Intria at hearing confirmed that the employer was not arguing the "lack of work" exemption under section 242 (3.1), only "discontinuance of a function".

2. The position in issue as held by Mr. Muthiah

[40] In 1999, when Mr. Muthiah accepted the "position" of Control Officer, the job description attached was titled "Intermediate Clerk/Processor", with "a range of specialized clerical/administrative support functions".

[41] The evidence was that Mr. Muthiah performed essentially the same work throughout. However, titles for his position changed frequently. In performance reviews from 2001 to 2008, the title of his "position" was in flux: Audit Verification Clerk (2001), Control Officer (2002), Receipt & Administrator Officer (2003), Contents Verification Clerk (CVC) (2005), Bag Handler/File Clerk (2005), CVC (2006), and finally, in December 2007 and April 2008, CVC/Bag Opener/Sundry Teller/Machine Operator. In his November 2008 complaint, Mr. Muthiah identified his job as Verification/Prepping Clerk.

[42] Attempts to clarify at the hearing the accepted title for Mr. Muthiah's position at the date of termination were not successful. CIBC/Intria suggested that his duties were best captured under the title Prepping Clerk; Mr. Muthiah preferred Verification Clerk.

Neither title encompasses the complete “bundle” of duties he performed over ten years, or at termination, nor does either title explain those used for performance review.

[43] In sum, the evidence establishes no particular or consistent correlation between Mr. Muthiah’s duties and position titles given either casually or on performance review.

3. Mr. Muthiah’s specific duties at Termination

[44] Mr. Muthiah worked the day shift Monday to Friday, and the evidence focussed on this, with some discussion of the night shift, but little of the afternoon shift.

[45] On Mondays (or Tuesdays after holiday Mondays), Mr. Muthiah was part of the Bag Opening Team, a distinct operation with different report structures. The team of 4-5 people opened all deposit bags collected by armoured car from various locations and delivered to that location for the purpose of sorting and verifying bag contents. The team reported to the Bag Opening Supervisor, SM, who reported to the Senior Manager, Deposit Processing, Ms. Gordon/Mr. Sharma.

[46] After the bag contents were verified by the Bag Opening Team, the variously bundled deposit slips were given to data entry personnel who transferred the data from paper slip to computer records.

[47] The bundled deposit slips were for CIBC business accounts. Select night deposit customers had BCA slips, which gave them same day credit for the deposit. A few business customers had their own computer generated deposit slips. However, the vast majority of the deposit slips handled, 70-80%, consisted of the standard business account form, referred to in this proceeding as “non-BCA”.

[48] When data entry operators completed a bundle, they rewrapped it with a plain piece of paper with their name/number and date. These bundles were filed by date in baskets and stored on site for 3 days, during which they could be opened by management to investigate and verify deposits as required.

[49] Mr. Muthiah said that he never did the above data entry duties and only handled the slips after the three day holding period. After his Monday duties, for the rest of the week Mr. Muthiah organized the deposit slips, which had been entered into the computer by others days earlier, and packaged them for storage or shipping.

[50] The majority of the testimony addressed Mr. Muthiah’s organizing and packaging of deposit slips, for which his direct supervisor was the Workflow Co-ordinator, S since March 2008, and formerly R. The Workflow Co-ordinator reported to the Night Deposit Supervisor, JM, who in turn reported to the Senior Manager, Deposit Processing, Ms. Gordon/Mr. Sharma.

[51] Most information regarding the particulars of Mr. Muthiah’s job came from the testimony of Mr. Muthiah and Mr. Sharma, and to some extent from Mr. C., the agency night shift employee who took on some of Mr. Muthiah’s duties after his position was eliminated.

[52] Both counsel referred to a written summary of Mr. Muthiah’s duties which was prepared almost a year after termination, by Mr. Sharma on September 9, 2009. This stated in its entirety:

1. Bag opening on Mondays (and Tuesdays after long weekends)
15-20% of the weekly hours
2. Sorting vouchers for operators
About 60% of the weekly hours
3. Filing/Shipping boxes
5-10% of the weekly hours
4. Validating large items and miscellaneous assignments
About 10% of the weekly hours

[53] Mr. Muthiah agreed with the above time estimates and duties, on the understanding that “sorting” vouchers in item 2 also included “filing” of vouchers by transit number. He retrieved baskets of three-day-old deposit slips, reopening each operator’s bundle, separating slips by type (BCA from Non-BCA deposit slips) and then organizing the non-BCA deposit slips numerically by bank transit number, using a wooden cubby.

[54] The “filing” in item 3 referred to packing bundles already sorted into boxes for storage or shipping. Not much was said about item 1 or Mr. Muthiah’s bag-opening duties, which would take, depending on volume, the whole Monday shift.

[55] Regarding item 4, Mr. Muthiah said his only use of the computer was to validate particulars of the occasional “large” deposit, defined as over \$1 million. Miscellaneous assignments were described as “ad hoc requests” for a second person necessary for joint custody of movement of cash, etc.

B. Employer’s evidence of “discontinuance of a function”

[56] CIBC/Intria argues that Mr. Muthiah was laid off because of the “discontinuance of a function”, a direct result of general restructuring at CIBC, Global and Intria to reduce costs, relying on Ms. Maltese for a general understanding of the restructuring and on Mr Sharma for particulars of the “discontinuance of a function”.

1. General Restructuring

[57] Ms. T. Maltese has been with CIBC/Intria since 1991, and since September 2008 she held the position of Intria’s Director of Cheque & Remittance in Mississauga. Prior to that she was Director of Operations Capacity and at some point was Director of Currency Operations at Mississauga.

[58] In addition to her duties with Intria, Ms. Maltese had concurrent special assignments with other CIBC operations. In this capacity, she said she was involved in PS, a strategic restructuring project, designed to meet a national cost-savings target for all CIBC operations through region consolidation, technology changes, and looking at “staffing to volume issues”. She said that she worked with Intria executives nationally to “identify cost saving initiatives across all three lines of business”. Division and local managers in all of CIBC’s operations were responsible for implementing the changes necessary to realize the savings, she said, and there was a desire to have these in place for the 2009 fiscal year (Nov 1, 2008 – Oct 31, 2009) to maximize savings in terms of head count.

[59] Ms. Maltese's testimony consisted of reviewing numerical data from three PS spreadsheets: one referring to "Severance Provision Head Count" (permanent employees); one to Total Head Count (permanent employees and agency employees); and one which quantified overall PS targets in dollars. The information on all three sheets used coded sub-projects, and based on her knowledge of these codes, she understood that Mr. Muthiah would fall within sub-project PR1, which she noted had met its targeted savings of \$2.2 million for the 2009 fiscal year.

[60] Ms. Maltese said that she was unaware of Mr. Muthiah prior to this proceeding. The PR1 head count data was numerical in nature and Ms. Maltese concluded that combined Head Count reduction for PR1 showed that 2 permanent and 50 agency employees were eliminated effective November 2008. Extrapolating from the two spreadsheets provided for overall reductions for the 2009 fiscal year, she said that PR1, as part of PS, had projected a reduction of 63, but had accomplished 65, or 2 more than planned.

[61] Ms. Maltese had no direct knowledge and was not involved in the decision to eliminate Mr. Muthiah's job. When asked to explain how the elimination of Mr. Muthiah's position was cost-effective, Ms. Maltese confirmed she had no other information than that on these spreadsheets and assumed the savings were that his salary was no longer being paid.

[62] Ms. Maltese speculated that Mr. Muthiah's job elimination may have been part of PS's general implementation of cost reduction by "redistributing work to others" or having "work absorbed by others", but had no direct knowledge. She said that she was aware of the use of a comparison matrix tool for identifying which of a group of persons doing the same job would be eliminated. She said that a list of persons doing the same job would be assessed and ranked using criteria such as accuracy, productivity and personal attributes (adaptability, attitude, progressive discipline). The person ranking lowest is the one whose job is eliminated. She said this process applies "if more than one person is doing the same job" and that an identification of the position as one chosen to be eliminated was a prerequisite for an employee to qualify for transition benefits or ETSP on termination.

2. Identification of Mr. Muthiah's position

[63] CIBC/Intria relied on Mr. Sharma's evidence for this. Mr. Sharma, with CIBC/Intria since 1987, like Ms. Maltese, worked in different roles, sometimes with concurrent special assignments. His current role, which he has held since early 2007, is Intria Risk Manager, Ontario Region. In early 2008, he took on a 9 week project in Alberta.

[64] From June to December 2008, Mr. Sharma was doing his regular Intria province-wide duties and filling in for Ms. Gordon. As Acting Manager, Deposit Processing at the Toronto location, he described his duties as generally "team building, performance management, and client satisfaction".

[65] Mr. Sharma said he was mostly present at the Toronto location during the day shift but he also did one night shift bi-weekly. He described the Toronto location as a large room in which the Manager's office was located by the main entry door. The only time Mr. Muthiah worked close by was on Mondays, when he did bag-opening duties just outside Mr. Sharma's office. For the rest of the week, he could see Mr. Muthiah at his

desk at the far end of this room but not what he was doing. Mr. Sharma said he was able to observe Mr. Muthiah directly when he took walks through the department, about 10-12 times a day, to discuss with staff what had to be done to ensure goals were met. He said that on Mondays particularly, he would ask Mr. Muthiah and other members of the bag opening team how things were going, to get a sense of volume and make adjustments if necessary.

[66] Mr. Sharma said he prepared the September 2009 memo setting out Mr. Muthiah's duties, based on his own unspecified inquiries and observance of him during the 4-5 months prior to termination. He said that, unless Mr. Muthiah was away, no one else was responsible for sorting vouchers on the day shift except Mr. Muthiah.

[67] Regarding the identification of Mr. Muthiah's position as one to be eliminated, Mr. Sharma appeared to have little direct knowledge. He frequently referred to "Ms. Gordon's vision", which he could not describe in any detail beyond stating that she had proposed that data entry operators could separate non-BCA slips from BCA slips while inputting data by making two piles rather than one, thus eliminating the need for this to be done by someone else after the 3 day period. There was nothing in the record about this idea prior to the termination. Mr. Sharma said he was aware of nothing in writing but said he attended a brief meeting with Ms. Proc and Ms. Gordon where it was discussed, some time in September. He pointed to the following email from Ms. Gordon, addressed to him and Ms. Proc, on September 9, 2008, as evidence of "identification". In apparent reference to the subject line, which stated "Bag Opener name", Ms. Gordon rather succinctly responds, as follows:

Hello there:

As requested:

First Name:

Last Name:

Muruganandarajah (Rajah)

MUTHIAH

Regards,

[68] While Mr. Sharma said this email resulted from his meeting with Ms. Gordon and Ms. Proc, it is not obvious how this was email related to their discussion of deposit slips.

[69] Mr. Sharma's testimony was clear that he took no action of his own regarding the merits of the position elimination. He said that he made no inquiries or reviews, and simply concluded after a while that he thought Ms. Gordon's "vision" had merit and agreed with it and that his primary involvement was ensuring that the proper approval process was in place prior to meeting with Mr. Muthiah to tell him.

[70] The record indicates the following. On September 29, 2008, a letter from the CIBC Restructuring Services to Ms. Proc encloses termination documents "further to Position Elimination Notice forwarded" to them on September 11, 2008. This Notice was never produced. On October 6, 2008, Mr. Pearson of CIBC HR Client Services emailed Ms. Proc, stating: "to confirm – are we proceeding with the ETSP notification for Raja Muthiah tomorrow?" In a reply the same day, copying Mr. Sharma and others, Ms. Proc wrote she would "also recommend proceeding" but gave the "last word" to her superior, Intria Vice-President, Mr. Dave Shewchuk. Five minutes later, Ms. VandenBerg replied "just spoke with Dave, he said proceed". One minute later, Mr. Pearson contacted Mr.

Sharma to suggest meeting the next morning and attached “some speaking points/language being used tomorrow for other restructuring activity”. Two hours later, Mr. Sharma emailed a Ted Porter from his Risk Manager office in Mississauga, stating “just as an FYI Dave Shewchuk has OK to proceed with this ESTP. Do we have your OK to go ahead as well?”

[71] Mr. Sharma stated that this chain of approvals was standard and when he met with Mr. Muthiah and the HR representative the next day, he was present only briefly to tell Mr. Muthiah his “job was eliminated” and then left the room while the HR person explained the ESTP program. He said that he met with Mr. Muthiah’s direct supervisors the next day to tell them of the decision, and within a few days he met with the data entry operators to tell them of their new sorting duty of separating BCA slips from non-BCA slips.

[72] On November 11, 2008, Mr. Sharma wrote an email to the data entry operators, among others, stating that they were not yet making two bundles of deposit slips (BCA/non-BCA) at the end of their day, as required. He wrote: “This process is intended to reduce time at the back end while sorting vouchers and assist the investigation teams”. In other words, while the intention was to reduce time type sorting, the transit sorting function remained.

C. Findings

[73] At issue is whether Mr. Muthiah’s complaint is one intended to be excluded from the application of the unjust dismissal provisions of the Code. The question at this point is not the appropriateness of that dismissal but whether the employer has presented sufficient evidence for me to conclude that the Mr. Muthiah’s complaint cannot proceed because he “has been laid off because of ... the discontinuance of a function”.

[74] CIBC/Intria argued that the majority of Mr. Muthiah’s duties were discontinued when it was decided that data entry operators should separate deposit slips by type [BCA/non-BCA] at the time of input, rather than three days later, after investigation and prior to shipping. It was also argued that Mr. Muthiah’s position was made redundant by this decision and that his position was therefore eliminated as part of general cost-cutting measures and restructuring under PS, the CIBC project described by Ms. Maltese.

[75] The evidence presented indicates that the processing of deposit slips at the Toronto location was done for CIBC and other contracted banks over three shifts, within a flexible framework of titles and tasks which allowed for duties and assignments to be adjusted based on the exigencies of the moment and available personnel on a given shift. As both permanent employees and agency employees, contracted through personnel agencies, were used, the available personnel could fluctuate on an as-needed basis.

[76] The type-sorting of the deposit slips (separating BCA from non-BCA slips), relied on by CIBC/Intria as the main change or discontinuance of a function, has not been shown to be a significant part of Mr. Muthiah’s duties. Of the 60% of the duties referred to as “sorting” in Mr. Sharma’s memo of September 2009, type-sorting was a small part. The BCA slips had only to be separated and put in a distinct pile. The majority of the work involved non-BCA slips, which had to be sorted by transit number. Four out of five deposit slips (70-80%) were non-BCA slips. Testimony from Mr. Muthiah and Mr. C.

indicated that most of their sorting time involved this transit number sorting, not type-sorting.

[77] The type-sorting process change was also not new or shown to be related to restructuring. The same process change had been introduced twice the year before, with Mr. Muthiah's encouragement, but not uniformly followed or enforced. Even when introduced and enforced after Mr. Muthiah's dismissal, there was only 85-90% compliance. Mr. C., the night shift agency employee now doing the transit sorting duties formerly done by Mr. Muthiah, said that he still has to sort deposit slips by type when operators have failed to sort them or when investigators have re-arranged a pre-sorted bundle. Comparing total sorting time estimates by Mr. Muthiah and Mr. C., even with 100% type-sorting compliance by others, the time saved sorting deposit slips in a week was less than a shift, or 15-20% of the week's duties, and no more than his bag-opening duties.

[78] The remaining 80% of his duties were reassigned ad hoc after the fact in a fashion not consistent with a pre-existing restructuring plan for discontinuance of a function. Other than the removal of type-sorting duties, no evidence was led regarding plans to re-assign the other 80% prior to the decision to terminate. Mr. Muthiah said he was called at home after termination, asking how certain of his tasks were to be done. Mr. Sharma said that sometime after October 7, 2008, perhaps before October 20, 2008, he came up on his own with the idea to move the transit number sorting duties for CIBC accounts to the night shift, to be done by an agency employee. This was not part of discussions prior to termination, he said, and while he initially claimed this would save a day of process time, he acknowledged later that no gain resulted, as sorting could only be done after a three-day hold period.

[79] Mr. Sharma said that his idea to move sorting duties to the night shift took some time to implement, and he needed the approval of the Night Supervisor. Mr. C., a night shift agency employee, was trained on sorting on the day shift, using the same desk as he used at night. Although he said he was initially assigned bag opening duties as well, these were removed from his duties shortly after and it is not known who was ultimately assigned them.

[80] It is evident that transit number sorting is still required and being done by Mr. C., who also does the large deposit validation and packing and shipping duties formerly done by Mr. Muthiah. Mr. C., who had done data entry duties for a non-CIBC bank on the night shift, said that he was given these additional duties "to keep him busy" because available hours were being reduced for agency employees. He continued with some of his non-CIBC duties and added Mr. Muthiah's duties of sorting, verifying large deposits, and packing for shipping. There was no evidence suggesting that he was faster or that Mr. Muthiah was slower in performing these duties. That Mr. C.'s hours were not increased is consistent with his description of how the job came to him. In short, the bulk of Mr. Muthiah's tasks at the time of termination have not been discontinued.

[81] CIBC/Intria's claim that Mr. Muthiah's pre-termination position was unique and that it was not possible to make an objective assessment or comparison with others has not been established on the evidence. He was a permanent employee, but in other respects his position was not much different from Mr. C., whose employment on the night shift also

involved mixed duties, subject to change as needed under the overall umbrella of clerical/administrative support functions for Currency Operations at Toronto. Like Mr. Muthiah, Mr. C. was initially hired as “control officer”, and took on new duties and kept or returned to old duties as required.

[82] While both Mr. C. and Mr. Muthiah could be said at any given time to have a distinct bundle of clerical/administrative duties, neither held positions nor performed jobs that could be said to be “unique” in the sense of “function” or “office”.

[83] Counsel for Mr. Muthiah submits that no review of cost and process efficiencies was done of Mr. Muthiah’s position prior to the termination and his that his lay-off cannot be said to have been “because of” a discontinuance of a function. He also argued that the Code provision cannot be used after the fact to “disguise the arbitrary selection of one employee to meet overall staff reduction targets”.

[84] It is the case that neither Ms. Maltese nor Mr. Sharma provided direct information regarding how Mr. Muthiah became part of the very broad restructuring undertaken by CIBC as PS. The projected head count reduction for November 2008 at his location was said to be 63, but 65 positions were eliminated. Whether Mr. Muthiah was part of the planned 63 or the added 2 is a matter of speculation as no rationale has been provided.

[85] Having reviewed the jurisprudence in the context of the evidence presented by the employer in this case, I am unable to conclude that section 242 (3.1) (a) applies. While employers are free to restructure and cut costs as they see fit, the Code applies unless the employee bringing the complaint can be said to have been “laid off because of a discontinuance of a function”.

[86] The employer has not met the necessary onus to show that there has been a discontinuance of a function and therefore I need not address at length whether he was “laid off because of” a discontinuance of a function. Suffice to say, the Code exemption does not contemplate reasoning done after termination.

[87] The case law is clear that employers seeking to bar a complaint under the Code are expected to provide evidence of a reasoned, not arbitrary, choice of elimination of a position for cost-saving and to establish that this was the “actual and operative reason” at the relevant time. Even if the operative reason in this case was simply “head count”, it is not clear how Mr. Muthiah and his salary fit into the head count restructuring decision.

[88] Mr. Sharma was only superficially involved and had no direct information regarding how, when or why Mr. Muthiah became part of the restructuring process. He said he never spoke with Mr. Muthiah’s immediate supervisors or anyone and merely agreed with a decision that had already been made by Ms. Gordon. This decision was reportedly based solely on separating deposit slips by type, a small part of Mr. Muthiah’s overall duties.

[89] Ms. Gordon or others more directly involved in the decision to terminate were not called and the rationale provided is largely anecdotal and indirect. The only contemporaneous evidence provided for the choice of Mr. Muthiah for position elimination, and eligibility for ETSP due to restructuring, was the terse email from Ms. Gordon in September 2009, providing only his name in an unspecified context.

[90] The evidence presented is insufficient to establish the circumstances necessary to apply section 242 (3.1) (a) and remove my jurisdiction to hear Mr. Muthiah's complaint. Whatever the merits of that complaint, the onus for exclusion has not been met.

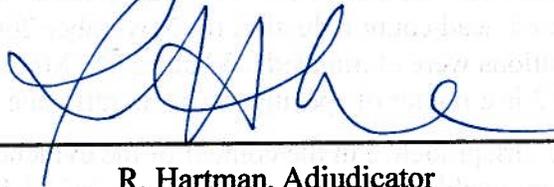
[91] I wish to thank both counsel for their strong arguments and analysis of the evidence from their respective positions.

ORDER

[92] A hearing of Mr. Muthiah's complaint is not barred by section 242 (3.1) (a). Counsel are asked to confer and advise the Adjudicator within 30 days how the parties wish to proceed on the issues remaining and their earliest available dates.

[93] Subject to clarification if necessary of the above order, there is no further order on the merits.

[94] Dated at Toronto, this 9th day of December, 2009.



R. Hartman, Adjudicator