2008 CarswellNat 4519, 70 C.C.E.L. (3d) 235

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2008 CarswellNat 4519

Thornton v. Toronto Dominion Bank

In the Matter of an Adjudication Under Division XIV - Part III of the Canada Labour Code, R.S.C. 1985, c. L-2, as Amended

Christopher Thornton (Hereinafter referred to as "the Complainant") and Toronto Dominion Bank (Hereinafter referred to as "the Bank")

And In the Matter of the Complaint of Christopher Thornton Regarding Alleged Unjust Dismissal

Canada Arbitration Board

G.F. Luborsky Adjud.

Heard: May 30, 2007; July 17, 19, 2007; October 30, 2007; November 2, 2007
Judgment: August 5, 2008
Docket: YM2707-7314

Counsel: **Kevin** T. **Fox** for Complainant

Catherine L. Peters, Michael Bates (Student) for Bank

Subject: Labour and Employment; Public

Labour and employment law --- Employment law — Termination and dismissal — Termination of employment by employer — Constructive dismissal — Miscellaneous

Employee worked for nine years at bank, beginning as teller — Employee took on position selling mortgages for bank — Employee claimed he was promised leads, introductions and powers of sale that would aid in his work, but which were not forthcoming — Employee not listed on bank's website list of mortgage sellers — Employee's sales were well below projected — Several attempts to have meetings with supervisor did not come to fruition — Employee requested time off to pursue martial arts activity using vacation time — Supervisor sent email to employee stating he would be transferred, and sent internal e-mail requesting dehire of employee — Employee began action for wrongful dismissal — Several weeks later, employer communicated that employee had not been fired but was on leave of absence and old position was available — Action allowed — Employee was constructively dismissed — Treatment of employee involved subtle misconduct in terms of evaluating performance — Employee would not have left former position without guarantee he would be provided with adequate leads, power of sales and introductions to make reasonable chance of success in new position — Bank breached fundamental term of contract by not providing employee with promised leads, power of sale and introductions and providing these benefits to others —

Lack of action by human resources department of bank created impression that bank was not interested in addressing issue — No indication that outside activities of employee interfered with his work, despite employer's claims — Documentation by bank purporting to show poor performance did not identify specific standards not being met, offered no assistance for improvement, and did not indicate any disciplinary action — Bank did not follow performance counselling protocol — Employee had reason to believe he was being "squeezed out" of employment.

Labour and employment law --- Employment law — Termination and dismissal — Notice — Mitigation by employee — Accepting job with same employer

Employee worked for nine years at bank, beginning as teller — Employee took on position selling mortgages for bank — Employee claimed he was promised leads, introductions and powers of sale that would aid in his work, but which were not forthcoming — Employee's sales were well below projected — Several attempts to have meetings with supervisor did not come to fruition — Employee requested time off to pursue martial arts activity using vacation time — Supervisor sent email to employee stating he would be transferred, and send internal e-mail requesting dehire of employee — Employee began action for wrongful dismissal — Several weeks later, employer communicated that employee had not been fired but was on leave of absence and old position was available — Action allowed — Employee was constructively dismissed — Both parties had expectation that employee would earn salary of approximately $100,000 within months of taking new position — Unrealistic to expect employee to accept offer of employment made well after litigation commenced and which would involve same strained relationship with bank — Employee's steps at mitigation were reasonable and he ultimately secured alternate employment — At time of dismissal, employee would likely have earned $100,000 annually in commissions — Employee entitled to $100,000 in damages, plus benefits and interest.

Labour and employment law --- Employment law — Termination and dismissal — Remedies — Damages — Calculation of quantum

Employee worked for nine years at bank, beginning as teller — Employee took on position selling mortgages for bank — Employee claimed he was promised leads, introductions and powers of sale that would aid in his work, but which were not forthcoming — Employee's sales were well below projected — Several attempts to have meetings with supervisor did not come to fruition — Employee requested time off to pursue martial arts activity using vacation time — Supervisor sent email to employee stating he would be transferred, and send internal e-mail requesting dehire of employee — Employee began action for wrongful dismissal — Several weeks later, employer communicated that employee had not been fired but was on leave of absence and old position was available — Action allowed — Employee was generally more credible than employer — Employee was constructively dismissed — Treatment of employee involved subtle misconduct in terms of evaluating performance — Employee would not have left former position without guarantee he would be provided with adequate leads, power of sales and introductions to make reasonable chance of success in new position — Bank breached fundamental term of contract by not providing employee with promised leads, power of sale and introductions and providing these benefits to others — Lack of action by human resources department of bank created impression that bank was not interested in addressing issue — Both parties had expectation that employee would earn salary of approximately $100,000 within months of taking new position — No indication that outside activities of employee interfered with his work, despite employer's claims — Employee reviews did not indicate poor performance, and employer did not initiate performance counselling as was standard — Employee had reason to believe he was being "squeezed out" of employment — Unrealistic to expect employee to accept offer of employment made well after litigation commenced and which would involve same strained relationship with bank — Employee's steps at mitigation were reasonable and he ultimately secured alternate — At time of dismissal, employee would likely have earned $100,000 annually in commissions — Employee entitled to $100,000 in damages, plus benefits and interest.

Cases considered by *G.F. Luborsky Adjud.*:

Ally v. Institute of Chartered Accountants (Ontario) (1992), 42 C.C.E.L. 118, 92 C.L.L.C. 14,039, 1992 Cars-

wellOnt 908 (Ont. Gen. Div.) — referred to

Banca Nazionale del Lavoro of Canada Ltd. v. Lee-Shanok (1988), 87 N.R. 178, 88 C.L.L.C. 14,033, 89 C.L.L.C. 14,026, 22 C.C.E.L. 59, 1988 CarswellNat 254 (Fed. C.A.) — referred to

Bank of Montreal v. Zomperelli (August 1, 1997), J.B. Rose Adjud. (Can. Adjud. app. under Can. Lab. Code) — referred to

Bank of Nova Scotia v. D'Mello (June 14, 2000), J.B. Rose Adjud. (Can. Adjud. app. under Can. Lab. Code) — referred to

Berg v. Cowie (1918), 40 D.L.R. 250 (Sask. C.A.) — referred to

Cardwell v. Young Manufacturer Inc. (1988), 20 C.C.E.L. 272, 1988 CarswellOnt 894 (Ont. Dist. Ct.) — referred to

Colistro v. BMO Bank of Montreal (August 16, 2006), Doc. YM2707-7015 (Can. Adjud. app. under Can. Lab. Code) — referred to

Cox v. Robertson (1999), 1999 CarswellBC 2490, 69 B.C.L.R. (3d) 65, 1999 BCCA 640, 131 B.C.A.C. 257, 214 W.A.C. 257, 181 D.L.R. (4th) 214 (B.C. C.A.) — considered

Deplanche v. Leggat Pontiac Buick Cadillac Ltd. (2008), 2008 CarswellOnt 2107 (Ont. S.C.J.) — followed

Evans v. Teamsters, Local 31 (2008), 65 C.C.E.L. (3d) 1, 2008 C.L.L.C. 210-019, 374 N.R. 1, D.T.E. 2008T-400, 292 D.L.R. (4th) 577, 253 B.C.A.C. 1, 425 W.A.C. 1, 2008 CarswellYukon 22, 2008 CarswellYukon 23, 2008 SCC 20, [2008] 1 S.C.R. 661 (S.C.C.) — considered

Farber c. Royal Trust Co. (1996), 1996 CarswellQue 1158, 1996 CarswellQue 1159, 145 D.L.R. (4th) 1, 97 C.L.L.C. 210-006, [1997] 1 S.C.R. 846, *(*sub nom. *Farber v. Cie Trust Royal)* 210 N.R. 161, 27 C.C.E.L. (2d) 163 (S.C.C.) — considered

Farquhar v. Butler Brothers Supplies Ltd. (1988), [1988] 3 W.W.R. 347, 1988 CarswellBC 46, 23 B.C.L.R. (2d) 89 (B.C. C.A.) — considered

Faryna v. Chorny (1951), 1951 CarswellBC 133, 4 W.W.R. (N.S.) 171, [1952] 2 D.L.R. 354 (B.C. C.A.) — referred to

Fasenko v. Flag Chevrolet-Geo-Oldsmobile Ltd. (1994), 5 C.C.E.L. (2d) 82, 1994 CarswellBC 1147 (B.C. S.C.) — referred to

Fraynn v. Ermineskin Band (April 9, 1999), A.C.L. Sims, Adjud. (Can. Adjud. app. under Can. Lab. Code) — referred to

Harper v. Garden Hill First Nation (July 13, 2006), K.E. Dunlop Adjud. (Can. Adjud. app. under Can. Lab. Code) — referred to

Laakso v. Valspar Inc. (1990), 32 C.C.E.L. 72, 1990 CarswellOnt 781 (Ont. Dist. Ct.) — referred to

Lloyd v. Imperial Parking Ltd. (1996), 25 C.C.E.L. (2d) 97, 46 Alta. L.R. (3d) 220, 192 A.R. 190, [1997] 3 W.W.R. 697, 1996 CarswellAlta 1036 (Alta. Q.B.) — considered

Manitoba Assn. of Native Fire Fighters Inc. v. Perswain (2003), 2003 CarswellNat 850, 2003 FCT 364, 25 C.C.E.L. (3d) 110, 2003 CFPI 364, 2003 CarswellNat 2064 (Fed. T.D.) — referred to

McDonald v. Royal Bank of Canada (July 14, 1998), S.M. Kubara Adjud. (Can. Adjud. app. under Can. Lab. Code) — referred to

Michaels v. Red Deer College (1975), [1976] 2 S.C.R. 324, 1975 CarswellAlta 57, 1975 CarswellAlta 142, [1975] 5 W.W.R. 575, 5 N.R. 99, 75 C.L.L.C. 14,280, 57 D.L.R. (3d) 386 (S.C.C.) — considered

Mifsud v. MacMillan Bathurst Inc. (1989), 28 C.C.E.L. 228, 63 D.L.R. (4th) 714, 35 O.A.C. 356, 70 O.R. (2d) 701, 1989 CarswellOnt 770 (Ont. C.A.) — considered

Misty Press v. 942260 Ontario Ltd. (2003), 2003 CarswellNat 5041 (Can. L.R.B.) — considered

Naotkamegwanning First Nation v. Gauthier (2000), 1 C.C.E.L. (3d) 252, 2000 CarswellNat 280 (Can. Adjud. app. under Can. Lab. Code) — referred to

Navarro v. Canadian Imperial Bank of Commerce (March 17, 1997), M. Bendel Adjud. (Can. Adjud. app. under Can. Lab. Code) — referred to

Palmer v. Canadian National Railway (2001), 2001 CarswellNat 821, 9 C.C.E.L. (3d) 111 (Can. Adjud. app. under Can. Lab. Code) — referred to

Pollard v. Federal Business Development Bank (November 23, 1995), M. Faubert Adjud. (Can. Adjud. app. under Can. Lab. Code) — referred to

Rowe v. General Electric Canada Inc. (1994), 1994 CarswellOnt 1006, 8 C.C.E.L. (2d) 95 (Ont. Gen. Div.) — referred to

Scarfe v. Saskatchewan Indian Cultural Centre (November 28, 1996), Ball Arb. (Can. Adjud. app. under Can. Lab. Code) — referred to

Shah v. Xerox Canada Ltd. (2000), 49 C.C.E.L. (2d) 166, 2000 CarswellOnt 831, 131 O.A.C. 44, 2000 C.L.L.C. 210-022 (Ont. C.A.) — considered

Srougi v. Lufthansa German Airlines (1988), 93 N.R. 244, 1988 CarswellNat 237 (Fed. C.A.) — referred to

Stamos v. Annuity Research & Marketing Service Ltd. (2002), [2002] O.T.C. 356, 2002 CarswellOnt 1600, 2002 C.L.L.C. 210-036, 18 C.C.E.L. (3d) 117 (Ont. S.C.J.) — considered

Starr v. Sandy Bay First Nation (October 12, 2006), Doc. YM2707-6459 (Can. Adjud. app. under Can. Lab. Code) — referred to

Wilding v. Qwest Foods Ltd. (1994), 4 C.C.E.L. (2d) 141, 93 B.C.L.R. (2d) 295, 45 B.C.A.C. 125, 72 W.A.C.

125, 1994 CarswellBC 295 (B.C. C.A.) — referred to

Wilson v. Bell Mobility Ltd. (May 4, 2005), M.R. Newman Adjud. (Can. Adjud. app. under Can. Lab. Code) — referred to

Statutes considered:

Canada Labour Code, R.S.C. 1985, c. L-2

Generally — referred to

Pt. III, Div. XIV — referred to

ss. 240-246 — referred to

s. 242 — referred to

s. 242(3)(a) — considered

s. 242(4) — considered

s. 242(4)(a) — considered

s. 242(4)(c) — considered

Federal Courts Act, R.S.C. 1985, c. F-7

Generally — referred to

ACTION by employee for wrongful dismissal.

***G.F. Luborsky Adjud.*:**

I. Introduction

1 I was appointed by the Minister of Labour pursuant to section 242 of the *Canada Labour Code* R.S.C. 1985, c. L-2, as amended, (the "*Code*") to adjudicate a complaint of alleged unjust dismissal brought by Mr. Christopher Thornton (the "Complainant") against his former employer the Toronto-Dominion Bank (the "Bank").

2 The Complainant alleges he was constructively dismissed as a result of a pattern of conduct culminating in an e-mail communication from his manager dated October 24, 2005 after approximately 10 years of service and was not obliged to accept the Bank's subsequent offers of continued or re-employment reporting to the same and/or another manager. After an approved vacation and leave of absence to January 30, 2006, the Complainant refused to return to work and ultimately secured employment with a different employer effective February 1, 2007. He seeks damages in lieu of reinstatement under the *Code* for his losses in that interval.

3 An oral hearing into this matter was held on a number of days spread over several months in Toronto, Ontario, at which time both parties, with the assistance of legal counsel, presented extensive evidence and arguments. The

parties agreed at the outset of the hearing that I was properly appointed and had jurisdiction to decide this dispute. The Complainant requested that I remain seized to deal with any post-hearing controversy respecting the implementation of my award in the event of his success on the merits. I alerted the parties to the likelihood that there would be a delay in rendering my decision, which given the volume of evidence and the need to carefully review conflicting testimony in order to resolve credibility issues, was regrettably longer than initially anticipated.

4 After the oral hearing but before finalizing this award, the Supreme Court of Canada released its decision in *Evans v. Teamsters, Local 31*, 2008 SCC 20 (S.C.C.) on May 1, 2008, dealing with the issue of mitigation that I invited the parties to consider and make submission on its effect, if any, to the disposition of this case. Both parties addressed that question in writing which I reviewed in completing my deliberations.

5 For the reasons that follow I conclude that the Complainant was unjustly dismissed and was not obliged to accept the Bank's subsequent offers of continued or reemployment. He is entitled to damages in accordance with section 242(4) (a) of the *Code* for lost remuneration from January 30, 2006 to his commencement of alternate employment effective February 1, 2007 within the principles set out below. I shall remain seized to deal with any dispute respecting the calculation of damages if the parties are unable to do so themselves. The Complainant is also entitled to interest on his damages and reasonable legal costs on a partial indemnity scale as agreed upon by the parties or remitted to me for resolution.

II. Evidence and Factual Findings

6 I heard testimony from the Complainant and his immediate manager, Mr. Rick Johnson, who were extensively cross-examined by opposing counsel. This case is very much a credibility contest between these two individuals; there being significant differences in their respective recollections and/or impressions of crucial events. The Bank also presented evidence from one of its Human Resources Counsellors, Ms. Cynthia Pachezo (formerly Spittal), and Ms. Kim Pratten, the Bank's Manager of Employment Standards.

7 In assessing the credibility of witnesses I have been guided by the following words of Ontario Superior Court Justice D. K. Gray in *Deplanche v. Leggat Pontiac Buick Cadillac Ltd.*, [2008] O.J. No. 1420 (Ont. S.C.J.) at paras. 46 - 47:

> ¶46 There are many factors that go into the assessment of credibility. Among other things, a trial judge must consider a witness's powers of observation, his or her memory, the passage of time, any bias or partiality, interest in the outcome, and demeanour. Of singular importance is the inherent probability or reasonableness of a particular version of the facts, against the backdrop of uncontroverted facts: see O'Halloran J. A. in *Faryna v. Chorny* (1952), 2 D.L.R. 354 (B.C.C.A.), at pp. 356-357. It is noted in the same case that demeanour alone is, generally speaking, an unreliable indicator of credibility.
>
> ¶ 47 It is not surprising that the evidence of witnesses will diverge, even on critical points. Memories fade with the passage of time. Quite naturally, the perspective of a witness will be affected by his or her interest in the outcome of the case. That witness's memory of the events will be shaped by self-interest. Thus, two quite different versions of the events will often emerge. There is nothing sinister, or surprising, about this. It is simply human nature at work.

8 Adopting these principles in evaluating the conflicting testimony of the Complainant and Mr. Johnson, and taking into account their divergent perspectives and obvious self-interest in the outcome of these proceedings, I have accepted the evidence of the Complainant where credibility is the determining factor for reasons that I will explain below.

(a) Background Information

9 The following background facts were not in dispute and form the contextual framework from which the contested evidence must be assessed.

10 The Complainant began his full-time employment with the Bank on November 6, 1995 as a customer service representative at its Bramalea City Centre branch located in Brampton, Ontario, which is a growing community northwest of Toronto. This was his first full-time job after completing high school and postsecondary education at a community college where he obtained a business diploma. At the relatively young age of 22 or 23 years, the Complainant had already held responsible part-time positions with the City of Brampton Parks and Recreation Department in its leadership programs, organized hockey schools, taught skating, and also worked for a major film company providing instruction to its actors and extras in the Martial Arts, with which he was very accomplished and cultivated an ongoing interest. The Complainant also worked as a part-time customer service representative and teller at the Bramalea Bank branch while completing high school. In delivering his evidence, the Complainant's testimony was articulate, clear and largely unequivocal, although occasionally tinged with demonstrable anger stemming from what he believed to have been unjust treatment by Mr. Johnson and the Human Resources officials of the Bank..

11 The Complainant's entire work experience and the majority of his business contacts came from the Brampton area. He made rapid progress at the Bramalea branch (which was the largest of the Bank's branches in Canada at the time), and later at its Heart Lake branch in Brampton. His initial annual salary as a customer service representative was approximately $30,000 plus standard employment benefits, which with his promotions over the years increased to at least $60,000 by March of 2004. These promotions were to positions as Financial Services Officer (with some supervisory function) and later as a Financial Advisor, where the Complainant had wide-ranging responsibilities from opening accounts to handling the investment and borrowing needs of his clients, including selling Bank products. His performance appraisals in this period were consistently "good to very good"; he was selected for cross-training on the Canada Trust systems at the time of its merger with the Bank; and in addition to in-house training the Complainant undertook several financial planning courses at a community college outside of working hours at his own expense (utilizing vacation days for time required to write examinations), obtaining his mutual fund license and earning a Certified Financial Planner designation from the Financial Standards Council of Canada. In or about 2003 he also began a part-time course of instruction through Dalhousie University's "Distance Learning" program with the goal of completing the requirements for a Master of Business Administration degree on his own time, which was 80% complete by the commencement of this adjudication. He was working towards and anticipated a life-long career with the Bank.

12 The Bank does not deny the Complainant's evidence that he was in a secure employment relationship and well regarded when his manager at the Heart Lake branch, and others within the Bank, encouraged him in late 2003 or early 2004 to apply for a position as "Manager, Residential Mortgages" before that position was advertised in the Bank's internal posting system. The essence of that job (which in spite of its title the parties agree is non-managerial under the *Code)* was to sell residential mortgages in the growing Brampton area, which while compensated on a commission-only basis held out the potential of significant income potential beyond his then $60,000 annual salary, which was an attractive inducement. The Complainant was told that the hiring manager for the position (and the person he would report to) was Mr. Rick Johnson, who the Complainant contacted to discuss details of the job before formally submitting his application for its anticipated posting.

(b) Terms of the Employment Contract

13 In their initial discussion Mr. Johnson made a presentation to the Complainant about the "pros and cons" of becoming a member of the Bank's Mortgage Sales Force ("MSF"). The Complainant's evidence is that Mr. Johnson told him that instead of working out of a particular Bank branch, the Complainant would be running his own business from his home, although he could arrange to meet with clients at a local Bank facility if necessary. In emphasizing the considerable autonomy in running his own business, the Complainant testified Mr. Johnson also said, "Chris, I'm never in your face" and that no-one from the Bank would be "hounding" the Complainant to achieve

specific objectives or minimum sales. Rather, Mr. Johnson stressed the importance of having a proper "work-life balance" and said it was up to the Complainant to pursue his own sales leads, set his own hours of work and monetary goals, without any pressure by the Bank to fulfill predetermined sales requirements. The Complainant quoted Mr. Johnson telling him that, "If you want to do $20,000 a year or $100,000 a year, it's up to you". None of this is disputed by the Bank.

14 Further, the Complainant testified that Mr. Johnson also made clear that he would be available to help if the Complainant needed assistance with a business development plan. According to the Complainant, Mr. Johnson mentioned that among the many benefits of selling residential mortgages for the Bank was Mr. Johnson's ability to secure valuable sources of ongoing mortgage referrals. Since the Bank provided financing to a number of home building developers (who did business with many potential buyers looking for mortgages) and also had access to powers of sale as the holder of secured mortgages on properties in default, it was the Complainant's evidence that Mr. Johnson said, "opportunities [for the Complainant] to get into a builder site was good"; meaning that the Bank could leverage its financial relationships with home builders and developers to throw sustained residential mortgage business or at least mortgage sales leads his way. The Complainant also claimed that Mr. Johnson stated that as powers of sale became available from defaulting mortgage holders, that these powers of sale would also be sources of referrals for mortgages by people seeking to purchase the defaulting property. The Complainant's evidence, which he steadfastly maintained in cross-examination, was that Mr. Johnson promised he would provide the Complainant with sales leads for residential mortgages from these sources, and that the Bank would assist the Complainant's own efforts to develop leads by supplying him with marketing materials and advertising the Complainant's position as a member of the MSF on the Bank's public Web site. These promises were important to the Complainant who recognized that unlike working in the Bank branch environment with a base salary, there was no guarantee of a set income as a residential mortgage salesperson.. It is a likely inference that he wanted to be reasonably assured of success before taking this big step.

15 The Complainant's evidence is that Mr. Johnson told him that "everyone in his department exceeded $100,000 in earnings" and employees who worked on builder sites were earning "over $200,000 a year easy". In response to Mr. Johnson's query about the amount the Complainant wanted to earn, the Complainant testified: "I said $100,000 that was based on what had been promised to me"; namely development site access and powers of sale opportunities that the Complainant said "sold me on leaving retail and joining his team".. Consequently, the Complainant formally applied for the Manager, Residential Mortgages position when it was posted on the Bank's Web site.

16 He was contacted by Mr. Johnson shortly afterwards who confirmed the Complainant's selection as one of two individuals hired in response to the job posting for the Brampton area (although the Complainant could solicit mortgage sales from other territories as well in certain circumstances). At the Bank's request the Complainant's start date in his new role as Manager, Residential Mortgages was delayed two months so he could assist his branch during the busy RRSP season until March 1, 2004. Prior to that, on January 19, 2004, Mr. Johnson dropped off a document entitled "Employment Agreement" at the Complainant's branch for his signature, without any discussion between the two of them concerning the terms of the Agreement and without the Complainant reviewing the matter with Human Resources officials of the Bank or obtaining (or told to obtain) independent legal advice regarding the effect, if any, of that document. The Complainant signed it in Mr. Johnson's presence on the same day he received it. He had never been asked to sign a written employment agreement for any of his previous positions at the Bank and thought it to be "pretty much the standard stuff. These facts are undisputed by the Bank.

17 The Employment Agreement included the following provisions concerning the Complainant's duties and the parties' respective rights upon termination of the Complainant's employment:

2. Duties and Conduct of the Manager, Residential Mortgages

2.01 At all times during the term of this Agreement I shall attend faithfully and diligently to my duties

which shall include, but not be limited to, the following:

(a) establishing business relationships with individuals, real estate firms and their sales personnel, builders and other business sources for the purpose of identifying prospects for residential transactions;

(b) interviewing and taking applications from those prospects for residential mortgage financing, and submitting such applications together with standard TD documentation, as set out in the procedural guidelines;

(c) ensuring that the mortgage application and all other required forms relative to each residential mortgage financing transaction are duly completed;

(d) obtaining from the customer, if applicable, appraisal fees and the documents required for CMHC insurance;

(e) recommending for approval only those loan applications for residential mortgage financing which in my opinion, represent a satisfactory credit risk pursuant to TD standards;

(f) providing both the client and the TD with updated information on the status of the transaction with the view of facilitating a timely closing of the transaction;

(g) reading and familiarizing myself with, complying with, and keeping current with TD mortgage lending policies, procedures and mortgage products and offerings;

(h) reading and familiarizing myself with and complying with the TD Code of Ethics;

(i) all other duties as set out in the job description.*

2.02 It is understood that duties and responsibilities other than those set out above may be assigned from time to time in accordance with the business requirements of TD.

2.03 I shall not accept or demand a bonus, reward, advantage or benefit of any kind, in any dealings, with any person or corporation which transact or contemplate transacting business with TD. I shall not place a mortgage with any mortgage lender other than TD with the exception of those lenders participating in the Alternative Lender program. TD reserves the right of first refusal and TD reserves the right to add and remove Lenders from the Alternative Lender program.

. . .

9. Termination of Employment

9.01 I acknowledge TD's right to terminate my employment for cause at any time without notice or payment in lieu of notice. Cause shall include, but not be limited to, misconduct reflecting detrimentally on TD or a breach of a material provision of this Agreement.

9.02 TD may also terminate this Agreement by providing me with either notice of termination, or payment in lieu of notice, or a combination thereof. I acknowledge and agree that the notice, payment in lieu of notice, or combination thereof, to be provided shall be the greater of:

> (a) two weeks for each full year during which I have been employed by TD (minimum one week, upon completion of three months service); or
>
> (b) the minimum notice period, or payment, or combination thereof, under any applicable legislation, together with any statutory severance pay.
>
> 9.03 I may terminate this Agreement upon two weeks' written notice to TD. Such notice may be waived by TD by payment in lieu of notice. In the event that I provide greater than two weeks' notice, TD, in its sole discretion, may deem such notice to b e two weeks' notice with the effective date of termination to be two weeks after the receipt of notice by TD.

* No job description is attached to the Employment Agreement nor was one filed by the parties.

18 Mr. Johnson's evidence is consistent with the Complainant's version of their initial discussions and early relationship. Mr. Johnson has been an employee of the Bank since 1994 and was appointed sales manager of the MSF in December 1999. He characterized the MSF as "a small company inside the big company that hunts and gathers mortgages for TD Canada Trust". While the MSF is a national sales force, Mr. Johnson's sales role was limited to managing a team of 17 (reduced from an earlier larger group of 23) individuals who serviced the areas in and around Brampton, Georgetown and Orangeville, Ontario, which has enjoyed a boom of residential development over the past several years. He described his duties as recruiting, training and retaining team members with responsibilities for "career development, joint team work and focus coaching" of its individuals. His evidence was that the attrition rate for new residential mortgage managers who failed to reach their financial goals was approximately 25%; however neither he nor the Complainant's evidence indicates whether Mr. Johnson ever advised the Complainant of that fact before the Complainant applied for the position. The absence of such evidence suggests that this was not disclosed to the Complainant.

19 In recounting the relevant events from the documentation filed by the parties (substantially in the form of e-mail communications between the principals in this case and "Coaching Session Reports", described below), Mr. Johnson usually read from the materials, demonstrating limited if any independent recall of the events supposedly depicted by the documentation. When pressed by counsel of both parties for details of supposed conversations reflected by the documentation and/or in response to specific charges levied by the Complainant, Mr. Johnson testified in very general or vague terms about what he "would have" said or done and repeatedly suggested that the circumstances leading to his issuance of an e-mail or a Coaching Session Report entered into evidence "would have been" sparked by certain events with no present recollection of what those events in fact were. Such limited ability to recall specific details, while not in itself determinative of his credibility, was nevertheless a factor that when taken with others considered below had the tendency to undermine my confidence in the reliability of his evidence on crucial matters, particularly where his and the Complainant's testimony differed on fundamental points.

20 Mr. Johnson acknowledged his discussion with the Complainant before offering the mortgage sales position to him. Consistent with the Complainant's testimony, Mr. Johnson confirmed that within the team goals established for the MSF (usually by Mr. Johnson working with his District Manager), each team member was asked to "set their own goals", with the majority of the mortgage sales managers given, according to Mr. Johnson, "pretty much total control over what they would like to achieve". Each mortgage sales manager was expected to establish an annual business plan (i.e. a projection of where and how much work they anticipated) that they could track through "weekly summaries" of their contacts and accomplishments, which while not a mandatory requirement was designed to assist the mortgage sales manager in achieving his or her goals. Mr. Johnson said that he reviewed each annual business plan on a quarterly basis, meeting with team members (which he said he tried to do every six weeks) to educate, offer ideas and coaching to focus them on opportunities to enhance their sales performance. He testified that in reviewing and setting sales goals for the members of his team, "our main concern is to make all goals realistic and achievable" and to make the process "as fair as possible".

21 Within these parameters, Mr. Johnson stated his expectation was that the Complainant would within a reasonable period of time achieve the national average for the MSF of two mortgage deals per week, at $1,000 in commissions per deal, which he said would readily provide him with $104,000 annual gross commission earnings, if not more. Thus the goal of $100,000 was conservative. This would apparently be paid out without tax withheld at source; the Complainant being responsible for remitting the appropriate taxes (as if operating a separate business) after accounting for his own tax deductible expenses.

22 In addition to offering assistance in the form of coaching, Mr. Johnson testified that his role was to work with each mortgage sales manager to help identify and develop referral sources, to do joint sales calls, to watch the mortgage sales manager in action and provide constructive feedback, and to assist in developing retail relationships with sources of mortgage sales referrals. In this regard Mr. Johnson noted the Bank's Web site generated sales leads (referred to as "e-leads"), which he said was a good source of potential sales that he equitably distributed to the members of his team. He also referred to powers of sales he controlled that could generate significant opportunities; however he testified that as far as powers of sales were concerned, there was a "pecking order" among mortgage sales managers, and that he reserved these lucrative opportunities for only the "very best first". Mr. Johnson confirmed the Bank had relationships with builders on large site developments that could generate sales leads for residential mortgages and that he made the decisions on distributing these valuable opportunities to the members of his team based on various factors that included the size of the building site, the expectations of the builder, the product being sold (i.e. whether it was first time home buyers or upgrade home buyers) and the individual capabilities or preferences of his team members. He testified that house sales within such large development sites could take more than 24 months to close, requiring the mortgage manager to "babysit the deal" a considerable time with a higher risk of such deals failing to close. He estimated that in 2005 the Bank had 22% share of the new site developments market and that on a builder site the Bank probably wrote 40% of the mortgage purchases that dropped to 15% on closing (i.e. actual completed sales of a new home). There was no evidence that such statistical information was ever shared with the Complainant as he was contemplating joining the MSF, from which I must infer it was not.

23 Turning to the circumstances of the Complainant's case, while confirming that the Complainant was referred by his branch manager as a candidate for the Manager, Residential Mortgages posting and that he spoke with the Complainant before his application about "what the expectations were" for the position, when asked in his examination-in-chief for the details of his initial conversation with the Complainant, Mr. Johnson testified he had no specific recollection. He did not deny the Complainant's claim of being promised power of sales opportunities, nor did he testify of ever informing the Complainant beforehand that such opportunities were reserved for the highest performing salespersons. While confirming the potential for mortgage sales from large development sites where the Bank has an ongoing financial involvement with a builder, his evidence is silent in response to the Complainant's assertion that Mr. Johnson promised that the Bank would use its influence with these large builders to generate sustained business opportunities for the Complainant.

24 Assessing the Complainant's and Mr. Johnson's evidence on the principles set out in *Deplanche v. Leggat Pontiac Buick Cadillac Ltd.*, *supra*, and discounting what I determined to be Mr. Johnson's comparatively poor demeanour as a witness (perhaps as a consequence of the passage of time and/or the heavy workload that he alluded to in his testimony making it difficult for him to recall events in any detail), and also considering the Complainant's anger towards his former manager and the Bank's Human Resource's Department that he demonstrated in his answers to some questions by Bank counsel, I find that before the Complainant applied for the Manager, Residential Mortgages position, Mr. Johnson made representations to the Complainant that included: (a) the autonomous nature of the job permitting the Complainant to set his own hours and objectives without limitations or set minimum sales requirements; (b) that an annual gross compensation of $100,000 was properly anticipated by the Complainant working with reasonable diligence; and (c) that in addition to developing his own sources of business the Complainant would receive valuable assistance from Mr. Johnson (and/or the Bank) in obtaining sales leads through the equitable distribution of e-leads from the Bank's Web site, a fair share of the power of sale opportunities as they became available, and introductions to large home builders in the Complainant's territory where the Bank had estab-

lished relationships expected to provide an ongoing source of business leads.

25 Not only are these conclusions consistent with the evidence of the Complainant and all of the surrounding circumstances attested to by Mr. Johnson, but it seems on a balance of probabilities unlikely that the Complainant would leave a secure position where he was already earning $60,000 annually and was on an upward track in his career without assurances of substantive assistance from Mr. Johnson, as claimed by the Complainant, particularly at the beginning of his employment in the new role when he was vulnerable. This conclusion is also supported by the absence of evidence contradicting the Complainant's assertion of the commitments conveyed to him by Mr. Johnson about the level of assistance he could reasonably expect in order to meet his financial goals, and Mr. Johnson's claimed inability to recall any of the details of his initial conversation with the Complainant. Absent such promises, I find it unlikely on a balance of probabilities in all of the surrounding circumstances that the Complainant would have left his otherwise secure job at the Heart Lake branch where he had enjoyed considerable success and had a bright future.

26 There is nothing in the written "Employment Agreement", assuming it is enforceable, diminishing the effect of Mr. Johnson's representations to the Complainant; nor any acknowledgment by the Complainant within the Agreement itself that it contained all of the terms and conditions of his employment that might permit the Bank to disavow Mr. Johnson's representations (which was clearly not the case since the Complainant's employment was also subject to all of the Bank's employment rules and regulations of general application, and the minimum entitlements under the *Code*). The Bank did not argue that the "Employment Agreement" dated January 19, 2004 limited the Complainant's potential recovery of statutory damages for unjust dismissal under the *Code*.

27 In the context of the Complainant's initial encouragement by his branch manager and Bank officials to apply for the position, the representations by Mr. Johnson can only be seen as promises that Mr. Johnson knew or, being a person who regularly dealt with legal instruments certainly ought to have known, that the Complainant would reasonably rely upon in making the important career decision to leave his job at the Heart Lake branch for a commission-based business. As such, I find that the foregoing promises by Mr. Johnson were among the essential or fundamental terms of the contract of employment between the Bank and the Complainant that enticed the Complainant to apply for the position of Manager, Residential Mortgages.

(c) The Complainant's Performance

28 For the first three months of his employment as a Manager, Residential Mortgages, the Complainant's base salary of $60,000 was maintained while the Complainant went about the task of cultivating his own contacts in or around the Brampton area for mortgage sales opportunities. I take from that the tacit recognition of the Bank as $60,000 being a reasonable floor compensation level from which the Bank anticipated the Complainant to grow. The Complainant communicated with Mr. Johnson primarily by e-mail (which Mr. Johnston testified he typically received at the rate of more than 60 per day) and/or telephone with little face-to-face interaction. What actual face-to-face encounters there were between them appears from the evidence to have been brief, and subject to repeated cancellation and rescheduling that each points to the other as being responsible for. With Mr. Johnson's input the Complainant prepared a business plan that Mr. Johnson testified was in fact a form of "action plan" designed to help keep the Complainant on track to achieve his objectives. The Complainant testified he had every reasonable expectation of attaining his financial goal of $100,000 in commission earnings based on the promises of help he received.

29 Unfortunately, this goal was never achieved for the substantial reason, according to the Complainant, of Mr. Johnson's failure to honour the promises that enticed the Complainant to leave his successful position as a branch Financial Advisor. Instead, the Complainant charged that Mr. Johnson handed out lucrative power of sales opportunities and/or introductions to large builder developments to his "friends" within the MSF (who the Complainant expressly identified but who did not testify in these proceedings), giving the Complainant comparatively nothing to work with. Mr. Johnson confirmed in his evidence the less than equitable distribution of power of sales opportunities and introductions to large development builders to his "top producing" mortgage salespersons, which did not include

the Complainant.

30 From Mr. Johnson's perspective, the Complainant's performance as a residential mortgage sales manager to the end of the MSF fiscal year on October 31, 2004 was, "Not bad, not great".. He testified that the expectation was that the Complainant "could have been a little more productive" which he ascribed to "a matter of [the Complainant] accepting the role, understanding the role and working within the role". In spite of Mr. Johnson's earlier testimony that he "would have" worked with the Complainant as a new mortgage salesperson by attending on sales calls with him, observing and offering to critique his technique, providing him with his fair share of e-leads, etc., in fact there was no evidence that he ever did. Any reason Mr. Johnson had for not providing the Complainant with even one power of sale opportunity and/or a single introduction to a large builder/developer to test his potential remained unstated..

31 The Complainant's evidence, on the other hand, was that he diligently tapped all sources of sales leads from friends, business acquaintances and worked hard by making "cold calls" on realtors and developers. However, without having something to give to a realtor in return for the lead on a potential residential mortgage (such as the listing on a power of sale), and without an introduction to developers as the Bank's preferred agent of mortgage business in the area, the Complainant claimed he could not make reasonable progress towards establishing the necessary credibility with people in a position to provide him with an ongoing source of mortgage customers. The Complainant maintained that after about three months in the new job, he began asking Mr. Johnson when he would be given power of sales opportunities and/or the promised introductions to large developers, but that Mr. Johnson initially told him that no such opportunities where available at that time. The Complainant claimed that he subsequently became aware that introductions to building developers were provided to another named employee (identified hereafter as "H.A."), who was hired the same day as he was, and that power of sales opportunities were also being handed out to others. These allegations were not denied in Mr. Johnson's subsequent testimony, and some (such as the inequitable distribution of power of sales opportunities and introductions to large site developers) were expressly confirmed.

32 In spite of that, the documentation entered into evidence by the Bank indicates that the Complainant met the business plan goals for mortgage approvals (37) and "fundings" (34) that he and Mr. Johnson initially established for the Complainant's first eight months as a residential mortgage salesperson in the period March 1 to October 31, 2004. Both Mr. Johnson and the Complainant confirmed that no issues were raised by the Bank respecting the Complainant's performance in 2004. I find as a fact that in spite of Mr. Johnson's equivocal assessment of the Complainant's work to the end of 2004 in his evidence, the Complainant's performance was satisfactory based on his achievement of the goals set for him in the initial business plan established with Mr. Johnson's input; although not to the expectations the Complainant had from the promises made in his initial discussion with Mr. Johnson.

33 For the next fiscal year ending October 31, 2005, the Complainant's evidence elicited in cross-examination was that he set a personal goal of selling 12 residential mortgage units in the first quarter and 80 units by the end of the year, which was more than sufficient to achieve his income expectations of $100,000. But progress towards that goal was not possible without the assistance the Complainant insisted he had been promised by Mr. Johnson, which the Complainant stated had a "depressing" impact on him, as his sales stalled throughout 2005 and his income plummeted to a mere $14,353 (before deductions) in that calendar year. The Complainant charged that his requests of Mr. Johnson that he fulfill the promises made before the Complainant applied for the position, which became more pressing as the Complainant's earnings declined precipitously, were ignored.

34 Several "Coaching Session Reports" prepared by Mr. Johnson respecting the Complainant's performance during 2005 dated January 21, 28, February 14, March 4, April 28, June 7, July 4 and August 2, 2005 were entered into evidence. Mr. Johnson testified that the format for these reports was recommended by the Bank's Human Resources consultants to document the interactions between the MSF manager and the members of his/her team providing comments under the headings "Objectives", "Focus of Last Activity", "Evaluation Summary", "Strengths", "Areas for Improvement", "Focus for Next Activity" and "General Comments" that were designed to offer substantive feedback on performance and to be used as a positive coaching device.

35 The Coaching Session Report is to be contrasted with the Bank's procedure for documenting and informing an employee of his or her failure to meet the reasonable performance standards of his/her position, as a precursor to administrative action (in the form of involuntary demotion or transfer) or termination for poor performance. Ms. Cynthia Pachezo (hereinafter identified under her former surname "Spittal" as she was known at the time), who has been employed by the Bank for over 11 years and, in the relevant period was the Bank's Human Resources Counsellor responsible for the "Real Estate Secured Lending Portfolio" that included the Complainant's area, testified that before transferring or disciplining employees for alleged performance deficiencies, the Bank has a process called "Performance Counselling". She described this as a Bank policy "designed to deal with employees who are not performing up to satisfactory levels by giving counselling and training in hopes of bringing their performance up".. She also explained that the Bank's formal Performance Counselling protocol consisted of a two part program; namely (1) the "People Management Guide to Performance Counselling" that "gives people managers ideas on how to approach employees [with performance problems] and what to deal with"; and (2) a "Performance Counselling Action Plan" that is "a template that would help [the manager] and the [employee] identify the problems and develop an action plan on how to deal with the performance problems". In short, the Bank's Performance Counselling program is designed to ensure a measure of fairness, by placing the employee on notice with respect to the specific deficiencies in his/her performance; establishing reasonable goals and timeframes for the satisfaction of those goals; and following-up with appropriate assistance in achieving those goals leading to administrative or disciplinary action in the event the employee is unable or unwilling to attain the reasonable requirements of his/her position.

36 This process was never initiated by Mr. Johnson, nor in his evidence concerning the specific Coaching Session Reports that he issued to the Complainant, reviewed below, was there any suggestion that a Coaching Session Report constituted a form of Performance Counselling, discipline, disciplinary warning or caution that any failure to adhere to the recommendations made in those Reports might be relied upon by the Bank in supporting future administrative or disciplinary action against the Complainant. At most, these documents may be a snapshot of the level of "interaction" (to use Mr. Johnson's description) and support that Mr. Johnson claimed that he rendered (or, if the Complainant's charges are to be believed, an attempt to cover himself with his boss), that may not be relied upon as disciplinary in nature or intent.

37 In taking me through each of these Coaching Session Reports in his examination-in-chief, Mr. Johnson's testimony suffered from the same difficulty exhibited in his earlier recall of specific events outside of the written documentation. His evidence was substantially restricted to repeating the words written on each coaching form, usually limited to the "General Comments" section of the form only, with little if any recollection of the specific circumstances prompting the written comments and details of the attempts that he says he made or offered to remedy the purported problems with the Complainant's performance at the relevant time. Consequently, I could give Mr. Johnson's oral testimony in this regard little if any weight.

38 For purposes of completeness, however, it is necessary to recount the evidence concerning these Reports. On the January 21, 2005 Coaching Session Report form, Mr. Johnson wrote the following under the title "General Comments" a copy of which he sent by e-mail to himself, but he could not remember ever sending it to the Complainant. I have reproduced Mr. Johnson's comments on this and all other similar Coaching Session Reports without correcting for the many punctuation and typographical errors in the original; which is not to be critical, but to point out the casual informality of these communications:

> Hello Chris,
>
> I've made (3) attempts to contact you this week, business line, cell & email. Unfortunately you've not responded.
>
> I'll need you to contact me asap so we can set up a meeting for Wednesday Jan. 26, 2005.

> Please bring your 2005 Zone business Plan to the meeting.
>
> Thanks.

39 When asked by Bank counsel why he sent this Report to himself, Mr. Johnson replied, "That's a good question, I would say" and then offered that he "would have filed it to share with the [Complainant] to use in a coaching session, to ask what is the problem or why the no show". Mr. Johnson had no recollection of why the January 21, 2005 meeting with the Complainant did not take place. There was no evidence that the Complainant was ever disciplined even in the mildest form of an oral or written warning for any alleged failure to attend a coaching session that he was required to. Outside of the "General Comments" section of the Coaching Session Report, nothing of substance was written in any of the other subsections of the Report entitled, "Evaluation Summary", "Strengths", "Areas for Improvement" and "Focus for Next Activity".

40 In cross-examination the Complainant maintained he'd never seen the January 21, 2005 Coaching Session Report, and since his BlackBerry cell phone was always on, he said he could not understand how he would not have responded if in fact it had been forwarded to him or he had received a message from Mr. Johnson. Contrary to the assertion made in that Coaching Session Report that the Complainant was a "no show" for a scheduled meeting, the Complainant claimed that Mr. Johnson cancelled the meeting that the Report refers to. The rescheduled meeting was subsequently cancelled because the Complainant was with a client at the time, which the Complainant testified he called to advise Mr. Johnson about before the meeting was supposed to take place and it was never rescheduled by Mr. Johnson. The Complainant maintained that Mr. Johnson was responsible for cancelling the majority of the few face-to-face meetings ever scheduled between them.

41 When asked by Bank counsel what prompted Mr. Johnson to prepare the next Coaching Session Report regarding the Complainant dated January 28, 2005, Mr. Johnson testified that it "looks like this would be a response to a meeting (with the Complainant). We would have met and the General Comments state what we would have discussed at our meeting on that day". When asked to elaborate upon his specific remark that the Complainant needed to get "back on Track", Mr. Johnson testified that he didn't "recall what that was in specific reference to", limiting his evidence to the written comments on the form that he read to me from the witness chair, as follows:

> Hello Chris, highlights from our meeting today.
>
> > 1) Get you back on Track — we need you back out there doing what you do best; as discussed, Face to Face, telephone & networking with your retail partners.
> >
> > 2) Activities drive business — let's invest our time into the "right" activities that benefit your business.
> >
> > 3) Communication — we both need to put in a better effort to communicate weekly on your business progress.
> >
> > 4) Opportunity — I believe it's out there for the taking — you need to decide which opportunity you wish to pursue.
>
> We're a team we are here to help in all situations, don't hesitate to ask me, or one of the other msf reps for assistance, they're all willing to help & assist where possible.
>
> We'll put Q1 results behind us and concentrate on Q2. You have all the tools/skills to be successful as a TD CT MSF Rep. We just need to put you & them into action.

42 When asked to acknowledge in cross-examination by Bank counsel that Mr. Johnson was "providing you with a number of suggestions to assist you to get your business on track", the Complainant denied that Mr. Johnson was giving him anything of substance, claiming that "It is all very general — nothing very specific". He questioned the *bona fides* of this Coaching Session Report, stating that the reason Mr. Johnson was referring to a mutual need for better communications was because Mr. Johnson "didn't do any of that" himself, suggesting that their relationship was substantially characterized by indifference or neglect from Mr. Johnson.

43 In the next Coaching Session Report dated February 14, 2005, Mr. Johnson wrote under the heading, "Evaluation Summary" the following: "Chris we need you to put your plan into action, and start the activities that produce business for you. We are now into the 2nd quarter of 2005 fiscal year, it's time for action." In his "General Comments", Mr. Johnson also wrote:

> Hello Chris, as per our meeting on Monday.
>
> We need to speed up the marketing material that you want to forward out, you need to get your office up and running 100% to satisfaction. Every day it's not running is opportunity lost.
>
> We'll also need you to continue to meet with new referral sources - Realtors, Financial Planners or other influences.
>
> Our goal is to have you obtain more business partners in 2005. Lets use Larry to leverage some additional [name of firm] Agents. Your other lady broker owner the same leverage for some additional introductions.
>
> You have all the talent & skills for the job, I just need you to increase the activity and interaction with either the Realtor, or Financial Planner Community to increase your business.

44 As before, no evidence was offered by Mr. Johnson of the specific discussions, if any, that he had with the Complainant about the observations and/or recommendations written in this (or any other) Report, or any specific assistance that Mr. Johnson actually rendered. Mr. Johnson could not remember the circumstances that prompted the comments he made in the Report, or any details outside those in the written document itself.

45 There was no confirmation in the evidence of Mr. Johnson that this Report was in fact ever presented to and/or discussed with the Complainant, and little recollection by the Complainant of ever discussing this Report with Mr. Johnson. Parenthetically, there is no acknowledgement of receipt for any of the Coaching Session Reports by the Complainant anywhere on the Report form itself, nor even a record of delivery of any Report by e-mail or otherwise to the Complainant (which one would assume to exist if the bulk of their communications was by e-mail). There was no evidence of any of these Reports ever being brought to the attention of Ms. Spittal or any other Human Resources official of the Bank at the time of a developing performance problem requiring implementation of the Bank's Performance Counselling protocol, prior to the events triggering the current adjudication proceedings.

46 According to the Complainant in cross-examination, the problem at this point in his employment was that he had been making promises to realtors about being able to provide powers of sale opportunities (that he could forward to realtors who could provide him with mortgage customer leads) based on the earlier promises made to him by Mr. Johnson that were not fulfilled, causing him to lose credibility (and potential business) as a result.. He testified that while there were marketing materials sent from the Bank's head office, no-one from the Bank ever got back to him about his own marketing initiatives promoting his own name as a preferred mortgage salesperson in the area that he had forwarded to Mr. Johnson. He called Mr. Johnson's comments in the Report, "Just an outright lie. [Mr. Johnson] never followed up what he promised; he never gave me the tools". When confronted by the Bank in cross-examination that Mr. Johnson's evidence would be that power of sales and introductions to larger developers "have

to be earned", the Complainant's angry retort was "Gotcha", conveying his frustration at not being given the chance to become a top producer without these promised opportunities. He denied ever being told that he had to "earn" these opportunities, which remained undisputed in Mr. Johnson's subsequent testimony.

47 The March 4, 2005 Coaching Session Report contains little of substance, other than a notation under the "Evaluation Summary" section of the Report that the Complainant "participates and contributes as a team member" with respect to "Team Orientation" and the statement that "Training Sessions have been scheduled for March 4 & March 24th."

48 The next Coaching Session Report entered into evidence, dated April 28, 2005, is of the same nature (with similar lack of specific recall by Mr. Johnson), containing the following statements under the "General Comments" section only (the other sections of the Report remaining blank):

> Chris a recap of our meeting on Thursday.
>
> Results — Q1 & Q2 well below what we wanted to achieve. As we can't alter the past we can only move forward. Lets make sure we get your revised plan for Q3 & Q4 in p lace for next Tuesday.
>
> The plan should focus on the referral sources you'll be prospecting (Realtors, Planners & or others) along with the activities you'll be performing to build the relationships and win over business.
>
> Lets get your contacts to set a date for you to meet the [S.G.] Broker Owner, so we can also filter through that office.
>
> I'll make sure I bring next week some additional folders so you can prepare prospecting packages.
>
> Check the iMSF I believe you can order the thank you cards direct via the marketing site, let me know if they are not on the site, and I can have Heather look into them for you.
>
> I'd like also in May for you to provide your Weekly summary via email & or fax by 5:00 p.m. every Friday.
>
> By monitoring activities we can help fine tune your approach in fast track building of referral sources.
>
> I'll see you on Tuesday and we can get started on a successful Q3 & 4.

49 When asked if he received the revised business plan requested in this Coaching Session Report, Mr. Johnson answered, "I don't believe so", and then he clarified that a revised plan was not received in the required timeframe, suggesting it had been received at a later date. There is no mention of any failure to provide a timely revised business plan in the next Coaching Session Report dated June 7, 2005, where under the subheading "Business Planning" Mr. Johnson wrote: "Chris, moving forward it will be important to keep others involved with your business, knowing the right information will allow us to make the right decisions". In connection with this Report, Mr. Johnson also testified that he and the Complainant "would have met and discussed his business plan" and that the Complainant also showed him "some personal marketing information he wanted to put out to individuals" which Mr. Johnson positively commented upon in the General Comments section of the Report, as follows:

> Chris as per out meeting, it's time to put you back as a priority! Life needs to be balanced between work and personal, you need time for both. I like your marketing material and strategy, make sure we forward all info to [K.G.] for approval before sending it out in masses. I still believe that face to face interactions are the most important along with the most effective way to win over business. Your personal strengths include a charming per-

> sonality, get it out there in front of referral sources and you will have more wins. I will also send you some of the home buyer kits that have been put together fro other team members.

50 By the time of the next Coaching Session Report dated July 4, 2005, Mr. Johnson testified that the Complainant's results "remained below expectation or below plan" and as a result Mr. Johnson wrote the following General Comments on the Report:

> Chris for the month of July we are going back to basics. I'm requesting from you weekly a copy of your Weekly Summary. We need to drill down on the activities your doing to ensure your on the right track to build your business. I'll ask that you review your Zone Business Plan from the beginning of 2005, revise the plan and take action. The ideal number of sales calls per day to build and develop business should be anywhere from 3 to 5 calls per day. These calls should be on new potential referral sources, along with referral sources we are moving to the next level. I would recommend you target a minimum of 20 new referral sources (Realtor, Financial Planners, Builder & or Direct Networking Opportunity) to get your business back up and running. The zone business plans are available on iMSF, lets get your updated with the activities that will bring you in some business. Summer is a great time to close in on referral sources, while others are not concentrating on business (golf, vacations etc) now is the time to get face to face with Potential Referral Sources and build that solid foundation. Your 1st weekly summary will be due by weeks end, if you have any questions, don't hesitate to ask. As we discussed, I will also be available to you to meet with referral sources, lets set your plan into action.

51 In the next Coaching Session Report dated August 2, 2005, Mr. Johnson made the following General Comments, in a notably more demanding tone:

> Chris, a copy of the email outlining the requirement for your business plan update, along with back to basics with weekly summary's. Hello Chris, I'd like an update of your plan for the final quarter of the year. New Agents & or Referral Sources you will be prospecting, volume anticipated for Aug, Sept & Oct. For the final quarter I will require starting this Friday Aug 5th weekly summary's from you. We need to get your business up and running. All business plan information is located on the imsf site. If you require any assistance let me know. Weekly summary's are due by 5:00 pm each and every Friday. Effective Monday August 10, I'd like to meet every Monday Morning 10:00 am, we'll go over the previous weekly summary, along with discussing what lies ahead for the coming week. We can meet at branch 89 Bramalea City Centre. Lets get your business turned around over the next 90 days!

52 Throughout the eight month timeframe reflected by the foregoing Coaching Session Reports, the Complainant testified he worked between 40 and 50 hours each week to establish as many sources of mortgage referrals he could without any assistance from Mr. Johnson. The Complainant's evidence was other than the meetings that Mr. Johnson held with all members of his team once quarterly, the Complainant and Mr. Johnson rarely met, confining most of their communications by e-mail, telephone and fax (the latter bit of technology he purchased himself because he said that Mr. Johnson never informed him the Bank would pay for that equipment). He also charged that many scheduled meetings were cancelled at Mr. Johnson's request and were not rescheduled by him.

53 The Complainant testified that he never received a share of any e-leads from the Web site. Instead, he discovered in March 2005 (after being on the job for one year) that his name had not even been added to the Bank's Web site as a residential mortgages manager costing him at least one opportunity when a prospective customer told him that she would not deal with him because of that. When he informed Mr. Johnson of that fact, the Complainant testified Mr. Johnson gave the Complainant a form to fill out. The Complainant returned the form to Mr. Johnson for forwarding to the Bank officials responsible for adding his name to the Web site, which the Complainant claimed was never done. In cross-examination the Complainant denied Bank counsel's assertion that he received a form at the time of his hiring that he was to fill out for the purpose of providing information for his Web site listing.. No such form; either filled out by the Complainant or as part of a package of documents supplied to the Complainant upon hiring in the MSF was ever produced in evidence. The Bank did not dispute that the Complainant's name as a

member of the MSF was never added to the Web site, implying instead (through Mr. Johnson) that any failure in that regard was the Complainant's own fault.

54 Throughout 2005 the Complainant says he repeatedly asked Mr. Johnson: "How come I'm not getting any power of sales?" The Complainant claimed Mr. Johnson told him that there were no power of sales available (which was contrary to the Complainant's subsequent testimony that other members of the MFS were receiving such opportunities and contradicts Mr. Johnson's own evidence on point) and Mr. Johnson never followed up on his promises to introduce him to large development sites, unlike other residential sales personnel who the Complainant maintained were given these lucrative contacts. The Complainant found what he characterized as the "suggestions" made by Mr. Johnson in the various Coaching Session Reports to be of no useful help; telling Mr. Johnson in an e-mail response to one of those Reports, "You are not doing anything for me" and charging that by the late spring/early summer of 2005, "It was clear to me that [Mr. Johnson] was setting me up to fail.." The e-mails entered into evidence also indicate that the Complainant began suffering physical illnesses by that time requiring his absence from work for varying durations with Mr. Johnson's knowledge.

55 I find on this evidence, the absence of any contradictory testimony from "H. A." or the other residential mortgage managers identified by the Complainant as Mr. Johnson's "friends", and from the revelation by Mr. Johnson of the existence of a "pecking order" for power of sales and building developer introductions, that in fact these opportunities were available for others at the very time the Complainant was struggling. If Mr. Johnson told the Complainant there were no powers of sales available, which from all of the surrounding circumstances I find is more likely to have happened on a balance of probabilities in order to put-off the Complainant's increasing demands for his share of these opportunities, I must conclude that such statements were untruthful and that the Complainant would not have reasonably uncovered the truth until sometime later.

(d) Alleged Termination of the Complainant's Employment

56 Coinciding with the August 2 Coaching Session Report, the Complainant testified that he was convinced that Mr. Johnson had personal issues with him and that Mr. Johnson "didn't want me on his team" and was trying to "push me out". The Bank's has a general telephone number advertised on its internal Web site that employees can call to seek advice and assistance about employment problems from a Human Resources counsellor. The Complainant testified he felt "stranded" by his situation and in frustration made a telephone call to the Bank's Human Resource's Department on this general line "looking for support" and "for some sort of direction". The Complainant could not recall the name of the Human Resources counsellor he initially spoke with who he said advised that because she was leaving for two weeks vacation someone else would get back to him. The Complainant understood that his communications with the Human Resources Department through this help line would be confidential and on that understanding he testified he explained all of the problems he had been having with Mr. Johnson to the unidentified Human Resources counsellor.

57 From the e-mails entered into evidence it appears that the Complainant's claimed initial contact with the Bank's Human Resources Department occurred after he received the August 2 Coaching Session Report and on or before August 7. In response to an e-mail from Mr. Johnson dated August 7 asking the Complainant for an "update of your plan for the final quarter of the year", the Complainant's reply e-mail at 5:40 p.m. that day was, in part: "I am in "pending status" waiting for some information from [Human Resources]. I was hoping to get this info Friday [August 5]. This could change the Q4 plan and your demands below. I will contact you, when I have more information to share with you. Let me know if this is acceptable to you."

58 The e-mail record entered into evidence shows that in response to this communication, Mr. Johnson forwarded the Complainant's e-mail of August 7 to Ms. Kym Soederhuysen, who was identified as the Manager, Human Resources, responsible for the Real Estate Secured Lending portfolio at that time, asking her: "Is there something here you can share with me or assist with how we handle this?" The e-mail trail (which was proffered into evidence by the Bank without objection) also shows that in reply, in the morning of August 9, Ms. Soederhuysen wrote

she had "no idea what this is about" and asked Mr. Johnson to have the Complainant forward "an e-mail outlining what he's looking for". In his examination-in-chief the Complainant confirmed he contacted Ms. Soederhuysen by telephone and "recapped what I had talked to the other HR lady about". But he testified that: "It was evident [Ms. Soederhuysen] had spoken with [Mr. Johnson] beforehand and she said there were no options for you; you have to do your job and that's it."

59 In cross-examination the Complainant elaborated that in his initial discussion with the person he identified as the "HR counsellor" he "was looking for answers about why I was being treated in this manner", outlining his frustrations over Mr. Johnson's failure to fulfill his promises and asked what his options were. He testified that Ms. Soederhuysen subsequently told him that, "[Mr. Johnson] had already spoken to her and I was told I had no option; leave of absence was the only option." He testified that it was evident Ms. Soederhuysen had already talked with Mr. Johnson behind his back and that: "HR was not concerned about me as an employee but more concerned with management." He stated that Ms. Soederhuysen wouldn't allow him to explain the situation further; claiming that there was no "let's sit down and talk" about it kind of response from her, but rather his impression was that: "It was almost as if I was wasting my time".

60 The Complainant's version of his conversation with Ms. Soederhuysen remains uncontradicted, as Ms. Soederhuysen was not called to testify and no explanation was offered for that. Ms. Soederhuysen was replaced in the Real Estate Secured Lending Portfolio by Ms. Spittal shortly afterwards on August 15, 2005, who while giving evidence in these proceedings was not asked whether she was made aware by her predecessor or anyone else of an issue involving the Complainant when she undertook her new duties.. Rather it appears from her subsequent testimony, recounted below, that she was unaware of the complaint to Human Resources only one week earlier. The Complainant's experience with seeking advice from the Human Resources Department left him jaded and suspicious. He testified he assumed that when "dealing with HR they are going to keep things in confidence" which he believed had been breached, compromising what he considered to be his already unsatisfactory relationship with Mr. Johnson. Mr. Johnson's evidence is that he never knew what the Complainant and the Human Resources Department were talking about. There was no follow up by anyone from the Human Resources Department or Mr. Johnson with the Complainant about his concerns at that time.

61 On this evidence I must accept the Complainant's version of his conversations with officials of the Bank's Human Resource's Department in or about mid-August 2005, drawing an adverse inference from the absence of any evidence to the contrary offered by Ms. Soederhuysen. I find that he advised the Bank through that Department about his difficulties with Mr. Johnson, which on a balance of probabilities would not have been complete without his mentioning the fundamental complaint that Mr. Johnson had broken his promises to refer power of sales opportunities and introductions to building developers, likely foremost in the Complainant's mind at the time, and particularly given his emerging awareness that Mr. Johnson was providing these opportunities for others. On the evidence I must also conclude that the response by the Bank's Human Resources officials was seemingly uncaring, making few if any inquiries about the Complainant's specific concerns at the time, with no follow up or notice to Ms. Soederhuysen's successor of any ongoing controversy, leaving the Complainant with the reasonable impression that he could expect no assistance from that quarter.

62 Against the foregoing facts, the timeline in the evidence presented to me jumps from mid-August to mid-October of 2005 with Mr. Johnson's testimony that on October 12 he notified the Complainant and all of his team members of the upcoming annual business review meeting scheduled for Monday, October 31, 2005.. This meeting is traditionally held at the fiscal year end to update all MSF members of upcoming events and to review each member's business plan for the next year, which each member was supposed to forward to Mr. Johnson by October 25.

63 On October 24, the Complainant e-mailed Mr. Johnson at 12:52 p.m. advising of a personal matter conflicting with the Complainant's attendance at the October 31 meeting. As noted above, the Complainant had an ongoing interest as an instructor in the Martial Arts and told Mr. Johnson in this e-mail that he had been "presented with the opportunity to discuss a pro contract [in Martial Arts, and to] train with the world light heavyweight champion" in

California, which would cause him to be absent on October 31. He concluded this communication by writing: "I am hoping to get the ok from you personally so that I can organize my time appropriately. I do have my business plan outline complete and will have this to you Tuesday [October 25] via email. It would be no longer than two weeks. Please let me know your thoughts."

64 The Complainant testified that he had never taken vacation as a member of the MSF and had accumulated eight weeks vacation time owing (an assertion never challenged by the Bank); two weeks of which he intended to use for this trip. In cross-examination the Complainant acknowledged the importance of the October 31 meeting; however he stated he did not think it would be an issue with Mr. Johnson who had told the Complainant on several occasions "you can take vacation when you want; you can do whatever you want to do". Mr. Johnson testified, in response to Bank counsel's question whether he thought it appropriate for the Complainant to miss the October 31 meeting for this reason, that: "I think I probably have a strong recommendation that he attend that meeting", although there was no evidence that he actually said that to the Complainant in response to the vacation request and, more importantly, no evidence of a clear denial of the Complainant's vacation request coupled with an unequivocal order to the Complainant that he attend the October 31 meeting.. If Mr. Johnson didn't approve the Complainant's request (which the Complainant's e-mail invited him to "ok"), he didn't take that opportunity to deny the time off.

65 Instead, in reply to the Complainant's request, Mr. Johnson wrote the following e-mail on October 24, 2005 at 9:27 p.m., which he copied to Ms. Spittal of Human Resources and to the Bank's District Manager responsible for the MSF (referred to as "MSF DM"):

> Hello Chris, I believe it's time to make a very important career decision.
>
> Your results YTD for 2005 are well below plan, along with well below MSF standards for 2nd year MSF Reps.
>
> . . .
>
> Since July 04, 2005 we've tried to work with you to step up your business, along with your business activities.
>
> July 04, 2005 Request for Weekly summary's to assist in the growth and relaunch of your business were ignored.
>
> July 12, 2005, we were to meet and you cancelled do to medical reasons.
>
> August 04, 2005, Request for business plan update as final quarter was approaching, 2nd request for weekly summary's, requests ignored.
>
> August 07, 2005, Note from you stating your in "Pending Status" awaiting HR Info.
>
> August 09, 2005 I received a note back from our HR Rep Kym Soderhuysen — she was not aware of any HR involvement with you.
>
> August 09, 2005, you were to advice/contact Kym.
>
> To date we've (I) have not been informed of any HR issue.
>
> ***I am going to recommend that we look at Options Outside of TD CT MSF (Retail Bank, or other TD CT Dept's) to accommodate your extracurricular activities.***

> Your reluctance to perform at the MSF minimums, along with your reluctance to provide the minimum weekly updates, along with your desire to pursue other interests leaves me to believe you have little to no interest or concern about your role as an MSF Representative.
>
> ***I will provide this information to HR, MSF DM, to start the process for a transfer out of TD CT MSF.***
>
> [Emphasis added]

66 Immediately after this e-mail to the Complainant, Mr. Johnson electronically delivered the following e-mail to Cynthia Spittal with a copy to his District Manager at 9:30 p.m.

> Hello Cynthia, I'd like to ask for HR assistance ***and work towards a dehire of Chris Thornton*** from TD CT MSF.
>
> Chris is performing well below targets, reluctant to provide business updates. His interests as per his email, now lie outside of TD CT MSF.
>
> ***I'll gladly support an opportunity to have Chris relocated back to retail branch Full Time or Part Time to pursue his goals outside of TD CT.***
>
> [Emphasis added]

67 The Complainant testified that Mr. Johnson's e-mail to him "blew me away". He felt that Mr. Johnson was questioning his loyalty, which he said "left me speechless". He was startled by the sentence in the e-mail instructing the Human Resources Department and his District Manager to "start the process for a transfer out of TD CT MSF". He said he was "taken aback that after 10/11 years [with the Bank], after being promised all these leads and sales [by Mr. Johnson] and I am now sitting in the position where I am not making any money, HR is giving me no support, and [Mr. Johnson] is giving me no support, where do I go now? What do I do? I am out of a job! I don't have access to the system; does HR contact me? I don't know what to do; it's like nobody could care less."

68 Based on this e-mail, the Complainant believed he was being "fired off the team" as a residential mortgages manager for asking for vacation time off to attend an event in his personal life that came up unexpectedly. The Complainant explained in cross-examination that he did not forward his business plan (which he claimed he completed beforehand) to Mr. Johnson the next day, "because he had fired me". He also claimed being surprised by Mr. Johnson's comment in the October 24 e-mail that the Complainant was reluctant "to perform to the MSF minimums", expected of a second year mortgage sales manager when as far as the Complainant was ever aware from Mr. Johnson's prior statements (i.e. that he could make as much or as little money as he wanted and that no-one would be in his face or "hounding" him, etc.), "there were none". Aside from the business plans that the Complainant and Mr. Johnson had earlier agreed upon establishing the Complainant's financial goals, the Bank did not produce any records or statistical information respecting the average performance of similarly situated residential mortgages managers (i.e. with the same power of sales/builder introduction opportunities, or lack thereof), against which the Complainant's competence was being measured at the time, if in fact that was the case..

69 In Mr. Johnson's examination-in-chief, he explained that he sent the October 24 e-mail to the Complainant because: "If he wants to pursue a career in Martial Arts maybe we should accommodate him to look for a role elsewhere to make that happen." Mr. Johnson claimed that all of his past requests (for weekly summaries, meetings, business development plans, etc.) and opportunities extended to help the Complainant "were ignored", leading Mr. Johnson to conclude that the Complainant "appeared to have lost his drive and lost interest" in his job in the MSF. Mr. Johnson therefore felt: "The best course of action was to bring [the Complainant's lack of production] to the attention of [Human Resources] and internal management [of MSF] and say maybe this is not the best job [for the

Complainant]; lets make him find the right job at that time." Since the Complainant had been an internal hire to the MSF from a retail area of the Bank, Mr. Johnson stated that he wanted "to provide him with the opportunity to go back to the TD Canada Trust retail world". Mr. Johnson suggested the statement in his October 24 e-mail to "start the process for a transfer out of TD CT MSF" was only being proposed as an option at that point. But when asked what he meant by the word "dehire" in his subsequent e-mail to Ms. Spittal, Mr. Johnston clarified: "We are looking to removing him from our area."

70 On this evidence I must reject Mr. Johnson's assertion that he was only suggesting the Complainant's transfer from the MSF to another position in the Bank as an "option" for further consideration, which he never expressed to any other Bank official or to the Complainant at that or any subsequent time. Rather, I find consistent with his "clarification" above that Mr. Johnson intended to and did in the October 24 e-mail convey the intention to involuntarily transfer the Complainant off the MSF team, effectively removing him as a residential mortgages manager to some uncertain position in the Bank, perhaps on a part-time basis to accommodate the Complainant's perceived lack of performance and dedication to his role, at least in part as a result of the Complainant's extra-curricular interest in the Martial Arts. In all of the Coaching Session Reports and e-mails provided to me, there was never a suggestion of any prior criticism of the Complainant's extra-curricular activities interfering with his duties for the Bank.

71 It is clear that Mr. Johnson's intention was also recognized by Ms. Spittal, who testified that she first became aware of any issue concerning the Complainant when she read her copy of Mr. Johnson's October 24 e-mail and his follow up communication requesting "HR assistance and work towards a dehire of Chris Thornton from TD CT MSF." From this documentation, she concluded "[Mr. Johnson] wanted to transfer [the Complainant] out of the Mortgage Sales Force", and she testified she had a problem with that. Ms. Spittal's evidence was that she subsequently spoke with Mr. Johnson over the telephone to get "an understanding from him what was going on and to explain that we don't transfer out employees but go through the Performance Counselling process". As described above, the Bank's policy requires its people managers to follow a Performance Counselling protocol before involuntarily transferring employees out of an area or otherwise disciplining employees because of unsatisfactory performance, which she outlined for Mr. Johnson, who was apparently unaware of the procedure. She testified that she couldn't recall what Mr. Johnson's reaction was to this information, but that: "The process was the process; so regardless of what his reaction was he would have to adhere to it". Ms. Spittal accordingly responded to Mr. Johnson's October 24 e-mail to her in which he asked for her help to "dehire" the Complainant the next day at 1:56 p.m., stating: "As discussed, I will send you the Performance Counselling guide via interbranch...just let me know if you would like to discuss further." This communication was not shared with the Complainant because, as Ms. Spittal testified: "I didn't think there would be a need to contact him at that point".

72 In fact, it is undisputed that no-one from the Bank attempted to discuss anything with the Complainant for five days after Mr. Johnson's October 24 e-mail, until Saturday, October 29, which in hindsight Ms. Spittal agreed should have been done earlier. When asked in cross-examination whether that was an acceptable response time, she stated: "It would have been my preference that he get a response before then", but no reason was offered for the delay. In that interval the Complainant testified he spent an agonizing week at his home, believing he had been fired off the MSF team and was anxious about his future. He claimed he was depressed and felt "in limbo", knowing only the Bank as his employer since completing college and having spent all of his money and vacation time trying to upgrade his qualifications for what he had hoped would be his lifelong career at the Bank, which now appeared to have been "blown away".

73 At 11:50 a.m. on Saturday, October 29, 2005, Mr. Johnson sent an e-mail to the Complainant, ignoring his earlier communication to the Complainant that he intended to start the process for his transfer out of the MSF, and instead asked for the Complainant's business plan and for a face-to-face meeting with him to discuss his performance. The Complainant was not advised he was being placed on the formal Performance Counselling procedure or that the message conveyed in Mr. Johnson's previous October 24 e-mail had been rescinded or changed. The October 29 e-mail from Mr. Johnson to the Complainant, which was copied to Ms. Spittal and the MSF District Manager, is reproduced below:

> Hello Chris, we need to sit down face to face for a performance meeting. October 12, 2005 I sent notification out to the entire team regarding our Teams Quarterly Review Monday October 31st.
>
> I had requested that all business plans be sent to me via email & or fax for Tuesday October 25th.
>
> Your plan was not received, and a follow up note went out to you (along with 2 others) to have the file in end of business Wednesday, October 26th.
>
> Received a note from you Monday Oct. 24th, in your note you advised the plan was complete and would be emailed Tuesday Oct. 25th.
>
> Unfortunately, I have never received the plan via email & or fax.
>
> I have set a meeting for Tuesday November 1st at 10:00 a.m. branch 2122 [address omitted].
>
> In the meeting I'd like to discuss your MSF Performance, specifically the activities you'd be engaging to ramp up your business, build referral sources along with the documentation and reporting of these activities.
>
> We specifically need to change your current results, along with the activities your currently undertaking.
>
> We'll need to develop a action plan, document the plan and follow through with the activities.
>
> I will set aside face to face time each week, (we can mutually agree on which day is best) to review the activities and continue to fine tune your efforts to build acceptable results for our MSF Team.
>
> I have shared this memo with [the District Manager] & Cynthia Spittal HR for your support. We are all here to support you with your efforts.
>
> I look forward to our meeting Tuesday, November 1st.

74 The Complainant testified that he was confused by the "mixed messages" he was now receiving, cynically characterizing Mr. Johnson's October 29 e-mail as an attempt to "cover his butt" with Mr. Johnson's boss, who he noted had been copied on this e-mail as well.. Believing that he had been fired off the MSF, Mr. Johnson's request for the business plan made no sense to the Complainant, and the attempt to schedule a face-to-face performance meeting was viewed with suspicion. He felt that Mr. Johnson had since spoken with someone in Human Resources and was "backpedaling", trying to "build up ammunition" against the Complainant to justify a decision that had already been made (namely, to terminate him from the MSF team). He testified he couldn't understand why no-one from the Human Resource's Department was calling him to follow up directly.

75 From this juncture in the narrative of relevant facts there was little, if any evidence of actual telephone discussions between the Complainant, Mr. Johnson and/or Ms. Spittal; all three parties using e-mail as the medium of communication. The Complainant expressed his confusion in an e-mail dated October 31, 2005 that he initiated to Ms. Spittal, which was their first communication on the matter.

> I would like the opportunity to discuss my position with MSF. I have not spoke [sic] with anyone and it seems that [Mr. Johnson] has some personal issues with me that need to be cleared up. I am totally confused by these emails as they are contradicting messages. I understand that you have been CC with both emails. I was hoping to call you today to discuss however my great-grandmother of 100 years has decided to leave the family now I

> will not be available to sort this issue out for a few days. However would like your professional advice in regards to the matter. Would it be ok to contact you on Thursday [November 3rd]?

76 The Complainant's reference to his great-grandmother, who he testified he was close to, was to the fact she had just passed away requiring his immediate attention to that family matter and adding to his emotional distress at that time.. Ms. Spittal had no objection to the Complainant's request, suggesting by return e-mail that he and Mr. Johnson could meet with her on the upcoming Thursday, November 3. Ms. Spittal agreed in cross-examination that she could understand why the Complainant would be embarrassed by Mr. Johnson's October 24 e-mail (given it had also been sent to the District Manager) and would have been reluctant to deal with Mr. Johnson further as a result. She also agreed that by the October 29 e-mail the only reasonable assumption the Complainant could have made was that his unilateral transfer out of the MSF was in process. In a separate e-mail to Mr. Johnson, Ms. Spittal proposed that the two of them talk before meeting with the Complainant so that she could "get an understanding of the deficiencies in his performance and to speak to it in the meeting" (further attesting to her lack of knowledge of any reported performance problems to that date) and that their meeting with the Complainant could be used to place him on Performance Counselling (even without her knowing the specific basis of Mr. Johnson's concerns at that juncture). Ms. Spittal also confirmed that she never expressly told the Complainant that the Bank intended to continue his employment as a member of the MSF and place him on Performance Counselling instead.

77 The e-mail trail filed by both parties supplemented by the testimony of the Complainant, Mr. Johnson and Ms. Spittal in fact shows that no-one expressly told the Complainant that the Bank did not intend to remove him as member of the MSF as of 11:40 a.m. on November 2, 2005, when the Complainant sent a responding e-mail to Ms. Spittal stating that he thought it best to "take some [vacation] time off [to] make some important decisions" about his future. The Complainant also wrote: "I must admit I am very disappointed with a few issues and am feeling stressed out. I need to make some clear choices." Ms. Spittal responded by e-mail at 11:53 a.m. that day, telling the Complainant: "...after you return, we can meet to discuss, just let me know so I can put some time aside" and encouraged him to contact the Bank's Employee Assistance Program that she wrote might "be able to help with the stress" the Complainant was feeling. She also sent an e-mail to Mr. Johnson at 12:42 p.m. that day advising him that their meeting scheduled for Thursday, November 3 to place the Complainant on Performance Counselling "will not happen tomorrow" and giving Mr. Johnson the "heads up" that the Complainant would be requesting vacation time off instead.

78 The Complainant contacted Mr. Johnson by e-mail at 1:15 p.m. on Friday, November 4, in which he advised he had communicated with Ms. Spittal and was requesting "some vacation days [to] evaluate and brainstorm some important decisions that I am faced with." Mr. Johnson responded by e-mail at 1:30 p.m. that date, telling the Complainant that he would support a two week vacation absence, instructing the Complainant to forward all of his electronic communications (i.e. pagers and e-mails) and his notes regarding ongoing residential mortgage files to H. A. (the other residential mortgages manager who was hired the same day the Complainant was) before the end of that business day. While the e-mail record indicates a dispute as to whether the Complainant immediately forwarded his electronic communication to H. A. as instructed, it is clear that Mr. Johnson approved the vacation request, advising the Complainant in a November 4 e-mail that "upon your return we conduct your performance meeting, along with the implementation of daily activity management", which Mr. Johnson did not elaborate upon in the e-mail.

79 Yet in all of this extended timeframe, including the subsequent two week vacation period, I find that no-one from the Bank expressly told the Complainant that the intention expressed in Mr. Johnson's October 24 e-mail to transfer the Complainant out of the MSF had been rescinded, amended or placed on hold. In response to Complainant counsel's suggestion to Ms. Spittal that the Complainant told her that he previously brought his complaints about Mr. Johnson to the attention of the Human Resources Department and that Ms. Spittal took no steps to confirm that, Mr. Spittal testified: "I can't recall if I took steps after the fact. I don't recall." There was nothing before me to suggest anyone from the Bank ever did.

80 On this evidence I find that the Complaint left on vacation on Monday, November 7, 2005 with the reasona-

ble continuing belief that he was effectively being terminated as a member of the MSF and was facing an uncertain, if any future with the Bank, after having been required to surrender all of his notes of his ongoing mortgage transactions and electronic communications to a co-worker before leaving, effectively severing all of his connections to the Bank. I also find that Ms. Spittal did not make inquiries of Ms. Soederhuysen or anyone else in the Human Resources Department to confirm the details of the earlier communications from the Complainant.

81 The Complainant testified he stayed home while on vacation "trying to evaluate where things were going". He said that he didn't know what was happening with his career; he believed he was terminated by Mr. Johnson from the MSF and "squeezed out of the TD" with no other specific positions in the Bank offered to him. He was also distressed that his personal privacy was now being compromised by the fact that his e-mails were now forwarded to a co-worker and he had been effectively removed him from the Bank's computer system from which he might get future sales leads. The Complainant's evidence that without access to the computer system he couldn't input any mortgage deals was not disputed.

82 Sometime in this immediate period, Mr. Johnson sent the Complainant a greeting card that was supposed to recognize the Complainant on his completion of 10 years of employment (which occurred on November 5, 2005). The Bank's policy is for the employee's manager to send a card that specifies the impending delivery of a gift (among a number of options selected by the employee) to acknowledge the service accomplishment. The card was admitted into evidence. It is hand printed with a message from Mr. Johnson that misspells the word "chosen", as follows: "Chris, Your 10th Anniversary Gift As Choosen", in what could reasonably be characterized as a sloppy scrawl. The Complainant testified co-workers who he showed the card to said: "Your boss doesn't like you very much". Mr. Johnson, who acknowledged the significance of such service recognition awards to employees, testified he saw nothing wrong with this card.

83 On November 10 the Complainant composed a lengthy e-mail response to Mr. Johnson's charge that the Complainant had not forwarded his pager and business e-mails to H. A. as instructed before leaving on vacation. This November 10 e-mail (from the Complainant's personal computer), addressed to Mr. Johnson and copied to Ms. Spittal, also comments upon the upcoming performance meeting referred to in Mr. Johnson's earlier November 4 e-mail, which in the absence of anyone explaining the purpose and procedure under the Bank's Performance Counselling protocol, the Complainant continued to view as an after-the-fact attempt to justify the Complainant's termination from the MSF.

84 In the Complainant's e-mail, among other things, he denies ever having been informed of a performance standard for second year mortgage sales reps, reminding Mr. Johnson that he told him he could run his business as he saw fit; he states that Mr. Johnson was not interested in the Complainant's repeated requests that they meet to discuss matters; he maintains he never received support from Mr. Johnson; he charges that several things stated in Mr. Johnson's October 24 e-mail transferring him out of the MSF were false; that his confidential discussions with the Human Resources Department were compromised and his privacy was breached by the requirement to forward his electronic messages to H. A.; he asserts that he was not given e-leads, powers of sale or sample realtor packages as promised by Mr. Johnson, and that all of this had negatively impacted his health. The Complainant's evidence that no-one from the Bank responded to this e-mail is not disputed by the Bank, although Mr. Johnson denied many of the allegations in the Complainant's November 10 e-mail, stating he took personal offence to the suggestion he cancelled the meetings with the Complainant, instead blaming the Complainant for those cancellations. For completeness, the Complainant's November 10 e-mail to Mr. Johnson is reproduced in its entirety below.

> I thought I did forward my mail. My pager is never used. My name has not been added to any of TD's Web site with my contact info after all this time therefore my pager number nobody uses. I did contact [H.A.] and made arrangements to forward my files. I had a couple of things pending that I wanted to clean up and not dump on H.A. Please stop drawing the wrong assumptions. I am getting very tired of it. I would like to be left alone to grieve the passing of my Grandmother. I was very close to her. I can't wait to meet with you on the following Monday. I will bring many issues to the table. You keep talking about work life balance and all these things at

> your meetings and that we can run our business the way we want etc etc. I have never seen these numbers for a second year mortgage rep etc etc. I know what you are up to and understand that you don't want me on your team. Rick I have asked you several times to meet with me and talk about some of the things that were going on and you did not appear interested. I have not received any support from you as a manager or as a person. You told me you were starting the transfer out of MSF and mentioned several things in that email that are false. I will look at other alternatives. The lat several emails have been all about you and what you believe is to be true. Wanted to point out that I was working together with my Doctor in regards to a health issue that I was having a hard time dealing with. It took a lot of time to straighten things out and bring my health where it needed to be in order for me to be successful moving forward. It is not a co-incidence that I lost more than 20% of my body weight. I told my doctor that I was 100% com [sic] and that I had the resources to manage all my living expenses. I was instructed by my doctor to focus on myself. I did not think this was a problem. I guess I was wrong to assume that. I have worked with this company for ten years and have lots of success in many areas. I must point out that yes you asked me to fax weekly summaries I also agreed to meet with you every Monday at that time. I have not met with you once. You use the word charming to describe me...do you honestly think I worked hard to complete my PFP, CFP, MBA and two certificates in financial planning from ICB and CEFP to be charming. I paid for these courses myself not TD Bank, used all my vacation days during that eight year span to write exams and finish all my assignments. I did this because I am hard working and focused, not charming. It is too bad that it has come down to this email. In regards to HR I did contact them to seek advice and I did not hear back from them in fact you asked me to contact Kym and I obliged. I found out later that the HR rep that I was dealing with did not do anything in regards to my issue as she went on vacation for two weeks. I did speak with Kym and the reason you did not hear back might have something to do with some privacy issues. I leave you with this final thought. I get no TD generated leads, I have not received one power of sale from you, you have not provided me with any sample realtor packages that you promised me. I would ask that you keep these discussions between you and myself and not discuss with other employees as I have been asked some questions from employee's that leads me to believe that my privacy and confidentiality is being jeopardized. I have no bad feelings towards you or the TD bank. I will see you at our next meeting. Please do not take anything personally my intentions are good and only wanted to shed some light on some information that has been misinterpreted.

85 Before his scheduled November 21 return from vacation the Complainant, still believing he was being terminated from the MSF, concluded that his only alternative was to take a leave of absence to further consider his future with the Bank outside of the MSF. He testified that he continued to be "depressed and needed some time off to focus" on the future and that, "There were no other options presented to me" having heard nothing from Mr. Johnson or Ms. Spittal contradicting Mr. Johnson's October 24 e-mail. His evidence was that Ms. Soederhuysen (referred to under her first name "Kym" in the Complainant's November 10 e-mail reproduced above) and/or the unidentified Human Resources counsellor had presented a leave of absence as an option in his earlier discussions with them in order to give him time to consider his future with the Bank.. Ms. Spittal denies making that suggestion, which the Complainant disputes; however Ms. Spittal did not look behind the Complainant's request for a leave of absence (ostensibly for time off to complete his studies and attend upcoming examinations in his MBA program) when it was presented to her in an e-mail from the Complainant dated November 17, 2005.

86 The Bank's leave of absence policy, which is set out in its internal Web site, permits employees with a minimum of 12 months continuous service to take up to 12 months leave without pay with the approval of their business head and Human Resources. The leave of absence policy also provides that at the end of the leave the Bank will attempt to return the employee to his/her previous employment; however there is no guarantee of returning to employment with the Bank at all. If the previous position is unavailable (through elimination or having been filled by another) and the employee refuses to accept an alternate position or there is no other appropriate position that the employee can be placed into in the Bank's sole discretion, the employment relationship may be terminated at the end of the leave of absence without any obligation by the Bank to pay severance (at least according to that document), which the Complainant testified he hadn't realized when he initially read the policy.

87 Ms. Spittal sent the Bank's internal leave of absence request form to Mr. Johnson, which he approved for a

leave of absence without pay from November 22, 2005 to January 30, 2006, and a copy was also sent to the Complainant for his final signature. However, before signing and returning the form, the Complainant sought for the first time advice of a solicitor, Mr. Kevin Fox. While considering his position, and continuing to believe he was being terminated from the MSF as a result of the October 24 e-mail, which neither Mr. Johnson or Ms. Spittal had expressly disavowed him of as of that date, the Complainant refused to report for work at the conclusion of his vacation and was advised by e-mail communication from Mr. Johnson that without having signed the leave of absence documents that the Complainant was "considered on an unsubstantiated Leave of Absence". The e-mail directed the Complainant to "contact Cynthia [Spittal] immediately with when she can expect the documents."

88 In a letter to Ms. Spittal dated December 21, 2005, Mr. Fox wrote that the Complainant would not sign the leave of absence form as he was taking the position that he had been constructively dismissed. The relevant portions of that letter are as follows:

> This letter is to advise you that Mr. Thornton has retained my services with respect to his employment with TD Canada Trust (herein "ID"). Specifically, I have been asked to address the events of the past few months.
>
> After discussing the matter with my client and reviewing the documentation in his possession it is my opinion that Mr. Thornton has been constructively dismissed. ID's actions, in amongst other things, unilaterally attempting to transfer him out of the Mortgage Sales Force Department without first discussing the matter with him and failing to advise him with respect to his rights when he contacted your department, amount to fundamental breach of his employment contract.
>
> In light of the above, Mr. Thornton was left with no option but to attempt to remove himself from a hostile environment. When TD failed to provide Mr. Thornton with any assistance he believed he was left with no option but to take a leave of absence. As you are aware, such a step would have detrimentally affected Mr. Thornton's employment rights. Despite this fact it appears that you encouraged Mr. Thornton to pursue this avenue.
>
> This letter is to advise you that Mr. Thornton will not be completing the Leave of Absence documentation, but rather, will be demanding a severance commensurate with his position, service and age.
>
> I would ask that you contact my office upon receipt of this letter to see whether an amicable resolution of this matter can be achieved. Further, please refrain form contacting Mr. Thornton directly. All future communication in this matter must go through my office.

89 It is not disputed that the Bank's position in the matter, communicated back to the Complainant's solicitor in response to his December 21 correspondence on January 16, 2006, was that the Complainant had not been constructively or otherwise dismissed, and that upon the completion of his leave of absence that the "status quo" would remain; meaning the Complainant would return to his position as a residential mortgages manager reporting to Mr. Johnson. This was the first time the Bank expressly informed the Complainant (through counsel) that his position in the MSF would continue notwithstanding Mr. Johnson's October 24 e-mail almost three months earlier. However, Ms. Spittal made it clear in her evidence that on his return the Complainant would be placed on Performance Counselling in accordance with the Bank's operating procedures.

90 The Complainant refused to return on those terms and registered his complaint of unjust dismissal with (what was then called) Human Resources and Skills Development Canada (HRSDC) under the *Code* on or about January 25, 2006, attaching a copy of Mr. Johnson's October 24 e-mail as an exhibit.

91 Ms. Kim Pratten, a Bank employee with 20 years service, who in the two years prior to her testimony has been the Bank's Manager of Employment Standards responsible for administering these complaints, received notice of the complaint on March 16, 2006. She responded by letter dated April 28, 2006 denying that the Complainant had

been dismissed and repeating the Bank's position that his job remained available to him, which is reproduced in relevant part below:

> ...It is the Bank's position that Mr. Thornton was not unjustly dismissed.
>
> By way of background, Mr. Thornton entered the Bank's employ on November 6, 1995 and currently holds the position of Area Mortgage Manager. Please note, Mr. Thornton's position is still available at the Bank and Mr. Thornton is still on the Bank's records as an employee. This point is explained in greater detail below.
>
> In October 2005 Mr. Thornton approached his Manager to request time off, effective immediately, for vacation. Unfortunately, at the time, the Bank was unable to accommodate Mr. Thornton's request.
>
> As identified in the [October 24] e-mail Mr. Thornton submitted to HRSDC, when the vacation request was made, Mr. Thornton's Manager mentioned the ongoing concerns the Bank had with Mr. Thornton's performance. This was not new information to Mr. Thornton, as these points had previously been raised with him. In the Bank it is common practice to ensure employees are aware of the level of their performance and know when improvement is required, as this is only fair to the employee.
>
> Subsequent to the above, in November 2005, Mr. Thornton requested a seven-week personal leave of absence. Mr. Thornton indicated in writing to his Manager that during the leave, he was going to look for other positions outside of the Mortgage Sales Force area.
>
> Mr. Thornton's request was granted to him and he was provided with the personal leave of absence. Upon completion of the personal leave of absence Mr. Thornton decided not to return to work and chose to request a severance from the Bank. Mr. Thornton was not entitled to a severance, as his position was there and the Bank was willing to continue to work with him in his role. Despite this, Mr. Thornton still did not return to work.
>
> As mentioned, Mr. Thornton's position is still available and the Bank is willing to discuss his return to work. However, should Mr. Thornton not to return to work the Bank will take it to mean he is not interested in his position and he has abandoned his employment. Mr. Thornton's name would then be removed from the Bank's records. In that regard, we would appreciate knowing Mr. Thornton's intentions by May 12, 2006.
>
> Based on the foregoing, it therefore remains the Bank's position that Mr. Thornton has not be unjustly dismissed.
>
> . . .

(e) Mitigation Efforts and New Employment

92 The Complainant produced records of his efforts to secure alternate employment, consisting primarily of e-mails to various on-line recruiting sites for some 57 different positions, beginning December 6, 2005 and intermittently covering the period to February 1, 2007 when he was hired by a discount mortgage brokerage to sell mortgages. (I note that for administrative purposes the Complainant's start date in his new employment situation was March 6, 2007; however the documentation filed supports the finding that he was in fact paid commissions on mortgages sold commencing February 1, 2007, which is the date Complainant counsel later submitted as the date to be used for calculating any damage entitlement). His evidence is that he also posted his résumé on-line with the other major banks, mutual funds, and was assisted by four recruiters in his mitigation efforts; none of which is disputed by the Bank (although the Bank does challenge the sufficiency of his efforts). He conceded in cross-examination he did not apply for any positions posted on the TD Bank Web site because he felt everyone there knew about his personal situation due to his privacy being breached at various levels, and he was embarrassed to come back to work for the

same employer in the circumstances. Since his entire working experience and business contacts were in the Brampton area, which was the territory Mr. Johnson was responsible for as a manager for the Bank's MSF, the Complainant also felt that a transfer to a different manager in the MSF in another area would not be feasible. The Complainant's records show that he earned (on paper) almost $80,000 in commissions in the five months after beginning in his new employment on February 1, 2007, although some of those commissions may be subject to adjustments downwards for mortgages on house sales that don't close at a future date..

93 However, before the Complainant secured alternate employment, it is not disputed that Ms. Pratten contacted HRSDC on June 1, 2006 to advise that the Bank was prepared to return the Complainant to his position in the MSF reporting to a different manager (and that the Bank was not interested in attending a mediation on the matter), which she repeated in a subsequent telephone call to the Complainant's solicitor on June 26, 2006. The reason given by Ms. Pratten for the Bank's change of position (i.e. from the Complainant returning to the same versus a different manager) was "because we recognized there were issues for [the Complainant] and his former manager [Mr. Johnson]". The specific territory that the Complainant would be assigned to was not identified; nor was the name of the new manager proposed in the telephone conversation between Ms. Pratten and the Complainant's counsel. While Ms. Pratten testified in her examination-in-chief that the Bank was willing to "work with him" on these points, there was no evidence that she expressly made that a part of the Bank's verbal offer.. Ms. Pratten confirmed that upon returning to the MSF, the new manager would be made aware of the problems with the Complainant's past performance and that the Complainant would be subject to the Performance Counselling procedure under the general direction of the same group in the Human Resources Department and same District Manager responsible for the MSF. No explanation was provided for the reason the Bank changed its position after more than six months of holding steadfastly to the view that the Complainant was obliged to return to his former position under the direction of Mr. Johnson with no changes to the status quo.

94 The Bank's offer to return the Complainant to a different manager was repeated in a subsequent letter to Complainant's counsel from Ms. Pratten dated September 21, 2006, in response to Complainant counsel's written reassertion of the Complainant's allegations coupled with a proposal to mediate the dispute that the Bank rejected. The relevant portions of the Bank's September 21 letter are as follows:

> . . .
>
> As per our previous discussions, the Bank is not aware of whom Mr. Thornton spoke with in Human Resources regarding a leave of absence. The Bank does know that Mr. Thornton did not get this advice from the Human Resources group that supports him. Rather, Human Resources only became aware of MR. Thornton's request for a leave of absence when he informed them of this.
>
> In our previous conversations it was indicated that Mr. Thornton did not want to work for his previous manager. In that regard, the Bank indicated we were prepared to have Mr. Thornton return to his previous position reporting to another manager. The Bank is still prepared to have Mr. Thornton return to his position reporting to a different manager.
>
> . . .
>
> Based on the above, the Bank maintains that Mr. Thornton has not been unjustly dismissed and is not prepared to go to mediation. Mr. Thornton is still an employee of the Bank and the Bank still has a position for him.
>
> Please advise the Bank by September 30, 2006 as to whether or not Mr. Thornton wants to return to the Bank or wants to terminate his employment.

95 When the Complainant was asked in cross-examination whether he followed up his concerns about working

for a different manager in another territory with Ms. Pratten, the Complainant responded in a somewhat sarcastic tone: "Was I asked to?" suggesting that the Bank's September 21 letter did not invite that kind of discussion. In response to Bank counsel's assertion that Ms. Pratten might have been able to resolve his concerns about working in a different territory had the matter been raised with her, the Complainant's retort was: "I wish she would have contacted me."

96 On this evidence I find that after six months of holding to its claim that the Complainant was not dismissed and that his position reporting to Mr. Johnson remained available for him, the Bank recognized there were sufficient "issues" between the Complainant and Mr. Johnson justifying the Complainant's return as a residential mortgages manager under a different manager. The reasonable implication of working for another manager included the Complainant's transfer to a different territory where he had no or few business contacts, rendering his task of securing mortgage sales all the more difficult.

97 Furthermore, I find that in making this offer to Complainant's counsel on June 26, 2006, repeated in its September 21 letter, there was no suggestion the Bank was inviting discussions with a view to accommodating or compensating the Complainant for any reasonable losses to that point and any he might sustain as a result of starting a commission-based business anew in an unfamiliar territory. The Bank's offer was also silent on whether the Complainant would receive the promised e-leads, power of sales opportunities and introductions to site developers that the Complainant had already raised with Mr. Johnson, Ms. Soederhuysen and referred to in his November 10 e-mail that was copied to Ms. Spittal.

III. The Parties' Arguments

(a) The Complainant's Submissions

98 On behalf of the Complainant, Mr. Fox submitted that the issues in this case were whether the Complainant had been constructively dismissed, and if so what the appropriate remedy was. A sub-issue going to remedy was the proper earnings figure to use for calculating the Complainant's damages, if he was entitled to any; and a second sub-issue under the head of remedy was whether the Complainant had taken reasonable steps to mitigate his losses, including any requirement to accept the offers of continued or re-employment by the Bank under the same or a different manager after the October 24 e-mail from Mr. Johnson. Lastly, if the Complainant succeeded on the merits and was entitled to a remedy, the question of legal costs and interest to make him whole would need to be resolved.

99 The Complainant argued that the Bank had a contractual obligation to treat him with decency, civility and respect, which the Bank breached by creating a hostile and embarrassing work environment, rendering the Complainant's employment intolerable. Whether Mr. Johnson unilaterally breached an essential term of the employment contract by renouncing promises given at the commencement of their relationship (i.e. by failing to provide an equitable distribution of e-leads, powers of sale and builder site referrals) or engaged in a pattern of conduct that was cumulatively abusive towards the Complainant making continued employment objectively unbearable, the result was the same; namely that the Bank had repudiated the employment agreement thereby constructively dismissing him, according to the Complainant.

100 Dissecting the relationship between the Complainant and Mr. Johnson in some detail (that will not be exhaustively recounted here) the Complainant submitted that by the October 24, 2005 e-mail their working relationship had deteriorated to the point that it was no longer functioning, for which Mr. Johnson was solely responsible. This, accordingly to the Complainant, was demonstrated by the card Mr. Johnson sent to the Complainant on the occasion of his 10th service anniversary that the Complainant claimed showed "complete disdain and a total lack of respect" and Mr. Johnson's "true feelings" towards the Complainant.

101 The Complainant submitted that Mr. Johnson's October 24 e-mail was, in substance, notice of the Complai-

nant's termination as a member of the MSF and unilateral transfer to an uncertain, if any, future with the Bank, which Ms. Spittal agreed the Complainant would find embarrassing, particularly since it had also been forwarded to the Complainant's District Manager. The Complainant also argued that the October 24 e-mail showed Mr. Johnson's animus towards the Complainant; unfairly questioned the Complainant's integrity and work ethic; and was a "harsh" and/or untruthful rendering of the facts surrounding the Complainant's request for vacation time, making it uncomfortable for the Complainant to maintain any future working relationship with Mr. Johnson.

102 Compounding matters was Mr. Johnson's and Ms. Spittal's unexplained failure to ever notify the Complainant that notwithstanding the clear message in that e-mail, the Bank in fact intended to continue his employment as a member of the MSF. In the absence of such clarification, the Complainant argued that no credibility could be given to Mr. Johnson's subsequent assertion that he really intended to present transfer as "an option" and to place the Complainant on Performance Counselling. Rather, in the present factual circumstances the Complainant submitted that he had the reasonable belief that the decision to terminate his employment in the MSF had already been made; and that any Performance Counselling thereafter would be a *post facto* attempt to justify that decision. Mr. Johnson's and Ms. Spittal's failure to expressly tell the Complainant of the Bank's purported desire to continue his employment and place him under the Performance Counselling protocol not only undermined their credibility, but also constituted further evidence of the abusive conduct towards the Complainant, who was understandably distressed by those events, from which the Complainant urged me to find that the employment contract had been repudiated. The Complainant also pointed to the Bank's suggestion (through at least one of the Human Resources official he consulted with) of a leave of absence for the Complainant as a "bad faith" effort to secure the Complainant's termination without severance obligation whatsoever (which would be the practical effect of signing the Bank's standard leave of absence form); all of which went to the further confirmation of the Bank's repudiation of the employment contract, according to the Complainant.

103 In the foregoing circumstances the Complainant argued that he was not required to return to work after the October 24 e-mail and that he was entitled to damages to make him whole for the period he remained unemployed from the end of his leave of absence (during which time he was not searching for work) until he secure alternate employment effective February 1, 2007. The Complainant asserted he took reasonable steps to mitigate his damages by seeking alternate employment throughout that interval, which was not disputed by any contrary evidence from the Bank. The Complainant denied that he was required to accept the offer of continuing employment under the claimed mismanagement of Mr. Johnson, who had been responsible for the inappropriate conduct towards the Complainant, and also questioned the *bona fides* of the Bank's subsequent offer to have him report to another manager, which was only extended when the Complainant commenced the present unjust dismissal proceedings several months after his constructive dismissal. Given the claim that his privacy had been violated by the Bank and that he would be subject to Performance Counselling if he returned to work for a different manager, the Complainant submitted he was not obliged to accept the Bank's subsequent offer, which was completely lacking in details and would be humiliating for him. In any event the Complainant submitted that the relationship between the Complainant and the Bank was so frayed by the time the Bank made its offer of employment reporting to a different manager on or about June 26, 2006; the basic trust, good faith and sincerity so destroyed by that point given the non-action by the Human Resources Department to the Complainant's situation, that the Complainant was under no obligation to accept the offer after the passage of so much time. In short, it was then "too late". Because of the Bank's delay and the Complainant's understandable resentment as a result, it was clear that the employment relationship was so strained as to be irreparably damaged by that point, according to the Complainant, making it objectively unreasonable to expect the Complainant to return.

104 In calculating the Complainant's damages to make him whole for unjust dismissal under the *Code*, the Complainant submitted that the calculation should be made on a "ballpark" entitlement of $104,000 per annum (i.e. $1,000 per mortgage deal on two deals per week), which was the gross amount he expected to earn from the initial representations made by Mr. Johnson, less the Complainant's "costs of doing business" (i.e. tax deductible expenses), which would have been reasonably achievable had Mr. Johnson fulfilled his promises of e-leads, power of sales opportunities and large developer introductions that enticed the Complainant to apply for the MSF posting. In

the alternative, the Complainant submitted that he would have had the reasonable expectation of earning at least $60,000 per annum, which was the sum he was earning when he left the Heart Lake branch at the encouragement of his branch manager and other Bank officials, had the promises made by Mr. Johnson at the outset been even minimally fulfilled.

105 The Complainant concluded by requesting compensation for interest on his damage award and his legal fees calculated on a full indemnity basis in order to make him whole for his unjust dismissal.

106 The following authorities were referred to by the Complainant in support of the foregoing representations: *Berg v. Cowie* (1918), 40 D.L.R. 250 (Sask. C.A.), *Lloyd v. Imperial Parking Ltd.*, [1996] A.J. No. 1087 (Alta. Q.B.), *Shah v. Xerox Canada Ltd.*, [2000] O.J. No. 849 (Ont. C.A.), *Stamos v. Annuity Research & Marketing Service Ltd.*, [2002] O.J. No. 1865 (Ont. S.C.J.), *Manitoba Assn. of Native Fire Fighters Inc. v. Perswain*, [2003] F.C.J. No. 533 (Fed. T.D.), *Fraynn v. Ermineskin Band*, [1999] C.L.A.D. No. 186 (Can. Adjud. app. under Can. Lab. Code) (Sims), *Harper v. Garden Hill First Nation*, [2006] C.L.A.D. No. 297 (Can. Adjud. app. under Can. Lab. Code) (Dunlop), *Starr v. Sandy Bay First Nation*, [2006] C.L.A.D. No. 410 (Can. Adjud. app. under Can. Lab. Code) (Lister), *Scarfe v. Saskatchewan Indian Cultural Centre*, [1996] C.L.A.D. No. 1088 (Can. Adjud. app. under Can. Lab. Code) (Ball), *Naotkamegwanning First Nation v. Gauthier*, [2000] C.L.A.D. No. 45 (Can. Adjud. app. under Can. Lab. Code) (Aggarwal), *Ally v. Institute of Chartered Accountants (Ontario)*, [1992] O.J. No. 940 (Ont. Gen. Div.), *Fasenko v. Flag Chevrolet-Geo-Oldsmobile Ltd.*, [1994] B.C.J. No. 1583 (B.C. S.C.), *Wilding v. Qwest Foods Ltd.*, [1994] B.C.J. No. 1080 (B.C. C.A.), *Laakso v. Valspar Inc.*, [1990] O.J. No. 158 (Ont. Dist. Ct.), *Banca Nazionale del Lavoro of Canada Ltd. v. Lee-Shanok*, [1988] F.C.J. No. 594 (Fed. C.A.), *Wilson v. Bell Mobility Ltd.*, [2005] C.L.A.D. No. 269 (Can. Adjud. app. under Can. Lab. Code) (M. R. Newman), *Rowe v. General Electric Canada Inc.*, [1994] O.J. No. 3137 (Ont. Gen. Div.), and *Cardwell v. Young Manufacturer Inc.*, [1988] O.J. No. 2932 (Ont. Dist. Ct.).

(b) The Bank's Submissions

107 On behalf of the Bank, Ms. Peters submitted that the Bank's position could be distilled into two basic propositions. First, that the Complainant was not actually or constructively dismissed by the Bank, choosing instead to leave his employment on his own volition in the face of reasonable demands from his manager to perform to expectations; in which case I had no jurisdiction to award him any remedy under the *Code*. Second, if the Complainant was constructively dismissed, he was obligated to mitigate his alleged damages by accepting continued employment with Mr. Johnson as his manager; or was at least required to meet with the Bank's Human Resources officials to discuss his objections to working with Mr. Johnson, in which case the Bank's offer of continuing employment with another manager ought to have been accepted (and may very well have been extended earlier had the Bank reasonably recognized the Complainant's objections to working for Mr. Johnson). In any event, the Bank submitted that the evidence was insufficient to support a finding that the Complainant took reasonable steps to search for alternate employment prior to February 1, 2007 when he accepted a position with another mortgage brokerage.

108 Acknowledging that cases of constructive dismissal were fact specific, the Bank stated it did not disagree with Complainant counsel's summary of the law of constructive dismissal or its applicability in unjust dismissal cases under the *Code*, but rather submitted the specific facts of this case did not support the Complainant's central premise that he had been dismissed. The Bank argued that in order to find that it had constructively dismissed the Complainant, the Complainant had the burden to show that the Bank made a fundamental change to the employment contract and that the change was unilaterally imposed by the Bank, which the Bank submitted he had failed to establish.

109 The Bank did not take issue with the Complainant's premise that an employer's course of conduct rendering the employment relationship intolerable could also be grounds establishing a constructive dismissal if it demonstrated a repudiation of the employment contract by the employer. However, the Bank submitted there was no standard of "respectful conduct" that employers had to fulfill; and that not every comment or action by a supervisor that in hindsight might be seen as not ideally framed or even inappropriate constituted a repudiation of the employment

contract. Rather, the Bank argued that an objective test must be applied to determine whether the course of conduct of a supervisor so significantly departs from reasonable norms of accepted behaviour into what may be properly characterized as "hostile", "unjustifiable" and/or "abusive" misconduct, which is a high standard. On the facts before me, the Bank submitted that even if Mr. Johnson could be properly criticized for not being the best supervisor or as precise as he should have been in his October 24 e-mail communication with the Complainant, and candidly conceded that with the benefit of 20/20 hindsight that e-mail probably should not have been sent at all, his conduct did not objectively cross the line into the kind of behaviour rendering the continued employment relationship intolerable.

110 Notwithstanding the Complainant's subjective appreciation of the events, the Bark argued that the test I must apply in determining whether a constructive dismissal has occurred is whether the objective conduct demonstrates an intention by the employer to no longer be bound by the contract of employment. Not only is it necessary to consider the supervisor's conduct; but more importantly the Bank submitted it was the employer's conduct (through the actions of the Human Resources Department) that must be assessed as the factor in determining whether a constructive dismissal has occurred. While the Bank accepted that Mr. Johnson's October 24 e-mail was not entirely appropriate, it was not the "death knell" of the employment relationship. Rather the Bank submitted that it acted reasonably in granting the Complainant vacation time off and a leave of absence to deal with his personal issues, with every expectation that the Complainant would return to work, denying any bad faith conduct in effectively granting the Complainant's leave of absence request.. On the facts before me the Bank submitted that having determined the Complainant could not meet the requirements of his position, which he had received notice of through the many Coaching Session Reports, which were fair and proper assessments of his deficiencies that the Bank was entitled to provide to him, the Complainant decided to terminate his own employment for which the Bank had no liability in this case..

111 Much as Complainant counsel had done in exhaustively taking me through Mr. Johnson's evidence to point out discrepancies and credibility issues, counsel for the Bank extensively dissected the Complainant's testimony (which will not be recounted in detail here) in support of its claim that the Complainant was not credible on the crucial facts separating the parties. The Bank characterized the Complainant as an "evasive and argumentative witness" who when answering the most innocuous of questions tended to respond with "lengthy answers about how badly he was treated" that were often "challenging and aggressive towards counsel"; which the Bank submitted was "designed to deflect his own responsibility". One example of such deflection was the Complainant's inability to name the Human Resources consultant he had supposedly spoken with after receiving the August 2 Coaching Session Report, or even to make a note of his alleged conversation with that person, which the Bank submitted undercut the credibility of his claim that he raised any complaint at that time. Rather, the Bank argued it wasn't until the October 24 e-mail that the issue of this alleged past conversation came up, likely to bolster the Complainant's assertions of ongoing difficulties with his manager, when the objective evidence showed he hadn't raised any concerns about Mr. Johnson until he dealt with Ms. Spittal, which was well afterwards. Moreover, in the absence of being able to identify the Human Resources counsellor who the Complainant said told him to take a leave of absence, which Ms. Spittal steadfastly denied ever suggesting, the Bank submitted there simply was no credible evidence corroborating that allegation. This, among many other claimed deficiencies in the clarity and balance of his testimony, coupled with the Complainant's unwillingness to concede any personal responsibility for the documented problems with his performance, but rather blaming all of his difficulties on Mr. Johnson (unfairly relegating Mr. Johnson's efforts to bring performance problems to the Complainant's attention as a "sham"), greatly undermined the Complainant's credibility, objectivity and any reliance I could give to his testimony on contentious matters, according to the Bank.

112 In contrast, the Bank submitted that the extensive e-mail record and Coaching Reports showed that every effort by Mr. Johnson to provide positive feedback to the Complainant was sincere, polite and courteous; hardly the hallmarks of an "abusive" manager failing to treat his employee with "decency and respect", which did not deserve the kind of disregard given in return by the Complainant. If anything, the Bank claimed that e-mail exchanges between Mr. Johnson and the Complainant bolstered Mr. Johnson's credibility, consistent with his oral testimony that the Bank characterized as clear and straight-forward, showing him to be a concerned manager who was trying to

deal with the Complainant's performance difficulties in a reasonable manner. The credibility of Ms. Spittal and Ms. Pratton could not be open to reasonable doubt, since both were committed Human Resources professionals who had no prior knowledge or involvement with the Complainant and were very candid in their testimony, according to the Bank.

113 The Bank spent some time on the October 24 e-mail from Mr. Johnson, which it urged me to "look at closely because it is obviously fairly pivotal". Contrary to the Complainant's interpretation of this e-mail as notice of being "fired off the MSF team", the Bank argued that in looking at the words used in that e-mail in proper context, Mr. Johnson was suggesting a process of working with the Complainant to look at employment options outside of the MSF; however, according to the Bank, "ultimately it remained up to [the Complainant] to determine if he was prepared to look at those other options or not". In response to my question as to whether I should view Mr. Johnson's subsequent communication with Ms. Spittal, in which he asked her assistance to "work towards a dehire of Chris Thornton", as a true indication of what he meant by his October 24 e-mail to the Complainant, the Bank answered that "the real question...is whether [the Complainant's] reaction was reasonable", and submitted that the Complainant's alleged belief that he was being terminated on the basis of that e-mail was objectively unreasonable. While acknowledging that the words used by Mr. Johnson might not have been the best in the circumstances, the Bank submitted that the October 24 e-mail firmly expressed Mr. Johnson's concerns about the Complainant's poor performance, in a manner that was "professional" and "not abusive or harassing". It urged me to look at more than that one sentence in assessing whether it was the Bank's intention to repudiate the employment relationship, but rather to consider the entire e-mail in the context of events before and afterwards, which would lead to the opposite conclusion.

114 Although the Bank also conceded that in hindsight it should have responded more quickly to assure the Complainant it was not going to transfer him out of the MSF, it submitted that the Complainant should have recognized his employment in the MSF was going to continue from Mr. Johnson's October 29 e-mail to him, which contemplated an on-going relationship. The Bank further agreed it had not made perfectly clear its intention to place the Complainant on a formal Performance Counselling procedure in any of its subsequent e-mail communications with the Complainant, but submitted that was understandable since Ms. Spittal and Mr. Johnson were waiting for a face-to-face meeting with the Complainant to explain the process and answer his questions in person, which never occurred through no fault of the Bank. Considered in context, Mr. Johnson and Ms. Spittal's actions, although admittedly "not perfect" (which is not a standard expected of anyone), displayed a good faith attempt at dealing with a serious performance problem, rather than the concerted plan or "set up" suggested by the Complainant to bring about his termination, according to the Bank. The Complainant's reactions to these efforts, it was submitted, were unreasonable and not supported by the objective evidence. In all of these circumstances the Bank urged me to find there had been no actual or constructive dismissal.

115 However, if I determined that the Complainant had been constructively or otherwise dismissed, the Bank submitted that the Complainant was not entitled to any damages because of his failure to mitigate his alleged losses. The Bank stated that the Complainant should have returned to his position reporting to Mr. Johnson, which was clearly identified (through his counsel) as being available for him before his leave of absence ended. He at least had the obligation of meeting with Human Resources officials at the end of his leave of absence to fully lay out his concerns so that the Bank could have an opportunity to address them, perhaps with a transfer to another manager, according to the Bank.. Even if that was not required, the Bank submitted he was obliged to accept Ms. Pratten's offer of continued employment in the same role but under the supervision of a different manager, made verbally to his counsel on June 26, 2006, and confirmed in writing on September 21, 2006. Finally, the Bank argued that having shown there were jobs available for the Complainant at the Bank, there was no credible evidence that the Complainant really applied himself to finding alternate work as soon as possible, particularly given his background and experience that should have resulted in a short, if any, period of unemployment.

116 Finally, in the event I decided that any damages were payable to the Complainant, the Bank submitted it was "not appropriate to look at damages from typical productive levels for a typical sales force representative, be-

cause he was never that", meaning that because the Complainant had never achieved the normative gross earnings expectations of a MSF manager, which the evidence had established to be approximately (or at least) $100,000, that number could not be used in assessing his losses. Instead, the Bank submitted a more appropriate measure of his loss would be based on the Complainant's last year of annual earnings from the Bank (which as indicated above was the gross sum of $14,353), or alternatively, given the variable nature of commission-only earnings, might be based on the average of the Complainant's last three years of earnings.

117 On the issue of legal costs if the Complainant succeeded, the Bank submitted that only payment on a partial indemnity (solicitor and client) basis was appropriate. In the event the Complainant did not succeed, the Bank stated it would not be asking for its costs.

118 In support of its representations the Bank referred to the following: *Srougi v. Lufthansa German Airlines*, [1988] F.C.J. No. 539 (Fed. C.A.), *Pollard v. Federal Business Development Bank*, [1995] C.L.A.D. No. 1045 (Can. Adjud. app. under Can. Lab. Code) (Faubert), *Farber c. Royal Trust Co.*, [1996] S.C.J. No. 118, [1997] 1 S.C.R. 846 (S.C.C.), *Shah v. Xerox Canada Ltd.*, *supra*, *Palmer v. Canadian National Railway*, [2001] C.L.A.D. No. 85 (Can. Adjud. app. under Can. Lab. Code) (Emrich), *Bank of Montreal v. Zomperelli*, [1997] C.L.A.D. No. 420 (Can. Adjud. app. under Can. Lab. Code) (Rose), *Navarro v. Canadian Imperial Bank of Commerce*, [1997] C.L.A.D. No. 142 (Can. Adjud. app. under Can. Lab. Code) (Bendel), *McDonald v. Royal Bank of Canada*, [1998] C.L.A.D. No. 408 (Can. Adjud. app. under Can. Lab. Code) (Kubara), *Bank of Nova Scotia v. D'Mello*, [2000] C.L.A.D. No. 341 (Can. Adjud. app. under Can. Lab. Code) (Rose), *Colistro v. BMO Bank of Montreal*, [2006] C.L.A.D. No. 345 (Can. Adjud. app. under Can. Lab. Code) (Tadman) and *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C. C.A.).

(c) Evans v. Teamsters Local Union No. 31

119 After receiving the oral evidence and argument in these proceedings but before I decided this case, the Supreme Court of Canada released its decision in *Evans v. Teamsters, Local 31*, *supra*, which addresses the obligation of terminated employees to accept offers of continuing employment by the very employer that terminated the relationship in mitigating the employee's losses. The parties made written submissions on the effect, if any, of that case to the circumstances before me; and in particular on the question of whether the Complainant was obliged to accept the Bank's offers of continuing employment with Mr. Johnson or another manager, even if he was constructively dismissed.

120 *Evans* was not a case of constructive dismissal, but rater dealt with an actual wrongful termination.. Mr. Evans was a union business agent with over 23 years of service when he was dismissed without cause by his employer, a Local of the Teamsters Union, following the election of a new union executive. In negotiations between the parties, Mr. Evans (through his counsel) expressed a willingness to return to work on terms that provided him with a severance package of 24 months pay; structured as continuing employment for 12 months followed by 12 months salary in lieu of notice. When negotiations broke down almost six months post-termination (during which time Mr. Evans continued to receive his regular salary), the employer requested that Mr. Evan's return to work under the same terms and conditions as his prior employment, to the balance of the 24 month notice period. Mr. Evans refused and commenced legal action for wrongful dismissal, where his former employer argued that he failed to mitigate his damages by not accepting its offer of continued employment.

121 The Supreme Court of Canada agreed. In concluding that Mr. Evan's failed to mitigate by rejecting the offer of continued employment, Bastarache J., writing for a 6:1 majority of the Court, approved the British Columbia Court of Appeal's approach in *Farquhar v. Butler Brothers Supplies Ltd.* (1988), 23 B.C.L.R. (2d) 89, [1988] B.C.J. No. 191 (B.C. C.A.) and *Cox v. Robertson* (1999), 69 B.C.L.R. (3d) 65, [1999] B.C.J. No. 2693 (B.C. C.A.), applying the same principles to both wrongfully dismissed and constructively dismissed employees, including the requirement that the employee make reasonable efforts to mitigate. He stated at para. 27: "Given that both wrongful dismissal and constructive dismissal are characterized by employer-imposed termination of the employment contract (without cause), there is no principled reason to distinguish between them when evaluating the need to mitigate" and

that in both situations the relationship is best considered on a case-by-case basis when determining the reasonableness of the employee's mitigation efforts, to be assessed on an objective standard. In evaluating the reasonableness of a dismissed employee's mitigation efforts, which might include the obligation to accept an offer of continued employment by the dismissing employer, Bastarache J. sets out the following considerations at paras. 28 - 35, which are reproduced below in order to appreciate the parties' subsequent submissions:

> [28] In my view, the courts have correctly determined that in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment (potential barriers to be discussed below), requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice, and *not* to penalize the employer for the dismissal itself. The notice period is meant to provide employees with sufficient opportunity to seek new employment and arrange their personal affairs, and employers who provide sufficient working notice are not required to pay an employee just because they have chosen to terminate the contract. Where notice is not given, the employer is required to pay damages in lieu of notice, but that requirement is subject to the employee making a reasonable effort to mitigate the damages by seeking an alternate source of income.
>
> [29] There appears to be very little practical difference between informing an employee that his or her contract will be terminated in 12 months' time (i.e. giving 12 months of working notice) and terminating the contract immediately but offering the employee a new employment opportunity for a period of up to 12 months. In both situations, it is expected that the employee will be aware that the employment relationship is finite; and that he or she will be seeking alternate work during the 12-month period. It can also be expected that in both situations the employee will find that continuing to work may be difficult. Nonetheless, it is an accepted principle of employment law that employers are entitled (indeed encouraged) to give employees working notice and that, absent bad faith or other extenuating circumstances, they are not required to financially compensate an employee simply because they have terminated the employment contract. It is likewise appropriate to assume that in the absence of conditions rendering the return to work unreasonable, on an objective basis, an employee can be expected to mitigate damages by returning to work for the dismissing employer. Finding otherwise would create an artificial distinction between an employer who terminates and offers re-employment and one who gives notice of termination and offers working notice. In either case, the employee has an opportunity to continue working for the employer while he or she arranges other employment, and I believe it nonsensical to say that when this ongoing relationship is termed "working notice" it is acceptable but when it is termed "mitigation" it is not.
>
> [30] I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are no acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701). In *Cox*, the British Columbia Court of Appeal held that the other relevant factors include the history and nature of the employment, whether or not the employee has commenced litigation, and whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left (paras. 12 - 18). In my view, the foregoing elements all underline the importance of a multi-factored and contextual analysis. The critical element is that an employee "not [be] obliged to mitigate by working in an atmosphere of hostility, embarrassment or humiliation" (*Farquhar*, at p. 94), and it is that factor which must be at the forefront of the inquiry into what is reasonable. Thus, although an objective standard must be used to evaluate whether a reasonable person in the employee's position would have accepted the employer's offer (*Reibl v. Hughes*, [1980] 2 S.C.R. 880), it is extremely important that the non-tangible ele-

ments of the situation — including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements - be included in the evaluation.

[31] I note that the nature of this inquiry increases the likelihood that individuals who are dismissed as a result of a change to their positions (motivated, for example, by legitimate business needs rather than by concerns about performance) will be required to mitigate by returning to the same employer more often than those employees who are terminated for some other reason. This is not, however, because the circumstances surrounding the termination of their contract may be far less personal than when dismissal relates more directly to the individuals themselves. This point is illustrated by *Michaud* in which a bank executive was constructively dismissed as a result of an organizational restructuring. The evidence showed that the bank offered the employee another executive position and was anxious to have him continue working for them. Importantly, there was no evidence that the relationship between the employee and the bank was acrimonious or that he would suffer any humiliation or loss of dignity by returning to work while he looked for new employment. As a result, mitigation was required.

. . .

[33] In sum, I believe that although both constructively dismissed and wrongfully dismissed employees may be required to mitigate their damages by returning to work for the dismissing employer, they are only required to do so where the conditions discussed in para. 30 above are met and the factors mentioned in *Cox* are considered. This kind of mitigation requires "a situation of mutual understanding and respect, and a situation where neither the employer nor the employee is likely to put the other's interest in jeopardy" (*Farquhar*, at p. 95). Further, the reasonableness of an employee's decision not to mitigate will be assessed on an objective standard.

. . .

[35] It is the union that bears the onus of proving that a reasonable person in the place of Mr. Evans would have returned to work, and the trial judge determined that the union had not discharged its burden. This was a finding of mixed fact and law and is therefore only subject to appellate intervention if there is a palpable and overriding error:

. . .

122 Applying the foregoing considerations, the Bank in written submissions argued the majority of the Court "made clear that the test is an objective one - namely, "whether a reasonable person would accept such an opportunity" (at para. 30) and "sent a strong signal that, given the importance of the obligation placed on the employee, the employee's reasons for refusing to mitigate his/her damages [by accepting continued employment with the dismissing employer] should be scrutinized with an objective eye to ensure they are objectively reasonable." The Bank also stated that, "The objective test articulated by the majority in *Evans* appears to be very similar to the test long-applied by the common law courts in constructive dismissal situations in assessing the reasonableness of an employee's refusal to continue in employment or return to employment with the employer in order to mitigate his/her damages".

123 Thus, the Bank submitted the *Evans* case provided additional support for its position that the Complainant failed to take reasonable steps to mitigate his damages in the case before me, resulting in the significant reduction of those damages (perhaps to nothing) in the event I found he was constructively dismissed. According to the Bank, its evidence established: "Mr. Johnson and Ms. Spittal offered many times to work with [the Complainant] to address his performance issues or any perceived issues concerning his relationship with Mr. Johnson or, if he preferred, to assist him to transition to another position with TD Canada Trust." Furthermore, once the Bank became aware of the Complainant's allegation of constructive dismissal, the Bank stated it "consistently conducted itself on the basis that it wished to maintain its employment relationship with him. The Bank denied that the Complainant was objectively

reasonable in refusing the Bank's attempts to continue his employment reporting to Mr. Johnson; however, even if the relationship with Mr. Johnson was found to be acrimonious, the Bank submitted such a finding "would not justify [the Complainant's] refusal to consider other positions within the Bank or his refusal to accept the Bank's repeated offers from June 1, 2006 onwards to return to work reporting to another manager". Consequently, the Complainant's assertion that it was "too late" at that point for the Complainant to return to employment with the Bank was "clearly not sustainable in the face of the *Evans* decision", according to the Bank.

124 The Complainant, in written representations, agreed that *Evans* did not change the law of mitigation in cases of constructive dismissal, but rather affirmed principles already established by *Cox v. Robertson*, *supra*, *Mifsud v. MacMillan Bathurst Inc.*, *supra* and *Farquhar v. Butler Brothers Supplies Ltd.*, *supra*, "namely that mitigation may, *in some circumstances*, require a dismissed employee to return to work for their former employer". The *Evans* decision did not stand for the proposition that an employee must always return to their former employer, according to the Complainant; instead the Complainant argued *Evans* shows that a requirement to return to work for the same employer "is more the exception rather than the rule" and that at para. 30 of its decision, the majority of the Court held that the following factors must be considered in evaluating whether a dismissed employee has the obligation to return to work for the dismissing employer: (a) Is the salary offered the same? (b) Are the working conditions substantially different? (c) Is the work being offered demeaning? (d) Are the personal relationships acrimonious? (e) What is the history and nature of the employment? (f) Has the employee commenced litigation? (g) Was the offer of re-employment made while the employee was still working for the employer or only after he or she had already left? (h) Will the employee be required to work in an atmosphere of hostility, embarrassment or humiliation? and (i) Will the employee suffer any loss of dignity?

125 In addition to conducting a multi-factored and contextual analysis" suggested by the foregoing considerations, the determination of whether the dismissed employee has an obligation to accept continuing employment with the dismissing employer requires an appreciation of "both the tangible and non-tangible elements" of the relationship, according to the Complainant. Thus, while it did not dispute that an objective standard is to be applied in assessing the reasonableness of an employee's mitigation efforts, the Complainant urged me to factor into my evaluation the important subjective qualification noted in para. 30 of *Evans*, that "it is extremely important that the non-tangible elements of the situation — including work atmosphere, stigma and loss of dignity, as well as nature and conditions of employment, the tangible elements — be included in the evaluation."

126 Applying those principles, the Complainant submitted that the Bank had not discharged its burden of showing that the Complainant was unreasonable in refusing the offers of continued employment with Mr. Johnson as his manager, and then six months later, of re-employment reporting to a different manager. Instead, the Complainant argued that it was objectively reasonable to refuse to return under the supervision of Mr. Johnson because to do so "would have necessarily involved [the Complainant] working in an atmosphere of hostility and humiliation".. The Bank's failure to ever provide the Complainant with clarification of his status after the October 24 e-mail from Mr. Johnson exacerbated the Complainant's distress and his hostility, and the existence of subsequent litigation, viewed objectively, was even more incompatible with returning to work for Mr. Johnson, according to the Complainant.

127 The Complainant also submitted it was not objectively unreasonable to refuse the Bank's subsequent offer to return to work under a different manager, extended by Ms. Pratten, because (a) he would continue to report to the same District Manager who had been copied on the October 24 e-mail, which the Complainant would reasonably find embarrassing (as agreed by Ms. Spittal in her evidence); and (b) the evidence established the Complainant would be subject to the Performance Counselling procedure under the new manager, which would reasonably be humiliating to him in the circumstances, particularly given his well-founded belief that other employees were aware of his difficulties through the breach of his privacy. But most importantly, the Complainant submitted that Ms. Pratten's offer to work for a different manager suffered from "complete lack of any of specifics [which] speaks to the fact that it was being extended as a part of a litigation strategy as opposed to a legitimate offer."

128 This distinguished the Complainant's situation from that of *Evans*, where the evidence was that Mr. Evans

had been offered the same job under the same known terms; and that his own proposal of 12 months working notice conceded there were no barriers and/or conditions preventing his return to work. That was very different from the factual circumstances in the case before me, according to the Complainant, where the details of Ms. Pratten's offer were unclear, and in the context of a frayed and distrustful relationship that had emerged as a consequence of the Human Resources Department's mishandling of the situation, reasonably justified the Complainant's rejection of the Bank's offers on an objective analysis.

IV. Reasons for Decision

(a) Constructive Dismissal

129 The parties agree on the principles I must apply. As an adjudicator appointed under the unjust dismissal provisions of Division XIV of the *Code* (sections 240 - 246), I have jurisdiction to determine whether the Complainant was constructively dismissed and to award the remedies permitted in the case of an unjust dismissal if that is established: see *Stougi v. Lufthansa German Airlines (F.C.A.)*, *supra*, and *Re Pollard and Federal Business Development Bank*, *supra*, at para. 32. The Complainant has the burden to show he was constructively dismissed on a balance of probabilities: see *McDonald and Royal Bank of Canada*, *supra*, at para. 15 and *Colistro v. Bank of Montreal*, *supra*, at para. 36. If a constructive dismissal has occurred, the Complainant may be obligated to accept offers of continued or re-employment with the same or another manager to mitigate his damages in proper circumstances, even if the terms of employment have fundamentally changed: see *Bank of Nova Scotia v. D'Mello*, *supra*, at para. 59, *Navarro and Canadian Imperial Bank of Commerce*, *supra*, at paras. 23-35 and *Evans v. Teamsters Local No. 31*, at paras. 28 - 33. However, the Bank has the burden of showing that the Complainant's mitigation efforts were objectively unreasonable for refusing its offers: see *Evans v. Teamsters Local No. 31*, at para. 35.

130 The case before me like many of its genre is fact specific, which I have exhaustively reviewed above. In doing so it has been necessary to resolve credibility issues, particularly with differences on crucial points in the evidence of the Complainant and Mr. Johnson. I have applied the well known formula from *Faryna v. Chorny*, *supra*, that I am to subject each witness's story "to an examination of its consistency with the probabilities that surround the currently existing conditions [and its] harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (per O'Halloran J. A. at p. 357). Just because a witness is demonstrably angry in giving evidence does not mean he or she is being untruthful, irrational or unreasonable. Rather, in some circumstances the absence of an angry reaction could (although it is by no means determinative) undermine a witness's claim of maltreatment.

131 The Complainant's anger in delivering testimony on certain key points of contention was a factor in my assessment of his credibility, not all of it endearing, which I considered along with the bulk of his otherwise even-tempered presentation; comparing it to Mr. Johnson's testimony as a whole, which on the most contentious of issues was, in my view, vague and unclear if not indifferent. But more importantly, discounting as much as possible Mr. Johnson's relatively poor demeanour as a witness, which may be an unreliable barometer of credibility, as well as the occasional unflattering displays of anger by the Complainant, it was more the actions of the principals in the context of the surrounding circumstances than their words that was most influential in arriving at my factual findings on contentious points. It is my opinion that the actions of the people involved in this case support the inherent credibility of the Complainant's assertions more so than they do the Bank's.

132 Focusing on the parties' actions and what seems most likely the context of all of the surrounding circumstances, I have found that the Complainant was a successful and valued Bank employee of almost nine years service when he was approached by his then branch manager and other Bank officials to put his name forward for one of two positions as Manager, Residential Mortgages, which had yet to be advertised in the Bank's posting system.. The evidence shows the Complainant to be a man who had worked for the Bank his entire career; he had a good employment record and reputation with senior management; and he dedicated his own time and money to improve his qualifications for the benefit of the Bank and to further his own aspirations for advancement. He anticipated a leng-

thy career with this employer.

133 In these circumstances, recognizing that it was the Bank asking him to put his name forward, and in the absence of evidence to the contrary, I have accepted as most likely on a balance of probabilities the Complainant's claim that he would have reasonably sought and received assurances from Mr. Johnson, before applying for the job, that he would be provided with his fair share of e-leads, power of sales and introductions to building site developers, without preconditions, from which he could reasonably anticipate ongoing sources of mortgage referrals. I found it unlikely the Complainant would have been persuaded to leave his otherwise secure position if he had been told that he would have to break through a "pecking order" to be granted these lucrative opportunities.

134 Rather, the evidence supports the conclusion that with Mr. Johnson's promised assistance, both the Complainant and the Bank reasonably expected the Complainant to earn at least $100,000 annually, in a relatively short period after the initial three months during which his base salary of $60,000 was maintained. I have found that Mr. Johnson breached his promises of assistance, which in the circumstances under which they were made must be considered among the fundamental terms of the contract of employment between the Complainant and the Bank. The written employment contract the Complainant signed on January 19, 2004, assuming it is enforceable (on which I make no determination), does not state that the written document exhaustively sets out all of the terms of employment precluding the kind of verbal promises extended by Mr. Johnson to entice the Complainant, which was not argued by the Bank. There was no suggestion, either through the Complainant's words or conduct, or from any evidence advanced by the Bank, that once becoming aware that he was not being provided with these opportunities while others were, which appears to have occurred after being in the new role for some time, the Complainant ever acquiesced to Mr. Johnson's failure to deliver on his promises.

135 Instead, the evidence shows that as his earnings tumbled throughout 2005, the Complainant protested to at least Mr. Johnson (who does not deny that), Ms. Soederhuysen (who was not called to dispute that) and Ms. Spittal, as one of the many grievances included in the Complainant's lengthy November 10 e-mail she was copied on. On these facts I conclude that the Bank's refusal to provide the Complainant with any e-leads, powers of sale and/or introductions to building site developers, was a likely contributor, if not the main reason for the collapse of his earnings during 2005. The failure to identify the Complainant as a member of the MSF on the Bank's Web site, even after the Complainant brought that omission to Mr. Johnson's attention, coupled with the sloppy greeting card prepared by Mr. Johnson on the occasion of the Complainant's 10 service anniversary, speaks to the indifference if not neglect exhibited towards the Complainant. While the Complainant cultivated a personal interest in the Martial Arts, there was no suggestion, prior to Mr. Johnson's October 24 e-mail, that the Complainant's extra-curricular activities interfered with his duties for the Bank. Instead, the evidence supports the conclusion that he dedicated most of his free time to enhance his educational credentials, much to the Bank's benefit. Having discovered that others were receiving powers of sales and being introduced to building site developers while he was not, it seems likely the Complainant would feel trapped, as he asserted in his testimony, within a situation of not being able to meet his own goals because of betrayed promises, leading him to seek the assistance of the Human Resources Department, which is what he did.

136 In the context of these surrounding circumstances, and having regard to Ms. Spittal's explanation that the Bank's Performance Counselling protocol is designed to ensure a measure of fairness by placing the employee on notice with respect to the specific deficiencies in his/her performance, which Mr. Johnson was apparently unaware of and the Complainant never placed on, I can give little weight to the Coaching Session Reports in the period January 21 to August 2, 2005 submitted by the Bank to supposedly document an under-achieving employee. Reading those Reports supports the Complainant's contention that Mr. Johnson's comments were of little, if any, substance. Mr. Johnson testified that his role was to work with each mortgage sales manager to help identify and develop referral sources, to do joint sales calls, to watch the mortgage sales manager in action and provide constructive feedback, and to assist in developing retail relationships with sources of mortgage sales referrals. Very little, if any of that is addressed by these Coaching Session Reports or demonstrated by Mr. Johnson's actions towards the Complainant throughout that timeframe. These Reports do not identify any specific standards of performance that the Complai-

nant was reasonably expected to meet (as compared with other second year mortgage sales managers provided with the same opportunities, or lack thereof); they offer little if any concrete assistance in reaching those standards (which might have otherwise if Mr. Johnson had provided the promised e-leads, powers of sale and building developer introductions initially promised); nor do they clearly place the Complainant on notice that failure to reach reasonable standards of performance would result in specific administrative (in the form of a demotion or transfer) or proper disciplinary action. Except for filling out the "General Comments" section in these Reports, often in vague terms that Mr. Johnson had difficulty (or couldn't) explain in his oral evidence, the other parts of the Coaching Session Reports under the headings, "Objectives", "Focus of Last Activity", "Evaluation Summary", "Strengths", "Areas for Improvement", and "Focus for Next Activity", which direct the attention of the employee to specific performance deficiencies with a plan to resolve them, were almost always left blank by Mr. Johnson, clearly undercutting the utility of the document as a coaching tool..

137 Ms. Pratten's April 28, 2006 letter to HRSDC states that ongoing performance concerns were raised with the Complainant and that: "In the Bank it is common practice to ensure employees are aware of the level of their performance and know when improvement is required, as this is only fair to the employee". In fact, the evidence before me is that the Bank didn't follow its own Performance Counselling protocol in the Complainant's case. Its failure to do so undermines the very "fairness" Ms. Pratten emphasized in her letter to HRSDC and Ms. Spittal pointed to as the rationale for the Bank's Performance Counselling policy.. Why it didn't follow its own process also reflects negatively on its, or at least Mr. Johnson's, motives.

138 The notion of constructive dismissal has traditionally been recognized in two situations. There is the clear unilateral breach of a fundamental term of the employment contract said to reveal the repudiation of the employment contract. But more subtly are those situations where the employee is isolated or marginalized in an effort to make the employment so disagreeable as to encourage the employee's (sought after) resignation, where it arises in circumstances indicating the employer no longer intends to be bound by fundamental terms of the employment contract.

139 In *Farber c. Royal Trust Co.*, *supra*, a case of alleged constructive dismissal from the province of Quebec, Gonthier J., speaking for a unanimous panel of the Supreme Court of Canada explained the concept of constructive dismissal in its classic sense at paras. 33 - 36:

> **(ii)** Situation in the Canadian Common Law Provinces
>
> ¶ 33 In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination. The leading case on this question is an English decision, *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315, in which the following was stated at pp. 321-22:
>
> > But if a claim for wrongful dismissal be founded on repudiation by the master, then I think that the general and recognized rules which apply in the case of ordinary contracts should apply also in the case of master and servant....It has been authoritatively stated that the question to be asked in cases of alleged repudiation is "whether the acts and conduct of the party evince an intention no longer to be bound by the contract"....The doctrine of repudiation must of course be applied in a just and reasonable manner. A dispute as to one or several minor provisions in an elaborate contract or a refusal to act upon what is substantially held to be the proper interpretation of such provisions should not, as a rule, be deemed to amount to repudiation....But...a deliberate breach of a single provisions of a contract may, under special circumstances, and particularly if the provision be important, amount to a repudiation of the whole bargain....
>
> Thus, it has been established in a number of Canadian common law decisions that where an employer unilate-

> rally makes a fundamental or substantial change to an employee's contract of employment - a change that violates the contract's terms - the employer is committing a fundament breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed. The employee can then claim damages from the employer in lieu of reasonable notice.... [Authorities omitted]
>
> ¶ 34 In an article entitled "Constructive Dismissal", in B. D. Bruce, ed., Work, Unemployment and Justice (1994), 127, Justice N. W. Sherstobitoff of the Saskatchewan Court of Appeal defined the concept of constructive dismissal as follows at p. 129:
>
> > A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of reasonable notice.
>
> ¶ 35 The common law rule is therefore similar to that applicable in Quebec civil law when it comes to the concept of constructive dismissal. Thus, although decisions from the common law courts are not authoritative, it may be helpful to refer to them to see what types of changes the courts have considered fundamental changes to an employment contract resulting in the termination of that contract. However, each constructive dismissal case must be decided on its own facts, since the specific features of each employment contract and each situation must be taken into account to determine whether the essential terms of the contract have been substantially altered.
>
> ¶ 36 In a number of decisions in both Quebec and the common law provinces, it has been held that a demotion, which generally means less prestige and status, is a substantial change to the essential terms of an employment contract that warrants a finding that the employee has been constructively dismissed. In some decisions, it has been held that a unilateral change to the method of calculating an employee's remuneration justifies the same finding. Other decisions have found that a significant reduction in an employee's income by an employer amounts to constructive dismissal. ... [Authorities omitted]

140 The classic notion of constructive dismissal as the unilateral change in a fundamental term of the employment contract without consent or acquiescence has been adapted to those more subtle situations where the conduct of the employer evinces an intention to repudiate the contract of employment. In *Lloyd v. Imperial Parking Ltd.*, *supra*, where a supervisor subjected an employee to abusive conduct, including vulgar name calling, baseless allegations of sexual misconduct with female workers, failure to schedule holidays, continuous screaming and repeated threats to terminate his employment, Sanderman J. of the Alberta Court of Queen's Bench held that such conduct constituted a form of constructive dismissal, explaining his rationale at paras. 39-42:

> ¶ 39 Does this persistent conduct, which led Mr. Lloyd to leave his employment, constitute a constructive dismissal? The answer is yes. The vulgar name calling, the failure to schedule holidays and the suggestions of inappropriate sexual conduct with female subordinate workers would not support this conclusion by themselves. It is the repeated and continuous incidents of yelling and screaming at Mr. Lloyd by Mr. Noiles in the workplace and the repeated threats to terminate his employment that support this finding. These two separate but interrelated patterns of behaviouir form the basis of the case made out by the Plaintiff. The other types of behaviour add to the overall strength of the Plaintiff's case but it is not dependent upon them.
>
> ¶ 40 It is well-recognized that in the absence of cause, any fundamental breach by the employer or a major term of the employment relationship allows the employee to take the position that a constructive dismissal has occurred. In order for a constructive dismissal to exist, the breach must be in relation to a fundamental term of the

> employment relationship rather than just a minor or incidental term. There must be a fundamental breach of a fundamental term of employment before one can claim to be constructively dismissed.
>
> ¶ 41 A fundamental implied term of any employment relationship is that the employer will treat the employee with civility, decency, respect, and dignity. The standard that has to be adhered to by the employer is dependent upon the particular work environment. This appears to be part of the trend to establish a duty upon an employer to treat employees "reasonably" in all aspects of the labour process. [Authorities omitted]
>
> ¶ 42 In this case, a fundamental implied terms of the employer/employee relationship has been breached. Mr. Noiles, Mr. Lloyd's superior, did not treat Mr. Lloyd with the civility, decency, respect, and dignity to which he was entitled. The abuse pattern of behaviour during 1993 was in contravention of this requirement.

141 In the Ontario case of *Shah v. Xerox Canada Ltd.*, *supra*, the availability of constructive dismissal was extended from the kind of overt inappropriate conduct of a repeated nature such as the continuous incidents of yelling and screaming, and repeated threats to terminate the employment relationship relied upon in *Lloyd*, *supra*, to more subtle actions that cumulatively demonstrated the employer no longer intended to be bound by the employment contract. In *Shah*, *supra*, the trial judge, Cullity J., concluded the employee had been constructively dismissed because of a pattern of conduct that included unsubstantiated criticisms of the employee's performance, warning letters that were "short on specifics" and "without justification" and a letter from the employer placing the employee on probation, found by the trial judge to be "unwarranted" because "instead of telling Shah what was expected of him and giving him a reasonable opportunity to respond to the criticisms against him, the responsible Xerox manager became "more authoritarian, impatient and intolerant" and "subsequently acted impulsively and without justification"" (at para. 9). The Ontario Court of Appeal upheld the trial judge's determination without identifying a specific fundamental term of the employment contract that had been breached; rather the impugned conduct constituted a repudiation of the contractual relationship. It explained its reasons for that conclusion at paras. 6 - 9, as follows:

> ¶ 6 Cullity J., however, concluded that the court may find an employee has been constructively dismissed, without identifying a specific fundamental term that has been breached, where the employer's treatment of the employee makes continued employment intolerable. We agree with Cullity J. The passages from *Farber* [*Farber v. Royal Trust Co.*, *supra*] and *Stoke* [*Re Stoke and Addario* (1997), 36 O.R. (3d) 323 (Ont. C. A.)] relied on by Xerox reflect a more general principle of contract law. Gonthier J. referred to this general principle in *Farber* at 195:
>
> > In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination.
>
> The application of this principle will vary depending on the conduct of the employer in question.
>
> ¶ 7 In cases where an employer requires an employee to relocate or take on a different position as part of a restructuring, the court, obviously, must decide whether in doing so the employer has changed a fundamental term of the employment contract.
>
> ¶ 8 In some cases, however the employer's conduct amounts not just to a change in a specific term of the employment contract but to repudiation of the entire employment relationship. For example, in *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.* (1988), 159 D.L.R. (4th) 18 (Man. C.A.), the trial judge concluded that an employee had been constructively dismissed because of a series of incidents culminating in the imposition of probation. The employer had unjustifiably criticized the employee, leveled vague and unfounded accusations against her, and created a hostile and embarrassing work environment. The trial judge concluded that, "viewed objectively, the plaintiff's continued employment in such environment was no

> longer possible." This conclusion was upheld by the Manitoba Court of Appeal. Thus, the decision in *Whiting v. Winnipeg* reflects the general principle referred to by Gonthier J. in *Farber*. The employer in the *Whiting* case had by its conduct demonstrated an intention to no longer be bound by the contract.
>
> ¶ 9 The case before us is similar. Xerox's treatment of Shah between November, 1995 and May, 1996 demonstrated that it no longer intended to b e bound by the employment contract, and that it had, therefore, constructively dismissed Shah. ...

142 The subsequent Ontario case of *Stamos v. Annuity Research & Marketing Service Ltd.*, *supra*, closes the analytical circle on the concept of constructive dismissal as either the breach of a specific fundamental term or conduct demonstrating a repudiation of the entire employment relationship, with the result being the same; namely the entitlement of the employee to treat the employment contract as at an end and to recover damages for unjust or wrongful dismissal. This is stated by Dambrot J. as follows at para. 60:

> ¶ 60 An employer owes a duty to its employees to treat them fairly, with civility, decency, respect and dignity. An employer who subjects employees to treatment that renders competent performance of their work impossible or continued employment intolerable exposes itself to an action for constructive dismissal. Where the employers' treatment of the employee is of sufficient severity and effect, it will be characterized as an unjustified repudiation of the employment contract. Whether such treatment is viewed as a breach of a specified fundamental implied term of the employment relationship (see, for example, *Lloyd v. Imperial Parking Ltd.*, [1996] AJ. No. 1087 (Q.B.), and *Sheppard v. Sobeys Inc.*, [1997] N.J. No. 78 (C.A.)), the result is the same. The employee is entitled to treat the employment contract as at an end, and to recover at least damages in lieu of reasonable notice.

143 Applying the principles from the foregoing cases, on the evidence before me I conclude that the Complainant has discharged his onus of proving a constructive dismissal on both the classic principles stated in *Farber*, *supra*, and the more subtle formulation in *Shah*, *supra*. The Bank breached a fundamental term of the contract of employment when Mr. Johnson refused to provide the Complainant with the promised e-leads, powers of sale opportunities and introductions to large building site developers, in spite of repeated requests from the Complainant, while handing these valuable benefits to others. It is not surprising that the Complainant would react angrily in the circumstances, both towards Mr. Johnson (creating a situation of animosity between them) and in his evidence before me, particularly given his past dedication and spotless service record with the Bank. The Human Resources officials initially consulted by the Complainant were substantively unresponsive to his concerns, leading the Complainant to, in my view, the reasonable conclusion that the Bank "could care less" as he stated in evidence, further demonstrating its intention not to be bound by an essential term of its contract of employment with the Complainant.

144 Consistent with that were Mr. Johnson's October 24 e-mail and the reaction to the e-mail by responsible Human Resources officials. On its face the words used in the October 24 e-mail convey the message that Mr. Johnson is starting the process of removing the Complainant as a member of the MSF, which the Complainant aptly characterized as "being fired off the team". The suggestion in the e-mail that the Complainant's performance difficulties were the result of his "extracurricular activities" questions the Complainant's commitment to the only employer he had known since completing college, which the evidence shows to have been a baseless charge. In response to the Complainant's request for permission to take vacation time, Mr. Johnson could have simply denied the request if the Complainant's participation at the October 31 year-end meeting was as crucial as Mr. Johnson maintained. His response was wholly disproportionate to the question he was being asked, suggesting a deeper motive to pump up an excuse to have him removed.

145 While not amounting to the type of extreme abuse in *Lloyd*, *supra*, the factual circumstances in this case, including the Bank's failure to utilize its own Performance Counselling protocol while asserting performance deficiencies that I have found were vague, unclear and not tied to specific standards, comes within those more subtle forms of employer misconduct relied upon in *Shah*, *supra*, to establish a repudiation of the employment relationship.

Mr. Johnson's October 24 e-mail is, in substance, notice that the Complainant was being unilaterally removed as a residential mortgages manager to an uncertain, if any, future with the Bank, based in substantial part on the bogus assertion that the Complainant's extra-curricular activities interfered with his employment obligations.

146 The parties' reliance upon the ubiquitous e-mail for the most sensitive of workplace conversations as opposed to face-to-face dialogue, held in private, where misunderstandings can be immediately redressed and the dignity of individuals subjected to harsh (even where appropriate) criticism may be reasonably preserved, is problematic because of the potentially imprecise nature of that medium (and the regrettable tendency by some to fire off such messages without adequate thought). If there was any misunderstanding by the Complainant of the October 24 e-mail from Mr. Johnson, it is my opinion that by choosing to communicate such a sensitive message by e-mail, even accepting that he may have acted in a pique of frustration, Mr. Johnson must be held responsible for the consequences of a reasonable interpretation of that e-mail, even if it did not accurately express his true intentions, or with the benefit of hindsight he now wishes he had rephrased or perhaps not sent it at all. The bluntness of that message was exacerbated by his copying this e-mail to the District Manager and the Human Resources Department (likely to bolster its authoritative impact), with the possibility of its further dissemination through the casual click of a mouse. The likelihood of embarrassment to the Complainant in such circumstances, particularly one who valued his good reputation earned through years of dedicated service, is so manifest it could not have reasonably been unintended by Mr. Johnson.

147 I find the reasonable interpretation of the October 24 e-mail to be that the Complainant was being unilaterally transferred out of the MSF to an uncertain future, contrary to the contract of employment. If there was any question about Mr. Johnson's intention, that was clarified in his e-mail to Ms. Spittal sent immediately afterwards asking for "HR assistance and work towards a dehire of [the Complainant]". These actions belie Mr. Johnson's subsequent testimony that he was only suggesting a transfer as an "option" for further consideration or discussion with the Complainant. He clearly wanted him out and was taking active steps to remove him.

148 The Complainant's belief that he was being "squeezed out" was objectively well-founded on these facts. In the context of the Complainant's ongoing (unsuccessful) efforts to have Mr. Johnson fulfill his earlier promises, and the neglect of his prior complaints to the Human Resources Department, the Complainant reasonably felt isolated and confused, with no apparent future at the Bank; and even more so after his access to the Bank's computer system required to transact business was cut off on Mr. Johnson's instructions.. I find that his need for a leave of absence to consider his future with the Bank outside of the MSF, which he maintained was presented to him as an option by Human Resources officials, was inherently likely on a balance of probabilities having regard to all of the surrounding circumstances.

149 Not every imprecise word spoken or written in an e-mail or formal correspondence by a manager or employee, where those words were stated out of frustration or by mistake, ought to forever foreclose the continuation of the employment relationship. Mistakes in the form of loose talk (or e-mail chatter) may be corrected by a retraction and, in appropriate circumstances, an apology. However, if an employer permits sensitive matters respecting the employment status of an employee to be sent through the cold medium of electronic mail, it is my opinion that the failure of the employer to rectify any apparent misunderstanding of its communication in reasonable time, may properly lead to an adverse inference respecting its true motives. Once again, the actions at the time speak louder than the words (and rationalizations) of witnesses after the fact.

150 In this case, as troublesome as Mr. Johnson's e-mail of October 24 is, the delayed response by those responsible for Human Resources management is even more disturbing; and that delay is a factor (among others) leading me to question the *bona fides* of the Bank's subsequent denial of any intent to dismiss the Complainant (or unilaterally remove him from his position in the MSF) and offers of continued employment under the same or a different manager, in all of the circumstances of this case. The evidence is conclusive that in spite of the Complainant registering his confusion at the mixed message he received from Mr. Johnson five days after the October 24 e-mail, neither Mr. Johnson nor anyone from the Human Resources Department clearly retracted, modified or further explained

the intent of Mr. Johnson's e-mail of October 24. The evidence shows that it wasn't until January 16, 2006, almost three months later, after Complainant's counsel had placed the Bank on notice that it was taking the position he had been constructively dismissed, that officials of the Human Resources Department stated that it was not intending to remove the Complainant from his position as a mortgage sales manager and that he could return to work for the same Mr. Johnson at the end of his leave of absence (the "status quo" offer). In the face of such lengthy unexplained delay, little weight can be given to the Bank's words by the time the matter had exploded into litigation. Rather, the Bank's actions speak the loudest about its true intent.

(b) Mitigation Considerations

151 Ms. Pratten's recognition of sufficient "issues" between Mr. Johnson and the Complainant to justify the Bank's June 2006 offer of continued employment with the Complainant reporting to a different manager begs the question: Why did it take so long to come to that realization? On my assessment of the evidence, the Bank constructively dismissed the Complainant and the relationship between the Complainant and Mr. Johnson was manifestly strained if not acrimonious by the October 24 e-mail. The responsible Human Resources officials knew or ought to have reasonably known that as a result of communications the Complainant was having with them since at least mid-August of 2005, yet it did substantively nothing to investigate and (at least try to) remedy those concerns. Perhaps if Ms. Pratten's offer had been made immediately the result may have been different. However, as time passed after the Complainant's leave of absence on January 30, 2006 to June 26 of that year when Ms. Pratten extended the Bank's offer of continued employment reporting to a different manager, in the context of ongoing unjust dismissal proceedings and the Bank's refusal to directly meet with the Complainant in mediation talks, it is understandable that the Complainant's position would have hardened as vestiges of good will towards the Bank evaporated leading to a frayed relationship, while he actively pursued opportunities elsewhere.

152 It is a reasonable inference from the evidence that Ms. Pratten, who only became involved in this matter as a result of the Complainant's commencement of unjust dismissal proceedings under the *Code*, realized the inherent difficulties with the Bank's case and sought to fix the problem with an offer of continued employment reporting to a different manager. As a tactical matter, the offer would also support the Bank's mitigation defence. It is my opinion, however, that the Bank's offer was insufficient as a basis for a mitigation defence in several respects; without considering the problematic consequences of the almost six-month delay in making its offer to the Complainant.

153 The offer is silent on the underlying dispute about the Bank's failure to provide the Complainant with his fair share of e-leads, powers of sale opportunities and introductions to building developers, which I have found the responsible Human Resources officials reasonably or ought to have known at the time, and which was substantially responsible for the significant drop in his income. Without those assurances the Complainant would not likely be able to achieve the goals he expected when he entered into his relationship with Mr. Johnson. The offer does not take into account the difficulties of working for a different manager in a different territory, where the Complainant had no past experience or contacts, and how that might impact his earnings potential, already under severe strain because of the repudiation of earlier promises. The offer does not provide for any compensation to the Complainant for his losses to that point; or any consequential loss as a result of restarting anew in a different area.

154 While Ms. Pratten suggested in her testimony that she would have been willing to discuss some of these issues with Complainant counsel if she had been asked, the Complainant's conclusion that Ms. Pratten's offer did not propose or contemplate such negotiations was objectively reasonable in the circumstances. The Bank's offer, linked as it was to its refusal to meet with the Complainant in direct mediation talks, leads to the inference that in spite of Ms. Pratten's statements on the witness stand suggesting flexibility, the Bank was in fact taking a hard line, using its belated offer as a tactic in an attempt to force the Complainant back to work on its terms, hoping to limit its liability and/or set up more fully its mitigation defence.

155 The foregoing factual context is readily distinguishable from those considered by the Supreme Court of Canada in *Evans*, *supra*. In that case, Mr. Evans' wages and benefits continued for a period of almost six months

while the parties engaged in unsuccessful settlement negotiations; the offer of re-employment came without condition; with the same compensation and benefits (without any overriding allegation of a breach of promises within the relationship); and in the face of Mr. Evans' request for 12 months working notice as a component of his severance package, he was tacitly acknowledging the absence of acrimony or embarrassment and the continuing viability of the relationship.

156 *Farquhar v. Butler Brothers Supplies Ltd.*, *supra*, which the majority of the Supreme Court of Canada expressly approved of in *Evans*, was a case of constructive dismissal where in the face of the employer's reduction of the employee's remuneration by 47% (including salary and benefits), the employer offered to continue the employee's employment on those terms and argued that his refusal to accept that offer constituted failure to properly mitigate his damages. In rejecting that argument, and rather holding that the employee would reasonably find it to be humiliating to return to work under such circumstances (with such a steep reduction in compensation), a unanimous panel of the British Columbia Court of Appeal stated the following (at pp. 3 - 4 in the Quicklaw report of this case):

> The employee is only required to take the steps in mitigation that a reasonable person would take. Sometimes it is clear from the circumstances that any further relationship between the employer and the employee is over. One of the other or both of them may have behaved in such a way that it would be unreasonable to expect either of them to maintain any new relationship of employer and employee. The employee is not obliged to mitigate by working in an atmosphere of hostility, embarrassment, or humiliation. But once the employer is clearly told, by words or equivalent action, that the termination is accepted by the employee, then, if the employer continues to offer a position to the employee, and the position is such that a reasonable employee would accept it, if he were not counting on damages, then the duty to mitigate may require the employee to accept the position, on a temporary basis while he looks for other work, even if it is roughly his old position before the constructive dismissal. Such circumstances may not arise frequently. Very often the relationship between the employer and the employee will have become so frayed that a reasonable person would not expect both sides to work together again in harmony. But sometimes it would be unreasonable for the employee to decline to continue in employment through the period equal to reasonable notice, while he looks for other work....
>
> The cases where there is an obligation to continue in the work force of the employer, under a new employment relationship, following a constructive dismissal, will roughly correspond with those cases where it is reasonable to expect the employment relationship to continue through a period of notice, rather than to end with pay in lieu of notice. There must be a situation of mutual understanding and respect, and a situation where neither the employer nor the employee is likely to put the others' interests in jeopardy. But if there is such a situation, then a reasonable employee should offer to work out the notice period, either where notice is given, or where there is a constructive dismissal and an offer of a new working relationship.

157 *Farquhar*, *supra*, was followed by the British Columbia Court of Appeal in *Cox v. Robertson*, *supra*, which was also approved in *Evans*, *supra*. In *Cox*, the employee had worked as a part-time dental assistant for 18 years for the employer dentist, when she was terminated on one month's working notice, ostensibly so the dentist could employ a new full-time assistant. After the employee commenced legal action, the dentist offered to reemploy her on the same terms as her previous employment until she found alternate work, which she rejected. The trial judge's determination that the employee failed to take reasonable steps to mitigate her loss by refusing to accept re-employment was reversed on appeal. In noting that the trial judge did not refer to the fact that the parties were in litigation at the time the offer of re-employment was made, the unanimous panel of the British Columbia Court of Appeal made the following observations at paras. 16 - 17, which are apposite in the case before me:

> ¶ 6 It might also be different if the offer of re-employment had been made before an action was commenced. In this respect, it is noted that the plaintiff did not rush to litigation. As Mr. Justice Donald mentioned in argument, it is almost amusing, and highly artificial, to say that these two persons should be expected to work closely and professionally together on the same mouths in the morning and then attend examinations for discovery in the afternoon and then continue to work harmoniously again the next day, all the while preparing for a summary trial.

> ¶ 17 As the authorities suggest, a reasonable person might rightly think that in some cases, an employee should accept temporary employment in mitigation of damages. In such cases, the parties did not usually have to interact closely with each other. In this case, however, with the plaintiff and defendant always working side by side, the employment relationship could not have been closer. In my view, no reasonable person would conclude that a dental assistant in these circumstances should be expected to cooperate harmoniously with a dentist who had been unfair to her and to litigate with him at the same time.

158 *Evans*, *supra*, also cited with approval at para. 30 the Ontario Court of Appeal's decision in *Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701 (Ont. C.A.), which was a case of constructive dismissal, for the proposition that a reasonable person would be expected to mitigate by accepting re-employment with the dismissing employee "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious". These were not the factual circumstances before me.

159 On the evidence before me it is clear that the relationship between the Complainant and Mr. Johnson was strained if not acrimonious by the time the "status quo" offer of January 16, 2006 making the prospects of a harmonious working relationship between them unlikely, particularly given the embarrassment the Complainant would naturally feel from the dissemination of Mr. Johnson's October 24 e- mail to the District Manager and Human Resources officials. Ms. Pratten probably realized this in making her subsequent offer of reporting to a different manager. It was not objectively reasonable for the Complainant to accept that offer, in my view, not only for the many deficiencies in that offer noted above (not the least of which would be the likelihood of very low earnings potential without the forms of support promised by Mr. Johnson and the humiliating and financially straining impact of that), but in the context of litigation that had been ongoing for several months, one can readily see that the relationship between the Complainant and the Bank had become so frayed by the passage of time, to quote *Farquhar*, *supra*, "that a reasonable person would not expect both sides to work together again in harmony".. Applying the principles from the foregoing authorities to the facts before me, I therefore conclude it was not objectively unreasonable for the Complainant to reject the offers of continued or re-employment under the same or a different manager in all of the circumstances of this case.

160 The Supreme Court of Canada's decision in *Michaels v. Red Deer College*, [1976] 2 S.C.R. 324 (S.C.C.), is cited in *Cardwell v. Young Manufacturer Inc.*, *supra*, for the proposition that, as applied in the case before me, "The onus is on the [Bank] to assert the [Complainant's] failure to mitigate. The [Bank] must prove not only that the [Complainant] failed to take reasonable steps, but also that if he had, he would likely have obtained other employment" (at para. 70).

161 While the Bank argued the Complainant did not take adequate steps to mitigate by applying for other positions at the Bank (not including the two offers he received), no evidence of any specific position at the Bank reasonably available to the Complainant in the relevant timeframe was placed before me. There was nothing submitted by the Bank to challenge the Complainant's testimony that he took all reasonable efforts to mitigate his losses in his job search strategy.. Rather, I find on the extensive volume of documentation filed by the Complainant that his mitigation efforts were satisfactory. The fact that once he ultimately secured alternate employment in a discount mortgage brokerage that his commission earnings in the first five months was $80,000 suggests (even accounting for the possibility of some reduction due to sales that didn't close) that the Complainant has the kind of selling potential for residential mortgages that would have resulted in his and the Bank's anticipated earnings of at least $100,000, had the Bank given him the promised support in fulfilling its contractual obligations.

(c) Calculation of Damages

162 That observation leads to the consideration of the appropriate measure of the Complainant's damages in this

case. Section 242(3) (a) of the *Code* confers jurisdiction to "consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon;" and section 242(4) defines my remedial authority as follows:

> 242 (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 employee 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 is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

163 The objective of assessing damages for breach of contract is to place the parties in the position they would have been had the contractual obligations been fulfilled. In an assessment of damages for unjust dismissal under the *Code*, it is accepted that the intention of the remedial provisions is not limited to the amounts that might be awarded at common law for payment in lieu of adequate notice, but rather "it is designed to fully compensate an employee who is unjustly dismissed": per O'Keefe J. in *Manitoba Assn. of Native Fire Fighters Inc. v. Perswain*, *supra*, at para. 30. Since the Complainant does not seek reinstatement, and has limited his recovery of damages to the point he secured alternate employment, given my conclusion he was not obliged to mitigate by taking the "status quo" offer or Ms. Pratten's subsequent one, I accept the Complainant's submission that his measure of damages should be calculated for the one year period from January 30, 2006 to February 1, 2007.

164 It is my opinion that the evidence in the present case compels the conclusion that had the Bank fulfilled its contractual obligations by providing the Complainant with the support he was promised by Mr. Johnson, both the Bank and the Complainant reasonably anticipated the Complainant's gross earnings to be at least $100,000 per annum in a relatively short period; but certainly by the second year in that role at the time of Mr. Johnson's October 24 e-mail. Thus, in order to fully compensate him for his losses from January 30, 2006 to February 1, 2007 in accordance with section 242(4)(a) of the *Code*, the Complainant is entitled to damages calculated on the basis of $100,000 gross annual earnings. He is also entitled to compensation for any loss of health and welfare and/or other benefits he would have normally received from the Bank in that interval.

165 I therefore order the Bank to pay the Complainant damages for unjust dismissal in the sum of $100,000 to provide him, restating the words of section 242(4) (a), with "the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the [Bank] to the [Complainant]." The Complainant is also entitled to the monetary value of any benefits he would have received in the relevant period in order to make him whole. The precise sum is remitted to the parties to determine within the foregoing principles, failing which I will remain seized to resolve any disputes.

(d) Interest and Legal Costs

166 No reason was suggested to deny the Complainant an award of interest on his damages in accordance with principles set out in *Banca Nazionale del Lavoro of Canada Ltd. v. Lee-Shanok*, *supra*, and my authority under section 242(4) (c) to "do any other like thing that is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal".. Interest is therefore ordered on the Complainant's damage award pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended and applicable *Rules* thereunder or as otherwise agreed.

167 There was also no reason advanced to deny the Complainant his reasonable legal costs in the event of his

success in this matter. In *Misty Press v. 942260 Ontario Ltd.*, [2003] C.L.A.D. No. 398 (Can. L.R.B.) (Luborsky), I examined the governing principles on the question of the appropriate scale of legal costs at paras. 8 - 10, that apply in the present circumstances:

> ¶ 8 Allanport did not dispute my authority to award costs under the *Canada Labour Code*, R.S.C. 1985, c. L-2, as amended. I accept as a correct statement of the law on the quantum of costs to be awarded to a successful party in cases of this nature, the following by Adjudicator Kuttner in *Polchies v. Woodstock First Nation*, [2002] C.L.A.D. No. 441, at paragraph 21:
>
> > para. 21 Counsel has requested the awarding of costs to the complainant on a solicitor-client basis. Since the decision of the Federal Court of Appeal in *Banca Nazionale del Lavoro of Canada Ltd.*, *supra*, the jurisdiction of an adjudicator to award costs is beyond question. There, Justice Stone found that jurisdiction to be grounded in section 242(4)(c) inasmuch as "legal costs incurred would effectively reduce compensation for lost remuneration, while their allowance would appear to remedy or, at least, to counteract a consequence of the dismissal" (at p. 12,182). As Adjudicator Bruce noted in *Re. Tina Paul*, *supra*, that legal costs in cases such as this have been incurred over a lengthy period of time is self-evident. Here, as there, the complainant has incurred the legal costs associated with the pursuit of this complaint over a significant period of time and it would be unfair to place the burden of those costs on him. However, ordinarily costs are not awarded on a solicitor-and-client basis but at a lower tariff whether part-and-party or otherwise. Nevertheless, in the appropriate case solicitor-and-client costs may be awarded. In the *Banca Nazionale* case Justice Stone addressed the matter as follows:
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> > > "Even in the courts, that sort of award is ordered "only in rare and exceptional circumstances to mark the court's disapproval of the parties' conduct in this litigation" (*Isaacs v. MHG International Ltd.* (1984), 45 O.R. (2d) 693 (Ont. C.A.) at page 695), and a judge must be "extremely cautious in departing from the general rule" that only part-and-party costs should be allowed a successful litigant (*Vanderclay Development Co. v. Inducon Engineering Ltd. et al.*, [1969] 1 O.R. 41 (Ont. H. C.), at page 48). An extraordinary award of this kind ought only to be made in circumstances that are clearly exceptional, as would be the case where an adjudicator wishes thereby to mark his disapproval of a party's conduct in a proceeding." (p. 12,183).
>
> ¶ 9 Applying the foregoing principles, it is my view that the Appellant is entitled to her reasonable legal costs; however, there were no exceptional circumstances presented by the conduct of either party in this case warranting a costs award outside of the usual partial indemnity (part-and-party) scale....

168 In the present case I similarly do not find anything in the conduct of the parties in litigation to justify the extraordinary award of costs on a full indemnity (solicitor-and-client) basis as urged by the Complainant. Therefore, in accordance with the foregoing I order costs in this matter to be assessed on partial indemnity scale as agreed upon by the parties or, in the absence of agreement remitted to me for settlement.

V. Disposition

169 I declare that the Complainant was unjustly dismissed and order the Bank to pay him damages in accordance with section 242(4) (a) of the *Code*.

170 He is entitled to compensation to make him whole for all loss of earnings and any benefits he would have otherwise received from January 30, 2006 to February 1, 2007. But for the breach of contract by the Bank, the Complainant would have reasonably expected gross annual earnings of $100,000 in that timeframe, which the Bank is hereby ordered to pay to the Complainant as part of its remedial obligation, in the same manner and with the same withholdings, if any, the Bank would otherwise have paid to the Complainant had he been employed as a residential

mortgages manager. He is also entitled to compensation for any lost benefits in the relevant period.

171 The precise calculation of the total damage entitlement is remitted to the parties to determine. The Bank is ordered to pay interest on the total sum owing and the Complainant's legal costs calculated on a partial indemnity (party-and-party) scale.

172 If the parties cannot resolve the final amount owing to the Complainant including interest and/or legal fees, they may remit such matters back to me that I will determine on the written representations of the parties (no more than 5 pages in total length by each and 3 pages in reply) to be received within 30 calendar days of the release of this award.

173 I shall remain seized to resolve such disputes and any other issues respecting the implementation of this award.

Action allowed.

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