

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

No. 438 of 2005

BETWEEN

MARGARET WHARTON	PLAINTIFF
AND	
BANK OF NOVA SCOTIA	DEFENDANT

Before: The Honourable Madam Justice Kaye Goodridge, Judge of the High Court

2008: May 26, 27; July 1

2009: July 27, 28; September 23

2010: March 22;

2013: June 28

Mr. Vernon O. Smith Q.C and Ms. Lisa R. Greaves of Messrs. Smith and Smith for the Plaintiff

Mrs. Alicia Richards-Hill of Messrs. Yearwood and Boyce for the Defendant

DECISION

Introduction

[1] This is an action in which the plaintiff has sued the defendant for damages for constructive dismissal.

- [2] The plaintiff was employed by the defendant from 9 December 1976 until her resignation in October 2004. The defendant is a financial institution carrying on the business of banking in Barbados, with its principal office located at Broad Street in the City of Bridgetown.
- [3] During the course of her employment with the defendant, the plaintiff held several positions, the last one being District Relationship Officer (DRO) for the Haggatt Hall, Wildey and Worthing branches. The plaintiff assumed this position in January 2004 and it is the events which took place afterwards which form the subject matter of this action.

The Pleadings

The Claim

- [4] By Writ of Summons filed on 4 March 2005, the plaintiff sought damages for constructive dismissal in the sum of \$81,875.78; general damages for mental, psychological and physical injury; interest and costs.
- [5] The plaintiff claimed that during the year 2004, after her promotion, she suffered harassment, more particularly that:
 - (a) Mr. Ervin Bowen (Mr. Bowen), Assistant Manager - Personal Banking at the Haggatt Hall branch of the defendant on several occasions during the period January 2004 to August 2004 attempted to place his hands on the plaintiff's jacket zipper while threatening to pull the said zipper down;
 - (b) During the period January 2004 to September 2004 Mr. Larry Kinch (Mr. Kinch), Manager of the Haggatt Hall branch of the defendant repeatedly used offensive language in the presence of others while discussing work with the plaintiff;

(c) In or around August 2004, Mr. Bowen during the course of business with one of the plaintiff's customers shouted that the plaintiff "was a fucking cunt and did not know what she was doing";

(d) In or around September 2004, Mr. Kinch repeatedly stated to the plaintiff that "the only thing that you are becoming famous for is being a thief".

[6] It is the plaintiff's claim that by reason of this harassment, she was forced to give up her employment with the defendant. She was therefore constructively dismissed, deprived of her salary and emoluments and consequently suffered loss and damage.

The Defence

[7] The defendant denied having dismissed the plaintiff and contended that she voluntarily withdrew herself from its employment. The defendant made no admission as to any alleged mental, psychological and physical injury, loss or damage and denied being indebted to the plaintiff in the amounts alleged or at all.

The Plaintiff's Case

[8] The plaintiff gave evidence and called two witnesses, Ms. Nancy Brathwaite, (Ms. Brathwaite) a customer of the defendant, and Dr. Stephen King (Dr. King), a registered medical practitioner, in support of her case.

The Plaintiff's Evidence

[9] The plaintiff testified that as DRO her duties were to maintain and develop the customer portfolio for high tiered customers whose net value or assets exceeded \$250,000. She visited customers from time to time, and met with them at the respective branches. She also met with the managers at the other branches.

[10] The plaintiff gave evidence that shortly after taking up the post of DRO, Mr. Bowen developed the habit of approaching her and threatening to pull down the zip of her jacket, and she would tell him "not my jacket" while holding it at the top. Mr. Bowen would reply "I ain't gine really do this, this is just our way of having fun in here".

[11] The plaintiff testified that Mr. Kinch had difficulty with the amount of time which she spent away from the branch dealing with clients at the other two branches and often

demanded to know of her whereabouts throughout the day. There were occasions on her return to the branch when Mr. Kinch quarrelled with her, used abusive language and cursed her. Sometimes this would be done in the presence of other staff members.

- [12] The plaintiff gave evidence that in late August 2004, Mr. Kinch told her on a couple of occasions that he and the other managers thought that all she was doing was gaining the reputation of becoming a thief - that she was stealing the branch's customers.
- [13] The plaintiff testified that she went on holiday in August 2004 and on her return she discovered that one of her customers, Ms. Brathwaite, had left an urgent voicemail for her. She called Ms. Brathwaite, who complained that during the course of business with her, Mr. Bowen referred to the plaintiff by saying that she "was a fucking cunt and did not know what she was doing".
- [14] The plaintiff called Mr. Anthony Brathwaite, the District Sales Manager and reported the matter. Mr. Brathwaite visited the branch, first spoke with Mr. Bowen and then called her into the office.
- [15] Mr. Brathwaite told the plaintiff that Mr. Bowen had denied the allegation. He then asked Mr. Bowen why the customer would say such a thing if it had not occurred. Mr. Bowen replied that he knew Ms. Brathwaite since they had grown up next door to each other and admitted that she would have no reason to say something like that if it was not true. After failing to get a confession from Mr. Bowen, Mr. Brathwaite said that he would speak to Mr. Bowen himself and the meeting ended.
- [16] A few days later the plaintiff attended a luncheon meeting with Mr. Brathwaite at which she was informed that he had spoken to Ms. Brathwaite and Mr. Bowen and the latter had admitted using the words. He asked whether Mr. Bowen had extended an apology and the plaintiff replied that he had not. The plaintiff then told Mr. Brathwaite about all of her complaints, about her zipper and Mr. Kinch's abusive behaviour. He said that he would speak to the officers.
- [17] The plaintiff testified that she told Mr. Brathwaite that she no longer wanted to work at that location, because it was stressful and as a result that she was having headaches. She had spoken to her doctor and priest and they had both agreed that that was not an environment to be working in.

[18] Mr. Brathwaite offered her a position at the Black Rock branch, which was a cross between the posts of District Officer and Loans Officer. The position would have been a diminution in status, but she would continue to be paid at the same rate. The plaintiff stated that she went home, thought about it, prayed about it, and made the decision to resign. She felt that by taking the position it would appear as if she had done something wrong and she needed to be demoted and this was not satisfactory. She therefore wrote a letter of resignation.

[19] The plaintiff was subsequently notified by Mr. Kinch that her services were being terminated with immediate effect but that she would be paid to the end of October 2004, when her resignation would take effect. She was given a termination letter dated 4 October 2004, a cheque, and told to leave immediately. The letter, which was signed by Mr. Kinch, stated in part:

“Dear Mr. Wharton,

We acknowledge receipt of your letter of resignation dated September 20, 2004 and effective October 31, 2004. In our subsequent discussion you advised that you have been accepted for employment by CLICO with responsibility for an investment portfolio. Margaret, unfortunately your new job appears to be a conflict of interest since it would indeed be competitive to your current duties at the Bank. We therefore think it would be in the best interest of both parties to sever the relationship with immediate effect. However, inasmuch as your advised date of resignation is October 31, 2004 you will be paid until that date. Also, any monies owing for vacation will be paid.”

[20] The plaintiff gave evidence that she had been in discussions with CLICO International Life Limited (CLICO) about a post as an insurance agent, and after meeting with the company’s representative, she was advised that she needed to write an examination for which she studied from October to December. On receipt of her insurance certificate, the plaintiff was employed with the company from February 2005.

[21] Under cross-examination, the plaintiff maintained that Mr. Kinch used abusive language on several occasions and that this occurred in one instance in the presence of Mr. Bowen and

Ms. Icilma Fagan. The plaintiff stated that she did not at any time express her dissatisfaction at this verbal abuse to Mr. Kinch, nor did she ask him to refrain from using such language because she did not like to be complaining. She said that she reported it when “things got out of hand”.

[22] Under further cross-examination, the plaintiff said that there was a chain of communication for employees at the bank who had questions or concerns about any issue and that there were places and persons to whom an employee could report any grievance or concern.

[23] The plaintiff maintained that Mr. Kinch did tell her that she was gaining a reputation of being a thief, and that she was stealing the bank’s customers. She stated that she complained to Mr. Brathwaite after her return to work from their luncheon meeting about Mr. Kinch’s use of those words.

Ms. Brathwaite’s Evidence

[24] Ms. Brathwaite gave evidence that she had experienced problems accessing funds from her mortgage account and this prompted her to speak to Mr. Bowen, who invited her to come into the bank to see him. She testified that while discussing the problem with Mr. Bowen, he said that the plaintiff did not know what she was doing and that she was a “fucking cunt”. She felt “embarrassed and appalled” by the way he responded to her in front of customers. She spoke to the plaintiff about the incident and lodged a complaint with Mr. Stephen Cozier. As a result, Mr. Brathwaite conducted an investigation into the matter.

[25] Under cross-examination, Ms. Brathwaite stated that she had worked at the bank for 16 years and knew Mr. Bowen’s behaviour was not proper behaviour. She further stated that Mr. Bowen had to shout the words at her in the open bank since she was not close enough to him.

Dr. King’s Evidence

[26] Dr. King gave evidence which supplemented the report which he had prepared on the plaintiff. He testified that the plaintiff had been a patient of his since September 1998. He testified that the plaintiff consulted him about a situation at her workplace on three occasions in 2004, namely 4 March, 10 July and 5 September. Dr. King stated that the plaintiff gave a history of harassment from her Manager, almost immediately

after assuming duties at the Haggatt Hall Branch. The plaintiff related to him that within the first month an Assistant Manager told her “bet you I pull down your zip”. There was conflict with the Manager who would become annoyed at the length of time she was away from the branch while she visited the other branches. That Manager would “carry on bad” sometimes in the presence of senior staff and customers.

[27] The witness testified that the plaintiff stated that she felt that she was “not treated as a human being” and hated going into the building on mornings. The plaintiff complained of headaches, shortness of breath while at work and insomnia at times. A physical examination revealed no significant abnormalities. Based on the history and the examination findings being negative, Dr. King concluded that the plaintiff was suffering from “situational anxiety”. In his opinion the plaintiff was very stressed at work and she indicated that just the thought of the situation made her “real vex”.

[28] Under cross-examination, Dr. King stated that he was not a psychiatrist and did not deem it necessary to refer the plaintiff to one because she was not suffering from a psychiatric illness. Anxiety was a common complaint which he treated during his practice. On the specific occasions that he saw the plaintiff it was apparent that she was suffering from anxiety. The plaintiff did not say whether she had spoken to anyone at her workplace about the situation.

The Defendant’s Case

[29] The defendant called three witnesses to give evidence on its behalf: Mr. Kinch, Branch Manager, Haggatt Hall Branch, Mr. Bowen, Personal Banking Manager and Mr. Brathwaite, Vice President of Sales and Services Scotiabank International Division. Mr. Kinch and Mr. Bowen both denied the plaintiff’s allegations of harassment.

Mr. Kinch’s Evidence

[30] Mr. Kinch testified that as Branch Manager he was in charge of the entire operations of the Haggatt Hall branch. As DRO, the plaintiff’s time was allocated as follows: one day each for the Worthing and Wildey branches and three days for Haggatt Hall because this branch had the most customers. Problems occurred sometimes because the plaintiff did not go to a branch on a designated day and on occasion he would receive a call from the manager of that branch. When he eventually located the plaintiff she would be at the

other branch dealing with a customer. He told the plaintiff that when she was attending a branch other than the prescribed one that she needed to inform him of this.

[31] Mr. Kinch testified that targets or goals had been assigned to the plaintiff's position as was the case with all other positions. The plaintiff was never ahead of her goals. There was a coaching programme which required all employees to report to their supervisors and where the employees would indicate what their challenges were. He said that regular follow-up had to be done in order to obtain the coaching template from the plaintiff. He referred to the plaintiff's performance appraisal where the plaintiff was graded at 3 which meant that improvement was required.

[32] The witness testified that the environment at Haggatt Hall was a healthy and good one and that the staff had good relations at all levels. He stated that he had a very good working relationship with the plaintiff and considered himself to be a professional, caring manager.

[33] Mr. Kinch denied using any offensive or abusive language to the staff and stated that he had no recollection of using offensive language either to, or in the presence of, the plaintiff while discussing business, or of her speaking to him about his conduct towards her or in her presence.

[34] Mr. Kinch denied that he told the plaintiff that "the only thing you are becoming famous for is being a thief". His evidence is that there was a practice that, when an employee left a branch to go to another branch, the customers were handed over to the employee's replacement. Movement of customers from branch to branch was discouraged, and every employee in the sales area was fully aware of the bank's policy in this regard. Mr. Kinch testified that the terminology used to describe the practice of encouraging customers to move from branch to branch was known as "stealing accounts" and the plaintiff was aware of this.

[35] Mr. Kinch gave evidence that, after receipt of the plaintiff's resignation in September 2004, he received information from one of the bank's high tier customers that the plaintiff was going to work for CLICO and she had enquired whether he would mind if she contacted him at a later date.

[36] After discussions with the HR department and Mr. Brathwaite, it was decided that it would be in the best interest of all parties if the relationship was severed prior to the

formal resignation date. The reason for this was that the bank had a policy relating to conflict of interest for employees going to similar financial institutions. The plaintiff was notified of the bank's decision by discussion and by letter of 4 October 2004 which was delivered to her on that date. The plaintiff was asked to hand over all files and keys which she did and was told that she was free to go. The plaintiff left later that day.

- [37] Mr. Kinch did not recall the plaintiff having sick leave for any stress related condition while employed at the branch, nor did he recall her indicating that she was experiencing any form of stress.
- [38] Under cross-examination, Mr. Kinch stated that the plaintiff confirmed that she was leaving the bank to go to CLICO. He became aware of the incident with Mr. Bowen during his vacation. On his return, he was advised by Mr. Brathwaite that the matter had been investigated and resolved and he was provided with evidence of the disciplinary action taken against Mr. Bowen.
- [39] Under further cross-examination, Mr. Kinch stated that he accused the plaintiff of taking accounts or customers from other branches to Haggatt Hall. He could not recall the specific date he spoke to the plaintiff about stealing accounts but said that it did not occur in August. Mr. Kinch stated that there was a time when the sum of \$25,000 could not be accounted for at the branch, but he could not recall if this was in August 2004.
- [40] Again under cross-examination, Mr. Kinch stated that Mr. Brathwaite never told him that he had a complaint from the plaintiff about his using abusive language to her. He denied that Mr. Brathwaite told him that the plaintiff did not want to work at the branch any longer or that she could no longer remain there because of his and Mr. Bowen's behaviour.

Mr. Bowen's Evidence

- [41] Mr. Bowen gave evidence of an excellent working relationship with the plaintiff and stated that she relied on him for assistance from time to time. He stated that he did not use obscene language to the plaintiff, staff or others with reference to her.
- [42] Mr. Bowen recalled an incident in August 2004 with Ms. Brathwaite but he never shouted the words complained of, although he did not recall what he had said. However, he admitted that he was a bit flustered and angry during the encounter, because he had

discovered a number of mistakes made by the plaintiff that morning which he had to address.

- [43] The witness stated that, when questioned by Mr. Brathwaite, he denied the allegation and Mr. Brathwaite asked him why would Ms. Brathwaite say so. He responded that he had known her since childhood and if he had said anything out of the way to her, he was surprised that she did not indicate such to him.
- [44] During the meeting with the plaintiff, the witness stated that Mr. Brathwaite informed him that if the allegation was true, such behaviour would not be tolerated and he would be disciplined for it. Also, he was informed that if such language is used to or in the presence of a staff member, it can be construed as harassment. At this point the plaintiff said "by the way, you attempted to pull my zipper, on occasion".
- [45] In response the witness told the plaintiff that this had happened on one occasion soon after she came to the branch and he made the comment jokingly as part of her initiation. The plaintiff did not refute his statement during the meeting. The plaintiff was then asked by Mr. Brathwaite if she was still comfortable working at the branch and she replied in the affirmative.
- [46] Mr. Bowen stated that disciplinary action was taken against him and he was issued with a performance improvement programme (PIP) at the advanced level. He admitted to signing the PIP because he realized that as someone at his level in the bank he should not have reacted in an angry manner and that his behaviour was unprofessional. The document was placed on his file for two years. This meant that if there was a repeat of such behaviour, it would have led to instant dismissal. After the incident was reported, his relationship with the plaintiff continued to be very cordial.
- [47] Mr. Bowen testified that he never heard Mr. Kinch use abusive or offensive language while discussing work with the plaintiff nor did he hear him use offensive language in the presence of the plaintiff.
- [48] Under cross-examination, Mr. Bowen said that Mr. Brathwaite did not speak to him about pulling at the plaintiff's zipper, as this was not part of the complaint. He maintained that he did not use the words reported by Ms. Brathwaite and that he could not recall what he had said. He denied using curse words during his normal conversations at the

bank. He stated that he spoke to the plaintiff in jest and said that he would pull her zipper but this occurred only once. He never attempted to pull the plaintiff's zipper.

Mr. Brathwaite's Evidence

- [49] The final witness for the defendant was Mr. Brathwaite who is now based in Canada. Mr. Brathwaite testified that at the material time he was the District Sales Manager. He stated that the plaintiff never expressed to him any issues which she was having with Mr. Kinch at any time. She never complained that he repeatedly used indecent language in the presence of others when discussing work with her, nor did she state that he repeatedly told her that the only thing she was becoming famous for was being a thief.
- [50] According to Mr. Brathwaite the term "stealing accounts" is commonly used within the banking industry in Barbados and in North America. He recounted his receipt of a call from the plaintiff and his investigations into the incident. Mr. Brathwaite testified that he informed Mr. Bowen that if it was ever proven that he had used the words complained of, or any language deemed offensive to others, such language could be construed as harassment or sexual harassment under the bank's guidelines.
- [51] Mr. Brathwaite testified that the plaintiff indicated that Mr. Bowen had on an occasion made a gesture to her about pulling down the zip on her blouse and Mr. Bowen responded that he did recall making some smart comment that for initiation at the branch they pull on those zips. He then said that that type of behaviour was not acceptable if in fact it did happen. The matter was not pursued because the plaintiff did not indicate that she had strong objection to it or that she was making a formal complaint in that regard after Mr. Bowen's response.
- [52] The plaintiff said that she was still comfortable working at the branch with Mr. Bowen and he informed Mr. Bowen that he would meet with him separately with respect to the disciplinary action to be taken.
- [53] Consequently, Mr. Bowen was disciplined and placed on the PIP and an advice was placed on his file for two years. On the PIP it was noted that Mr. Bowen had used "inappropriate and unprofessional language in comments made with respect to another staff member".

- [54] Mr. Brathwaite said that he met with the plaintiff in early September, after he was advised that she had been making inquiries about her pension. At this meeting, the plaintiff stated that she was finding the bank too stressful and was thinking of moving on. Mr. Brathwaite then told the plaintiff that if she was resigning because she was not comfortable at the branch, he was prepared to relocate her at the Black Rock branch in a similar position.
- [55] He asked the plaintiff what she planned to do if she did resign and she said that she had an offer from Yellow Pages as a sales representative and that she had an interview on the following Saturday with CLICO for an investment sales position.
- [56] The plaintiff subsequently informed him that she had been successful in obtaining the job at CLICO and that she would be resigning from the bank. The plaintiff resigned.
- [57] Mr. Brathwaite's evidence is that the plaintiff did not speak to him about her work environment as far as he could recall. She did not tell him about any harassment she was facing or any stress which she was experiencing, apart from the comment made at the meeting.
- [58] Under cross-examination, Mr. Brathwaite stated that under the Bank's guidelines, the words which Mr. Bowen was reported to have used and his gesture about pulling down zips could be construed as sexual harassment. He stated that he offered the plaintiff another job at another branch because he wanted to be satisfied that the plaintiff was resigning of her own free will and not because of what had happened. He said that he had no reason to doubt what the plaintiff had told him about her "comfort level in continuing to work with the Bank of Nova Scotia".
- [59] Under further cross-examination, Mr. Brathwaite stated that he knew that the plaintiff had been working at the bank for quite a long time, some twenty odd years, and that it was not normal that someone who had put in a long time at the bank would give it up, but it happens.

The Issues

- [60] The following issues arise for the court's determination:

1. Was there a breach of the contract of employment between the plaintiff and the defendant, and if so, was it such a serious breach that it amounted to constructive dismissal?
2. Is the plaintiff entitled to recover damages?

Issue No. 1 - Was there a breach of the contract of employment between the plaintiff and the defendant, and if so, was it such a serious breach that it amounted to constructive dismissal?

[61] The relationship between the plaintiff and the defendant was governed by an employment agreement dated 24 December 1976 and a letter of 6 February 2004 confirming her appointment as DRO. The employment agreement set out the plaintiff's obligations to the defendant, namely (i) to serve honestly and diligently at all times; (ii) to observe strict secrecy of the systems and procedures of the bank; (iii) to account for and pay over all money, securities and other property which came into her custody; (iv) to reimburse the bank for any loss suffered as a result of misapplication or misappropriation of any money, and (v) to join the pension fund and to authorize the deduction of contributions from her salary. The letter of confirmation of employment merely set out the plaintiff's salary and salary range. No reference was made in either document to the defendant's obligations as employer.

The Submissions

The Plaintiff's Submissions

- [62] Mr. Vernon Smith, Q.C, counsel for the plaintiff, submitted that an implied term of trust and confidence is an essential term of any contract of employment. He relied on the case of *Woods v W.M Car Services [1981] ICR 666* where **Browne-Wilkinson J** stated in reference to this implied term at **page 672** that "any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract".
- [63] Mr. Smith, Q.C submitted that the plaintiff had established, on a balance of probabilities, that Mr. Bowen had used abusive and offensive comments about the plaintiff, and that the

use of such language within earshot of customers constituted a significant breach of the implied term of trust and respect. In support of his submission counsel cited the case of ***Palmanor v Cedron [1978] ICR 1008***.

- [64] Counsel contended that the use of the word “stealing” by Mr. Kinch when he told the plaintiff that she was getting into the habit of stealing accounts connoted dishonesty on the plaintiff’s part, especially in light of the fact that \$25,000 went missing from the branch and could not be accounted for. This he stated was also a breach.
- [65] He further submitted that the action of Mr. Bowen in threatening to pull down the plaintiff’s “zipper” constituted sexual harassment. Mr. Smith asked the court to accept the plaintiff’s evidence that Mr. Kinch used abusive language when he spoke to her, and that this behaviour, coupled with that of Mr. Bowen, amounted to a serious breach going to the root of the employment contract. This was a repudiation of the contract by the defendant which was accepted by the plaintiff when she resigned. The plaintiff was therefore entitled to terminate the contract as a result of conduct amounting to a significant breach and was constructively dismissed. He relied on the case of ***Western Excavating (EEC) Ltd v Sharp [1978] 1 All E R 713 (Western)***.

The Defendant’s Submissions

- [66] Relying on the case of ***Courtaulds Northern Textiles Ltd v Andrew [1979] I.R.L.R 84***, Mrs. Alicia Richards-Hill, counsel for the defendant, submitted that the defendant had an implied duty to its employees, and by extension the plaintiff, whilst she was in its employ, to preserve the trust and confidence that an employee should have in her employer.
- [67] Mrs. Richards-Hill submitted that the plaintiff had failed to prove that the defendant, by its servants and/or employees, conducted itself in such a manner so as to destroy the relationship of trust and confidence with the plaintiff. She contended that the defendant was not made aware of any alleged improper conduct on the part of its employees save and except for the incident with Mr. Bowen and the customer. That incident was promptly investigated and dealt with in accordance with the defendant’s guidelines for professional conduct.
- [68] Counsel submitted that the failure of the plaintiff to bring the complaints of alleged inappropriate behaviour by the defendant’s employees to its attention deprived it of the

opportunity to conduct its investigations into the same and offer redress to the plaintiff. In such a case, counsel argued, it could not be said that the defendant created or fostered a situation which led to a breach of the mutual trust and confidence.

[69] It was also submitted by Mrs. Richards-Hill that, if it was established that the defendant was in breach of mutual trust and confidence, the question then becomes whether the plaintiff's resignation was in response to that breach. Counsel submitted that the case of ***Meikle v Nottinghamshire County Council [2005] I.C.R 1*** established that an employee will be held to have waived any breach by the employer or be deemed to have elected to affirm the contract of employment if she does not resign soon after the conduct of which she alleges amounted to a repudiatory breach of contract leading to the constructive dismissal.

[70] Counsel submitted that the evidence has shown that the defendant always maintained the mutual trust and confidence of the plaintiff and that the plaintiff's resignation from the defendant was solely in response to an offer of employment from CLICO and not as a result of any alleged breach by the defendant.

Discussion

[71] In every contract of employment, there is an implied term that the employer will not "without reasonable and proper cause, conduct itself in a manner calculated as likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" - ***Volume 16, Halsbury's Laws of England, Fourth Edition, at para 47.***

[72] There is no doubt that there was an implied term of mutual trust and confidence in the contract of employment between the plaintiff and the defendant. The defendant was therefore under a duty to ensure that its servants or agents, did not, by their conduct, destroy or seriously damage the relationship of trust and confidence which existed between the parties.

[73] In ***Western***, Lord Denning M.R made the following statement at ***p 717***:

"If an employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from

any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

- [74] According to *section 19(1) of the Severance Payments Act, Cap. 355A, (The Act)* constructive dismissal occurs when an employee terminates the contract of employment in circumstances in which he is entitled to terminate it by reason of the employer's conduct. The employee may terminate the contract with or without notice. It is not necessary for the employee to inform the employer at the time of termination of the reason for leaving the employment; the test is simply one of causation: was the employee's departure caused by the employer's conduct?
- [75] A court which is considering whether an employer's conduct entitled the employee to terminate the contract, must bear in mind the dicta of **McCardie J.** in re **Rubel Bronze and Metal Company Limited v. Vos [1918] 1 K.B.315** at 322:
- "In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and on the general circumstances of the case."

The Conduct of the Defendant's Employees

- [76] The plaintiff alleged that she suffered sexual harassment from Mr. Bowen, (who was one of the defendant's senior employees) in that he had a habit of approaching her and threatening to pull her zipper, while saying that he would not pull it and that this was just a way of having fun. When the issue was raised in the meeting with Mr. Brathwaite, Mr. Bowen did acknowledge that he may have made some smart comment to the plaintiff shortly after she came to the branch. Dr. King's evidence is that the plaintiff reported that this behaviour occurred within her first month at the branch.
- [77] Having seen and heard the witnesses and having analysed the evidence, I find as a fact that this behaviour occurred on occasions during the early part of the plaintiff's tenure at the branch. This type of behaviour in the workplace is clearly inappropriate and must be deprecated. It is not the kind of behaviour expected of a senior member of any

institution. Mr. Bowen's conduct constituted sexual harassment and was a serious breach of the employment contract.

- [78] There is the allegation that Mr. Kinch told the plaintiff that she was gaining a reputation of being a thief, and that she was stealing the branch's customers. Mr. Kinch denied calling the plaintiff a thief and his evidence is that he told her that she was "stealing accounts". I observed Mr. Kinch's demeanour during cross-examination, and when pertinent questions were put to him about his conduct towards the plaintiff, he became uncomfortable, and hesitated before responding. I find as a fact that Mr. Kinch was untruthful. I accept the plaintiff's evidence and find as a fact that Mr. Kinch did use the words alleged by the plaintiff.
- [79] The other complaint of the plaintiff is that Mr. Kinch used abusive language, cursed, and generally spoke to her in a quarrelsome manner because of her absence from the branch when she visited the other branches. Mr. Kinch said that he had no recollection of using offensive language to the plaintiff but stated that problems occurred sometimes, because he would receive calls from the other managers about the plaintiff's absence and he had to speak to her about this. Dr. King's evidence is that the plaintiff said that Mr. Kinch would "carry on bad".
- [80] An employee is entitled to be treated with civility, decency, respect and dignity by his/her employer and the employer's other employees especially those in positions of authority. It is clear that Mr. Kinch resented the plaintiff's absences from the branch even though it was her duty to visit other branches. I accept the plaintiff's evidence that Mr. Kinch's language during their discussions fell far short of the standards which ought to exist in a work environment such as a bank. I therefore find as a fact that Mr. Kinch used offensive language to the plaintiff.
- [81] I accept Ms. Brathwaite's evidence of what she said that Mr. Bowen said to her about the plaintiff and find as a fact that Mr. Bowen used the language attributed to him in reference to the plaintiff. It seems implausible that Mr. Bowen could not remember what he said but was adamant that he did not use the words alleged. Mr. Bowen was not a credible witness, and I find that his evidence was untruthful. The action taken by the employer against Mr. Bowen clearly shows that it believed the allegation of the plaintiff. While it is true that the language was not used in the plaintiff's presence, it was

used when other customers were in the vicinity and it is not unreasonable to assume that it was heard by some of them. The language used by Mr. Bowen was most intemperate and amounted to a serious breach of the plaintiff's contract of employment.

[82] I accept the plaintiff's evidence that, although she was aware of the grievance procedure established by the defendant, she did not avail herself of it at the time because she did not like to complain and only did so "when things got out of hand". The plaintiff had been employed by the defendant for more than 20 years and undoubtedly must have felt some commitment to her employer.

[83] The final submission of the defendant was that the plaintiff's resignation was due to an offer of alternate employment from CLICO. The fact that an employee has another job to go to may not prevent a finding of constructive dismissal if the employer's conduct was the main operative cause of the resignation - *Walker v Josiah Wedgwood & Sons Ltd [1978] IRLR 105*. The employer's conduct must be a significant breach going to the root of the contract of employment and the employee's resignation must be in response to that breach.

[84] The plaintiff was 53 years old at the time, with retirement some way in the future. She held a junior management position. The evidence of Mr. Brathwaite that it was unusual for an employee with the years of experience of the plaintiff to resign only serves to show that the plaintiff made every effort in the face of abuse to stay the course. The fact that she could take it no longer and sought other employment is just a manifestation of the effect upon her of the abuse she suffered at the hands of Mr. Kinch and Mr. Bowen.

[85] In my opinion, the conduct of Mr. Bowen and Mr. Kinch together amount to a fundamental breach of the plaintiff's contract of employment, sufficient to force her to resign. It is the finding of the court that the plaintiff was constructively dismissed.

Issue No. 2 - Is the plaintiff entitled to recover damages?

[86] Given the court's finding that the plaintiff was constructively dismissed, the plaintiff is entitled to recover damages from the defendant in respect of that dismissal calculated in accordance with *section 45* of *the Act*. I now turn to a consideration of the damages.

[87] Mr. Smith submitted that the harassment suffered by the plaintiff caused her stress and headaches. He referred to Dr. King's evidence that the plaintiff was diagnosed with

situational anxiety, tension headaches and insomnia and further submitted that the plaintiff should recover general damages for this.

[88] Mrs. Richards-Hill submitted that, in order for the plaintiff to succeed, she had to prove that she suffered from a recognized psychiatric illness. No such illness was proved, as Dr. King, not being a psychiatrist, was unable to offer any opinion on the plaintiff's state of mind. No damages should therefore be awarded under this head.

[89] According to the case of *Hatton v Sutherland [2002] EWCA Civ 76*, the question to be asked in cases where an employee alleges that he has suffered psychiatric injury caused by stress at work is, whether the kind of harm the employee suffered was reasonably foreseeable. There must be clear indications of impending harm for the employer to realize that he ought to do something about it. The employee must suffer a recognized psychiatric illness.

[90] The available medical evidence does not disclose that the plaintiff was suffering from a recognized psychiatric illness/disorder, or that she brought any such illness to the attention of her employer. In the circumstances, the plaintiff has not established that she suffered mental and psychological injury. Therefore she is not entitled to recover damages under this head. Accordingly, no such award is made.

[91] Turning to the claim for special damages, the plaintiff's claim is for the amount of \$56,842.50 as severance pay for her 27 years of continuous employment. This amount has not been disputed by the defendant and the plaintiff is awarded the amount of \$56,842.50 as damages for constructive dismissal.

[92] The plaintiff has claimed loss of salary in lieu of notice for the period of six months, being the sum of \$32,470.74. The defendant contended that the sum of \$16,235.37 representing three months' salary was appropriate. According to **section 20(b) of the Act**, the statutory period of notice is not less than four weeks' notice. However, it is considered that a period of three months' notice is reasonable, having regard to the plaintiff's years of service and her position at the bank at the time of her resignation. The amount recoverable would be \$16,235.37. When this sum is added to the amount of \$56,842.50, being severance pay, the damages would be \$73,077.87. The sum of \$7,437.46 which the plaintiff received at the time of her departure would have to be deducted from that amount, making the total award \$65,640.41.

Disposal

[93] Judgment is given for the plaintiff in the sum of \$65,640.41 with interest awarded at the rate of 6% from the date of filing of the writ until payment. Costs certified for two attorneys-at law to be taxed or agreed.

**Kaye Goodridge,
Judge of the High Court.**