**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Garner v. Bank of Nova Scotia, 2015* NSSC 122

**Date:** 2015 04 22
**Docket:** Halifax No. 354371
**Registry:** Halifax

**Between:**

Christopher Taylor Garner

Plaintiff

and

The Bank of Nova Scotia

Defendant

**Revised Decision:** The text of the original decision has been corrected according to the attached erratum dated May 14, 2015.

**Judge**: The Honourable Associate Chief Justice Deborah K. Smith

**Heard**: February 19th, 20th, 21st, 24th, 25th, 26th, 27th, March 10th, 11th, 25th, 26th, 27th, 28th, April 22nd, May 15th, 2014, in Halifax, Nova Scotia

**Final Written Submissions:** From the Plaintiff: April 1st, 2015
From the Defendant: April 2nd, 2015

**Counsel**: Kevin A. MacDonald, for the Plaintiff

G. Grant Machum, Rebecca Saturley and Sean Kelly for the Defendant

**By the Court:**

[1] In July 1975, Christopher Garner started working for The Bank of Nova Scotia ("the Bank"). Thirty-six years later, Mr. Garner brought an action in the Supreme Court of Nova Scotia alleging, *inter alia*, age discrimination and constructive dismissal. Shortly thereafter, Mr. Garner's employment with the Bank was terminated. This action deals, *inter alia*, with the question of whether Mr. Garner was constructively dismissed and, in addition, whether he was wrongfully dismissed from his employment.

## BACKGROUND

[2] Mr. Garner began working for the Bank in 1975 following his graduation from Saint Mary's University with a Bachelor of Arts degree. He began his employment as a Loan Trainee. He left the Bank for a short period in 1976 and returned in 1977 as a Loan Officer. Thereafter, he enjoyed a number of promotions, eventually becoming the manager of a large branch of the Bank in Clayton Park. He did not have a written contract of employment with the Bank.

[3] Mr. Garner's evaluations over the years establish that he was a well-respected and successful Branch Manager. According to his evaluations, he was seen as a leader who motivated his staff to achieve their best. The branches that he managed performed very well. For example, in the eleven years that Mr. Garner managed the Clayton Park branch, it exceeded its financial targets ten out of eleven years. His evaluations over the decades were extremely impressive and establish a solid history of performance with the Bank.

[4] Over the years, the Plaintiff expressed an interest in moving up the ranks to a more senior position. In October 2005, Mr. Garner filed his first application to become a District Vice-President ("DVP"). The first DVP position that he applied for was in southwest Nova Scotia. The Plaintiff was interviewed for that job but was not the successful candidate. Over the next few years, Mr. Garner applied to be a DVP in the British Columbia and Yukon regions as well as an International Branch Manager in the British Virgin Islands. He received telephone interviews for these two jobs, but again, he was not the successful candidate. Thereafter, Mr. Garner applied for numerous senior positions including several DVP positions. With the exception of one position that he applied for in 2009, he did not receive an interview for any of these jobs.

[5] In May 2010, Mr. Garner applied for a DVP position in northeast Nova Scotia. He did not receive an interview for this position and was not hired for the job. Displeased with the situation (including the manner in which he was told that he would not be getting an interview), he arranged to meet with Peter Bessey, a Senior Vice-President with the Bank who was involved in the hiring process for this position. The Plaintiff had previously spoken with Mr. Bessey about his desire to advance within the Bank and thought that he was supportive of his goal. The Plaintiff felt that being turned down for this job (particularly since Mr. Bessey was involved with selecting the candidate) was inconsistent with these previous discussions.

[6] The two men met at Mr. Bessey's office on June 25th, 2010. According to the Plaintiff, during that meeting, Mr. Bessey explained what the Bank was looking for in a DVP. Mr. Garner testified that during this conversation, Mr. Bessey said, "It is not so much the timelines behind you that matter as the timelines in front of you to fill this position and other senior leadership roles within the Bank." Mr. Garner says that Mr. Bessey stated that the average age of an Executive Vice-President (at the Bank) was 49 years and the average age of District Vice-Presidents and Senior Vice-Presidents was 53 years. Mr. Garner testified that Mr. Bessey went on to say "It's age discrimination. Don't quote me on that." It is unclear from Mr. Garner's evidence exactly what Mr. Bessey is alleged to have said was age discrimination.

[7] During this meeting, Mr. Garner reviewed his background and experience and explained why he thought that he should be considered for the DVP position. According to Mr. Garner, Mr. Bessey said that he was listening carefully to what Mr. Garner was saying and was "thinking of something" but could not tell him exactly what he was thinking about. According to Mr. Garner, he then asked Mr. Bessey about the possibility of him being considered for the position of Director of Regional Banking. Mr. Garner thought that this position might be a stepping stone to becoming a DVP. According to Mr. Garner, Mr. Bessey said that he would not consider Mr. Garner for that position because it was not an "end position", but was for a career moving forward.

[8] According to Mr. Garner, he became frustrated at this meeting. He says he offered to give up his Branch Manager's position to a younger person, but Mr. Bessey declined this offer. He testified that he told Mr. Bessey that it was the fifty-year olds that were performing in the Atlantic region – not the forty-year olds. He says he was a bit angry because he was one of those people over fifty that were getting the "big numbers" and were driving the region. At the time of this meeting, Mr. Garner was 58 years old.

[9] Shortly after this meeting, Mr. Garner sent an email to Mr. Bessey thanking him for the opportunity to discuss his career and for the feedback. He did not refer to Mr. Bessey's alleged "age discrimination" comment in this email. He reiterated his offer to step aside for the benefit of another individual who could move up and progress in their career and suggested that he would be open to accepting a severance package. He indicated that he would agree to sign any confidentiality agreements that would be required for such an arrangement. Alternatively, he said he would be open to any other position that could be created where he could utilize his 35 years of experience with the Bank.

[10] Within minutes of sending this email, Mr. Garner and Mr. Bessey ran into each other. Mr. Bessey expressed surprise at the content of Mr. Garner's email. He indicated that Mr. Garner was a great manager and he was not going to give him a severance package. According to Mr. Garner, Mr. Bessey then pulled out his Blackberry and showed him a memo addressed to Anatol von Hahn (Executive Vice-President for Canadian Banking with the Bank) about a proposed Community Manager's position in the Atlantic region. Mr. Bessey said the Bank was looking at implementing such a position and was thinking of Mr. Garner for this role. Mr. Bessey told Mr. Garner that he could not make any promises about the position as the Bank had to determine whether it was financially feasible to add this extra layer of management. However, that was what Mr. Bessey was considering for Mr. Garner. Mr. Garner indicated that he would be interested in this position and the two men eventually shook hands. Mr. Garner did not hear further from Mr. Bessey in relation to the Community Manager's position.

[11] Shortly after this meeting, Mr. Garner's direct supervisor, Gisela Marker (née Cardwell) invited him to lunch to discuss the possible Community Manager's position. She confirmed that the Bank was considering implementing this position in the Atlantic region but advised that for Mr. Garner to be considered for the job, he would have to work at a very high level. Ms. Marker indicated that she expected to know within three to six months whether the position would be approved. This lunch took place in September 2010. Five months later, Mr. Garner contacted Ms. Marker seeking an update on the matter. Ms. Marker said that she would inquire and let Mr. Garner know. Two more months went by with no word. Mr. Garner inquired again and was advised by Ms. Marker that the position had not been approved for that year and would not be reconsidered until the next fiscal year.

[12] In the meantime, Mr. Garner had been having an excellent year at his branch in Clayton Park. His Achievement Assessment for the period ending September 30,

2010, gave him a whole year overall achievement rating of "superior". He received the same overall achievement rating for the first two quarters of 2011.

[13] According to Mr. Garner, he was not getting any feedback on advancement within the Bank and he decided that he could not let the matter go. In April 2011, he filed a complaint of age discrimination against the Bank with the Canadian Human Rights Commission. The complaint speaks for itself, but related primarily to his application for the DVP position in northeast Nova Scotia in May 2010, his request to be considered for the position of Director of Regional Banking and his meeting with Peter Bessey on June 25th, 2010.

[14] The parties attempted to mediate the human rights complaint. The mediation took place on July 26th, 2011, but was unsuccessful. Shortly thereafter, the Plaintiff's solicitor wrote to the Canadian Human Rights Commission withdrawing Mr. Garner's complaint. On August 24th, 2011, Mr. Garner filed this action against the Bank in the Supreme Court of Nova Scotia. He alleged, *inter alia*, that the Bank discriminated against him on the basis of age and that he had been constructively dismissed both as a result of the acts of discrimination and the Bank breaching a duty of good faith and fair dealing. He claimed against the Bank on the basis of discrimination, constructive dismissal and tortious interference with contractual relations.

[15] On August 30th, 2011, counsel for the Bank wrote to the Plaintiff's solicitor referring to the serious allegations that had been made against the Bank by the Plaintiff. These allegations were said to be inconsistent with Mr. Garner's continued employment with the Bank. It was suggested that commencement of the action could not be considered to be anything but repudiation by the Plaintiff of his employment with the Bank. Nevertheless, the Bank indicated a desire to maintain the employment relationship. It asked that Mr. Garner reconsider the matter and discontinue his action by September 6th, 2011, failing which it would have no alternative but to accept his repudiation, effective on the date the action was commenced, and end the employment relationship without further notice.

[16] Within days, the Plaintiff's solicitor wrote to the Defendant's solicitor advising that Mr. Garner would not be withdrawing his lawsuit. The suggestion was made that the Plaintiff remained employed by the Bank notwithstanding its "various breaches of law and his employment contract" due to his duty to mitigate his damages. It was further suggested that if the Bank terminated Mr. Garner's employment, the Plaintiff would claim retaliation and seek increased damages.

[17] On September 6th, 2011, counsel for the Defendant wrote to the Plaintiff's solicitor indicating that Mr. Garner was not to report to work after September 8th, 2011. He confirmed that the Defendant would not take the position that Mr. Garner had failed to mitigate his damages by not remaining at work with the Bank. Once again, Mr. Garner was invited to reconsider his position. Once again, Mr. Garner declined to do so. On September 8th, 2011, Mr. Garner's employment with the Bank ended.

[18] On September 12th, 2011, Mr. Garner amended his pleadings to claim, *inter alia*, that the Bank had retaliated against him. He also claimed for wrongful dismissal, defamation and tortious infliction of nervous shock. During the trial, counsel for the Plaintiff confirmed that his client was not advancing a defamation claim but asked the court, when assessing damages, to take into account certain statements that the Defendant had made when the Plaintiff's employment ended. Further, counsel for the Plaintiff confirmed that his client was not pursuing claims for tortious interference with contractual relations or tortious infliction of nervous shock.

## ISSUES

[19] A multitude of issues have been raised in this proceeding. They can be dealt with under the following headings:

1. Does the court have jurisdiction to deal with this matter?

2. Should comments made by the Defendant's in-house counsel at the time of the mediation be admitted into evidence?

3. Was the Plaintiff constructively dismissed by the Defendant?

4. Was the Plaintiff wrongfully dismissed by the Defendant?

5. Did the Defendant retaliate against the Plaintiff?

6. Damages.

## 1. DOES THE COURT HAVE JURISDICTION TO DEAL WITH THIS MATTER?

[20] The Defendant submits that this action is a discrimination case "dressed up" as a case of constructive/wrongful dismissal. In its pretrial brief, the Defendant

suggests that this action is founded entirely on an alleged breach of the ***Canadian Human Rights Act***, RSC 1985, c H-6 and that this court lacks jurisdiction over such an action. The Defendant submits that the matter is more properly dealt with by the Canadian Human Rights Commission and refers to the cases of ***Seneca College of Applied Arts and Technology v Bhadauria***, [1981] 2 SCR 181, ***Honda Canada Inc v Keays***, 2008 SCC 39 and ***Kennedy v Hewlett Packard (Canada) Co***, 2011 NSSC 502, in support of its position.

[21] The Plaintiff, relying on the Nova Scotia Court of Appeal decision in ***Nova Scotia (Human Rights Commission) v Multibond Inc***, ***(sub nom Kaiser v Dural, a division of Multibond Inc)***, 2003 NSCA 122, [2003] NSJ No 418 (CA), argues that the court has jurisdiction to deal with the allegation of discrimination as part of his claims for constructive and wrongful dismissal. In addition, the Plaintiff takes the position that the Canadian Human Rights Commission and this court have concurrent jurisdiction to decide breaches of the ***Canadian Human Rights Act***.

[22] I am satisfied that the court has jurisdiction to deal with this matter.

[23] An analysis of this issue must begin with the Supreme Court of Canada decision in ***Seneca College of Applied Arts and Technology v Bhadauria***, *supra*. In that case, the plaintiff brought an action against the defendant College alleging that it had breached a common law duty not to discriminate against her in the hiring process. In the alternative, the plaintiff argued that a civil right of action flowed directly from a breach of *The Ontario Human Rights Code*. At the time, the said *Code* contained a privative clause giving the Ontario Human Rights Tribunal exclusive jurisdiction over discrimination claims. The defendant had applied successfully to strike out the plaintiff's statement of claim as disclosing no reasonable cause of action. That decision was overturned by the Ontario Court of Appeal. On further appeal to the Supreme Court of Canada, the court held that no cause of action exists at common law for discrimination or for a breach of human rights legislation. Laskin CJC, speaking for the court, stated at p. 183:

> In my opinion, the attempt of the respondent to hold the judgment in her favour on the ground that a right of action springs directly from a breach of *The Ontario Human Rights Code* cannot succeed. The reason lies in the comprehensiveness of the Code in its administrative and adjudicative features, the latter including a wide right of appeal to the Courts on both fact and law…

[24] Further, at p. 195, he stated:

> … I would hold that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based

> on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use.

[25] In ***Honda Canada Inc v Keays***, *supra*, Bastarache J, speaking for the majority, referred to ***Seneca College of Applied Arts and Technology v Bhadauria***, *supra*, and stated at ¶63:

> … In that case, this Court clearly articulated that a plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of its substantive terms. The reasoning behind this conclusion is that the purpose of the Ontario *Human Rights Code* is to remedy the effects of discrimination; if breaches to the Code were actionable in common law courts, it would encourage litigants to use the Code for a purpose the legislature did not intend – namely, to punish employers who discriminate against their employees. Thus, a person who alleges a breach of the provisions of the Code must seek a remedy within the statutory scheme set out in the Code itself…..

[26] Despite these comments, jurisprudence has developed which allows allegations of discrimination to be dealt with as a part of a recognized, independent, actionable wrong. The leading case in Nova Scotia on this issue is ***Nova Scotia (Human Rights Commission) v Multibond Inc (sub nom Kaiser v Dural, a division of Multibond Inc)***, *supra*. In that case, the court was satisfied that where the plaintiff had a common law right of action for breach of contract which gave the court jurisdiction to adjudicate the plaintiff's wrongful dismissal action, the trial judge also had jurisdiction to adjudicate the allegation that discrimination played an integral part in any injury that was suffered (see ¶26).

[27] In the case at bar, Mr. Garner has raised a number of allegations against the Defendant including discrimination, constructive dismissal and wrongful dismissal. The court clearly has jurisdiction to deal with the Plaintiff's allegations of constructive and wrongful dismissal. I am satisfied that in these circumstances, I have jurisdiction to decide the discrimination issue as an integral part of the Plaintiff's claim for constructive and wrongful dismissal. For reasons that will become apparent later in my decision, it is not necessary for me to decide whether this court has concurrent jurisdiction with the Canadian Human Rights Commission to decide breaches of the ***Canadian Human Rights Act***.

## 2. **SHOULD COMMENTS MADE BY THE DEFENDANT'S IN-HOUSE COUNSEL AT THE TIME OF THE MEDIATION BE ADMITTED INTO EVIDENCE?**

[28] As indicated previously, the parties attempted to mediate a resolution of this matter on July 26th, 2011. Two Bank representatives were in attendance at the mediation, including Andrew Finlay, a Vice-President and Associate General Counsel for the Bank. The Plaintiff attended with his wife and his solicitor. Rounding out the group was a representative from the Canadian Human Rights Commission.

[29] The mediation was unsuccessful. According to the evidence, counsel for the Plaintiff declared the mediation to be at an end. He advised that the Plaintiff would be withdrawing his complaint with the Human Rights Commission and would be pursuing the matter in the Nova Scotia Supreme Court. Mr. Finlay openly questioned whether Mr. Garner could maintain his employment with the Bank if he commenced a court action. He then answered his own question, commenting that he did not think it would be a problem since Mr. Garner is professional. This comment is of some significance as the Bank now takes the position that the commencement of Mr. Garner's action was inconsistent with his continued employment.

[30] The Defendant objects to the admission of this evidence on the basis that it is subject to settlement privilege. The Plaintiff takes the position that the mediation had already concluded when Mr. Finlay's statements were made and, therefore, they are not subject to settlement privilege and are admissible.

[31] Settlement privilege has long been recognized in Canadian law. Parties to a dispute are encouraged to resolve their differences without the need for litigation or, if litigation has been commenced, without the need for a trial. In order to further these objectives, the court protects, and deems privileged, communications that are made with settlement in mind.

[32] In A.W. Bryant, S.N. Lederman and M.K. Fuerst, ***The Law of Evidence in Canada,*** 3rd ed (Markham, Ontario: LexisNexis Canada Inc., 2009) the authors note at p. 1033 the following conditions that must be present for settlement privilege to be recognized:

> (a) A litigious dispute must be in existence or within contemplation;
>
> (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed;
>
> (c) the purpose of the communication must be to attempt to effect a settlement.

[33] While the present action had not yet been commenced at the time these statements were made, the human rights complaint had been filed. In addition, both parties to the matter had engaged counsel (the Plaintiff had engaged Mr. MacDonald; the Defendant was using its in-house counsel). Further, the Plaintiff's solicitor had advised that his client would be pursuing the matter in the Supreme Court. I am satisfied that a litigious dispute was in existence or within contemplation at the time the statements in question were made.

[34] I will deal with the latter two conditions together. There is no dispute that the mediation where these comments were made was held on a without prejudice basis and that its purpose was to attempt to resolve the matter. The issue arises, however, as the critical statements were spoken *after* the Plaintiff's solicitor had declared the mediation to be at an end, but while the parties were still together at the mediation facility. The Plaintiff's solicitor suggests that since he had declared the mediation to be over, these comments, unlike other comments made during the mediation, are not protected by privilege. The Defendant takes the position that all comments made at the mediation facility were cloaked with the protection of settlement privilege.

[35] In my view, the answer to this issue lies in the policy for which the privilege was developed. Parties to real or contemplated litigation should have a safe mechanism to discuss a resolution of their disputes without fear that their comments will be used to their prejudice at a later date. Once parties have agreed to participate in without prejudice mediation, anything said at that mediation (subject to certain exceptions that will be discussed below) should be privileged, whether it is said as the parties enter the room, during the negotiations themselves, or as the parties are exiting the premises. The public policy reasons for developing this privilege are not served by parsing certain statements made at the beginning or end of the mediation and granting them less protection than would be accorded to statements made during the heart of the mediation.

[36] I am satisfied that the comments made by Mr. Finlay at the mediation facility are *prima facie* protected by settlement privilege.

[37] Counsel for the Plaintiff argued this issue on the basis that settlement privilege did not apply to Mr. Finlay's statements. He did not advance an alternate argument that if the statements made were privileged, they should nevertheless be admitted into evidence as an exception requiring disclosure. In the case of ***Sable Offshore Energy Inc v Ameron International Corp***, 2013 SCC 37, the Supreme Court of Canada confirmed that settlement privilege is not absolute, stating at ¶12:

> Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), at p. 740.)

[38] Further, at ¶19, the court stated:

> There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, 'a competing public interest outweighs the public interest in encouraging settlement' (*Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A. Civ. Div.), *Underwood v. Cox* (1912), 26 O.L.R. 303 (Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*).

[39] Bryson, J.A. of our Court of Appeal dealt with this issue extensively in ***Brown v Cape Breton (Regional Municipality)***, 2011 NSCA 32, which was referred to with approval by the Supreme Court of Canada in ***Sable***, *supra*.

[40] Despite the fact that the Plaintiff has not argued for an exception to the general rule relating to settlement privilege, I have nevertheless considered the matter.

[41] In ***Dos Santos v Sun Life Assurance Co of Canada,*** 2005 BCCA 4, Finch, CJBC, (as he then was) stated at ¶17-20:

> In ***Middelkamp***, *supra,* Chief Justice McEachern said there must be exceptions to the blanket privilege for settlement communications. Notably, he referred to the proper disposition of litigation (para. 20).
>
> In my view, ***Middelkamp*** did not close the door on what might constitute a valid exception to the blanket privilege (see reviews of types of exceptions to the rule in ***Berry v. Cypost Corp.*** (2003), 43 C.P.C. ($5^{th}$ ) 275, 2003 BCSC 1827, and ***Unilever plc v. The Proctor & Gamble Co.***, [2000] 1 W.L.R. 2436 (C.A.)).
>
> However, the test for discharging the burden to establish an exception should not be set too low. The public policy behind settlement privilege is a compelling one. It is so compelling that even threats arising in the context of settlement negotiations may not justify an exception: ***Unilever***, *supra* at p. 2449-2450.

> To establish an exception in this case, the defendant must show that a competing public interest outweighs the public interest in encouraging settlement. An exception should only be found where the documents sought are both relevant, and necessary in the circumstances of the case to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice.
>
> [Emphasis in the original]

[42] In ***Meyers v Dunphy***, 2007 NLCA 1, Wells, CJNL (as he then was) reviewed the comments of Chief Justice Finch in ***Dos Santos***, *supra*, and Lord Robert Walker in ***Unilever***, *supra*, and concluded with a list of principles to guide one's analysis of a claimed exception to settlement privilege. They are as follows:

> 1. Protection of admissions against interest, for the purpose of encouraging settlement discussions, is a compelling public policy basis for settlement privilege;
>
> 2. Express or implied agreement of the parties can also be a basis for the rule, and where the admissions fall within what can clearly be identified as a term of an express or implied agreement between the parties that factor is also to be considered;
>
> 3. Except where a special reason exists, or on the basis of express or implied agreement, protection should not be withheld from identifiable admissions while extending it to others expressed in the privileged communication;
>
> 4. Without prejudice communications are admissible to prove those communications have resulted in a compromise agreement; and
>
> 5. Where exclusion of the communication would facilitate an abuse of the privilege, or another compelling or overriding interest of justice requires it, without prejudice communications are admissible.
>
> [See ¶27]

[43] Chief Justice Wells also summarized the categories of exceptions to settlement privilege that had been referred to by the English Court of Appeal in ***Unilever***, *supra*. He listed them as follows at ¶20:

> (1) Whether without prejudice communications have resulted in a concluded compromise agreement;

> (2) To show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence;
>
> (3) Where a clear statement made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel;
>
> (4) If the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety, but such an exception should only be applied in the clearest cases of abuse of a privileged occasion;
>
> (5) In order to explain delay or apparent acquiescence in responding to an application to strike out a proceeding for want of prosecution but use of the letters is to be limited to the fact that such letters have been written and the dates at which they were written;
>
> (6) Whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him; and
>
> (7) Where an offer is expressly made "without prejudice except as to costs".

[44] Of these exceptions, only the third is of relevance in the case at bar. Did Mr. Finlay make a clear statement on which Mr. Garner was intended to act and did in fact act so as to give rise to an estoppel? I have concluded that he did not.

[45] First, I am not at all satisfied that Mr. Finlay's comments were statements upon which Mr. Garner was intended to act. I conclude from the testimony of the witnesses that Mr. Finlay's comments were more in the nature of musings to himself. As Ms. Reinbold testified, Mr. Finlay was "thinking out loud".

[46] Further, I am not satisfied that Mr. Garner relied on Mr. Finlay's statements when deciding whether to proceed with this action. In fact, his testimony suggests otherwise. According to Mr. Garner, his counsel had declared the mediation to be at an end and had said that his client would be withdrawing his human rights complaint and would be proceeding with a civil action. It was *after* this statement was made that Mr. Finlay queried whether Mr. Garner could continue to work for the Bank if he commenced an action, and apparently satisfied himself that it would not be a problem. The timing of the comments suggests that Mr. Garner's counsel had already decided to proceed in the Supreme Court before Mr. Finlay's statements were made.

[47] Even if Mr. Garner was somehow induced into commencing this action by Mr. Finlay's comments, he was advised prior to the termination of his employment of the Bank's clear position that the continuation of this action was incompatible with his continued employment. Despite this advice, he elected to proceed with this action. In these circumstances, I am not satisfied that an estoppel would arise.

[48] In my view, the Plaintiff has not established a compelling or overriding interest of justice that warrants an exception to settlement privilege being granted. Mr. Finlay's comments are privileged and are not admitted into evidence.

## 3. **WAS THE PLAINTIFF CONSTRUCTIVELY DISMISSED BY THE DEFENDANT?**

[49] In ***Farber v Royal Trust Co,*** [1997] 1 SCR 846, the Supreme Court of Canada said the following in relation to the issue of constructive dismissal:

> 24 Where an employer decides unilaterally to make substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to the changes and leaves his or her job, the employee has not resigned, but has been dismissed. Since the employer has not formally dismissed the employee, this is referred to as 'constructive dismissal'. By unilaterally seeking to make substantial changes to the essential terms of the employment contract, the employer is ceasing to meet its obligations and is therefore terminating the contract. The employee can then treat the contract as resiliated for breach and can leave. In such circumstances, the employee is entitled to compensation in lieu of notice and, where appropriate, damages.
>
> …
>
> 26 To reach the conclusion that an employee has been constructively dismissed, the court must therefore determine whether the unilateral changes imposed by the employer substantially altered the essential terms of the employee's contract of employment. For this purpose, the judge must ask whether, at the time the offer was made, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. The fact that the employee may have been prepared to accept some of the changes is not conclusive, because there might have been other reasons for the employee's willingness to accept less than what he or she was entitled to have.
>
> 27 Moreover, for the employment contract to be resiliated, it is not necessary for the employer to have intended to force the employee to leave his or her employment or to have been acting in bad faith when making substantial changes

> to the contract's essential terms. However, if the employer was acting in bad faith, this would have an impact on the damages awarded to the employee…

[50] In the recent decision in ***Potter v New Brunswick Legal Aid Services Commission***, 2015 SCC 10, the Supreme Court of Canada held that constructive dismissal can take two forms: a single unilateral act that breaches an essential term of the contract, or a series of acts that, taken together, show that the employer intended to no longer be bound by the contract (see ¶43). The Court explained at ¶¶37-39:

> At the first step of the analysis, the court must determine objectively whether a breach has occurred. To do so, it must ascertain whether the employer has unilaterally changed the contract. If an express or an implied term gives the employer the authority to make the change, or if the employee consents to or acquiesces in it, the change is not a unilateral act and therefore will not constitute a breach. If so, it does not amount to constructive dismissal. Moreover, to qualify as a breach, the change must be detrimental to the employee.
>
> This first step of the analysis involves a distinct inquiry from the one that must be carried out to determine whether the breach is substantial …
>
> Once it has been objectively established that a breach has occurred, the court must turn to the second step of the analysis and ask whether, 'at the time the [breach occurred], a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed' (*Farber*, at para. 26). A breach that is minor in that it could not be perceived as having substantially changed an essential term of the contract does not amount to constructive dismissal.

[51] The Court went on to state at ¶42:

> The second branch of the test for constructive dismissal necessarily requires a different approach. In cases in which this branch of the test applies, constructive dismissal consists of conduct that, when viewed in the light of all the circumstances, would lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. The employee is not required to point to an actual specific substantial change in compensation, work assignments, or so on, that on its own constitutes a substantial breach. The focus is on whether a course of conduct pursued by the employer 'evince[s] an intention no longer to be bound by the contract': In re *Rubel Bronze*, at p. 322. A course of conduct that does evince such an intention amounts cumulatively to an actual breach. Gonthier J. said the following in this regard in *Farber*:

> 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. [para. 33]

[52] The burden is on the Plaintiff to show that he was constructively dismissed.

[53] In the case at bar, the Plaintiff has pleaded that he was constructively dismissed as a result of acts of discrimination and what are said to be breaches of the Bank's duty of good faith and fair dealing. While not specifically articulated in this manner, it appears that Mr. Garner is alleging that the Bank breached an implied term of his employment contract that he would not be subjected to discrimination due to age and would be treated fairly and in good faith. I begin, therefore, by asking whether, from an objective viewpoint, a breach of contract occurred in this case. In order to reach such a conclusion, the court would have to be satisfied that discrimination or a breach of a duty of good faith and fair dealing had actually occurred. I will consider first the issue of whether Mr. Garner was discriminated against. I will then consider whether the Bank breached any duty of good faith or fair dealing that could be found to exist.

[54] In ***Andrews v Law Society of British Columbia***, [1989] 1 SCR 143, McIntyre, J described discrimination as follows at pp. 174-175:

> …I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[55] The Plaintiff submits that he has been discriminated against on the basis of age. Age is a prohibited ground of discrimination under the ***Canadian Human Rights Act***. Claimants under that legislation bear the burden of establishing discrimination in accordance with what is known as the "*prima facie*" test. In ***Ontario Human Rights Commission v Simpsons-Sears (O'Malley)***, [1985] 2 SCR 536, McIntyre J. described a "*prima facie*" case as follows at p. 558:

> …The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which

> covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer…..

[56] This means that the onus lies on the complainant to establish discrimination on a balance of probabilities and, if the complainant is successful in this regard, the evidentiary burden shifts to the respondent (see ***Shaw v Phipps***, 2012 ONCA 155 at ¶12).

[57] In order to establish a *prima facie* case, a complainant is not required to show that the impugned action was based solely on a discriminatory factor. It is sufficient that discrimination is one of the factors in the impugned employment decision (see for example: ***Lee v British Columbia Hydro and Power Authority***, 2004 BCCA 457, at ¶24 and ***Shaw v Phipps***, *supra*, at ¶31).

[58] The Defendant has referred the court to the decision in ***Shakes v Rex Pak Limited*** (1981), 3 CHRR D/1001 (Ont Bd Inq) for what it submits is the classic statement of the evidence necessary to establish a *prima facie* case of discrimination in a case pertaining to hiring or promotion. There, the tribunal stated at ¶8918:

> Proof of discrimination is almost invariably by circumstantial evidence. Only rarely at a Board of Inquiry will there be an admission by the respondent or other direct evidence. In an employment complaint, the Commission usually establishes a *prima facie* case by proving (a) that the complainant was qualified for the particular employment; (b) that the complainant was not hired; and (c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (i.e.: race, colour, etc.) subsequently obtained the position. If these elements are proved, there is an evidentiary onus on the respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation for what occurred. If the respondent does proffer an equally consistent explanation, the complaint of discrimination must fail for the onus of proving discrimination ultimately rests on the Commission…..

[59] While the ***Shakes*** test is often relied on in cases where someone other than the complainant is hired for a certain position, it is not without its critics. In ***Ogunyankin v Queen's University***, 2011 HRTO 1910, the tribunal referred to the ***Shakes*** test and stated at ¶96:

> This test has been criticized in this Tribunal's jurisprudence, most notably in the *Almeida* decision, *supra*. In that decision, Professor McCamus noted that the *McDonnell* and *Shakes* tests function well with 'lower level' positions; however,

> for higher level jobs, there might be several qualified candidates, such that the failure of a particular qualified candidate may not arouse suspicion. To this criticism, I would add that, again for higher level positions, it often is difficult to assess without hearing evidence from the respondent whether the applicant was indeed 'qualified' for the position or whether the successful candidate was 'no better qualified'.

[60] Further, in ***MacAulay v Port Hawkesbury (Town)***, [2008] NSHRBID No 1 it was stated at ¶23-24:

> I find the Shakes test to be incomplete. It requires a presumption that the reason a person possessing a distinguishing characteristic protected in sections 5(1)(h) to 5(1)(v) does not get a job before someone else who has equal or lesser qualifications, must have had something to do with that distinguishing characteristic. This is an unacceptable presumption for not only does it fail to consider the multitude of other considerations that may impact the hiring process, but it negates the requirement to prove one of the main ingredients in a finding of discrimination – that the protected characteristic played some role in the adverse treatment. The simple fact that the complainant did not get the job does not equate to adverse treatment.
>
> It is my opinion that if we are to accept that in establishing a *prima facie* case in employment complaints one has only to show that a person without the protected characteristic got hired ahead of another person of equal qualification who does possess the protected characteristic, the bar has not left the ground. In essence, the allegation becomes the proof. Consequently accepting such a presumption is tantamount to negating altogether the onus of proving a *prima facie* case.

[61] In ***Premakumar v Air Canada***, [2002] CHRD No 3, the tribunal stated at ¶77:

> While both the Shakes and the Israeli tests serve as useful guides, neither test should be automatically applied in a rigid or arbitrary fashion in every hiring case: rather the circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether Mr. Premakumar has satisfied the O'Malley test, that is: if believed, is the evidence before me complete and sufficient to justify a verdict in Mr. Premakumar's favour, in the absence of an answer from the respondent?

[62] In the case at bar, Mr. Garner has the onus of establishing discrimination on a balance of probabilities. To meet this burden, he is not required to show that his age was the sole factor in the decision not to promote him to DVP. It is sufficient

to show that age was *a* factor in the decision. If he is successful in this regard, the burden shifts to the Bank to explain its actions.

[63] Mr. Garner's complaints of age discrimination relate to his May 2010 application for a DVP position in northeast Nova Scotia, and to Mr. Bessey's suggestion, in or about June 2010, that he would not consider Mr. Garner for the position of Director of Regional Banking (DRB). Mr. Garner testified at trial that up until this time, he thought he had been getting a "fair swing at the bat" when it came to his applications for promotion.

[64] Was Mr. Garner discriminated against by the Bank in relation to the DVP position in northeast Nova Scotia and the DRB position he discussed with Mr. Bessey?

[65] Testimony given at trial confirms that the Bank is concerned about succession planning given the number of employees who will be eligible to retire in the next five to fifteen years. The Bank is looking for emerging leaders to fill the vacancies that will arise. The Plaintiff suggests that the Bank's solution to this problem has been to fast track younger employees for senior leadership jobs and, as a result, older candidates are being passed over for these positions.

[66] Counsel for the Plaintiff argued in summation that up until 2009, one needed to be an outstanding Branch Manager with varied experience in order to be promoted to DVP. He says that in 2009, there was a "seismic shift" in policy whereby senior positions within the Bank, including DVP positions, were deemed to be developmental and were reserved for rising stars and emerging leaders. He submitted that unless you were in a special demographic (such as being female or "speaking mandarin") the Bank was no longer looking for people with 25 or 30 years' experience to take on more senior roles. Instead, they were looking for younger employees with an MBA. He suggests that this policy "red circled" any male Branch Manager with significant experience at the Bank who was over 54 years of age.

[67] During the trial, similar fact evidence was permitted to be given on behalf of the Plaintiff by Stephen Vickery, a Branch Manager with the Bank in British Columbia. Mr. Vickery has been employed with the Bank for almost 36 years.

[68] Mr. Vickery testified that he was interested in applying for the northeast Nova Scotia DVP position that Mr. Garner applied for in May 2010. He contacted his DVP, John Matheson, to seek permission to apply for the job. He required permission because he was only two and a half years into his posting and the Bank

expected Branch Managers to stay at least three years. According to Mr. Vickery, Mr. Matheson indicated that he was sitting across from Peter Bessey (who was the Senior Vice-President for Nova Scotia at the time) and Mr. Bessey had indicated to him that he had someone local in mind for the job. Mr. Vickery decided not to apply for the position.

[69] Thereafter, Mr. Vickery received a telephone call from George Marlett, a Senior Vice-President with the Bank in Alberta. Mr. Marlett apparently wanted to explain to Mr. Vickery what the Bank was looking for in a DVP. Mr. Marlett explained that the DVP position was a developmental role. It was normally a three-year post after which the Bank expected you to move on to another area. During this conversation, Mr. Marlett told Mr. Vickery that he was "too old" for the position. Mr. Vickery was 54 years old at the time.

[70] Mr. Vickery was upset by this comment and wrote to his supervisor (Mr. Matheson) advising that he did not appreciate being told that he was too old for the job. Mr. Matheson telephoned Mr. Vickery and indicated that he was upset with Mr. Vickery for putting his concerns in writing. During that conversation, Mr. Matheson commented that he would not have told Mr. Vickery that he was too old for the job, but would have instead said that "his runway wasn't long enough". The Plaintiff submits that this evidence helps to establish that the Bank's policy on filling these DVP positions discriminates against senior and experienced employees.

[71] The Plaintiff also referred to an article released by Anatol von Hahn in June 2011. This article contained a "leadership spotlight" which read:

> A strategic focus on leadership means keeping a keen eye on deepening our talent pool.
>
> As an organization, this means creating new development opportunities and training to cultivate great leaders.
>
> This also means ensuring that we create the cross-developmental and cross-divisional moves that support the growth and development of both our leaders and our business.
>
> Due to this renewed focus, we're happy to announce that since the beginning of Fiscal 2011, we have facilitated 58 development moves.

[72] The Plaintiff submits that this article supports the suggestion that the Bank was focusing on younger employees who had enough time ahead to take on these developmental positions.

[73] I am satisfied from the evidence presented that for years prior to 2010, the Bank had been focusing on succession issues and planning and was looking for emerging leaders who could take on senior positions within the Bank. I am also satisfied that over the years the Bank has broadened the pool of those who can be considered for senior positions. In other words, it was not insisting that an individual be a seasoned employee within the Bank in order to be offered a role such as DVP. Employees who were identified as "emerging leaders" were given an opportunity to vie for these positions, regardless of their seniority. This shift in focus could result in discrimination if it was applied in such a way that senior, experienced employees were not given a legitimate opportunity to compete and be awarded these positions. Mr. Vickery's situation is an example of an improper application of such a policy. I fully accept Mr. Vickery's evidence that he was told by Mr. Marlett that he was "too old" for a DVP position. I am not satisfied, however, that this evidence, or the other evidence introduced at trial, establishes widespread discriminatory practices in relation to the hiring of individuals for these developmental roles. Each situation has to be considered independently.

[74] I turn now to Mr. Garner and the question of whether he was discriminated against on the basis of age. In order to determine this issue, it is useful to understand how promotions were handled within the Bank during the period in question. It is also useful to review the differences between the job that Mr. Garner had (Branch Manager) and the position that he wanted (District Vice-President). Finally, I will review the various jobs that Mr. Garner applied for and how he fared in relation to each application.

[75] Bruce Smith testified on behalf of the Defendant. He is a Senior Manager of Staffing and Planning. I found him to be an impressive and balanced witness. He testified that the Bank goes through an annual process known as workforce planning. During this process, DVPs are provided with a spreadsheet listing the people who report to them and are asked to indicate, *inter alia*, each employee's next and highest potential position. That information is then inputted into a regional report, which is used for discussion purposes during an annual roundtable dealing with workforce planning.

[76] The annual roundtable in Atlantic Canada involves the local Senior Vice-President (SVP), five DVPs, Mr. Smith and, generally, the Director of Regional Banking. At the roundtable, these individuals discuss, *inter alia*, anyone who has

been identified as having DVP potential. A decision is made at this meeting as to whether the employee in question should remain on the list of potential DVP candidates. At this same meeting, all "level 9" Branch Managers are discussed. At the relevant time, Mr. Garner was a "level 9" Branch Manager.

[77] Following the Atlantic roundtable, a revised report is prepared which is sent to the SVP and DVPs who participated in the meeting. The SVP can use certain portions of the revised report for higher level roundtables he or she participates in. DVPs can use this document for developmental purposes for the employees that report to them. The revised report is also used as a resource for filling job vacancies.

[78] The evidence at trial establishes, and I find, that during the period in question (2005-2011), Mr. Garner was identified in the workforce planning documents as being promotable from a "level 9/4" Branch Manager to a "level 9/5" Branch Manager. He was also considered to have Community Manager potential (a Community Manager's position is above a Branch Manager but below a DVP position). At no time during this period was Mr. Garner identified in the workforce planning process as having DVP potential.

[79] Commencing in 2005, Mr. Garner began applying for DVP (and other) positions. I find that there is a significant difference between a Branch Manager's job and the job of a DVP. A Branch Manager usually manages one branch of 6 to 45 employees. A DVP supervises 25 to 40 Branch Managers overseeing 400 to 600 employees. The DVP is expected to set the vision and direction for all of the branches in a district.

[80] A Branch Manager works directly with the team of employees that they supervise. A DVP manages individuals that are scattered around a geographical area or region. They must be able to produce results without direct daily contact with the people who report to them. It is seen to be a highly competitive job.

[81] According to Islay McGlynn (a senior Vice-President with the Bank), the DVP role is viewed as a senior leadership position. It is generally considered to be a developmental role for individuals who can grow into higher executive level positions. The Branch Manager position, however, is seen to be more of a destination job. Employees often stay in Branch Manager roles until they retire.

[82] At the present time, there are approximately 1000 Branch Managers with the Bank in Canada. There are only 40 DVPs.

[83] Mr. Garner's first application for a DVP position was filed in October 2005. Mr. Smith was assisting with the posting of this job and was tasked with recommending a short list of candidates to be interviewed. Mr. Garner was not on the short list prepared by Mr. Smith. The SVP at the time was John Oliver. As an SVP, he was free to accept Mr. Smith's recommendations on whom to interview or to select alternate candidates himself. Mr. Oliver was new to the area and wanted to interview a number of people. He therefore went beyond Mr. Smith's recommended list and interviewed ten people in order to get to know them better. Mr. Garner was one of the ten people he interviewed. According to Mr. Smith, Mr. Garner had a good interview, but he was not one of the top contenders for the job. The successful candidate for this position was an individual who had already been a DVP for a number of years.

[84] Mr. Garner's next application for a DVP position was filed in August 2006. It was for a position in the British Columbia and Yukon region. Mr. Garner testified that he had a telephone interview for this job, but was not the successful candidate. The individual who was selected for the position had been a Community Manager in Ontario.

[85] In 2007, Mr. Garner applied twice to be an International Branch Manager. He received one interview by telephone, but was not successful in getting the job.

[86] Mr. Garner's next application for a DVP position was filed in July 2008. It was for a position in Newfoundland and Labrador, one of the largest districts in the country. It was considered to be a key district and was known for being difficult to manage and lead. The Bank was looking for someone with very high skills for this position and interviewed only one person for the job. That individual, who had 35 years of banking experience, held two previous DVP postings and was originally from Newfoundland, was successful in getting the position. According to Mr. Smith's evidence, Mr. Garner was not a contender for this job.

[87] In August 2008, Mr. Garner applied for a DVP position in Ontario. Mr. Smith was involved in selecting the candidates who would be interviewed for this position. He testified that he reviewed the applications, as well as the workforce planning documents, and selected the individuals that he felt were the strongest. Mr. Garner was not on the list prepared by Mr. Smith and was not interviewed for the job. According to Mr. Smith's evidence, of the 13 applications that were received for this position, Mr. Garner was ranked somewhere around 10$^{th}$ or 11$^{th}$. The individual who was hired for this position had been a Director of Regional Banking in Ontario prior to being named a DVP.

[88] According to Mr. Garner's evidence, he also applied for a Director of Regional Banking position in Ontario and a DVP position in British Columbia in 2008, but did not receive an interview for either of these positions.

[89] In October 2008, Mr. Garner applied for a DVP position in southwest Nova Scotia. He did not make the short list of those who would be interviewed for the job. Mr. Smith, the author of the list, noted that Mr. Garner had not been identified in the workforce planning documents as having DVP potential. The candidates who were selected for an interview had been so identified. According to Mr. Smith's evidence, the individual who won this competition had much better qualifications than Mr. Garner, including having a large main branch while having 6 to 7 other branches reporting to her.

[90] In December 2008, Mr. Garner applied for the position of Scotia Private Client Group Director in Halifax, Nova Scotia. He was interviewed for the job. According to Mr. Garner, during the interview he was told by the person conducting the interview that he had a glowing recommendation from the Atlantic Region. Mr. Garner was unsuccessful in obtaining the position. The successful candidate had already attained the DVP level.

[91] In late May 2010, Mr. Garner applied for a DVP position in northeast Nova Scotia. Mr. Smith was tasked with reviewing the applications and recommending which candidates would be interviewed. He recommended that three people be interviewed. Two of these individuals had been identified as having DVP potential and the third was already at the VP level. Mr. Smith did not recommend that Mr. Garner be interviewed.

[92] Peter Bessey was doing the interviews for this posting. He interviewed two of the individuals that Mr. Smith had recommended and spoke to the third person (but did not formally interview him). He also interviewed Gordon Brost. Mr. Smith had not recommended that Mr. Brost be interviewed. However, HR in Toronto (who are involved in the hiring of DVPs) had recommended Mr. Brost as a candidate due to his identification on a Leadership Resource Planning List as an emerging leader. Mr. Bessey decided to interview him. He testified that when he interviewed Mr. Brost over the telephone, he had no information about Mr. Brost's age, nor had he ever met him.

[93] Mr. Brost was selected for the DVP position in northeast Nova Scotia. Mr. Bessey testified that he had by far the strongest interview of the three individuals who were interviewed and had come highly recommended by HR in Toronto. Mr. Bessey noted that in the past, Mr. Brost had managed a large branch in Calgary and

had two branches and a sub-branch reporting to him. The evidence also establishes that he was recognized as being well educated, very bright and had been a District Banking Manager prior to becoming a DVP.

[94] In July 2010, Mr. Garner applied for a DVP position in the greater Toronto area. He was not interviewed for the job.

[95] In May 2011, the Plaintiff applied for two DVP positions in Ontario. He was not granted an interview for either job.

[96] In June 2011, Mr. Garner applied for DVP positions in Newfoundland and Labrador and west New Brunswick. He was not selected for an interview for either job. The individual who was selected for the Newfoundland and Labrador position was considered to be a highly skilled individual who had already been a DVP and a Director of Regional Banking in Ontario. It was felt that with a district as large as Newfoundland, an individual with previous DVP experience would be a significant asset.

[97] The candidate who was selected for west New Brunswick had been a Director of Regional Banking. He had been identified as a strong performer with DVP potential. He knew the area in question well and was seen to have leadership capabilities.

[98] I have carefully reviewed the evidence provided at trial concerning the circumstances surrounding each promotion for which Mr. Garner applied. I am satisfied, and I find, that age was not a factor in the decision not to promote him.

[99] I will deal specifically with Mr. Garner's May 2010 application for the DVP position in northeast Nova Scotia, as that application is of particular concern to him.

[100] Three candidates were formally interviewed for the northeast Nova Scotia position. All three of these candidates had received a higher PAR (Performance Appraisal Report) rating than Mr. Garner in the year prior to this competition. Those that were chosen to be interviewed had a "superior" rating, while Mr. Garner had received a "distinguished" rating. A "superior" rating is one level higher than a "distinguished" rating.

[101] One must be careful not to put too much weight on this factor. Both the "distinguished" rating and the "superior" rating are impressive. In addition, the ratings in question are only for the year 2009 (the year before the competition). Further, the evidence indicates that PAR ratings are only one of the factors that are

taken into account when considering promotions. Nevertheless, the fact remains that the individuals who were selected for a formal interview all had higher PAR ratings than the Plaintiff in 2009.

[102] Further, each individual who was recommended for an interview, or who was interviewed, had been identified as having DVP potential, as being an emerging leader, or, in one case, was already at the VP level. Mr. Garner was not recognized, in the workforce planning process, as having this potential.

[103] I realize that Mr. Garner was seen by some in the Bank as having the potential to be a DVP. The evidence establishes that in 2005 and 2006 he was interviewed for two DVP positions (southwest Nova Scotia and BC/Yukon) and, in 2005, the Atlantic Regional SVP at the time (John Oliver) spoke to Mr. Garner about the possibility of him taking a DVP position in New Brunswick. However, Mr. Garner was never identified in the workforce planning process as having DVP potential. I conclude, after hearing the witnesses and reviewing the exhibits at trial, that while Mr. Garner was seen as an excellent Branch Manager and a valued employee, he was not recognized by the Bank in 2010 as being a serious contender for a DVP position. I am satisfied that the decision not to interview him for the northeast Nova Scotia position was not based on his age but, rather, on the fact that he was not seen to be as qualified as the other candidates who applied for the job. There is no doubt that Mr. Garner was a talented employee, but a number of talented employees applied for the northeast Nova Scotia DVP position.

[104] I accept Mr. MacDonald's suggestion that the promotion landscape at the Bank had changed over the years. Whereas, historically, one may have had to be a senior employee with the Bank in order to get promoted into this type of position, less seasoned employees, who were nevertheless considered to be emerging leaders, were now able to compete for and obtain these jobs. In my view, there is no difficulty with this, provided that all qualified candidates are properly considered for these positions, without regard to age. In Mr. Garner's case, I am satisfied that his application was properly considered and weighed against the other qualified candidates who applied for the job. I find that age was not a factor in the decision not to interview him for this position.

[105] That takes me to the issue of the Director of Regional Banking position. As indicated previously, Mr. Garner testified that at the June 25th, 2010 meeting with Mr. Bessey, he asked about the possibility of being considered for the position of Director of Regional Banking ("DRB"). The person who holds this position acts as the assistant to the regional SVP. Mr. Garner thought that if Mr. Bessey would not consider him for a DVP position, he might consider him for the DRB position.

Mr. Garner testified that Mr. Bessey said he would not consider Mr. Garner for this role, as it was not an "end position" but was for a career moving forward.

[106] Mr. Bessey acknowledged telling Mr. Garner that he would not consider him for the DRB position (he thought that this conversation took place at a later time, but he did not dispute that it occurred). He testified that he viewed this position as one of the best training grounds for becoming a DVP. Mr. Bessey did not see Mr. Garner as being a fit in terms of skill and ability for a DVP position, so he told him that he would not consider him for the DRB job. Mr. Bessey's evidence was unclear on whether he said that the DRB position was not an "end position" but, rather, was for a career moving forward. At one point in his evidence he said that he did not recall saying that. At another point in his testimony, he acknowledged saying that it would not be considered an "end position" but, rather, was a developmental role for a career moving forward.

[107] I find that Mr. Bessey told Mr. Garner that he would not consider him for the DRB position. I am also satisfied that Mr. Bessey told Mr. Garner that the DRB position was not an "end position" but was for a career moving forward. Are these comments evidence of discrimination against Mr. Garner on the basis of age?

[108] In order to answer this question, it is useful to review the evidence concerning Mr. Bessey's opinion of Mr. Garner and his ability to advance into more senior roles within the Bank.

[109] Mr. Bessey testified that during the workforce planning process he never identified Mr. Garner as having DVP potential. Also, he noted that the DVPs that Mr. Garner worked for did not identify him as having this potential. Mr. Bessey expressed concern, *inter alia*, about Mr. Garner's experience with strategic influencing and relationship building, his ability to communicate broadly across multiple channels, his ability to deliver a clear vision and his ability to think outside the confines of a branch.

[110] Mr. Bessey's view of Mr. Garner's prospects as a DVP was not always so definitive. In 2008, Mr. Garner emailed Mr. Bessey (who had recently arrived in Nova Scotia as an SVP) to let him know that he had applied for a DVP posting in Ontario. Mr. Bessey responded that he would be meeting with Sue Graham-Parker (an SVP in the Ontario region) the next week and would take the opportunity to discuss Mr. Garner's application with her.

[111] That same year, Mr. Bessey and Mr. Garner had lunch. During that lunch, Mr. Garner advised Mr. Bessey that he aspired to be a DVP. The two men

discussed the matter. I find that during that luncheon, Mr. Bessey was equivocal about the possibility of Mr. Garner becoming a DVP.

[112] Shortly thereafter, Mr. Garner emailed Mr. Bessey advising him that there was a posting for a DVP in British Columbia and asking whether it would be appropriate for him to submit an application for that position. Mr. Bessey responded, "It wouldn't hurt to apply".

[113] I find that Mr. Garner was actively networking with Mr. Bessey in an attempt to improve his chances of becoming a DVP. I am satisfied that Mr. Bessey did not view Mr. Garner as a serious contender for a DVP role and, rather than bluntly tell him this, he provided some limited support to the Plaintiff. I accept Mr. Bessey's evidence that he considered the DRB position to be a training ground for someone to move on to become a DVP and that he did not consider Mr. Garner to be a proper fit for the DVP role. He therefore indicated that he would not consider him for the DRB position. Viewed in this context, I am not satisfied that Mr. Bessey's comment that this was not an "end position", but was for a career moving forward, is evidence of age discrimination. The DVP position was viewed in the bank as a developmental role. People who were put into this position were expected to be successful in that role and, where possible, to have the ability to progress into more senior roles within the Bank. This was important due to the Bank's operational risk around succession planning. Mr. Bessey did not view Mr. Garner as having that career potential. His comments must be viewed in that context.

[114] That takes me to the June 25th, 2010 meeting between Mr. Garner and Mr. Bessey. Mr. Garner had a clear recollection of this meeting. As indicated previously, he suggested that during this meeting, Mr. Bessey said, *inter alia*, "It is not so much the timelines behind you that matter as the timelines in front of you to fill this position and other senior leadership roles within the Bank". Mr. Garner said that Mr. Bessey went on to say that the average age of an Executive Vice-President was 49 years and the average age of District Vice-Presidents and Senior Vice-Presidents was 53 years. Mr. Garner testified that Mr. Bessey went on to say, "It's age discrimination. Don't quote me on that."

[115] Mr. Bessey recalled the meeting quite differently. He denied making a number of the comments attributed to him by Mr. Garner. He testified that he said to Mr. Garner that it was not what he did in his past roles (that was important) but what he could do in future roles.

[116] Mr. Bessey testified that he provided Mr. Garner with certain confidential demographics that represented an operational risk to the Bank. In particular, he said he told the Plaintiff that the average age of Executive Vice-Presidents (EVPs) was 49 years and the average age of Senior Vice-Presidents (SVPs) and Vice-Presidents (VPs) was "early 50s". He denied giving Mr. Garner an average age for DVPs. Mr. Bessey referred to this at trial as an inverted age structure, where higher level executives (EVPs) were younger than those below them. Since Bank employees could retire at 53 or 55 years of age, this inverted age structure represented an operational risk to the Bank as a large number of VPs and SVPs could retire within a short window of time. He said that he gave Mr. Garner this information to try to explain to him why a DVP position was not a "destination role", but a developmental position for individuals who had the skills to move on to more senior positions. He said that he asked Mr. Garner to keep this information confidential and not to quote these numbers as the Bank did not want them to be public. He adamantly denied saying "It's age discrimination. Don't quote me on that."

[117] I find that Mr. Bessey's recollection of what was said at the June 25th, 2010 meeting was not as clear as Mr. Garner's recollection. That is not a criticism of Mr. Bessey. He testified that he thought that the meeting had gone quite well. He had no particular reason to remember the specific details of all that was said during this meeting.

[118] I find that Mr. Garner had a better recollection of what was said at this meeting. That does not mean, however, that I am satisfied that the Plaintiff properly heard the message that was being delivered.

[119] I am satisfied, on a balance of probabilities, that during this meeting Mr. Bessey made a comment to the effect that it was not so much the timelines behind Mr. Garner that matter as the timelines in front of him to fill the DVP position and other senior leadership roles within the Bank. I am not satisfied, however, that this comment is evidence of age discrimination.

[120] During this meeting, Mr. Bessey was attempting to explain to the Plaintiff that the DVP position was a developmental role for those who were seen to have potential to move up in the Bank to more senior roles. I accept Mr. Bessey's evidence that he did not believe that Mr. Garner had this potential, nor was he going to develop it in the future. Mr. Bessey's comment must be analyzed in that context.

[121] I accept that, on a balance of probabilities, something was said by Mr. Bessey during this meeting about age discrimination. However, I am unable to conclude, based on the evidence before me, specifically what was said or the context in which it was said.

[122] In paragraph 19 of the Plaintiff's second amended Statement of Claim it is alleged:

> … Bessey pointed out that the rationale concerning time lines was based on the Leadership Succession Policy of 'years ahead' and he admitted that it was age discrimination, but that Garner should not quote him on that…..

[123] The Plaintiff's Statement of Claim is not evidence. However, it represents the Plaintiff's position on the facts of the case.

[124] At trial, Mr. Bessey's alleged age discrimination comment was put in a slightly different context. It was said to have been made after Mr. Bessey gave the average ages of DVPs, SVPs, etc.

[125] In the end, I am satisfied from the evidence presented that Mr. Bessey made a comment about age discrimination. However, I am unable to conclude exactly what was said or the context in which the comment was made. In my view, very little turns on this. The issue in this case is not whether Mr. Bessey said that a certain bank policy was discriminatory in a general sense. The issue is whether Mr. Garner was discriminated against. After hearing from the various witnesses and considering the evidence, I have concluded that age was not a factor in the decisions not to promote Mr. Garner and that he was not discriminated against on the basis of age.

[126] As I have concluded that Mr. Garner was not discriminated against, it is unnecessary for me to decide whether this court has concurrent jurisdiction with the Canadian Human Rights Commission to decide breaches of the ***Canadian Human Rights Act***.

[127] The Plaintiff has also alleged that he was constructively dismissed as a result of the Bank breaching what is said to be a duty of good faith and fair dealing it owed to him. At paragraphs 36 & 37 of the Plaintiff's Statement of Claim it is alleged:

> Garner repeats the foregoing and says that it was an implied term of his contract of employment with the Bank of Nova Scotia that the parties would deal with each other in good faith and fairly and that Garner would be provided

> guidance and direction to ensure advancement within the Bank of Nova Scotia in a work place that was free from harassment or discrimination.
>
> Garner repeats the foregoing and says that in addition to being discriminated against on the basis of his age, contrary to *The Human Rights Act of Canada* [sic], he has been constructively dismissed, both as the result of the acts of discrimination and as a result of the Bank of Nova Scotia breaching it's [sic] duty of good faith and fair dealing to him.

[128] Counsel for the Plaintiff has not provided me with any authority for the suggestion that the Bank owed a general duty of good faith and fair dealing to the Plaintiff in the context of his employment relationship. In Innis Christie et al, ***Employment Law in Canada, 4th ed*** (Markham, Ont: LexisNexis Butterworths, 2005) (Looseleaf: Updated to 2014), the authors note at pp.10-13 to 10-14:

> **§10.20** One of the most hotly debated issues in Canadian employment law in recent years has been whether the courts should imply as a standardized term in all employment contracts an obligation on the employer to treat the employee fairly in regard to his or her working conditions. The traditional common law position is that employees have no implicit right to 'fairness' in either the procedural or the substantive senses in discharge, discipline and the organization of the work process, except in the case of judicially recognized office holders whose employers are exercising statutory powers. For a duty of fairness to apply, therefore, the contract must either expressly provide for it or there must exist a strong factual basis for concluding that the parties intend to be bound by the duty so that it can be implied into the contract. Thus, many organizations have explicit disciplinary and dismissal procedures, often contained in personnel manuals, that may be expressly or impliedly incorporated into their employment contract.
>
> [Citations omitted]

[129] Later at p.13-65 it is stated:

> **§13.64** As discussed elsewhere in this book, Canadian courts do not recognize that there is an independent implied duty on employers under the employment contract to treat employees fairly in *all* aspects of the labour process, although the seeds of such a duty were apparent prior to the 1997 decision of the Supreme Court of Canada in *Wallace v. United Grain Growers*. The latter decision, however, appears to have dealt a death blow to the emergence of such a duty…..
>
> [Citation omitted]

[130] In ***Wallace v United Grain Growers Ltd***, [1997] 3 SCR 701, the majority of the Court refused to imply a term in the employment contract that would have required the employer to dismiss the plaintiff fairly and in good faith (see ¶75 and ¶76). Further, it refused to find that a tort of "bad faith discharge" existed (see ¶77 and ¶78). However, the majority were prepared to hold employers to an obligation of good faith and fair dealing in the *manner* in which an employee is dismissed.

[131] The comments of Wagner J in ***Potter v New Brunswick Legal Aid Services Commission***, *supra*, at ¶84 suggest that the Supreme Court's view on this issue may be changing.

[132] It is unnecessary for me to decide whether employers have a general duty to treat their employees fairly and in good faith in all aspects of their employment relationship. I have reached this conclusion as a consequence of my view that even if the Plaintiff could establish that such a duty exists, nothing that the Defendant did or did not do in the circumstances of this case (either individually or collectively) would constitute a breach of such a duty, or warrant a finding of constructive dismissal of the Plaintiff.

[133] I have already dealt with the Plaintiff's various applications for promotion. I am satisfied that the Bank acted fairly and in good faith when considering Mr. Garner's candidacy. In my view, the Plaintiff has failed to establish evidence of "harassment or discrimination" in relation to his applications for a promotion. During the trial, however, the Plaintiff referred to numerous other complaints that he had with the Bank and the manner in which it treated him. One of these complaints related to Mr. Garner's Employee Development Plans.

[134] Employees of the Bank annually prepare what is known as an Employee Development Plan (EDP). The goal of the plan is to identify each employee's career aspirations and the training that may be required to get the employee where they want to go. The employee is responsible to prepare the plan and it is managed and supported by the employee's supervisor. The Bank's documents indicate that one of the major accountabilities of a DVP is to prepare and obtain agreement on individual development plans and act as a mentor for all Branch Managers that report to them.

[135] I have been provided with copies of Mr. Garner's Employee Development Plans from 1998 forward. There are some years after this date where no Employee Development Plan appears to have been filed. The documents that have been filed indicate that starting in 2002, Mr. Garner expressed an interest in becoming a DVP. At trial, Mr. Garner complained that some of his supervisors failed to

properly respond to his EDPs. Further, he noted that, over the years, none of his supervisors told him that his career objective to become a DVP was unrealistic. I will deal first with Mr. Garner's complaint that some of his supervisors failed to properly respond to his EDPs.

[136] I am satisfied that there were periods of time when Mr. Garner's EDPs did not receive a great deal of attention. I find that, at times, both Mr. Garner and some of his supervisors had a relatively relaxed attitude toward his Employee Development Plans. With Mr. Garner, this is evidenced by some of the Plans themselves which I would describe as cursory. With respect to some of his supervisors, this is evidenced by a failure to formally respond in writing to his Plans. This lack of formal response does not appear to have been of serious concern to Mr. Garner as he acknowledged at trial that he did not follow up with his superiors if his EDPs were not formally signed off.

[137] In addition, the fact that his EDPs may not have been formally responded to in writing does not mean that his superiors failed to discuss his career aspirations with him or mentor him in this regard. There was evidence given of a number of conversations between Mr. Garner and his superiors about his desire to advance to a DVP position. Mr. Garner seems to make reference to this himself in an email that he wrote to Mr. Bessey after their June 25th, 2010 meeting. In this email, Mr. Garner states:

> … While it has been my career goal to advance to a higher position within the Bank, I have concluded from my 11 JOL Applications during the past 5 years in particular <u>including discussions with my 3 DVP's, previous SVP and yourself</u> that there may not appear further opportunity for myself as I do not fit the current structure going forward.
>
> [Emphasis added]

[138] While, at times, the formal process surrounding Mr. Garner's EDPs may not have been followed, there is, in my view, no evidence of bad faith or unfairness in the manner in which his EDPs were dealt with.

[139] Mr. Garner also complains that none of his supervisors told him that his desire to become a DVP was unrealistic.

[140] Mr. Garner had a number of DVPs that he reported to over the years. As indicated previously, he first expressed an interest in becoming a DVP on his 2002 Employee Development Plan. From 2002 to 2011 (when his employment with the

Bank ended) his DVPs were David Martin, Helen Quinlan-Hainse and Gisela Marker. All of these individuals testified at trial.

[141] Mr. Martin testified that he viewed the Plaintiff as a candidate to be a DVP, but there were steps that Mr. Garner would have to take if he was going to pursue that goal. During the time that Mr. Garner reported to Ms. Quinlan-Hainse, she did not feel that he was ready for a DVP position and testified that she told him this. She said that she was unable to predict whether he would have the ability to become a DVP in the future. Similarly, Ms. Marker testified that during the time that she was Mr. Garner's DVP, she did not feel that he was ready to take on a DVP role. She did not suggest that he was incapable of taking on such a position in the future.

[142] The evidence establishes that the DVPs that Mr. Garner reported to from 2002 onward did not feel that he was ready to be a DVP at the time that he was working with them. However, none of these individuals gave evidence that they felt he was incapable of becoming a DVP in the future. In these circumstances, I would not expect these people to suggest to Mr. Garner that his objective to become a DVP was unrealistic.

[143] Mr. Bessey testified that in his view, Mr. Garner was not a candidate for a DVP position and would never progress into that role. Mr. Bessey was not Mr. Garner's DVP and would not have been directly involved in reviewing his Employee Development Plans. He was, however, aware of Mr. Garner's desire to become a DVP.

[144] As I have indicated, I am satisfied that Mr. Garner was networking with Mr. Bessey in an attempt to improve his chances of becoming a DVP and, rather than bluntly tell the Plaintiff that he did not think he would succeed in this regard, Mr. Bessey provided the Plaintiff with some limited support. That support, however, was not significant. In addition, I am satisfied that during the June 25th, 2010 meeting, Mr. Bessey attempted to convey to Mr. Garner that he was not cut out for the job. With the benefit of hindsight (and the knowledge of all that has occurred in this case) it would have been preferable if Mr. Bessey had been direct with Mr. Garner about his inability to become a DVP at an earlier stage if, indeed, he had formed that opinion prior to that date. I am not satisfied, however, that Mr. Bessey's actions in this regard were unfair or constitute bad faith. Nor would they warrant a finding of constructive dismissal.

[145] The Plaintiff has also expressed concern about the fact that the Defendant collects and records information about employees' possible retirement dates. For

example, the evidence discloses that on some of the workforce planning documents there is a section for recording an employee's normal retirement date (the date by which an employee can retire with a full pension). Further, the evidence establishes that during employee development discussions, Ms. Marker was discussing the issue of retirement with employees who were within five years of their normal retirement date, including Mr. Garner. In particular, Ms. Marker testified that she had discussions with Mr. Garner about his career plans, including the possibility of his retirement. She said that in January 2010 (and at other times), Mr. Garner indicated to her that he might retire at some point in the next three years. Mr. Garner denied any recall of that conversation. Later in his testimony, he denied that this conversation occurred. He testified that in 2010 he had not turned his mind to retirement and was not in a financial position to consider retirement. Further, he said that he did not signal to anyone at the Bank, at any point, that he was planning to retire.

[146] The Plaintiff's solicitor takes the position that the collection of this information and the raising of this topic with employees was improper, unfair and against public policy. He notes that Ms. McGlynn (who has significant experience in human resources) agreed with him at trial that if she was in a discussion with an employee about the fact that that employee wanted to be promoted, it would not be "legitimate" to ask what that employee was planning to do in terms of retirement.

[147] According to the evidence of Bruce Smith, the purpose of workforce planning is twofold. First, it is intended to identify staffing gaps that may arise as a result of retirements or employees looking for other positions. He explained that demographics is a huge issue for the Bank these days. It is anticipated that a large number of Bank employees are likely going to retire over the next five to fifteen years and the Bank needs to make sure that they have a plan to replace them. Secondly, workforce planning is used to identify future leaders of the Bank.

[148] In my view, there is nothing improper about the Defendant collecting and recording data, including data on their workforce planning documents, on when their employees are eligible to retire, provided that this data is not used inappropriately. In fact, I would be surprised if this data was not collected. In the circumstances of this case, there is no evidence to suggest that this information was used improperly.

[149] Further, I have no difficulty with the fact that Ms. Marker discussed the issue of retirement with Mr. Garner. There is no suggestion in this case that Mr. Garner was being pressured in any way to retire.

[150] There is one aspect of this retirement issue, however, that deserves further comment. Ms. Marker acknowledged at trial that during the workforce planning meeting of 2010, there was discussion about Mr. Garner retiring. This could be of significance if, indeed, Mr. Garner never signalled to anyone at the Bank that he was thinking of retiring.

[151] I have carefully reviewed the evidence surrounding this issue. I am satisfied, and I find on a balance of probabilities, that in January 2010, Mr. Garner advised Ms. Marker that he might retire at some point over the next three years. I do not think that Mr. Garner was attempting to mislead the Court when he denied that this conversation took place. I am satisfied that he did not recall this discussion, but I find that the conversation did, indeed, take place.

[152] Even if I am wrong in this regard, the evidence as a whole satisfies me that the suggestion that the Plaintiff might retire played little, if any, role in the decision not to recognize Mr. Garner as having DVP potential.

[153] The Plaintiff has also raised the fact that when Ms. Marker began working as a DVP for southwest Nova Scotia, she prepared a contact list of all employees in her district which included each employee's birthday and year of birth. The Plaintiff suggests that there was something nefarious about collecting and recording the year that each employee was born.

[154] Ms. Marker testified that she included the employees' birth dates and years on this list in order to acknowledge milestone or special birthdays of the people that reported to her. She testified that it was (and is) her practice to send congratulations to her employees on these special occasions. Usually this is done by telephone, email or e-card, or with flowers. She testified that she did not use this information for any other purpose (including workforce planning) and noted that it was available to her regardless of whether she prepared this list.

[155] In my view, there is nothing untoward or wrong with Ms. Marker including employee' birth dates and years on her contact list. I fully accept her evidence as to why she collected this data and that she did not use it for any other purpose.

[156] The Plaintiff has also raised concerns about a lack of transparency in the promotion process at the Bank. He notes, for example, that until this lawsuit was commenced, he had not seen copies of the Bank's workforce planning documents and alleges that some of these documents contain errors. In particular, some of the workforce planning documents say that the Plaintiff was only mobile within a one-hour commute or was not mobile at all. The Plaintiff testified on direct

examination that he had never suggested to anyone at the bank that he was not mobile and that his mobility was always open, which meant that he was willing to transfer anywhere.

[157] It is not surprising, in my view, that the Bank would have confidential documents concerning workforce planning, including the career potential of its employees. I have no difficulty with the fact that these materials are not handed out to the employees that are referred to in the documents. I am concerned, however, by the suggestion that these documents were incorrect concerning the Plaintiff's mobility. The evidence at trial confirmed that mobility can be an important issue when it comes to promotions.

[158] The workforce planning documents that have been tendered show that for the years 2004 and 2005, Mr. Garner was identified as being mobile within a one-hour commute. For the year 2006 he is shown as being "not mobile". For the years 2007 onward, the workforce planning documents are silent on the issue of Mr. Garner's mobility.

[159] Mr. Garner's testimony that he had never suggested to anyone at the Bank that he was not mobile was incorrect. During cross-examination, he confirmed that in 2005 he told the regional SVP at the time (Mr. Oliver) that he was not mobile due to family obligations. He testified that in 2007 he told Mr. Oliver that he was fully mobile again.

[160] I am not satisfied that the Plaintiff's recollection concerning his mobility is fully reliable. Nor am I satisfied that the workforce planning documents incorrectly reflect his mobility at the relevant times. These documents show that he had limited mobility in and around 2005 and was not mobile in 2006. This information appears to be correct based on the evidence. They are silent on the issue of his mobility for the years 2007 onward.

[161] In any event, I find from the evidence presented that Mr. Garner's mobility did not play a role in the decision not to recognize him as having DVP potential.

[162] Mr. Garner also raised a concern about a discussion about him between Ms. Quinlan-Hainse and Mr. Bessey.

[163] The evidence satisfies me that at some point prior to 2010, Ms. Quinlan-Hainse expressed to Mr. Bessey her suspicion that, that in the past, Mr. Garner had attempted to undermine her authority. Mr. Bessey understood that his predecessor (Mr. Oliver) had addressed the matter and it was no longer a problem. He acknowledged, however, that this was one of the factors that he took into account

when considering Mr. Garner's ability to be a DVP. He further testified that this would have been a much smaller consideration in his mind than Mr. Garner's skill set and ability to take on the DVP role.

[164] Mr. Garner denied having ever undermined Ms. Quinlan-Hainse's authority. His lawyer criticizes a process which allows for these types of subjective comments to influence one's career. He submits that this comment by Ms. Quinlan-Haines negatively affected Mr. Garner's chances of being promoted to DVP.

[165] In my view, any evaluation of an employee by a superior (whether for promotion or otherwise) will, necessarily, involve an element of subjectivity. It is unrealistic to expect otherwise.

[166] In this case, I accept Mr. Bessey's evidence that this comment by Ms. Quinlan-Hainse played a very small role in his overall evaluation of Mr. Garner's ability to be a DVP. Mr. Bessey understood that the situation had occurred in the past and had been resolved.

[167] Counsel for the Plaintiff also raised numerous other complaints during the trial, including an evaluation that Ms. Quinlan-Hainse gave to Mr. Garner early in her tenure as his DVP, and the fact that some promotions in the Bank were done by appointment rather than by competition. Further, in the post-trial brief filed by the Plaintiff, he has alleged that the Defendant failed to properly investigate his complaint of discrimination. None of these issues, in my view, support the suggestion that the Bank breached any duty that could be found to exist to treat its employees fairly and in good faith.

[168] I return now to the constructive dismissal analysis. I find no breach of contract by the Bank on the basis of discrimination, nor any breach of any alleged duty of good faith or fair dealing. Nor do I find any circumstances that would lead a reasonable person to conclude that the Bank no longer intended to be bound by the terms of the contract. I conclude that Mr. Garner was not constructively dismissed from the Bank.

## 4. **WAS THE PLAINTIFF WRONGFULLY DISMISSED BY THE DEFENDANT?**

[169] The law has long recognized the right of employers or employees to terminate an employment contract at any time, provided there are no express provisions in an employment contract to the contrary (***Wallace v United Grain***

***Growers Ltd***, *supra*, ¶75.) In ***Farber v Royal Trust Co***, *supra*, Gonthier J. stated at p.858:

> In the context of an indeterminate employment contract, one party can resiliate the contract unilaterally. The resiliation is considered a dismissal if it originates with the employer and a resignation if it originates with the employee. If an employer dismisses an employee without cause, the employer must give the employee reasonable notice that the contract is about to be terminated or compensation in lieu thereof …..
>
> [Citations omitted]

[170] In ***Honda Canada Inc v Keays***, *supra*, the Supreme Court of Canada explained the nature of an action for wrongful dismissal at ¶50:

> An action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Thus, if an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term (*Wallace*, at para. 115). The general rule, which stems from the British case of *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.), is that damages allocated in such actions are confined to the loss suffered as a result of the employer's failure to give proper notice and that no damages are available to the employee for the actual loss of his or her job and/or pain and distress that may have been suffered as a consequence of being terminated. This Court affirmed this rule in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, at p. 684:
>
> > ….. the damages cannot be increased by reason of the circumstances of dismissal whether in respect of the [employee's] wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment.

[171] If an employee is found to have been wrongfully dismissed, the court determines the reasonable notice period to which the employee is entitled.

[172] The Plaintiff takes the position that he was wrongfully dismissed by the Bank. The Defendant alleges that by bringing an action for constructive dismissal which is unfounded, the Plaintiff has repudiated the employment contract himself and, therefore, was not dismissed. The Defendant relies on the decisions in ***Suleman v British Columbia Research Council*** (1990), 52 BCLR (2d) 138 (BCCA); ***Hulme v Cadillac Fairview Corp*** (1993), 1 CCEL (2d) 94 (aff'd at [1998] OJ No. 3237 leave to appeal to the SCC refused at (1999), 236 NR 188

(note)); ***Zaraweh v Hermon***, ***Bunbury***, 2001 BCCA 524 and ***Potter v New Brunswick (Legal Aid Services Commission)***, 2011 NBQB 296 (aff'd at 2013 NBCA 27) in support of its position. It further alleges that the allegations made by the Plaintiff in his Statement of Claim were incompatible with his continued employment.

[173] It is helpful to review each of the cases relied on by the Defendant.

[174] ***Suleman v British Columbia Research Council***, s*upra*, is an often-quoted decision from the British Columbia Court of Appeal. It involved a thirteen-year employee who was given six months' notice that her employment would be ending. Shortly after receiving this notice, the plaintiff went on sick leave. Less than two weeks later, she commenced an action against her employer alleging wrongful dismissal. Her employer wrote to her advising that since she had elected to treat the contract of employment as terminated, her resignation was accepted. The trial judge determined that neither the commencement of the action nor the pleadings required him to conclude that the plaintiff had resigned. The Court of Appeal disagreed and stated at p. 142:

> … the contract of employment is not terminated until the end of the notice period and during that period the employer has the right to the services of the employee. It follows that the employee must remain ready and willing to carry out the contract of service. In the present case, the named day was 31st March 1987. It was not until that date that the cause of action accrued for the alleged breach of the contract to continue the relationship.
>
> Unless, therefore, Mrs. Suleman is able to establish a case of constructive dismissal, the issue of the writ of summons on 22nd October 1986 was premature and amounted to a repudiation of her contract of employment.
>
> [Emphasis added]

[175] It is important to note that in ***Suleman***, *supra*, the Court of Appeal concluded that based on the pleadings, the plaintiff was declining to work further once she filed her Statement of Claim. It stated at p. 141:

> In other words, it appears to me that if the employee is unable to prove, on a balance of probabilities, that she had been the subject of a constructive dismissal, she was nonetheless declining to work further in accordance with para. 9 of her statement of claim…..
>
> [Emphasis added]

[176] Therefore, in ***Suleman***, *supra*, the plaintiff had stopped working (having gone on sick leave) before commencing her action and, based on her pleadings, was found by the Court of Appeal to have declined to work further.

[177] ***Hulme v Cadillac Fairview Corp***, *supra*, involved a Vice-President of a company who commenced an action against his employer alleging wrongful dismissal. The trial judge denied the plaintiff's claim for wrongful dismissal and held that it was "inconsistent with an employment relationship for an employee to be suing a company for wrongful dismissal". The court held that the employer was entitled to terminate the relationship in light of the lawsuit (see ¶40). In affirming the trial judge's decision, the Court of Appeal stated at ¶3:

> The appellant now argues that even if there was no constructive dismissal, in its letter of February 25, 1981 the Corporation wrongfully terminated his employment. However, this letter came only after the appellant had commenced an action against the Corporation on January 27, 1981. In the letter, the Corporation took the position that by instigating the action the appellant obviously intended to terminate his employment with the Corporation. The appellant did not reply or indicate in any other way that this was not his intention. In our view, it is clear from the evidence that the appellant had already decided to terminate his relationship with the company and to repudiate the employment contract. He had taken other steps, in addition to launching the action, to terminate the relationship. As found by the trial judge, the appellant had repudiated the contract and it was open to the Corporation to terminate the relationship, as it did in the letter. This does not seem to have been a serious issue in dispute at the trial.
>
> [Emphasis added]

[178] ***Zaraweh v Hermon***, ***Bunbury***, *supra*, is another British Columbia Court of Appeal decision involving an action against an employer for wrongful dismissal. The plaintiff in that case, who had been given notice that her employment would be terminated, was working when she served court documents on her employer seeking general and punitive damages. Four days later, she was sent home. Her employer took the position that the Plaintiff had repudiated the employment contract by commencing her action. The trial judge (at 2000 BCSC 0154) found that the notice period given by the employer was inadequate. In relation to the issue of the plaintiff commencing an action during a period of working notice, he stated at ¶¶ 6-8:

> In contending that Ms. Zaraweh repudiated the contract of employment when she issued the writ, the partnership relies in the main on the decision of the Court of Appeal in ***Suleman v. British Columbia Research Council*** (1990), 52 B.C.L.R.

(2d) 138. There an employee who issued a writ during what appears to have been an unreasonable period of notice was held to have repudiated her contract of employment. She alleged but failed to establish a constructive dismissal based on changes in the terms of her employment that predated the notice she was given. The partnership relies as well on ***Podas v. Pacific Press Ltd.*** (1991), 61 B.C.L.R. (2d) 196 (C.A.), where ***Suleman*** was applied in somewhat similar circumstances. Further, in ***Cox v. Robertson***, [1999] B.C.J. No. 2693 (Q.L.) (C.A.), a case about mitigation, at para. 16 it was recognized that litigation between employee and employer is of course inconsistent with a harmonious working arrangement. And in a decision of the Ontario Court of Justice (Gen. Div.) it was said that it is inconsistent with an employer-employee relationship for an employee to be suing a company for wrongful dismissal: ***Hulme v. Cadillac Fairview Corp.*** (1993), 1 C.C.E.L. (2d) 94 at para. 40.

However, in my view, the distinguishing feature in ***Suleman, Podas*** and ***Hulme*** is that in each of those cases, in addition to commencing an action, the employees involved appear to have refused to do any further work for the employer. That was clearly the case in ***Suleman*** where the employee specifically pleaded having elected to treat the contract of employment at an end. There, as recognized in ***Podas***, the employee was held to have repudiated the contract because a writ had been issued and she refused to continue to work. Indeed, in his concurring reasons in ***Podas***, Taylor J.A. entertained the contention that the two cases were factually distinguishable in that regard but concluded they were not. This case is different. Ms. Zaraweh issued a writ during the period of notice she was given, but she did not plead any election to treat the contract at an end. To the contrary, she was prepared to continue working for the partnership and stopped only because she was told not to return to work.

I do not consider that an employee who does no more than issue a writ and file a pleading alleging a wrongful dismissal when given working notice that is less than reasonable is to be denied her remedy if she is prepared to continue working for her employer and does so until the employer terminates the contract. I do not consider that the writ Ms. Zaraweh issued precludes her from making out a case for wrongful dismissal.

[Emphasis added and in the original]

[179] It appears that between the time of trial and the hearing of the appeal in that case, the plaintiff changed her position on the effect of filing her action. According to the decision of Saunders J.A., both parties agreed in the Court of Appeal that the Plaintiff's action in issuing a writ and statement of claim was not compatible with a continuing employment relationship (see ¶19). It is, therefore,

not surprising that the Court of Appeal reached that conclusion. It stated at ¶¶ 20-22:

> The learned trial judge did not address the issue of repudiation in the terms presented to us, and he seems to have concluded that Ms. Zaraweh had neither elected to accept a repudiation of, nor repudiated, the contract.
>
> On my view of the pleadings and the case law, I do not consider that his view can hold, and I am of the view that the acts of issuing the writ and statement of claim and serving them upon the partnership were conduct incompatible with continuation of the contract of employment. Absent a prior repudiation by the partnership which would allow Ms. Zaraweh to elect to end the contract, or which alternatively could be viewed as justifying her termination of the contract, such actions must be viewed as unjustified repudiation by Ms. Zaraweh. This result is consistent with the decision of our Court in **Suleman v. B.C. Research Council** (1990), 52 B.C.L.R. (2d) 138 in which this Court held that commencement of the action amounted to repudiation of the contract of employment.
>
> In reaching this conclusion I refer only to the facts of this case which were issuance of a writ of summons and statement of claim seeking general and punitive damages, some time before the end of the working notice. It may be that not all actions by an employee against an employer are of the same nature. For example, an action for a declaration as to a contract's continuance, or for an injunction, such as in **Hill v. C.A. Parsons & Co. Ltd.**, [1972] 1 Ch. 305, [1971] 3 All E.R. 1345 (C.A.), may have a character compatible with performance, not breach, of a contractual obligation. But such is not the case here.

[180] That takes me to ***Potter v New Brunswick (Legal Aid Services Commission)***, *supra*. That case involved a constructive dismissal action brought by the Executive Director of the New Brunswick Legal Aid Services Commission, who had been off of work for medical reasons. He and his employer had been having discussions about finding a mutually acceptable method of bringing his contract to an end when the plaintiff was advised not to return to work until further direction from the Commission. He was suspended with pay at the conclusion of his sick leave and his duties were transferred to another individual. The plaintiff commenced an action claiming that he had been constructively dismissed. The Commission took the position that the plaintiff had resigned as a result of commencing his action and stopped paying his salary and benefits. The plaintiff's solicitor immediately denied that the plaintiff had resigned.

[181] At trial, the plaintiff's constructive dismissal action was dismissed. In addition, it was found that the commencement of the lawsuit by the plaintiff effectively destroyed the chances of a productive relationship and amounted to a

repudiation of the employment contract as well as a resignation of the plaintiff's position. The trial judge's findings were confirmed by the Court of Appeal. On the issue of repudiation by the employee, Drapeau CJNB stated at ¶100:

> Equating his indefinite administrative suspension (with full pay) to a constructive dismissal, Mr. Potter elected to repudiate his contract of employment and resign, thus opening the door to his lawsuit. That action in damages for constructive dismissal failed. Assuming this option remained open in the immediate aftermath of the institution of the action, it is now too late for a withdrawal of the predicate election to terminate and incidental resignation, or for judicial remedial relief. In my view, Mr. Potter did not have to state, in explicit terms, that he was resigning. What occurred here is a resignation by operation of law, one that Mr. Potter had to have intended since it was a corollary to his action in damages for constructive dismissal.

[182] The conclusion by the Court of Appeal in ***Potter***, *supra*, that the commencement by an employee of an action for constructive dismissal results in repudiation of the employment contract, and a resignation by operation of law, raised some interesting issues. First, this finding is inconsistent with the reality that many employees bring various types of legal proceedings against their employers without the threat of losing their job. For example, unionized employees file grievances against their employers while maintaining their employment. In addition, employees bring class actions against their employers while continuing to work (see for example: ***Fulawka v Bank of Nova Scotia***, 2012 ONCA 443 which included a claim for breach of an alleged duty to act in good faith). Further, employees file complaints against their employers under human rights legislation and are protected, by law, from retaliation (see for example: s. 14.1 of the ***Canadian Human Rights Act***). The issue is highlighted by the circumstances of this very case. Mr. Garner filed a complaint with the Canadian Human Rights Commission alleging age discrimination. There was no suggestion by the Bank that the laying of this complaint resulted in a repudiation of the employment contract. Paradoxically, when the Plaintiff changed forums and brought this action in the Supreme Court, he is said to have done just that. I appreciate that his Supreme Court action included additional allegations of constructive dismissal, tortious interference with contractual relations and a failure to treat him fairly and in good faith. Nevertheless, I am satisfied that the basic facts underlying both proceedings were essentially the same. The question arises why certain types of legal proceedings (such as an action based on an allegation of constructive dismissal) are said to automatically result in repudiation of the employment contract, but others do not.

[183] Further, the adoption by the Court of Appeal in ***Potter***, *supra*, of a general rule that the bringing of an action by an employee for constructive dismissal necessarily results in a repudiation of the employment relationship is inconsistent with the evolution of the law of summary dismissal, which deals with the issue of whether "misconduct" by an employee amounts to a repudiation of the employment relationship. Where such a repudiation on the part of the employee is found, the employer will have just cause to dismiss the employee: ***Halsbury's Laws of Canada*** (Online) – Employment (2011 Reissue) at HEM-301.

[184] In ***McKinley v BC Tel***, 2001 SCC 38, the leading authority on just cause, the Supreme Court of Canada considered whether to adopt an absolute, unqualified rule that dishonest conduct by an employee automatically gives rise to just cause for dismissal. The Court stated at ¶48:

> ….. I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligation to his or her employer.

[185] The Court concluded that a contextual approach should be taken to assess whether an employee's dishonesty provides just cause for dismissal and stated at ¶¶ 53-54:

> Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, where Dickson C.J. (writing in dissent) stated at p. 368:
>
> > Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

> This passage was subsequently cited with approval by this Court in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, and in *Wallace*, *supra*, at para. 95. In *Wallace*, the majority added to this notion by stating that not only is work itself fundamental to an individual's identity, but 'the manner in which employment can be terminated is equally important'.
>
> Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In *Wallace*, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position *vis-à-vis* their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.
>
> [Emphasis added]

[186] Finally, the Court stated at ¶¶ 56-57:

> ….. Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as 'dishonesty' might well have an overly hard and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labelled 'dishonest' would further unjustly augment the power employers wield within the employment relationship.
>
> Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship…….

[187] Although the Court in ***McKinley***, *supra*, was considering employee dishonesty in particular, lower courts view the contextual approach endorsed in that case as applying to any case where an employer raises the defence of just cause: see, for example, ***Bonneville v Unisource Canada Inc***, 2002 SKQB 304, at ¶35; ***MacLeod v W Eric Whebby Ltd***, 2014 NSSC 306, at ¶20.

[188] According to the Supreme Court of Canada, when considering whether an employer was entitled to terminate an employee for cause, the test is whether the employee's conduct gave rise to a breakdown in the employment relationship.

This approach requires a consideration of the employment relationship as a whole in order to determine whether the employee's conduct justifies termination. In my view, there is no reason to adopt a distinct approach where the conduct in question is the bringing of an action against the employer for constructive dismissal. It would seem to me that if a dishonest employee is entitled to the benefit of a contextual analysis to determine whether the employment relationship can continue notwithstanding his conduct, an honest employee, who mistakenly believed that he was constructively dismissed, is entitled to the same.

[189] Finally, a finding that an employee resigns by operation of law once they commence an action for constructive dismissal fails to recognize the difficult, and in some ways, inconsistent position an employee who believes they have been constructively dismissed is placed in. I will elaborate.

[190] First, if an employee believes that he has been constructively dismissed but does not pursue the matter in a timely manner, he can be found to have accepted the employer's fundamental changes to the employment relationship and be precluded from succeeding in an action for damages (see for example: ***Anstey v Fednav Offshore Inc*** (1990), 34 FTR 192 (TD)[1]). If, on the other hand, the employee decides to pursue the matter and commences an action, according to the Court of Appeal in ***Potter***, *supra*, he will be found to have resigned by operation of law.

[191] To further complicate the matter, if the employee is successful in his claim for constructive dismissal, he may be found to have a duty to mitigate his damages by continuing to work for the employer that he has sued (see for example: ***Evans v Teamsters Local Union No 31***, 2008 SCC 20). All of this, in my view, places the employee in a difficult and vulnerable position.

[192] The Court of Appeal decision in ***Potter***, *supra*, was appealed to the Supreme Court of Canada. The appeal was heard during the course of this trial. At the

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[1] This case is also interesting as it involved a senior management employee who filed an unsuccessful complaint with the Canadian Human Rights Commission alleging discrimination on the basis of age and then sued his employer in Federal Court for constructive dismissal. The employer took the position that the act of commencing legal proceedings was inconsistent with the requirements of "utmost loyalty, good faith and trust" required of senior employees. MacKay J. disagreed stating at ¶40 "… An employee's act of bringing an action against an employer is a serious matter and no doubt in most cases it will negatively affect the employment relationship. It seems to me likely that the employee in such circumstances would resign or alternatively would be dismissed from his position by the employer. Be that as it may, it seems to me that commencing an action against an employer does not in itself amount to just cause as that term is commonly accepted in wrongful dismissal actions. Misconduct or gross incompetence or inability to perform the work is the essence of just cause ……" The Court concluded that while it was within the defendant's discretion to dismiss the plaintiff, it could not do so without reasonable notice.

conclusion of the trial, I advised counsel that I would not be releasing my decision until the Supreme Court of Canada had released their decision in ***Potter***, *supra*. That decision was released on March 6th, 2015. The Supreme Court found that in the circumstances of that case, Mr. Potter had been constructively dismissed. Therefore, it was unnecessary for them to deal directly with the repudiation issue. Nevertheless, they did comment on the matter, stating, at ¶¶ 108-111:

> I would note, however, that in many failed constructive dismissal cases, the reason why the question of resignation by the employee does not arise will be that it is clear that the employee has resigned, given that, after the employer acted unilaterally to, for instance, demote the employee or transfer him or her to a new position, the employee elected to quit work and sue the employer. In this typical situation, if the constructive dismissal action fails, the employee cannot then argue that he or she did not quit work.
>
> Nevertheless, there are instances in which it will not be necessary to conclude that the employee has resigned in bringing the constructive dismissal suit. One such case would be where, following the changes to the contract, the employee has continued to work under protest. This Court has held that employees have a duty to mitigate their damages by remaining in the workplace, provided that doing so would not be objectively unreasonable: see, e.g., *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661. Where the employment relationship has not become untenable, it is not evident that by commencing legal action the employee should be held to have resigned by operation of law.
>
> In the case at bar, the unilateral change by the employer was an indefinite suspension with pay. After the suspension had continued for approximately eight weeks, Mr. Potter sued for damages for constructive dismissal. He did not, as has happened in other cases, clearly *resign*, given that he had already stopped performing his duties while continuing to be paid and that, in his view, the fact that he continued to "work" – i.e. that he remained on suspension with pay – was consistent with the position he was taking in his constructive dismissal action. The Board of course viewed Mr. Potter's action as a resignation and promptly cut his salary and benefits. Were I to uphold the trial judge's decision that Mr. Potter was not constructively dismissed, I would then have to determine whether Mr. Potter resigned when he commenced his action for constructive dismissal, or was wrongly terminated by the Board when it cut his salary and benefits.
>
> The courts below took the view – as does the Commission – that a resignation had been effected by operation of law. In *Suleman*, for example, an employee whose workload had been reduced had failed to make out a case of constructive dismissal and was found to have repudiated her contract 'by the position she took in her statement of claim' (p. 144; Court of Appeal reasons, at para. 99). This view certainly finds support in the traditional principles of the law applicable to constructive dismissal, and I have no doubt that the employee will be found to

> have resigned in the majority of failed constructive dismissal cases. However, I will leave open the question whether there are factual circumstances in which an employee whose constructive dismissal action is unsuccessful might nevertheless argue that he or she did not resign.
>
> [Emphasis added]

[193] While these comments of the Supreme Court of Canada in ***Potter***, *supra*, are clearly *obiter*, they are instructive in any event.

[194] In my view, the Supreme Court's suggestion that where the employment relationship has not become untenable, it is not evident that by commencing legal action the employee has resigned by operation of law, allows for a more contextual approach to this issue and a consideration of all of the circumstances in order to determine whether a resignation or repudiation actually occurred. Clearly, there will be circumstances in which the filing of an action against an employer will constitute repudiation of the employment contract or a resignation by operation of law. ***Suleman***, *supra*, and ***Hulme***, *supra*, (where the plaintiffs declined to work further for their employers) are both examples of such cases. However, there may be cases where the circumstances will dictate against such a finding. Each case will have to be decided on its own facts.

[195] In analyzing the situation, the court will first ask whether the employee actually resigned. If the answer to that question is negative, the court should go on to ask whether, in the circumstances of the case, the employee's actions were such that he should be found to have resigned by operation of law or to have repudiated the employment contract by filing an action against his employer. In assessing this issue, the court should consider, *inter alia*, the nature of the plaintiff's employment, the length of his service, the context in which the action was brought, the nature and seriousness of the allegations made against the employer and the extent to which the lawsuit impacts upon the employment relationship. In essence, was it reasonable to expect the employee and employer to continue the relationship? Put another way, has the filing of the action given rise to a breakdown in the employment relationship to the extent that continued employment has become untenable?

[196] I appreciate that this conclusion does not fit nicely with the principles of general contract law which provide that a non-breaching party faced with a repudiatory breach by the other party has a choice to either affirm the contract or to accept the repudiation and treat the contract as over and sue for damages (see the comments of Cromwell J. in ***Potter***, *supra*, at ¶181). It has long been recognized,

however, that employment contracts differ from regular commercial contracts. I refer, for example, to the comments of Iacobucci J., speaking for the majority, in ***Wallace v United Grain Growers Ltd***, *supra*, at ¶¶91-95, where he stated:

> The contract of employment has many characteristics that set it apart from the ordinary commercial contract. Some of the views on this subject that have already been approved of in previous decisions of this Court (see e.g. *Machtinger, supra*) bear repeating. As K. Swinton noted in 'Contract Law and the Employment Relationship: The Proper Forum for Reform', in B. J. Reiter and J. Swan, eds., *Studies in Contract Law* (1980), 357, at p. 363:
>
> > . . . the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.
>
> This power imbalance is not limited to the employment contract itself. Rather, it informs virtually all facets of the employment relationship. In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, Dickson C.J., writing for the majority of the Court, had occasion to comment on the nature of this relationship. At pp. 1051-52 he quoted with approval from P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983), at p. 18:
>
> > [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination. . . .
>
> This unequal balance of power led the majority of the Court in *Slaight Communications*, *supra*, to describe employees as a vulnerable group in society: see p. 1051. The vulnerability of employees is underscored by the level of importance which our society attaches to employment. As Dickson C.J. noted in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368:
>
> > Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

> Thus, for most people, work is one of the defining features of their lives. Accordingly, any change in a person's employment status is bound to have far-reaching repercussions. In 'Aggravated Damages and the Employment Contract', *supra*, Schai noted at p. 346 that, '[w]hen this change is involuntary, the extent of our 'personal dislocation' is even greater.'
>
> The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In *Machtinger, supra,* it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002)…..

[197] See also the comments in ***Employment Law in Canada***, *supra*, at p. 7-1, where it is stated, *inter alia*, that "Indeed, it is fair to say that whereas the employment relationship is undoubtedly built upon a contractual framework, the general principles of contract law have been stretched to such a degree to accommodate the special nature of this relationship that employment contract law is almost *sui generis*".

[198] I begin my analysis on this issue by determining whether Mr. Garner actually resigned. A resignation must be clear and unambiguous in order to be effective and binding on an employee. In ***Kerr v 2463103 Nova Scotia Ltd (cob Valley Volkswagen)***, 2015 NSCA 7, the Court of Appeal stated at ¶5:

> ….. to be effective and binding, an employee's resignation must be evident in clear and unambiguous terms. Whether an employee has resigned requires a careful examination of the context having regard to all of the circumstances. The resignation must be voluntary and the employee's words or conduct evidencing a resignation, must be clear and unequivocal and objectively reflect an intention to resign:
>
> III. DISTINGUISHING QUTTING FROM DISMISSAL
>
> para 13.12 It may sometimes be difficult to determine whether the employment relationship has been terminated by a quit on the employee's part or by a dismissal on the part of the employer. The courts … have held that a valid resignation must have a subjective as well as an objective component. The former requires conduct on the employee's part that unequivocally manifests that he or she

> had the subjective intention of quitting. The latter requires conduct on the employee's part that would lead a reasonable person in the position of the employer to believe that the employee has carried out his or her subjective intention. …
>
> (*Employment Law in Canada*, 4th ed., looseleaf (Markham: LexisNexis, 2005), c. 13, by Geoffrey England and Innis Christie and Peter Barnacle)
>
> [Emphasis added]

[199] There is, in my view, no evidence in this case to support a finding that Mr. Garner actually resigned from his job with the Bank. In fact, the evidence is very much to the contrary. I will explain.

[200] Mr. Garner was disappointed that he was not interviewed for the northeast Nova Scotia DVP position. He was also upset about his June 25th, 2010 meeting with Mr. Bessey. His disappointment, however, did not translate into poor work performance or a cessation of the performance of his duties. In fact, the opposite occurred. Mr. Garner testified that after his meeting with Mr. Bessey he wanted to show that he could perform and he made an effort to "stand out". That effort produced results. According to Mr. Garner, the last Achievement Assessment he received from the Bank (for the second quarter of 2011) was one of the best, if not the best, assessment he had in 35 years. He received an overall rating of "superior" from his DVP. Her comments on his assessment report include "A really strong first half of the year Chris! The branch is cooking on all cylinders!" "Overall Chris – a great first half on all fronts!!"

[201] Unlike the plaintiff in ***Suleman***, *supra*, who stopped working and declined to work further once she had a dispute with her employer, the Plaintiff in this action stepped up his game. In Mr. Garner's last year with the Bank, he was entitled to five weeks' vacation and eight sick and personal obligation days. He took only two to two and a half vacation days that year and the same amount of sick time. Mr. Garner's work product for the Bank actually increased once this dispute arose, rather than decreased.

[202] As indicated previously, Mr. Garner filed his age discrimination complaint with the Canadian Human Rights Commission in April 2011. Mediation of that complaint took place (unsuccessfully) on July 26th, 2011. Mr. Garner's action was commenced on August 24th, 2011. There is no evidence to suggest that his work performance diminished in any way during that time. He continued to work until September 8th, 2011, when he was told that he was no longer considered an

employee of the Bank and was not to report to work. I appreciate that the Plaintiff's lawyer wrote to the Bank's solicitor on September 1st, 2011, stating that "The reason that Mr. Garner remains employed with the bank (notwithstanding their various breaches of law and his employment contract), was directly as a result of my advice that he has to mitigate his damages". Despite this comment, I find, based on a preponderance of the evidence, that Mr. Garner was prepared to continue working for the Bank and wanted to continue to work for the Bank. I find no evidence that Mr. Garner had the subjective intention of quitting. Nor, in my view, was there conduct on Mr. Garner's part that would lead a reasonable employer in the position of the Bank to believe that the Plaintiff had carried out such an intention. I find that the Plaintiff did not resign from his employment with the Bank.

[203] That takes me to the question of whether Mr. Garner's actions were such that he should be found to have resigned by operation of law or repudiated the employment contract by filing this action against his employer. The Defendant takes the position that it could not continue to employ the Plaintiff as a result of the serious and unfounded allegations made against it in a public forum, as well as the nature of the position held by the Plaintiff. In particular, it says that Mr. Garner was the "face" of the Bank in the Clayton Park area. He had "gone public" about suing the Bank and it was not possible for him to properly manage staff and deal with customers in light of his public allegations. According to the Defendant, the Plaintiff's allegations against the Bank made his continued employment untenable. These submissions require careful examination against the facts of the case.

[204] Mr. Garner had been employed with the Bank for over 35 years when he commenced this action. He was a well-respected and successful manager of a large branch of the Bank, but was not in the executive ranks. He was one of a thousand Branch Managers across Canada.

[205] In April 2011, Mr. Garner alleged, in a document filed with the Canadian Human Rights Commission, that the Bank had discriminated against him based on age. Despite that allegation, he continued to work for the Bank doing an excellent job. There is no evidence that after the filing of his human rights complaint the Bank was negatively affected in any way by his allegations or conduct. I find that during this time, his performance for the Bank actually improved.

[206] In August 2011, after an unsuccessful attempt at mediation of the human rights complaint, Mr. Garner decided to commence an action against his employer in the Nova Scotia Supreme Court. He broadened his claim to include allegations of constructive dismissal, tortious interference with contractual relations and a

failure to treat him fairly and in good faith. I accept that these were serious allegations. I am not satisfied, however, that these allegations, in and of themselves, made the Plaintiff's continued employment untenable.

[207] I anticipate that in many situations in which a lawsuit has been commenced by an employee against an employer, the atmosphere or working relationship would be such that it would be unreasonable to expect the parties to continue the employment relationship. Such was not the case here. The Plaintiff had the unique ability to separate his dispute with the Bank from his work for the Bank. There was no evidence that the Plaintiff's dispute with the Defendant affected his performance or resulted in any difficulties with any other employees of the Bank or with the public. If that had occurred, the situation could be re-evaluated. There was evidence of a small amount of publicity surrounding this lawsuit, but the majority of that publicity was after the Plaintiff was dismissed from his employment and matters had gone downhill.

[208] Both forums that the Plaintiff elected to proceed in (before the Canadian Human Rights Commission and the Supreme Court) are public forums (see s.52 of the ***Canadian Human Rights Act***). In my view, neither forum is more public than the other.

[209] Up until the filing of the Plaintiff's Statement of Claim, both parties were functioning very well together despite the Plaintiff's allegation of discrimination. I accept that the Plaintiff upped the ante when he broadened his claim in the Nova Scotia Supreme Court. However, taking all matters into consideration, I am not satisfied that the Plaintiff repudiated the contract of employment by bringing this proceeding against the Bank. Nor am I satisfied, in the circumstances of this case, that the commencement of this action made continued employment untenable. Mr. Garner was a long-term employee who had given decades of service to the Bank. The Bank determined that it had to dismiss him. This, it was entitled to do. However, in my view, he was entitled to reasonable notice of his termination or pay in lieu thereof.

[210] Before leaving this topic, there is one additional matter that I should comment upon. Prior to dismissing Mr. Garner, the Bank attempted (on two occasions) to convince him to reconsider his position. It indicated a desire to maintain the employment relationship but said he would have to discontinue his action in order for this to occur. In my view, these attempts to maintain Mr. Garner's employment are relevant to my finding that the relationship had not become untenable and to the Plaintiff's claim for moral and punitive damages, but they do not negate the fact that he was wrongfully dismissed. In other words, the

fact that the Bank gave the Plaintiff the option of discontinuing his action in order to continue his employment does not affect my conclusion that he was entitled to reasonable notice when the dismissal actually occurred.

## 5. DID THE DEFENDANT RETALIATE AGAINST THE PLAINTIFF?

[211] The Plaintiff suggests that the Bank retaliated against him and seeks a declaration to that effect. Retaliation is dealt with in s.14.1 of the ***Canadian Human Rights Act*** which provides:

> 14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.
>
> [Emphasis added]

[212] This section is designed to protect against retaliation for the filing of a complaint with the Canadian Human Rights Commission. I find that the Bank did not retaliate against Mr. Garner for the filing of his complaint with the Commission.

[213] Further, I find that the Bank did not retaliate against Mr. Garner in general. The position that the Bank took in relation to this matter was supported by a number of authorities (see ¶172). I have chosen to distinguish those authorities. Nevertheless, the Bank's decision to dismiss Mr. Garner was supportable in law and, in my view, was not retaliation for the bringing of this action.

## 6. DAMAGES

[214] As I have concluded that Mr. Garner was wrongfully dismissed, I must determine the period of notice to which he was entitled. The Plaintiff's solicitor invites me to base the notice period on the number of years left until the Plaintiff's retirement. In particular, I am invited to find that Mr. Garner would have retired at age 67 and to set the notice period based on the amount of time between the date of dismissal and the anticipated retirement date. According to my calculations, that would result in a notice period of 87 months. The Plaintiff's solicitor has not provided me with any authority in support of this unorthodox approach to setting damages in a wrongful dismissal action and I am not satisfied that it is the appropriate approach to take.

[215] The Defendant submits that if I find that the Plaintiff was wrongfully dismissed, notice should be set at 18 months.

[216] There is no exact formula for calculating the appropriate notice period in a wrongful dismissal action. The leading authority on the matter is considered to be ***Bardal v The Globe & Mail Ltd*** (1960), 24 DLR (2d) 140 (Ont SC-H Ct J), where McRuer CJHC stated, at p.145:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[217] These factors are not exhaustive (see ***Wallace v United Grain Growers Ltd***, *supra*, at ¶82).

[218] In ***Wallace*** *supra*, the Supreme Court described a 24 month notice period as "at the high end of the scale" (see ¶109). The Plaintiff in that case was 58 years of age at the time of dismissal and was let go after 14 years as a salesperson. He had been lured away from a secure job to work for United Grain Growers Ltd. It is important to note that the 24 month notice period in that case included an enhancement period for bad faith.

[219] In ***Silvester v Lloyds Register of North America Inc***, 2004 NSCA 17, the Nova Scotia Court of Appeal indicated that "While 24 months does not represent the absolute maximum notice period beyond which a court may not go, a period on [of] notice above that 'high end' of the range must be justified on the facts" (see ¶28).

[220] I have reviewed all of the cases provided to me by counsel on the issue of notice. I have also found the decisions in ***Bauer v Unitel Communications Inc*** (1994), 5 CCEL (2d) 179 (BCSC); ***Blackburn v Victory Credit Union Ltd*** (1997), 32 CCEL (2d) 39 (NSSC) (varied on other grounds at 165 NSR (2d) 1); ***Cain v Clarica Life Insurance Co***, 2004 ABQB 531 (reversed on other grounds at 2005 ABCA 437); ***Mastrogiuseppe v Bank of Nova Scotia*** (2005), 144 ACWS (3d) 488 (Ont Sup Ct J) (varied at 2007 ONCA 726) and ***Mathieson v Scotia Capital Inc*** (2009), 78 CCEL (3d) 76 (Ont Sup Ct J), to be instructive. I turn now to the case at bar.

[221] Mr. Garner was a young man when he started to work for the Defendant in 1975. He left the Bank for a short period in 1976 but returned the following year. For the next three and one-half decades he worked for the Defendant, eventually becoming the manager of a large branch of the Bank. He was a solid and well-respected employee. While he was not in the executive ranks, he was an impressive and valued Branch Manager. He was 59 years old at the time of his dismissal. Despite reasonable attempts at finding alternate employment, he has not been able to secure a new job. At his present age of 63 years, it is unlikely that he will be able to obtain similar employment in the future. Taking all matters into consideration, I find that he was entitled to a notice period of 24 months. I am not satisfied that the circumstances justify an award in excess of that amount.

[222] The Plaintiff had a base salary of $105,197.00 per annum at the time of his dismissal. He is therefore entitled to $210,394.00 for the 24 month notice period I have set.

[223] On top of Mr. Garner's base salary, he earned a bonus through what is known as the Annual Incentive Plan. This bonus is based on an employee's job level, his performance (as determined by his Achievement Assessment), as well as the Bank's performance each year. The evidence indicates that for the fiscal year ending October 31st, 2011, Mr. Garner would have received a bonus of $30,795.00 if he had received a "superior" rating and a bonus of $37,394.37 if he had received an "exceptional" rating on his Achievement Assessment for that year.

[224] The evidence establishes that Mr. Garner received a "superior" rating for 2010 as well as for the first two quarters of 2011. He had submitted a similar rating for the third quarter of 2011 (the employee and his supervisor both submit a rating) but he was not assessed after the second quarter.

[225] Mr. Garner testified that had he not been dismissed, he would have submitted an "exceptional" rating for the full year 2011 as his branch was the runner up for the "best of the best" that year. At trial, he suggested that his bonus for the period ending October 31st, 2011, should be based on either a "superior" rating, an "exceptional" rating, or somewhere in between. At the conclusion of the trial, his solicitor suggested that the bonus should be based on an "exceptional" rating. He submitted that the court should prorate the bonus to the date of termination (September 8th, 2011) and then award damages for loss of the bonus for each year of notice.

[226] The Bank takes the position that Mr. Garner did not qualify for a bonus in 2011 (or thereafter) as his employment had ended. They rely on the wording of an

internal Bank document which indicates, *inter alia*, that an employee is ineligible to participate in the Annual Incentive Plan if the following change in an employee's status occurs:

> (a) voluntary resignation or termination of employment and the employee does not meet the definition of "retired" for the purposes of the Annual Incentive Plan;
>
> (b) involuntary termination of employment including termination for cause or if the employee is in receipt of severance payments or payments in lieu of reasonable notice of termination, whether by lump sum or by way of salary continuation.

[227] In my view, Mr. Garner was involuntarily terminated in the circumstances of this case.

[228] Islay McGlynn (on behalf of the Bank) testified that if an employee retires or is off of work due to illness for part of a year, that employee's bonus is prorated and paid for the part of the year that was worked. In other words, if an employee qualified for the bonus for part of the year, but not the full year, the bonus is prorated for the part of the year that he qualified. I see no reason why this practice would not apply to Mr. Garner. The issue is whether the Plaintiff's bonus to the date he was dismissed should be calculated using the "superior" rating for performance or the "exceptional" rating.

[229] Ms. McGlynn testified that typically, when a branch is the runner up for "best of the best", the manager involved receives an "exceptional" rating for the year. Mr. Garner was the manager of the Clayton Park branch for most of the fiscal year 2011. That Branch was runner up for "best of the best" that year. I am satisfied that if his employment had continued beyond September 8th, 2011, he would have received an "exceptional" rating on his Achievement Assessment that year. I find that he is entitled to his bonus for the fiscal year 2011 prorated to the date of his dismissal (September 8th, 2011) calculated at the "exceptional" rating. In other words, he is entitled to a share of the full year bonus of $37,394.37 prorated to the date of his dismissal.

[230] That takes me to the issue of whether the Plaintiff is entitled to have bonus income included in the calculation of his damages for the 24 month notice period. In ***The Law of Dismissal in Canada***, 3d ed (Aurora, Ont: Canada Law Book, 2003) (Looseleaf: Updated to April 2015), Howard Levitt describes the general rule regarding bonuses in wrongful dismissal actions as follows at pp.9-6 and 9-7:

> If bonuses are reasonably anticipated by the employee, and have been provided both regularly and in fairly predictable amounts such that they are reasonably considered to be an integral part of the wage structure, they become part of the contract of employment…..
>
> [Citations omitted]

[231] He continued at p.9-8:

> As a general rule, the employee must establish entitlement to a bonus and, accordingly, bonuses will be included in calculating the damages for wrongful dismissal. This will be so even if the bonus had not originally been considered to be part of the remuneration package. If, on the balance of probabilities, the plaintiff but for his or her dismissal would have received the bonus, the court will award such bonus. If the plaintiff can demonstrate that he or she would have received the bonus during the notice period, then the bonus will form part of the damages.
>
> [Citations omitted]

[232] In my view, the Bank's internal document that purports to preclude the payment of a bonus if an employee has been terminated or is receiving payments in lieu of notice cannot oust the ability of the court to award damages for this loss any more than an internal bank document could purport to limit the notice period an employee would be entitled to if wrongfully dismissed. If a bonus is an integral part of an employee's compensation package, the court can award damages for the loss of such.

[233] I am satisfied that the Annual Incentive Plan was an integral part of Mr. Garner's compensation and that the court should include bonus income in the 24 month notice period.

[234] I have not been provided with the bonus formula for the fiscal years 2012 and 2013. As indicated, the calculation is based on an employee's job level, his performance, as well as the Bank's performance each year. Mr. Garner is entitled to bonus payments for the 24 month notice period. The bonus shall be calculated based on him being a "level 9" Branch Manager. For the period from the date of termination to October 31st, 2011, it shall be calculated using the "exceptional" rating. For the remainder of the 24 month period, it shall be calculated using the "superior" rating. (I am not satisfied that Mr. Garner would have been able to maintain the pace he was keeping in 2011. On a balance of probabilities, I find that he would have had a "superior" rating for the remainder of the notice period.)

I will hear from counsel in the event that they are unable to agree on the exact bonus figures.

[235] Mr. Garner has also claimed the sum of $1,200.00 per annum which is the amount the Bank would contribute each year toward his Employee Share Ownership Plan. The Bank agreed that this is a proper claim in the event I found that Mr. Garner was constructively or wrongfully dismissed. I therefore award $2,400.00 for this head of damages.

[236] Further, the Plaintiff seeks an award of damages in relation to his pension. In particular, he suggests that he would have received a higher pension payment each month if he had not been wrongfully dismissed. During the trial, counsel agreed that if the Bank was found liable to Mr. Garner, the parties would attempt to calculate this loss by agreement. I will hear from them if they are unable to reach a consensus on the appropriate figure.

[237] The Plaintiff has also claimed the sum of $1,000.00 for mitigation costs. The Bank's solicitor confirmed that they have no issue with this claim in the event the Bank is found liable to Mr. Garner. I therefore award $1,000.00 for this head of damages.

[238] In addition to the damages already referred to, the Plaintiff is seeking $75,000.00 to $125,000.00 in moral damages for the manner in which he was dismissed.

[239] In ***Wallace v United Grain Growers Ltd***, *supra*, Iacobucci J., speaking for the majority, confirmed that damages for mental distress can be awarded as a result of bad faith conduct by the employer in the manner of dismissal. In ***Wallace***, *supra*, these damages resulted in an extension of the employee's notice period. In ***Honda Canada Inc v Keays***, *supra*, the court reiterated that the normal distress and hurt feelings that result from a dismissal are not compensable. The contract of employment is, by its terms, subject to cancellation on notice or subject to the payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision (see ¶56). However, damages (sometimes referred to as moral damages) are available if the employer engages in conduct during the course of dismissal that is unfair or in bad faith (see ¶57). The court concluded on this issue at ¶59:

> ..... Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as all other cases dealing with moral damages. Thus, if the employee can prove that the manner of

> dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100).

[240] In my view, the facts of this case do not warrant an award for moral damages for the manner of dismissal. While I have concluded that Mr. Garner should have been given reasonable notice of the Bank's decision to terminate his employment, I am not satisfied that there is any basis to award damages for the manner in which he was dismissed.

[241] Dismissing a long-term employee is difficult. I find that the Bank was sensitive to the situation. They decided that they could not continue Mr. Garner's employment while the lawsuit was outstanding. Rather than simply fire him, they asked, on two occasions, for him to reconsider his position so that he could maintain his job. He elected not to do so. While I have concluded that Mr. Garner was entitled to notice, or damages in lieu thereof, I am not satisfied that the manner of dismissal warrants additional damages.

[242] The Plaintiff has made specific reference to an email that was sent to all bank managers upon Mr. Garner's departure which read "With regret I advise that Chris Garner has chosen to leave the Bank after 34 years of service." Mr. Garner takes great exception to the suggestion that he chose to leave the Bank and suggests that the email should have been more neutral and simply indicate that he had left his employment. While I agree that it was incorrect to suggest that Mr. Garner chose to leave the Bank, I am not satisfied that this warrants moral damages for the manner of dismissal.

[243] Finally, the Plaintiff has claimed punitive damages in the range of $25,000.00 to $30,000.00.

[244] In ***Honda Canada Inc v Keays***, *supra*, the Supreme Court of Canada stated at ¶62:

> In *Vorvis*, McIntyre J., for the majority, held that punitive damages are recoverable provided the defendant's conduct said to give rise to the claim is itself 'an actionable wrong'. This position stood until 2002 when my colleague Binnie J., writing for the majority, dealt comprehensively with the issue of punitive damages in the context of the *Whiten* case. He specified that an 'actionable

> wrong' within the *Vorvis* rule does not require an independent tort and that a breach of the contractual duty of good faith can qualify as an independent wrong. Binnie J. concluded, at para. 82, that '[a]n independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation' ……. punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own…….

[245] At ¶68 of the same decision, the court stated:

> ….. this Court has stated that punitive damages should 'receive the most careful consideration and the discretion to award them should be most cautiously exercised' (*Vorvis*, at pp. 1104-5). Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be 'harsh, vindictive, reprehensible and malicious', as well as 'extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment' (*Vorvis*, at p. 1108) …….

[246] In my view, there is no basis in this case for an award of punitive damages.

[247] The Defendant takes the position that the Plaintiff has failed to mitigate his damages. The burden is on the Defendant to prove such. While I have some concern about the length of time that it took for the Plaintiff to commence looking for a new job, the Defendant has not satisfied me that he has failed to mitigate his losses.

[248] The parties have agreed to prejudgment interest of 2.9% (simple interest) on special damages. I trust that counsel will be able to agree to the specific figures for prejudgment interest but will hear from them if there is any disagreement in this regard.

[249] Finally, I will hear from the parties on the issue of costs in the event that they are unable to reach an agreement in this regard.

Deborah K. Smith
Associate Chief Justice

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Garner v. Bank of Nova Scotia, 2015* NSSC 122

**Date:** 2015 04 22
**Docket:** Halifax No. 354371
**Registry:** Halifax

**Between:**

Christopher Taylor Garner

Plaintiff

and

The Bank of Nova Scotia

Defendant

| | |
|---|---|
| **Revised decision:** | The text of the original decision has been corrected according to the attached erratum (May 14th, 2015) |
| **Judge**: | The Honourable Associate Chief Justice Deborah K. Smith |
| **Written Decision:** | April 22nd, 2015 |
| **Counsel**: | Kevin A. MacDonald, for the Plaintiff |
| | G. Grant Machum, Rebecca Saturley and Sean Kelly for the Defendant |

**ERRATUM**

[250] At paragraph 229 – last sentence – replace the word “order” with “other”.

Deborah K. Smith
Associate Chief Justice