

States of Guernsey



EMPLOYMENT & DISCRIMINATION TRIBUNAL

APPLICANT: Miss Rosemary Ellis

Represented by:

RESPONDENT: Cable & Wireless Guernsey Limited

Represented by: Rachel Richardson, Carey Olsen

Decision of the Tribunal Hearing held on 14, 15, 18 and 19 July 2011

Tribunal Members: Ms Helen Martin (Chair)

Mr Nigel Burnard

Ms Caroline Latham

DECISION

Based on the evidence presented, the Tribunal found:

- The Applicant to be an employee of Cable & Wireless Guernsey Limited;
- the Applicant's effective date of termination to be 14 September 2009;
- and that, having considered all the evidence presented by both parties with due regard to all the circumstances, under the provisions of The Employment Protection (Guernsey) Law, 1998, as amended, Miss Rosemary Ellis was not, as alleged, constructively dismissed.

Amount of Award (if applicable): Not Applicable

Ms Helen Martin

.....
Signature of the Chairman

31 August 2011

.....
Date

NOTE: Any award made by a Tribunal may be liable to Income Tax
Any costs relating to the recovery of this award are to be borne by the Employer

Any Notice of an Appeal should be sent to the Secretary to the Tribunal within a period of one month beginning on the date of this written decision. The detailed reasons for the Tribunal's Decision are available on application to the Secretary to the Tribunal, Commerce and Employment, Raymond Falla House, PO Box 459, Longue Rue, St Martins, Guernsey, GY1 6AF.

The Law referred to in this document is The Employment Protection (Guernsey) Law, 1998, as amended.

Extended Reasons

1.0 Introduction

1.1 The Applicant, who represented herself, gave witness testimony, which was supported by documentary evidence (EE1, EE2, EE3 and EE4 refer).

1.2 The Applicant called the following witnesses:

Mr Martin Priaulx (Senior Staff Representative)
Ms Jacqui Carberry (Customer Loyalty Executive, Marketing Department)

1.3 Associate Solicitor Rachel Richardson represented the Respondent supported by documentary evidence (ER1, ER2, ER3, ER4, ER5 and ER6 refer).

1.4 Ms Richardson called the following witnesses:

Mr Gareth Fooks (Commercial Finance Manager)
Mrs Jan Nobes (HR Director)
Mr Patrick Deller (Finance Director)
Mr Rick Ozanne (Head of Business Propositions/TU Rep.)
Mr Geoff Chow (HR Director/Consultant)
Mr James Williams (Regulatory Finance Manager)

These were supported by documentary evidence (ER1 refers).

In addition, witness statements were submitted as documentary evidence (ER2 refers) from the following witnesses:

Mr Steve Le Tissier (Commercial Finance Analyst)
Mr Steve Le Lerre (Commercial Finance Analyst)
Mr Ollie Ward (Regulatory Finance Analyst)
Ms Sharon Williams (Purchase Ledger Supervisor)
Ms Julie Coulter (Senior Purchase Ledger Clerk)
Ms Donna Kelly (Purchase Ledger Assistant)
Ms Angela Gill (Financial Accounts Team Leader)
Ms Sue Kirkpatrick (Financial Accounting Analyst)
Mr Ian Pearce (Head of Revenue Assurance)
Mr Mike Stratford (Revenue Assurance Analyst)
Mr Ashley Holmes (Financial Accountant – Jersey and Isle of Man)
Ms Sarah Liddle (Commercial Finance Manager)

1.5 The Applicant claimed that she had been constructively dismissed from her employment with Cable & Wireless Guernsey Limited. The Applicant alleged that she had no alternative but to resign from her employment with the Respondent by reason of the Company's conduct. The Applicant asserted that her line manager, Mr Fooks, had singled her out by criticising her performance and behaviour in the office without good reason for so doing and that this had led to an irrevocable breakdown in their working relationship. The Applicant claimed that this led directly to her decision to resign from the Company.

- 1.6 In support of her claim that she was constructively dismissed, the Applicant alleged that Mr Fooks had graded her performance as 'poor' and that this grade was completely unwarranted. The Applicant asserted that she raised a formal grievance with HR in which she alleged that she was being bullied and harassed by Mr Fooks. As the result of an informal review, the Applicant alleged that the 'poor' rating was unfair and this was duly changed to 'acceptable'.
- 1.7 In May 2010, the Respondent restructured the finance division and the Applicant alleged that she was mandated to return to the Commercial Finance Team and told by Mr Fooks to "take it or leave it." The Applicant claimed that soon after this communication she handed in her letter of resignation, dated 14 June 2010, giving her contractual three months' notice. The Applicant claimed that Mrs Jan Nobes, the HR Director, offered her a consultancy position with the Respondent on the condition that the Applicant did not bring proceedings against the Company for constructive unfair dismissal. Miss Ellis claimed that the Respondent subsequently withdrew this offer. The Applicant claimed that the Respondent offered to extend her notice period on the same contractual terms, again on the condition that she did not bring proceedings against the Company for constructive unfair dismissal. The Applicant alleged that at no time did the Company make any attempt to resolve the fundamental problem concerning her allegations against Mr Fooks. In summary, she asserted the following:
- a. the Respondent had failed to take reasonable steps to provide a safe workplace and protect the Applicant from unacceptable bullying behaviour;
 - b. the Respondent had failed to provide a suitable working environment for the performance of the Applicant's employment duties;
 - c. the Company had attempted on various occasions to change the Applicant's role, in particular most recently in the summer of 2010. The Company failed to seek the Applicant's agreement to this fundamental change to her terms and conditions of employment;
 - d. taken together, the Applicant alleged that the above amounted to a breach of the term of trust and confidence in the employment relationship.
- 1.8 The Applicant claimed the breaches were sufficiently significant to support a claim of constructive unfair dismissal.
- 1.9 The Respondent denied that the Applicant was constructively dismissed and claimed that the Applicant had resigned by letter on 14 June 2010. The Respondent asserted that there was no change in the Applicant's job title/role or duties of which she was unaware or did not consent to or that was not permitted under her contract of employment. The Respondent alleged that at no time did the Applicant raise a formal grievance regarding her line manager, Mr Fooks, and that there was no evidence that the Applicant was being bullied by Mr Fooks. The Respondent claimed that the Applicant resigned and worked her contractual three months' notice and thereby acknowledged that the contract was still in existence at the time of the Applicant's resignation. The Respondent alleged that the Applicant did not raise the constructive dismissal or breach of contract in her letter of resignation and that in any case, the Applicant's resignation took place 6-18 months after the alleged incidents relating to the alleged bullying took place.

2.0 Facts Found

- 2.1 The Applicant was employed as a Commercial Financial Analyst in the Commercial Finance Team.
- 2.2 The Respondent obtained a housing licence for the Applicant on the basis of the role of Commercial Financial Analyst.

- 2.3 The Applicant commenced employment with the Respondent on 4 May 2008 and resigned by letter on 14 June 2010. Her employment with the Respondent ended on 14 September 2010 after she had completed her three months' contractual notice period.
- 2.4 The Applicant was initially engaged on the 'AX Project' and thereafter placed within the Commercial Finance Team as per her job description. The Applicant reported to Mr Gareth Fooks, the Commercial Finance Manager.
- 2.5 The Applicant was awarded a 'poor' grade for her half-year appraisal for 2009/2010 by Mr Gareth Fooks, which was subsequently re-awarded as 'acceptable' after an informal review took place.

3.0 Miss Rosemary Ellis

- 3.1 The Applicant told the Tribunal that she felt she had been forced to resign because the Respondent mandated that she was to return to the Commercial Finance Team and report to Mr Fooks, six months after she had complained to the Human Resources Department that she had been bullied and victimised by him (EE2 refers).
- 3.2 The Applicant told the Tribunal that her work on the implementation of an ERP System ('AX Project') for the Channel Islands had been well received by the Chief Financial Officer (CFO), Mr Patrick Deller, and that she had been rated as "good to excellent" at her half-year appraisal (EE1 p108 refers) in recognition of her work on the 'AX Project.'
- 3.3 The Applicant told the Tribunal that at the end of the 'AX Project' she returned to reporting directly to Mr Gareth Fooks and her year end appraisal for 2008/2009 (EE1 p106–109 refers) was reduced to 'acceptable to good' by Mr Fooks after the Applicant had worked for him for the final three months of the year.
- 3.4 The Applicant stated that she was assigned to the 'WIP' (work in progress) project and the management of capital expenditure after requesting more work to do. However, the Applicant told the Tribunal that her line manager, Mr Fooks, became increasingly critical of her during this period and that furthermore, during the six months leading up to her 2009 half-year appraisal review, she felt she was increasingly targeted with bullying behaviour by Mr Fooks. She asserted that this behaviour only occurred in private one-to-one meetings.
- 3.5 In response to the criticisms concerning her workload the Applicant logged her work in her Outlook Calendar with approximate timings (EE1 p39–52 refers).
- 3.6 In response to the alleged criticism by Mr Fooks concerning her late arrival at work, the Applicant recorded her arrival and leaving times in her Outlook Calendar. The Applicant asserted that such lapses were tolerated for her colleagues but not for her and that she felt under pressure to be more than perfect in her conduct at work for fear that any non-compliance could result in an unpleasant one-to-one meeting.
- 3.7 The Applicant claimed that the unscheduled one-to-one meetings continued; regularly reducing her to tears and that she came to dread being called into a private meeting with her line manager.
- 3.8 Due to her housing licence conditions and lease on her flat, the Applicant felt unable to resign from her post at this time although she asserted that she had reached the conclusion that this was the only way to escape her situation.

- 3.9 The Applicant told the Tribunal that Mr Fooks did not openly criticise her work in the office and that she deputised for him on occasions (EE1 p75 refers).
- 3.10 On receipt of her mid-year appraisal grade of 'poor,' the Applicant sought a formal review and asserted that she advised the Human Resources (HR) Department that she wished to pursue a complaint of bullying against Mr Fooks.
- 3.11 Following an informal review involving HR and staff representatives, the rating originally given by Mr Fooks was changed to 'acceptable' and the Applicant was assigned to undertake a series of projects under the direction of Mr Deller, the CFO. As a result she did not seek to pursue the allegations of bullying against Mr Fooks.
- 3.12 Due to departmental restructuring in May 2010, the Applicant returned to the Commercial Finance Team and was told by Mr Fooks that there was not a 'specific' role available for her and that she would work as one of the team on routine tasks. The Applicant felt that she had no option but to resign in light of the prospect of returning to report on a day-to-day basis to Mr Fooks and working in the team on routine tasks.
- 3.13 Further to her resignation, the Applicant told the Tribunal that Mrs Jan Nobes, the HR Director, offered her a consultancy position, on the proviso that she did not attempt to bring a claim for constructive dismissal against the Company. The Applicant asserted that subsequently this offer was withdrawn and an alternative offer of a further three month contract on the same terms as her employment was offered instead, reporting to Mr Fooks again on the understanding that she would not bring a claim against the Company.
- 3.14 The Applicant declined the offer to extend her contract and told the Tribunal that she became ill due to the great deal of stress that she was subjected to at that time.

4.0 Mr Martin Priaulx

- 4.1 Mr Priaulx told the Tribunal that he had attended the informal appraisal review meeting involving the Applicant and Mr Fooks as the staff trade union representative and that Mr Fooks had come across as a "a little inexperienced" during the meeting.
- 4.2 Mr Priaulx confirmed that following this meeting, the rating was changed by Mr Fooks to 'acceptable.'
- 4.3 Mr Priaulx told the Tribunal that he was aware that the Applicant felt bullied and victimised by Mr Fooks but that he had not represented her in an official claim or formal grievance against the Respondent.

5.0 Ms Jacqui Carberry

- 5.1 Ms Carberry told the Tribunal that she was employed by the Respondent as a Customer Loyalty Executive and that she was good friends with the Applicant (EE1, p80 refers).
- 5.2 Ms Carberry asserted that she was aware that the Applicant felt she was being singled out by Mr Fooks and felt belittled because she was given work/tasks to do which were significantly below her capability.
- 5.3 The Applicant talked to Ms Carberry at great length regarding her situation at work. Ms Carberry confirmed to the Tribunal that she did not witness the alleged bullying herself but that the decision by the Applicant to resign had not been taken lightly and had been one that the Applicant, in her opinion, had thought about "for a long time."

6.0 Mr Gareth Fooks

- 6.1 Mr Fooks told the Tribunal that he was employed by the Respondent as the department head/Commercial Finance Manager of the Commercial Finance Team in Guernsey and that the department had five employees.
- 6.2 During her work on the 'AX Project', the Applicant had reported on a day-to-day basis to Mr Mark Cordrey, an external consultant. Mr Fooks maintained a close working relationship with the Applicant throughout the project as a member of the 'AX Project' committee.
- 6.3 The witness told the Tribunal that he met with the Applicant (and all members of the team) one-to-one on a monthly basis.
- 6.4 From February 2009, Mr Fooks asserted that he received multiple complaints from James Williams, a manager of a sub-team within his department, concerning the Applicant's work and attitude and that as a result had to restructure the team to move the Applicant from Mr Williams' sub-team.
- 6.5 From March 2009, Mr Fooks reallocated the 'Capital WIP project' to the Applicant and told the Tribunal that this was a high profile and important role that she appeared happy to take on.
- 6.6 Mr Fooks told the Tribunal that between March and August 2009, he observed that the Applicant was increasingly engaged in non work-related conversations around the business and regularly arrived late for work, causing meetings to begin later to accommodate this. Mr Fooks stated that he spoke to the Applicant informally about this on two occasions between June and August 2009 and that he refuted the allegation that he singled out the Applicant in this regard, on the grounds that he met regularly with all employees under his management to guide, advise and discuss how to resolve issues that arose.
- 6.7 The witness told the Tribunal that he had further concerns regarding the Applicant's 'Capital WIP' reporting and the methodology she had applied. Mr Fooks told the Tribunal that he had not realised that a 'poor' rating was rarely assigned in the appraisal process and that it had not been personal in any sense to assign this rating, rather a genuine reflection of his performance assessment. On review, he decided to amend the rating after taking other factors into consideration that the Applicant had brought to his attention.
- 6.8 Mr Fooks stated that he was genuinely shocked by the allegations of bullying made by the Applicant and that he had always believed that he had a satisfactory working relationship with the Applicant in spite of the Applicant's quite obvious lack of enthusiasm for her role as a Commercial Financial Analyst. Furthermore, Mr Fooks asserted that the bullying allegation had only been communicated to him in relation to the appraisal grading of 'poor', at the time of the informal review.
- 6.9 The Applicant's resignation on 14 June 2010 did not entirely surprise Mr Fooks in light of the Applicant's clear reluctance to undertake Commercial Finance Analyst tasks and he asserted that the Applicant continued to work for him throughout her notice period and met with him to discuss her duties as normal.
- 6.10 Mr Fooks told the Tribunal that he met with the Applicant when she was offered an extension of her notice period and the discussion focussed specifically on the Applicant's request for a salary increase, which he was unable to offer, rather than on the duties she would be performing.

- 6.11 On the Applicant's last day, Mr Fooks arranged a small leaving presentation for her and made a short speech thanking her for her time and work for the Company. Mr Fooks told the Tribunal that he had seen the Applicant at several work and social functions since she had left the Company and that they had exchanged social niceties.

7.0 Mr Patrick Deller

- 7.1 Mr Deller told the Tribunal that he was employed by the Respondent as Chief Financial Officer (CFO) and that he was responsible for leading the 'AX Project' on which the Applicant worked, as well as the 'Bermuda AX Project', project managed by the Applicant from December 2009 to July 2010.
- 7.2 Although the 'AX Project' had been successfully completed, Mr Deller spoke of his frustration regarding the significant gaps in knowledge transfer from the Bermuda team to the Guernsey team in the 'Bermuda AX Project' and stated that this was primarily due to the poor transfer of process and information that the Applicant, as project manager, was directly responsible for. This was formally recorded in the Applicant's appraisal in May 2010.
- 7.3 Mr Deller spoke of his extreme surprise at the Applicant's allegations of bullying against Mr Fooks and that he had not observed any unacceptable behaviour in the office. Mr Deller told the Tribunal that, if anything, the Applicant had been given special treatment in accommodating her desire to work on specific projects and undertake different and/or interesting tasks.
- 7.4 The resumption of the Applicant's original role in the Commercial Finance team was confirmed to the Tribunal by Mr Deller as the role that she would have been doing the entire period of her employment had she not been assigned to the 'AX Project' and 'Capital WIP project.'
- 7.5 Mr Deller asserted that Mr Fooks was a very dedicated manager with a calm demeanour who thought carefully about what he was doing and saying and that, in Mr Deller's opinion, he managed the team well.
- 7.6 Mr Deller told the Tribunal that the Applicant had handed her letter of resignation to him and that in response to his request for more detail, she had told him that there was not enough work for her in Mr Fook's team and that she felt she could be better utilised in other areas. Mr Deller told the Tribunal, in summary, that in his view the Applicant had not liked the routine regulatory accounting work in Mr Fook's team.

8.0 Mrs Jan Nobes

- 8.1 Mrs Nobes told the Tribunal that the Applicant was not moved out of Mr Fook's department because of the Applicant's allegations against her line manager, but rather because of a requirement to work on a specific project.
- 8.2 Mrs Nobes told the Tribunal that she had 20 years of experience in Human Resources (HR) and that she only became aware of the Applicant's allegation of bullying at the time of her resignation when the trade union representative, Martin Priaux, told her that the Applicant was considering bringing a claim of constructive dismissal against the Respondent.
- 8.3 Mrs Nobes asserted that Mr Fooks was not capable of being a bully and was intimidated by the Applicant, who was in her opinion very self-assured. Mrs Nobes said that Mr Fooks regularly visited the HR Department to seek advice about how to speak to the Applicant because he was new to management and he was a "timid fellow" who was very "finance

focussed.” She said that he dreaded conversing with the Applicant about issues relating to her employment and that if anyone was a “bully” in this case, it was the Applicant.

- 8.4 When the witness had asked the Applicant for examples of Mr Fooks’ bullying behaviour she had not received specific information regarding the time or place of the alleged bullying. She confirmed that Mr Fooks had spoken to the Applicant about her conduct, timekeeping and workflow and that in her view these were all considered legitimate issues for a line manager to discuss with an employee and did not warrant further investigation.
- 8.5 Mrs Nobes asserted that the Applicant did not like Mr Fooks and preferred to report to Mr Deller and that she felt capable of doing more than the role of Commercial Financial Analyst. Mrs Nobes told the Tribunal that the Applicant knew that there was not a ‘bigger’ role in the Company at the time of accepting the position of Commercial Financial Analyst and that, in Mrs Nobes’ view, the Applicant thought she was more capable than Mr Fooks was.
- 8.6 Mrs Nobes told the Tribunal that there had been no mention of constructive dismissal in the Applicant’s resignation letter and that she believed that the Applicant had only made a claim of constructive unfair dismissal because she was “looking for money” and was aware that compromise agreements involving payments to employees had been used by the Company previously.
- 8.7 The witness expressed her frustration that the Tribunal hearing had been convened and strongly asserted that “he.. (Mr Fooks) did not bully her (the Applicant) and she (Mrs Nobes) would go to her grave saying this.” Mrs Nobes said she had known Mr Fooks for a long time and he was “not a bully” but frightened to approach the Applicant who she described as “assertive, astute – a very strong lady.” Mrs Nobes told the Tribunal that she had not agreed with the appraisal rating being changed to ‘acceptable’ and that a rating of ‘poor’ had been justified. Mrs Nobes asserted that the Applicant did not agree with the feedback about her performance from Mr Fooks but that this did not constitute bullying. In addition, she told the Tribunal that she had observed the frequent late arrival of the Applicant herself from her office. Mrs Nobes gave evidence that one of her team, Mr Tim Vidamour, had been distracted by non work-related conversations with the Applicant and that she had overheard these herself.
- 8.8 Mrs Nobes asserted that she had not considered requiring the Applicant to sign a waiver or compromise agreement protecting the Company against a potential claim of constructive unfair dismissal and that the offer of consultancy with the Respondent was not withdrawn at any time but that she had advised the Applicant that she would have to move out of her local market dwelling into open market accommodation in order to take up this role. Mrs Nobes told the Tribunal that the offer by the Respondent to extend her contract for three months on the same contractual terms had nothing to do with a potential claim against the Company by the Applicant but reflected the Respondent’s desire to allow her more time to make new personal arrangements.
- 8.9 In response to cross-examination by the Applicant, Mrs Nobes asserted that the Applicant did not want the role she had been appointed to perform as Commercial Financial Analyst and that this was the reason for her resignation.

9.0 Mr Geoff Chow

- 9.1 Mr Chow told the Tribunal that he worked as an HR Consultant to the Respondent in Guernsey for seven years and that he was involved with the ‘AX Project’ because it constituted a significant change management programme.

- 9.2 Mr Chow recalled many discussions with the Applicant regarding working practices within the Finance Department but he had no clear indication from her that she felt that she had been bullied or harassed by Mr Fooks.
- 9.3 When the Applicant discussed her appraisal rating of 'poor' with Mr Chow, she told him that she felt singled out for criticism by Mr Fooks but did not use the term 'bullying.' Mr Chow told the Tribunal that he had told Miss Ellis that if she "really thought there was a problem" then she could raise a formal grievance but that she had agreed to an informal, mediated review of her appraisal rating.
- 9.4 Mr Chow asserted that the role of project manager on the 'AX Bermuda Project' was not created to move the Applicant away from Mr Fooks but was based on a genuine business need.
- 9.5 The witness asserted that difficulties arose in the relationship between the Applicant and Mr Fooks because the Applicant felt her management style was better than Mr Fooks, but Mr Fooks remained in charge.
- 9.6 Mr Chow said he worked closely with Mrs Nobes and confirmed to the Tribunal that he had no knowledge of any sum of money being put aside for the Applicant in acknowledgement of a potential constructive dismissal claim.
- 9.7 Mr Chow told the Tribunal that in his opinion there was no evidence of bullying and that Mr Fooks was very focussed and treated everyone in the same manner: fair and factual and rarely showed emotion. In his view, Mr Fooks did not have time to make someone feel uncomfortable and that it would be unproductive to do so, in Mr Fooks' view. Mr Chow said that Mr Fooks was softly spoken and methodical in his approach and that in his view he did not raise unreasonable issues with the Applicant concerning her performance.

10.0 Mr Rick Ozanne

- 10.1 Mr Ozanne told the Tribunal that he attended the second meeting relating to the informal review of the Applicant's appraisal rating and that Mr Fooks had told the Applicant that he could have been more flexible in assessing her performance and had agreed to take her other work into consideration and re-grade her appraisal accordingly. In his view, this had been a friendly meeting and he had thought the situation was resolved and that the Applicant had appeared happy with the outcome.
- 10.2 With reference to the bullying allegation, Mr Ozanne said he was shocked to learn of it as he had always found Mr Fooks to be fair and reasonable in all his dealings.

11.0 Mr James Williams

- 11.1 Mr Williams told the Tribunal that he worked for the Respondent as Regulatory Finance Manager and reported to Mr Fooks.
- 11.2 Mr Williams asserted that he became concerned about the Applicant's attitude when she helped him with the regulatory accounts and he was shocked at how much time she spent away from her desk as well as her slow completion of relatively simple tasks in comparison to the other sub-team member, Ollie Ward.
- 11.3 Mr Williams told the Tribunal that he noticed the Applicant was late for work most days and that although she still appeared to be working her hours by staying later, her late appearance in the office was often disruptive and served only to reinforce the general opinion of her

laziness. He told the Tribunal that without doubt “she was the laziest person he had ever worked with.” In his opinion, she did not like being managed by anyone and justified the rating of ‘poor’ in her mid-year appraisal.

- 11.4 Mr Williams said he had complained to Mr Fooks about the Applicant’s performance and that he had felt Mr Fooks was in support of the Applicant and that Mr Fooks had not acknowledged the veracity of his issues with the Applicant’s performance.
- 11.5 Mr Williams said that he had felt ‘bullied’ by the Applicant and that she had undermined him at almost every opportunity and seemed to derive pleasure from doing so; he had not directly raised such issues with the Applicant because he was not her line manager. Ultimately, Mr Williams asked Mr Fooks to remove the Applicant from the team because he felt he could not work with her anymore.
- 11.6 Mr Williams said that in November 2009 when he had had a chance to review the quality of the Applicant’s work in relation to the October submission of annual regulatory accounts, he found many mistakes in it.
- 11.7 Mr Williams told the Tribunal that the Applicant spent very little time sat at her desk, regularly came in late, used the Internet for personal use and made drinks for everyone taking between 5 and 40 minutes to do so. Furthermore, she engaged in unnecessarily long meetings.
- 11.8 Regarding the allegation of bullying by Mr Fooks, Mr Williams said he observed the Applicant being rude and difficult towards Mr Fooks and seeking to dominate him for whatever outcome suited her.
- 11.9 Mr Williams told the Tribunal that the Applicant had told him that she resigned because the project she had been working on had come to an end and that she had only wanted to do project work and did not want to go back to doing the “monthly boring work.” She had not mentioned anything to him about being bullied or feeling forced to leave. At her leaving presentation, Mr Williams did not gain the impression that there was any ill-feeling between the Applicant and Mr Fooks.

12.0 Witness statements

- 12.1 The Respondent submitted signed witness statements from twelve other employees (ER2 refers).
- 12.2 The Applicant responded in writing (EE3 refers) to these submissions and this was noted and taken into consideration by the Tribunal.

13.0 Closing statement: Applicant

- 13.1 The Applicant summarised that she had complained to the Respondent that Mr Fooks had bullied her but that her complaints were not taken seriously by the Respondent and a formal investigation was not undertaken.
- 13.2 The Applicant asserted that the Respondent failed to provide a safe workplace for her and that it was the prospect of returning to report to Mr Fooks that was the trigger for her resignation. The Applicant said that she found the unscheduled one-to-one meetings intimidating and that “the Respondent could not say for certain that she was not bullied because they had never troubled to find out”.

13.3 The Applicant concluded that resignation was the only real option available to her despite the loss of income and her housing licence (EE4 refers).

14.0 Closing statement: Respondent

14.1 Ms Richardson told the Tribunal that in order to succeed in a complaint of constructive dismissal, the Applicant must establish:

1. that there was a fundamental/repudiatory breach of contract on the part of the Respondent;
2. that this fundamental breach caused the Applicant to resign; and
3. that the Applicant did not delay too long before resigning, thus affirming the contract.

14.2 Ms Richardson referred to case law *RDF Media Group v Clements* (2007) EWCA 2892 QB at 105 concerning the 'test' of a fundamental breach of contract: "the test whether there is a breach of contract or not is said to be a severe one. In this regard it should be remembered that for an employee to become entitled to claim that he has been constructively dismissed on this ground, it is not enough to prove that the employer has done something which was in breach of contract or 'out of order' or that it caused some damage to the relationship; there is a need to prove that the conduct of the employer is sufficiently serious and calculated or likely to cause such damage that it can be fairly regarded as repudiatory of the contract of employment, that is to say, so serious that the employee is entitled to regard himself as entitled to leave immediately without notice."

14.3 Ms Richardson summarised the Respondent's case by asserting that:

- Mr Fooks acted as a reasonable and professional manager and there was no evidence that he bullied the Applicant;
- no other employee in the same open plan office as the Applicant ever witnessed or noticed any behaviour that could be thought of as bullying;
- the appraisal issue was resolved by early December 2009 by mediated discussions and an amended rating;
- no formal grievance was raised by the Applicant concerning the appraisal rating;
- the Applicant's role or duties as a Commercial Financial Analyst were in line with her offer letter, contract of employment and job description (EE1 p96 refers);
- the Applicant was aware from the outset that any project work was temporary in nature;
- any discussions concerning the extension of her contract and/or consultancy role took place after her resignation and were therefore not relevant to her claim of constructive dismissal;
- there is no evidence whatsoever to support the allegation that Mr Fooks was bullying the Applicant and no formal grievance was lodged despite the Applicant having recourse to do so;

- the Respondent acted reasonably and with proper cause through the Applicant's employment.

- 14.4 Ms Richardson told the Tribunal that the Applicant's resignation letter did not mention bullying or constructive dismissal but that she was resigning because her role did not utilise her skills or qualifications and that there was significant evidence to support the fact that the Applicant was not working in an 'unbearable' environment.
- 14.5 Ms Richardson asserted that the Applicant resigned because she felt that her role and duties were no longer commensurate with her skills and qualifications. In addition, the Respondent's representative stated that the Applicant chose to work her notice period reporting to Mr Fooks and entered into negotiations to extend her notice period provided that her salary was increased.
- 14.6 Ms Richardson told the Tribunal that the Applicant delayed for too long in resigning after the appraisal related review meetings in November 2009 and that in light of the above; there was no breach, no causation and an evident delay in resignation. As a result, there was no evidence to support a claim of constructive dismissal.

15.0 The Law

- 15.1 According to the Employment Protection (Guernsey) Law 1998 – 5.5(2)(c):

"An employee shall be treated as dismissed by his employer if, but only if the employee terminates that contract, with or without notice, in circumstances that he is entitled to terminate it without notice by reason of the employer's conduct."

16.0 Conclusions

- 16.1 The Tribunal heard considerable oral evidence during the Hearing and considered all the written evidence before it, whether specifically referenced in this judgement or not.
- 16.2 A contract of employment may only terminate without notice if the other party has committed a fundamental breach of contract. So the test is whether or not the conduct of the employer is sufficiently serious to repudiate the contract of employment. There is a need to prove that the employer's conduct is sufficiently serious that the employee is entitled to regard himself as entitled to leave immediately without notice. The Tribunal's function therefore was to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. The question of whether a breach is fundamental or not is always a matter for the Tribunal to decide upon when considering the evidence put before it. Importantly, it is only behaviour that is wholly inappropriate to the situation and the employee's position within the company that can form the basis of a fundamental breach of contract.
- 16.3 According to the Workplace Bullying and Trauma Institute, workplace bullying is "repeated, health harming mistreatment, verbal abuse, or conduct which is threatening, humiliating, intimidating or sabotage that interferes with work, or some combination of the three." With regard to allegations of bullying, the Tribunal gave considerable weight to the frank and unequivocal evidence from Mrs Jan Nobes, the HR Director concerning the working relationship between Mr Fooks and the Applicant and concluded that Mr Fooks was a relatively inexperienced manager who had a reasonable and genuine belief that he should deal with performance issues relating to the Applicant's employment and that he had sought advice on a number of occasions from Human Resources concerning how to go about this. The Tribunal felt that it was appropriate that this communication was undertaken away from the

open office environment in one-to-one meetings with the Applicant and that all the issues that were raised with the Applicant were appropriate matters for a line manager to seek to address. The fact that the Applicant did not agree with the feedback from her line manager concerning her performance and her evident lack of respect for his management style could not be perceived by the Applicant as a fundamental breach of contract sufficient to justify her resignation. The appraisal rating of 'poor' was amended on review and the issue, as far as the Applicant was concerned, by her own admission, was resolved. Moreover, the Tribunal did not feel that she had been 'singled out' for this feedback, as alleged by the Applicant, because sufficient evidence was put forward to explain that the concerns that were raised with the Applicant were legitimate. In summary, the Tribunal could not find any tangible evidence that the Applicant had been 'bullied' by her line manager, Mr Fooks and concluded that the impact of the Respondent's conduct towards the Applicant in this regard did not constitute a repudiation of the contract of employment that was sufficient for the Applicant to claim she had been constructively dismissed.

16.4 Evidence presented at the Tribunal strongly indicated that the Applicant was not satisfied with her role as Commercial Financial Analyst within the Commercial Finance Team and that this had impacted on her morale and engagement. However, notably the Applicant had been employed in this role from the outset and therefore it was commensurate with her contract of employment and job description. The Applicant's role had been explained to her prior to accepting the position and her housing licence had been granted linked to this role. Therefore there was no breach of contract involved in her returning to the role that she had been hired to fulfil from the outset. If anything, the Tribunal felt that Mr Fooks had sought to accommodate the Applicant's desire to be involved in project work by engaging her to work on the 'Capital WIP project' and the Tribunal took the view that this was not the action of a line manager who was seeking to 'bully' someone at work.

16.5 The Tribunal was persuaded that the Applicant showed no clear intention to abandon and altogether refuse to perform the contract at the point of her resignation and notably there was no mention of constructive dismissal or allegations of bullying in her resignation letter. Clearly, although mitigating circumstances were put forward relating to her housing licence, the Applicant did not leave the employment of the Respondent but instead worked her full contractual notice period of three months. The Tribunal was persuaded that the Applicant resigned because the role of Commercial Financial Analyst that she was originally hired into and contracted to perform did not suit her skills and qualifications and that she found the routine work of the department that was 'pooled/shared' in the team boring (ER1, Tab 11, Pg 9). Furthermore, the Tribunal noted the Applicant's desire to engage in ongoing discussions about extending her contract on either the same contractual terms reporting to Mr Fooks or on a consultancy basis, which effectively further undermined her allegation that there had been a fundamental breach of contract sufficient to justify her resignation.

16.6 In conclusion, the Tribunal determined that the Applicant had failed on all counts to satisfy the legal test for constructive dismissal.

17.0 Decision

17.1 Having considered all the evidence presented and the representations of both parties and having due regard to all the circumstances, the Tribunal found that, under the provisions of the Employment Protection (Guernsey) Law, 1998 as amended, the Applicant was not constructively dismissed.

Ms Helen Martin

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Signature of the Chairman

31 August 2011

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Date