

**COMMONWEALTH OF THE BAHAMAS**

**SUPREME COURT**

**Common Law and Equity Division**

**2012/CLE/gen/00934**

**BETWEEN**

**SAMANTHA RUSSELL**

**Plaintiff**

**AND**

**COMMONWEALTH BANK**

**Defendant**

Before: The Honourable Justice Ian Winder

Appearances: Wayne Munroe QC with Jade Fowler for the Plaintiff  
Robert Adams with Kenneth Lightbourne for the Defendant

13 December 2016, 17 November 2017, 31 October 2018 and 15 March 2019

**JUDGMENT**

## WINDER J,

This is a claim in breach of the Health and Safety at Work Act 2002 and negligence by the plaintiff alleging personal injuries and damages as a result of exposure to mold in the defendant's premises.

1. The action was commenced by the plaintiff on 17 July 2012. The Statement of Claim is settled, in part, in the following terms:

3. In late 2008 the Plaintiff who was at that time employed as the Receptionist in Corporate Accounts situated at the Defendant's Star Plaza Branch began to experience kidney infections, migraine headaches and sinus infections.

4. Her sickness continued to worsen during 2009 which led to her seeking various medical treatment from various doctors.

5. It was not until sometime in August 2010, when during the course of air condition maintenance at the Defendant's Star Plaza Branch the Plaintiff arrived at work to discover the interior walls of her office covered with a black substance which was later confirmed to be mold spores.

6. The Defendant was provided with a report dated the 5th October 2009 prepared by New Millennium Air Quality advising that the air ducts and main trunk were (sic)

7. contaminated with mold and that mold spores have started to grow on the ceiling tiles which if left untreated could spread throughout the entire air conditioning system and infect the entire floor. The Plaintiff will rely on this report at the trial of this matter for its full term and affect. (sic)

8. The Plaintiff consulted Dr. Kevin King who conducted a mold panel which confirmed abnormal findings of Penicillium Mold and he recommended that the Plaintiff be placed in a different environment. His findings are set out in a report prepared by him dated the 25th August 2010 which the Plaintiff will rely on at the trial of this matter for its full term and affect.

9. It was an implied term of the Plaintiff's contract of employment that the Defendant, would by its servants or agents, take all reasonable care to provide and/or maintain a reasonable safe system of work.

10. The Defendant also had a statutory obligation by virtue of the Health and Safety at Work Act 2002 to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all its employees.

11. The Plaintiff has continued to undergo various medical tests and treatment from a plethora of experts both locally and abroad and is currently diagnosed

with lead and mercury poison and other metal toxins that resulted from her exposure to the Defendant's environment.

12. The injuries sustained by the Plaintiff is as a result of the negligence and/or breach of statutory and/or common law duty of the Defendant, its servants or agents.

#### PARTICULARS OF NEGLIGENCE

The Defendant by its servant and/or agent was negligent and/or in breach of its duty in that they:

- i. Failed to take reasonable care for the health, safety and welfare of the Plaintiff;
- ii. Failed to adequately maintain its air conditioning system;
- iii. Failed to provide a work environment free of mold spores and other toxins hazardous to the health of the Plaintiff and its other employees;
- iv. Failed to take the necessary steps and carryout the recommended process to eliminate all mold spores (developed and potential)

2. The Defence filed on 17 July 2012 denied the allegations and pleaded that if (which is not admitted) the Plaintiff contracted lead and mercury poison and other metal toxins, the same was not caused by her exposure to the Bank's environment. The defendant expressly did not admit to the injuries, loss and damage alleged by the plaintiff and put her to strict proof of the same.

3. The agreed statement of facts provided:

- (1.) The Defendant is and was at all material times, a registered company incorporated under the laws of The Bahamas and the owner and occupier (a company) of the premises situate at the company's Star Plaza Branch, situate on Mackey Street New Providence, The Bahamas and doing business as a commercial bank.
- (2.) That at all material times the Plaintiff was an employee of the Defendant Company in their said premises as a Receptionist in Corporate Accounts Department.
- (3.) That in or around 5<sup>th</sup> October 2009, the Defendant engaged the services of New Millennium Air Quality, who prepared a report advising them that the air ducts and main trunk extending from the chill water system were contaminated with mold and that there were a few water spots where mold spores started to grow on the ceiling tiles, which if left untreated could spread throughout the system and infect the entire floor.

- (4.) On 9<sup>th</sup> November, 2009, New Millennium completed the cleaning of all air ducts and related supply trunks but advised of a problem of mold spores in all of the supply vents (diffusers) attached to the lights. Additionally, in or around 26<sup>th</sup> August, 2010, the Defendant engaged the services of Land-Specs to conduct a thorough inspection of the premises and clean the air-condition ducts.
- (5.) That in or around August 2010, the Plaintiff complained of acute sinusitis, headaches and fatigue. She further alleged that she contracted lead and mercury poison and other metal toxins as a result of her exposure to the mold.

4. At trial the plaintiff gave evidence and called Dr Tyrone Bartlett as a witness.
5. The plaintiff's evidence, contained primarily in her witness statement, confirmed the particulars of her Statement of Claim. In sum, her evidence was that she commenced employment at the defendant bank in 2008 and shortly thereafter began to experience medical issues which affected her health and quality of life. She indicated that prior to this she never had any allergies or allergic reactions. She advised her manager in June 2010 that she was experiencing ill health which seemingly worsened while she was at work. She continued to seek medical treatment and to determine the cause of her illnesses. She was terminated in December 2012 and had to relocate with her father to Andros, in order for him to assist her with all the medical and living expenses.
6. The plaintiff gave evidence of the following tests being conducted on her:
  - (1) The Bonaventure Test received, August 20, 2010. She say she was told that the results were abnormal and she along was present with her Physician Dr. Kevin King when he called to confirm the result.
  - (2) ALCAT Food Sensitivity Test, received 3rd February, 2011. – The test determined a mild sensitivity to Rhizopus and that its antibodies were present in her system.

(3) Allergy testing at the Cleveland Clinic Department of Allergy and Immunology on 9th December 2011. The result for each variation of mold tested was zero. Plaintiff was found to be allergic to cats, dogs, and tree pollen.

7. The plaintiff worked in the Corporate Accounts Department of Commonwealth Bank located at the 3<sup>rd</sup> floor. She had worked for a year on the first floor and then on the third floor for a year and about 10 months. She was then moved out of the building. She says that she blacked out in September 2010 and admitted to hospital under the care of Dr. Charles Diggis and Charles Osouswa. Her complaint to Dr Osazuwa was mold intolerance.
8. According to the plaintiff, a difficult day at work would result in her inability to breathe. She was required to be at work in the mornings at 8:30 and until 4:30 for 5-6 days per week. She would leave the building to get air at lunch time but as the receptionist she was "literally stationed under a leaking vent for almost two years" she had to stay in one spot all day.
9. The plaintiff's evidence was that when she went on sick leave in September 2010 she did not return to the building and on her return to work in January 2011 she reported to the Golden Gates branch. She was on the third floor where there the Land Specs report showed visible mold colonization on all ceiling tiles.
10. The plaintiff says that she saw Dr Maharaj in December 2010 who conducted extensive blood work and urine testing. She says that Maharaj along with her natural doctors diagnosed her as having been exposed to mold. The plaintiff says that she went to the Cleveland Clinic, at the direction of the defendant, several times during late 2011. When she was tested at the Cleveland Clinic she was only found to have hypersensitivity for allergens positive for cat and dog and tree pollen. Prior to this she was not aware for any allergy to cat and dog or anything.
11. The plaintiff gave evidence that Dr Bartlett was her doctor since she was a baby.

12. Dr. Tyrone Bartlett was deemed an expert in family medicine. Dr. Bartlett's described himself as a family physician with a sub-specialist in obstetrics says that in his role as a family physician he is somewhat of a "quarterback" calling the plays for the patient. He would do the general preparation, primary care deciding the best referrals when necessary and receiving reports over the course of the treatment. He would see the reports from other physicians and test results.

13. His medical assessment was contained in a letter report dated 3 July 2013.

That letter report is settled as follows:

July 3<sup>rd</sup>, 2013

Donovan Gibson  
Munroe & Associates  
Counsel and Attorneys-at-Law  
Notaries Public  
4<sup>th</sup> Floor, Gold Circle House  
East Bay St.  
P.O. Box N-8332  
Nassau, The Bahamas

**Re: Samantha Russell**  
**D.O.B. 21.12.1985**

The above became my patient on February 20<sup>th</sup>, 2007, she presented with URTI. She gave a history of Juvenile Diabetes since age 13 years and was controlled on insulin. She was treated successfully and was seen again on May 30<sup>th</sup>, 2007 for a Urinary Tract Infection which also resolved with antibiotic treatment. Her Diabetes was well controlled in that period.

She presented to me after more than 2 years on January 25<sup>th</sup>, 2010 for an Annual Physical. She was six (6) pounds less than her weight in 2007, and her glucose levels were out of control. Her general health was overall less than satisfactory and she informed me of a persistent fatigue she was experiencing for the last three (3) months with recurring headaches and loss of appetite. She presented again on October 18<sup>th</sup>, 2010 for these recurring headaches, which I presumed to be a recent development in the last twelve (12) months.

She was then diagnosed with Toxic Building Syndrome by Dr. Maharay, Boynton Beach, Florida in January 2011, subsequent visits on March 19<sup>th</sup>,

2011 and March 30<sup>th</sup>, 2011 revealed a pattern of uncontrollable Diabetes and recurring Urinary Tract Infections with persistent hematuria. On October 21<sup>st</sup>, 2011 when she presented with persistent fatigue and urinary symptoms, she was discovered to be Hypertensive (146/100) for which she was prescribed Lisinopril 10 mg. Follow-up on November 5<sup>th</sup>, 2011 revealed a persistent hematuria with pyelonephritis but controlled Hypertension on treatment.

Subsequent visits from February 29<sup>th</sup> 2012, March 8<sup>th</sup>, 2012, April 4<sup>th</sup>, 2012, April 23<sup>rd</sup>, 2012, May 31<sup>st</sup>, 2012, June 16<sup>th</sup>, 2012, June 29<sup>th</sup>, 2012, July 24<sup>th</sup>, 2012, August 9<sup>th</sup>, 2012. September 4<sup>th</sup>, 2012, September 13<sup>th</sup>, 2012, September 25<sup>th</sup>, 2012, October 1<sup>st</sup>, 2012, November 9<sup>th</sup>, 2012 and November 16<sup>th</sup>, 2012 was highlighted by a persistent and chronic Urinary Tract Infection, resistant to all attempts with antibiotic treatment, chronic Leg Ulcers, low body weight, fatigue, recurring headaches, poorly controlled Diabetes and Hypertension. She was unable to work for much of 2012 and was bordering on Clinical Depression as a consequence of her declining health.

At this point, on her last visit to me on November 16<sup>th</sup>, 2012, I referred her to Dr. Sy Coolridge Pierre for further management. I have not seen her since then and I'm not aware of her present status.

I trust this information is adequate, however if you require additional information, please feel free to contact my office.

Regards,

\_\_\_\_\_  
Dr. Tyrone Bartlett  
MBBS

14. Dr Bartlett indicated that he treated the plaintiff as her family physician since she was a child and that she never had any history of any allergies before he saw her in 2010. She had no previous history of allergies. The Plaintiff complained of persistent blood in the urine, urinary tract infection that wouldn't respond to antibiotics, ulceration that were the result of rashes that suddenly appeared, persistent headaches that required medication, weight loss, fatigue and chronic fatigue.

15. He reviewed the results of the ALCAT test which, he says showed that the plaintiff had a mild reaction to a Rhizopus fungus, which was identified as being present in her system. That based on his own studies and his investigation into the toxic mold syndrome, he was able to conclude that with Dr. Maharaj's assessment that the Plaintiff was suffering from toxic mold syndrome. He was aware of the ALCAT allergy test and that the test continues to be made available to them as evidence of an allergy.

16. Dr Bartlett says that he unaware of any diagnosis for the plaintiff's condition which is different from a diagnosis of toxic mold syndrome.

17. The defendant's only witness was Dr. Ernest Chiodo ("Dr. Chiodo") who was deemed an expert in industrial hygiene, industrial toxicology, and internal medicine internal medicine. Dr Chiodo expressed an opinion on each of the tests performed on the plaintiff as well as their results. He expressed his views on the Bonaventure Medical Lab mold panel as follows:

"This lab report, which is a report of a mold panel, this is a panel of mold that they test for the antibody, IGE antibody for the molds. The molds that they tested for [are] absolutely normal in each case and [every] case. ...They tested for Penicillum, Cladospori herb, Aspergillus Fum and Alternaria Ten, so they tested for molds that are commonly found in building [related] diseases due to mold. And in each case the test was resulted in a result [sic] for an antibody titer of less than .10, which is negative in all cases. ...This is a little bit confusing report [sic] because it gives a result and then next they have printed abnormal. Abnormal would be where the result would be printed if they were abnormal. That space is all blank. And then in the middle it gives a classification range with class zero being 0.00 to 0.1. So in each case it was a negative test for all the molds that were tested. So abnormal is just a heading. It doesn't mean this was an abnormal test."

18. Dr Chiodo says that he is unaware of the ALCAT test because he says the literature, peer review, says that it is unproven. He does not know this as a fact,



he cited a journal which says its an unproven test. He says that he does not know how its done because it is an unproven test.

19. Dr Chiodo agreed that as far as general causation, not specific causation, the suggestion by Mr. Munroe Counsel for the plaintiff, that the "the occupants of mold contaminated environment, particularly water-damages buildings, develop symptoms, including the central nervous system and immune system. In addition to pulmonary disease and inflammatory reaction. He qualified the statement by saying that just because one can get an illness due to having an exposure, does not mean that given exposure cause a particular person's illness if there are alternative causes for it. Mold can cause a number of symptoms consistent with the symptoms that are caused by mold. He agreed that mold exposure can cause immune response.

20. According to Dr Chiodo, people can become allergic to mold and have symptoms from mold and get very sick form mold but it does not cause people to develop allergies to dogs cats pollen.

#### Issues

21. The issues to be determined in this dispute, as per the agreed statement of issues, are the following:

- (1) Whether the Defendant breached its duty of care to the Plaintiff and was negligent?
- (2) Whether the presence of mold spores or the level of mold exposure caused or contributed to the Plaintiff's injuries?
- (3) What is the quantum of damages (if applicable)?

#### Case for the plaintiff

22. The plaintiff, through her counsel, describes her case as "simply an allegation of negligence, breach of statutory duty". The simple issue she says is "whether the condition of Commonwealth's office at Star Plaza, in particular, mold infestation on the third floor where the plaintiff would have been situated, cause her physical

harm." The court will have to decide, on a balance of probability, did the exposure to mold caused the injuries complained of by the plaintiff.

23. The plaintiff says that despite the defendant being advised by New Millennium Air Quality in November 2009 after their initial cleaning that there was a problem with mold spores in all of the supply vents and the recommendation that all the diffusers be removed and replaced; the defendant took no further steps to address the problem until mid-2010 (26<sup>th</sup> August, 2010).

24. Further, says the plaintiff, at paragraphs 10.4-10.6 and 11.1 – 11.2 of her submissions:

10.4. We affirm the veracity of the ALCAT test, since as was indicated by Dr. Bartlett; the test is still requested and relied upon by physician in assessing their parents. We further deny that the Bonaventure report's presence of the term "abnormal" was solely a heading as the results were verified by the Plaintiff's physician at the time.

10.5. We further assert that it is unreasonable to conclude that the Plaintiff was solely suffering allergic reactions from cats, dogs, tree pollen, weed pollen and grass pollen as she had no prior indication of adverse reactions to such 'triggers' before. There is simply no evidential basis for this.

10.6. As it relates to the reliance on reports by Dr. Bartlett, we contend that it is common practice for physicians to rely on the expertise of other physicians in arriving at a diagnosis or conclusion. Even the Defendant's witness, Dr. Chiodo accepted that he considered peer reviewed literature [See Dr. Chiodo's report, page 5, paragraph 8].

11.1. We contend that as a result of the mold exposure the Plaintiff began suffering from acute sinus infections, headaches, breathing problems and fatigue. Other toxins were also medically assessed as being present in the Plaintiff's system. We also submit that as a result of the mold exposure and resultant chronic illness, the Plaintiff suffered from weight loss, loss of appetite, dizziness, shortness of breath, non-healing skin ulcers, difficulty controlling her diabetes and clinical depression. Additionally, the Plaintiff was diagnosed as having Toxic Building Syndrome and was being treated for heavy metal toxicity and its effects.

11.2. Even if the Defendant asserts that other factors may have contributed to the Plaintiff's illness, it is more probable than not that the presence of mold in the Defendant Bank caused or contributed to cause the

Plaintiff's injuries and damaged. There is simply no evidence of any other probable cause."

#### Case for the defendant

25. The defendant's case is set out at paragraphs 25-28 of their written submissions;

25. The evidence does not establish that the Plaintiff was in fact exposed to the mold found on the Defendant's premises. The Bonaventure Medical Lab report relied upon shows that there was less than .1 presence of mold antibodies in the Plaintiff's bloodstream, which was not an abnormal finding. In relying on the uncontradicted evidence of Dr. Chiodo, the findings reflected in that report were normal.

26. Further, the evidence adduced is inconclusive as to whether the Plaintiff is in fact allergic to mold in any event. The Defendant submits that the results of the Alcat test ought not to be heavily relied upon by this Honourable Court. In this regard, we refer this Court to the expert testimony of Dr. Chiodo, in the Defendant's assertion that this test is unproven.

27. Moreover, the evidence undoubtedly shows that there were other factors that are equally as likely to have caused the Plaintiff's allergies. There is no evidence which proves mold exposure materially contributed to the alleged injury more than those other factors. Indeed, the evidence relied upon by the Plaintiff does not establish a causal link between mold exposure and anemia, hypertension, neuropathy or migraine headaches, which the Plaintiff complains of. The Defendant relies upon the testimony of Dr. Chiodo, and the literature which he has referred to in forming his opinion.

28. In light of the evidence and the applicable legal principles, the Defendant submits that the Plaintiff's evidence does not prove that the mold in the Defendant's premises caused, or materially contributed to, the injuries sustained by the Plaintiff. Thus, the Plaintiff's claim ought to fail.

#### Law, Analysis and Disposition

26. Section 4 of the *Health and Safety at Work Act, 2002* provides as follows:

4. (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

(2) Without prejudice to the generality employer's duty under subsection (1) the matters to which that duty extends include in particular --

- (a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;
- (b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use handling storage and transport of articles and substances;
- (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;
- (d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;
- (e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

27. *Evans J* (as he then was) provides a useful discussion on the extent of the statutory duty in the case of *Ferguson v Grand Bahama Power Company Limited* - [2011] 2 BHS J. No. 2

26 As regards the defendant's statutory duty to the plaintiff as its employee, section 4 of the Health and Safety at Work Act, 2002 provides as follows:

...

27 In the case of *Wilson & Clyde Coal Company Ltd v English* [1938] AC. 57 Lord Wright at page 84 expressed the view that the duty which rests on the employer is personal to him and his failure to perform such duty is his personal negligence. At page 81 he cited the comments of Lord Cairns in the case of *Wilson v Merry & Cunningham* L.R. 1 H.L. (Sc) 326, 332 that:

"What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work."

28 Lord Wright continued:

"To this must be added a third head - namely, to provide a proper system of working...By this is meant, not a warranty, but a duty to exercise...all reasonable care."

29 Then in *Latimer v AEC Ltd* [1953] AC 643, the Court of Appeal said

"the duty is one of reasonable care only and thus the employer is not obliged to take unreasonable precautions even against foreseeable risks".

30 And, as Hall, J. in the case of *Mackey-Bethel and Canadian Imperial Bank of Commerce* [1993] BHS J. No. 8, opined:

"Employers have no duty to ensure that the workplace is risk free. There are hazards in every workplace as there are in every household, and an employee does have the responsibility to take reasonable care for his own safety."

31 Further, the mere fact that an injury - even a severe injury - is sustained by an employee while at work does not, without more, establish negligence or breach of statutory duty on the part of his employer. As observed by Hall J. in the case of *Sturup v Resorts International (Bahamas) 1984 Ltd* [1991] BHS J. No. 103, 1985 No. 83,

"an employer would have to be in breach of his common law or statutory duty or there would have to be some unusual dangers (as in *Jennings v Cole* [1949] 2 All ER 191) to ground liability for injuries so sustained and each person, even while performing his duty as an employee, has to assume a measure of responsibility for his own safety..."

32 Finally, the learned authors of *Halsburys Laws of England* Volume 20, 1911 edition at paragraph 234 state:

"It is an implied term of the contract of service at common law that a servant takes upon himself the risks incidental to his employment..."

...

"Apart from special contract or statute therefore, he cannot call upon his master, merely upon the ground of their relationship of master and servant, to compensate him for any injury which he may sustain in the course of performing his duties.

...

"The master does not warrant the safety of the servant's employment; he undertakes only that he will take all reasonable precautions to protect him against accidents..."

33 It is clear from the above authorities that an employer owes a duty to take all reasonable precautions to protect his employee from injury and he does this by providing a safe system of work, training and tools and equipment to perform the work. However, he is not obliged to warrant his employee's safety and the employee also has a measure of responsibility for his own safety.

34 In this case, the plaintiff alleges at paragraphs 4 and 5 of his statement of claim that "upon lifting the said 5-gallon buckets of hydraulic oil, he experienced pain in his left shoulder and neck; that the "matters complained of were caused by the "negligence and/or breach of the statutory duty of care owed by the defendant to the plaintiff under section 4 of the Health and Safety at Work Act, 2002, by reason of which negligence and/or breach of statutory duty of care, the plaintiff has sustained severe personal injuries and has suffered loss and damage"

28. It is accepted that in a claim for negligence it is essential for the plaintiff to prove, on a balance of probabilities, that the defendant's act caused, or materially

contributed to, the injuries complained of. She must adduce evidence to show a sufficient causal link between the injuries and the defendant's act, or omission. In the House of Lords case of *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 an employee of a dressing shops foundry was exposed to a noxious dust from the grinders which he alleged caused him to contract pneumoconiosis. The employer had failed to ensure that the grinders were compliant with the statutory requirements. In determining that the employee and not the employer bore the onus of proving causation the court nonetheless was satisfied that the employee had met the burden. According to Lord Reid:

*"In my judgment, the employee must in all cases prove his case by the ordinary standard of proof in civil actions: he must make it appear at least that on a balance of probabilities the breach of duty caused or materially contributed to his injury."* (emphasis added)

29. The defendant says that "in assessing the weight of the evidence given by experts, the court ought to have regard to whether the proposed witness has the necessary expertise, which is the requisite knowledge and experience, in the medical field to which the matter relates." In this regard the defendant asks that I discard the evidence of Dr Bartlett in favour of the opinions of Dr Chiodo.

30. Whilst I found that the expert witness for the defendant was highly trained and knowledgeable in his area of expertise, in my assessment of him, as a witness, I had reservations.

(1) He was prone to speculate in areas which he had neither the factual evidence or basis to do so. An example would be his unsubstantiated attack on the Land Spec report and its principal Joseph Cooper. Simply to convince the court as to his expertise, and his opinion that mold in the defendant's premises did not cause the injuries alleged to have been suffered by the plaintiff, he alleged that the report was erroneous. He did so notwithstanding he neither inspected the building at the material time or made an assessment or had any factual basis to do so other than a quip that Cooper did not have

his expertise. It is difficult to appreciate that Cooper who on the face of the report itself conducted testing, could not identify visible mold colonies as he did.

- (2) Dr Chiodo, in my view, seemed too content with his view that mold was everywhere. He found, notwithstanding his review of the report from Land Specs and their assessment of visible mold colonies, that the defendant didn't need to make any positive action in relation to the findings in the Land Specs report. This was despite the fact that the report went at lengths to identify the types of mold they assessed to be in the building and to note the presence of visible mold colonies.
- (3) Notwithstanding he admitted he knew nothing of the ALCAT food sensitivity test and how it was conducted, he was prepared to assert and speculate (without absolutely no proof) that the test was doctored by Dr. Maharaj, who performed the test, to suit a finding that the plaintiff was exposed to Rhizopus spores.
- (4) Notwithstanding he did not examine the plaintiff, he was dismissive of the situation in her workplace and the plaintiff's condition without offering alternative for the medical health challenges which the defendant does not dispute she faced.

31. Dr Bartlett undoubtedly did not have the expertise of Dr Chiodo. However, unlike Chiodo, Dr Bartlett was both a witness of fact as well as a medical expert. He actually examined the plaintiff at the time of her complaints and made referrals seeking to get to the bottom of her complaints. In fact, Dr. Bartlett was a part of the process of eliminating other possible causes of her complaints and had been her medical practitioner since she was a child. His evidence, which is undisputed, is that the complaints all occurred since her employment with the defendant and her placement in the Star Plaza building between 2008-2010.

32. Notwithstanding the unsubstantiated speculation and hyperbole of the defendant's witness, it is not seriously disputed that the work environment within

which the plaintiff was required to work was infested by mold and that there was a breach of the defendant's statutory duty as well as their duty of care. In 2009, the cleaning firm Millennium, in an effort to secure contractual services to the defendant, identified the presence of mold in the defendant Star Plaza building. There is no evidence of any effort to remediate the state of the workplace since the Millennium 2009 assessment. The defendant allowed a toxic environment to persist unabated.

33. As a result, it seems, of the complaints of the defendant's staff including the plaintiff (August 2010), it would not be until 1 September 2010 that the defendant contracted the services of Joseph Cooper of Land Specs to assess the air quality in the building. Land Specs specifically identified the presence of mold and found, in its conclusive summary, as follows:

#### CONCLUSIVE SUMMARY

In this conclusive summary, results of the IAQ testing analysis and the physical assessment are addressed for each floor. In addition, providing an overview of the present building conditions.

We at Land-Specs Company Limited have concluded the following:

- High moisture content found throughout interior of building <70% average in some areas, specifically on the higher floors. This is an indication of excess positive pressure being built up northern, southern and eastern walls. Noticeable structural cracks to ceiling/floor walls due to.
- Floor analysis – there is a high contamination of two fungus found throughout the building, Aspergillus and penicillium. Test result shows a high cfu count of these particular micro-organisms. The two fungus are associated with dirt. High counts are signs of a dirty building.
- Third 3<sup>rd</sup> floor analysis (Corporate Accounts & Administration) – floor is saturated with moisture content in air. The dampness throughout has allowed micro-organisms to colonized rapidly. An overgrowth of Rhizopus spores were found only in Accounts, which is not unusual because of area closed off. Check air-blowers on floor.
- Second 2<sup>nd</sup> floor analysis (Human Resources & Executive Offices N&S) – indications show from testing results that HR is contaminated with penicillium. Did not find any return vents in HR. The executive areas showed low cfu (colony forming units), which in this case is unusual because of a very high moisture content >70% RH found on this floor.



- First 1<sup>st</sup> floor analysis (IT Section & Statement/Proof) – this floor in all areas is contaminated with the only area that could have been tested is the Data Center. This shows counts of cladosporium of spores existing and an overgrowth of penicillium and aspergillus. There is a lack of cooling >80F in IT area. Low counts of carbon dioxide found in computer systems area, which is expected. Readings were <200ppm.
- Lobby/Ground floor analysis (Bank & Credit) – this floor does not show no high percentage of RH (Relative Humidity), however the system that is cooling bank area has to be changed. Indication of rust on diffusers shows condensation occurring from system (sic)

Based on the testing results and findings from the assessment carried out, we at Land-Specs can mutually conclude that the Commonwealth Bank Headquarters building is “dirty” and the type of fungi found are opportunistic pathogens which can impose an environmental health risk to the occupants of this building. That is to say that the occupants of this building can acquire symptoms related to these micro-organisms. The high moisture content RH is not making the situation any better. The building is presently sick and needs to be inoculated.

We will conclude that the building should have some form of ventilation or exhaust system to control the positive pressure, which is causing the moisture buildup and furthermore to allow the removal of stale air.

Immediate form of action now is to treat or inoculate building, replace FILTERS and control moisture content on floors with a dehumidifier.

34. I accept the submissions of the defendant that the Bonaventure report does not demonstrate unequivocally as to the exposure of the plaintiff to the types of molds tested. That test however, as Dr. Chiodo accepted, did not test for Rhizopus spores, which was one of the molds which were specifically identified in the area of the building where the plaintiff operated. He also specially accepted that it was possible that the plaintiff could have had positive antibodies for Rhizopus.

35. The nature of the Cleveland Clinic report did not have the benefit of any proper explanation. Like the Bonaventure an ALCAT tests, the maker of this report was not called as a witness. The Cleveland Clinic examination was conducted and reported upon in December 2011, over a year after the plaintiff was taken out of the toxic environment. Additionally, the report determined that the plaintiff was allergic to dogs and cats. However, on the plaintiff's evidence, such allergies had never been the case with her.

36. The ALCAT test found that the plaintiff had a mild reaction to Rhizopus spores. Dr. Bartlett was familiar with the ALCAT test which he says continues to be made available to practitioners to determine allergies and other food sensitivity. Dr Chiodo was unfamiliar with the operation of the test, saying only that "his reading" indicates that it is an unproven test. Having seen and heard the witnesses as they gave evidence, I accept that, on a balance of probabilities, that the plaintiff did develop positive antibodies to Rhizopus as reflected in the ALCAT report. Dr Chiodo, made it clear that he had no real knowledge of the ALCAT test other than his readings that the test is unproven. I am not satisfied that it is a sheer coincidence that the test reflects a sensitivity to the very mold spores that was present in the plaintiff's work space. Further I am not satisfied that there is any reason to diminish the authenticity of the results as Dr Chiodo seeks to do.

37. Whilst Dr Chiodo sought to refute that damage was specifically sustained by the plaintiff he nonetheless admitted that persons exposed to mold can develop symptoms, including the central nervous system and immune system in addition to pulmonary disease and inflammatory reaction, some of which symptoms the plaintiff was experiencing. Additionally, to his opinion Dr Chiodo accepted that mold exposure could cause swollen lymph nodes, asthma or allergic disease. The evidence, which has not been challenged, is that the plaintiff continued to complain about the challenges of breathing and working in the environment. The plaintiff's evidence was that her job as a receptionist in the corporate accounts department required her to be seated near a continuously dripping air conditioning vent daily, with only an hour's break for lunch. The evidence in both the Millennium and Land Specs reports which is unlikely to come as any surprise, was that increased moisture created an environment for mold to thrive.

38. The plaintiff's evidence was such that she would run out of the building during her lunch break for breathable air. For negligence there need only be some injury

or damage to the plaintiff which was caused or materially contributed to, as a result of the defendant's breach, irrespective of extent. I am satisfied that, it is more probable than not, that some injury and damage was caused to the plaintiff as a result of her continuous exposure to the workplace environment. I am prepared to find therefore, on a balance of probabilities for the plaintiff on breach of the defendant's statutory duty and in negligence. I am aided in this conclusion by the evidence of Dr Bartlett of not finding any other possible cause for the plaintiff's ailments.

39. The issue to now consider therefore is, what was the extent to which all of the ailments for which the plaintiff alleges she suffered was attributable to, or contributed to, by the defendant? On the evidence, which I accept, the toxic work environment caused or materially contributed to some of the injury to the plaintiff. I am prepared to find that the injuries, as described by her physician Dr Bartlett in his 3 July 2013 report, which were caused by or materially contributed to by this work environment, were limited to the *persistent headaches that required medication, weight loss, fatigue and chronic fatigue*. I also accept Dr Bartlett's evidence that although not detailed in his report the plaintiff had a prior diagnosis of swollen lymph nodes.

40. I was not satisfied that the allegations as to anaemia and asthma as well as lead, mercury and other metal toxins were proven on the evidence.

41. At the trial, neither of the parties provided any specific submissions on the issue of assessing general damages. I accept that the defendant argued that the state of the evidence did not permit an assessment and that, at best, nominal damages were all that was possible. Having determined the question of liability, I thought I ought to hear the parties on this issue rather than coming to a determination without their input. I therefore invited the parties to make written submissions on the question of damages as limited to my finding at paragraph 39 above.

42. Having taken the further submissions on the appropriate question of damages I will make an award of \$25,000 to the plaintiff for pain and suffering and loss of amenities. I could not make an award for special damages as these sums had not been proven. Invoices provided by the plaintiff in its bundle of documents were not agreed and not otherwise submitted or proved in evidence at trial. Interest on the said sum of \$25,000 is awarded at the rate of 4% from the date of the filing of the Statement of Claim to judgment and to accrue thereafter at the statutory rate.

43. As to costs, I award the plaintiff 2/3 of her costs to be taxed if not agreed.

Dated this 17 day of July AD 2019



Ian Winder  
Justice