Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

**Citation:** 2018 CHRT 34
**Date:** December 21, 2018
**File No.:** T2116/3215

**Between:**

**Kathleen O'Grady**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Bell Canada**

**Respondent**

**Decision**

**Member:** Ronald Sydney Williams

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## I. Overview

[1] Kathleen O'Grady, the Complainant, brought this matter before the Canadian Human Rights Commission and ultimately before the Canadian Human Rights Tribunal ("CHRT"), on the allegation, as an employee of Bell Canada, that she suffered discrimination on the basis of her mental illness disability, resulting in her dismissal, contrary to section 7 of the *Canadian Human Rights Act* (the "*Act*").

[2] Section 7 of the *Act* reads as follows:

> 7. It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ *or continue to employ* any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination. [Emphasis added]

[3] The prohibited grounds of discrimination are set out in section 3 of the *Act*, and include "disability".

[4] Ms. O'Grady states that the Respondent, Bell Canada ("Respondent" or "Bell"), was under a duty to accommodate her disability in the workplace.

[5] Ms. O'Grady went on sick leave on or about June 1, 2006 due to a mental illness. This involved a long term disability absence ("LTD"), after which she hoped she could return to her employment. She had originally expected to return to work on a part-time basis, and after a period of time, return to full time work.

[6] Ms. O'Grady, in her oral evidence, stated she went on sick leave from June 7, 2006 to August 4th 2007, at which point she was placed on LTD until April 20, 2009.

[7] Notwithstanding her expectations, she was given notice of termination in April 2009. She was one of 2,500 Bell employees whose employment was terminated as part of Bell's "100 day" restructuring plan.

[8] Ms. O'Grady asserted that in September of 2010, Bell announced a Mental Illness Health Initiative, but that she was denied access to this program and the possibility of returning to work due to her earlier dismissal. [1]

[9] Kathleen O'Grady had been a Bell employee since on or about March 1990.

## II. The Facts of the Complaint

[10] Ms. O'Grady's employment history with Bell commenced on or about March 26, 1990. Until 2004, she had held various positions within Bell.

[11] On or about April 5, 2004, she became, with others, a member of the Bell Systems and Technology group ("BST Group") as a Web Specialist.

[12] Initially, the Complainant's immediate supervisor was Ms. Kelly Gillis, Director of Systems and Technology Practices.

[13] While the Complainant started as a Web Specialist, she was advised by her supervisor, that she, like other members of the BST Group, would have various roles and duties as the functions of the team and its requirements evolved.

[14] Ms. Gillis' evidence indicated that all employees joining the BST Group could hold various duties within the group, as the program evolved and needs changed.

[15] Prior to accepting this position, Ms. O'Grady had agreed to the aforementioned terms of employment. In fact, her role subsequently changed from web design to supporting and developing a "K-Store" — a repository of information or knowledge management.

[16] Early in 2006, the Complainant expressed to Ms. Gillis that she was having difficulties with work-life issues. She also reported this to her new team leader.

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[1] Complainant Book of Documents C-2, T-71

[17] It was recommended that she seek assistance from Bell's Employee Assistance Program ("EAP"), which she did. She found that this program was helpful and she was committed to the plan established for her.[2]

[18] On June 1, 2006, Ms. O'Grady went on short term disability leave. At this time, she was responsible for the K-Store.

[19] She received her first short term disability benefits on June 8, 2006 and this continued until June 7, 2007. At this point she moved from short term disability to LTD. As per the policy, she then took her vacation days, and started LTD in August 2007.[3]

[20] The Respondent provided evidence by way of testimony from Ms. Kelly Gillis, from Dr. Liliane Demers (head of Bell Disability Management Group ("Bell DMG")), and from Suzanne Prashad (Ms. Gillis' Administrative Assistant during the relevant time), indicating that pursuant to Bell Policy, no one — including her managers — was made aware of the nature of her illness, thereby maintaining the confidentiality of this information.

[21] Her short term disability absence was managed by the Disability Management Group of Manulife Financial ("Manulife"), which managed all short term disability cases on behalf of Bell. Ms. O'Grady was required from time to time to submit medical reports in order to substantiate her need for continued short term disability leave and benefits.[4]

[22] In September 2007, the Respondent retained the services of Banyan Work Health Solutions ("Banyan") to assist the Complainant in her efforts to rehabilitate.[5] Banyan was a firm specializing in absence management and rehabilitation field visits.

[23] From September 2007 through to December 2008, Ms. O'Grady participated with the Banyan group in various forms of rehabilitation.

[24] The testimony of Dr. Liliane Demers indicated that continuation with the LTD program was not dependent on continued participation with the Banyan group.

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[2] Respondent Book of Documents, R-2, T-7
[3] Respondent Book of Documents, R-2, T-9
[4] Respondent Book of Documents R-1 T-42
[5] Respondent Book of Documents, R-1, T-5

[25] In August of 2008, the Respondent announced a new 100-day program to assist employees to return to work. Ms. O'Grady accepted participation, which required an independent assessment of her health issues, and an independent medical examination was arranged for her. In October 2008, a psychiatric exam was conducted by Dr. Barry Gilbert.

[26] Dr. Gilbert's report indicated that Ms. O'Grady was getting better and, while more treatment was required, he was hopeful that she could return to work on a progressive basis. His report also indicated that she would require up to 7 weeks' preparation before she could return to work.[6]

[27] After discussions with Ms. O'Grady, with her physician, and with Dr. Gilbert, Bell DMG determined that she could return to work on January 31, 2009 — subject to any further report from Dr. Gilbert.[7]

[28] Ms. O'Grady indicated to Bell DMG that she was still having difficulties with the idea of returning to work, and requested an extension of her LTD period. Bell DMG indicated that further medical reports were required to justify her remaining on long term benefits beyond January 31, 2009. Ms. O'Grady's physician was to complete the requisite medical form prior to January 22, 2009.[8]

[29] Notwithstanding the time limit imposed on her physician to respond as to Ms. O'Grady's indication that she was not ready to go back to work, and needed to stay on LTD, the physician finally responded on March 5, 2009.

[30] It was Ms. O'Grady's physician's advice that she could return to work in early May 2009, under a progressive plan with support and training.[9]

[31] A meeting with Ms. O'Grady was scheduled by Bell DMG to take place on April 20, 2009. When the Complainant enquired as to who would be her supervisor and

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[6] Respondent Book of documents, R-1, T-30; T-40
[7] Respondent Book of Documents, R-1, T-43, pages 25-26.
[8] Respondent Book of Documents, R-1,T-38, T-44, page 26
[9] Respondent Book of Documents, R-1, T-40

department on her return to work, she was advised that Bell DMG did not deal with those matters, which were the domain of Human Resources.

[32] Contrary to the recollection of Ms. O'Grady, the evidence of Ms. Brigithe Goyette (Disability Case Manager, Bell DMG) was that there had been no discussion of any progressive return to work plan and that, specifically, no promises had been made in this regard.[10]

[33] The April 20, 2009 meeting was attended by Ms. O'Grady, a Human Resources Consultant, and the Vice President of IT Deliver—Network and Field Services & Operations. At this time she was advised that her position had been abolished in August 2008.

[34] The Respondent advised that her dismissal was part of a new re-organizational plan, initiated on July 11, 2008. In a communication on July 28, 2008 indicating a need to achieve a cost competitive profile, Bell announced the departure of 2,500 management employees, or about 6% of the total Bell workforce.

[35] Ms. O'Grady had been on disability leave when Bell commenced this restructuring, what it referred to as its "100-day plan". The re-organization would eliminate layers of management, making Bell more efficient and cost effective, and reducing its employment level by a large number of employees, of which Ms. O'Grady was one.[11]

[36] Notwithstanding the earlier announcements of the re-organization, Ms. O'Grady, who was at home on disability, was taken by surprise to learn of it at the meeting of April 20, 2009, during which she was provided with a proposed severance package.

[37] According to Ms. Goyette's testimony, Ms. O'Grady was advised that the decision to terminate her employment had been made by the business unit.

[38] As a result of the Complainant's termination, she was no longer eligible to receive LTD payments, which were only for the benefit of employees of Bell, and which were self-

[10] Respondent Book of Documents, R-1, T-43, page 36
[11] Respondent Book of Documents, R-1, T-44 and T-45

funded by Bell. As a result, her monthly benefits and her cost of living adjustment were ultimately terminated.

[39] Believing the severance package offered to be unsatisfactory, she refused to accept it, and with the assistance of counsel she negotiated new severance terms with Bell in February 2010. The agreement provided $81,333.00 as a termination allowance, $5,606.70 for lost benefits, and $200 for an incentive award. The agreement also contained a release and discharge which was later found by the Federal Court to be invalid.[12]

[40] Ms. O'Grady believed that the termination was a discriminatory practice, in that Bell failed to accommodate her disability through the continuation of LTD benefits after her termination, on the ground that such benefits are only provided to employees. Her belief was that the Respondent, in order to end any obligation to pay LTD until her return to work or retirement, decided to terminate her employment.

[41] Ultimately, after various attempts to resolve her Complaint through the Canadian Human Rights Commission process, and after judicial review proceedings in the Federal Court, the matter was referred to the CHRT.

[42] As stated in paragraph 1 hereof, the Complainant brought the matter pursuant to section 7 of the *Act*, alleging in her Statement of Particulars that as a result of her mental disability, Bell had refused to continue to employ her when she was to return to work on a progressive basis.

## III. Issues Raised before the CHRT

[43] The Complainant's sole basis for relief under the *Act* was on the basis of section 7 and her mental disability.

[12] Respondent Book of Documents, R-2, T-42-26, T-74-75; *O'Grady v. Bell Canada,* 2012 FC 1448.

[44] The Tribunal accepted the veracity of the evidence establishing the seriousness of Ms. O'Grady's illness. The Tribunal was also made aware, from her management of her case before the Tribunal, that she possessed considerable intellectual skills.

[45] Ms. O'Grady was charged with satisfying the Tribunal that her dismissal was — at least in part — as a result of her continued lack of mental health and not, as claimed by the Respondent, a direct result of Bell's restructuring and downsizing of employee levels, which completely eliminated her section.[13]

## IV. Legal Framework

[46] It has long been held that a complainant under the *Act* has the burden to establish a *prima facie* case of discrimination. In the employment context, a *prima facie* case is one which covers the allegations made and which, if they are believed, is complete and sufficient to find for the complainant, unless there is a valid answer from the Respondent-employer.[14]

[47] In order to make out a *prima facie* case under s. 7(a) of the *Act*, Ms. O'Grady must prove on a balance of probabilities that:

i. the respondent refused to employ or continue to employ her; and

ii. there is a connection between—on the one hand—the refusal to employ or continue to employ her—and on the other—a prohibited ground of discrimination enumerated in s. 3 of the *Act.*[15]

[48] Ms. O'Grady need not show that discriminatory considerations were the sole reason for Bell's actions. It is sufficient if she can demonstrate that discrimination was a factor in Bell's actions or decisions (*Holden v. Canadian National Railway Co.* (1990), 14 C.H.R.R. D/12 (F.C.A.).

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[13] Respondent Book of Documents, R-1, T-40, page 2
[14] *Ontario Human Rights Commission v. Simpsons-Sears,* 1985 CanLII 18 (SCC) at para. 28.
[15] *Québec (C.D.P.D.J.) v. Bombardier Aerospace Training Centre* 2015 SCC 39 at paras. 52, 65; *Moffat v. Davey Cartage Co. (1973) Ltd.,* 2015 CHRT 5, paras. 35, 54.

[49] To rebut the *prima facie* case, the Respondent can present evidence tending to refute the elements of *prima facie* discrimination, *e.g.* evidence tending to demonstrate that the termination of Ms. O'Grady's employment was *not* connected to a prohibited ground under section 3 of the *Act*.

**[50]** Alternatively (or in addition), Bell may put forward a defence justifying the discrimination.[16]

## V. The Finding of the Tribunal

[51] The Tribunal was satisfied that Ms. O'Grady truly believed that her dismissal was directly a result of her mental disability, the existence of which was not challenged. However in the Tribunal's opinion and as indicated above, evidence engaging a prohibited ground is not sufficient on its own to establish her *prima facie* case of discrimination.

[52] Moreover, given the standard of proof in matters of discrimination, a complainant's perception or belief is not sufficient alone to establish a discriminatory practice.[17]

[53] Ms. O'Grady must show that her exclusion from continued employment with Bell is connected to her disability.

[54] Moreover, she must do this "…in accordance with the standard of proof on a balance of probabilities, which…she must still meet... [T]he case must be 'complete and sufficient', that is, it must correspond to the degree of proof required in the civil law."[18]

[55] Evidence of an employee's termination while on disability leave does not in itself establish the requisite connection between the loss of employment and the ground of disability.

[56] In the matter of *Kerr v. Bell Canada*, 2007 FC 1230, the Honourable Madam Justice Dawson stated as follows at paragraph 18: "Looking at the whole of the evidence, the

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[16] *Moffat supra,* at para. 38
[17] *Roopnarine v. Bank of Montreal*, 2010 CHRT 5, para. 61
[18] *Bombardier, supra*, para. 65;

termination of an employment relationship while an employee is on disability leave does not give rise to an irrefutable presumption of discrimination on the ground of disability."

[57] In circumstances not too dissimilar to those of the *Kerr* case, *supra*, Bell Canada's restructuring pursuant to its "100-day" plan resulted in Bell's dismantling of the BST Group. The role of Ms. O'Grady's one time supervisor was abolished and Ms. O'Grady's role and functions were eliminated. Her duties related to implementing and developing a K-store were not transferred to any other employee.

[58] While the Tribunal was sympathetic to Ms. O'Grady's disability, I must subscribe to the jurisprudence under s. 7 of the *Act* which has on numerous occasions held that a complainant must demonstrate that a prohibited ground played a role in the impugned employment decision (See *e.g. Turner v. Canada Border Services Agency,* 2018 CHRT 9 para. 27).

[59] Ms. O'Grady cited the case of *Tofflemire v. Metro (Windsor) Enterprises,* 2009 HRTO 1471, wherein the Ontario tribunal, referring to the duty to accommodate, quoted the following excerpt from the Supreme Court of Canada:

> More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue hardship" that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship" [19]

[60] Ms. O'Grady failed to provide documentary evidence or oral testimony sufficient to persuade the Tribunal that her dismissal was related to her disability.

[61] The Tribunal believes that the cases relied upon by the Complainant are distinguishable from the matter at hand. In Ms. O'Grady's case, she was dismissed well before her LTD expired. Her dismissal was clearly unrelated to her disability, but was rather only the result of the corporate restructuring of the Respondent. She was one of a group of 2,500.

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[19] At para. 36, citing *Central Okanagan School District No. 23 v. Renaud* 1992 CanLII 81 (SCC)

[62] The Respondent's SOP refers to the case of *Tutty v. Canada (Attorney General),* 2011 FC 57, which is similar to the present matter. An employee alleged discrimination when his position was eliminated due to restructuring and he was terminated on the eve of his return. The Honourable Mr. Justice Barnes stated at paragraph 25 that "[a]n employer's duty to accommodate does not, after all, require that it hold a legitimate corporate reorganization in abeyance pending the resolution of an affected employee's disability." At paragraph 26 he stated that…"[i]n the face of a legitimate business reorganization, Mr. Tutty had no special 'right' to be maintained in his existing position simply because the accommodation he was receiving had not yet run its course."

[63] I believe that the "duty to accommodate" is a very serious obligation, but it is not absolute, and the jurisprudence supports the position that it does not arise unless a complainant has first established a *prima facie* case of discrimination (See *Renaud, supra*; *Roopnarine, supra,* at para. 72) .

[64] Notwithstanding the Tribunal's sympathy for the disability suffered by the Complainant, the Respondent cites *Hill v. Spectrum Telecom Group Ltd.* [20] which stated that due to the restructuring of the employer having commenced prior to the employee's returning to work, there was no connection between the Respondent's restructuring and the Complainant's disability:

> There is no evidence, save for the applicant's suspicions and the unfortunate timing, that the applicant's disability was a factor in the decision, directly or indirectly. The respondents started the restructuring before the applicant was declared fit to return to work.

[65] Upon reading the cases cited by the Respondent, it is clear that there must be a link or connection between the dismissal and the disability. In the case before me, there is no link between the reasons for Ms. O'Grady's termination and her disability. Had she not suffered from a disability, her employment would have been terminated in any event. Cases have held that even where the duty to accommodate is engaged, it does not require an employer to maintain an existing position for an employee while it undergoes

[20] 2012 HRTO 133, para. 32

reorganization. Moreover, a restructuring employer may even replace the employee, so long as its decision is untainted by discriminatory considerations.[21]

[66] The Complainant, in her final argument, suggests that her lack of knowledge of the 100-day plan and the dismissal of affected employees resulted from adverse treatment by Bell in connection with her mental illness disability.[22] I find no merit to this position.

[67] Notwithstanding the belief that her termination was as a result of her disability, the Complainant did not present the Tribunal with any creditable evidence that this was the case. As a result, I do not find that the Complainant was successful in presenting a *prima facie* case that her dismissal was connected to a prohibited ground of discrimination, and in particular, her disability.

[68] The Complainant argues that upon presentation of a *prima facie* case of discrimination pursuant to the *Act*, the burden shifts to the Respondent to provide a credible and rational explanation demonstrating on a balance of probabilities that the impugned conduct or decision did not involve a discriminatory consideration. She also makes additional submissions on the obligations of the respective parties to prove or deny various elements on the balance of probabilities. I find, based on *Bombardier, supra,* that the burden of proof does not shift to the Respondent at any time in the determination of *prima facie* discrimination.

[69] The Complainant, also in final argument, states that a *prima facie* case is established, *inter alia*, where another employee, no better qualified for the position, subsequently obtained the position. As stated heretofore, at the time of Ms. O'Grady's dismissal she was responsible for supporting the K-Store, and in fact no other employee replaced her in this role.[23]

[70] As a result of the 100-day plan, her position was abolished, and no other employee was hired for the position.

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[21] *Filion v. Capers Restaurant*, 2010 HRTO 264, paras. 26-27; *Brosnan v. Bank of Montreal,* 2015 FC 925, paras. 25-26.
[22] Complainant's Book of Authorities C-6, T-189, paras. 5-6
[23] Respondent Book of Documents, R-2, T-10

[71] As a result of the Tribunal's finding, it is not necessary to deal with the remedies sought by the Complainant.

[72] As stated elsewhere in this decision, the Tribunal has great sympathy for Ms. O'Grady's disability, and acknowledges that notwithstanding her impairment, she presented herself before the Tribunal with dignity and with much effort. But the *Act* does not impose a duty to accommodate upon an employer unless *prima facie* discrimination within the meaning of the *Act* has occurred. Bell was entitled to institute its re-organization under its 100-day plan and, on the evidence before me, the dismissal of 2,500 employees as a result — including Ms. O'Grady — was not a discriminatory practice in and of itself.

[73] The Tribunal dismisses the Complaint of Kathleen O'Grady for the reasons set out above.

*Signed by*

Ronald Sydney Williams
Tribunal Member

Ottawa, Ontario
December 21, 2018

## Canadian Human Rights Tribunal

## Parties of Record

**Tribunal File:** T2116/3215

**Style of Cause:** Kathleen O'Grady v. Bell Canada

**Decision of the Tribunal Dated:** December 21, 2018

**Date and Place of Hearing:** March 7-10, 2017, March 14-16, 2017 and May 9, 2017

Mississauga, ON

**Appearances:**

Kathleen O'Grady, for herself

No one appearing, for the Canadian Human Rights Commission

Maryse Tremblay, for the Respondent