Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2025 CHRT 9
Date: February 3, 2025
File No.: T2655/3121

Between:

Yaroslava Bayrock

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Correctional Service Canada

Respondent

Decision

Member: Naseem Mithoowani

Contents

I. BACKGROUND

[1] The Complainant, Ms. Bayrock alleges discrimination with respect to employment that she held with the Respondent, Correctional Service Canada, in the Edmonton Institution for Women. Ms. Bayrock was hired on a casual basis, to fill a temporary leave for an individual who held the position of information clerk. Ms. Bayrock disclosed in an early conversation with Mr. Tuck, the Manager of Assessment and Intervention at the institution, that she had a disability requiring accommodation. She indicated that, as a result of her disability, she was unable to work full time, and expressed a need for reduced work hours and flexibility in her start time.

[2] In line with her requests, Ms. Bayrock was allowed to work only part time hours (i.e. 22 hours) from the usual requirement to work 37.5 hours. In addition, she was provided with flexibility as it related to her start times and days of work.

[3] Ms. Bayrock was hired on February 22, 2017, and began employment on March 1, 2017.

[4] However, the employee whose position she was meant to fill (Ms. Bayrock's "predecessor") remained in her role for longer then expected, for reasons not relevant to this complaint. As such, Ms. Bayrock did not undertake the duties of an information clerk in earnest until May 31, 2017. In the interim, Ms. Bayrock received training and completed additional tasks, such as the creation of a training manual.

[5] Soon after taking over the role of information clerk, Ms. Bayrock began communicating with her employer expressing that it was taking her longer than she had expected to complete all of the tasks required of her. Through a number of emails addressed to Mr. Tuck and others, she provided suggestions as to how she might be able to accomplish more during her 3 days at work, including pointing to "inefficiencies" that might be rectified, and sought clarification as to whether some tasks could be given to others. Mr. Tuck forwarded one such correspondence from Ms. Bayrock to another manager, noting that it

appeared that Ms. Bayrock had underestimated the job she was taking on. He expressed concern that she was not the right fit for the job.

[6] After 6 days undertaking the duties of an information clerk, Ms. Bayrock was terminated from her position on June 16, 2017.

II. ISSUES

[7] Ms. Bayrock asks this Tribunal to determine:

1) Whether she was discriminated in her employment contrary to the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 ("the Act" or "CHRA")
2) Whether she experienced harassment in her employment, contrary to the Act; and
3) Whether the Respondent engaged in systemic discrimination on the basis of disability.

[8] The above were the focus of the hearing and evidence before the Tribunal. Ms. Bayrock also asks this Tribunal to determine a number of other issues. These will be assessed under the heading "ancillary claims".

III. DECISION

[9] For the reasons that follow, I find that Ms. Bayrock's claim that she was discriminated in employment, on the basis of disability, substantiated. However, I dismiss the remainder of Ms. Bayrock's claims.

IV. ANALYSIS

[10] Ms. Bayrock alleges discrimination in relation to employment on the basis of disability within the meaning of s. 7 of the Act. The test in determining whether discrimination exists is well established. Firstly, the Complainant has the onus of proving the existence of a *prima facie* case of discrimination. The Respondent can present evidence to refute the prima facie case if it chooses to do so. If a *prima facie* case is established, the burden shifts on the Respondent to justify its' conduct based on the Act and case law. See, for example,

Christoforou v John Grant Haulage Ltd., 2020 CHRT 33 (CanLII) [*Christoforou*] at paras 60 to 66 for a summary of the leading case law.

A. DISCRIMINATION UNDER SECTION 7

(i) A *PRIMA FACIE* CASE OF DISCRIMINATION EXISTS

[11] A *prima facie* case is one that "covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favor in the absence of an answer from the [R]espondent" (*Ontario Human Rights Commission v. Simpsons-Sears*, 1985 CanLII 18 (SCC) at para 28).

[12] Ms. Bayrock must meet her onus on a standard of proof of a balance of probabilities (*Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 65 [*Bombardier*]).

[13] To establish a *prima facie* case, the complainant has to prove that it is more likely than not (i.e. on a balance of probabilities) that she meets the three parts of the following test: that she has a characteristic protected from discrimination under the CHRA, that she experienced an adverse impact with respect to employment and that the protected characteristic was a factor in the adverse impact (*Moore v. British Columbia (Education)*, 2012 SCC 61).

[14] The Respondent concedes that Ms. Bayrock suffered from a disability and that she suffered an adverse impact with respect to her employment when she was terminated. The sole contention therefore between the parties regarding the Complainant's *prima facie* burden is whether Ms. Bayrock's disability was a factor in her termination.

[15] It is important to note that the discriminatory considerations need not be the sole reason for the termination. It is sufficient for the Complainant to prove the existence of a connection between a prohibited ground of discrimination and the adverse impact experienced, even if other factors were at play (see *Bombardier* at paras 44-52; see also *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 25,

and *Holden v. Canadian National Railway Co.*, (1991) 1990 CanLII 12529 (FCA), 14 C.H.R.R. D/12 (F.C.A.) at para 7).

[16] Similarly, it is not required for Ms. Bayrock to show that the Respondent had an intent to discriminate.

[17] The Respondent submits that Ms. Bayrock's dismissal was unrelated to her disability. Rather, the Respondent submits that it was solely due to Ms. Bayrock's poor work performance that she was terminated, and points to her inability to satisfactorily perform the essential function of her employment – i.e. information sharing.

[18] Information sharing refers to the process whereby the Respondent discloses information that may be used to make decisions about an offender to them. This disclosure (or information sharing) is a legal obligation on the part of the Respondent. Delays in providing an inmate with the required disclosure may result in postponements or adjournments of their parole hearings. Delays in parole hearings hinder the Respondent's obligation to ensure that offenders are released at the first possible opportunity.

[19] The Respondent submitted that by the time she was terminated, Ms. Bayrock was only required to do information sharing, and she was terminated as she was unable to do this task satisfactorily. The Respondent submits that since deficiencies in information sharing can have serious and direct legal consequences, as it may result in the delayed release of an inmate, Ms. Bayrock's errors in this regard could not be tolerated. In Mr. Tuck's words, there can be no compromise on excellence.

[20] When asked whether there were any postponements or adjournments of parole hearings as a result of deficient information sharing by Ms. Bayrock, Mr. Tuck admitted that he did not believe that there were any. He testified that this was because parole officers were ultimately responsible for the information sharing, and therefore had oversight over the process, but that he had heard from parole officers that they needed to correct deficiencies and errors in Ms. Bayrock's work.

[21] However, the Respondent did not provide any evidence of this aside from Mr. Tuck's testimony, such as emails indicating these concerns, or witness testimony from parole

officers themselves. Had the information sharing deficiencies been the sole reason for the termination, as advanced by the Respondent, I would have expected more evidence in this regard to have been tendered.

[22] It is also telling that in the email chain between Mr. Tuck and Ms. Tara Leipert (also a manager at the facility) and copied to Ms. Willard, Mr. Tuck's supervisor, on June 8, 2017 (days before Ms. Bayrock's termination), there is no mention that Ms. Bayrock was not completing the information sharing correctly. Rather, Mr. Tuck expresses a concern that Ms. Bayrock might be the "wrong fit" and that – based on her email (as opposed to her actual work performance) – they would "suffer under her proposition(s)". When asked what he meant by that during the hearing, Mr. Tuck indicated that he meant that the work would suffer. This, to me, indicates that there was not a definitive concern about the work on or before June 8, 2017, but rather concern about whether there might be problems in the future.

[23] Ms. Leipert, in her reply, writes that she does not appreciate the "tone and language" in Ms. Bayrock's email, specifically as it related to claims that Ms. Bayrock's predecessor's practices were inefficient.

[24] Neither manager make any mention of specific performance issues, including relating to the information sharing duties that Ms. Bayrock was undertaking. Ms. Bayrock states that she was dismissed because the Respondent wanted a full-time worker, or at least one that could complete a full-time workload, regardless of actual hours worked. She submits that her perceived poor work performance therefore directly relates to her inability to work full time hours or complete a full-time workload, as a result of her disability. She contends that her workload was never altered in the manner that the Respondent suggests – i.e. that she was only required to complete essential information sharing tasks. For the reasons that are identified in the portion of these reasons addressing whether the Respondent has been able to demonstrate a *bona fide* occupational requirement, I accept Ms. Bayrock's testimony in this regard.

[25] My finding that the termination was linked to Ms. Bayrock's disability is also informed by the manner in which the termination occurred. Ms. Bayrock testified that she was told, at the meeting which was held to communicate her termination to her, that the Respondent

needed to find someone who could work full time hours. She was not told that her termination was a result of poor performance. I find Ms. Bayrock's evidence in this regard to be credible and uncontradicted. Ms. Willard was present at the time but admitted that she could not recall this conversation on cross examination. Ms. Bayrock, however, had a vivid recollection of the event.

[26] Ms. Bayrock also testified that errors in her work were not discussed with her in the days leading up to her termination, and her evidence in this regard was not contradicted by other evidence in the record. For example, there were no records of meetings or emails to Ms. Bayrock addressing that she was making errors in the information sharing process provided to the Tribunal. I find Ms. Bayrock's testimony credible.

[27] Ms. Bayrock's submission that her inability to work full time hours contributed to her dismissal is also in line with the overall tenor of the Respondent in its' dealings with her. An email between Mr. Tuck and Ms. Popiwchak, dated February 13, 2017 (pre-employment), summarizes a telephone call between Mr. Tuck and Ms. Bayrock. Within this email, Mr. Tuck notes: "seems she is going to submit a fairly reduced hours of work…Maria, I defer to you when we get this if this will meet our needs, since you are familiar with her work and give an opinion on what we can expect…she indicated about 22.5 hours a week…I guess some is better then none if it comes to that. Wholly (sic) eh…"

[28] This email demonstrates an initial opposition to the idea of Ms. Bayrock being able to perform as an information clerk while working reduced hours. This sentiment is repeated in a number of other correspondences, such as the above noted June 7, 2017 correspondence between Mr. Tuck and Ms. Leipert, in which Mr. Tuck communicates that Ms. Bayrock might be a wrong fit for the job and notes that it seems that "we are trying to make a liter into a gallon…and that leaves us waaaay (sic) short of the performance mark we need".

[29] While I appreciate that the Respondent felt justified in terminating Ms. Bayrock because they viewed her performance to be lacking, I believe that the Respondent's perception that Ms. Bayrock's work performance was poor was in part related to her not being able to work full time hours and consequently complete the work required of a full-

time worker. Noting that Ms. Bayrock's disability does not have to be the only reason for the termination and finding that the termination was connected (at least in part) to her disability, I find that her disability was at least one factor in the decision to terminate her employment.

[30] The Complainant has therefore established a *prima facie* case of discrimination. I will now turn to the justification or explanation from the Respondent.

(ii) THE RESPONDENT HAS NOT BEEN ABLE TO DEMONSTRATE A *BONA FIDE* OCCUPATIONAL REQUIREMENT

[31] As Ms. Bayrock has established a *prima facie* case, the Respondent must now demonstrate that it is more likely than not that the standard or policy it established was based on a *bona fide* occupational requirement, pursuant to section 15(1)(a) of the Act. If the Respondent fails, a finding of discrimination will be made.

[32] As per the Supreme Court in *British Columbia (Public Service Employee Relations Commission) v BCGSEU,* 1999 CanLII 652 (SCC) [*Meiorin*] at paragraph 54, to establish a *bona fide* occupational requirement, the Respondent must show:

1) That the employer adopted the standard for a purpose rationally connected to the performance of the job;
2) That the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. Here, it must be demonstrated that it is impossible to accommodate the employee without imposing undue hardship on the employer.

[33] In this case, the Respondent adopted a standard that required the information sharing (what is described as the "essential duty" of the job) to be completed to a high degree of competency, with little or no error.

[34] I accept that the employer adopted this standard for a purpose rationally connected to the performance of the job. The Respondent's evidence was that information sharing is essential to ensuring the proper functioning of parole hearings. Errors or delays in information sharing may impact the scheduling of parole hearings, thereby impacting the Respondent's obligation to ensure that offenders are released at the earliest opportunity.

[35] The importance of information sharing, and this task's centrality to the role that Ms. Bayrock had undertaken, is not in dispute. Completing this task with competency is rationally connected to the performance of the job.

[36] I also accept that the employer adopted the standard in an honest and good faith belief that it was necessary to the fulfillment of the legitimate work-related purpose. The Respondent had a legal duty to ensure that it was respecting an offender's right to a parole hearing, which included right to disclosure of the information that could be used to make a decision at that hearing.

[37] This case turns on the third of the above criteria – i.e. whether the Respondent has shown that it could not accommodate Ms. Bayrock, without undue hardship.

[38] It is uncontested that Ms. Bayrock's first full day in the role she was employed to cover (information clerk) was May 31, 2017. She was terminated on June 16, 2017, after only 6 days of undertaking the duties of an information clerk.

[39] Ms. Bayrock concedes that she initially believed that she could do the entirety of the role of an information clerk within her reduced working hours. This impression was formulated when Ms. Bayrock was training and completing other tasks prior to taking over the role in earnest, as her predecessor was unexpectedly in the role for longer then expected. Given her experiences with her training, and her prior experience in a similar position within another CSC institution, Ms. Bayrock believed she could perform the complete duties of the role even while she was working a reduced schedule.

[40] As a result of Ms. Bayrock's confidence in her ability to do the role, Mr. Tuck testified that he did not immediately address accommodating the workload or tasks to match the reduction in working hours with Ms. Bayrock, as he felt that it may have been unnecessary. He testified that since different people worked differently, he believed Ms. Bayrock may have been able to handle the entire workload of her predecessor, even while working less hours. He noted that Ms. Bayrock presented as very capable, and that she herself had indicated that she believed that she would require more work to fill her time.

[41] However, when she actually stepped into the shoes of the individual she was meant to replace, it is uncontested that Ms. Bayrock struggled.

[42] While the Respondent initially provided Ms. Bayrock accommodations in terms of working hours and flexibility with her working schedule, it was incumbent on the Respondent to adjust and revisit accommodation needs as these were identified in the course of the employment relationship.

[43] I find that Ms. Bayrock communicated a need to be further accommodated in her job, beyond the accommodations offered, by specifically requesting that her workload be adjusted to reflect the reduction in working hours she was afforded.

[44] A clear indicator of this is Ms. Bayrock's email to Mr. Tuck on the morning of June 7, 2017. She requested that certain tasks, such as cell assignment updates, be removed from her list of duties to "free up" her time to do "the more important things required of this position."

[45] Ms. Bayrock reached out to Mr. Tuck again, after working hours, on June 7, 2017. In this email, titled "request for help with job expectations" Ms. Bayrock states that in her prior role, the focus was on information sharing, and the other tasks on her predecessor's list of duties are new to her. She noted that these tasks take more time then expected, and noted that she felt pulled in many directions as each task was a priority to the person making the request. She specifically acknowledged feeling "overwhelmed" by the tasks and stated that she "cannot do a full time in 3 days". The email contains Ms. Bayrock's suggestions for adjustments that, in her view, might have been able to allow her to do more during the hours she was at work.

[46] She forwarded this email to Mr. Tuck's superior, Ms. Debbie Willard, on June 12, 2017. There, she notes again "I need to know where I can best help out (i.e. doing priorities first) because expecting me to do all the things [my predecessor] did without any adjustment will only result in some things not getting done." She further noted that while she had initially hoped to do the full job in three days of work, this was an "unrealistic" assumption.

[47] Ms. Bayrock's emails were not well received by the Respondent. As will be seen below, Ms. Bayrock's emails were not viewed as attempts to engage in conversations regarding ongoing accommodations, but rather, as Ms. Bayrock forcing her view of how things ought to be done at the workplace.

[48] Mr. Dale summed this up when in his words, the amount of work that Ms. Bayrock was to complete was "up for negotiation", but the manner in which it was to be done was not. He noted that Ms. Bayrock could not be expected to be in a position to identify inefficiencies in the role after only a short time in the job, since she would have required more time to understand why things were done in a certain way. Mr. Tuck testified that new hires should not dismantle or reconfigure the tasks assigned to them because they may not know enough to do so.

[49] This is also akin to how Ms. Leipert responded to Mr. Tuck, after he had forwarded Ms. Bayrock's email of June 7, 2017 to her. As indicated earlier in these reasons, Ms. Leipert notes: "Well I do not appreciate some of her tone and language in the email – claiming that [her predecessor's] practices are inefficient and such. Considering that she has yet to grasp the true nature of her job it is not appropriate to then call into question her ways." Ms. Leipert then discussed some of the proposals made by Ms. Bayrock, and the various reasons for why they could not be implemented.

[50] It is true that an employee cannot dictate the precise form that accommodation takes. The Respondent rightfully points out that Ms. Bayrock did not have a right to insist upon the tweaks that she suggested to the tasks she was assigned. Employees have an obligation to accept reasonable accommodation and cannot expect a perfect solution (*Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992], 2 S.C.R. 970 at p. 995).

[51] However, in this case, I do not believe that Ms. Bayrock can be faulted for trying to suggest changes to how she did her work in the absence of any proposed solution by the Respondent to emails where she clearly indicated her struggles with performing all of the tasks of a full-time employee, while being accommodated on account of disability to work less then full time hours.

[52] While Ms. Bayrock was not entitled to insist on the changes she wished to be made to how she performed her job, the Respondent had a duty to arrange the employee's workplace or duties to enable the employee to do his or her work, if it can do so without undue hardship (*Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43).

[53] I do not find that the evidence shows that this duty was met in this case. The Respondent was not an active participant in the conversations regarding potential further accommodations for Ms. Bayrock's disability, instead leaving it completely to her to fashion responses to her reduced work hours.

[54] While the Respondent submits that it had accommodated Ms. Bayrock by removing tasks from her duties, leaving only the essential information sharing task, I do not find this to have been clearly communicated to Ms. Bayrock. Her testimony on this point was clear when she stated: "I had no idea what I was permitted not to do. That's why I was asking all the questions."

[55] Indeed, as evidenced above, the email communication shows continual efforts on Ms. Bayrock's part to engage in discussions regarding her workload, and no substantive response from the Respondent.

[56] In response to her initial email of June 7, 2017, which I discuss above, Mr. Tuck responded that: "I've very little doubt that all these tasks are necessary or we wouldn't be doing them." Mr. Tuck instructed to seek information from colleagues about the "hows and whys" of the tasks, and to approach those same colleagues for help, as they had offered to lend a hand while Ms. Bayrock absorbed her tasks to the best of her ability.

[57] Mr. Tuck did not adjust the workload or provide any direction as to which tasks to prioritize. Tasks were not explicitly removed from her job description, though she was asked to seek assistance from other colleagues when and if necessary.

[58] After receipt of her second email to Mr. Tuck, on the same day, further outlining her concern that she could not perform all of the tasks assigned to her, Mr. Tuck did not respond to Ms. Bayrock directly.

[59] Instead, he forwarded the email with concerns regarding Ms. Bayrock's fitness for the role to his superior, Ms. Willard. In his email to Ms. Willard, Mr. Tuck stated: "it seems she has completely underestimated the job she was taking on" and wonders "if we have the wrong fit here and need something/someone more robust…judging by this email we are going to suffer under her proposition(s) here…Thoughts? I can take it to the CR group to see if we can cover, but seems we are trying to make liter into a gallon…and that leaves us waaaay (sic) short of the performance mark we need."

[60] This email, to me, suggests that while there might have been some potential accommodation researched (i.e. arranging for others to cover), this was never seriously pursued.

[61] As noted above, Ms. Bayrock also wrote an email to Mr. Tuck's superior, Ms. Debbie Willard, on June 12, 2017. Within her email, Ms. Bayrock requests assistance identifying priorities.

[62] Mr. Tuck indicated that the email communication reflected only part of the relationship between himself and Ms. Bayrock, and do not encompass all of the conversations that took place. While I agree, I did not receive any specific evidence from the Respondent that would lead me to believe that Ms. Bayrock's accommodation requests were treated as such, and that they were given due consideration by the employer. There is no concrete evidence of the Respondent engaging with the Complainant to address her concerns, of the Respondent trying to come up with a plan, or proposing alternatives.

[63] Mr. Tuck stated that, in his mind, it was for Ms. Bayrock to inform the Respondent as to what she wanted to do, and what she felt she could not do, within the hours she was available for work. He testified at times that accommodation should be done in "collaboration" but ultimately, appeared to put the onus on Ms. Bayrock to identify the tasks she would undertake. He testified, for example, that he believed it was for Ms. Bayrock to

say “these are things I will do and do satisfactory”. He also testified that she was given the “greatest latitude” to determine which parts of her job would be done, and which would not.

[64] Mr. Tuck testified that he believed that his approach – to allow Ms. Bayrock to lead the accommodation process – was “kinder”, as it allowed the person requesting accommodation, and therefore in the best position to comment on their limitations, to take control of the process. However, this approach does not take into account the power imbalance between the parties. It ultimately left Ms. Bayrock in an unenviable position of being forced to unilaterally propose potential ways that she could be accommodated in her job without any input from her employer. Solutions that Ms. Bayrock advanced but were deemed inappropriate by the Respondent were met with hostility and created strain in the relationship. The Respondent abdicated their responsibility to engage in the accommodation process by placing the onus solely on Ms. Bayrock.

[65] For example, the Respondent’s view that they engaged in the accommodation process by asking Ms. Bayrock to unilaterally delegate tasks to other colleagues without any further direction is not realistic. As noted by Ms. Bayrock, her colleagues were hesitant to take on her tasks as they had their own work to complete, and she did not have direct authority to force them to do so. Similarly, to require Ms. Bayrock to identify – through questions to her colleagues – what the most important parts of her duties were, and which duties she could skip, is similarly not feasible. I agree with Ms. Bayrock that it is not the responsibility of colleagues to identify for Ms. Bayrock what the essential portions of her duties are, or to permit her to take certain tasks off her plate entirely.

[66] In Mr. Tuck’s view, accommodation was ultimately provided in that Ms. Bayrock’s job tasks were reduced to the point where they only encompassed the sharing of information – viewed as the essential task, and one that was required to be done satisfactorily.

[67] Ms. Bayrock testified, for her part, that she did not understand that duties were taken off her plate to the point where she was only required to do information sharing. She indicated that while she was given some relief through other colleagues who picked up certain tasks, she did not believe this to be a wholesale transfer of duties. Rather, she believed that she was depending on the goodwill of other colleagues to pick up work she

was unable to complete. She did not believe that she had the power to tell her employer which portions of her job she felt able to complete and which she was allowed to completely bypass altogether. As a result of this arrangement, Ms. Bayrock was left in a position where she did not know what she was to do and what she was not responsible for.

[68] I do not find that Ms. Bayrock was ever advised that she could simply choose which portions of her job to do, and ultimately was only required to do information sharing. Had this been the case, I do not believe Ms. Bayrock would have continued to suggest ways to adjust the role to allow her to accomplish more tasks during her time.

[69] While the Tribunal is cognizant that there is no separate procedural right to accommodation which can give rise to remedy, the procedure used by the employer is an important consideration. The Tribunal relies on the case of *Canada (Attorney General) v Cruden* (2013 FC 520), which notes at paragraph 70 that:

> [70] If an employer has not engaged in any accommodation analysis or attempts at accommodation at the time a request by an employee is made, it is likely to be very difficult to satisfy a tribunal on an evidentiary level that it could not have accommodated that employee short of undue hardship.

[70] In this case, I do not find that the Respondent has met its evidentiary burden to show that Ms. Bayrock could not have been accommodated short of undue hardship. While the Tribunal is mindful of the importance of the tasks that Ms. Bayrock was entrusted with to the proper functioning of the parole hearing system, that does not absolve the Respondent from at least considering ongoing accommodation requests made by Ms. Bayrock.

[71] I therefore accept Ms. Bayrock's claim that the Respondent discriminated against her.

B. HARASSMENT

[72] The Act states it is a discriminatory practice, in matters related to employment, to harass on a prohibited ground of discrimination, by application of s. 14(1)(c) of the CHRA. In her statement of particulars, and throughout the hearing, Ms. Bayrock alleged harassment on the part of her predecessor.

[73] While harassment is not defined in the Act, as noted in *Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2019 CHRT 18 (CanLII) [*Aéropro*], this Tribunal has often adopted the analysis in *Morin v. Canada*, 2005 CHRT 41 at paragraph 246 [*Morin*]. I also adopt the following analysis from *Morin*:

> [246] Harassment, as proscribed under the *Act*, has been broadly defined as unwelcome conduct related to one of the prohibited grounds of discrimination that detrimentally affects the work environment or leads to adverse job-related consequences for the victims (*Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1284; *Rampersadsingh v. Wignall (No. 2)* (2002), 45 C.H.R.R. D/237 at para. 40 (C.H.R.T.)). In *Canada (HRC) v. Canada (Armed Forces) and Franke*, [1999] 3 F.C. 653 at paras. 29-50 (F.C.T.D.) ("*Franke*"), Madame Justice Tremblay-Lamer articulated the test for harassment under the *Act*. In order for a complaint to be substantiated, the following must be demonstrated:
>
> i. The respondent's alleged conduct must be shown to be related to the prohibited ground of discrimination alleged in the complaint (in the present case, the Complainant's colour). This must be determined in accordance with the standard of a reasonable person in the circumstances of the case, keeping in mind the prevailing social norms.
> ii. The acts that are the subject of the complaint must be shown to have been unwelcome. This can be determined by assessing the complainant's reaction at the time of the alleged incidents of harassment and ascertaining whether he expressly, or by his behaviour, demonstrated that the conduct was unwelcome. A verbal "no" is not required in all circumstances - a repetitive failure to respond to a harasser's comments constitutes a signal to him that his conduct is unwelcome. The appropriate standard against which to assess a complainant's reaction will also be that of a reasonable person in the circumstances.
> iii. Ordinarily, harassment requires an element of persistence or repetition, but in certain circumstances even a single incident may be severe enough to create a hostile environment. For instance, a single physical assault may be serious enough to constitute harassment, but a solitary crude joke, although in poor taste, will not generally be enough to constitute harassment since it is less likely, on its own, to create a negative work environment. The objective, reasonable person standard is used to assess this factor as well.
> iv. Finally, where a complaint is filed against an employer regarding the conduct of one or more of its employees,

> as in the present case, fairness demands that the victim of the harassment, whenever possible, notify the employer of the alleged offensive conduct. This requirement exists where the employer has a personnel department with a comprehensive and effective harassment policy, including appropriate redress mechanisms, which are already in place.

[74] In sum, it is necessary to determine whether the behaviour or conduct complained of by Ms. Bayrock was related to a prohibited ground of discrimination, unsolicited and unwelcome, and persistent or serious enough to create a hostile or negative work environment that undermined her dignity. Ms. Bayrock must establish that it was more likely than not that she was harassed based on her disability. The evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test (*F. H. v. McDougall*, 2008 SCC 53 (CanLII) at para 46).

[75] Ms. Bayrock alleges that her predecessor harassed her by not giving her adequate meaningful opportunities to learn the requirements of the position during the training period. She also alleges that her predecessor gave her improper instructions and tasks that she knew she would be unable to complete, as a way of setting Ms. Bayrock up to fail. She further alleges that her predecessor disparaged her in emails, by stating for example that Ms. Bayrock wasn't paying attention to instructions, and by intimating that Ms. Bayrock was not fulfilling the tasks required of her. In one email which Ms. Bayrock relies on to substantiate her claim of harassment, her predecessor sarcastically refers to her as "the star" before criticizing her work.

[76] To find harassment occurred, I must find that the treatment of Ms. Bayrock was in some way related to her disability.

[77] In this case, I do not find that I have sufficient evidence before me to find that the treatment that Ms. Bayrock experienced was related to her disability. Rather, for the reasons that follow, I find that the treatment was part of a workplace dispute, unrelated to disability.

[78] Ms. Bayrock's disability was not known to her predecessor. Though not determinative, Ms. Bayrock's disabiltiy was not mentioned, even obliquely, in any of the communication.

[79] In his testimony, Mr. Tuck admitted that Ms. Bayrock's predecessor had a "straightforward style" of communication that could be misinterpreted. Ms. Bayrock also admitted that her predecessor had difficulty with interpersonal skills. There was ample evidence on the record that Ms. Bayrock's predecessor's direct or abrupt communication style was well known. For example, Mr. Tuck in his email to Ms. Leipert states: "I can appreciate that Marlene is a poor teacher and probably didn't help matters in that regard." Ms. Leipert in her reply email confirms "Marlene has interpersonal concerns, without a doubt, but she did try to teach Yaro…". Given this evidence, it appears that Ms. Bayrock's predecessor was known to be abrupt in her dealings with colleagues. In this way, it appears that the manner in which she approached Ms. Bayrock was in line with her general style. This weighs in favor of a finding that the treatment was not related to Ms. Bayrock's disability.

[80] Moreover, the treatment alleged (calling Ms. Bayrock a "star" sarcastically, for example and complaining of work left incomplete) was part of an overall back and forth interaction between Ms. Bayrock and her predecessor. Within this context, Ms. Bayrock made complaints to her supervisor about her interactions with her predecessor and brought her grievances directly to her predecessor as well. Ms. Bayrock's own rebukes of her predecessor in these emails (for example, as someone who plays games with people she works with, and engaged in practices that were a poor use of resources) are in a similar tone to the way that her predecessor spoke about her. Both women were frustrated with each other, and made their frustration known. I agree with the Respondent that there is insufficient evidence to point the Tribunal to anything other then interpersonal conflict between colleagues, unrelated to Ms. Bayrock's disability.

[81] I therefore dismiss Ms. Bayrock's claim under section 14(1)(c) of the Act.

C. SYSTEMIC DISCRIMINATION

[82] Ms. Bayrock alleges that the Respondent engages in systemic discrimination against people with disabilities who cannot work full time by failing to post employment opportunities for part time work, and by excluding individuals who need to work part time from employment more generally.

[83] Section 10 of the CHRA addresses systemic discrimination (*Emmett v. Canada Revenue Agency*, 2018 CHRT 23 at paras 69-70 [*Emmett*]). Section 10(a) of the CHRA states that it is a discriminatory practice for an employer to establish or pursue a policy or practice that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[84] Ms. Bayrock must prove that the Respondent was pursuing a policy or practice that deprived or tended to deprive disabled persons of employment opportunities, on a balance of probabilities (*Emmett* at para 71).

[85] As with all cases of discrimination, direct proof of discrimination is not required. The Tribunal must consider all the circumstances that gave rise to the complaint in order to determine whether there is a subtle scent of discrimination. As noted in *Aéropro* at para 17:

> The Tribunal can therefore draw inferences from circumstantial evidence when the evidence presented in support of allegations make such an inference more probable than other possible inferences or hypotheses (see *Basi v. Canadian National Railway Company*, 1998 CanLII 108 (CHRT)). That said, the circumstantial evidence must be tangibly related to the Respondent's impugned decision or conduct (see *Bombardier*, at para. 88).

[86] The Respondent's uncontested evidence was that the nature of hours of employment (full or part time) is not published when a job is posted at all. While the Respondent's evidence was that an assumption is made that the position would require full-time hours (as most employees are seeking the income of full-time work, and this also coincides with the needs of the Respondent), should a worker disclose a need for part time work owing to a disability during the interview/hiring process, that would be an accommodation that the Respondent would consider.

[87] Ms. Bayrock suggests that the Respondent deprives employment opportunities to individuals who are required to work part-time as a result of their disability. She states that when such individuals identify their need for part time work, they are no longer considered for the position.

[88] As evidence of this, Ms. Bayrock points to the fact that she had not been offered jobs she applied for in the past, which she believes was due to her disability and need for part-

time work. As an example of this, Ms. Bayrock provided an email in which she was advised that she was being considered for a position with the Respondent in May 2021. Ms. Bayrock advised that she was limited to working part time and inquired about accommodation including working part time, having flexible start time and potentially working from home. She was advised by the acting manager of the facility in question that they had exhausted their options to shift duties to others to accommodate, and due to the need to interact with offenders on-site, could not offer fully remote work.

[89] However, Ms. Bayrock was successful in obtaining work at least three times with the Respondent, including immediately after she was terminated from her role as an information clerk, at a time when her limitations were well known to the Respondent. She also refused one position that she was being considered for, on the basis that it required too much walking.

[90] Ms. Bayrock also proffered the testimony of Ms. Letendre and Ms. Dubois as individuals who could attest to the discriminatory hiring practices of the Respondent.

[91] Ms. Dubois was employed with the Respondent in the filing department, a different department then the one where Ms. Bayrock was let go from. She testified that the individual who replaced Ms. Bayrock was eventually sent to the filing department because she “could not do the job”. However, she also admitted that she had no direct knowledge of what happened prior to the individual’s move into her department. It appeared that she made this assumption based on her own view that the individual performed poorly in the filing department. I do not give Ms. Dubois’ evidence weight.

[92] Ms. Letendre was also employed by the Respondent. She acted as Ms. Bayrock’s supervisor at one point, after she was let go from her position as an information clerk. Ms. Letendre agreed that Ms. Bayrock was accommodated in her position when she was working under her supervision, and allowed to work part time. Ms. Letendre noted that while she was looking to staff a position, or involved in hiring decisions, there had never been an individual (aside from Ms. Bayrock) who indicated a preference for part time work since “most people want full time work”. I do not find that Ms. Letendre’s testimony assists

Ms. Bayrock in establishing that the Respondent created barriers for those whose disabilities required part time working hours.

[93] Ms. Bayrock also alleged that those who wish to work part time are not offered indeterminate positions, but rather are relegated to casual work opportunities. As noted below, Ms. Bayrock points out to ways in which casual positions differ from indeterminate positions which make casual work less desirable.

[94] When asked what evidence she had for this position, during cross-examination, Ms. Bayrock was unable to respond. In fact, Ms. Bayrock did accept that she had been approached at least once for a term position, but decided to go with a casual assignment for personal reasons.

[95] When I consider all of the circumstances of this case, including the circumstantial evidence that Ms. Bayrock provided, I do not believe that the evidence establishes a subtle scent of systemic discrimination as alleged.

[96] Ms. Bayrock alleges that casual employees are not given the same benefits as term employees (such as union membership, access to a pension, accumulation of job seniority and other benefits), and are restricted to 90 days of work per calendar year (which does not apply to term employees). Ms. Bayrock submits that this is unfair, given that both casual and term employees are expected to undertake the same job duties. It is not for the Tribunal to comment on the overall fairness of the various employment structures that the Respondent offers. I have already determined that the evidence did not establish that employees with disabilities are excluded from indeterminate positions. There is no violation under section 10 of the CHRA unless there is a link between the impugned conduct and a prohibited ground of discrimination under the CHRA.

[97] I dismiss Ms. Bayrock’s claim that the Respondent violated section 10 of the CHRA.

V. ANCILLIARY CLAIMS

[98] The Complainant also asks this Tribunal to assess whether the Respondent breached obligations pursuant to the *Canada Labour Code* (R.S.C., 1985, c. L-2) (by

terminating without providing sufficient notice or pay in lieu), and whether the Respondent wrongfully dismissed her. Similarly, Ms. Bayrock alleges that problems with the Phoenix payroll system during her employment with the Respondent resulted in delayed payment and mental anguish. However, the Tribunal is confined to assessing whether there have been breaches to the Act, and does not have the jurisdiction to make these determinations. However, as seen above, the circumstances of the termination broadly have been considered as they relate to whether Ms. Bayrock suffered discrimination in employment and potential damages that flow.

[99] The Complainant asks the Tribunal to assess whether the Respondent breached its duty to accommodate her. There is no free-standing duty to accommodate. I have already dealt with accommodation in my analysis on whether Ms. Bayrock suffered discrimination contrary to the Act.

[100] Ms. Bayrock also asks the Tribunal to determine whether the Respondent defamed her in its' defense of her allegations of discrimination to the Canadian Human Rights Commission and this Tribunal, and during the employment relationship, including at termination. While I do not have the jurisdiction to determine whether Ms. Bayrock was defamed generally by the Respondent, as noted above, I have considered the circumstances of the employment relationship and termination broadly as they relate to Ms. Bayrock's claim she suffered discrimination in employment and in assessing damages.

[101] With respect to statements made before the Commission and Tribunal in response to the complaint initiated by Ms. Bayrock, the Respondent is entitled to advance a full defense in these proceedings. I do not view any of the statements made by the Respondent as exceeding this function.

[102] Finally, Ms. Bayrock asks the Tribunal to determine whether the Respondent humiliated her during the termination process. The Tribunal has considered the nature of the termination in the context of determining whether discrimination occurred and in assessing damages.

VI. DAMAGES

[103] Ms. Bayrock seeks damages under section 53(2)(e) of the CHRA. Under this section, the Tribunal can order that the Respondent compensate the Complainant up to $20,000 for pain and suffering as a result of the discrimination. This type of award is to compensate the Complainant, to the extent possible, for pain and suffering endured including to her dignity interests. The primary considerations for assessing damages are the objective seriousness of the conduct and the effect on the particular individual (*Christoforou* at para 16).

[104] As it relates to the effect on Ms. Bayrock, I accept that the discrimination had significant emotional consequences for her. She was visibly shaken during the hearing when recalling the treatment and testified that she was made to feel as if she could not perform the work. I accept that the discrimination had an adverse impact on her self worth.

[105] As it relates to the objective seriousness of the conduct, I recognize that Ms. Bayrock's tenure with the Respondent, at the time of the discrimination suffered, was not long. I also recognize that Ms. Bayrock was initially accommodated in her position.

[106] I find this case to be similar to the case of *Closs v. Fulton Forwarders Incorporated and Stephen Fulton, 2012 CHRT 30* which was provided to me by the Respondent. There, a part-time employee of slightly less then 2 years was found to have been discriminated against, which the Tribunal accepted caused him emotional upset. He was awarded $5000 in pain and suffering.

[107] I believe this is an appropriate amount in this case. I also award $5000 for pain and suffering under section 53(2)(e) of the CHRA to Ms. Bayrock.

[108] Ms. Bayrock seeks damages under section 53(3) of the CHRA. This award is meant to discourage those who engage in reckless or deliberate discrimination. Recklessness includes acts that disregard or show indifference to the consequences such that the conduct is done wantonly or heedlessly (see *Canada (Attorney General) v. Johnstone*, 2013 FC 113 aff'd 2014 FCA 110 at para 155). It does not require a finding that the discrimination was done intentionally, and I do not make this finding. I find that the Respondent engaged in discrimination recklessly as they acted in excessive haste, and without regard for the

consequences of their action. Instead of viewing Ms. Bayrock's suggestions for modifications to her job through the lens of accommodation, she was very quickly written off as someone who could not do the work required and as someone who was making inappropriate demands. I award $2000 under section 53(3) of the CHRA.

[109] Ms. Bayrock found employment with the Respondent almost immediately after she was terminated. She worked the entire allotment that a casual worker is entitled to work in that calendar year. She therefore did not suffer lost wages.

[110] Ms. Bayrock's other damages requests are dismissed, as they relate to allegations that were not substantiated.

[111] Ms. Bayrock also requests interest pursuant to the CHRA. Under section 53(4) of the CHRA, the Tribunal can award interest on an order to pay financial compensation:

> **53** …
>
> **Interest**
>
> **(4)** Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate.

[112] Rule 46 of the *Canadian Human Rights Tribunal Rules of Procedure, 2021*, SOR/2021-137 states that interest awarded under this section must be simple interest that is equivalent to the bank rate established by the Bank of Canada.

[113] I award simple interest on the total compensation awarded to Ms. Bayrock, that is $7,000, at the relevant bank rates established by the Bank of Canada from May 31, 2017, being Ms. Bayrock's first full day in the role she was employed to cover (information clerk), until the date it is paid.

Signed by

Naseem Mithoowani
Tribunal Member

Ottawa, Ontario
February 3, 2025

Canadian Human Rights Tribunal

Parties of Record

File No.: T2655/3121

Style of Cause: Yaroslava Bayrock v. Correctional Service Canada

Decision of the Tribunal Dated: February 3, 2025

Date and Place of Hearing: December 18-22, 2023

Zoom Videoconference

Appearances:

Yaroslava Bayrock, Self-represented

William Kuchapski, for the Respondent