

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE
LA PERSONNE

TARAMATIE ROOPNARINE

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

BANK OF MONTREAL

Respondent

DECISION

MEMBER: Shirish P. Chotalia, Q.C. 2010 CHRT 5
2010/03/19

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I. COMPLAINT

A. Physical Disability - Employment

[1] Ms. Roopnarine was an employee of the Bank of Montreal ("BMO") for 31 years. She joined BMO when she was 20 years old in 1975 and performed various jobs ranging from proof machine operator to data entry clerk to collector and fraud investigator. She was terminated by BMO on February 15, 2007 and was given a severance package. At this time she was on an accommodated leave of absence from work for a wrist injury. This leave was to be extended upon receipt of a medical report supporting an extension. BMO terminated her prior to receipt of this report. Ms. Roopnarine alleges that she was terminated because of her disability.

[2] In particular, Ms. Roopnarine makes the following allegations: her performance until termination was competent and her performance appraisals prior to 2003 demonstrated this; her subsequent appraisals were incorrect and unfair; she was not accorded due process in the evaluation process and content, and that managers did not bring performance issues to her attention; when she had a wrist injury BMO used these evaluations as a pretext to terminate her when the real reason for her termination was because BMO did not want to accommodate her wrist injury.

II. FINDINGS OF FACT

A. Findings in this Case

Work History

[3] In January 2002, Ms. Roopnarine was seeking a promotion. She sought to move from the collections department into a more senior position as a fraud investigator. She was interviewed for this position but did not receive it. Then, still in January 2002, she applied for a position as a fraud analyst and obtained a lateral transfer into this position.

[4] She worked in the mortgage fraud stream known as Gemini in the fraud detection unit. Her job was to investigate and analyze applications flagged as potentially involving mortgage fraud. For example, if the identity of a potential mortgage customer was at issue, she was to take steps to determine if the mortgage application was fraudulent or satisfactory. This investigation included reviewing information on the computer, speaking to the applicant's employer for verification purposes, checking if the SIN numbers and addresses matched, and analyzing the credit information. After conducting a thorough investigation, she was to make a determination as to whether fraud existed. If no fraud existed, the mortgage application was cleared. It was returned to another unit for the mortgage application to be confirmed as satisfactory to the potential mortgage customer. If she believed that there was evidence of fraud the file was routed to the unsatisfactory basket. If she incorrectly classified the mortgage application as unsatisfactory when it could have been verified as acceptable, BMO lost business as the mortgage customer's application was declined. BMO had a 24 hour window within which it expected that a mortgage customer would be advised if the application was accepted or declined.

[5] BMO had 5 streams in the fraud unit including Gemini and CRDS. CRDS focused on detecting bank account fraud. CRDS was the most basic stream in which new employees and students were initially trained.

[6] When Ms. Roopnarine was transferred in 2002, she maintained her grade and pay level and became the highest graded and highest paid employee in the fraud unit. From the date of transfer, she was given significant ongoing training over the years in both Gemini and CRDS. However, by May 2006 she still had not acquired the skills to perform the duties of a fraud analyst in either of these 2 streams. For her part, Ms. Roopnarine believed that she had been entitled to a promotion in a higher position as a fraud investigator since 2002. Yet, even as late as January 2007, she had been unable or unwilling to acquire the basic skill sets of even 2 of the 5 streams. Difficulties with her performance began to be documented in the 2003 -2004 year end review.

[7] As per an interim 6 month progress review for the time period November 1, 2003 to April 30, 2004, she was having difficulty with both productivity and competence. She challenged this assessment and her year-end review for the period November 1, 2003 to October 31, 2004 fiscal year was graded as "successfully meets expectations". That year-end appraisal acknowledged that she had made improvement in overall productivity since July of that year when managers removed some of her regular tasks to allow her time to focus on a comprehensive skills development plan. However, it also documented her reluctance to follow prescribed standards, the need for her to improve her skills and increase team efficiency and effectiveness, and her reluctance to receive and implement feedback. Rather than accepting that she needed to improve, Ms. Roopnarine became defensive. She initially refused to sign her 2003-2004 year-end performance appraisal in spite of numerous discussions and input from BMO staff. She also refused to attend meetings with managers to discuss her performance. Eventually she signed the appraisal and attached her personal notes regarding her performance.

[8] BMO continued to provide her with training and support. Her 2004-2005 year-end review was again marked as "successfully meets expectations" and was more positive than that of the prior year. It confirmed that she had in-depth knowledge of Gemini and working knowledge of CRDS. Yet, it also confirmed that it was a priority to ensure that Ms. Roopnarine received more training to focus on continued development and enhancement of skills, and that it was mandatory to meet minimum department requirements. She signed and accepted this appraisal.

Performance Problems - Pre-wrist Injury

[9] In April 2006 Ms. Jamie Khan became manager of the fraud unit. Ms. Khan had been employed with BMO for 24 years and had experience in loans, mortgages, fraud detection and investigation services.

[10] As part of her management initiative, she met personally in one-on-one meetings with each of the 15 employees in the fraud unit to discuss their skills and objectives. Of her 15 member team, Ms. Khan observed, that excepting Ms. Roopnarine, each member was capable of working in a minimum of 3 of the 5 streams and that many members were competent to work in 4 of the 5 streams. Yet Ms. Roopnarine had worked primarily in only 1 stream, being Gemini.

[11] Ms. Khan met with Ms. Roopnarine in about April 2006. Ms. Roopnarine told her that she was highly skilled and highly graded. She also told Ms. Khan that she was disappointed

with being passed over for a promotion to the position of fraud investigator in a different area in 2002. Ms. Khan told her that she was happy to work with her to improve and expand her skill set so that she would be better qualified for future opportunities. Accordingly, in order to improve her knowledge of more streams and to bring her skill set up to par with her more junior peers, Ms. Khan told Ms. Roopnarine that she would begin by moving her to CRDS. Ms. Khan indicated that once Ms. Roopnarine mastered the skills in this stream and worked satisfactorily in this stream, she would move her back to Gemini to upgrade her skills there as well. She moved Ms. Roopnarine to CRDS on May 11, 2006.

[12] In CRDS Ms. Khan provided Ms. Roopnarine with intensive training from May 12 to 26, 2006, during which time a trainer sat with her at her desk to guide her, and showed her how to produce CRDS reports, how to deal with international withdrawals and how to report her work on downloads to managers. Ms. Roopnarine was to investigate and identify "skimming" in customer bank accounts. "Skimming" refers to credit card fraud whereby criminals remove money from bank accounts. The day shift analyst was responsible for downloading the system at 8:00 a.m., 12:00 p.m. and 4:00 p.m. and reviewing the flagged accounts to verify them for "skimming".

[13] Both Gemini and CRDS required the analyst to start the computer and use the mouse and keyboard to view the identified accounts. The analyst typed in a number and obtained information. There was minimal distinction between the physical requirements of the jobs. However, CRDS required more accounts to be processed. While in CRDS, Ms. Roopnarine continued to work occasionally in Gemini. Despite receiving CRDS training and other ongoing coaching from Ms. Khan, Ms. Roopnarine was unable or unwilling to cope with the CRDS work. She failed to follow procedures. She did not work the necessary minimum number of accounts and failed to follow the downloading schedule.

[14] Ms. Roopnarine recognized her performance issues and within the first few months of being assigned to CRDS she asked Ms. Khan to return her to Gemini where it was more difficult to evaluate her underperformance. Ms. Roopnarine continued to complain to Ms. Khan that she was dissatisfied for not having received a raise and a promotion.

[15] Between May 2006 and October 2006 Ms. Khan met with Ms. Roopnarine on numerous occasions, and sometimes in the presence of Ms. Kahn's manager, Ms. Coupland. Ms. Khan repeatedly offered Ms. Roopnarine constructive criticism, in regard to both CRDS and Gemini. Ms. Kahn told her that she was not fully investigating suspected fraud, and that she worked randomly rather than systematically as required. Concomitantly, she also offered Ms. Roopnarine continued training and assistance in a supportive manner. On June 1, 2006, Ms. Roopnarine agreed with Ms. Khan that once she met the CRDS performance expectations, Ms. Khan would return her to Gemini. In spite of agreeing to the same, Ms. Roopnarine continued to complain into September 2006 that her experience, knowledge and skills were not a fit with her role in CRDS, and that she wished to return to Gemini. She did not complain about work duties as they related to any wrist injury.

[16] After 5 months in the CRDS stream, in spite of having received in-depth training and coaching, feedback and continued ongoing assistance, Ms. Roopnarine was unable to perform the job. She had technical challenges and poor productivity: she worked 7.5 accounts per hour as opposed to the department standard of 25-35 accounts per hour. Several times she neglected to work the full set of CRDS and worked randomly. She also had technical challenges. For example, in June 2006, she again dragged a master file for CRDS into the wrong folder which resulted in lost productivity for the rest of the analysts who could not

locate it and thus could not work on other accounts. When Ms. Khan confronted her with these issues she continued to insist that she be returned to Gemini. She received no performance pay or base pay increases for 2006.

Wrist Pain & Prior Accommodation

[17] During her employment, Ms. Roopnarine had a number of disability issues that required accommodation. BMO is a large employer, and in accordance with its accommodation policies managed by Oncidium Health Group ("Oncidium") it accommodated Ms. Roopnarine in 2003 when she requested and received a modification of her workstation for an injury. BMO had a contract with a third party to provide disability management which party interacted with Oncidium. Oncidium was responsible for evaluating requests for accommodation and ensuring that all requests for accommodation were evaluated fairly and impartially.

[18] The first time Ms. Roopnarine told Ms. Khan that she was experiencing pain in her wrist was on October 5, 2006 in a casual conversation. At the time Ms. Roopnarine recorded her conversation in her diary. In response Ms. Khan told her to submit medical evidence in support of a request for accommodation and that she would honour whatever the doctor said. Ms. Roopnarine contacted human resources and then Oncidium and received the medical forms to be completed by her physician on October 11, 2006. Ms. Roopnarine forwarded her doctor's statement dated October 17, 2006 to Oncidium. The statement stated that she had wrist pain of a chronic and acute nature and that BMO should limit her time on the computer to 4 hours per day. The statement did not specify the duration of time for which the accommodation was required. It did indicate that the physician had referred her to a neurologist. Ms. Roopnarine dealt directly with Oncidium regarding her wrist issues. Ms. Khan was not involved in evaluating accommodation requests.

2006 Performance Appraisal

[19] As Ms. Roopnarine's manager, Ms. Khan was required to prepare her 2006 performance review with respect to her work from November 1, 2005 to October 31, 2006. She followed BMO's policy in performing this assessment. She sought input from Ms. Roopnarine. In mid October 2006 Ms. Khan again met with Ms. Roopnarine to advise her that she was not meeting standards and to provide her with coaching to help her meet those standards.

[20] Unfortunately, on October 19, 2006, Ms. Roopnarine was involved in a motor vehicle accident and took a medical leave of absence from work due to injuries she sustained in that accident. She received short term disability (STD) benefits. She returned to work on November 14, 2006. On November 16, 2006, Oncidium advised Ms. Khan that the medical information provided by Ms. Roopnarine was insufficient to support accommodation for her wrist injury. After her return to work from STD leave Ms. Roopnarine complained casually about her wrist to Ms. Khan. Ms. Khan was aware that Ms. Roopnarine was dealing with Oncidium regarding accommodation for her wrist injury. Ms. Khan awaited its direction. At this time, Ms. Roopnarine was dealing separately with Oncidium and told her doctor to provide his complete files to Oncidium.

[21] On November 16, 2006 Ms. Khan requested that Ms. Roopnarine prepare a self-assessment of her performance. Ms. Roopnarine wrote a glowing self-assessment using abstract language and including such phrases as "negotiates for a win-win situation by influencing strategies tailored to business situations and structuring agreements to meet both parties' objectives". She failed to assess her own performance in concrete terms regarding the

number of accounts she investigated and downloaded in either Gemini or CRDS streams and the quality of her investigations. Her self-assessment was difficult to understand and inaccurate.

[22] Ms. Khan also consulted with Ms. Roopnarine's prior managers to assess the first half of the fiscal year, because Ms. Khan had only been her manager since April, 2006. Based on that feedback Ms. Kahn documented Ms. Roopnarine's prior difficulties in Gemini as: "Tara has had some challenges with presentation, mitigation, and analysis" of applications. Her applications were "not thoroughly investigated and followed up upon in timely manner, and often times the applications were placed in 'unable to mitigate' stage" which resulted in a loss of business to BMO. In spite of coaching, Ms. Roopnarine did not take "corrective action" to improve her performance. Post April 2006, Ms. Kahn documented that in spite of receiving 5 months of training Ms. Roopnarine was still in the "learning" category in CRDS. She had "some challenges adhering to CRDS schedule and downloads".

[23] Essentially, Ms. Roopnarine did not follow the download schedule, created technical problems, neglected to investigate the full set of accounts, and worked randomly rather than systematically as directed. As a result, there were gaps in the work that she performed and the work of subsequent shifts was negatively affected. While Ms. Roopnarine received a few congratulatory emails regarding her work performance during this fiscal period, two from Ms. Khan, these were part of a broader employee encouragement program known as *Bravo*, and did not reflect individual employee performance. Ms. Roopnarine had not acquired the necessary skills to work in CRDS and Gemini. This did not meet BMO's objectives of ensuring that all analysts could work in most of the streams, thereby allowing for flexibility of scheduling and comprehensive analysis and knowledge of the unit. For this reason Ms. Khan assessed Ms. Roopnarine's work to be substandard to her peers. Accordingly, she graded her as "contribution below expectations".

[24] Next, Ms. Khan met with Ms. Coupland and discussed the performance appraisal. Ms. Coupland signed it on November 30, 2006 and wrote, "stay focused on your development opportunities and accept the coaching [from] a positive perspective". Then Ms. Khan signed it on December 18, 2006 and met with Ms. Roopnarine the same day, at which time she gave her a hard copy to discuss it with her. Ms. Khan had set aside 1 hour to discuss the appraisal. However, within 2 minutes Ms. Roopnarine told Ms. Khan that she wished to discuss it only with Ms. Coupland. Ms. Roopnarine refused to sign the appraisal. She said she wanted a "soft" or electronic copy of the document. Ms. Khan declined to provide a "soft" copy to her because in the past Ms. Roopnarine had altered and rewritten portions of Ms. Khan's emails. Ms. Khan did not want her original appraisal document altered. Ms. Khan agreed to arrange a meeting with Ms. Coupland.

[25] Thereafter, Ms. Roopnarine's performance difficulties continued. During December 2006, Ms. Khan continued to receive emails from other managers complaining about Ms. Roopnarine's performance. For example, in December 2006, 39 of BMO's accounts were subject to a fraud "hit" being a situation wherein a number of accounts were 'skimmed' of monies; yet, Ms. Roopnarine had not identified any of these accounts as being in need of investigation for potential fraud. She continued to underperform. For example, in mid December 2006, on a particular day she worked only 28 minutes.

Accommodation Process

[26] Meanwhile, Ms. Roopnarine's physician sent to Oncidium on December 27, 2006, a written report outlining the length of time he had been her physician and advising that

Ms. Roopnarine required modified duties in the form of working no more than 4 hours per day on the mouse and keyboard. On January 2, 2007, after receipt of the medical report from Ms. Roopnarine's physician, Oncidium advised BMO that it had approved accommodation for the Complainant's wrist injury for the period of January 2, 2007 to February 4, 2007. Oncidium also advised Ms. Roopnarine and BMO that additional and updated medical information was required to substantiate accommodation beyond February 4, 2007.

[27] Ms. Khan immediately accommodated Ms. Roopnarine by approving a reduction in her work on the computer from 7.5 to 4 consecutive hours in a working day in CRDS. Because the fraud unit was completely computerized, BMO did not provide her with additional duties for the 3.5 hours per day, but paid her for the full day of work. As well, in January 2007, BMO modified Ms. Roopnarine's work schedule to allow her to attend physiotherapy appointments pertaining to injuries she sustained in her motor vehicle accident.

Meeting with Ms. Coupland

[28] As requested by Ms. Roopnarine, on January 10, 2007, Ms. Coupland and Ms. Khan met with Ms. Roopnarine to discuss the 2006 appraisal. Ms. Roopnarine continued to complain about her past 5 years of employment, and how she had been denied a promotion. There was not much discussion regarding the appraisal. A few minutes into the meeting, Ms. Roopnarine told Ms. Coupland: "Jamie's a liar" referring to Ms. Khan. Both Ms. Khan and Ms. Coupland were shocked. As a result, Ms. Khan remained silent for the rest of the meeting. About 1 hour into the discussion, Ms. Coupland became impatient and told Ms. Roopnarine to "get to the point" of the meeting, while pointing at the table. Following the meeting, Ms. Coupland sent an email to Ms. Roopnarine stating, "Your behavior in our meeting today in calling Jamie a liar is completely unacceptable. An apology was not forthcoming from you at any time during the meeting. Jamie has spent considerable time with you since she arrived as your Manager and has demonstrated outstanding patience with you at a cost of not spending the time she should be spending with other members of your team." Ms. Coupland stated that Ms. Roopnarine continued to focus on the past and continued to blame others for her own performance. These behaviours had used up 90% of the meeting time.

[29] The same day Ms. Roopnarine then telephoned Ms. Coupland's manager, Ms. Penny to request a meeting. Meanwhile, Ms. Khan, disregarding the accusation of being a liar, continued to treat Ms. Roopnarine in a positive and helpful manner.

[30] However, when Ms. Roopnarine did not apologize for her behavior at any time, either during the meeting or after Ms. Coupland's email, Ms. Coupland and Ms. Penny made a decision to terminate Ms. Roopnarine. BMO's employment policies expressly contemplated termination either for cause, or with notice and a severance package in lieu of notice. The disciplinary policies encapsulated a multi-step approach to terminations for cause, but allowed for managerial discretion to move to termination without prior warning in some cases. As Ms. Roopnarine was a long service employee and it would have been difficult to terminate her for "cause" in the legal sense, BMO chose to terminate her without "cause". It chose to provide her with a severance package and pay in lieu of notice.

[31] Just prior to the termination date, Oncidium advised Ms. Khan on February 13, 2007, that no further medical documentation had been received to support the extension of accommodation beyond February 4, 2007 and that Oncidium was awaiting an outstanding medical report as it was aware that Ms. Roopnarine had an upcoming appointment with a specialist.

[32] On February 15, 2007 Ms. Coupland terminated Ms. Roopnarine and provided her a termination letter dated the same day. Ms. Khan was not involved in this decision. Ms. Coupland's letter stated: "...this will confirm that your employment with BMO will be terminated with appropriate severance effective February 15, 2007." As per the letter BMO provided her with a severance package of salary continuation for 95 weeks from February 16, 2007 to December 12, 2008. The value of the salary continuation was \$86,955.00. She also received a payment of \$2,952.00, representing the incentive pay component of her severance pay to be paid at the conclusion of the salary continuation period, and benefits continuation and ongoing accrual of pension contributions for 95 weeks and outplacement counselling.

Post Termination

[33] Ms. Roopnarine had seen the neurologist in January 2007 and his report dated March 13, 2007 was sent to Oncidium later that month. This report confirmed that she had a repetitive strain injury and that there was no definitive evidence of carpal tunnel syndrome.

[34] Ms. Roopnarine was then involved in a 2nd motor vehicle accident on April 19, 2007. She commenced a civil action against the owner and operator of another vehicle involved in that collision claiming damages in the amount of \$1,500,000.00 (\$600,000.0 for general damages and \$900,000.00 for special damages). She alleged that she had suffered significant physical injuries.

[35] As of the date of hearing being January 25, 2010, Ms. Roopnarine had not obtained employment since her termination at BMO. She made efforts to mitigate her wage loss through searching for other employ.

B. Agreed Facts and Access to Justice

[36] Through active pre-hearing case management and exploration of the issues with counsel at the opening of the hearing, a number of facts were agreed to by both counsel. This agreement of facts expedited the hearing which presumably resulted in a direct cost benefit to the parties in reduced legal fees. This is particularly important given the decision of *Canada (Attorney General) v. Mowat*, 2009 FCA 309 in which the Federal Court of Appeal held that the Tribunal does not have the jurisdiction to award legal fees to successful Complainants, and given that there is no provision for awarding legal fees to Respondents or unsuccessful Complainants. The agreement also focused the hearing for the Tribunal and resulted in a reduced number of issues. Also, the medical evidence of both the general practitioner and the neurologist was entered without the need to subpoena these doctors, who were reluctant to attend the hearing, and thereby saved both parties monies that would likely have been expended to cover the costs to have them testify. Instead, the affidavit of Ms. Roopnarine's family physician was tendered for the truth of its contents and BMO waived its right to cross-examine him. Finally, the parties agreed that only two witnesses would testify: Ms. Roopnarine and Ms. Khan.

C. Dispute over Factual Issues

[37] In making the above findings of fact I carefully considered all of the evidence. There was a startling discrepancy between the evidence of Ms. Roopnarine and that of Ms. Khan with respect to performance issues, Ms. Roopnarine's conduct, and the termination. I chose to accept the evidence of Ms. Khan when it conflicted with that of Ms. Roopnarine for a number of reasons: In spite of a lengthy and exhaustive cross-examination by Ms. Roopnarine's counsel, Ms. Kahn remained calm and candid. Over-all, I found Ms. Khan to be forthright, clear and consistent. I found her to be fair and balanced. For example, Ms. Khan

acknowledged that Ms. Roopnarine had complained to her about her wrist in November 2006. I found Ms. Khan's testimony to accord with the documentary evidence. I found her to be independent in that while she was Ms. Roopnarine's manager and had assessed her performance appraisal as falling below expectations, she did not make the final decision to terminate her. This decision was made by her manager, Ms. Coupland. I also found that in her testimony she demonstrated no agitation or hostility towards Ms. Roopnarine in recalling how Ms. Roopnarine called her "a liar". On the whole, I found Ms. Khan's evidence to be inherently consistent.

[38] On the other hand, I had difficulty with Ms. Roopnarine's evidence for a number of reasons. While Mr. McKillop is a lawyer of significant skill, I found his cross examination of Ms. Roopnarine to be fair and respectful. He repeatedly gave her an opportunity to change her evidence and made a genuine effort to understand her evidence and to ensure that it was not misrepresented. Yet, Ms. Roopnarine refused repeatedly to answer mundane questions in a candid manner with a "yes" or "no" answer. For example, upon being shown her job description, she refused to confirm the duties of her position as outlined until repeatedly being requested to do so. She refused to acknowledge that her identification of a mortgage as potentially fraudulent resulted in the denial of the mortgage application until repeatedly being asked questions about the process. She was guarded and defensive throughout the cross-examination. Eventually, she acknowledged that she did not advise Ms. Khan of her wrist injury until October 2006. At the end of cross-examination, she finally admitted that her 2004 performance problems, her 2005 performance problems and her performance problems in Gemini for the first 6 months of 2006 were unrelated to her wrist injury.

[39] I also found Ms. Roopnarine's evidence to contain numerous inconsistencies: for example, she changed her evidence numerous times in cross examination after she was given an opportunity to do so. She denied that she had been given much training in CRDS, and when confronted with the detailed notes of the May 2006 4-week training session made to fellow employees, she eventually accepted that she had received some of that training, could not recall some of it, and denied much of it. I compared this evidence to Ms. Khan's evidence that such training was provided, which evidence was consistent with the notes of the trainer outlining concrete instruction given. On another point, Ms. Roopnarine denied being upset with the 2006 appraisal even though she complained about it to Ms. Coupland and then to Ms. Penny.

[40] Ms. Roopnarine denied that she had performance issues in her testimony in chief and in cross-examination initially. Later in cross-examination she conceded that she made mistakes in 2004. Yet, she immediately insisted on making differentiations between "carelessness" and a "mistake". Initially, she denied absolutely that she had any performance problems from 2004 onwards. Mr. McKillop took her through 25 incidents and in cross-examination she acknowledged a number of them. For example, she signed the 2005 performance appraisal and agreed that she needed to improve her skills to meet minimum department standards. Initially, she denied that she failed to follow directions and procedure, but later admitted the same. After much questioning, she finally acknowledged that she agreed with her trainer's recommendation in June 2006 that she needed to focus on working CRDS to maintain accuracy in downloading and in sending out alerts. She eventually accepted that she was told in June 2006 that she had dragged a master file from CRDS, but denied that this created significant problems for others who could not therefore access it. She stated that the technical problem was corrected within 15 to 20 minutes by the IT department whereas Ms. Khan stated that the problem took 1.5 days to resolve.

[41] Significantly, she denied that she had called Ms. Khan a liar, even though an email confirming such an event had been sent by Ms. Coupland to Ms. Penny copied to Ms. Khan shortly after the meeting and a hard copy had been given to Ms. Roopnarine. She did not demonstrate that the email was unreliable. In cross-examination Ms. Roopnarine initially refused to acknowledge that calling a manager a liar was a serious matter, but then conceded that such conduct would be unacceptable.

[42] She exaggerated her evidence. For example, she implied that she was responsible for designing part of the process at Gemini when there is no evidence that someone at her level would have been involved in design. Another example that I found striking was her glowing 2006 self-assessment: she used abstract high level language to describe her work rather than providing concrete examples of her skills. I found this effort to place a positive face on her performance to be disingenuous. I also found it difficult to believe that she had not seen her civil statement of claim pertaining to her April 2007 accident, and that she did not know the status of that action. For that matter, I had directed her counsel in her presence in a pre-hearing conference to contact Ms. Roopnarine's separate counsel in the civil litigation to obtain and produce relevant documentation. On the whole, I did not find her credible. I found many inconsistencies in her evidence.

D. New Evidence Regarding Submissions Pertaining to Cutbacks

[43] Ms. Roopnarine's counsel had not prepared written argument at the close of the hearing and requested an opportunity to file written submissions. I agreed to give him this opportunity. In those submissions and emails, Ms. Roopnarine's counsel argued that Mr. McKillop could not argue that the reason for Ms. Roopnarine's termination was relevant to a broader BMO policy to terminate non-performing employees in the particular economic climate as it had not been raised in BMO's particulars. I agree with Ms. Roopnarine's counsel that the first time the issue pertaining to alleged cutbacks arose was at the hearing, and that was mostly in argument. Accordingly I place no weight on this aspect of BMO's argument.

E. Commission Investigation Report

[44] The Commission's investigation report was tendered by consent in these proceedings. While Ms. Roopnarine's counsel's arguments relied upon factual findings and conclusions made in the Commission's investigation report to support her position, I place no weight on its factual findings and conclusions. I rely on the evidence tendered at the hearing.

III. LAW

A. Establishing a *Prima Facie* Case of Discrimination

[45] Section 7 of the *Act* legislates that it is a discriminatory practice to refuse to continue to employ an employee, or in the course of employment to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. Disability is included amongst the list of prohibited grounds of discrimination set out in s. 3 of the *Act*. According to s. 25, "disability", for the purposes of the *Act*, means "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug".

[46] In a human rights case before this Tribunal, the Complainant must first establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a decision in favour of the Complainant, in the absence of an answer from the Respondent. The Respondent's answer should not be considered in the determination of whether the Complainant has made out a *prima facie* case of discrimination. (See *Ontario (Human Rights Commission) and O'Malley*

v. Simpson Sears Ltd., [1985] 2 S.C.R 536; and *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204.) It has been held that the allegations made by the Complainant have to be credible in order to support a conclusion that a *prima facie* case exists, *Dhanjal v. Canada (Human Rights Commission)*, (1997) 139 F.T.R. 37 at para. 6).

B. Defences

[47] Once a *prima facie* case of discrimination is established, the burden shifts to the Respondent to demonstrate that the alleged discrimination either did not occur as alleged or that the conduct was somehow non-discriminatory or justified. (*Maillet v. Canada (Attorney General)*, 2005 CHRT 48, para. 4; *CHRA*, s. 15). See also *Canada v. Lambie* 1996 CanLii 3940 (F.C.). When dealing with course of conduct as opposed to transaction driven by pre-existing policy one should start by examining whether the transaction between parties, taken as a whole, results in adverse treatment on a prohibited ground (*Hutchinson v. Canada (Minister of the Environment)* (C.A.), 2003 FCA 133, [2003] 4 F.C. 580). It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a Complainant to succeed. It is sufficient that the discrimination be but one basis for the employer's actions or decisions. (*Holden v. Canadian National Railway Co.* (1990) 14 C.H.R.R. D/12 (F.C.A.))

C. Evidence

[48] The jurisprudence recognizes the difficulty in proving allegations of discrimination by way of direct evidence. As was noted in *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029 (C.H.R.T.), discrimination is not a practice which one would expect to see displayed overtly. In fact, there are rarely cases where one can show by direct evidence that discrimination is purposely practised. Rather, one must consider all of the circumstances to determine if there exists the subtle scent of discrimination.

[49] Fundamentally, however, the Complainant in this case must establish a link between her disability and the employer's decision to terminate her employment (*Mills v. Culp Transport Inc.* 2009 CHRT 17). (See also *Benoit c. Bell Canada*, 2005 CF 926 at paras. 15-16).

IV. ANALYSIS

A. Did Ms. Roopnarine Establish Discrimination?

(i) Termination of Employment

a) *Prima Facie* Case Established

[50] BMO conceded that, at the time of termination, Ms. Roopnarine suffered from a disability being a wrist injury involving repetitive strain and a specialist's report was outstanding to extend the accommodation period. Regarding other injuries, Ms. Roopnarine did not allege that she was not accommodated for the injuries she sustained as a result of the October 19, 2006 motor vehicle accident: indeed she conceded that she took a medical leave of absence from work and received STD benefits. In Ms. Roopnarine's counsel's written submissions, her counsel referred to her neck, shoulder, hand and finger injuries at the time of termination. Yet, the only medical evidence proffered by Ms. Roopnarine's family physician dealt exclusively with her hand and wrist injuries. In pre-hearing conferences both counsel agreed that the only injuries at issue in this hearing were her wrist injuries involving repetitive strain.

[51] Ms. Roopnarine's fundamental argument as outlined in the Statement of Particulars and argued at the opening of the hearing was that BMO terminated her suddenly and unexpectedly while she was suffering from her wrist injury, was on an accommodated leave for that injury, was receiving physiotherapy for her disability, and was awaiting a specialist's

report to have the accommodation period extended. At the time of her termination she was experiencing wrist pain consistent with a repetitive strain injury. No functional analysis had been performed.

[52] As none of these facts are significantly contested by BMO I find that Ms. Roopnarine established a *prima facie* case of discrimination on the basis of disability.

b) Reasonable Non-Pretextual Explanation Proffered

[53] However, I find that BMO tendered a reasonable non-pretextual explanation for her termination. Ms. Roopnarine's wrist injury was not a factor in the termination decision. Rather, Ms. Roopnarine was a difficult employee who believed that she was entitled to a promotion and pay raise based on her years of service and salary grade. She set her goals on being promoted into a senior fraud investigator position. However, she was unwilling or unable to meet the minimum standards of a junior fraud analyst. She could not or would not master the most basic skills of CRDS. She refused to accept constructive criticism. Therefore Ms. Roopnarine sought to return to Gemini where it would be more difficult to identify her performance shortcomings. Even there, she had failed to conduct thorough and competent mortgage assessments in the past and still required further training. She refused to sign her 2006 performance appraisal. She refused to discuss her shortcomings with Ms. Khan. Instead she chose to escalate the complaint to Ms. Khan's manager. Precipitously, she opened the meeting by stating, "Jamie is a liar", referring to Ms. Khan. Even though the meeting continued for an hour, she did not apologize for her statement either then or after. Ms. Khan had treated Ms. Roopnarine with unremitting patience and had provided her with daily personal assistance, as well as extensive and ongoing training. Ms. Coupland decided that BMO would not tolerate such disrespect by an employee towards a competent, personable and intelligent manager. I do not find this decision to be discriminatory.

[54] Throughout, BMO gave Ms. Khan extensive feedback regarding its concerns about her performance.

[55] Given Ms. Roopnarine's conduct at the January 10, 2007 meeting, coupled with her performance difficulties and reluctance to follow procedures, BMO chose to terminate her. Given that she was a long term employee, BMO decided to provide her with notice and a severance package.

[56] Ms. Roopnarine's performance problems were unrelated to her wrist injury and pre-dated it. Ms. Roopnarine sought to return to Gemini so that her underperformance would be more difficult to evaluate. She did not seek to return because there was less typing and because such accommodation was necessary to accommodate her wrist injury. While there may have been less typing in Gemini, there is insufficient evidence to demonstrate that a return to Gemini was required to accommodate her wrist injury. Her family physician did not request such accommodation. BMO provided Ms. Roopnarine with the accommodation outlined by her doctor in CRDS.

[57] BMO accepted its responsibility to accommodate Ms. Roopnarine. Indeed BMO accommodated Ms. Roopnarine following a car accident she sustained on October 19, 2006. Due to medical issues arising from her accident, she was absent from work and received STD benefits. In January 2007, BMO modified Ms. Roopnarine's work schedule to allow her to attend physiotherapy appointments pertaining to injuries she sustained in her motor vehicle accident. There was no evidence indicating that BMO's efforts to accommodate her car accident injuries were insufficient. From January 2, 2007 to the date of termination, BMO accommodated Ms. Roopnarine's wrist injury by limiting her time on the computer to 4 hours

per day, as directed by her physician. Further, the conduct of Ms. Khan and Ms. Coupland towards Ms. Roopnarine was not affected by Oncidium's evaluation process.

[58] Nor is this case about whether Ms. Roopnarine had the physical abilities to perform her work. Her physical abilities played no role in BMO's decision to terminate her. The only factors were her performance and attitude.

[59] In short I find BMO's conduct and explanation for termination reasonable and not linked to Ms. Roopnarine's wrist injury. I find it genuine, and non-pretextual. I have carefully examined the evidence for the subtle scent of discrimination to determine whether BMO used Ms. Roopnarine's poor performance as a pretext to terminate her, and whether Ms. Roopnarine's performance problems were caused by or were exacerbated by her wrist injury. Neither was the case here. Employers are not precluded from terminating employees with a disability for non-discriminatory reasons, such as substandard performance unrelated to the disability. (*Crouse v. Canadian Steamship Lines Inc.*, 2001 CanLII 8493 (C.H.R.T.) and *Coulter v. Purolator Courier Ltd.*, 2004 CHRT 37. See also *Desormeaux v Ottawa*, 2005 FCA, 311.) On a balance of probabilities, Ms. Roopnarine's physical limitations played no role in BMO's decision to terminate her.

(ii) Adverse Differential Treatment in the Course of Employment

a) No *Prima Facie* Case Established

[60] Ms. Roopnarine's case revolved around the termination and how the pre-termination conduct led to the alleged discriminatory termination. Ms. Roopnarine did not argue in her Statement of Particulars that there was adverse differentiation during the pre-termination period. However, I raised this period with both counsel at the hearing. As it was left for argument, I choose to address this period in this decision for the sake of being complete.

[61] I do not find that Ms. Roopnarine established a *prima facie* case of discrimination prior to termination from October 2006 onward. Section 7(b) prohibits adverse differentiation during the course of employment. In establishing a discriminatory practice, Ms. Roopnarine's perception or belief is not sufficient to establish the same: *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32, at para. 41, *aff'd*, 2006 FC 785.

[62] After examining all of the evidence for the subtle scent of discrimination, I do not find that BMO treated her in a discriminatory fashion during her employment and after she advised Ms. Khan of her wrist injury on October 5, 2006. To the contrary, Ms. Khan made every effort to work with her to improve her skill set to facilitate future growth opportunities. Ms. Roopnarine's performance issues and attitude had been a concern for BMO since 2004. Ms. Roopnarine refused to accept criticism and direction, and in spite of training, failed to improve in an entry level position at CRDS. On a balance of probabilities, her October 2006 wrist injury played no role in the ongoing efforts by Ms. Khan to assist and direct her.

[63] During the hearing, I specifically asked counsel if Oncidium's requirement for medical information was a live issue in the case. Ms. Roopnarine's counsel stated that it was a live issue, in that BMO ought reasonably to have known that Ms. Roopnarine had a "disability" from May 2006, and at least from October 2006 onward, and ought not to have required further medical information and should have provided accommodation sooner. In spite of Ms. Roopnarine's counsel's oral submissions, this issue was not raised in Ms. Roopnarine's statement of particulars. BMO always understood that the case was about the termination and expressed surprise about late disclosure of this issue. Accordingly it is not properly before me. Contrary to her counsel's position, Ms. Roopnarine testified that she was satisfied with the Oncidium medical disclosure process.

[64] Further, BMO's accommodation process was consistent with its duty to accommodate an employee claiming a disability. The Complainant, as part of her duty to facilitate the search for accommodation, has an obligation to comply with the employer's reasonable request for relevant medical information: *Tweten v. RTL Robinson Enterprises Ltd.*, 2005 CHRT 8. As soon as the report was received by Oncidium, it communicated this information to BMO staff, and BMO adhered to the accommodation as suggested by Ms. Roopnarine's physician. (See also *Wong v. Royal Bank of Canada*, 2001 CanLII 8499 (C.H.R.T.))

[65] Oncidium and BMO acted in good faith throughout their dealings with Ms. Roopnarine.

[66] Ms. Roopnarine argued at the hearing and in her written submissions filed after the hearing that Oncidium unilaterally imposed an expiry date of February 4, 2007 for her accommodation period. I do not find this restriction unreasonable as Ms. Roopnarine's physician had confirmed in his October 17, 2006 statement that she was to see a specialist. When his December 27, 2006 letter confirmed that this appointment was scheduled for January 18, 2007 it was not unreasonable for Oncidium to expect it by February 4, 2007 to address continued accommodation. Further, nothing turns on this as BMO did not stop the accommodation as of that date but continued to accommodate her to the termination date.

[67] Regarding Ms. Roopnarine's allegation that BMO failed to conduct a functional analysis prior to terminating her, I have already found that BMO did not terminate her because of her disability but due to her poor performance and attitude.

[68] With respect to her argument that BMO should have returned her to Gemini where her wrist injury would have been better accommodated, there is insufficient medical evidence that a return to Gemini would have assisted her to reduce wrist pain. Her physician restricted her from prolonged use of mouse and keyboard, defining "prolonged use" as being for more than 4 hours. Ms. Khan chose for reasonable management reasons to have Ms. Roopnarine master CRDS entry level skills, and she reasonably accommodated Ms. Roopnarine in the CRDS position by complying with the restrictions. Ms. Roopnarine continued to seek to return to Gemini because she was not succeeding in CRDS, and her work was harder to monitor in Gemini. As discussed above, her request to return to Gemini was not a request for accommodation of her wrist injury.

[69] From January 2, 2007 onwards, Ms. Roopnarine was to work only 4 hours per day out of a 7.5 hour day. BMO paid her for the 3 hours that she did not work. Regarding Ms. Roopnarine's argument that BMO ought to have given her additional non-computerized work for the rest of the day, the medical report did not outline such a form of accommodation. It stated only that she be limited to not more than 4 hours per day on the mouse and keyboard. Ms. Roopnarine did not tell BMO until this hearing that she sought to spread the 4 hours per day over the 7.5 hour day. Thus she failed in her obligation to provide BMO with notice of her desired accommodation and requisite medical evidence supporting the request. (See *Tweten v. RTL Robinson Enterprises Ltd.*, 2005 CHRT 8.) Further, while the accommodation process is an individualized one, the Complainant cannot expect a perfect solution: *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 S.C.R. 161, at para. 22. No authority was presented to me that BMO had an obligation under the *CHRA* to create work for the Complainant.

[70] Finally, Ms. Roopnarine argued that BMO raised performance issues only after she indicated that she had a wrist injury. This allegation is contrary to the evidence that Ms. Roopnarine had performance issues of concern to BMO since 2004, and that these issues

continued to the date of termination. Ms. Khan acted reasonably and patiently with Ms. Roopnarine throughout her dealings with her. She was genuinely open to assisting Ms. Roopnarine with accommodation. She provided her with continuous constructive feedback and training to help her to improve her skills. Nor do I accept that Ms. Coupland acted in a discriminatory manner towards Ms. Roopnarine.

b) Reasonable Explanation Proffered

[71] Even if the evidence could be viewed as establishing a *prima facie* case, BMO provided reasonable non-pretextual reasons for its conduct from October 2006 to termination as outlined above.

c) No Freestanding Duty to Accommodate

[72] Finally, a Complainant cannot make a free-standing claim that BMO discriminated against her by not accommodating her wrist injury. A "failure to accommodate" is neither a prohibited ground of discrimination nor a discriminatory practice under the *CHRA*. There is no free-standing right to accommodation under the *CHRA*. The duty to accommodate only arises in the context of s. 15(2) of the *CHRA* and only when a Respondent raises a *bona fide* justification by way of defense to an allegation of discrimination. [*Graham v. Canada Post* 2007 CHRT 40]

V. DECISION

[73] For these reasons I conclude that BMO terminated Ms. Roopnarine for performance issues. Her disability, being a wrist injury involving repetitive strain, was not a factor in that termination decision.

[74] Regarding issues of accommodation prior to dismissal, I find that BMO tried to accommodate her and did accommodate her with respect to her wrist injury in an appropriate manner. BMO requested her to provide her physician's medical report clearly outlining the form of accommodation required. Immediately upon receipt of the same it accommodated her by limiting her time using the mouse and key board to 4 hours or less per day. BMO staff did not treat her in a discriminatory fashion during her employment.

[75] Accordingly I dismiss the complaint, as it has not been substantiated. I have considered the evidence both discretely and collectively and find no breach of section 7 of the *CHRA*.

"Signed by"

Shirish P. Chotalia, Q.C.

OTTAWA, Ontario
March 19, 2010

PARTIES OF RECORD

TRIBUNAL FILE:	T1405/03109
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STYLE OF CAUSE:	Taramatie Roopnarine v. Bank of Montreal
DATE AND PLACE OF HEARING:	January 25 to 29, 2010 Toronto, Ontario
DECISION OF THE TRIBUNAL DATED:	March 19, 2010
APPEARANCES:	
Fola Adekusibe Emmanuel Akioyamen	For the Complainant
No one appearing	For the Canadian Human Rights Commission
Malcolm MacKillop Meighan Ferris-Milles Alison Adam	For the Respondent