Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Heather Lynn Grant

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Manitoba Telecom Services Inc.

Respondent

Decision

Member: Sophie Marchildon
Date: April 26, 2012
Citation: 2012 CHRT 10

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I. Complaint and Background

[1] The Complainant, Ms. Heather Lynn Grant, filed a complaint with the Canadian Human Rights Commission (the Commission) on January 10, 2008. The Complainant alleged that her employer, Manitoba Telecom Services Inc. (the Respondent or MTS), engaged in a discriminatory practice within the meaning of section 7 of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (the *CHRA*) when it decided to terminate her employment, choosing to retain a more junior employee, based on the Complainant's negative performance appraisals. The Complainant alleges that the negative comments in the performance appraisals were linked to her disability, type II diabetes. After reviewing its report and submissions in response to the report, the Commission decided, pursuant to section 41(1) of the *CHRA*, to deal only with the alleged termination of employment, including the Complainant's February 2006 and January 2007 performance assessments. On December 30, 2009, pursuant to section 44(3)(a) of the *CHRA*, the Commission requested that the Canadian Human Rights Tribunal (the Tribunal) inquire into the complaint.

[2] The Commission did not participate at the hearing that took place on November 1, 2 and 5, 2010 and on February 7 to 11, 2011.

II. Facts

[3] After having carefully reviewed all of the submissions and evidence provided by the parties, including the Agreed Statement of Facts, my findings of fact are as follows.

[4] The Complainant was employed by MTS for 26 years until she was laid off on February 19, 2007.

[5] From 2001 to February 19, 2007, the Complainant worked for MTS as a Regional Account Support Representative (RASR). From 2003 to the date of her termination on February 19, 2007, the Complainant worked under the supervision of Ann Ukrainec. During that last period, her performance was formally evaluated by the Respondent (per Ms. Ukrainec) on an

annual or semi-annual basis using a document called Partnering for Performance and Results (PP&R or Performance Appraisal). PP&Rs are used by the Respondent as a means of evaluating and recording the performance of MTS employees. Year round, an employee's immediate supervisor could add comments to the document.

[6] During her years of service at MTS, the Complainant was a member of the Telecommunications Employees Association of Manitoba (the Union or TEAM) and was governed by a collective bargaining agreement negotiated by TEAM and MTS (the Collective Agreement).

[7] On August 19, 2005, the Complainant was diagnosed with high blood sugar levels by her physician, Dr. Barry Van Jaarsveld of the Bethesda Hospital in Steinbach, Manitoba. Subsequently, around September 2005, the Complainant was diagnosed with type II diabetes.

[8] The 2008 Canadian Diabetes Association Clinical Practice Guidelines define diabetes as a fasting blood sugar greater or equal to 7.0 mmol/L or casual plasma glucose greater or equal to 11.1 mmol/L and, symptoms of diabetes or two-hour plasma glucose in a 75mg oral glucose tolerance test greater or equal to 11.1 mmol/L. Blood sugars are measured as instant values, present at a precise moment in time, and as average values measured over an approximate 90-day period of time. Instant values are measured in a laboratory on a venous sample. Capillary blood sugar values are taken by patients on a home blood glucose monitor. The glycosylated hemoglobin or HbA1C test provides information about blood sugars over the previous three-month period of time. Symptoms of elevated blood sugars include, but are not limited to: thirst, increased hunger, frequent urination, urinary tract infections, recurring yeast infections, blurred vision, frequent urination at night, weight loss, dry mouth, malaise, poor healing, infection, fatigue, altered mental status including agitation, unexplained irritability, inattention, extreme lethargy or confusion. Many symptoms are related to glucose loss in urine. Though the threshold for urine glucose secretion varies, on average blood sugar levels of glucose over 12 mmol/L are associated with urine glucose loss and symptoms of hyperglycemia. Blood sugar levels can be brought into the normal range by a combination of the following treatments: following a diabetic

diet, weight loss to ideal body weight, following a regular exercise program, adherence to oral medication or prescribed insulin, and changing lifestyle to reduce stressors. Blood sugar levels can sometimes spike with the influence of illness, infection or stress even if the condition is well managed. These spikes will not automatically show up on a 90 days test, such as an HbA1C.

[9] On September 26 and on October 13, 18 and 24, 2005, the Complainant again visited her physician, Dr. Van Jaarsveld. After the October 24, 2005 visit, Dr. Van Jaarsveld advised the Respondent in writing that the Complainant was unable to work from October 25 until November 30, 2005 for medical reasons. Dr. Van Jaarsveld mentioned that the Complainant was a newly diagnosed diabetic and that, due to stress she was experiencing at work, she was unable to control her blood sugar levels. He added that there was a possibility for an extension of that time-off period.

[10] From October 25 to November 30, 2005, the Complainant took a health leave from her employment with the Respondent. The Respondent hired an independent Return to Work Coordinator, Des Hathaway, to assist the Complainant in returning to work by serving as a liaison between the Complainant, her doctor and the Respondent, both during her time off and after she returned to work. Des Hathaway was in regular communication with the Complainant, the Complainant's doctor, and the Respondent (per Ms. Ukrainec). On December 29, 2005, Des Hathaway prepared a brief one page report for the Respondent wherein he stated Dr. Van Jaarsveld's opinion that the Complainant is capable of returning to work without restriction; at full capacity at the present time; and, without special needs or accommodations to support her recovery and safe return to work. On November 30, 2005, Des Hathaway wrote to Ann Ukrainec stating that the Complainant was returning to work on December 1; however, due to her medical condition and the condition being uncontrollable, if she were to return to the same situation she left, there would be a high risk of her condition worsening again.

[11] The Complainant returned to work on December 1, 2005.

[12] On March 14, 2006, Dr. Van Jaarsveld wrote again to the Respondent to communicate that he understood the Complainant was under a lot of stress in her workplace environment. He mentioned that it did not appear that the workload was affecting her condition. Dr. Van Jaarsveld wrote that stress was a serious trigger for her illness and strongly recommended transferring the Complainant to Brandon headquarters so that she could be close to her family and her friends to have a strong support network.

[13] Although a transfer to Brandon headquarters was not granted at first by her supervisor, Ann Ukrainec, once the Complainant received the support of her union, the transfer was approved. Ann Ukrainec signed off on the Complainant's transfer to Brandon with the condition that the Complainant address potential issues of conflict in a manner that enables her to successfully support Sales Staff within a challenging team environment.

[14] Around April 13, 2006, the Complainant was transferred from Steinbach to Brandon; both cities are in Manitoba. Despite the transfer, the Complainant remained working under the supervision of Ann Ukrainec.

[15] In 2005 and 2006, the Complainant received negative and critical comments in her PP&Rs from her supervisor, Ann Ukrainec.

[16] On October 2, 2006, the Respondent announced a major downsizing initiative. As part of the downsizing initiative, the Respondent offered TEAM employees a Voluntary Retirement Incentive Program (VRIP). The VRIP allowed employees the option of resigning their position in return for compensation.

[17] Seventy-seven TEAM employees voluntarily offered to take the VRIP and 73 offers were accepted by the Respondent.

[18] After the VRIP initiative, due to market pressures, the Respondent decided it needed to continue to reduce its Manitoba workforce. An additional 35 positions in the Corporate Sales

Department were targeted for lay-off by MTS. Senior management within the Corporate Sales Department were tasked with determining how it would reduce the number of employees in the Department. For RASR positions, it was determined that up to three positions could be eliminated without detrimentally impacting service to customers. The Brandon region was oversubscribed, and had two employees working as RASRs: the Complainant and Sharon Horner. MTS decided that one of the two would be laid-off.

[19] Article 26.03.1 of the Collective Agreement addresses how an employee in a multi-incumbent position is to be selected for lay-off:

> "In the case of multi-incumbent positions, where there are no differences between incumbents on the basis of skill, ability, performance, qualifications, and headquarters, the junior incumbent, according to Net Credited Service (NCS) date shall be laid off first."

[20] In the Agreed Statement of Facts provided by the parties, it states that article 26.03.1 of the Collective Agreement calls for a comparison of the skill, ability, performance, qualifications and headquarters of employees in multi-incumbent positions. A selection committee (lay-off committee) composed of non-union members, Brian Arnal, Vice-President, Sales, and Larry Goerzen, Director, Sales, was charged with selecting employees for layoff. The lay-off committee proceeded in reviewing the Complainant's personal file, including performance appraisals and did the same for Sharon Horner. They compared both incumbents' skills, abilities, qualifications and performance. They also interviewed their respective immediate manager, which in the case of the Complainant was Ann Ukrainec. The lay-off committee chose to lay-off the Complainant and to retain Sharon Horner, although the Complainant was the more senior employee. The basis of the lay-off committee's decision was that Sharon Horner's performance was superior to that of the Complainant.

[21] Upon the lay-off committee's conclusion, Don Rooney (Director of Labour Relations), requested that Martin Shelest, who then worked in MTS' Human Resources Department, conduct an independent comparison of the Complainant and Ms. Horner without speaking to anyone. Mr. Shelest completed the review and informed Don Rooney that he was of the opinion that

based on the criteria outlined in article 26.03.1 of the Collective Agreement, the Complainant should be laid off before Ms. Horner.

[22] On February 28, 2007, TEAM filed a grievance on the Complainant's behalf alleging that MTS breached article 26 of the Collective Agreement. The substance of the grievance was that the Complainant was improperly laid off in that she had greater skills, abilities and qualifications than at least one other employee who was not laid off and who held an equivalent position as the Complainant.

[23] TEAM referred the grievance to an arbitration hearing. The grievance was withdrawn at the pre-hearing stage without prejudice to the Complainant's rights under the *CHRA*.

III. Law and Analysis

[24] At the outset of this analysis, it bears mentioning that, during the hearing in this case, numerous objections were made by the Respondent and several from the Complainant. Some were dealt with in writing, others *viva voce* on record at the hearing and others were taken under reserve. The objections under reserve were all examined and the ones that are determinative on the outcome of this case are individually addressed in the analysis of this decision. Other objections that are not determinative on the outcome of this decision have been examined according to the probative value of the evidence that entered under reserve and will not be individually dealt with in the decision. Nevertheless, all objections were noted and taken into consideration in weighing the evidence submitted.

A. The Complainant has established a *prima facie* case of discrimination

[25] The complainant in a proceeding before the Tribunal must 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 verdict in the complainant's favour in the absence of an answer from the respondent" (*Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28). In establishing a *prima facie* case, it is not

necessary that discriminatory considerations be the sole reason for the actions in issue. It is sufficient that the discrimination be but one basis for the employer's actions or decisions (see *Holden v. Canadian National Railway Co*. (1990), 112 N.R. 395 (F.C.A.); and, *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569). However, allegations made by a complainant have to be credible in order to support a conclusion that a *prima facie* case exists (see *Dhanjal v. Canada (Human Rights Commission)* (1997), 139 FTR 37 (F.C.)). In *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029 at para. 38481 (CHRT), the Tribunal stated:

> "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 practiced."

[26] A tribunal should therefore consider all circumstances to determine if there exists a "subtle scent of discrimination". The jurisprudence recognizes the difficulty in proving allegations of discrimination by way of direct evidence.

[27] To make a decision in this first step, the Tribunal must limit itself to analyzing only the testimonial and documentary evidence filed by the Complainant. It must disregard the evidence submitted by the Respondent (see *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at para. 22 [*Lincoln*]). Fundamentally, however, the Complainant in this case must establish a link between her disability and the employer's decision to terminate her employment (see *Roopnarine v. Bank of Montreal*, 2010 CHRT 5 at para. 49).

[28] According to the Complainant, the symptoms of her disability negatively affected her performance at work. Although aware of her disability, the Respondent negatively assessed her performance in her PP&Rs without considering the effects of her disability on her performance. As her PP&Rs were used to compare her performance with that of another employee for the purpose of determining who would be laid-off, the Complainant alleges that her disability was a factor in the Respondent's decision to refuse to continue to employ her. The Complainant also alleges that she was specifically targeted for lay-off because of her disability. In this regard, she

claims that the Respondent has a history of targeting disabled employees for lay-off; and, therefore, her lay-off based on performance was a pretext for discrimination. On this basis, the Complainant alleges that the Respondent has breached section 7 of the *CHRA*. This section provides:

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

[29] The Complainant lives with a condition, type II diabetes. Disability is included amongst the prohibited grounds of discrimination set out in section 3 of the *CHRA*, and is defined in section 25 as "any previous or existing mental or physical disability". Being a physical disability, diabetes is encompassed by the definition of disability in the *CHRA*. In the present case, the fact that the Complainant has a disability was not disputed. Rather, the issue at hand is about establishing a nexus between the Complainant's disability and her lay-off. In other words, was the Complainant's disability a factor that influenced the outcome of the Respondent's decision to lay her off?

[30] When the VRIP was completed, the employer still wanted to further downsize its workforce and proceeded with a layoff process designed to eliminate a position in Brandon where the Complainant was working after she was transferred. Two employees, the Complainant and Sharon Horner, occupied RASR positions, one of which was targeted for lay off.

[31] To decide who would be laid off in Brandon, the employer considered both the incumbents' PP&Rs to establish if there was a difference between the performances of the two incumbents. The Complainant had negative comments in her 2005 and 2006 PP&Rs, which negatively impacted the assessment of the Complainant's performance for the purpose of determining who would be laid off.

[32] According to the Complainant, before the diagnosis of her diabetic condition, her PP&Rs were positive and the negative comments found in her 2005 and 2006 PP&Rs are linked to her disability. The Complainant's physician reports contained in the Agreed Statement of Facts mention that she was having difficulty controlling her blood glucose levels due to stress, which resulted in a health leave from October 25 until November 30, 2005. Later, on March 16, 2006, the same treating physician, Dr. Van Jaarsveld, wrote that stress was a serious trigger for the Complainant's illness and that she was experiencing stress in her workplace, especially with her boss. The two medical reports mention the negative effects of stress on the Complainant's disability and correspond to the same period when the negative PP&Rs were written. The argument made by the Respondent that the physician was not called as a witness before the Tribunal, therefore no weight should be placed on the medical reports, has no merit since the reports were incorporated in the Agreed Statement of Facts and the March 16, 2006 report also formed the basis for the Complainant's transfer to Brandon.

[33] Lori D. Berard, Registered Nurse, (Nurse manager, Winnipeg Regional Health Authority, Health Sciences Centre Winnipeg, Diabetes research Group, Appointed staff, University of Manitoba, Department of Medicine Section of Endocrinology) provided expert testimony before the Tribunal concerning her view of the Complainant's health and the impact it had on her performance at work. Ms. Berard prepared a report at the Complainant's request for the purpose of these proceedings that mentions:

> It is well understood that the onset of diabetes is not immediate and drastic. Type 2 diabetes is often present for 6-9 years before the diagnosis is made.
>
> The diagnosis of type II diabetes can cause stress, anxiety, anger, guilt and fear. Patients can go through the stages of loss (Denial and isolation; Anger: Bargaining: Depression and Acceptance) while being encouraged to make healthy lifestyle changes, monitor blood glucose levels and begin taking medication. As reference in the Psychological Aspects of Diabetes Chapter Canadian Diabetes Association Clinical Practice guidelines 2008: "significant behavioral demands and challenging psychological factors affect nearly all aspects of diabetes management and subsequent diabetes control. Psychological issues related to the diagnosis and/or self care demands may present anywhere on a continuum from impairment in quality of life clinically depressive and/or anxiety disorders. Symptoms associated with dealing with a chronic illness- "The Vicious Symptom

> Cycle" from Living a Healthy Life with Chronic conditions include; Disease-tense muscles-pain-stress/anxiety-difficult emotions-depression-fatigue-(….) Impact factors: Stress can contribute to elevated blood glucose levels. Unhealthy lifestyle choices such as obesity, improper eating habits and lack of activity can lead to increasing blood glucose levels".

[34] According to Ms. Berard, the Complainant has made significant efforts to improve her health to the point of becoming a very healthy individual. However, the expert stated that stress can contribute to elevated blood sugar levels. She mentioned that:

> It is documented in medical records that the Complainant was experiencing stress during the initial phase post diagnosis of diabetes and having difficulty controlling her glucose levels which resulted in a leave of absence end of 2005.

[35] Ms. Berard examined the Complainant's PP&R from 2005 and made the following comments:

> Appear to have lost focus on the task at hand, difficulty with relationships and work ethics could be consistent with altered mental status with uncontrolled diabetes and the stress of diabetes.

[36] Ms. Berard also analyzed the Complainant's 2006 PP&R:

> Appears to be regaining some initiative to the job at hand-continues to have difficulty with being harsh and crewd (sic) which requires improvement and identification that seems to have mood swings that take her to a few good days to wanting isolation. While it appears her diabetes is well managed by this time it is possible that she is having difficulty coping and symptoms of depression.

[37] There are at least three points in time where results showed that the Complainant's blood glucose levels were measured to be above 12 mmol/L (high): on August 19 2005, September 7, 2005 and September 26, 2005. There is an HbA1C test, taken October 13, 2005, that indicates that the Complainant had average elevated blood sugars over a three month time period (July 2005 to October 2005). There are also indications that the Complainant had some elevated blood sugar levels and uncontrolled type II diabetes as of November 30, 2005 even if she was diagnosed previously and, was undergoing treatment. Moreover, Ms. Berard mentioned in her

testimony that even if an HbA1C is normal, it does not mean that there was not any daily changes in the blood glucose levels because spikes in a given day will not show up on that type of test.

[38] I find that both the treating physician, who examined and was following the Complainant's progress, and the expert, Lori Berard, established that the Complainant was under stress which affected her blood sugar levels. Lori Berard stated that symptoms of elevated blood sugar levels include fatigue, altered mental status including agitation, unexplained irritability, inattention, extreme lethargy or confusion. I find that the expert was able to show a nexus more probable than not between stress at work impacting the Complainant's blood sugar levels and the Complainant's negative behaviour described in the 2005 and 2006 PP&Rs.

[39] At the time when the Complainant was on sick leave on the advice of her Doctor, Ann Ukrainec wrote in the Complainant's 2005 PP&R:

> in the year end review target: not met: Communication within Steinbach team is still an issue and differences have not been brought out as Heather is finding it difficult as she sees no problem. One on one sessions with the account managers did not continue through last quarter as requested by immediate manager which only delays issues that need to be addressed.

[40] On March 8, 2006, the Complainant spoke with Ann Ukrainec in an attempt to address her performance issues and followed up the conversation with suggested changes to her PP&Rs in an email to her supervisor. The Complainant expressed that the PP&R comments should be changed to reflect her health issues. The email also states that any lack of communication with her immediate team was due to her illness and in following her doctor's instructions that she reduce stress to improve her health. Ann Ukrainec, added only the following comment concerning the Complainant that addresses the one on one sessions, which was placed at page 9 of 9 of the 2005 PP&R without any other explanation:

> Heather was away on a health leave from Oct 25th to Dec 2nd. In the beginning of 2005 Heather had a huge desire to make a move and to work in another area that she felt would help her grow and keep her busy. This lasted until mid summer

> and then a deterioration of Heather's overall outlook has changed to a dislike and shut down of her communication with her immediate team. Finds it difficult to communicate to her immediate team does not want to be in conflict of any kind to share her inner feelings to help others understand what is going on with the changes team is seeing in her.

[41] This statement is consistent with how the Complainant described her interactions with people following her doctor's recommendation that she avoid stressful situations, such as conflict of any kind to share her inner feelings. This is also consistent with how the Complainant described the effects of her condition following her diagnosis and the reasons why she needed time off from work.

[42] For the purpose of determining whether there was a nexus between the Complainant's disability and her assessed performance at work, I did not make my findings on the basis of some of the arguments made by the Complainant relating to alleged states of depression, medication and menstrual cycle for two reasons: these facts were in dispute and I did not have sufficient evidence before me to make a finding on them. I made my findings regarding the nexus between the disability and the documented performance in the Complainant's Performance Appraisals on the basis of two main pieces of evidence:

(1) Dr. Van Jaarsveld's medical reports corroborating the information tendered by the Complainant's expert witness about stress having a negative impact on controlling blood sugar levels;

(2) Ms. Lori Berard's testimony, which was credible, especially given the fact that she did not make any absolute statements such as always and never, but rather she used terms like "*may have caused or consistent with*". She was cautious and objective and appeared to possess an extensive knowledge, not only about the disability and its treatments, but on the day to day challenges faced by persons with type II diabetes. In addition, she has expertise in training people to face these challenges. The evidence adduced by the Complainant has established that it is more probable than not that at the time the Complainant received her bad

performance appraisals, she was experiencing stress in the workplace, which aggravated her diabetic condition, resulting in performance issues.

[43] Given the above, I find that the Complainant's disability, type II diabetes, was at least one of the factors that contributed to her receiving negative comments in her 2005 and 2006 PP&Rs. The manager, in writing comments in the PP&Rs, did not take into account the effect of the Complainant's disability on her performance. The 2005 and 2006 PP&Rs were used by the Respondent to compare the performance of the Complainant and Sharon Horner for the purposes of determining who would be laid off.

[44] With regard to the Complainant's allegation that she was specifically targeted for lay-off because of her disability, she contends that after her transfer to Brandon, Ann Ukrainec was keeping track of her. To that effect, the Complainant refers to the fact that Ann Ukrainec wrote a report regarding the Complainant's negative performance and submitted it to Don Rooney on November 9, 2006. The report was requested by Larry Goerzen, just after the Respondent had announced it would be reducing staff and just after the time limit for accepting the voluntary retirement incentive package had expired. The email gives a summary of Ann Ukrainec's perspective of the Complainant's history of bad performance and communication problems. While this report may indicate that the Complainant was being targeted for layoff because of her performance, there is no indication in the report that her disability was the reason she was being targeted. If anything, the report again supports the allegation that the Respondent did not take into account the effect of the Complainant's disability on her performance.

[45] The Complainant also relies on the testimony of Larry Trach (Business Manager for TEAM) to support her allegation that she was specifically targeted for lay-off because of her disability. Mr. Trach testified that it was the first time in MTS's history that it preceded with lay-offs after successfully meeting its staff reduction goals through a VRIP. According to Mr. Trach, it was bad faith to proceed with lay-offs, because the union convinced some of the employees who were close to retirement to use the VRIP to save jobs for younger employees. In the end, an additional nine TEAM members were laid off, including the Complainant. As a result, Mr. Trach

claims that TEAM felt betrayed. While proceeding with the lay-offs after the VRIP may have been viewed by TEAM as being in bad faith, there is no sufficient indication in Mr. Trach's testimony that the Complainant was targeted for lay-off because of her disability. Rather, the bad faith conduct Mr. Trach refers to seems to be related to the labour relations between the union and the employer, as opposed to discriminatory conduct on behalf of the employer.

[46] Mr. Trach also testified that, in determining who would be laid off between the Complainant and Ms. Horner, it was the first time MTS compared the skill, ability, performance, qualifications, and headquarters of incumbents. According to Mr. Trach, MTS' usual practice was to just lay-off the junior employee. Article 26.03.1 specifically provides for laying off the more junior incumbent. However, as the parties stated in the Agreed Statement of Facts, that is provided there are no differences between the incumbents on the basis of skill, ability, performance, qualifications, and headquarters. In this case, the employer found that there was a difference between the performance of the two incumbents chosen for lay-off. Without more, I fail to see how the employer targeted the Complainant for lay-off because of her disability simply by not choosing the more junior incumbent.

[47] Finally, the Complainant contends that following its downsizing initiative, MTS hired 39 additional sales personnel. The Complainant contends that the Respondent was training employees in the company as new RASRs about a month after she was laid-off; and, she contends she was not recalled pursuant to the recall provision in the Collective Agreement. However, aside from making this allegation, and without limiting the type of evidence the Complainant could have led, little information was provided on the nature of the 39 hires, except that the Respondent hired them to work outside Manitoba; whether the Complainant should have been recalled; whether other employees were recalled; or, most importantly, how discrimination factored into the employer's decision. Again, without a discriminatory element, this seems to be a labour relations issue between the union and the employer, as opposed to discriminatory conduct. As a result, I find I do not have sufficient evidence before me to substantiate this allegation at the *prima facie* stage.

[48] Based on the above, the Complainant has not established a *prima facie* case that she was targeted for lay-off because of her disability or that the Respondent's decision to lay-off employees was a pretext for discrimination. However, on a *prima facie* basis, the Complainant has established that her disability had an effect on her performance at work and that the Respondent, although aware of her disability, did not consider the effects of her disability in negatively reviewing her performance. As the Complainant's performance and Performance Appraisals formed the basis of the Respondent's decision to lay her off, there is a nexus between the Complainant's disability and the loss of her employment. Therefore, the Complainant has established a *prima facie* case of discrimination pursuant to section 7(a) of the *CHRA* as it appears that her disability was a factor in the Respondent's decision to refuse to continue to employ her.

B. The Respondent has not established that the *prima facie* discriminatory conduct did not occur as alleged or was non-discriminatory

[49] Once a *prima facie* case is established, the Respondent has an opportunity to demonstrate that the alleged discrimination did not occur as alleged or was not a discriminatory practice under the *CHRA* (see *Maillet v. Canada (Attorney General)*, 2005 CHRT 48 at para. 4; and, section 15 of the *CHRA*).

[50] The Respondent's position is that the *prima facie* discriminatory conduct did not occur as alleged. The Respondent contends that the symptoms associated with the Complainant's disability did not affect her work performance or her PP&Rs. According to the Respondent, the Complainant's PP&Rs show a history of performance issues at work that are unrelated to the symptoms of her diabetic condition. As a result, the Respondent contends it fairly assessed the Complainant in the lay-off process and was justified in laying-off the Complainant based on the superior performance record of the other incumbent considered for lay-off.

Expert evidence

[51] The Respondent contends that the Complainant's symptoms relating to her disability did not have an impact on her performance. In support of this contention and to respond to the Complainant's expert evidence on type II diabetes and its symptoms provided by Ms. Berard, the Respondent brought forward Dr. Elizabeth Salamon, M.D., F.R.C.P. (C), endocrinologist.

[52] Dr. Salamon stated that blood sugars vary throughout the day, in everyone. Diabetes is not diagnosed unless blood sugar is over 11.2 mmol/L. Dr. Salamon stated that these normal variations in blood sugar levels are not known to cause the type of symptoms attributed in the Complainant's case.

[53] Dr. Salamon agreed on the general information provided by Ms. Berard on diabetes. However, in her report prepared on behalf of the Respondent for the purpose of this hearing, she states that mood swings, attitude issues and poor work ethics are not symptoms of elevated blood sugars. According to Dr. Salamon, although blood sugar levels can be normalized within minutes, different symptoms may take hours to days to resolve. Dr. Salamon wrote: "*Once blood sugars have stabilized into the normal range there are often no symptoms of hyperglycemia. Blood sugars consistently in the normal range should not cause symptoms of hyperglycemia*".

[54] According to Dr. Salamon, the provided medical record starts from Ms. Grant's emergency room visit subsequent to the physician's office visits starting in September 2005. There is no information about her condition prior to this time. Dr. Salamon stated that based on the provided medical record, it is not possible to determine if the Complainant had symptoms of diabetes prior to her diagnosis. Dr. Salamon mentions the Complainant may have had symptoms in September and possibly in August 2005. She also mentions in her report that the Complainant was most likely asymptomatic part of October, November, and December 2005. Dr. Salamon finds there are elevated blood sugar levels in September 2005 - above 12; an HbA1C in October 2005 was elevated, suggesting that there were elevated blood sugars for three months prior. Another HbA1C by January 6, 2006 was normal at 6.2 % suggesting that most of the blood

sugars in the three month period prior to January were normal. Dr. Salamon also mentions the Complainant's self-reported blood sugars were in the normal or near normal range by January 12, 2006 as stated in the record and reiterated by Ms. Berard.

[55] On the possibility of the Complainant having spikes in her blood sugar levels, Dr. Salamon mentions in her second report (Following a line of questioning by the Complainant to her expert, an objection had been made that some of the questions were not in the expert's report. The Complainant's expert testimony was adjourned, remaining under oath. The Complainant provided an amended report and Dr. Salamon reviewed that amended report and provided her answers in a second report prior to her testimony and prior to the cross-examination of the Complainant's expert): "*My review of Ms. Grant's medical record shows no "spikes" of blood glucose levels. Though on presentation to the emergency room she was found to have an elevated blood sugar, that sugar is the highest on the record provided*".

[56] Dr. Salamon testified that an employer can accommodate an employee with diabetes: "by allowing time off to see a physician and other health care team appointments, ensure an opportunity to take regular meal breaks, and limit shift work if possible or at the very least provide a reasonable rotation of shift hours". Dr. Salamon also mentions: "when possible, not having the diabetic work unexpected overtime hours where possible, and when possible allow the diabetic to live where outside work and family supports are available if they are deemed to be helpful. These actions would help anyone improve blood sugar levels. At the request of the patient and her physician, MTS did arrange a transfer of her to another office where she would be closer to family supports".

[57] According to Dr. Salomon, people with type II diabetes can accomplish anything and, she listed numerous names of known people such as athletes, singers, entertainers, politicians and she listed professions such as doctors, teachers, and lawyers. She mentions they all perform their jobs well. These answers on how people live with type II diabetes and the hardship they might face are not convincing. I understand the point she is trying to make, that having diabetes does not stop an individual from living life fully; however, she did not suggest she knew these people

or their medical files. Even though the people she referred to can do many things, we have no information on what happened when they were diagnosed, how they manage stress and its impacts on their condition. Even the Complainant was going to work so anyone could say she has type II diabetes, but continues to work. I find that Dr. Salamon's conclusions regarding how people live with type II diabetes and the hardships they might face are unconvincing and ignore the individual differences between people copping with a diabetic condition. Dr. Salamon even admitted that all things in diabetes are individualized. These types of answers also do not address the psychological or social impacts that type II diabetes may have on a person with that condition.

[58] After reviewing the Complainant's PP&Rs, Dr. Salamon denied any link between the Complainant's performance at work and the symptoms of type II diabetes. Dr. Salamon finds the Complainant to have extremely good control of her blood sugar levels. She notes Dr. Van Jaarsveld describing the Complainant as a "well controlled diabetic". On the other hand, she expresses different views than Dr. Van Jaarsveld about the impacts of stress on the Complainant's condition because she did not find any specific mention about the symptoms in the report. Dr. Salamon admitted she reviewed the medical documentation provided but did not discuss with Dr. Van Jaarsveld about the reports or the Complainant`s condition. Dr. Salamon believes that the communication and relationship issues that the Complainant was having within her team, and the resulting negative comments in her PP&Rs, are not related to elevated blood sugar levels.

[59] Dr. Salamon stated that the Complainant's poor performance evaluations on the PP&Rs occurred both when blood sugars were elevated (as per her abnormal HbA1C) and normal (as per her normal HbA1C). The evaluations do not describe a significant event that could be ascribed to one isolated spike, but recurring behaviour issues that associated with spikes would have reflected in a worsening of her blood sugar control. This is not at all reflected in the improving HbA1C. This suggests that blood sugar levels were not a factor in the poor performance as noted.

[60] Dr. Salamon mentioned the physician's notes repeatedly mention that she is stressed by work and at work and that there is no mention of any other common symptoms of hyperglycemia. However, Dr. Salamon admitted that the medical record shows that in November 2005, the Complainant was uncontrolled and that her blood sugar levels were high at the same time she was experiencing stress. This nuances what she had written in her expert report prepared prior to her testimony:

> Though the medical record indicates that Ms. Grant experienced stress described as stress at work during office visits in the fall of 2005, Ms. Grant's HbA1C continued to fall from an elevated level of 8.6% to a near normal or normal level of 6.2% during this same period of time. The opposite would occur if the stress caused the blood sugars to rise. As there was no corresponding rise in blood sugars to stress:
>
> There would be no effect on her ability to perform her duties
>
> There would be no relationship to the poor performance documented in the PP&R.

[61] Although Dr. Salamon's report states that Ms. Grant may have had symptoms of hyperglycaemia in September and possibly August 2005, she indicated that there is no medical information on which to rely to determine if the Complainant had symptoms prior to August 2005. However, she also stated that an HbA1C test taken in October 2005 was elevated, suggesting that there were elevated blood sugar levels for three months prior. Three months prior to October 2005 would include July 2005. In July 2005 is when the Complainant began receiving comments in her PP&Rs regarding a "shut down" in her communications. Dr. Salamon admitted that when a person experiences symptoms of high blood sugar levels there is often a feeling of being "unwell" that can impact the person with diabetes' daily life. She also stated that to feel unwell and not want to socialize is a reasonable connection; although this connection would have to be associated with high blood sugar levels. Dr. Salamon testified her patients would not describe the symptoms in detail to her when consulting with her but rather describe their condition as feeling unwell. Dr. Salamon later testified that although the Complainant consulted

with her treating physician for feeling unwell, there is no indication in the report about the specific symptoms related to hyperglycemia.

[62] Dr. Salamon's report indicates that there are at least three points in time where the Complainant's blood sugar levels are recorded as being high; and, given the HbA1C test in October 2005, there is an indication that she was experiencing high blood sugar levels in July 2005 as well. After considering Dr. Salamon's evidence and Ms. Berard's evidence, I find that a person with a type II diabetes condition can experience communication/social issues due to the symptoms of their condition especially when under stress, and that the Complainant in this case was experiencing elevated blood sugar levels around the time when communication issues where identified by her employer as having a negative impact on her performance.

Performance Appraisals

[63] The Respondent alleges that the Complainant was not terminated on the basis of her disability but simply because of her poor performance as evidenced by her PP&Rs, which the Respondent contends, are in no way flawed or biased as the Complainant would have us believe.

[64] I reviewed all of the Complainant's PP&Rs from 1999 to 2006, which were filed in the Agreed Statement of Facts. Since the Respondent alleges that the Complainant has a history of poor performance, which resulted in her being laid-off, examining the contents of the PP&Rs is relevant and essential to making a proper finding in this case.

[65] The evidence establishes that the PP&Rs considered in the comparison of the two incumbents for the purpose of lay-off were the 2003 to mid 2006 PP&Rs. Prior to that period, there are very few comments regarding the need for the Complainant to improve her work performance. The following examines in more detail the Complainant's PP&Rs during the 2003 to mid 2006 period.

[66] The Complainant's 2003 PP&R comments, written by Ms. Ukrainec, in sum are:

> Heather is very upfront and is quite confident in her role. Seems self sufficient and demonstrated this through taking ownership of her PC when she needed it upgraded to perform the training requirements of her position.
>
> Has adapted to changes easily and willingly shares her knowledge and make changes quite readily where necessary.
>
> Would like to see a stronger work relationship between herself and immediate account manager as this would improve her day to day work environment.

[67] Although the last comment indicates that a stronger relationship between the Complainant and her account manager would improve her work environment, overall, the comments are positive and there is no indication of performance issues.

[68] The 2004 PP&R comments contained in the Agreed Statement of Facts state the following:

> Does participate in meetings and has offered and indicated she can take on extra work. Has also assisted in preparing customer profiles. Has the knowledge and skill to perform her daily tasks and did take on extra projects to help assist the team and immediate manager with account lists information updates.
>
> Has a good strong relationship with most of the members of the team and always got involved and participated in all team meetings.

[69] I find this statement shows the Complainant was involved and had a good relationship with most of the members of her team. There is no sufficient indication of performance issues in her 2004 PP&R.

> Is flexible and offered to take on more workload.
>
> Has a positive attitude towards sharing information and making decisions that effect (sic) her position and the team's direction.

[70] In the "competency to communicate effectively" section of the Complainant's 2004 PP&R, Ann Ukrainec wrote:

> An open, honest and direct communicator who appreciates having clear direction and a chance to interact as a team player.
>
> Understood the concept of a supportive team player to sales and helped drive of whatever she could to help assist with ensuring that sales were closed and billed for the team.
>
> Has adapted to a ever changing environment and has remained focused and opened to any ideas that has either improved her own skills or knowledge level.

[71] In her final comments in the 2004 PP&R, Ann Ukrainec wrote:

> Heather is a true supporter of sales and has demonstrated that she is keenly focused on ensuring that our customers are trained and trained well.
>
> Makes her point and asks questions if understanding isn't clear the first time.
>
> Although she had differences amongst specific team players, not once did she show any disrespect to the individual even though there may have been disagreement.

[72] In reviewing the Complainant's PP&Rs over the years prior to 2005-2006, I find they are positive towards the Complainant. I find that, prior to the Complainant being diagnosed with her disability and going on a health leave and a transfer, her Performance Appraisals indicate that she is positive, communicates effectively and works hard, without indication of performance issues. In 2003 and 2004, the Complainant was also given the opportunity to write her own comments in the PP&Rs, under Ann Ukrainec's supervision.

[73] In the 2005 PP&R, under the title mid-year review, around the time the Complainant was diagnosed with type II diabetes, Ann Ukrainec wrote:

> Has had a few issues with communication within immediate team that needs to be addressed. One on one sessions will held (sic) identify and prioritize immediate needs. This is an area of risk that needs to be improved moving forward.

[74] After the Complainant was diagnosed and went away on her health leave, under the title year-end review in the 2005 PP&R, Ann Ukrainec wrote:

> Communication within Steinbach team is still an issue and differencies (sic) have not been brought out as Heather is finding it difficult as she sees no problem. One on one sessions with the account managers *did not continue through last quarter as requested by immediate manager which only delays issues that need to be addressed. (emphasis added)*

[75] I find this comment is clearly misleading to a person reading the PP&R. The reason why the Complainant was not present at the one on one sessions was because she was on a health leave, being recently diagnosed with diabetes and needing to stabilize her condition. Ann Ukrainec testified that she did not include the fact that the Complainant was on a medical leave from October 25th to December 2nd in the PP&R because health records were kept separate from the PP&Rs. This explanation is not convincing. Not mentioning the fact that health leave was the reason why the Complainant missed the one on one sessions, reflects negatively on the Complainant's work performance. Without context, the comment appears to indicate that the Complainant is being insubordinate when that is not the case. As mentioned above, after a meeting with the union and the Complainant, Ann Ukrainec agreed to include the fact that the Complainant was on health leave from October 25 to December 2, 2005 in the 2005 PP&R. However, no context regarding the reasons for the leave and the stress the Complainant was experiencing are mentioned; nor is the health leave mentioned as the reasons why the Complainant missed the one on one sessions.

[76] Ann Ukrainec wrote in the 2005 year-end review this negative comment:

> Puratone- customer not happy with Heather's support and Loewen Windows finds Heather non supportive at times, moving forward I have asked Loewen Windows to direct any issues to myself in Winnipeg (immediate manager).

The Complainant testified she was not made aware of that fact prior to the mention in the PP&R.

[77] Ann Ukrainec in that same section wrote:

> Has trained an additional customer in December 05 Penner Building center.

This occurred upon the Complainant's return from her health leave.

[78] Under the 2005 mid-year objective there is a mention: "*on target*".

[79] The 2005 year-end objective mentions: *Not met*. In the second half of the year, the Complainant was absent for over a month.

[80] In the area of "team support competency" the 2005 mid-year objective mentions:

> Helped out on the Mega Link Project which resulted in improving the process and providing further insight to what was needed by the ASR's.
>
> Participants and provides feedbacks in team meetings.
>
> Needs Currently has a good working knowledge of her immediate position but would like to see a more proactive role to assist the immediate account managers by off loading them in a more positive approach. Target: met.
>
> to improve communications in direct Steinbach team.
>
> Moving forward a schedule of meetings need to take place to address all concerns that Heather is experiencing as she is feeling singled out by her team members and not communicating what and how she feels about the situations that are been

> addressed during meetings that have been held with Steinbach team and immediate manager.

[81] In the area of "job knowledge competency", in the 2005 mid-year review, Ann Ukrainec wrote:

> Currently has a good working knowledge of her immediate position but would like to see a more proactive role to assist the immediate account managers by off loading them in a more positive approach.

[82] Under the 2005 year-end review Ann Ukrainec wrote:

> Heather has the knowledge and skill to do an exceptional job but seems reluctant to accommodate her immediate Steinbach team as well as she has indicated her desire not to be the first contact but the last resort with immediate ASR peers. Target: Not met.

[83] I find this comment is consistent with the fact that the Complainant was trying to reduce stress.

[84] Under "Focus on the Customer", in the 2005 year-end review, Ann Ukrainec wrote:

> Heather has failed to remember that her main focus is on her immediate account managers which reside in Steinbach. This relationship needs to be restored and improved upon as it is a direct reflection on her own professional which could and will move into directly impact external customers.

[85] I find the rest of the comments in the 2005 PP&R are not entered as mid-year or year-end but only as general comments for the entire year. The evidence led before the Tribunal established that the parties could not identify the precise time when comments were entered in the PP&R.

[86] Under the heading "being a team player", Ann Ukrainec wrote:

> Has a somewhat (sic)relationship with her immediate ASR peer group, relationship with immediate account managers needs to change dramatically in the New Year as this is not a healthy situation for all parties in the regional sales group.

[87] Ann Ukrainec included the following comment after the Complainant requested her to do so:

> *"Did share some information with the rest of her peer group on a process" (emphasis added)***.**

The evidence established that the process was named the "Unicorn account". Ann Ukrainec wrote this comment in the same section that addressed this particular competency and it gives more context and information to the comments, unlike the issue with the 2005 PP&R with regard to the Complainant's health leave.

[88] Also in the 2005 PP&R, under the heading "Communicate effectively", Ann Ukrainec wrote:

> In the beginning of 2005 Heather had a huge desire to make a move and to work in another area that she felt would help her grow and keep her busy. This lasted until mid summer and then a deterioration of Heather's overall outlook has changed to a dislike and shut down of her communication with her immediate team does not want to be in conflict of any kind to share her inter (sic) feelings to help others understand what is going on with the changes team is seeing in her.

[89] This comment is consistent with the timing of the Complainant's diagnosis.

[90] The overall comments from Ann Ukrainec at the last page of the 2005 PP&R are:

> Heather has the capabilities to be one of the strongest ASRS in the regions if she puts her mind into it. Has indicated a desire to move into BCC area which will even be more stressfull (sic) and challenging as their (sic) are 30 account managers with different work habits which maybe a challenge in itself for

> Heather. The complexity of our business and the workload will continue to increase which requires high performance individuals in Corporate Sales to meet those demands. Heather needs to make a concentrated effort to ensure she wants to be a part of Corporate Sales in a hugh (sic) team environment or move to an area of less demands and less interaction with account managers.

[91] The 2005 PP&R is finalized on that note in December 2005, even though, as mentioned above, the Complainant disagreed with many comments and addressed a need to explain her disability and the impacts she felt needed to be understood by her manager.

[92] The 2006 PP&R was reviewed up to mid-year in the lay-off process. Therefore, I will focus on the mid-year review of that PP&R. The Complainant was working the first four months from January to April in Steinbach, and then she was working in Brandon. In this regard, Ann Ukrainec wrote the following comments:

> Moving to Brandon since May 06, Heather has been extremely busy in assisting with taking on 3 account managers to assist with the new hires that have joined our team. She has also taken on an extra month of being team lead so that the new ASRS get a chance to become familiar with their own territories and the team's expectations.

[93] There is no mention of the transfer being the result of a recommendation from the Complainant's treating physician to accommodate her disability and to reduce the effects of stress on her condition. Again, without context, the reader does not understand the extent to which the Complainant's disability has affected her work environment.

[94] Under "Customer satisfaction" in the 2006 mid-year review, Ann Ukrainec wrote:

> Feedback from team members that Heather is in direct contact with daily have indicated that she is being somewhat approachable by most members. Communication with one on one will further improve this area as there is still some concern with responsiveness.

[95] Under "team support" in the 2006 mid-year review, Ann Ukrainec wrote:

> The ASR team has found Heather to be very receptive to their requests and willing to participate.
>
> In the area of ensuring that all accounts managers are kept up todate (sic), it has been identified that this is somewhat of a concern at times. (this is a risk area)
>
> Grading at this time will be on target with the understanding that there will be an improvement for the identified area above.
>
> Her image and communication while in office need to somewhat improve as at times she is coming across very harsh and crewd with her unsolicited comments (at risk).
>
> Has taken on the initiative to become more involved with web/meeting to help her further gain insight into customer one.
>
> Grating at this time will be on target with understanding that communication needs to improve.

[96] Although not reviewed in the lay-off process, the 2006 year-end target is marked as "not met". However, I still find the year-end appraisal instructive since Ann Ukrainec was interviewed in the lay-off process and mentions her overall impression of the Complainant:

> Customer service and support has been an ongoing challenge with Heather and the team as she is underperforming the level of expectation that is required by the team and Corporate Sales. She seems to have mood swings that will take her from having a few good days where she has performed to an exceptable (sic) level to many days of wanting to be in isolation of the team and those that needs to work with directly on a daily basis.
>
> Heather is an individual who is quite capable of performing the ASR Role but over the past year has not been consistent with her performance and continues to demonstrate a barrier between herself and most members of the team. The team has learnt to feel it's taking up too much time and energy and has impacted them negatively.

> Although I have tried on one on one sessions to open discussion with Heather on any issue that she wishes to discuss, she remains in isolation and provides me with one line answers to any questions that are directed to her.
>
> My recommendation would be that Heather continue (sic) to seek help with outside professional help to have her talk about what needs to work on to become part of a team as she doesn't seem to want to be open and honest with her immediate team in the regions.

[97] As evidence of further communication issues with members of her team, the Respondent also argued that the Complainant had problems with Rob Lagemodiere, a co-worker who was not allowed to be added to the witness list after the hearing had started (see *Heather Lynn Grant v. Manitoba Telecom Services Inc.*, 2011 CHRT 1). I find from the evidence heard from both parties that the problem existed between both individuals. Furthermore, this problem is not sufficient to make an inference that the negative comments in her 2005 and 2006 PP&Rs were indicative of an ongoing performance or communication issue. I do not find this a strong point in the Respondent's case. If it were, this would have been a major issue discussed in the PP&Rs prior to 2005-2006.

[98] The Respondent also provided the Tribunal with the testimony of Ann Ukrainec. According to Ms. Ukrainec, she had trouble getting information from the Complainant concerning issues at work. She stated that the Complainant would only give short answers to inquiries and did not say more than: "*I guess I will have to change*". However, I find this happened because the Complainant was not being understood by Ms. Ukrainec, and did not feel that any communication would improve the situation. Ms. Ukrainec admitted receiving and reading the email sent by Des Hathaway on November 30, 2005 prior to the Complainant's return to work on December 1, 2005. Although aware that, if the Complainant returned to work in the same situation that she left, there would be a high risk of her condition worsening again, Ann Ukrainec testified that she did not think she needed to hold back on addressing the Complainant's performance issues. According to Ann Ukrainec, the Complainant's behaviour changed and her communication shut down when she was refused a Business Communication Consultant (BCC) position. However, Ms. Ukrainec later testified that she witnessed the Complainant's communication breakdown and her behaviour change at the time of the

Complainant's diagnosis. Although aware of the Complainant's condition and her resulting behavioural changes, and notified of the effects of stress on her condition, Ms. Ukrainec did not believe that the Complainant's disability was having an effect on her performance; to that effect she testified she believed it was an excuse. The fact that the Complainant had to request the help of her union to get a transfer to the Brandon location, when the transfer was recommended by her Doctor as a means of accommodation, also shows the kind of understanding she received from her employer. Before the transfer, in a letter addressed to the Complainant dated April 13 2006 and included in the Agreed Statement of Facts, Ann Ukrainec wrote:

> As discussed, the purpose of the meeting was to ensure that all parties were of the same understanding with respect to the particulars surrounding your transfer and the company's expectations going forward. Specifically, your transfer was granted in conjunction with the medical opinion of your Healthcare Practionner, combined with your commitment to proactively address potential issues of conflict in a manner which enables you to successfully support Sales Staff within a challenging team environment. More specifically, you were encouraged and committed to, communicating openly with myself as your manager to overt/ manage potential issues of conflict going forward.
>
> To this end, I look forward to you becoming part of the Brandon sales team and wish you every success in your location.

[99] This shows that the transfer was treated more like a favour than accommodating the Complainant's disability. Even though the circumstances of the transfer are not part of the termination of employment, I find it gives context and supports the Complainant's contention that her disability was not taken seriously by her employer. Ann Ukrainec testified she did not believe the contents of the letter of transfer would cause stress to the Complainant in indicating what their expectations were after the transfer.

[100] Overall and for the above mentioned reasons and after reviewing the Complainant's testimony, I prefer it over that of Ann Ukrainec's.

[101] The Respondent also argued that the Complainant should have grieved any issue with her PP&Rs and, since she did not, a negative inference should be made. When asked the question if

the employer thought that grieving the contents of her PP&Rs would have been stressful for the Complainant, Don Rooney (Director of Labor Relations at MTS) testified that he did not understand why the Complainant would have found it stressful if she had grieved to correct a situation. Mr. Shelest (Human Resources Department) also testified at the hearing. According to him, if notified by a manager of performance issues with an employee, oftentimes the employer would put together an action plan to assist the employee in performing better. However, no action plan was put together to assist the Complainant in improving her performance; nor was her disability considered at this point either. Again, I find Mr. Rooney's comments and the fact that no action plan was prepared supportive of the Complainant's contention that her disability was not taken seriously by her employer in addressing her performance issues at work.

[102] Based on the evidence presented by the Respondent, the conclusion I arrive at from reading the PP&Rs prior to 2005 is that the Complainant did not have performance issues. Although there is an indication in the 2004 PP&R that the Complainant needed a little improvement in her communication with others, nothing appears significant enough to arrive to a conclusion that she had a history of communication issues with members of her team. While communication issues become more apparent in the 2005 and 2006 PP&Rs, these issues coincide with the diagnosis of the Complainant's disability and her attempts to reduce the impact of stress on her condition. The Complainant tried to address these issues with the Respondent and have her PP&Rs changed, but to the Complainant's disability was not considered as a factor affecting her performance.

[103] The purpose of the *CHRA* is to give effect to the principle that

> all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices…
>
> (Section 2 of the *CHRA*)

[104] In the same vein with this principle, the *Covenant on the Rights of Persons with Disabilities*, adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106 signed by Canada on March 30th, 2007 and ratified by Canada on March 11, 2010, in its Preamble section h mentions:

> Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.

[105] In the employment context, to ensure that all employees have an opportunity equal with other employees, an employer must take reasonable measures short of undue hardship to accommodate an employee's needs (see *Central Okanagan School District No. 23 v. Renaud*. [1992] 2 S.C.R. 970, at para. 16 [*Renaud*]). Although the scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made, throughout the employment relationship, an employer must make an effort to accommodate the employee (see *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, at para. 22). In examining whether an employer has discharged its duty to accommodate an employee, "it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation" *(British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)*, [1999] 3 S.C.R. 3, at para. 66). In the case of employees with a disability, the procedural aspect of the duty to accommodate involves obtaining all relevant information about the employee's disability, including information about the employee's current medical condition, prognosis for recovery, ability to perform job duties and capabilities for alternate work (see *ADGA Group Consultants Inc. v. Lane et al.*, 91 O.R. (3d) 649 (Ont. Sup. Ct. J., Div. Ct.), at para. 107 [*Lane*]). According to the Court in *Lane*:

> The term undue hardship requires respondents in human rights cases to seriously consider how complainants could be accommodated. A failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the "procedural" duty to accommodate.
>
> (*Lane* at para. 107)

[106] Overall, a person tasked with evaluating the performance of the Complainant, based on interviewing Ann Ukrainec and reading the Complainant's PP&Rs without any context about the Complainant's behaviour and disability, would probably conclude that the Complainant was a poor performer. On the other hand, when given the whole context, the findings may be different. The Complainant was not offered any opportunity to explain her behaviour in her PP&Rs, nor to the people in charge of comparing her with Sharon Horner for the lay-off. Although the employer was made aware of the Complainant's disability and the effects of stress on her condition on various occasions, there is no sufficient evidence to suggest that the Respondent seriously considered whether the Complainant's disability was affecting her performance at work and how it could accommodate the Complainant in this regard. Rather, the Complainant's performance was evaluated without seriously considering the effects of her disability on her performance at work. As those Performance Appraisals were used as the basis for laying-off the Complainant, disability factored into the Respondent's decision to no longer employ her.

[107] Having considered the Respondent's evidence and argument, and on the basis of the reasoning above, I find the Respondent has not provided a reasonable explanation for its *prima facie* discriminatory conduct. Therefore, the Respondent has violated section 7(a) of the *CHRA* in refusing to continue to employ the Complainant on the basis of her disability.

IV. Remedies

[108] Parties made their final arguments in writing, I reserved jurisdiction to ask any additional question that might arise from their submissions and will address this matter in each of the requested remedies that require further clarification.

[109] When a complaint under section 7 of the *CHRA* has been substantiated, the Tribunal has remedial authority to make an order under the terms of sections 53(2), 53(3) and 53(4) of the *CHRA*.

[110] The aim of the *CHRA* is remedial and is "...not aimed at determining fault or punishing conduct" (*Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at para. 13 [*Robichaud*]). Rather, the primary focus of the legislation is to "...identify and eliminate discrimination" (*Robichaud* at para.13). The Tribunal deals with complex and emotional disputes between parties, which demands "...innovation and flexibility on the part of the Tribunal in fashioning effective remedies and the Act is structured so as to encourage this flexibility" (*Grover v. Canada (National Research Council - NRC*) (1994), 80 F.T.R. 256 (Fed. Ct. TD)). Although the Tribunal has remedial flexibility and discretion under section 53, this discretion is not unlimited. In the context of discussing the limit on the liability for compensation under the *CHRA*, the Federal Court of Appeal in *Chopra v. Canada (Attorney General),* 2007 FCA 268 [*Chopra*], stated:

> The first limit is that recognized by all members of the Court in Morgan, that is, there must be a causal link between the discriminatory practice and the loss claimed. The second limit is recognized in the Act itself, namely, the discretion given to the Tribunal to make an order for compensation for any or all of wages lost as a result of the discriminatory practice. This discretion must be exercised on a principled basis.
>
> (*Chopra* at para.37)

[111] Stated more generally:

> ...orders of a remedial nature must be linked or have a nexus to the lis or subject-matter of the complaint substantiated by the tribunal: the "four corners of the complaint" or "the real subject matter". The remedy must be commensurate with the breach. The orders also must be reasonable and the remedial discretion exercised in light of the evidence presented.
>
> (*Hughes v. Elections Canada*, 2010 CHRT 4 at para.50 [*Hughes*])

[112] In implementing remedial orders, the Canadian Human Rights Commission or other parties may be involved in terms of consultation or monitoring. The involvement of other actors recognizes that the Tribunal has an adjudicative role that does not translate well into the technical or task-specific aspects of the implementation of orders often affecting the day-to-day operations of a governmental or corporate respondent (see *Hughes* at para 51). In consideration of these principles, the following are my reasons with regard to remedying the discrimination in this case.

Liability of TEAM

[113] The Respondent attempted to have TEAM added as a respondent to this matter on the basis that it was jointly liable for any discriminatory act. The Tribunal dismissed the Respondent's request to add TEAM as a respondent, but stated that it was free to make submissions that TEAM was jointly liable (see *Heather Lynn Grant v. Manitoba Telecom Services Inc.*, 2010 CHRT 26). Relying on *Renaud*, the Respondent argues that TEAM is jointly liable for any discriminatory act arising from the good faith application and administration of the Collective Agreement. However, in this case, the discrimination was not a result of the application of section 26.03.1 of the Collective Agreement. Rather, the finding of discrimination in this case relates to how the Respondent assessed the Complainant's performance and how those assessments factored into her lay-off. TEAM did not play a role in the assessment of the Complainant's performance and no sufficient evidence was led to suggest that TEAM was a party to the discrimination. Therefore, there is no basis to hold TEAM jointly liable for the discrimination in this case.

Compensation for pain and suffering

[114] The Complainant is seeking $20,000 for the pain and suffering she experienced as a result of the discriminatory practice, pursuant to section 53(2)(e) of the *CHRA*. The Complainant contends that she should be awarded the maximum amount under this section on the basis that the Respondent has manifestly demonstrated a lack of concern and of understanding of her

situation. She experienced a lot of stress, both in the latter stages of her employment with the Respondent and in the course of pursuing this human rights complaint. Finally, the Complainant says she is entitled to the maximum amount on the basis of the deceptive manner in which the Respondent determined the Complainant's layoff and adduced evidence at the hearing of the complaint.

[115] When someone endures pain and suffering, there is no amount of money that can remove that pain and suffering from the Complainant. Moral pain related to discrimination is subjective and varies from one individual to another. Psychological scars often take a long time to heal and can affect a person's self worth. From the point of view of the person that suffered discrimination, large amounts of money should be granted to reflect what they lived through and to provide justice. This being said, when evidence establishes pain and suffering an attempt to compensate for it must be made (See *Cruden v. Canadian International Development Agency and Health Canada*, 2011 CHRT 13, at para.170). However, $20,000 is the maximum amount that the Tribunal can award under section 53(2)(e) and the Tribunal only awards the maximum amount in the most egregious of circumstances.

[116] The medical evidence contained in the Agreed Statement of Facts and the Complainant's testimony established that the Complainant did suffer from stress related to the discrimination. Her employer negatively assessed her performance at a time when she required understanding and accommodation from her employer. Instead, she had to turn to her union for help.

[117] As a result, I order the Respondent to pay $10,000 for the pain and suffering endured by the Complainant as a result of her termination.

Compensation for having engaged in the discriminatory practice wilfully or recklessly

[118] The Complainant is seeking compensation from the Respondent in the amount of $20,000 pursuant to section 53(3) of the *CHRA*. The Complainant seeks the maximum amount under this

section because she wants the Tribunal to send a strong message that the Respondent's conduct was wholly inappropriate.

[119] The objective of the *CHRA* is to remedy discrimination, not punish it (*Robichaud* at para.13). In order to be wilful or reckless, "…some measure of intent or behaviour so devoid of caution or without regard to the consequences of that behaviour" must be found (*Canada (Attorney General) v. Collins*, 2011 FC 1168, at para. 33). Again, the award of the maximum amount under this section should be reserved for the very worst cases.

[120] As outlined in the analysis of the Complainant's *prima facie* case, there was not sufficient evidence to indicate that the Complainant was targeted for lay-off because of her disability or that the Respondent intended to discriminate against the Complainant. However, although aware of the Complainant's disability, the Respondent did not sufficiently consider the effects her disability was having on her conduct at work in evaluating her performance. Nor did it consider the Complainant's comments in response to the negative Performance Appraisals addressing the same. Essentially, the Respondent was "devoid of caution" in its duty to at least consider accommodating the Complainant. Given all the circumstances of this case, this Tribunal awards Ms. Grant $10,000.00 under this heading.

Reintegration and wage loss:

[121] The Complainant is seeking:

(a) Reinstatement in her position in the same location or to an equivalently rated position in the same location;

(b) Compensation for lost wages, missed pension contributions, employee share ownership plan lost benefits, variable pay plan lost benefits, group sales lost bonus;

(c) Reinstatement of her net credited service date and pension (including the Respondent's contributions from the date of termination to the date of reinstatement).

[122] The objective here is to place the Complainant, as close as possible, in the state she would have been in had the discrimination not occurred. I will retain jurisdiction and give the parties an opportunity to make submissions on how they wish to address this particular and complex remedy.

Special damages:

[123] The Complainant is seeking special damages for expenses she incurred in accordance with section 53(2)(c) of the *CHRA*. At the hearing, I retained jurisdiction if any question should arise from the hearing or after receiving the parties written submissions; therefore, I will defer my decision under this heading until the parties have made further submissions on the remedies that need clarification.

Costs:

[124] Prior to the release of the Supreme Court decision in Canada (*Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, the Complainant submitted she wanted to make a submission on the issue of costs if her complaint was upheld. Since the Supreme Court decision was rendered, no legal costs can be granted. Therefore, the Complainant can make submissions on costs, but not legal costs. I will defer my decision under this heading until the parties have made further submissions on the remedies that need clarification.

Interest:

[125] The Complainant sought interest on any award of compensation in accordance with section 53(4) of the *CHRA*. I will defer my decision under this heading until the parties have made further submissions on the remedies that need clarification.

Public interest remedy:

[126] Pursuant to section 53(2)(a) of the *CHRA*, the Complainant also seeks an order that the Respondent implement appropriate measures in consultation with the Commission, to prevent similar discriminatory practices from occurring in the future. I find the Respondent lacks some knowledge on its duty to accommodate. The evidence established that management at MTS is not familiar with the *CHRA* and the employer's obligations in this regard. Therefore, I order the Respondent to work with the Commission to train high level management such as Directors and heads of the labour relations department on the duty to accommodate and the *CHRA*. The Respondent will work with the Commission to ensure they have an appropriate policy on the duty to accommodate and if not, the Respondent is to elaborate one or amend their existing policy. The Respondent will consult with the Union in this process to consider the point of view of employees. This remedy shall be completed within a year of this decision.

V. Order

[127] Having found the present complaint to be substantiated, pursuant to section 53(2) of the *CHRA* the Tribunal orders as follows:

1. The Respondent is to compensate the Complainant in the amount of $10,000 for the pain and suffering she experienced as a result of the discrimination practice.

2. The Respondent is to compensate the Complainant in the amount of $10,000 for having engaged in the discriminatory practice wilfully or recklessly.

3. The Respondent is to work with the Commission to train high level management such as Directors and heads of the labor relations department on the duty to accommodate and the *CHRA*. The Respondent will work with the Commission to ensure they have an appropriate policy on the duty to accommodate and if not, the Respondent is to elaborate one or amend their existing policy. The Respondent will consult with the Union in this

process to consider the point of view of employees. This remedy shall be completed within a year of this decision.

4. Within two weeks of this decision, the parties will provide the Tribunal with their availabilities for a conference call or half a day of hearing to make additional submissions and answer any questions or provide clarification on the above mentioned remedies. Parties shall have every relevant documents and information with them to proceed with the call or hearing.

[128] The Tribunal continues to retain jurisdiction and remains seized of this matter until the parties provide their additional submissions on remedies and the Tribunal renders a decision thereon.

Signed by

Sophie Marchildon
Administrative Judge

OTTAWA, Ontario
April 26, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1452/7809

Style of Cause: Heather Lynn Grant v. Manitoba Telecom Services Inc.

Ruling/Decision of The Tribunal Dated: April 26, 2012

Place of hearing: Winnipeg, Manitoba

Appearances:

R. Ivan Holloway, for the Complainant

Gerald D. Parkinson and Paul A. McDonald, for the Respondent