

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2019 CHRT 13

**Date:** April 17, 2019

**File No.:** T2239/6117

**Between:**

**Paul Campbell**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Canadian Imperial Bank of Commerce**

**Respondent**

**Decision**

**Member:** Colleen Harrington

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## I. Introduction

[1] In January of 2014, after being employed by CIBC as a personal banking representative at its Fredericton call centre for nearly thirteen years, Paul Campbell received a letter stating that his employment was being terminated due to ongoing concerns with his performance. Prior to terminating his employment, CIBC sought to determine whether his performance issues, which had been more pronounced since early 2010, were related to a disability. It was known within the workplace that, prior to being employed by CIBC, Mr. Campbell had been in a motor vehicle accident that left him with serious injuries, including a brain injury. Mr. Campbell was open about his accident and subsequent recovery because he was understandably proud of his accomplishments since then.

[2] In 2012, CIBC arranged for Mr. Campbell to undergo neuropsychological testing in order to obtain a better understanding of whether he had a disability that could be accommodated. In his report, the neuropsychologist stated that Mr. Campbell presented with, “mild to moderate neurocognitive difficulties”, with some impairments to his memory, attention and executive functioning. He concluded that the test results were indicative of Cognitive Disorder NOS<sup>1</sup>, and said Mr. Campbell’s impairments were not serious enough to meet the criteria for a more severe disorder.

[3] The neuropsychologist recommended occupational therapy, psychological support, and psychotherapy. Following receipt of this report, CIBC hired an occupational therapist to work with Mr. Campbell to ensure he was provided with accommodations that would permit him to be successful in his job.

[4] The timing of the termination of Mr. Campbell’s employment in relation to the accommodation process is in dispute. He argues that he was still being accommodated when CIBC decided to end his employment, thus making the termination discriminatory. CIBC says Mr. Campbell’s employment was terminated for legitimate non-discriminatory business reasons following serious misconduct and, in any event, it had exhausted all

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<sup>1</sup> Dr. Turgeon’s report states that Cognitive Disorder NOS, “is a category for disorders characterized by cognitive dysfunction presumed to be due to the direct physiological effect of a general medical condition, but not meeting criteria for any specific delirium, dementia or amnesic disorder.”

recommended accommodations for a reasonable period of time. It says that, because Mr. Campbell did not cooperate with reasonable accommodation efforts, CIBC satisfied its duty to accommodate him.

[5] For the reasons set out in this decision, I do not agree that Mr. Campbell was discriminated against in the course of his employment, nor that his termination was discriminatory, and I therefore dismiss his complaint.

## **II. Issues**

[6] Certain evidentiary and legal issues arose during the hearing and in the closing submissions of the parties. In coming to my decision, I considered the following questions:

- i) Can I rely on employment law principles, and how much weight, if any, should I attribute to the evidence relating to Mr. Campbell's job performance throughout his employment with CIBC?
- ii) Has Mr. Campbell established a prima facie case of discrimination? If so, has CIBC justified the discrimination by providing a defence under section 15 of the Canadian Human Rights Act (the Act)? In answering these questions, I considered the following two issues that arose in the parties' written closing submissions:
  - a. Do I agree that Mr. Campbell introduced new evidence about his disability in his Reply submissions and, if so, should I disregard these allegations?
  - b. Should I draw a negative inference with respect to CIBC's carriage of its case, including the decision not to call further witnesses? If I make a finding of prima facie discrimination, should I draw a negative inference with respect to CIBC's decision to close its case after disclosing its Workplace Accommodation Policy? If so, does this preclude CIBC from calling a defence to the complaint?

### **III. Context**

#### **A. Paul Campbell**

[7] In December of 1987 Mr. Campbell was in a serious motor vehicle accident that left him in a coma for fifty-one days. Among other injuries, he suffered a broken back, collapsed lung, and a traumatic brain injury. He was nineteen years old at the time and had hoped to pursue a professional hockey career. Mr. Campbell testified that, following the accident, he had to learn to walk, talk and tie his shoes again. He says that his capacity to learn is not diminished as a result of the accident, but says he now learns differently than he did before the accident.

[8] On February 20, 2001, after going back to university to obtain both a degree and a diploma, and after several years of supply teaching and various other jobs, he was offered employment with CIBC as a Customer Associate, President's Choice Financial, Level 4, to commence March 2, 2001. His job title changed to Personal Banking Representative (PBR) at some point during his employment, although the basic job duties remained the same. He says he left supply teaching because, as a father of two young children, he needed a steady job with benefits, and he was unable to obtain a full-time teaching position.

[9] Mr. Campbell is understandably proud of his post-accident recovery and what he has accomplished since then. He is a motivational speaker and has written a book about his recovery. He says that his accident was fairly common knowledge in the workplace because he had been a high profile hockey player from a small town in the Maritimes and his story was reported in the media. He says his cousin worked in human resources at CIBC, which is how he learned about the job, and he recalls discussing his accident during his job interview. I accept that Mr. Campbell was comfortable telling both his co-workers and his telephone customers about his accident and recovery.

[10] Mr. Campbell acknowledges that he did not request any accommodation when he started working for CIBC because he did not think he had a disability that required accommodation. He testified that, because he had worked so hard to overcome barriers

following his accident, he did not admit he had a disability that could be affecting his work performance until he received Dr. Turgeon's report in June of 2012.

## **B. CIBC**

[11] According to its post-hearing submissions, "CIBC is a leading financial institution that provides financial products and services to clients." The Fredericton call centre where Mr. Campbell worked served both CIBC and President's Choice Financial (PCF) during Mr. Campbell's employment. CIBC no longer provides PCF banking services, but now provides services for Simplii Financial, a "digital bank".

[12] At all times during Mr. Campbell's employment, the Fredericton call centre received "inbound" calls, meaning the PBRs answered calls from customers seeking assistance with online banking, ordering cheques, applying for products, and sending drafts and wires. The representatives could also answer general banking questions. Mr. Bona testified that Mr. Campbell was a PBR in the "proactive queue", meaning he was also to proactively sell CIBC products, including financing, refinancing and mortgages.

[13] Both Mr. Bona and Ms. Savage testified that, since the transition from PCF to Simplii Financial, PBRs have not done any sales. They both agreed that the work of the call centre is more complex now than it was when Mr. Campbell worked there, due to anti-money laundering legislation and related rules that have come into effect, and because of changes to mortgage requirements.

[14] The Fredericton call centre is one of many CIBC workplaces across the country, and Ms. Savage testified that there are subject matter experts in Toronto and Montreal, available for consultation and assistance with employee relations, workplace accommodations, and CIBC's policies. Ms. Savage testified that the workplace accommodations team in Toronto has expertise with respect to accommodating employees with disabilities. She advised that Rhoda Lee, the Workplace Accommodation Program Manager with whom she worked on Mr. Campbell's case, is now the Director of Workplace Accommodations for CIBC in Toronto. While Ms. Savage, as the human resources consultant at the Fredericton call centre, was aware of Mr. Campbell's

accommodation process and offered support to the accommodations team, it is clear that the workplace accommodations and employee relations experts were very much involved in the decisions relating to Mr. Campbell's accommodation and his termination.

### **C. Paul Campbell's Employment with CIBC**

[15] A 2010 job description for a CIBC PBR states that CIBC's employees are, "...focused on providing excellence in client service, product solutions and relationship-based advice..." The job description indicates that a PBR must follow all CIBC policies, procedures and standards, as well as its Code of Conduct, and must read, "all disclosures on the Agent Support Tool (AST)."

[16] Mr. Bona described the AST as being like the PBRs' "bible", as it contains all of the information they require to do their jobs effectively and professionally. The AST is located on a PBR's computer desktop for ease of reference when speaking to customers on the telephone. Mr. Bona testified that the information in the AST is updated regularly and that important changes are communicated to employees through the "news of the day" located in the AST, or by email.

[17] The AST sets out the steps PBRs are to take to validate the identity of clients prior to discussing their private financial information over the phone.<sup>2</sup> The AST also contains "disclosures" that PBRs must read verbatim to clients prior to providing service, as well as "advises" that may either be read verbatim or paraphrased, which contain information that must be communicated to the client. Both Mr. Bona and Ms. Savage testified about the importance of using the AST and following all of the requirements set out therein, in order to reduce legal and reputational risk to the bank.

[18] Mr. Campbell testified that he was aware of these requirements while employed by CIBC. His job offer, which he signed on February 20, 2001, states:

The employment relationship in the Bank differs from other employment because of the unique nature of the banking industry and the way it is

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<sup>2</sup> All of the witnesses also testified that clients could "call in validated", meaning the client already confirmed their identity following a recorded prompt, prior to speaking with a PBR.

perceived by its customers and the community at large. The relationship is based upon a very high level of trust between the Bank and employees. This level of trust must be maintained as it is fundamental to the employment relationship. Bank employees must not only be, but be seen, by its customers and the community, to be honest and above reproach and they must conduct themselves at all times so as to meet this level of trust.

[19] Mr. Bona became Mr. Campbell's Team Leader for the proactive queue in 2007. As Team Leader, Mr. Bona was responsible for coaching the PBRs on his team, answering questions, taking more difficult client calls, performance or attendance management, and administrative duties. Mr. Bona testified that Mr. Campbell already had a performance management file when he took over as his team leader. He testified that Mr. Campbell took up much more of his time than the other PBRs on his team, as he spent a great deal of time coaching Mr. Campbell one-on-one to help him improve his customer service skills and his employee evaluation results. At the hearing, CIBC entered over three hundred pages of coaching notes for Mr. Campbell from September 2008 to October 2013. Mr. Campbell objected to CIBC calling evidence relating to his performance due to the nature of his termination. I will address the objection and the appropriate weight of this evidence in the Analysis section below.

[20] CIBC also entered into evidence copies of Mr. Campbell's quarterly evaluation forms, called "Performance Management and Measurement" (PMM) assessments or "Scorecards"<sup>3</sup>. Mr. Bona testified that the metrics against which employees were measured changed in 2009. Prior to that Mr. Campbell generally obtained satisfactory scores on his Scorecards, when five out of ten was considered satisfactory. The Scorecards provided from before 2009 show that Mr. Campbell received overall scores of between four and six, with his sales score always being higher than his call quality score. Mr. Bona said that, prior to the change in 2009, Mr. Campbell could obtain passing scores based upon his mortgage sales alone, but once greater emphasis was placed on the quality of service rather than on sales, his performance began to suffer.

[21] In 2009, the Scorecards changed from using numbered scores to ratings of "Exceeded Expectations (EE)", "Met Expectations (ME)", or "Did Not Meet Expectations

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<sup>3</sup> I will refer to both of these employee assessment forms as "Scorecards" in this decision, as this is the term that both Mr. Campbell and Mr. Bona used.



(DNM)". Both Mr. Bona and Ms. Savage testified that, following this change, if PBRs did not meet expectations for Call Quality and Accuracy on a quarterly Scorecard, they could not meet the overall expectations for that Quarter, even if they met expectations in the other categories, including sales. Ms. Savage testified that Call Quality and Accuracy became "qualifier measures" because they are the key measures that mitigate risk for the bank and so, if a PBR does not meet these qualifiers, they are not meeting the requirements of the bank.

[22] Mr. Bona testified that Mr. Campbell did not meet the Call Quality requirement on a regular basis because he consistently refused to use the AST and he often used unprofessional language or had unprofessional conversations with clients. He says Mr. Campbell regularly failed to properly validate clients who called in, or to communicate the "disclosures and advises" to them.

[23] Employees' quarterly ratings were compiled at the end of the fiscal year and they received a Final Score for that year. Mr. Campbell's Final Scores for each of fiscal years 2007 and 2008 was five out of ten. For fiscal years 2009, 2010 and 2011 his Final Score was DNM. For fiscal year 2012, his Final Score was "Undetermined", even though he had received DNM for the first three quarters of the fiscal year. Although he also did not meet the Call Quality requirement for the last quarter of 2012, he was given an Undetermined for this quarter because CIBC was still implementing his accommodation plan, and so his Final Score for 2012 also reflected the fact that he was being accommodated. For fiscal year 2013, he received a Final Score of DNM, although the scorecards for the first three quarters of the year reflect a score of Undetermined because he continued to be accommodated during that time. Again, though, he did not meet the requirements for either Call Quality or Accuracy in any of those first three quarters of 2013.

[24] Although the documentary evidence is clear that Mr. Campbell did have performance issues for which he was disciplined or coached throughout much of his employment with CIBC, beginning with a 2004 warning letter for a failure to use the AST and unprofessional service that resulted in two customer complaints, I accept that CIBC became more concerned with Mr. Campbell's workplace issues sometime in 2010.

#### **D. Events leading up to the neuropsychological assessment**

[25] On May 21, 2010, Mr. Campbell received a disciplinary letter for unprofessional language on a call for commenting on a client's potential source of income, asking her if she had anything growing in her backyard that she would like to declare. He also provided her with his personal email address, in case she wanted to stay in touch with him. In the disciplinary letter, Mr. Bona says, "It is never appropriate to provide your personal e-mail to a client.... You need to be mindful of the conversations that you are having with our clients as you have exposed the business to potential legal and reputational risk." The letter constituted a formal warning that if immediate and sustained improvement in his performance did not occur, further disciplinary action would be taken. When asked at hearing whether he thought it was appropriate to give a client his personal email address, Mr. Campbell initially did not see this as a problem because, in fact, he had given the client a fake email address. He admitted upon furthering questioning that he "made a mistake with that one."

[26] In January of 2012, Mr. Campbell gave another female client his personal email address during a telephone call in which he discussed a range of personal topics. The CIBC employee who reviewed the call for quality described it as "a mini fiasco". When asked about this call at hearing Mr. Campbell said in hindsight it probably was not appropriate, but he justified his behaviour by saying he did not have "bad intentions." He initially said he was not flirting with the client, but rather building rapport with her, but then agreed upon further questioning that he was flirting and that it was inappropriate.

[27] There is evidence that Mr. Campbell had some awareness that his phone manner was not always appropriate, as in mid-2010 and early 2011 his own comments on his scorecards noted that he needed to be more professional, use less "fluff" and slang, use appropriate language, and use the AST rather than relying on his memory.

[28] On August 30, 2010 the Fredericton call centre's Senior Human Resources Consultant, Anne Fitzpatrick, sent an email to a Senior Consultant, Employee Relations Policy & Governance for CIBC in Toronto, to say she had met with other managers in Fredericton to discuss "Paul's case". She inquired as to whether they could involve CIBC's

corporate medical director, Dr. Brown, in determining whether Mr. Campbell may require any accommodations. Ms. Fitzpatrick was asked to transcribe some of Mr. Campbell's concerning calls in order to identify his various behaviours and was advised that Dr. Brown needed to be asked specific questions around Mr. Campbell's communication abilities in relation to his claimed brain injury. In a November 25, 2010 email to Dr. Brown, Ms. Fitzpatrick said, Mr. Campbell "had a severe head injury prior to working with us. He has had issues throughout the tenure of his employment; however, they seem to have worsened over the last six to eight months. Paul has a difficult time grasping that conversations he is having with our customers are not appropriate, despite repeated discussions to this effect with him."

[29] Ms. Fitzpatrick advised Dr. Brown that Mr. Campbell, "has been managed for a number of issues over the last five to six years", including failure to validate clients' identities prior to assisting them, improper sales tracking, and "not meeting call metrics (for example, managing how long it takes to 'wrap' a call, idle time, and hold time)." She said that he had also been placed on two Performance Improvement Plans (PIP), and had been on one since June of 2010. She sent Dr. Brown a summary of some of Mr. Campbell's concerning phone calls as examples and said, "because we are aware that he has a head injury, we need to understand what, if any, accommodation he may need." Along with this information, Ms. Fitzpatrick forwarded to Dr. Brown a concerning email from Mr. Campbell that was copied to Mr. Bona, dated September 3, 2010 that said: "they asked me if I wanted time off but I asked if there was any danger — they ruled out stroke or bloodclot — they are scheduling me for a neurological assesment sometime within teh next month — where I was pralaysed from va — tehy think it could be nerves either dying or regowth ,,who knew" (as written).

[30] Over a year later, in October of 2011, Mr. Bona had a conversation with Mr. Campbell about having a neuropsychological assessment. The script Mr. Bona had been provided with by his managers at CIBC to prepare for the conversation indicates that Dr. Brown had spoken with Mr. Campbell's doctor, who indicated that such an assessment would be helpful in determining his abilities in the workplace, as well as any

accommodations that may be required to help him to do his job successfully. Mr. Campbell agreed to undergo the assessment.

#### **E. The neuropsychological assessment**

[31] Mr. Campbell was eventually assessed by neuropsychologist Dr. Yves Turgeon, who conducted his assessment on April 18 and 19, 2012 in Moncton, New Brunswick, and provided his report on June 14, 2012. In the “Summary and Comments” section of his report, he notes that Mr. Campbell was referred for a psychological evaluation, “to better understand the scope of his cognitive abilities and psychological functioning pertaining to his ability to function in his credit-counselling job.” Under “Behavioural Observations”, Dr. Turgeon notes that, “[s]ubjectively, Mr. Campbell appears to have some degree of impairment in his attention and concentration, regulation of impulsivity, memory and speech.”

[32] Dr. Turgeon notes that Mr. Campbell’s verbal comprehension skills are significantly greater than his perceptual reasoning skills, which means he is better at tasks that are more verbal in nature as opposed to “hands-on” tasks and occupations, and so in his job he may be better at selling than “minutely managing accounts”. He observes that, “He would work well in a setting where there is routine and clear expectations of performance, and where he can learn at his own pace.”

[33] Dr. Turgeon concludes that, as Mr. Campbell’s executive performance was variable, he “would be able to achieve and maintain expected levels of cognitive performance, except in very specific work situations or environments.”

[34] With respect to learning and memory, Dr. Turgeon says Mr. Campbell’s test results show that he has, “clinically significant difficulties with short-term memory, long-term memory and the organization of memory.”

[35] Under “Recommendations”, Dr. Turgeon says Mr. Campbell presents with mild cognitive impairment overall, with moderate impairment only across very specific cognitive domains. He says he is expected to be able to function in everyday life, including at work, although he will struggle with more demanding tasks relating to his dysfunction. Dr.

Turgeon recommends occupational therapy as well as psychological support to help him optimise benefits from occupational accommodations, such as routine interventions to, “palliate prospective memory impairment on the job site”, like using an agenda or other external memory aids.

[36] Dr. Turgeon says that Mr. Campbell’s behavioural impulsivity needs to be tackled first, during the implementation of specific occupational therapy strategies. He also says that Mr. Campbell, “needs to be helped to realise that he is not as efficient as he believes he is, at least not in everything that he does”, and recommends, “psychotherapy to help manage Mr. Campbell’s emotions and traumas, hoping to make him accept his disability, and continue to make the best of what he’s got.... He needs to be helped develop a more realistic perspective on his personal strengths and weaknesses.” Dr. Turgeon concludes by saying that he would be pleased to help orient occupational intervention with Mr. Campbell.

## **F. Job Accommodation Assessment Reports**

[37] Following receipt of Dr. Turgeon’s report, CIBC contracted with an Occupational Therapist, Fran Robinson of Proactive Therapy Services, who came into the workplace and met with Mr. Bona and Mr. Campbell. She produced three Job Accommodation Assessment Reports – on July 17, 2012, October 22, 2012 and November 28, 2012.

### **(i) July 17, 2012 Report**

[38] Ms. Robinson’s first report notes that, although Mr. Campbell still has a sales quota to meet, CIBC’s change in how it evaluates sales performance to now include call quality and the length of the call (which can have an effect on the number of calls taken per day), as well as compliance with procedures and regulations, has resulted in Mr. Campbell having more difficulties than he initially did because of his failure to adhere to all of the bank’s criteria. Ms. Robinson says that there is greater variance in the length of Mr. Campbell’s calls than is acceptable, with some calls lasting as long as fifty minutes. She

also says that, if an employee does not adhere to all up-to-date requirements of the bank, like reading the AST, they are likely to make significant errors in their job.

[39] Ms. Robinson reviewed Dr. Turgeon's report with Mr. Campbell and she notes that both he and Mr. Bona agreed that basic clerical tasks are difficult, and that his memory is a problem at work, as he tries to do all tasks while on the phone with a customer without making any handwritten notes. Mr. Campbell agreed he was too talkative and too impulsive sometimes. Ms. Robinson says Mr. Campbell may not use the telephone protocol because he does not check his daily emails and messages directed to all employees.

[40] She identifies a number of barriers to employment and provides several recommendations to address these. For example, in order to reduce office noise and allow Mr. Campbell to improve his concentration, she recommends he be provided with a headset that covers both ears.

[41] She says Mr. Campbell needs to check his call time throughout the day as self-cueing and regulating behaviour, and then have regular feedback on his call length in his biweekly meetings with Mr. Bona, which will provide him with regular reminders. She says Mr. Bona is also supposed to provide Mr. Campbell with more consistent feedback in these biweekly meetings to ensure Mr. Campbell is speaking appropriately to his customers and following the proper procedures. She says, "With such regular feedback, Mr. Campbell will be more apt to modify his behaviours."

[42] Ms. Robinson further recommends that the client validation procedure should be repeated either by Mr. Bona or Mr. Campbell's peer mentor, as this is a task he struggles with. She says regular repetition of the procedure will help him learn it.

[43] She recommends using a Post-it note or other system on his computer to assist him to remember to use the AST, rather than relying on his memory, and it would be helpful to have a checklist at his fingertips to help him quickly uncover the main concerns of clients and then deal with their issues.

[44] In addition, she recommends using a notepad and pen to jot down points such as the client's name and the reason for the call while on the phone instead of trying to remember these details. Finally, Ms. Robinson recommends having Dr. Turgeon speak to Mr. Campbell directly regarding the assessment results, as well as having him speak to the employer regarding the assessment and recommendations. She indicates that her involvement and intervention on a periodic basis would be beneficial to follow through with the recommendations.

[45] Under cross-examination, Mr. Campbell either agreed that all of these recommendations were met or he could not remember whether they had been met. His impression was that either Mr. Bona did not do the regular check-ins with him to provide feedback, or that the feedback was not useful, but merely criticism. CIBC's evidence, both documentary and oral, shows that all of the recommendations that were within their power to implement were followed. In addition to many coaching logs completed by Mr. Bona that indicate he complied with his obligations, there were two Accommodation Implementation Checklists prepared by Rhoda Lee and Mr. Bona to ensure Ms. Robinson's assessment report was being followed. The checklists include dates of Mr. Bona's follow-up sessions with Mr. Campbell and what was discussed. As Mr. Campbell could not recall whether all of the recommendations were followed, he could not deny that they were; as such, I accept CIBC's evidence about its compliance with the assessment report as it remains uncontradicted.

[46] In a coaching log a month after Ms. Robinson's first report, Mr. Bona indicates that he had spoken to Mr. Campbell about further action items that would help him with his calls, to avoid mistakes and allow him to complete calls with minimal help. Mr. Bona indicates that the intention was to, "get back to basics and build from there." The action items put in place were to pull back on sales completely, ensure he is doing validation, reading disclosures, and following procedures on his calls to ensure risk and client impact are minimized. Mr. Bona also notes in the coaching log that Mr. Campbell had been hanging up on clients when their requests were more complicated, although at hearing Mr. Campbell said the hang ups were not intentional. Mr. Bona notes that they were looking for a commitment from Mr. Campbell to stop asking his coworkers for the procedures and

to seek out the answers himself by actively using the AST. The coaching log says that all of these action items are, “compulsory requests on behalf of the business and are designed to help Paul build confidence and autonomy on his calls.”

**(ii) October 22, 2012 Report**

[47] Ms. Robinson’s second Assessment Report followed another visit to the workplace on October 4, 2012. In this report she notes that she also spoke with Dr. Turgeon on October 22<sup>nd</sup> about her assessment results and findings.

[48] She says Mr. Bona reported to her that the quality of Mr. Campbell’s phone calls had improved one hundred percent by following the strategies that were recommended.

[49] She notes that Mr. Campbell had been instructed not to initiate sales with customers unless a customer was requesting it or it was obvious this is where the conversation should be directed. Mr. Bona advised that Mr. Campbell had been following this restriction for the most part, until the last couple of days when he had started to initiate more sales with each phone call. Mr. Bona was concerned that he was not following instructions and that he would revert to his previous habits of lengthy and inappropriate phone calls with customers.

[50] Ms. Robinson notes that Mr. Campbell was using the binaural headset, using the AST procedures, and checking his emails, and that he now recognizes he has some memory limitations and is trying to eliminate some of the impulsive comments he used to make.

[51] In this report, she recommends that he continue to use the strategies put in place since July, including using a notepad to make notes while on calls and to complete his checklist. Mr. Bona was to work with Mr. Campbell on a responsive sales approach, rather than trying to make a sale out of every phone call, and was to hold weekly review meetings to follow up. She suggests that, after Mr. Campbell has adopted a responsive sales approach for two to three months, another review meeting be held with her to ensure that he is continuing to adhere to the strategies that have been initiated and that he has not reverted back to his old habits.



[52] Ms. Robinson notes that, in her conversation with Dr. Turgeon, he felt the bank should release pressure on the commission part of his sales so that he could focus more on the quality of his sales.

[53] A week following Ms. Robinson's second report, Mr. Bona's coaching log for Mr. Campbell says that CIBC had reintroduced sales by allowing him to responsively sell when he sees or hears an opportunity, but had noticed a decline in his quality results since then, as well as an increase in the number of questions he was asking Mr. Bona and his peers. Mr. Bona says he believes Mr. Campbell is regressing in certain parts of the accommodation plan since he is distracted when he is selling. Under cross-examination, Mr. Campbell said he was distracted because his brother was dying; however, two months later, Mr. Campbell received one hundred percent under Call Quality, despite his brother's continuing terminal condition.

[54] The November 5, 2012 coaching log says that Mr. Campbell's call quality continues to be poor due to procedural errors that could be easily avoided by referring to the AST. For example, he had failed to read certain disclosures, validate a client correctly, and advise a client that PCF offers mutual funds. Mr. Bona notes that Mr. Campbell continues to engage clients in non-business related conversations when his time could be better spent discussing the client's financial needs, and that he needs to ensure the client's initial request is processed prior to asking probing questions.

### **(iii) November 28, 2012 Report**

[55] In her third and final Assessment Report, Ms. Robinson says she was advised by Mr. Bona that, since Mr. Campbell had started to integrate a sales component into his work again, his performance had begun to decline, and that he had returned to engaging in inappropriate conversations with clients.

[56] She says that Mr. Campbell had been meeting his Call Quality target of 70% prior to reintroducing sales, when it dropped again. She notes that Call Quality is a reflection of using the AST to follow protocols and to answer client questions.

[57] Ms. Robinson says they discussed the targets that PBRs were required to meet and whether it would be reasonable to lower Mr. Campbell's targets given the context of his barriers. Mr. Bona was of the opinion that the Quality target could not be reduced below 70%, and Ms. Robinson agreed, as quality is an extremely important target. However, Mr. Bona thought that productivity and sales could remain lower than target as an accommodation, as these two areas had already been lower for Mr. Campbell for quite some time. He could not say how low these targets could be set for Mr. Campbell's circumstances, but Ms. Robinson agreed both of these targets should be lowered. Both Mr. Bona and Ms. Savage testified, and Mr. Campbell agreed, that these targets were eventually adjusted as a form of accommodation.

[58] The Report notes that Mr. Campbell was still asking his colleagues for answers to questions instead of finding them in the AST himself, which was distracting to some of his colleagues. While he was supposed to put clients on hold to look up the information in the AST himself, Mr. Campbell felt that putting a client on hold while he researched a topic interfered with his ability to build rapport with clients.

[59] Ms. Robinson concludes by saying that the strategies put in place for Mr. Campbell, if followed, will help him do his job successfully. Neither she nor Mr. Bona nor Mr. Campbell were able to identify any further strategies that he could use to help serve as reminders for him to do his job more effectively. She says, "We provided him with the facts relating to his work performance and advised him that his quality needs to get up to the minimum standard and that this is more important than building rapport with his clients."

[60] Mr. Bona agreed to continue his meetings with Mr. Campbell every two weeks and Mr. Campbell agreed to continue with a responsive sales approach, although Mr. Bona expressed concern that, as in the past, Mr. Campbell would slide back into his past habits, thus decreasing his quality again.

**G. Mr. Campbell's performance following the Accommodation Assessment Reports**

[61] While Mr. Campbell appears to have met the Quality target for a couple of months following Ms. Robinson's last report, by January 22, 2013, Mr. Bona noted in the Coaching Log that a number of Mr. Campbell's old habits seemed to be showing up, although he remained positive and encouraging towards Mr. Campbell.

[62] On April 26, 2013 Mr. Bona advised Mr. Campbell that, as it had been recommended that consideration be given to adjusting some of his targets as part of the accommodation plan, CIBC had decided that, commencing May 1, 2013, some of his Performance Management and Measurement targets would be adjusted. Specifically, his lending targets would be reduced, as would the requirement that he complete a certain number of calls per hour (called True Calls Per Hour or "TCPH"). The letter further states that the other targets, such as Accuracy and Call Quality would not be adjusted. He was still expected to achieve at least 70% for Call Quality.

[63] In June of 2013, CIBC compiled a list of areas of concern from Mr. Campbell's phone calls from October 1, 2012 to May 25, 2013. The list includes concerns such as Mr. Campbell lacking confidence or appearing confused when providing information to a client, providing incorrect information to a client, failing to update important information about clients, not adequately handling client complaints, hanging up on clients when they were still speaking, not properly validating clients, and failing to listen to clients, so that they had to repeat themselves numerous times.

[64] There is also a Documented Verbal Warning signed by Mr. Bona and Mr. Campbell from June 25, 2013 confirming that they spoke about Mr. Campbell's, "workplace behaviour and workplace avoidance", including issues such as Mr. Campbell providing an unfair advantage to a team member, frequently spending too much time on non-work related conversations with customers, having to be told three times in two weeks that he is no longer allowed to eat at his desk, and having to be spoken to numerous times about using his cell phone at his desk, which he had already been warned about a year prior. The document states that, if Mr. Campbell's performance improves they would continue

with the coaching and feedback they had been engaging in and, if his unsatisfactory performance continues, the employer would issue an initial warning letter.

[65] In July of 2013, Ms. Savage received an email from the call centre manager Michelle Lockhart with Mr. Campbell's first quarter results for that fiscal year, which reflected the amended lending and calls-per-hour targets. It was noted that, despite the amended targets, he was not meeting expectations. Ms. Lockhart says, "I do think given his brothers (*sic*) situation he has been distracted but wanted to give it some visibility."

[66] Between July 6 and September 3, 2013, Mr. Campbell was granted compassionate care leave to spend time with his brother. On September 9, 2013, shortly after Mr. Campbell's return to work, Ms. Lockhart sent an email to Mr. Bona saying that she required Mr. Bona's assistance to gather some information to help them assess next steps. The information was being sent to Ms. Lee, the Workplace Accommodation Program Manager in Toronto.

[67] In response to her request, Mr. Bona provided information from January 2012 to September 2013 about Mr. Campbell's targets, as well as dates he had provided coaching to Mr. Campbell and what was discussed, which mainly included problems with his Call Quality and Accuracy because of a lack of professionalism or a failure to provide the correct information to a client, to properly validate the client, or to use the AST. He notes that, while Mr. Campbell can and sometimes does meet the Quality target, "the issue is it takes so much focus for him to do this the rest of his numbers fall off. If he addresses the other numbers, TCPH and or sales his Quality slips." In a follow-up email providing more specific information, Mr. Bona says that, on average, Mr. Campbell takes about three hundred calls per month and has approximately fourteen calls monitored.

[68] CIBC's documentary evidence shows that, in September of 2013, Mr. Campbell made several errors in the course of providing services to clients and he testified that his brother was very ill at that point and he was focused on that.

## **H. Events leading up to the termination**

[69] On October 1, 2013, Mr. Campbell made a comment to a customer on the telephone in relation to his computer being slow. He described his computer as being irritable and temperamental in the morning, saying it “must be a woman or something.” The client complained to CIBC about this obviously inappropriate and sexist remark. In an October 3, 2013 email to Ms. Savage and Mr. Bona about this call, Ms. Lockhart indicates that Ms. Lee was made aware of Mr. Campbell’s comments and she says that CIBC has concerns on a daily basis about the reputational and legal risk they are exposed to around Mr. Campbell’s comments, errors, validation, and disclosures that are being missed. She notes that she has received feedback from other employees at the call centre expressing frustration about having to take his “escalated calls” since his return to work.

[70] By this time, Mr. Campbell already had two letters in his personnel file for Unprofessional Conduct relating to inappropriate customer comments, from May 21, 2010 and February 8, 2012. Under cross-examination, he was asked if he thought his comment to the client about his computer being like a woman was professional, and if it was contrary to CIBC’s Code of Conduct. Mr. Campbell responded that he did not think about it, that it was a joke, and then said he does not consider it to be funny today nor was it in 2013. He added, “but my brother was dying.”

[71] On October 8 and 9, 2013, there was an issue with Mr. Campbell trying to refinance a mortgage for a client after being told by his Sales Leader that he was not permitted to do so. Mr. Campbell did not listen to the client, repeatedly asked her for the same information, and called her numerous times despite the fact that she told him she could not talk until the following morning. He inflated the price of her home contrary to her own clear statement about its value. He asked her inappropriate questions, and made inappropriate comments about himself. The client then called back and spoke to another PBR and questioned whether Mr. Campbell was even qualified to answer mortgage questions. The

Sales Leader told Ms. Lockhart, “I know we are well aware of the issues with Paul, but I think we are really starting to put ourselves at risk on the GRLR<sup>4</sup> side of things.”

[72] The Quality Manager who reviewed Mr. Campbell’s calls to the client said the mortgage refinancing application should never have been submitted for a number of reasons, and that she had concerns with the numbers Mr. Campbell used in terms of the value of the house and the client’s income. She said in an email to Ms. Lockhart: “Paul was scattered, repeatedly asked for the same information and did not seem to even remember details of the application when he called her back to decline. I completely agree with [the Sales Leader’s] comments in regards to putting ourselves at risk. This series of calls is no different than any of the other calls that I have monitored for Paul...the difference is that this client complained. I am more than willing to contact the client, but not completely sure how to apologize for her experience?”

[73] CIBC entered into evidence an email from Mr. Bona to Ms. Savage and Ms. Lockhart dated October 25, 2013 indicating he had spoken to Mr. Campbell about this call. Mr. Bona says he asked Mr. Campbell why he would continue to press the mortgage refinance when he was told it was not workable and he told Mr. Bona he, “just really wanted to help the client.” Mr. Bona suggested to Mr. Campbell that, by continuing to call the client and question her on the value of her house, “he was more likely trying to help himself rather than the client”, by improving his sales score. Under cross examination, Mr. Campbell said he did not remember this call, or talking to Mr. Bona about it.

[74] Sadly, on November 15, 2013 Mr. Campbell’s brother died and he was off work for about a week. Shortly after his return, on November 27, 2013, Mr. Bona, Ms. Savage and Ms. Lockhart met with Mr. Campbell about his performance. Mr. Campbell’s fourth quarter scorecard for August 1 – October 31, 2013 indicated he did not meet expectations for either Accuracy or Call Quality, the two targets that were not adjusted as part of his accommodation plan, although he did meet the adjusted targets for lending and TCPH. His year-to-date scorecard, for the time period October 1, 2012 to October 31, 2013 also indicated that he had not met expectations for the entire fiscal year because, while he had

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<sup>4</sup> I understand this to mean the bank’s legal and reputational risk.

met the other metrics, he did not meet the Accuracy or Call Quality targets. At the meeting on November 27, 2013, Mr. Campbell signed these two scorecards and, according to Mr. Bona they discussed with Mr. Campbell how it was not working out with him and how they wanted to help him find other work with CIBC by the end of January, 2014.

[75] Mr. Campbell says he does not recall them saying they had concerns with him continuing in his role at the call centre and that they did not offer him other work at CIBC. He says Mr. Bona told him, "You're gone"; however, this is disputed by Mr. Bona and Ms. Savage. Mr. Campbell does agree that they gave him time off the phones to work on finding a new job and referred him to myCareer on CIBC's intranet to assist him with his job search, although he says he could not log on. Mr. Bona and Ms. Savage testified that they had told him that, if he could not find a job internally with CIBC, they would provide him with resources to find external work and that they recommended he make use of the Employee Assistance Program (EAP). Mr. Campbell says he cannot remember this because his brother had just died, but he says he does remember asking them for a letter saying he was being terminated but they said no. Ms. Savage testified that he actually requested a letter saying he would be paid severance, but CIBC would not agree to provide him with such a letter because he was not being terminated at that time, so no determination had been made about severance.

[76] When asked if he applied for any other jobs with CIBC following this meeting, Mr. Campbell questioned why they would hire him when they had just fired him. Mr. Campbell did meet with a career counsellor whose services were provided by CIBC in January of 2014.

[77] On January 2, 2014, Ms. Savage prepared a Case Review regarding Mr. Campbell. She testified that it was for the executives to support offering Mr. Campbell a severance package. The Case Review notes that he had been managed for performance and unprofessional conduct throughout his tenure with CIBC, including 6 warning letters for performance, 2 warning letters for unprofessional conduct with customers, 1 letter for unacceptable use of a cell phone, and that he was placed on Performance Improvement Plans 3 times throughout his tenure. She notes that he had received a performance rating of Does Not Meet or Undetermined for the past 6 years. She mentions in the Case Review

that he suffered severe head injuries in a car accident prior to starting work at CIBC and outlines the accommodation efforts, and that Mr. Campbell did not participate meaningfully in those efforts. The Case Review concludes that, due to ongoing concerns about his impact on CIBC's reputation, he was no longer considered a fit for his position.

## **I. Termination of Employment**

[78] On January 15, 2014 Mr. Campbell was given a termination letter from CIBC which states: "Further to our ongoing discussions we continue to have serious concerns with respect to your performance. Accordingly, this letter confirms that your employment with CIBC will end on February 12, 2014." The letter says he will continue to be paid for four weeks in order to conduct a job search, that he will be provided with severance of thirty-six weeks' pay in lieu of notice, and that CIBC will continue providing him with external outplacement support for up to two months in order to obtain alternate employment. He was also offered a training allowance for eligible retraining programs up to \$2,500 that he could access for up to twelve months.

[79] In response to a question as to how CIBC could generate a rating for Mr. Campbell in the third and fourth quarters of the 2013 fiscal year (from May 1 – October 31, 2013), when he was off on compassionate care leave for much of that time, Ms. Savage testified that he worked at least 150 hours on the phones in each of these quarters, which is the minimum number of hours that CIBC requires at all of its call centres in order to rate an employee's performance.

[80] Ms. Savage also testified that the final accommodation measure that was implemented for Mr. Campbell was the adjusted targets, which commenced at the beginning of the third quarter of the 2013 fiscal year (May 1, 2013). She advised that it is CIBC's practice to provide employees with adjusted performance targets for one full quarter where it rates them Undetermined, in order to give them time to adjust to the new targets, then the next quarter it applies the standard ratings. So, for Mr. Campbell's third quarter, from May 1 – July 31, 2013, he was rated Undetermined because he was adjusting to his new targets. Then by the fourth quarter, from August 1 – October 31, 2013,



CIBC expected him to be Meeting Expectations. However, in Mr. Campbell's case, in October of 2013, despite all of the accommodations being in place, including the adjusted targets, he still had two calls that resulted in complaints from customers and his behaviour on those calls constituted serious misconduct from CIBC's perspective. It was CIBC's view that he could not Meet Expectations for the fourth quarter given the nature of these two calls.

[81] When asked what he did in the four weeks following the termination letter, Mr. Campbell said he worked with his career counsellor, looking at banking jobs, and then relied on his teaching degree to become a supply teacher again because he needed to work. He did not remember if he applied for any jobs except supply teaching and said he did not apply for any banking jobs because of his experience at CIBC.

[82] However, he said he wants to go back to his job at CIBC because he was "awesome" at what he did. When asked in cross examination about how he would fare in the role of PBR now that it is focused only on client service and not sales, suggesting this is where his weakness lies, he said, "I was awesome after I got over my brother's death. I exceeded expectations [in my last Scorecard]". The Scorecard Mr. Campbell is referring to, that he entered as evidence at the hearing, says it is for the first quarter of fiscal year 2013, for the period November 1 – December 8, although it must actually be for the 2014 fiscal year, as this is the time period he is referring to, and the 2013 fiscal year ended on October 31, 2013. Unlike all of the other Scorecards provided by the parties as evidence during the hearing, this Scorecard is not signed or dated. CIBC could not locate this Scorecard in its own records. At the request of Mr. Campbell's counsel, following Ms. Savage's evidence, CIBC provided the number of hours Mr. Campbell worked on the telephones for November and December of 2013, and January of 2014, a total of 118.9 hours for these three months. As such, he did not work the minimum of 150 hours required by CIBC in order to receive a quarterly rating.

[83] When asked why Mr. Campbell was not terminated "for cause", Ms. Savage testified that, rather than restarting the progressive discipline process, CIBC wanted to take a more supportive approach with Mr. Campbell and help him transition to other work,

which is why he was offered a severance package and further time and assistance to search for employment.

#### **IV. Analysis**

[84] In this section I will consider and decide each of the Issues identified above.

##### **A. Can I rely on employment law principles, and how much weight, if any, should I attribute to the evidence relating to Mr. Campbell's job performance throughout his employment with CIBC?**

[85] As part of its evidence at hearing, CIBC provided over three hundred pages of coaching notes for Mr. Campbell from September 2008 to October 2013. Mr. Campbell objected to CIBC's attempts to introduce any evidence relating to his workplace conduct, especially prior to 2010, arguing that, because he was not terminated "for cause", his performance is irrelevant under federal employment law principles. I agreed to admit CIBC's evidence regarding Mr. Campbell's performance throughout his employment and indicated that I would attribute the appropriate weight to this evidence in my decision. In order to do this, I must address the argument that employment law principles are relevant to this complaint.

[86] It is Mr. Campbell's position that federally regulated employers must allege "just cause" or they cannot terminate an employment relationship. The employment law principles that Mr. Campbell relies upon are grounded in federal legislation: the *Canada Labour Code* ("CLC"). I was advised that Mr. Campbell filed a complaint under the *CLC* at the same time he filed his human rights complaint with the Canadian Human Rights Commission (Commission), but that the hearing of the *CLC* complaint was stayed at the request of CIBC pending the outcome of the human rights complaint. A copy of the decision of Adjudicator Peter Seheult dated May 5, 2015 is attached to Mr. Campbell's Reply submissions. This decision was made while the human rights complaint was still being considered by the Commission.

[87] According to Adjudicator Seheult's decision, as Mr. Campbell was not a unionized employee, his complaint was filed under section 240 of the *CLC*, which permits employees who have been employed for at least one year to make a complaint, "if the employee has been dismissed and considers the dismissal to be unjust." Subsection 241(1) entitles the person who was dismissed to request a written statement giving the reasons for the dismissal. If the complaint cannot be settled, an adjudicator may be appointed to hear the complaint and decide whether the dismissal was unjust.<sup>5</sup> Subsection 242(3.1)(b) of the *CLC* provides that, if a procedure for redress is provided for elsewhere in the *CLC* or in other federal legislation, the adjudicator shall not consider the complaint.

[88] The decision of Adjudicator Seheult indicates that CIBC raised a preliminary objection to his jurisdiction to adjudicate the complaint based upon subsection 242(3.1)(b) of the *CLC*. It is clear from the decision that this section of the *CLC* is similar to subsections 41(1)(a) and (b)<sup>6</sup> and 44(2)(a) and (b)<sup>7</sup> of the *Canadian Human Rights Act*, provisions that are meant to prevent the wasting of administrative or quasi-judicial resources by avoiding a multiplicity of proceedings arising from the same factual situation. Adjudicator Seheult decided he was without jurisdiction to proceed while Mr. Campbell's complaint was before the Commission. He agreed to stay the adjudication under the *CLC*, unless or until the Commission decided to refer the matter back to him under the applicable provision of the *Act*. On October 4, 2017 the Commission asked this Tribunal to inquire into the complaint. I was provided with no other information about the *CLC* complaint.

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<sup>5</sup> Subsections 241(3) and 242(1) and (3) of the *CLC*.

<sup>6</sup> 41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

<sup>7</sup> 44 (2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

it shall refer the complainant to the appropriate authority.

[89] While Mr. Campbell seemingly agrees that the appropriate forum for a finding of whether his dismissal was “unjust” under the *CLC* is an adjudicator appointed pursuant to that legislation, he persists in arguing that CIBC cannot rely on his workplace performance in defending itself against his human rights complaint. Mr. Campbell says CIBC is trying to make this case about whether an accommodated employee can be terminated for misconduct or poor performance but that this is “entirely irrelevant” because CIBC did not terminate Mr. Campbell for performance or misconduct. He argues that I should give no weight to the content of the pre-2010 performance management records, based upon, “employment law principles [that] are fundamentally important to this case”. He relies on the decision of the Supreme Court of Canada in *Wilson v. Atomic Energy of Canada Ltd.*<sup>8</sup>, saying it “stands for the proposition that CIBC’s termination of [Mr. Campbell], without cause, on provision of reasonable notice (which it did not pay) contravenes” the *CLC*.

[90] Mr. Campbell argues that I should apply the common law doctrine of negative inference to CIBC’s carriage of its case such that CIBC should be precluded from defending itself against the complaint. In his Reply submissions, Mr. Campbell says that CIBC’s litigation strategy is “abusive” because it “advances termination without just cause”, contrary to the *CLC* and because CIBC, “refused to have the without cause *Canada Labour Code* violation determined until discrimination allegations are determined”. Mr. Campbell argues that, “advancing untenable defences is worthy of comment and worthy of sanction.”

[91] CIBC argues that whether it decided to allege cause for dismissal or not, “is wholly irrelevant to this proceeding under the” *Canadian Human Rights Act*. I agree. Statutory tribunals like the Canadian Human Rights Tribunal do not possess the inherent jurisdiction of a Court.<sup>9</sup> Like all administrative tribunals, it is a creature of statute, deriving its jurisdiction from the *Act*, which creates the federal human rights complaint regime. The *CLC* similarly sets out a system for non-unionized employees in the federal sector to complain if they feel they have been unjustly terminated. However, while an adjudicator

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<sup>8</sup> [2016] S.C.J. No.29

<sup>9</sup> *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513, 2006 SCC 14 (CanLII) at para.16.

appointed pursuant to the *CLC* can apply the *Canadian Human Rights Act*, it is my view that the Canadian Human Rights Tribunal cannot similarly apply the *CLC*.

[92] Adjudicator Seheult refers to the applicability of the *Canadian Human Rights Act* to certain complaints under the *CLC*, citing the Federal Court decision in *MacFarlane v. Day & Ross Inc. ("Day & Ross")*.<sup>10</sup> In that case, Justice Mainville states that an adjudicator appointed under subsection 242(1) of the *CLC* has "ancillary jurisdiction" to that of the Canadian Human Rights Commission and Tribunal. As such, if the Commission decides to refer a complaint to an adjudicator appointed under the *CLC* upon being satisfied that it could be more appropriately dealt with in that context, "the adjudicator appointed under the *Canadian Labour Code* would have the authority to hear and decide the human rights allegations to the extent that they relate to the unjust dismissal which he is appointed to adjudicate."<sup>11</sup> Justice Mainville goes on to state:

[76] Under paragraph 242(3)(a) of the *Canada Labour Code*, an Adjudicator must "consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon." **Surely a dismissal made in violation of an employee's human rights is "unjust" within the meaning of that provision of the Code, and I fail to understand why an adjudicator could not so find.** Obviously, the decision of the adjudicator in such a case is made under the relevant provisions of the *Canada Labour Code*, and the remedial measures which the adjudicator can order are those set out in that *Code* and not those provided for in other legislation such as the *Canadian Human Rights Act*. However, **the concept of "unjust dismissal" is not such as to foreclose any consideration of motives for dismissal based on violations of human rights where an adjudicator is properly referred a matter pursuant to paragraph 41(1)(b) or paragraph 44(2)(b) of the *Canadian Human Rights Act*.** (Emphasis added)

[93] Justice Mainville goes on to conclude that, just as an arbitrator has jurisdiction to adjudicate grievances that raise the violation of human rights statutes even if the rights run counter to a collective agreement<sup>12</sup>, this principle should "apply with even more force in situations...where there is no collective agreement preventing the application of the

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<sup>10</sup> (2011) 4 F.C.R. 117

<sup>11</sup> *Ibid* at para.74.

<sup>12</sup> Principle established by the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board and O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42 (CanLII)

statutorily guaranteed right not to be dismissed on the prohibited grounds of discrimination.”<sup>13</sup> He concludes as follows:

[82] In my view, the absence of a statutory provision in the *Canada Labour Code* explicitly conferring on an adjudicator the power to interpret and apply human rights statutes or any other statute does not negate the adjudicator’s authority to do so. This power is rather implicitly provided for in paragraph 242(3)(a) of the *Canada Labour Code*: it gives the adjudicator the authority to consider whether the dismissal was “unjust”, and empowers the adjudicator to render a binding decision on this matter.

[94] It is important to note that the *CLC* establishes two different kinds of decision-makers: specialist tribunals that consider complaints by employees subject to collective agreements, and *ad hoc* adjudicators who consider complaints from non-unionized employees. The Federal Court of Appeal in *Byers Transport Ltd. v. Kosanovich* stated:

...[W]here Parliament has established specialist tribunals, whether under the *Canada Labour Code* or elsewhere, to deal with certain aspects of employer-employee relationships, it should not be taken to have conferred concurrent jurisdiction on *ad hoc* adjudicators to deal with the same matter. In my view the procedure in Part III for the filing of complaints by non-unionized employees for unjust dismissal, for hearing by an adjudicator, should be seen as a residual procedure intended to provide some redress where such redress was not otherwise available. It seems to me that that is the clear meaning of paragraph 242(3.1)(b).<sup>14</sup>

[95] The Canadian Human Rights Tribunal is such a “specialist tribunal” established by Parliament.

[96] I cannot accept Mr. Campbell’s submission that CIBC’s litigation strategy has been abusive to him because it “refused” to deal with the *CLC* complaint first. CIBC took a position with respect to the *CLC* complaint, as it was entitled to do, and Adjudicator Seheult decided he did not have jurisdiction to consider that complaint unless the Commission referred it back to him. Justice Mainville in *Day & Ross* finds that complaints involving discriminatory practices that might otherwise be heard by an adjudicator under the *CLC* *must* be filed with the Human Rights Commission and the matter may only proceed under the *CLC* if the Commission so determines, in the exercise of its discretion

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<sup>13</sup> *Day & Ross*, *supra* note 10 at para.79.

<sup>14</sup> 1995 CanLII 3515 (FCA), [1995] 2 F.C. 354 (C.A.) at para.40.

under the Act.<sup>15</sup> He cites with approval the Federal Court of Appeal in *Canada (Attorney General) v. Boutilier*<sup>16</sup> which states at paragraph 18:

Paragraphs 41(1)(a) and 44(2)(a) of the *Canadian Human Rights Act* constitute important discretionary powers in the arsenal of the Commission, as it performs its role in the handling of a complaint, and permit it, in an appropriate case, to require the complainant to exhaust grievance procedures. Paragraphs 41(1)(a) and 44(2)(a) also indicate that Parliament expressly considered that situations would arise in which a conflict or an overlap would occur between legislatively mandated grievance procedures, such as that provided for in the *Public Service Staff Relations Act*, and the legislative powers and procedures in the *Canadian Human Rights Act* for dealing with complaints of discriminatory practices. In the event of such a conflict or overlap, Parliament chose to permit the Commission, by virtue of paragraphs 41(1)(a) and 44(2)(a), to determine whether the matter should proceed as a grievance under other legislation ... or as a complaint under the *Canadian Human Rights Act*. Indeed, the ability of the Commission to make such a determination is consistent with its pivotal role in the management and processing of complaints of discriminatory practices.

[97] Justice Mainville in *Day and Ross* finds these reasons to be compelling and states that they should be, “extended to the interpretation of the interplay between paragraph 242(3.1)(b) of the *Canada Labour Code* and paragraphs 41(1)(b) and 44(2)(b) of the *Canadian Human Rights Act*.”<sup>17</sup>

[98] I decline to draw a negative inference in relation to Mr. Campbell’s allegation that CIBC insisted this matter proceed in the human rights system, as opposed to under the *CLC*. It is clear from the *CLC* and the case law referred to in Adjudicator Seheult’s decision that it is for the Commission to decide which is the appropriate forum to consider a particular complaint: a specialised human rights tribunal, or a “residual procedure” available to non-unionized employees with no other available complaint mechanism.

[99] The Supreme Court of Canada has considered and affirmed the ability of other administrative decision-makers to consider and apply human rights legislation. In

<sup>15</sup> *Day & Ross*, *supra* note 10 at paras.73-74.

<sup>16</sup> [2000] 3 FC 27, 1999 CanLII 9397 (FCA), Justice Linden quoting with approval, and upholding the decision of, Madam Justice McGillis of the Federal Court in *Canada (Attorney General) v. Boutilier*, [1998 CanLII 9111 \(FC\)](#), [1999] 1 F.C. 459; (1998), 154 F.T.R. 40 (T.D.); revg *Boutilier and Treasury Board (Natural Resources)*, [1997] C.P.S.S.R.B. No. 54 (QL).

<sup>17</sup> *Day & Ross*, *supra* note 10 at para.70.

*Charette*<sup>18</sup>, the Court noted that allowing many administrative actors to apply human rights legislation fosters a general culture of respect for human rights in the administrative system. In finding that the Ontario Social Benefits Tribunal had the jurisdiction to consider the Ontario *Human Rights Code* in the course of its decision-making role, the Supreme Court stated that the, “most important characteristic of the [Code](#) for the purposes of this appeal is that it is fundamental, quasi-constitutional law...” which must be interpreted in a “liberal and purposive manner, with a view towards broadly protecting the human rights of those to whom it applies...”<sup>19</sup> Like the *Canadian Charter of Rights and Freedoms*, human rights legislation, “must be recognized as being the law of the people....”<sup>20</sup>

[100] While the ability of statutory tribunals to consider and apply human rights legislation in the context of their decision-making roles is well established, the inverse is not true. I have not been provided with any authority that says the power to apply the *CLC* and employment law principles has been similarly bestowed upon the Canadian Human Rights Tribunal.

[101] Although not directly relevant to the issue he was asked to consider, Justice Mainville in *Day & Ross Inc.* stated that, “...it is true that the burden of proof may fall on different parties depending on whether the complaint is processed under the *Canada Labour Code* or the *Canadian Human Rights Act*, and that the certain principles of labour law may be more difficult to plead in the context of proceedings under the *Canadian Human Rights Act* (an issue on which I take no position),....”<sup>21</sup> In *Bouvier v. Metro Express*<sup>22</sup>, the Tribunal stated:

It would appear that we do not have jurisdiction to apply the Canada Labour Code. The mandate of a human rights tribunal derives from a combination of several provisions of the C.H.R.A. For example, ss. 49 and 50 direct the tribunal to inquire into a complaint submitted to it by the Human Rights Commission. The complaint itself must, under ss. 4 and 39, relate to a discriminatory practice, that is, one of the practices described in ss. 5 to 14 of the *Act*. In other words, the mandate of a human rights tribunal is to apply

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<sup>18</sup> *Quebec (Attorney General) v. Quebec (Human Rights Tribunal) (“Charette”)*, [2004] 2 SCR 223, 2004 SCC 40 (CanLII) at para. 28.

<sup>19</sup> *Tranchemontagne*, *supra* note 9 at para.33.

<sup>20</sup> *Ibid*, at para.33.

<sup>21</sup> *Day & Ross*, *supra* note 10 at para.60.

<sup>22</sup> 1992 CanLII 1429 (CHRT), [1992] C.H.R.D. No. 8 at para. 37.



its enabling legislation. It has no jurisdiction to apply the Canada Labour Code....

[102] I do not agree with Mr. Campbell that I should give no weight to evidence CIBC has presented in support of its defence that Mr. Campbell's termination was not discriminatory, simply because he alleges that under the *CLC* his termination was not lawful. My job is to determine whether CIBC contravened the *Canadian Human Rights Act*, not the *Canada Labour Code*. Mr. Campbell bears the burden of proving a *prima facie* case of discrimination and CIBC is entitled to respond to the complaint by refuting Mr. Campbell's allegations of discrimination.

[103] In his opening statement, Counsel for Mr. Campbell stated that his client's performance was consistent over the course of his employment with CIBC. CIBC is entitled to call evidence to dispute this. Also, in this case, Mr. Campbell alleges his termination was discriminatory because he was in the midst of being accommodated and because the behaviours for which he was terminated are linked to his disability. CIBC argues that, in determining whether there is discrimination in the workplace, the Tribunal must look at the entire context of the employment relationship. CIBC says it is important that the Tribunal is aware of everything it did from day one to try to maintain the employment relationship with Mr. Campbell. It says that, although he was not terminated "for cause", there is reference to serious ongoing performance issues in the termination letter, and so it is entitled to call evidence about these performance issues. CIBC maintains that I must determine what performance issues, if any, were related to Mr. Campbell's disability, and what was simply his preferred way of doing business. It argues that Mr. Campbell was disciplined for certain performance issues as early as 2004 and that those same issues persisted until 2013, when CIBC met with him in November to advise that it would try to assist him to find other employment.

[104] With respect to evidence of his performance prior to 2010, although Mr. Campbell's counsel mentioned in his opening remarks that his client's performance had been consistent throughout his employment, this ultimately did not become of central importance to either his arguments or to CIBC's response to the complaint. As such, I attribute very little weight to any evidence relating to poor performance on Mr. Campbell's

part prior to 2010, and only for the purpose of acknowledging that there were some issues with his performance relating to unprofessional comments and a failure to use the AST prior to the implementation of the accommodation process.

[105] I do not accept that the *CLC* and employment law principles oust CIBC's right to call a lawful defence under the *Act*, nor that CIBC's defence to the complaint is "abusive" or worthy of sanction. Evidence of Mr. Campbell's job performance is relevant to CIBC's response to the human rights complaint. Therefore, I have decided to give full weight to the evidence of Mr. Campbell's performance from 2010 until his termination in 2014, including coaching notes and other documentary and oral evidence.

**B. Has Mr. Campbell proven on a balance of probabilities that he was discriminated against by CIBC?**

**(i) Legal Framework**

[106] Mr. Campbell's human rights complaint alleges discrimination in relation to employment on the basis of his disability, contrary to subsections 3, 7(a) and 7(b) of the *Act*.

[107] It is well established that this Tribunal, like other human rights tribunals across Canada, is to apply a two-part analysis when deciding complaints of discrimination in employment.

**(a) Step 1: *Prima facie* discrimination**

[108] First, the complainant must establish what the Supreme Court of Canada refers to as a "*prima facie* case" of discrimination.<sup>23</sup> Although the *Act* does not use the term "*prima*

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<sup>23</sup> See, for example, *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 ("O'Malley"), *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 ("Moore"), *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, [2015] 2 S.C.R. 789, 2015 SCC 39 ("Bombardier"), *Stewart v. Elk Valley Coal Corp.*, [2017] 1 S.C.R. 591, 2017 SCC 30 ("Elk Valley").

*facie*”, it does set out, in sections 3 and 7, the elements the complainant must establish in order to show he or she has been subjected to a discriminatory practice in employment.<sup>24</sup>

[109] In order for the Tribunal to decide that a complainant has established a *prima facie* case of discrimination, the complainant must prove:

- 1) they have a characteristic protected from discrimination under the *Act*;
- 2) they experienced an adverse impact within the meaning of section 7 of the *Act*; and
- 3) the protected characteristic was a factor in the adverse impact.<sup>25</sup>

[110] In order to meet the third requirement, the complainant must show that there is a connection between the first two elements, i.e. the prohibited ground of discrimination and the adverse impact. This Tribunal has stated that:

A “causal connection” is not required as there may be many different reasons for a respondent’s acts. That is, it is not necessary that a prohibited ground or grounds be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that a prohibited ground or grounds be one of the factors in the actions in issue.<sup>26</sup>

[111] The Supreme Court has stated that, “[w]hether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis.”<sup>27</sup>

[112] The complainant must establish this *prima facie* case on a balance of probabilities,<sup>28</sup> meaning the Tribunal must find that it is more likely than not that the events

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<sup>24</sup> *Canadian Human Rights Act*:

**3 (1)** For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

**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.

<sup>25</sup> *Moore*, *supra* note 23 at para.33; *Elk Valley*, *supra* note 23 at para.24.

<sup>26</sup> *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (CanLII) at para.25.

<sup>27</sup> *Elk Valley*, *supra* note 23 at para.39.

<sup>28</sup> *Bombardier*, *supra* note 23 at para.65.

described by the complainant happened that way.<sup>29</sup> Discriminatory intent on behalf of the respondent is not required to establish *prima facie* discrimination.<sup>30</sup>

[113] The Tribunal can consider all of the evidence before it in determining whether *prima facie* discrimination has occurred.<sup>31</sup> This necessarily includes the Respondent's evidence, as the Supreme Court confirmed in *Bombardier* that, in order to respond to a complaint of discrimination, a respondent can either present evidence to refute the allegation of *prima facie* discrimination, put forward a defence justifying the discrimination (i.e. a statutory defence such as a *bona fide* occupational requirement (BFOR)), or do both.<sup>32</sup>

[114] There are a number of ways respondents can refute allegations of *prima facie* discrimination. For example, they can lead evidence refuting the allegation that the complainant has a protected characteristic under the *Act*, or that he or she suffered an adverse impact, or by presenting an explanation for the conduct that the complainant says is discriminatory so as to negate the alleged connection between the prohibited ground and the adverse impact. Where a respondent refutes the allegation of discrimination, this explanation must be reasonable, it cannot be a "pretext" — or an excuse — to conceal discrimination.<sup>33</sup>

### **(b) Step 2: Justification for the alleged discriminatory conduct**

[115] The Tribunal only engages the second part of the two-step analysis *if* the complainant establishes a *prima facie* case of discrimination. Once a *prima facie* case has been established, the burden shifts to the respondent to, "justify his or her decision or conduct on the basis of the exemptions provided for in the applicable human rights legislation or those developed by the courts."<sup>34</sup> For example, an employer relying on the

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<sup>29</sup> See *Croteau v. Canadian National Railway Company*, 2014 CHRT 16 (CanLII) where the Tribunal described the civil standard of the balance of probabilities as follows: "According to this standard, discrimination may be inferred where the evidence offered in support of the discrimination renders such an inference more probable than the other possible inferences or hypotheses ...." (at para.41)

<sup>30</sup> *Elk Valley*, *supra* note 23 at para.24; *Bombardier*, *supra* note 23 at para.40.

<sup>31</sup> *Elk Valley*, *ibid* at paras.26, 32, 35,43; *Bombardier*, *ibid* at paras. 64, 67, 81; *Emmett v. Canada Revenue Agency*, 2018 CHRT 23 at paras.58 and 61.

<sup>32</sup> *Bombardier*, *ibid* at para.64

<sup>33</sup> *Moffat v. Davey Cartage Co.(1973) Ltd.*, 2015 CHRT 5 (CanLII) ("*Moffat*") at para.38.

<sup>34</sup> *Bombardier*, *supra* note 23 at para.37.

BFOR defence under section 15 of the *Act*<sup>35</sup> will be required to prove, on a balance of probabilities, that it accommodated the employee to the point of undue hardship. If the respondent fails to justify the discriminatory conduct, discrimination will be found to have occurred.

**(ii) Discriminatory Termination under Subsection 7(a) of the Act**

[116] Subsection 7(a) of the *Act* says that, “It is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual on a prohibited ground of discrimination”.

**(a) Mr. Campbell’s Position**

[117] Mr. Campbell says certain facts are uncontested that support a finding of *prima facie* discrimination, including that CIBC believed his performance was tied to a disability, which was supported by medical evidence. In his Reply submissions, Mr. Campbell says that the medical inquiry CIBC undertook to evaluate him, “resulted in a confirmation that [his] spontaneous inappropriate comments were tied to a disability and not wilful.”

[118] He says that, after engaging in a process to investigate whether he should be accommodated, CIBC implemented, “some accommodation strategies identified by its medical experts”, and then terminated him during a period of accommodation.

[119] He says he was terminated, “on express consideration of his disability”, as his head injury and workplace accommodation were mentioned in CIBC’s January 2, 2014 Case Review prepared prior to his termination letter of January 15, 2014.

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<sup>35</sup> Under subsections 15(1)(a) and 15(2) of the *Act*:

s.15(1) It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement; ...

s.15(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement ..., it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

[120] Mr. Campbell argues that, where there is a relationship between performance and disability, as in this case, and the employee is terminated, *prima facie* discrimination is established.

**(b) CIBC's Position**

[121] CIBC argues that Mr. Campbell has not discharged his burden of proving *prima facie* discrimination. It says his employment with CIBC was terminated for legitimate non-discriminatory business reasons following serious misconduct. CIBC submits that the evidence does not establish that his disability was a factor in his dismissal.

[122] CIBC says that Mr. Campbell's job changed over time. While the focus was originally on sales, which he was very good at, over the course of his employment CIBC made the quality of service to its customers paramount. It changed the way employee performance was evaluated and Mr. Campbell had great difficulty in meeting the "quality" requirement. As this became more important, Mr. Campbell's workplace conduct became more problematic.

[123] CIBC's position is that, while Mr. Campbell had performance issues requiring discipline and management throughout his employment, these issues increased noticeably in 2010. As such, CIBC initiated the process of investigating whether he had a disability that was affecting his workplace performance, and took all of the necessary steps to pursue accommodation. CIBC says that it went through a detailed process to try to maintain Mr. Campbell's employment but, after a number of years it had to end the employment relationship because of the reputational, financial and legal risk he posed to the bank.

[124] CIBC says it is for the Tribunal to decide what, if any, of Mr. Campbell's problematic workplace conduct was related to his disability. Its position is that the problematic behaviours identified in customer calls were not related to his disability, but rather were simply his preferred way of doing business. It says the same behaviours prevailed throughout his employment and, while it could have terminated him when his performance management plans were introduced, he was capable of making improvements and doing

the job as required if he chose to. However, he would always revert back to his preferred way of doing business.

[125] CIBC says that, in October of 2013, after an accommodation plan had been in place for more than a year and a half — in addition to many years of performance management of the same issues prior to this — it received complaints from two customers about Mr. Campbell's behaviour and comments on the telephone. CIBC says this serious misconduct on Mr. Campbell's part triggered its decision to start a process to help him transition to other employment.

[126] CIBC argues that, if I determine that the conduct that led to his termination was not related to his disability, but was simply his preferred way of doing business, I cannot conclude that he was terminated in a discriminatory manner contrary to the *Act*.

### **(c) New Evidence Allegations**

[127] In response to Mr. Campbell's Reply submissions, CIBC filed an objection to what it characterizes as, "new allegations not raised in the Complainant's Post-Hearing Submissions", nor in the opening statements or in evidence during the hearing. Specifically, CIBC objects to Mr. Campbell saying that his disability results in, "spontaneous inappropriate comments" that are "not wilful". CIBC says this is a significant new allegation and that the effects of a disability go to the heart of any case where discrimination on the basis of a disability is alleged. CIBC says it is inappropriate for Mr. Campbell to raise this allegation in Reply submissions, as it has had no opportunity to respond to it, or to lead evidence at the hearing to rebut the allegation.

[128] In response to this new evidence allegation, Mr. Campbell says the statements in his Reply respond to CIBC's position that Mr. Campbell's inappropriate customer comments were simply the way he liked to do business. He says that CIBC was concerned about his worrisome customer comments, which are evidence of "behavioural impulsivity" as described by Dr. Turgeon. He says that CIBC suspected his conduct, "was not voluntary or wilful", which is why it started a medical inquiry, and not, as CIBC alleges, because he informed his supervisors in September of 2010 that he was seeing physicians

about some health problems. I indicated that I did not require further submissions from the parties on this “new evidence” objection, and I would address the allegations in my decision.

**(iii) Subsection 7(a) Analysis**

[129] Based upon the legal framework set out above, I must first decide whether Mr. Campbell has established a *prima facie* case of discrimination within the meaning of s. 7(a) of the *Act*. I cannot consider at this stage whether CIBC’s accommodation efforts were sufficient to amount to a defence under section 15 of the *Act*, as to do so would be premature without a finding of *prima facie* discrimination. However, I cannot address whether Mr. Campbell’s disability was a factor in the decision to terminate him without discussing some aspects of the accommodation process. My discussion of the accommodation process at this stage is only for the purpose of providing context with respect to Mr. Campbell’s workplace performance and CIBC’s decision to dismiss him.

[130] In this case, in order to establish a *prima facie* case of discrimination, Mr. Campbell must prove on a balance of probabilities that:

- i) he has a disability; and
- ii) CIBC terminated his employment; and
- iii) his disability was a factor in the decision to terminate him.

[131] CIBC does not dispute that Mr. Campbell has a disability and that his employment was terminated. I must determine whether Mr. Campbell’s disability was a factor in CIBC’s decision to terminate his employment, making it *prima facie* discriminatory.

[132] Mr. Campbell makes three main assertions in support of his argument that he experienced *prima facie* discrimination. First, he says the medical evidence submitted during the inquiry into his complaint supports his assertion that his performance was tied to his disability, and specifically that his disability caused him to make spontaneous inappropriate comments like those made in the customer calls that ultimately led to his termination. His second assertion is that his disability was specifically considered in the



decision to terminate his employment, in that his head injury and the accommodation process were mentioned in the Case Review prepared prior to his termination letter. Third, he says that, because his employment was terminated during the accommodation process, the decision to terminate was *prima facie* discriminatory.

[133] CIBC argues that he was terminated because of serious misconduct that persisted for much of his employment with CIBC, including during the accommodation process, and that his workplace behaviour was not related to a disability.

[134] I will discuss each of these arguments below.

**(a) Medical evidence that his unprofessional comments were linked to his disability**

[135] CIBC alleges that Mr. Campbell introduced new evidence in his Reply submissions by stating that his “non-wilful spontaneous comments” are related to his disability. I do not view this as Mr. Campbell alleging a new area of disability in Reply so much as characterizing the evidence set out in Dr. Turgeon’s report in a way that cannot be supported. I do not agree to strike this aspect of the Reply submissions as requested by CIBC, but I also do not agree with Mr. Campbell’s suggestion that the evidence supports a finding that it is more likely than not that his inappropriate workplace comments were related to his disability.

[136] Mr. Campbell suggests that, because Dr. Turgeon concluded that his, “behavioural impulsivity needs to be tackled first and during the implementation of specific occupational therapy strategies”, this means that his inappropriate comments to customers resulted from his disability. In reviewing Dr. Turgeon’s report for references to impulsivity, I note that he utilized the, “Conners’ Continuous Performance Test, a computerized assessment of one’s attention capacity....[that] measures reaction times, the consistency of reaction times, modulation of impulsive responding, and vigilance (sustained attention) in the detection of flashing targets on a computer screen.” Dr. Turgeon concluded that, “there was sufficient evidence of impulsivity during the current evaluation and as Mr. Campbell reported a history of symptoms of ADHD Stemming from childhood, it is likely he continues

to meet criteria for ADHD, Predominantly Hyperactive-Impulsive Type at this time, in addition to mild cognitive disorders.” He also indicated that, “Mr. Campbell’s profile did not indicate the main markers of impulsivity as his number of perseveration errors, and the combination of his commission errors and reaction times were within normal limits.”

[137] Neither party called Dr. Turgeon as a witness, nor any other witness with medical or neuropsychological expertise. The Tribunal does not possess expertise in this area and so, without further explanation about how Dr. Turgeon’s results relate to Mr. Campbell’s specific problematic behaviours in the workplace, the report by itself is not of much assistance aside from the “Summary and Comments” and “Recommendations” sections, which summarize the test results and set out the foundation for further work with an Occupational Therapist to develop workplace accommodations.

[138] As such, I cannot agree with Mr. Campbell’s assertion that what he refers to as “non-wilful spontaneous comments” to customers were related to, or resulted from, his disability. I was not presented with evidence that this is what Dr. Turgeon was evaluating in terms of impulsivity and I am unwilling to agree that the report supports this finding without evidence from Dr. Turgeon. As Mr. Campbell chose to rely upon this argument, it was incumbent on him to ensure he called the necessary evidence at hearing to prove this allegation.

[139] At the end of the hearing I was left with medical evidence about Mr. Campbell’s disability from his own testimony and from Dr. Turgeon’s report. Mr. Campbell’s own evidence about his disability also does not support the suggestion that his inappropriate comments to customers were related to his disability. His argument that his comments were “non-wilful” and “spontaneous” would make more sense if he accepted that these comments were inappropriate and he regretted making them, but both the coaching notes from Mr. Bona and Mr. Campbell’s own testimony indicate that he did not really think there was anything wrong with having these unprofessional conversations with clients, as it was all part of building rapport by being humorous or flirting or talking about himself in order to sell financial products. He also testified that he had no bad intentions when having these kinds of conversations with customers, and also suggested that his brother’s illness was somehow responsible for his behaviour.

[140] His argument that his unprofessional behaviour was linked to his disability is further contradicted by the evidence of both Mr. Bona and Mr. Campbell that he was capable of being professional if he chose to, but that he ultimately reverted to his preferred way of doing business in order to build rapport with customers.

**(b) Serious misconduct was persistent throughout his employment and was not related to a disability, but was simply his preferred way of doing business**

[141] CIBC's allegations with respect to Mr. Campbell's workplace misconduct are not limited to his unprofessional conversations with customers. His failure to consistently use the AST was the source of much of his workplace misconduct. Rather than using the AST, he would ask his coworkers how to do certain tasks. This caused resentment amongst his co-workers, who felt he was disruptive and relied on them to do his job. He also often failed to validate customers' identities, and to read disclosures that the bank was legally required to provide to customers over the phone.

[142] There is evidence that, prior to the neuropsychological assessment and accommodation process, Mr. Campbell received workplace coaching on using the AST in order to ensure he followed CIBC's policies and procedures. However, even after years of coaching from his supervisors and an accommodation plan that was meant to ensure he could do his job successfully despite his disability, he persisted in doing things the way he always had. The coaching notes in evidence, as well as the testimonies of Mr. Bona and Mr. Campbell, show that, when Mr. Campbell did use the AST, his performance improved and he sometimes met the quality metric. But he always reverted to his preferred approach to sales.

[143] As discussed, Mr. Campbell was also repeatedly told to be more professional in his conversations with customers, to refrain from talking about his personal life or from sharing his personal contact information with them. When asked about Mr. Campbell's unprofessional language with customers, Mr. Bona said he was too personal or familiar with them, and that he would say, "things you wouldn't expect to hear when you call your bank." In October of 2013, after many years of coaching about professionalism, he was

still making inappropriate comments in his phone calls, including telling one customer that, as his computer was being temperamental in the morning, it “must be a woman.” This customer made a complaint to CIBC about Mr. Campbell’s comments, and this was not the first time CIBC received complaints or negative feedback about his behaviour on customer calls.

[144] As stated earlier, I am not persuaded that Mr. Campbell’s unprofessional comments were related to his disability. I also do not agree that Mr. Campbell’s other problematic workplace behaviours were related to his disability. Dr. Turgeon stated that, despite his mild cognitive impairment, Mr. Campbell would be able to function at work, especially with the assistance of the recommended occupational and psychological supports. The evidence shows that CIBC did what it was required to in terms of implementing the accommodation strategies developed with Ms. Robinson. I do not find that his disability prevented him from complying with the accommodation strategies, but rather that he chose not to follow them consistently because he felt they interfered with his ability to sell financial products.

[145] Mr. Campbell did not testify that he was unable to learn new things following his motor vehicle accident, although he said he now learns differently than he did before. He did not elaborate on this. Rather, his evidence was that he was understandably very proud of his ability to achieve and learn following his brain injury, by going back to university and obtaining both a Bachelor of Education degree and a Diploma in Advanced Undergraduate Studies. He testified that he worked as a supply teacher for many years, and continues to do so, that he has written a book and been a motivational speaker, and that he was accepted into a nursing program that he had taken a leave of absence from to complete his book.

[146] He also agreed that he was capable of following the instructions of his supervisors at CIBC and, when he did, he could meet the targets for Quality and Accuracy in his biweekly evaluations. When he chose to use the AST and follow the advice of his supervisors, he was successful in his job. However, the evidence shows that he did not consistently use the AST or follow CIBC’s policies and procedures. For example, he did not regularly use a pen and paper to write down basic information like customers’ names

so that he would not have to ask for the same information repeatedly. While he initially testified that he was not allowed to use a pen and paper at his work station, he eventually agreed that he was permitted to do so, and the evidence of Mr. Bona and Ms. Savage was that PBRs were allowed to use a pen and paper so long as they did not leave confidential information on their desks.

[147] The evidence also shows that Mr. Campbell did not like to put customers on hold to use the AST to look up answers to their questions, or for instructions on how to complete certain requests, because it interfered with his rapport-building. He testified that he was expected to sell mortgages, but that he could not improve both the number of calls per hour and the quality of those calls if CIBC wanted him to continue to sell mortgages. This speaks to his persistence in doing his job the way he always had, even when he was asked to pull back on sales and focus on changing his approach by following the recommended accommodation strategies.

[148] Mr. Campbell gave evidence that he had made the bank a lot of money through his sales, and that he had been rewarded for doing so many times. While I accept that this is true, at some point during his employment with CIBC, the bank put less emphasis on sales and more emphasis on the quality of customer service, and Mr. Campbell chose to continue doing his job the way he had always done it.

[149] The evidence presented at hearing is that CIBC worked diligently to ensure the accommodation plan was implemented as recommended by Dr. Turgeon and Ms. Robinson. The accommodations were monitored and their compliance was followed up on. Mr. Bona met with Mr. Campbell regularly and, while Mr. Campbell may have felt that Mr. Bona was criticizing his work, Mr. Bona's notes reflect that he was meeting with Mr. Campbell as recommended to implement the accommodation strategies. Mr. Bona's coaching notes exhibit patience and persistence in trying to assist Mr. Campbell to be successful in his job. Mr. Bona was encouraging and he persisted in coaching him on how to use the AST, and why it was important, and about being professional in his conversations with customers. He was positive and encouraging when Mr. Campbell performed well as a result of following the procedures and remaining professional. There was evidence that Mr. Bona's efforts were in fact appreciated by Mr. Campbell at the time

as he nominated him for an Achievers Award because of his efforts to support his workplace accommodation.

[150] During cross-examination Mr. Campbell was asked about the extensive job coaching he received over the course of his employment and he commented that it is the definition of insanity to keep doing the same thing over and over without seeing results. While I can only imagine how frustrating it was for Mr. Bona to make the same comments over and over to Mr. Campbell, he was merely fulfilling his obligations as Mr. Campbell's Team Leader, both to the bank's customers to ensure quality of service by its PBRs, and to Mr. Campbell, to help him do his job successfully, before and during his accommodation process.

[151] While it was Mr. Campbell's perception that most of the recommended accommodation strategies were not implemented, the evidence simply does not support this. Again, I am not evaluating the accommodation process itself, but rather noting that the evidence supports a finding that CIBC complied with the accommodations recommended by Ms. Robinson that were within its control. Mr. Campbell had his own obligation to cooperate in the accommodation process, but the evidence shows that he persisted in doing his job his preferred way.

[152] Ms. Robinson's last Accommodation Assessment Report from November of 2012 says that she had no further recommendations for accommodation beyond those in the report. She notes that, despite all accommodations having been implemented, Mr. Campbell was struggling with his productivity and performance. She reports that he told her he did not like putting clients on hold to look up information on the AST as recommended, because it interfered with his ability to build rapport with clients, which reflects his preference for doing things his own way, rather than following the accommodation recommendations. Ms. Robinson was of the view that if Mr. Campbell followed the recommendations, he would be successful in his job and she told him that his Quality scores needed to improve, which was more important than building rapport with clients.

[153] The evidence also does not support an assumption that anything would have changed if he was given more time under the accommodation plan, as he continued to exhibit the same problematic behaviours that he had throughout his employment. As mentioned in the Context section of this decision, Mr. Campbell entered into evidence a Scorecard indicating he “exceeded expectations” for the first quarter of the 2014 fiscal year, from November 1–December 8, 2013. Mr. Campbell argues that this Scorecard shows that, despite his brother passing away in November of 2013 and the stress he had experienced around his brother’s illness, at the time of his termination he was exceeding expectations, and that this is evidence that he would have continued to succeed in his job had he not been terminated. Even if I accept that this scorecard was prepared by a manager at CIBC, I respectfully disagree with Mr. Campbell’s argument that this is conclusive evidence that he would have ongoing success in his job.

[154] The evidence at hearing showed that, from time to time, Mr. Campbell did respond to Mr. Bona’s extensive coaching and recommendations and when he did so, using the AST and being professional as required, he was capable of meeting the bank’s expectations for quality and other performance measures. This applied both during the stressful period when his brother was terminally ill, and prior to that. However, such success was always short-lived, as he would inevitably revert back to his previous habits in the performance of his job, by not using the AST and engaging in his own style of rapport-building with clients in order to sell them financial products.

[155] Some of the recommended accommodation measures had actually been utilized by CIBC prior to the assessment and accommodation report — for example, one on one coaching about professionalism, and instruction and reminders to use the AST. Despite much effort on CIBC’s part for many years to assist Mr. Campbell to be successful in his job, he persisted in doing things his own way.

[156] On October 9, 2013, nearly a year after Ms. Robinson’s last Accommodation Assessment Report, Mr. Bona wrote an email to management, saying:

Based on the calls that have been monitored for Paul, his behaviour on the phone places PCF at risk on a daily basis. Paul admittedly cannot tell when a client has called in validated (he has been coached to this on several

occasions) which places both PCF and the client at risk. Despite multiple coaching sessions, he continues to make unprofessional comments to clients ... . Paul routinely fails to confirm the client's name, read disclosures and/or leave contact logs. Continuously provides misinformation which negatively impacts the customer experience. His conversations lack structure and are often scattered with the same items being repeated unnecessarily throughout the call. For instance, repeatedly confirming the client's name; this type of behaviour does not instill confidence in the client, leads to escalations etc. Routinely contacts IQ when he should be able to handle the call himself. In summary, although Paul has an incredibly positive attitude and is friendly to a fault, his inability to effectively handle calls places PCF and our customers at risk each and every day.

[157] In October of 2013, CIBC received complaints about two of Mr. Campbell's telephone calls with customers, as described previously. After years of similar conduct by Mr. Campbell, and the substantial effort put into assessing and accommodating him with no changes or improvement in his job performance, CIBC decided that it could no longer tolerate the risk he posed to the bank.

[158] After first exploring whether Mr. Campbell's workplace issues could be related to a disability, then implementing an accommodation strategy for approximately a year and a half, when faced with the fact that Mr. Campbell was persisting in his preferred approach to doing his job, CIBC was entitled to move on to other options, including removing Mr. Campbell from the phones. To its credit, CIBC did not immediately terminate Mr. Campbell, but gave him the opportunity to conduct a job search, either internally or externally, while still being paid and utilizing job search resources provided by the bank. The evidence shows that Mr. Campbell did not make use of these resources in any meaningful way. While he testified that he had been told in November of 2013 that he was being fired, it is clear that he remained employed in the call centre until January 15, 2014, and that the job search resources were available to him for several weeks after his termination as well. Rather than using these resources, he went back to supply teaching, which was his prerogative.

[159] I agree with CIBC that the evidence as a whole supports its assertion that Mr. Campbell's workplace misconduct existed prior to the accommodation process and persisted throughout the accommodation process as well. I agree that, rather than



diligently following the accommodation plan with the full support of CIBC, Dr. Turgeon and Ms. Robinson, he felt his rapport-building approach to selling financial products — even when he was not supposed to be actively selling — was more effective than using the AST and engaging professionally with all of CIBC’s customers.

[160] I do not find that his workplace conduct, or his failure to cooperate meaningfully in the accommodation process, were related to his disability, but were rather a result of him doing his job in his preferred manner.

**(c) Specific consideration of his disability in the decision to terminate his employment**

[161] Mr. Campbell argues that, because his head injury and accommodation were mentioned in the Case Review prepared prior to his termination letter, his disability was necessarily a factor in the decision to terminate his employment. I do not agree with this assertion.

[162] Ms. Savage testified that she had prepared the Case Review to support a decision by CIBC to offer Mr. Campbell a severance payment. Indeed, “Severance — Termination” appears at the top of the document to describe the “Type of Case” being reviewed. The document, dated January 2, 2014, is a brief summary of Mr. Campbell’s ongoing employment issues and CIBC’s efforts to accommodate him, as described in the Context section of this decision. The reference to Mr. Campbell’s car accident and head injury in the document explains the reason that his file was, “escalated to CIBC’s Corporate Doctor for consultation in October 2010.” The Case Review goes on to summarize the types of accommodation strategies that were put in place for Mr. Campbell, noting however that, “several of the strategies would only be helpful as long as Paul participated and implemented them consistently”, but that he, “has continued to struggle with implementing the strategies put in place and as a result he has continued to struggle with his performance, validation and professional conversations with customers.” The Case Review concludes by stating that CIBC no longer feels that Mr. Campbell is a “fit for the position”, and that it has significant concerns about the level of customer service he is providing, as well as the, “great impact on customer satisfaction and CIBC’s reputation.”

[163] The January 15, 2014 termination letter itself says that Mr. Campbell's employment with CIBC would end as of February 12, 2014 because of continuing, "serious concerns with respect to [his] performance", and provides information about the severance payment and other benefits.

[164] I accept Ms. Savage's explanation that she prepared the Case Review in order to support a decision to pay Mr. Campbell severance upon his termination from employment. It was clear from CIBC's evidence that all of the decisions concerning Mr. Campbell were carefully considered and documented, and that approvals for various decisions were made in conjunction with subject matter experts outside of the Fredericton call centre. For example, when it became apparent that, after several months with all accommodations in place, Mr. Campbell was continuing to struggle with professionalism and was making errors in dealing with customers that could be prevented by using the AST, this information was sent to the Workplace Accommodation Program Manager, Ms. Lee, who had been involved in his accommodation process throughout.

[165] I also accept Ms. Savage's evidence that CIBC liked Mr. Campbell and cared about him and his future and wanted to assist him in finding other employment. The description of Mr. Campbell as no longer being a "fit" for the position of PBR is well supported by the evidence and this conclusion was made following a comprehensive medical inquiry and accommodation process, at the end of which Mr. Campbell was still engaging in the same misconduct he had for years. CIBC was legitimately concerned about its reputation and his impact on their customers.

[166] I do not agree that, simply because Mr. Campbell's accommodation process was mentioned in the Case Review, this means his disability was a factor in the decision to terminate his employment. Ms. Savage was providing information in the Case Review to support a decision that required details about Mr. Campbell's employment history with CIBC. Mr. Campbell's job history could not be described without reference to his accommodation process, which had been a significant part of his employment for quite some time.

[167] Mentioning the fact that it was aware of Mr. Campbell's head injury as a reason for seeking assistance from the corporate physician also does not necessarily mean his disability was a factor in the termination decision. This was mentioned in order to describe the reason for engaging in the accommodation process in the first place.

[168] Referring to Mr. Campbell's head injury and the neuropsychological assessment and accommodation process does not amount to *prima facie* discrimination without evidence that those factors played a role in the decision to terminate him. What the Case Review says is that, despite the accommodation strategies put in place, he struggled with implementing them. It does not say he struggled with implementing them because of his disability, nor does the evidence support such an assertion. His participation in the accommodation strategies was required to ensure the accommodation plan could be fully implemented, and I have concluded that his lack of cooperation with the accommodation strategies put in place to help him succeed in his job was not related to his disability, but was rather the result of his decision to do his job the way he always had.

[169] Mr. Campbell asked me to draw a negative inference from CIBC's decision not to call Ms. Lockhart as a witness. Mr. Campbell suggests that she made the decision to terminate his employment and so, by not calling her as a witness, CIBC prevented the Tribunal from hearing from the one person who could offer evidence about the true reasons behind his termination. CIBC called Ms. Savage to testify about who was involved in the accommodation process and in the decision to terminate Mr. Campbell's employment. Ms. Savage was centrally involved in the determination as to how to proceed following Mr. Campbell's inappropriate customer calls in October of 2013, and testified that she supported both the managers within the Fredericton call centre and the subject matter experts in Toronto who had been involved with Mr. Campbell's case since 2010, including those in the Employee Relations department. It is clear from Ms. Savage's evidence that Ms. Lockhart was not the sole decision maker.

[170] I am satisfied that the testimonies of Ms. Savage and Mr. Bona, as well as the extensive documentary evidence provided during the hearing, has provided me with a very clear picture of the true reasons for Mr. Campbell's termination and I do not find those reasons to be *prima facie* discriminatory. I agree with CIBC that it was under no obligation

to call every employee involved in Mr. Campbell's multi-year accommodation process, as to do so would be contrary to the *Act's* requirement that the proceedings be informal and expeditious. CIBC was not obliged to call evidence to substantiate Mr. Campbell's allegations, but rather to support its response to the complaint, which it has done. As such, I decline Mr. Campbell's request to draw a negative inference in this regard.

**(d) Employment was terminated during the accommodation process**

[171] Mr. Campbell argues that, because he was still being accommodated by CIBC when his employment was terminated, the termination is necessarily related to his disability.

[172] CIBC disputes that he was still being accommodated when the decision was made to terminate his employment. Ms. Savage testified that Mr. Campbell worked at least the required 150 hours on the phones in each of the third and fourth quarters of the 2013 fiscal year in order to qualify for a performance evaluation, even though he had been off on compassionate care leave for several weeks during this time. Her evidence was not disputed or contradicted. She testified that, after being afforded two full quarters with the final accommodation recommendation of the revised targets in place, CIBC still saw no improvement in Mr. Campbell's job performance. As the bank continued to experience what it considered significant legal and reputational risk as a result of his workplace behaviour, it decided to terminate his employment. I find CIBC's explanation reasonable and I do not agree that the temporal proximity between the accommodation process and Mr. Campbell's termination leads to a finding of *prima facie* discrimination.

[173] Nor do I agree that a *prima facie* case of discrimination is proven simply because an employee who has a disability was terminated from his employment. The law is clear that there must be a connection between the disability and the termination in order for there to be *prima facie* discrimination. Where the Tribunal concludes that the cause of the termination was for legitimate workplace reasons, such as ongoing misconduct that affects

the employer's reputation, "the mere existence of [a disability] does not establish *prima facie* discrimination."<sup>36</sup>

**(e) Conclusion – s.7(a) of the Act**

[174] The case law says that, while the disability need not be the sole reason for the termination, if it was a factor that led to the termination, then the third element of the *prima facie* test is met. What I must consider here is whether CIBC has provided a reasonable, non-pretextual explanation for the termination.

[175] It is easy to look back at events and criticize actions after the fact, as the Tribunal's Chairperson stated in *Moffat*:

[45] Unless there is evidence that a discriminatory ground was a factor, directly or indirectly, it is not the role of the Tribunal to second-guess the business decisions of company management which, with the benefit of hindsight, may be easy to criticize. The role of the Tribunal is to examine all of the considerations leading up to the impugned decision. In so doing, the Tribunal will ask itself whether the explanation proffered in support of the decision was reasonable in that context, but only so far as is necessary to determine whether the explanation given in support of the decision was not simply a pretext for discriminatory considerations (See *Morin v. Canada*, 2005 CHRT 41, at para. 219; *Durrer v. CIB*, 2007 CHRT 6, at para. 63, aff'd on other grounds in 2008 FCA 384).<sup>37</sup>

[176] Nothing in the medical evidence or testimony of the witnesses has led me to believe that Mr. Campbell's disability as described by Dr. Turgeon, or by Mr. Campbell himself, was responsible for the ongoing problematic behaviours that ultimately led to his employment being terminated. Nor was there evidence that Mr. Campbell's disability prevented him from being able to comply with the recommended accommodation strategies put in place to assist him to do his job in an acceptable manner, by being professional with customers and using the AST in order to comply with policies and procedures. The medical evidence does not say he could not be successful in his job with CIBC because of his disability. In fact, Dr. Turgeon and Ms. Robinson were both of the view that, if the recommended accommodations were followed, he could do his job

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<sup>36</sup> *Stewart*, supra note 23 at para.12.

<sup>37</sup> *Supra* note 33.

successfully. And both Mr. Bona and Mr. Campbell himself indicated that he was capable of being professional and using the AST when he chose to.

[177] In this case, when considering CIBC's decision to terminate Mr. Campbell's employment in the context of the entire employment relationship, I cannot conclude that his disability was a factor in the decision to terminate.

[178] Rather, I agree that he was terminated for legitimate business reasons following misconduct and poor performance that had been recurring throughout his employment and I do not conclude that Mr. Campbell has proven on a balance of probabilities that his objectionable behaviours and poor performance at work, or his failure to comply with the accommodation recommendations, were related to his disability. CIBC's decision to terminate Mr. Campbell is not tinged with the "subtle scent of discrimination", and I find their explanation for the decision to terminate him is not a pretext for discrimination.

[179] As I do not find that CIBC discriminated against Mr. Campbell on the prohibited ground of disability in relation to the termination of his employment, I dismiss his complaint under subsection 7(a) of the *Act*.

**(iv) Discrimination under Subsection 7(b) of the Act**

[180] Subsection 7(b) says that, "it is a discriminatory practice, directly or indirectly, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination." Mr. Campbell's closing submissions do not directly address discrimination on the basis of subsection 7(b), although there is a brief reference to "Other Issues — Adverse Impact Discrimination", which states that, throughout the course of the hearing, several issues came to light that confirm the impacts of poor implementation of the duty to accommodate, notably that: i) a CIBC employee made a comment to a customer about Mr. Campbell's brain injury; ii) other employees felt like they were being punished by having to sit near Mr. Campbell; and iii) Mr. Campbell was no longer allowed to eat at his desk because he left a mess, even though he had been given permission to arrive early at work and eat his breakfast. There is also reference to CIBC's "Case Study" referring to Mr. Campbell no longer being a "fit" for his position.

**(a) Subsection 7(b) Analysis**

[181] Again, I must determine whether Mr. Campbell has established a *prima facie* case of discrimination, this time within the meaning of s. 7(b) of the *CHRA*, prior to moving on to consider any statutory defences under the *Act*.

[182] I will consider each of these allegations and determine whether CIBC differentiated adversely in relation to Mr. Campbell, and whether his disability was a factor in that treatment.

[183] There was evidence that, in June of 2010, another call centre employee took a call from a client who had spoken to Mr. Campbell several days earlier about an error the client had made that was not yet corrected. The client described her call with Mr. Campbell as “a little weird”. The CIBC employee replied, “To be quite honest with you he had a brain injury at some point...I understand what you’re saying.” It does not appear that Mr. Campbell was made aware at the time that his co-worker had made this comment to the customer.

[184] Reference to his co-worker’s comment is included in CIBC’s email correspondence around investigating whether Mr. Campbell had a disability that required accommodation. I do not agree that one comment made by a co-worker to a customer, although divulging information of a personal nature about Mr. Campbell, constitutes adverse differential treatment by CIBC. The Federal Court of Appeal, in considering the requirements for a finding of “adverse differential treatment” under the *Act*, agreed that “establishing the element of differentiation” on the basis of a ground protected under the *Act* (in that case, religion), did not by itself establish discrimination.<sup>38</sup> The Court said, “Discrimination requires something more, which the judge correctly described as something harmful, hurtful or hostile.”<sup>39</sup>

[185] It seems apparent from the documentary evidence that the comment was made by the co-worker to explain Mr. Campbell’s inappropriate comments to the customer the previous week, and that the customer accepted this as a reasonable explanation for his behaviour. I do not find that sharing the information about his brain injury, while obviously

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<sup>38</sup> *Tahmourpour v. Canada (Attorney General)*, 2010 FCA 192 at para.12.

<sup>39</sup> *Ibid*

inappropriate, reaches the level of “harmful, hurtful or hostile”, especially since Mr. Campbell himself was known to disclose this information to customers.

[186] In any event, the co-worker’s comment about Mr. Campbell was brought to the attention of management at CIBC, and this incident formed part of the discussion about approaching Mr. Campbell to determine whether he may have a disability that required accommodation.

[187] I do not find that this comment by Mr. Campbell’s co-worker establishes *prima facie* discrimination under subsection 7(b) of the *Act*.

[188] With regard to the allegation that other employees felt like they were being punished by having to sit near Mr. Campbell because he was disruptive and asked them questions he should have found the answers to on his own by using the AST, I also do not find that this supports a finding of discrimination. Again, it does not appear that Mr. Campbell was aware of these complaints by his co-workers during his employment at CIBC, or that these comments on their own led to any adverse treatment of Mr. Campbell. I also do not agree that there is a link between Mr. Campbell’s behaviour that his fellow employees were complaining about and his disability.

[189] I do not find that these complaints indicate an intolerance for, or interference with, Mr. Campbell’s accommodation plan. The evidence shows that Mr. Campbell did not like to put clients on hold to find the answers to their questions because he felt it interfered with his ability to build rapport with them, so instead he would ask his co-workers. However, one of the goals of the accommodation plan was to have Mr. Campbell become comfortable with, and use, the AST.

[190] I do not find that complaints by Mr. Campbell’s co-workers, that he disrupted them by asking them questions he should have looked up on his own, amounts to adverse differentiation by CIBC in relation to his disability.

[191] With regard to the allegation about not being able to eat at his desk, it is true that Mr. Campbell had been given permission to arrive early and eat his breakfast at work in order to read his emails before starting to take calls, as he felt it was too distracting to read



emails between phone calls. However, such an accommodation would reasonably come with an expectation that he clean up his desk after eating there, as he was not the only employee to use that work station. There was no evidence provided that Mr. Campbell's disability prevented him from cleaning up after himself.

[192] Evidence that Mr. Campbell's co-workers had expressed concerns about working with him based on his behaviours in the workplace that are not related to his disability does not prove on a balance of probabilities that he was treated in an adverse differential manner in relation to his disability.

[193] Finally, with regard to the Case Review saying, "the business feels that Paul is no longer a fit for the position and we have significant concerns regarding the level of customer service that [he] is providing to customers", I have already discussed this comment above in my consideration of subsection 7(a) of the *Act*. I note that the Case Review does not say, nor does it imply, that he is no longer a fit for his job because of his disability. In light of CIBC's conclusion that his workplace performance had not improved despite its considerable efforts, it is fair to say that Mr. Campbell was no longer a fit for his position. I do not agree that this comment establishes discrimination on the basis of his disability.

**(b) Conclusion – s.7(b) of the Act**

[194] I do not agree that any of the above actions or comments by Mr. Campbell's co-workers support a finding that CIBC differentiated adversely in relation to Mr. Campbell on the basis of his disability. As such, I do not find that Mr. Campbell has established a *prima facie* case of discrimination, and therefore dismiss his complaint under subsection 7(b) of the *Act*.

## V. Conclusion

[195] I do not find that there is a reasonable basis in the evidence that CIBC's decision to terminate Mr. Campbell's employment was influenced by, or related to, his disability. CIBC provided credible reasons for the termination that I do not find to be a pretext for discrimination.

[196] I do not find that Mr. Campbell has established a *prima facie* case of discrimination on the basis of subsections 7(a) or (b) of the *Act*. As such, I dismiss his complaint in its entirety.

*Signed by*

Colleen Harrington  
Tribunal Member

Ottawa, Ontario  
April 17, 2019

## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal File:** T2239/6117

**Style of Cause:** Paul Campbell v. Canadian Imperial Bank of Commerce

**Decision of the Tribunal Dated:** April 17, 2019

**Date and Place of Hearing:** April 30 to May 4, 2018

Fredericton, New Brunswick

#### **Appearances:**

Dominic Caron and Dan Leger, for the Complainant

No one appearing for the Canadian Human Rights Commission

Grant Machum and Killian McParland, for the Respondent