Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 38
Date: October 19, 2021
File No.: T2331/8618

Between:

Nalini Sampat

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Air Canada

Respondent

Decision

Member: Alex G. Pannu

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I. OVERVIEW

[1] Nalini Sampat, the Complainant, was employed by Air Canada, the Respondent, as a station attendant at the Vancouver airport between June 2013 and May 2017. She says that during that time she experienced two non-work-related motor vehicle accidents and subsequently developed anxiety and post traumatic stress disorder (PTSD). These conditions, she says, impacted her ability to successfully pass one of the required tests for station attendant which involved driving a vehicle to push aircraft into position (colloquially "pushback"). Upon failing to pass the test in three tries (the Air Canada standard), Ms. Sampat resigned from her position.

[2] Ms. Sampat seeks reinstatement in a suitable position with no loss of seniority, along with payment of pension contributions she would have otherwise earned. She also claims $20,000 in compensation for pain and suffering.

[3] The Respondent, Air Canada, denies that it had any knowledge of the alleged disability. It denies that Ms. Sampat had a disability, and in the alternative, that it was not a factor in the decision to end her employment. Air Canada claims that if Ms. Sampat had a disability, she failed to notify them of it and she did not facilitate or participate in any accommodation regarding pushback testing. In the further alternative, it argues that Ms. Sampat was accommodated to the extent requested by her throughout the process.

[4] Air Canada made no submissions on remedy and asked the Tribunal to dismiss the complaint.

[5] This case turns on whether the Complainant had a disability and whether the Respondent knew or ought to have known about her condition. If so, I must determine whether it was discriminatory for the Respondent to deny the Complainant's request to be placed in a role not requiring pushback certification, and ultimately to refuse to continue to employ her. I must also determine whether the alleged disability was a factor in the Complainant's termination or was it based on the failure to meet the requirements of the position.

[6] The Complainant argues that her employer did not do enough to try to accommodate her. The Respondent justifies its decision on the basis that all station attendants were required to be qualified to pushback aircraft and it was a *bona fide* occupational requirement. The Respondent says it could not have accommodated the Complainant short of undue hardship.

[7] The Complainant represented herself at the hearing and the Respondent was represented by counsel. The hearing was held online and took place over three days. The Canadian Human Rights Commission ("Commission") which investigated and referred the matter to the Tribunal for adjudication did not participate at the hearing.

[8] At the hearing the Complainant testified and called on Francisco Sanchez Andrade and June Joseph, two former colleagues at Air Canada. The Respondent called Greg Daniels who was Ms. Sampat's manager at the time of her employment, to testify.

[9] Witness testimony and documentary evidence is integrated with my analysis of the issues and applicable legal authorities.

II. DECISION

[10] The complaint is not allowed. Ms. Sampat has not shown that the Respondent's denial of her request for accommodation and refusal to continue to employ her constitute a *prima facie* case of discrimination on the ground of disability. The Respondent established that it could not accommodate Ms. Sampat without suffering undue hardship.

III. FACTUAL CONTEXT

[11] The Complainant was employed by the Respondent as a station attendant at Vancouver International Airport from June 2013 until May 11, 2017. A station attendant's duties include loading and unloading cargo and baggage from Air Canada aircraft and driving and operating ramp service vehicles.

[12] One of the major components of the job is the marshaling and towing of aircraft to and from gate and runway positions for passenger boarding and deplaning and takeoff and

landing. This is known in the business as “pushback”. It was the Complainant’s failure to complete the required training and testing for pushback that was the Respondent’s stated rationale for the end of her employment with Air Canada.

[13] Ms. Sampat was hired by Air Canada in June 2013. She says her status was a part-time permanent employee. Air Canada maintains it was as a part-time casual employee.

[14] Ms. Sampat said she worked in several positions as a station agent from 2013 to 2015.

[15] Ms. Sampat was involved in two motor vehicle accidents in 2014 and as a result, claimed that she suffered post-traumatic stress disorder (PTSD) and was nervous when driving. She claims that it was this PTSD which affected her ability to pass the pushback training.

[16] In October 2015, Ms. Sampat bid for a type of work at Air Canada. The Respondent allows its unionized employees to “bid on lines” twice a year. That means employees could choose, based on seniority, the type of work and days and times of their shifts.

[17] As she had limited seniority, Ms. Sampat bid on what was still available. She chose station agent – relief line. That meant she would have to cover for absent employees – those on vacation, sick or otherwise unavailable to work as a station agent.

[18] The position required Ms. Sampat to be proficient in performing all the duties of a station agent including driving lav(atory) trucks, de-icer trucks, air stairs trucks and the small trucks for pushback. Her training for these new skills commenced in November 2015.

[19] Ms. Sampat underwent Air Canada’s training and passed all the required tests without issue except for the pushback one.

[20] Air Canada’s policy with respect to these required skills is that an employee must pass the tests following training within three (3) attempts. Failure to pass results in administrative termination for the employee.

[21] The Complainant underwent pushback training and assessment November 4-5, 2015, February 8-10, 2016, and March 2-4, 2016. Each time, Ms. Sampat failed the

pushback assessment. As a result of not passing the assessment in three attempts, the Complainant was administratively terminated on March 7, 2016.

[22] Ms. Sampat's union filed a grievance against the termination. Ms. Sampat argued that during her November 2015 pushback training, one of her trainers went home sick and she did not receive her full training.

[23] Air Canada and Ms. Sampat entered into a Settlement Agreement on April 8, 2016. Ms. Sampat was given a fourth attempt to pass the pushback training. Failure to pass would result in her termination. Ms. Sampat undertook pushback training and assessment May 9-11, 2016. Ms. Sampat failed the assessment.

[24] Following her assessment, her trainer directed Ms. Sampat to see Greg Daniels, her manager. She told him that she was nervous and anxious during the assessment. Ms. Sampat and Mr. Daniels disagreed in their respective testimonies whether she told him she had PTSD from previous car accidents.

[25] Mr. Daniels recommended to Ms. Sampat that she resign instead of being administratively terminated as the Training Expectations Agreement and Settlement Agreement stipulated if she failed the pushback assessment again. He told her that if she resigned, she could apply to Air Canada for other positions whereas a termination would likely disqualify her from being re-hired by the Respondent. Mr. Daniels advised her to see her union shop steward and then return to meet again. Ms. Sampat met with Rod Ramsey, her union representative and together they met with Mr. Daniels. Both Mr. Daniels and Mr. Ramsey repeated the advice for her to resign rather than be terminated. Ms. Sampat resigned her position with Air Canada on that day, May 11, 2016.

[26] On June 30, 2016, Ms. Sampat filed a complaint against Air Canada with the Canadian Human Rights Commission ("Commission").

IV. ISSUES

[27] I must determine the following issues. I will address them in turn in my analysis below.

1. Has the Complainant established a prima facie case of discrimination under section 7 of the Act, because the Respondent refused her requests to return to work and refused to employ her?

2. If yes, has the Respondent established a valid justification for its otherwise discriminatory actions? In particular, has it established that the three-attempt standard for passing the assessments including pushback test were bona fide occupational requirements (BFOR)?

3. If the Respondent cannot establish a justification, what remedies should be awarded that flow from the discrimination?

V. REASONS AND ANALYSIS

A. Legal Framework

[28] Ms. Sampat alleges discrimination in relation to employment based on disability, contrary to section 7 of the *Canadian Human Rights Act* (the *Act* or *CHRA*, RSC 1985, c H-6). Section 7 of the *Act* says it is a discriminatory practice to refuse to employ or continue to employ, or differentiate adversely in relation to an employee, on a prohibited ground of discrimination. The prohibited grounds of discrimination are set out in section 3(1) of the *Act*.

[29] There are two parts to proving discrimination in the employment context.

[30] First, a Complainant must establish a case which covers the allegations made and which, if believed, is complete and sufficient to justify a decision for the Complainant (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, 1985 SCC 18 (CanLII) at para 28 "*Simpsons-Sears*").

[31] The use of the expression "*prima facie* discrimination" must not be seen as a relaxation of the Complainant's obligation to satisfy the tribunal in accordance with the standard of proof on a balance of probabilities, which she must still meet (*Québec (C.D.P.D.J) v. Bombardier Inc.,* 2015 SCC 39 (CanLII), at para 65 ("*Bombardier*").

[32] To establish a *prima facie* case, the Complainant must show that it is more likely than not that: 1) she had a characteristic protected from discrimination under the *CHRA; 2)* she experienced an adverse impact with respect to employment; and 3) the protected

characteristic was a factor in the adverse impact (*Moore v. B.C. (Education)* 2012 SCC 61 (CanLII), at para 33).

[33] The protected characteristic need not be the only factor in the adverse treatment, and a causal connection is not required (See, for example, *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) ["*FNCFCSC*"] at para 25).

[34] The Supreme Court of Canada elaborated on this definition in *Bombardier* at para 56

> … the proof required of the plaintiff is of a simple "connection" or "factor" rather than that of a "causal connection", he or she must nonetheless prove the three elements of discrimination on a balance of probabilities. This means that the "connection" or "factor" must be proven on a balance of probabilities

[35] The Supreme Court went on to say that in practical terms, this means that the Respondent can either present evidence to refute the allegations of discrimination, put forward a defence justifying the discrimination or both. If no justification is established by the Respondent, proof of these three elements on a balance of probabilities will be sufficient for the Tribunal to find that the *CHRA* has been violated. If, on the other hand, the Respondent succeeds in justifying his decision, there will be no finding of discrimination, even if the Complainant meets their case: (*Bombardier* at para 64.)

Issue 1: Has the Complainant established a *prima facie* case of discrimination under section 7 of the *Act*, because the Respondent refused her request for work not requiring pushback certification and refused to employ her?

(a) Does the Complainant qualify for protection from discrimination because she has a protected characteristic?

[36] I do not find that the Complainant had a protected characteristic.

[37] Ms. Sampat alleged discrimination based on disability. A "disability" under the *Act* means any previous or existing mental or physical disability..." (s. 25 of the *Act*). The *Act* does not contain list of "disabilities". A disability does not have to be permanent, and it is not just the most serious or most severe mental disabilities that are entitled to the protection of

the *Act* (*Mellon v. Canada (Human Resources Development)*, 2006 CHRT 3 (CanLII) ("*Mellon*"), at para 88). The *Act* bars discrimination in the workplace on the basis of a perception or impression of a disability and requires accommodation by the employer unless it constitutes undue hardship (*Dupuis v. Canada (Attorney General),* 2010 FC 511 (CanLII) ("*Dupuis*"), at para 25).

[38] Ms. Sampat testified that she was unaware she was suffering from PTSD until some time after the accidents. She described feeling anxious when driving and said she had at least one panic attack while driving her car.

[39] Ms. Sampat testified that she was being treated by Dr. Baldev Kahlon for her anxiety and panic attacks. She presented as evidence, a note from Dr. Kahlon, which she claimed was dated May 6, 2016. The note says that she has a problem with anxiety and panic attacks and that she "is started on meds". The medication is not specified. The note goes on to say that "she should be avoiding operating machinery and being trained because that can trigger her anxiety and panic attack…".

[40] Ms. Sampat did not present the note to the Respondent prior to her May 11, 2016 pushback assessment.

[41] As part of a separate legal matter, Ms. Sampat submitted into evidence an assessment by Dr. Christopher Watt, a sports medicine physician, dated September 21, 2016. In his Opinions and Conclusions, Dr. Watt had the opinion that Ms. Sampat had, among other conditions, Posttraumatic Stress Disorder, Panic Disorder and Generalized Anxiety Disorder.

[42] Dr. Watt's report and opinions were based in part on a working file of documents, including past clinical records and a psychological assessment by Dr. Rami Nader (Psychologist) dated August 4, 2016. The psychologist's assessment is cited as Tab 1.4 of the Appendix to Dr. Watt's report, but a copy of this report was never provided to the Tribunal and the information it contained was unverifiable. Since Dr. Watt is a certified sports medicine physician, not a psychologist, the extent to which he relied on Dr. Nader's report to make his findings is unclear. Further, this report postdates the impugned conduct by several months.

[43] Ms. Sampat's physician, Dr. Kahlon, provided a brief medical note with an ambiguous date in 2016 that may or may not have been contemporaneous to the events at issue. It provided insufficient descriptions on the distinctive nature of the anxiety and panic attacks and how those relate to the pushback assessments. I do not find this short medical note persuasive.

[44] Ms. Sampat elected not to have Dr. Watt or Dr. Kahlon testify at the hearing. The Federal Court has recognized that a tribunal may afford little to no probative value to a doctor's note, if that doctor does not testify at the hearing: *Hughes v Canada*, 2021 FC 147 (CanLII) ("*Hughes*"), at para 84, citing *Halfacree v. Canada (Attorney General)*, 2014 FC 360 (CanLII) ("*Halfacree"*), at para 38. Without testimony, I can give no weight to these medical notes.

[45] With respect to Ms. Sampat's testimony about her disability, I found it unconvincing. Despite knowing the importance of her final chance to pass the pushback assessment, Ms. Sampat did not ask for accommodation for her disability. She did not raise the issue of her disability to Air Canada until after she failed her fourth pushback assessment. She did not raise the disability issue at any of the three previous pushback assessments. Ms. Sampat knew how the accommodation process at Air Canada worked. She was represented by a sophisticated union and she had on three occasions in, 2014 and 2015, received accommodation from Air Canada for various physical limitations. For all these reasons, I do not assign much credibility to the Claimant's testimony

[46] Within the human rights context, the concept of disability must be interpreted broadly, and there is no exhaustive list of recognized mental disorders: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. City of Montreal,* 2000 SCC 27(CanLII) ("*Quebec C.D.P.D.J*"), at para 76). The applicable legal test finds that a disability consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment: *Desormeaux v Ottawa (City)*, 2005 FCA 311 (CanLII) ("*Desormeaux')* at para 15. It is incumbent on the Complainant to present sufficient evidence to support the existence of a disability in light of this legal test.

[47] In *Halfacree* the Federal Court said at para 40, that "while stress may be disabling, it is not in and of itself a disability requiring accommodation. In order to obtain the protection of human rights legislation, an employee needs to provide a diagnosis with specificity and substance".

[48] Further support for the decision in *Halfacree* can be found in *Hughes*, at para 84 and in *Canada (Attorney General) v. Gatien*, 2016 FCA 3 at para 48 where the Federal Court of Appeal said that "…the case law recognizes that one cannot equate stress with a disability."

[49] In my view, situational anxiety may constitute the sort of normal ailment of an individual that is excluded from the concept of a disability (*Quebec C.D.P.D.J* , at para 82), unless the Complainant is able to prove a diagnosis with some degree of substance or specificity (*Hughes* at para 84).

[50] In *Desormeaux*, the Tribunal relied on evidence of the Complainant and her family physician to make a finding of disability. In the absence of both convincing testimony by the Complainant or medical notes with any probative value, there is no evidence to prove a diagnosis with some degree of substance and specificity.The Complainant did not provide sufficient evidence to support her claim she had a disability that would attract protection under the *CHRA*. Therefore, I do not find that Ms. Sampat has demonstrated she suffered discrimination on a prohibited ground.

(b) Did the Complainant suffer an adverse impact with respect to employment?

[51] Yes, there is no dispute that the Complainant suffered an adverse impact with the loss of her job at Air Canada.

[52] Ms. Sampat testified that the loss of her job adversely impacted her financially and on her mental condition. She also said it affected her relationship with her spouse. I have no reasons to doubt Ms. Sampat's testimony on these specific points.

(c) Was the Complainant's disability a factor in her failing the push back testing and the subsequent end of her employment?

[53] No. Even if I had found that the Complainant had a disability, I have not seen sufficient evidence that her disability was a factor in her failing her fourth pushback assessment and automatic administrative termination. If Ms. Sampat had not resigned from Air Canada, she would have been terminated. The reason for her termination was her failure to pass her pushback assessment, not any disability.

[54] Pushback generally requires the station attendant to drive a tractor to push or tow an aircraft at a slow walking pace. During a departure, the station attendant may be required to communicate with the crew onboard the aircraft and other ramp personnel to ensure proper positioning, follow hand signals from guidemen, monitor the right wing of the aircraft and monitor the turning angle of the nosewheel as it pushes the aircraft to the appropriate position on the runway.

[55] During each of her first three training sessions and assessments for pushback training, Ms. Sampat did not advise the Respondent that she had a disability. Other than her testimony, she has provided no evidence that her alleged disability affected her failure to pass the pushback assessment.

[56] Ms. Sampat passed the assessments for the other station attendant duties that required driving including the de-icing truck, lavatory truck and stairs. She did not claim to be suffering from any anxiety or alleged PTSD during these assessments. She did not mention anything about her disability to the Respondent during these other assessments.

[57] When her union grieved her termination for failure to pass the pushback assessment within three attempts, the basis for her grievance was not because the Complainant had an alleged disability. It was because she did not receive a full training day during her first session.

[58] When her union negotiated an agreement with the Respondent that she would be given one final attempt to pass the pushback assessment or be terminated, Ms. Sampat did not advise the Respondent that she had a disability and required accommodation.

[59] When Ms. Sampat failed her fourth attempt at pushback, she testified that the trainer had raised his voice and she “broke down from anxiety”. However, when she went to see Mr. Daniels, she said she was to too embarrassed to present him with her medical note. She testified that she had not taken her medication the night before the assessment because she was afraid she might sleep in.

[60] Ms. Sampat testified that she told Mr. Daniels she was anxious during the assessment because the trainer yelled at her. She said that she told Mr. Daniels she had PTSD. Mr. Daniels testified that he has no recollection of Ms. Sampat telling him she had PTSD only that she was nervous.

[61] Given that Ms. Sampat testified that she was too embarrassed to give her medical note describing her anxiety and PTSD to the Respondent prior to her fourth pushback assessment or at her May 11 meeting with Mr. Daniels, I find Mr. Daniels to be more credible on this issue.

[62] There is insufficient evidence for me to find that Ms. Sampat’s failure to pass the fourth pushback assessment was affected by an alleged disability.

[63] There is also insufficient evidence for me to find that alleged disability was a factor in her loss of employment. If Ms. Sampat had not resigned, under the terms of the settlement agreement she would have been terminated if she failed her fourth pushback assessment. Mr. Daniels was aware that Ms. Sampat had expressed a desire to be a flight attendant and advised her that a resignation rather than a termination would increase her chances of being re-hired by Air Canada. There is no practical distinction in my view whether the Complainant resigned or was terminated.

[64] I distinguish this case from *Chan v. Dencan Restaurants Inc.,* 2011 BCSC 1439 (CanLII) which was about a forced resignation and the Complainant cited to support her case. However, in this case the Respondent allowed Ms. Sampat to resign to preserve her ability to reapply for a different position. It was not a forced resignation because Ms. Sampat already agreed that she would be terminated if she failed her final pushback assessment. Put simply, if Ms. Sampat had not resigned, she would have been terminated anyway.

[65] Air Canada did not have Ms. Sampat's medical note at the time of her resignation. There is a fundamental disagreement between Ms. Sampat and Mr. Daniels over what the Complainant advised the Respondent about her alleged disability. I have found Mr. Daniels to be more credible on this issue.

[66] The Respondent cited *Stewart v. Elk Valley Coal Corp*., 2017 SCC 30 (CanLII) ("*Stewart*") to support its case. In *Stewart*, the Supreme Court of Canada upheld the Tribunal's decision that the Complainant was terminated not because of his addiction to drugs but because his drug use at work breached the employer's policy. I believe *Stewart* is applicable in this case. I find that Ms. Sampat's loss of employment with Air Canada was because of her inability to pass the pushback assessment, not because she had an alleged disability.

[67] The Complainant has not established a *prima facie* case of discrimination. Even if the Complainant could have done so, I find that the Respondent provided a reasonable explanation.

Issue 2: If the Complainant had been able to establish a *prima facie* case, did the Respondent provided a valid justification for its actions?

[68] The test for establishing a *bona fide* occupational requirement (BFOR) was set out in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU,* 1999 SCC 652 (CanLII) ("*Meiorin*") It says an employer relying on an undue hardship defence must prove the following on a balance of probabilities:

a. The Respondent adopted the impugned standard (in this case the employer's three-attempt standard for passing the assessments including pushback) for a purpose or goal rationally connected to the function being performed;

b. The Respondent adopted the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate purpose or goal; and

c. The standard is reasonably necessary to the accomplishment of that legitimate purpose or goal, in the sense that it is impossible to accommodate an individual sharing the characteristics of the Complainant without incurring undue hardship based on health, safety or cost.

[69] The Respondent must demonstrate that it is more likely than not that the standard or policy it established is a BFOR (s.15 of the *Act*, *Bombardier* at para 37 and *Meiorin* at paras 54 and 71-72). If the Respondent fails to justify the discriminatory conduct, this will result in a finding of discrimination.

[70] The Respondent must demonstrate that it took reasonable steps to accommodate the employee without suffering undue hardship. The onus is on the employer, as the employer is in possession of the necessary information to show undue hardship. The employee, will rarely, if ever, be in a position to show its absence (*Simpson-Sears* at para 28).

[71] Where a Respondent refutes the allegation of discrimination, this explanation must be reasonable, it cannot be a "pretext" - or an excuse - to conceal discrimination (*Moffat v. Davey Cartage Co (1973) Ltd*., 2015 CHRT 5 (CanLII), at para 38).

(a) Did the employer adopt the standard for a purpose rationally connected to the performance of the job?

[72] Yes. As a federally regulated airline, Air Canada places great emphasis on safety and requires its employees to be properly trained to do their jobs.

[73] Station attendants at Air Canada are required to sign an agreement acknowledging the training expectations required of them. These requirements include passing written and driving tests on several airport vehicles used in their daily operations. Ms. Sampat signed her expectations agreement in 2013 when she first started.

(b) Did the Respondent adopt the standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose?

[74] Yes. The Relief Line of work for Station Agents that Ms. Sampat bid on in 2015 required her to be able to fill in for station agents on vacation, sick or otherwise absent. The relief agent must be able to fulfill any duty required including operating the various vehicles used in operations.

[75] Ms. Sampat understood the requirements for becoming a relief station agent and began her training shortly after she bid on her line of work. She did not raise any objection to any of the requirements. Her training records showed that she took and passed all the assessments. The exception was pushback, which she took four times because she was granted one additional attempt although the standard for station agents was three attempts to pass.

[76] I heard nothing to suggest that the Respondent did not the adopt the standard in good faith. I believe that the standard was necessary for the fulfilment of a legitimate work purpose – a safe and efficient airline operation.

(c) Was the standard reasonably necessary to accomplish its purpose or goal because it was impossible to accommodate Ms. Sampat without imposing undue hardship?

[77] Yes. The Respondent already accommodated the Complainant by granting her a fourth attempt to pass her pushback assessment. Air Canada also accommodated Ms. Sampat by not assigning a particular training instructor because of the Complainant's objection.

[78] Ms. Sampat made no requests for accommodation during any of her assessments for all the vehicles that she had to drive including pushback.

[79] Air Canada could not have accommodated Ms. Sampat had she made a request for accommodation by being exempt from performing pushback despite being a relief station attendant. The position required relief attendants to be able to operate all the vehicles used in airline operations.

[80] Ms. Sampat called Francisco Javier Sanchez Andrade as a witness. He testified that he was a station attendant and was terminated by Air Canada after three failed attempts at pushback. His union grieved the dismissal and ordered Air Canada to rehire him. He was transferred to cargo operations. He is no longer employed by the Respondent.

[81] It does not appear that Mr. Sanchez was or wanted to be a relief station attendant upon reinstatement since he had not passed pushback. If Ms. Sampat believed that she

should have been given the same opportunity as Mr. Sanchez, she could have withdrawn her attempt to be a relief station attendant and instead requested a transfer to a position not requiring pushback. However, she chose to enter into a settlement agreement giving her one final attempt to pass pushback. That settlement agreement stipulated that failure to pass the final attempt would result in termination without the right to grieve.

[82] The Complainant called a former colleague June Joseph to testify. Ms. Joseph said that Ms. Sampat talked to her about her anxiety during her pushback training. There was a suggestion that Mr. Daniels was trying to intimidate Ms. Joseph into not testifying through a phone call to her at home but she provided no evidence of this and Mr. Daniels provided a reasonable explanation for his call. I did not find this testimony compelling.

[83] The Complainant asked the Tribunal to consider *Air Canada v. Cheema* 2017 BCSC 1060 (CanLII) but that case was about allegations of differential treatment and collusion between Air Canada and a union. Ms. Sampat has made no submissions on this point and if she did, they would be more appropriately made in a labour relations forum and not in a human rights complaint.

Findings on accommodation

[84] Ms. Sampat did not ask for accommodation by the Respondent for her pushback assessment because of an alleged disability until she filed a complaint with the Commission.

[85] However, she did have familiarity with Air Canada's accommodation process, having utilized it on several occasions. In October and November 2014 and December 2015, Ms. Sampat entered into accommodation agreements with Air Canada to allow her modified duties because of some physical injuries and limitations she claimed.

[86] Although Ms. Sampat had direct experience with the Respondent's accommodation process previously, she did not ask for an accommodation for her alleged impairment especially when it came to passing her pushback assessments.

[87] She did not present Air Canada with her medical note with its description of her stress and anxiety until the complaint was filed. Her evidence that she advised Mr. Daniels that she had PTSD after the fourth assessment was directly denied by Mr. Daniels.

[88] In her closing, Ms. Sampat argued that having told Mr. Daniels of her PTDS (which he disputes), the Respondent had a procedural duty to inquire into her potential disability and to accommodate her. In essence, the Complainant argued that she had a freestanding right to certain procedural accommodations. That is not supported by in law.

[89] In *Canada (Attorney General) v. Cruden*, 2014 FCA 131 (CanLII) the Federal Court of Appeal confirmed that there is no freestanding procedural duty to accommodate. At paragraph 16, the Court said: "There is no separate procedural duty to accommodate under the CHRA that could give rise to remedies if the employer establishes that it has satisfied all parts of the test for determining whether a prima facie discriminatory standard is a bona fide occupational requirement…".

[90] While there are cases where an employer might have an obligation to consider whether an employee's job performance is related to a disability, more evidence of the employee's potential disability is required. In *Matheson v. Okanagan Similkameen School District No. 53*, 2009 BCHRT 112, the Tribunal said in paragraph 11 "In fact, an employee seeking accommodation for a disability is under a duty to disclose sufficient information to her employer to enable it to fulfill its duty to accommodate…".

[91] Ms. Sampat provided little to no information to the Respondent on her alleged disability. It is not reasonable for an employer to provide accommodation when it is not clear what accommodation is being sought for an unknown disability or when accommodation is not sought at all.

[92] Even had the Respondent breached its duty to inquire, there is no remedy if the Complainant has not established a case of discrimination.

VI. ORDER

[93] The complaint is not substantiated, and the Complainant is not entitled to remedies.

Signed by

Alex G. Pannu
Tribunal Member

Vancouver, British Columbia
October 19, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2331/8618

Style of Cause: Nalini Sampat v. Air Canada

Decision of the Tribunal Dated: October 19, 2021

Date and Place of Hearing: November 24, 25 and 26, 2020

by videoconference

Appearances:

Nalini Sampat, for herself

No one appearing, for the Canadian Human Rights Commission

Andrew Woodhouse, for the Respondent