

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2024 CHRT 94

Date: August 1, 2024

File No.: T2700/7621

Between:

Christian Miller

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Toronto-Dominion Bank

Respondent

Decision

Member: Edward P. Lustig

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I. OVERVIEW

[1] Christian Miller, the Complainant, self-identifies as a Black man of African-Caribbean descent.

[2] On or about March of 2018, after working for the Toronto-Dominion Bank (“the Bank”), the Respondent, for about eight years, Mr. Miller was demoted from his Manager of Customer Service and Sales (MCSS) position at the Owen Sound branch, as a result of the implementation of a country wide reorganization program known as the “IRIS” program (“the program”). Under the program, it was determined that Mr. Miller’s MCSS position in Owen Sound was redundant for business reasons and was eliminated.

[3] Mr. Miller held the position as an MCSS in the Owen Sound branch from about March of 2017 to about March of 2018 when he was demoted as part of the program which eliminated that position in most branches across Canada. In his performance assessment in October of 2017, his performance in that role was assessed as “D” for developing as he had only been in the MCSS position for about six months when the assessment was done. Performance was a key factor in assessing where employees impacted by the program would be “mapped” into new positions. Two White men who were also displaced under the program from their MCSS positions in his district but had higher performance rankings and greater tenure than Mr. Miller were promoted to higher-paying jobs in their branches.

[4] In implementing the program, the Bank “mapped” Mr. Miller into the lower-paying job of Financial Advisor (FA) at its Port Elgin branch. Mr. Miller worked in that position from about April until about June of 2018 when he went on medical leave. He remains an employee of the Bank on long-term disability benefits provided by the Bank’s health insurer.

[5] Based on his observations and experiences, Mr. Miller alleges that his race, colour and/or disability was a factor in the Bank’s decision to demote him when it implemented the program, contrary to section 7 of the *Canadian Human Rights Act* (CHRA). He argues that the adverse effect of the program on him as a Black man was discriminatory.

[6] The Bank contends that there is no evidence to support the allegation that Mr. Miller's race, colour and/or disability was a factor, directly or indirectly, in the Bank's decision to demote him when it implemented the program.

II. DECISION

[7] The complaint in this matter is dismissed because there is insufficient evidence to sustain the allegation that Mr. Miller's race, colour and/or disability was a factor, directly or indirectly, in the Bank's decision to demote him when it implemented the program.

III. ISSUE

[8] The issue to be determined in this case is whether Mr. Miller's race, colour and/or disability was a factor, directly or indirectly, in the Bank's decision to demote him when it implemented the program, contrary to section 7 of the CHRA.

IV. BACKGROUND

[9] As part of an effort to employ a more diverse workforce, the Bank hired Mr. Miller as a part-time Customer Service Representative in Mississauga in February of 2010 as he is a Black man of African-Caribbean descent. Thereafter, Mr. Miller progressed to working in some of the Bank's other branches, including commencing a full-time FA position in a branch in Saskatoon in about March of 2015.

[10] In about March of 2017, he was recruited from his position in Saskatoon and accepted the full-time MCSS position in a branch in Owen Sound. This was a promotion as the MCSS position had a pay level of 7 while the FA position had a pay level of 6.

[11] In his final annual performance evaluation in the FA position in Saskatoon, Mr. Miller received a Quality Rating of "S" for "solid" performance. In his only performance evaluation in the MCSS position in Owen Sound in October of 2017, Mr. Miller received a Quality Rating of "D" as he had only been in that position for about six months when assessed. While he could have obtained a higher Quality Rating if his performance had been assessed higher

at the time, it was not uncommon for an employee who was still in the learning phase of a new position to receive a Quality Rating of “D”.

[12] In his complaint dated February 22, 2019, Mr. Miller made various allegations against the Bank regarding events that occurred during the period prior to the implementation of the program and his demotion; however, the Canadian Human Rights Commission (the “Commission”) decided to refer his complaint to the Tribunal for inquiry into the issue as set forth in paragraph 8 above.

[13] The demotion took place in about March/April of 2018 when, pursuant to the implementation of the program protocols by the Bank, Mr. Miller’s MCSS position was deemed redundant for business reasons, and he was “mapped” into a vacant FA position at a branch in Port Elgin at pay level 6, one pay level lower than his then-current MCSS pay level 7 at the Owen Sound branch.

[14] Despite the demotion to a lower pay level, Mr. Miller's pay would remain at level 7 for two years without any reduction. Also, Mr. Miller was given a \$500 increase in pay because the move to Port Elgin resulted in further driving distance/time and expense.

[15] Prior to accepting the FA position at the Port Elgin branch, the Bank discussed with and offered Mr. Miller an alternative “mapping” opportunity into a vacant Manager of Customer Service (MCS) position in Port Elgin. The Bank felt that the MCS position might be more favourable for him, but this position also involved a demotion to pay level 6. Instead, Mr. Miller decided to accept the FA position in Port Elgin as it was a job he was familiar with, and he reported to work at the Port Elgin branch as the FA.

[16] Around June 2018, Mr. Miller went on medical leave due to mental health issues. As noted in my ruling in 2024 CHRT 2, prior to Mr. Miller taking medical leave, the Bank was not made aware of any mental health issues that Mr. Miller had.

[17] Mr. Miller remains an employee of the Bank on a long-term disability claim provided for by the Bank’s health insurer, Manulife, and has not been cleared to return to work.

[18] In early 2017, the Bank approved the program as a national program to save costs and enhance profits in a competitive environment by eliminating positions that had become

redundant as a result of customers increasingly using the internet, ATMs and other technologies to do much of their banking, instead of interacting with bank employees at branches. The program impacted a variety of positions in the Bank across Canada, including the MCSS position.

[19] The program was rolled out nationally in the first months of 2018. This was achieved through the combined efforts of the Bank's human resources staff, operational staff in all of the areas affected by the program and supporting staff.

[20] The program impacted about 961 employees across Canada, including 119 employees in MCSS positions that were eliminated in every branch that had a dedicated Branch Manager. Only rural branches maintained the MCSS position where there was not a dedicated Branch Manager.

[21] Unfortunately, Mr. Miller's branch in Owen Sound had a dedicated Branch Manager, making his position redundant. As a result, Mr. Miller was left with two options: either leave the Bank with a severance package or stay and be "mapped" into another available vacant position, which might be lower paying or as close as possible to his salary at the impacted branch.

[22] The Bank wished to retain employees and avoid terminations to the greatest extent possible in setting up protocols for implementing the program and filling vacant positions with employees who were being displaced as a result of the elimination of positions through redundancies under the program as described below.

[23] Employees impacted by the program were identified through a process where human resources staff reviewed the data for each branch and the positions that were within the scope of the program to determine which employees were impacted. The initial focus area for identifying positions for impacted employees was within approximately a 50-kilometre radius of their branch. The Bank wanted to keep employees in their branches and communities as much as possible to avoid disruptions to employees and customers. The process of "mapping" impacted employees into alternate positions would first consider performance. Then tenure and geography, being determining factors, would be considered.

[24] There were no factors in the program or its implementation related to an employee's race, colour or disability. The Bank has limited access to some of its employees' personal, protected characteristics, including race and colour. These details may be given by employees on a voluntary and strictly confidential basis during the hiring process or for equity auditing purposes. However, the Bank did not track or use any of this information in implementing the program.

[25] For employees identified as impacted, the process ultimately concluded with the District Vice President working with the human resources staff to confirm the "mapping" of the employee. This was done after reviewing the situation with each impacted employee and assessing it on an individual basis.

[26] Impacted employees were first considered for placement into a vacancy in the same position from which they were being displaced, within the same geographic area as their former role.

[27] Where the number of MCSS employees displaced exceeded the number of vacancies available for MCSS positions within the geographic area, human resources would first consider the employees' most recent performance rating. Where the performance ratings were the same, the employee with the greater tenure would be offered the vacancy.

[28] Human resources would next consider vacancies within the geographic area that were up to a pay level below the MCSS position's pay level. Again, in the event of limited vacancies, human resources would first consider the employee's most recent performance rating. Where performance ratings were the same, the employee with the greater tenure would be offered the vacancy.

[29] Impacted employees who had a "NI" (needs improvement) rating or who could not be placed into an alternate role were offered a severance package and were displaced from employment.

[30] In early 2018, the Bank advised impacted employees of the program and, thereafter, began to discuss and work with them to find alternate positions to "map" them into. Mr. Miller was one of the employees impacted. Within the geographic area that Mr. Miller worked,

there were three MCSS positions, including Mr. Miller's, that were impacted by redundancies under the program and eliminated.

[31] The other two impacted employees who were White were located in branches where the program also resulted in the creation of a Manager Financial Services (MFS) position as a result of the size of those branches. Both of the branches that these two impacted White employees worked in met the minimum staffing requirements for the creation of a new MFS position.

[32] These two impacted White employees were both promoted from their eliminated MCSS positions into the new MFS positions created as a result of the program. Both employees had very high performance ratings: a Quality Rating of "H" for "high" performance or a Quality Rating of "E" for "exceptional" performance, which was the highest rating in the Bank. They both had lengthy tenures with the Bank and were both familiar with their team, customers and community at their branch. The MFS position was at a higher pay level (a pay level of 8) than the MCSS position and two levels above the FA position that Mr. Miller was demoted to.

[33] Mr. Miller's branch in Owen Sound did not meet the minimum staffing requirements to create a new MFS position and did not have vacancies for either an MCS or an FA position at the time. Additionally, there were no comparable vacant positions at a pay level of 7 in the Bank's retail business, resulting in Mr. Miller being "mapped" into an alternate branch in Port Elgin as an FA at a lower pay at level 6.

[34] Mr. Miller found out about the program and its impact on his position in about January of 2018 when he was informed by Tara Clark, the Vice-President for the District. As noted above, the Bank engaged in discussions with him as it tried to find an alternate position for him. He was offered an MCS position at the Port Elgin branch at the level 6 pay rate. According to the Bank (but disputed by Mr. Miller), he was also offered other FA positions outside of the district also at the level 6 pay rate, but he decided to accept the FA position at the Port Elgin branch with his pay remaining at level 7 for two years and with an additional \$500 for travel expenses. He worked in the FA position in Port Elgin from about March/April until about June of 2018 when he went on a medical leave.

[35] Mr. Miller was represented by legal counsel earlier in the proceeding when he filed his Statement of Particulars (SOPs) and Reply in 2022 and through a subsequent mediation. Thereafter, he ceased to retain his lawyer and appeared at the beginning of the hearing as a self-represented party and gave his evidence in chief without legal representation. He did not call any other witnesses. After his evidence in chief, Mr. Miller was represented by Mr. English who conducted the direct examination of Mr. Miller and the cross-examinations of the Bank's four witnesses and made final submissions on Mr. Miller's behalf.

[36] Mr. Miller's oral evidence consisted mainly of his impressions and general observations about alleged systemic racial discrimination by the Bank over the years and about how unfairly he felt he was treated in the workplace by the Bank and through the program.

[37] Mr. Miller testified that the Bank discriminated against Blacks in its hiring, promotion and termination practices. In his view, the Bank did not have many Black people working for it and almost none in management and executive positions. He testified that the Bank hired some Blacks for inclusivity and diversity reasons in response to situations like the George Floyd incident in the US but then let them go when their White executives made mistakes that required the Bank to lay off people for business reasons. He claimed that Blacks were the last to be hired and the first to be fired by the Bank.

[38] Mr. Miller did not produce any corroborating statistical or other evidence about the alleged underrepresentation of Blacks in the workforce or systemic discrimination by the Bank against Blacks in its hiring, promotion and termination practices. He complained that Ms. Clarke did not allow him to make notes during his discussions with her and that information that he could have produced was lost with his computer when he was homeless after his demotion.

[39] With respect to the program's implementation that led to his demotion, Mr. Miller testified that it was flawed as it was based on employees' seniority rather than their performance which favoured Whites who had been with the Bank for many years. He felt that the Bank was only interested in making money, not in providing support for Blacks and

other minorities. He stated that if the Bank were to provide, in its workforce, for more equity, diversity and inclusion (“EDI”), it would actually have greater success.

[40] Mr. Miller suggested that the promotion of the two other displaced MCSS employees in his district who were White to MFS positions at their current branches, while he was demoted, demonstrated the Bank’s prejudice towards him because he was Black. In his view, their promotions were mainly based on tenure rather than on performance. He felt that the Bank broke promises to him about promotions and that he was not supported, as promised, in his efforts to maintain his pay level and workplace location in the program, as the Bank was not really interested in EDI when it demoted him. Mr. Miller felt that the Bank should have found a way to avoid demoting him if it was really committed to EDI as it had only recently recruited him from Saskatchewan and promoted him into a new role, which he was still learning, as an MCSS even though the Bank already knew about the program that would eliminate his position.

[41] Other than the two employees mentioned above, Mr. Miller did not produce any evidence that any other Bank employee was treated better than he was in the implementation of the program on account of race, colour, disability or any other factor.

[42] The only document that Mr. Miller introduced into evidence as an exhibit was a note dated October 22, 2018, from a psychiatrist, Dr. Abdulaziz Memon, who examined him about five months after he went on medical leave. The note includes references to information disclosed to the physician by Mr. Miller about depression and anxiety that Mr. Miller felt because of harassment and bullying in the workplace. The Bank was not made aware of Mr. Miller’s mental health issues at the time of the demotion and has kept him on its employee roster as he continues to be on a disability pension for mental health issues with the Bank’s health insurer.

[43] Ms. Meyer on behalf of the Bank called four witnesses at the hearing. Todd Church, an experienced manager in the Human Resources (HR) department, was not involved in the decision to demote Mr. Miller and didn’t know him. He worked as part of the HR Advice team on the data that was produced to handle the redundancy termination exercise and provide support to the program. He and several other of his colleagues in HR went through

the spread sheets of all employees in branches across Canada, analyzing them branch-by-branch and district-by-district, to pick out the employees who would be impacted given the scope of the program. His evidence was that the program and process was implemented, as described above, across Canada at each of the branches in each of the districts to achieve the elimination of the positions and the reorganization of employees impacted.

[44] Mr. Church's evidence was that the data described the positions that fell within the scope of the program, including the MCSS positions. The most recent performance rating of each employee was part of the data and played a key role in assessing impact and then "mapping" employees impacted into alternate positions. The tenure of the employee impacted was of secondary importance to break ties between impacted employees competing for the same vacancy, and geography (i.e., travel distance from branch and inconvenience) came after that.

[45] Mr. Church testified that the program did not identify or consider the race, colour or physical condition of any employees as a factor in the assessment and "mapping" of impacted employees to alternate roles, nor did EDI play any role in the program's implementation.

[46] Mr. Church was a credible witness, and none of the evidence in this case contradicted Mr. Church's evidence, except that Mr. Miller felt that the program's implementation of terminations and demotions should have considered ways to advance minorities, including Blacks, pursuant to EDI principles.

[47] Suzanne Steele is also an experienced Human Resources Associate Vice President who was involved with the program at the time as an HR Manager. Her role with her team was to follow up on the work done by the HR Advice team in identifying impacted employees and then support the District Vice President and branch managers in "mapping" the impacted employees into alternate roles and reporting to her superiors at the Bank. Her evidence confirmed the evidence of Mr. Church and the description above about the implementation of the program.

[48] Ms. Steele confirmed that race, colour and disability was not a factor in assessing employees in the program. She confirmed that performance was the number one factor,

followed by tenure to break a tie, and then geography. She testified that the personal confidential information voluntarily provided by employees about protected characteristics such as race and colour was collected in connection with equity audits and hiring applications, as referred to in paragraph 24 above. She also stated that this information and EDI considerations were not used in the assessment of employees in the implementation of the program.

[49] Ms. Steele was a credible witness, and her testimony was also not contradicted by other evidence at the hearing.

[50] Sandi Jasper is the branch Manager of the Bank's Port Elgin branch presently and held that position when the program was implemented. She did not make any of the decisions in the implementation of the program about Mr. Miller's identification as an impacted employee or about "mapping" him into the role of FA in or about March/April of 2018 at her branch. She had vacancies at the time in her branch for both an MCS position, which was first offered to Mr. Miller in January of 2018, and the FA position, which he accepted in or about March/April of 2018, starting the job there at the end of March of 2018.

[51] Ms. Clarke is currently a Vice President of Governance with the Bank, focusing on risk management. In March of 2017, she was the District Vice President for the 20 branches in the "Georgian Trails" district, including Owen Sound, Port Elgin, Midland and Collingwood. Her role was to supervise the operations of the branches in the district to support and direct them and to assist with talent development and group strategies.

[52] At that time, as there was a vacancy in the position of MCSS in the Owen Sound branch, Ms. Clarke reached out to her peers across the country to help her recruit a person to fill the vacancy. She was particularly interested in hiring someone who would bring more diversity to the branch and district. She recruited Mr. Miller for the position and had various conversations with him leading up to his transfer from Saskatoon and promotion to the Owen Sound branch as MCSS. She felt that his acceptance of the vacant MCSS position in Owen Sound would be "great". She testified that at that time she was not aware that the program would make his position redundant and lead to his demotion as she only became aware of the program in November of 2017.

[53] While Mr. Miller worked in Owen Sound, Ms. Clarke had a number of regular meetings and discussions with him as she visited branches at least every month in her role as District Vice President. She had an “open door policy” and spoke to Mr. Miller one-on-one on various occasions and coached him to assist him with his career development. She testified that she was “invested in and committed to him” in his future with the Bank.

[54] Ms. Clarke said she was very familiar with Mr. Miller and his performance in the role of MCSS in Owen Sound. She testified that he was new to the role and was working through a steep learning curve but was learning and developing in the role. At the same time, he had performance issues including lateness and attendance. Additionally, she said he struggled in connecting with his team.

[55] Ms. Clarke’s role in the program as a District Vice President was to make the final decisions with respect to impacted employees in her district by “mapping” them into suitable available vacancies or by terminating and providing severances to them if there was no available vacancy. The information and data produced by HR, including recommendations prepared by HR based on the program’s protocols and factors such as recent performance, tenure and geography, were used by her in deliberating about final decisions regarding employees impacted. However, this information and data prepared by HR was not solely relied on by her in making final “mapping” decisions. She performed her own assessments using not only this information and data but also her own observations, experiences and knowledge about the performance, tenure and location of the impacted employees, after discussing matters with the impacted employees one-on-one.

[56] Ms. Clarke testified that, when she found out about the program in November of 2017, she felt “sick” at having to terminate Mr. Miller’s position, as she had only recently recruited him from Saskatoon. Subsequently, she met with Mr. Miller and the employees impacted by the program in her district on several occasions to discuss their situations and for her to make final “mapping” decisions.

[57] In addition to Mr. Miller, there were only two other MCSS employees in the district who were similarly impacted by redundancies under the program. They were located in branches in Midland and Collingwood. Both of these individuals were White. Vacancies

came up in both of their branches for an MFS position as a result of an assessment of these branches in connection with the program. Both of these branches were large enough to meet the Bank's criteria for establishing MFS positions in the branches according to the rules for establishing this position. The two White employees were promoted into the MFS positions in each of their respective branches under the program with Ms. Clarke's approval. The MFS position was a pay level 8 position and hence a promotion for the two White employees.

[58] Ms. Clarke knew all three of the employees impacted quite well and gave evidence about them and their "mapping" under the program that was detailed and clear. With respect to the two White employees, she testified that they had very high and exceptional performance ratings, lengthy tenure and were strongly connected to their branches' teams and to the communities. According to Ms. Clarke, these two employees should have been promoted to the newly created vacancies in the MFS positions that became available in their branches based upon the three main assessment factors (performance, tenure and geography) under the program. It was necessary to keep things consistent across Canada in the implementation of the program, and it would have been unnecessarily disruptive to the operations had the promotions not taken place.

[59] On the other hand, Ms. Clarke testified that Mr. Miller was not, in her opinion, ready to be promoted to an MFS role as he was still new to and learning the MCSS position when he was demoted. Because of the steep learning curve he faced, it would have taken him two years to reach the level of performance needed for that position. As noted above, she also had concerns about his performance.

[60] Ms. Clarke testified that at that time there were no vacant, suitable roles available in the Owen Sound branch and that it was not large enough to allow the establishment of an MFS position. There were also no comparable level 7 pay positions within the retail banking system at the time.

[61] As a result, Mr. Miller was offered the position of MCS at the Port Elgin branch approximately 45 minutes from the Owen Sound branch at pay level 6 with his pay remaining at level 7 for two years and a \$500 increase in annual pay for his additional travel expenses.

Mr. Miller elected to decline this position and instead took the other vacant position of FA at the Port Elgin branch at the level 6 pay rate with his pay remaining at level 7 for two years and the \$500 salary increase.

[62] Ms. Clarke testified that she was invested in and committed to Mr. Miller's future career path at the Bank. She described her decision due to the program's implementation as "heart breaking", as she had only recently recruited and moved him from Saskatchewan partly for reasons of the diversity and inclusiveness that she supports. She also testified that she tried to get Mr. Miller to accept a FA role closer to his parents' home in Toronto and that she would support such a move for him even though it meant losing him from her district.

[63] In particular, Ms. Clarke testified that race, colour and disability were not factors in her decisions about "mapping" any employee, including Mr. Miller, into alternate roles under the program or that more generally the program itself and its implementation took these factors into consideration in promotions or demotions.

[64] Ms. Clarke is Indigenous and supports inclusive initiatives to promote diversity in the workforce which was one of the reasons she had recruited Mr. Miller to Owen Sound. She couldn't map Mr. Miller into an equivalent position or promote him under the program as there were no available vacant positions other than the two positions he was offered in Port Elgin and he was not ready for an MFS role. She was a very credible witness, and I believe that her decision was not based on his race, colour or disability but rather on her assessment of his performance, skills and readiness.

[65] Ms. Clarke stated that she was never made aware of Mr. Miller's disability before he went on medical leave.

V. LEGAL FRAMEWORK

[66] Section 7 of the CHRA provides, in part, 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. Race, colour and disability are among the prohibited grounds of discrimination included in section 3 of the CHRA.

[67] A complainant alleging conduct in contravention of the provisions of the CHRA bears the onus of proving a *prima facie* case of discrimination. The applicable standard of proof is the civil standard of the balance of probabilities. To discharge the onus, a complainant must establish at least a simple “connection” or “factor” rather than a “causal connection” between the impugned conduct and a prohibited ground under the CHRA. (see *Quebec (Commission des droits de la Personne et droits et droits de lad Jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39 at paras 64-65 [*Bombardier*].)

[68] A *prima facie* case is “one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of answer from the respondent-employer.” (see *Ontario Human Rights Commission and O’Malley v. Simpsons-Sears*, [1985] 2 SCR 536 at para 28 [*O’Malley*].)

[69] To establish a *prima facie* case, the complainant must show that it is more likely than not that: 1) they have one or more characteristics protected from discrimination under the CHRA; 2) they were subjected to treatment that had an adverse impact with respect to employment; 3) one or more of their protected characteristics was a factor, but not necessarily the only factor, in the adverse treatment and impact. (see *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (CanLII) at para 69 citing *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 at para 33 [*Moore*] and *Bombardier*, at paras 60-63.)

[70] A complainant is not required to prove that the respondent-employer intended to discriminate in order to establish a *prima facie* case as some discrimination involves multiple factors and is unconscious. Indeed, it is often said that discrimination is not a practice that would ordinarily be displayed openly or even practiced intentionally. As a result, the Tribunal must examine all of the circumstances, invariably often involving circumstantial evidence, that both support and undermine the allegation of discrimination to determine if there exists what the Tribunal has called the “subtle scent of discrimination”. (see *Bombardier* at paras 40-41; *Basi v. Canadian National Railway*, 1988 Can LII 108 (CHRT); *British Columbia (Public Service Employees Relations Commission) v. BCGSEU*, [1999] 3 SCR at para 29).

[71] Once a *prima facie* case has been established, the burden shifts to the respondent to refute the allegations of discrimination or demonstrate that the conduct was justified,

within the framework of the exemptions provided under the CHRA. If the conduct cannot be refuted or justified, discrimination will be found to have occurred. (see *Dulce-Crowchild v. Tsuut'ina Nation*, 2020 CHRT 6 AT paras 10-11 and *O'Malley* at para 28 and *Moore* at para 33.)

[72] Where a complainant has a complaint that is not linked to an enumerated prohibited ground of discrimination under the CHRA, the complaint cannot succeed. (see *Ozcevik v. Canada (Revenue Agency)*, 2021 FC 13 (CanLII) at para 20.)

VI. PARTIES' SUBMISSIONS

[73] Mr. English, in his submissions on behalf of Mr. Miller, acknowledged that the issue and the scope in this case related to Mr. Miller's demotion due to the implementation of the program, not to other allegations that Mr. Miller raised initially, but the Commission did not refer to the Tribunal. He took no issue with the Bank's right to reduce staffing levels for legitimate business reasons. He also admitted that there was no obvious or blatant *prima facie* evidence of discrimination against Mr. Miller in this case, nor did he suggest that the program itself deliberately used race as a factor in identifying impacted employees.

[74] Mr. English argued that just as the Bank was motivated to initially hire and then promote Mr. Miller as a Black man, in part, because of its support for the principles of EDI in the workplace, it should have also been motivated by the same principles in the redundancy/termination process under the program. He argued that the failure of the Bank to do so in this case amounted to the adverse effect of discrimination.

[75] In his argument, Mr. English stated that "Tara employs subjective criteria when hiring and promoting. The bank, when screening for redundancy termination uses objective parameters (performance, tenure, location). Thus, the subjective criteria which led to the hiring were not present in the firing or reallocation. This asymmetry is tantamount to adverse effect discrimination which must be considered with any *prima facie* criteria in order to avoid creating further systemic discrimination. The bank, therefore, creates a culture of *prima facie* or direct discrimination in its reverse screening redundancy termination protocol."

[76] Although section 10 of the CHRA was not cited in this complaint, the referral by the Commission or the SOPs of the parties, Mr. English argued that “On a broad reading of the Act and section 10, the asymmetrical protocols of luring diversity candidates such as Christian to work for the bank only to treat them like mere numbers is a method of perverting the intention of the Act and, arguably, a breach of section 10 in particular.”

[77] Ms. Meyer, on behalf of the Bank, acknowledged that the first two tests in the *prima facie* analysis of employment discrimination under section 7 of the CHRA as referred to in paragraph 69 above had been met by Mr. Miller as he was clearly a Black man and had been adversely affected by the program.

[78] Ms. Meyer argued that there was insufficient evidence adduced at the hearing by Mr. Miller that the Bank had discriminated against Mr. Miller in the formation or implementation of the program. In particular, he had not led any evidence to establish a connection between his race, colour or a disability and his demotion from an MCSS role in Owen Sound to an FA role in Port Elgin.

[79] Ms. Meyer submitted that Mr. Miller’s evidence about race being a factor in his demotion and the promotion of the two White employees who had been in the same situation as him was purely speculative and did not support the connection required for a finding of a *prima facie* case of discrimination on the balance of probabilities.

[80] According to Ms. Meyer, the Bank had justification for the differential treatment between Mr. Miller and the two White employees promoted that was not connected to any protected ground. The differential treatment was based on the criteria used in the program which was not race-based. Rather, it was based on their far superior performance than Mr. Miller as the first factor and their far greater tenure as the second factor together with the fact that they were already in and familiar with the branches where they were promoted resulting in greater continuity for employees and customers.

[81] Ms. Meyer stated in her argument that “the decision of which role to map him into after it was determined that his MCSS role was being eliminated was consistent with the process and procedures determined by the Bank for such placement and reflective of his learning and development at the time”.

[82] Ms. Meyer stated that “that there is simply no basis in law to find that Mr. Miller was discriminated against” either directly or indirectly and that he “has failed to meet his burden in this matter.” As such, she submitted that the complaint should be dismissed.

VII. ANALYSIS

[83] Clearly, Mr. Miller is a Black man who has suffered an adverse impact as a result of the program. It doesn't surprise me that Mr. Miller is frustrated and angry at being recruited and promoted, partly for EDI reasons, to an MCSS position with a move from Saskatoon to Owen Sound, when the Bank knew the position was going to be eliminated under the program, and then demoted less than a year later in the implementation of the program.

[84] It seems unusual and difficult to understand why the Bank in January of 2017 approved of the program that included plans to eliminate the MCSS position in Owen Sound but then hired Mr. Miller to the position of MCSS in Owen Sound in March of 2017 with Ms. Clarke knowing that it would take him two years to fully learn the job. This seems like a recipe for Mr. Miller's failure.

[85] To add to his frustration and anger is the fact that the only other two impacted employees in his district who were MCSSs were White men who were actually promoted under the program to newly created positions in their current branches with a higher salary level than before while Mr. Miller was demoted to a position with a lower salary level than before.

[86] That said, I accept the evidence of the Bank that there were legitimate and valid reasons for the two White employees to receive their promotions instead of Mr. Miller on the basis of the protocols of the program that used performance, tenure and location as the key factors and did not take race, colour or disability into account.

[87] It is unfortunate that the Bank could not have found some way to avoid demoting Mr. Miller or at least keeping his then current salary level for a longer period than two years, given the circumstances of his promotion and then his abrupt demotion while he was still in learning mode for a position that became redundant soon after he was promoted into it.

[88] I am satisfied on the evidence, however, that Ms. Clarke made her final decision to “map” Mr. Miller into the FA position in Port Elgin not because of his race, colour or a disability but because there were no vacancies in acceptable alternative equivalent positions in the Bank and because he was not ready to be promoted.

[89] I am also satisfied on the evidence that the program itself as conceived and implemented was neutral with respect to race, colour or disability and did not consider any protected characteristics under the CHRA to determine who was impacted.

[90] There was no evidence presented at the hearing about any other Black employees or marginalized groups of employees impacted by the program. Mr. Miller’s evidence about the lack of representation of Blacks or other marginalized groups of employees in the Bank’s workforce was very general and impressionistic and not backed up by any specifics or statistics.

[91] This is not a case of adverse effect discrimination. There was no evidence presented that this neutral program, which was applied equally to everyone without reference to any protected characteristics, had the unintended or disproportionate and negative impact in its protocols of discriminating against a marginalized group or individual on the basis of their race, colour and/or disability.

[92] There is no legal requirement or mandate that an employer must provide for EDI in reorganization programs like the one in this case involving redundancies, demotions and terminations where the program is neutral and does not consider the protected characteristics of any impacted employees in its implementation. In other words, there is no violation under the CHRA in such a case under section 10 or any other section of the CHRA unless there is proof of a connection or factor between the impugned conduct and a prohibited ground of discrimination under the CHRA.

[93] As per the Supreme Court of Canada 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.”

[94] However unfortunate and adversely impactful the circumstances in this case were for Mr. Miller, there is insufficient evidence on the balance of probabilities that his race, colour or a disability was a factor in his demotion under the program so as to constitute discrimination, directly or indirectly, against him by the Bank, contrary to section 7 of the CHRA.

VIII. ORDER

[95] Accordingly, Mr. Miller's complaint in this matter has not been substantiated and is therefore dismissed.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
August 1, 2024

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2700/7621

Style of Cause: Christian Miller v. Toronto-Dominion Bank

Decision of the Tribunal Dated: August 1, 2024

Date and Place of Hearing: March 26-27 & May 29-31, 2024

By videoconference

Appearances:

Christian Miller, for himself (March 26-27, 2024)

Daniel English, Representative for the Complainant (May 29-31, 2024)

Lisa M. Meyer, for the Respondent