CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

MARY MELLON

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

HUMAN RESOURCES DEVELOPMENT CANADA

Respondent

DECISION

MEMBER: Michel Doucet

2006 CHRT 3
2006/01/25

I. INTRODUCTION

[1] On May 27, 2002, Mary Mellon (the "Complainant) filed a complaint under section 7 of the *Canadian Human Rights Act* (the "*Act*") against Human Resources Development Canada (the "Respondent"). In her complaint she alleged that the Respondent engaged in a discriminatory practice on the ground of disability in a matter related to employment.

[2] The Complainant alleges that she suffers from a disability; more specifically, she testified that she suffers from panic and anxiety attacks. She further asserts that a series of events related to these attacks occurred in the workplace between April 17 and August 30, 2001, creating conditions that led to the Respondent's decision not to renew her contract.

[3] During the hearing, the parties requested that the issue of liability and the issues of damages and relief, if any, be dealt with separately. I agreed to the bifurcation of the hearing. Therefore, this decision will deal only with the issue of liability. Since I have found the complaint to be substantiated, another hearing will be ordered to deal with the issues of damages and relief.

II. HISTORY OF THE COMPLAINANT'S EMPLOYMENT WITH THE RESPONDENT

[4] The Complainant started working for the Respondent on November 25, 1991 as a term employee. She held the position of CR-03, "Reception and Enquiries" in the Respondent's Hamilton office. This employment was to end on December 31, 1991 but three term extensions were granted. It finally terminated on May 1, 1992.

[5] She was given another term appointment on December 31, 1992, at the same position and classification. This term ended on March 31, 1993. A new term appointment, at the same position and classification, was made on December 2, 1993, with two more extensions, one on December 30, 1993, and another on March 1, 1994. This period of employment terminated on March 23, 1994.
[6] The Complainant testified that she enjoyed her work in this position. She added that the workplace provided a happy and pleasant environment. A letter of recommendation, dated December 7, 1993, prepared by the Respondent's Supervisor of Employment Services, referred to the Complainant as an employee who "diligently carr[ies] out her duties with efficiency and effectiveness" and as "a pleasant individual who is easy to work with."
[7] On July 28, 1994, the Complainant was offered another term of employment, this time in the Respondent's Burlington Office. This was again a CR-03 position. Two other term extensions were offered to the Complainant in this position, one on October 6, 1994 and the other on December 29, 1994. The last term came to an end on March 22, 1995.
[8] On February 24, 1995, her supervisor in the Burlington Office, Mr. Rick Levert, wrote that the Complainant "has proven herself to be a most reliable and dependable worker." He further added that "[s]he adapted well to the routine of our office and has become a valuable member of our staff in the short time she has worked here. Her pleasant manner and friendliness enabled her to quickly gain the respect of other staff members and her helpful and accommodating attitude towards working with others has been a positive influence for our office."
[9] In the summer of 1997, the Complainant was contacted by Ms. Marg Garey, manager of the Respondent's Oakville office. They had previously met in 1991 when the Complainant was working in the Hamilton Office. Ms. Garey offered the Complainant term employment in the Oakville office. The Complainant accepted, and from July 7, 1997 up to September 25, 1997, she worked in a CR-04 position, as a "Client Service Representative". The difference between a CR-03 and a CR-04 job classification is that a CR-04 job involves more decision-making and multi-tasking.
[10] According to the Complainant, this position was "very challenging". She added that although she enjoyed her work, at one point it became too much for her and it started to affect her health. On October 29, 1997, she saw Dr. Charanjeat Mander, who was filling in for her regular family doctor. Dr. Mander eventually became the Complainant's family doctor. Dr. Mander decided to put the Complainant off work for a period of three weeks. She also prescribed Paxil, an antidepressant. The Complainant was on sick leave from October 17 to November 14, 1997. The memo in her file indicated "emotional stress related to work/cannot cope, unable to work until further notice."
[11] The Complainant testified that she had informed her manager of her medical condition. She referred to a telephone conversation they had around that period. Her understanding of this conversation was that Marg Garey understood what she was dealing with. She added that she had informed her manager that she was on antidepressants and that they were having a really bad effect on her. She said that she indicated that under these circumstances she could not return to the workplace. Marg Garey testified that she had no recollection of this conversation.
[12] The Complainant returned to work on November 17, 1997. On February 2, 1998, Ms. Garey offered the Complainant a lower level deployment to a CR-03 (Program

Support Clerk) position. The Complainant said that she accepted this lower level deployment because it provided a more stable environment.

[13] The Complainant was again hired, on a term basis, at the Oakville office at a CR-03 level, as service delivery support clerk, on May 11, 2000. This CR-03 position is referred to as her "substantive or home base position". This appointment was renewed without break in employment, on July 7 and September 22, 2000 and on March 30, 2001. As of July 9, 2001, she was still working under this term but acting in another position at the CR-4 level, as a service delivery assistant.

[14] The workplace was described as being "self-directed", meaning that employees were being asked to sort out any problems within their team. This also meant that when someone was absent in the unit, then the unit had to work together to cover that absence.

[15] According to the organizational chart dated July 9, 2001, the Oakville office had seven service delivery assistants at the CR-04 level and thirteen and a half program officers. During the summer period the number of program officers was actually "inflated" by four because of the summer career placement program. These four additional officers were only temporary and would have been gone by the Fall.

III. THE EVENTS OF APRIL TO AUGUST 2001

[16] Ms. Debby McIntyre was appointed service delivery manager at the Oakville office on April 17, 2001, to replace Marg Garey. She then asked Rick Levert, the service delivery coordinator, to oversee both the Foreign Worker Unit and the Labour Market Information Unit in addition to the in-person services.

[17] Mr. Levert described this period as a transition stage. He added that one of the proposed changes was to work the Complainant into becoming the service delivery support person for the Foreign Worker Unit. This was a change for both the Unit and the Complainant since the Unit had never had a dedicated support person until that time. Prior to that period, the Complainant and Diann Luksa were handling the support functions for the Unit. The decision to make these changes was taken by Debby McIntyre, Dal Swackhammer, the supervisor of the Program Unit and Mr. Levert. Mr. Levert did not recall having any special conversation with the Complainant about these changes.

[18] Debby McIntyre kept notes of her various meetings with the Complainant and other employees. She stated that it was her practice to make notes of meetings with employees. She would write her notes immediately following these meetings. These notes were very helpful in reconstructing the events of that period as the recollection of the various witnesses had become, in many cases, blurred by the passing of time.

[19] Prior to April 17, 2001, Ms. McIntyre admitted that she had no knowledge that the Complainant had had any problems performing her duties. She also admitted that the Complainant's work performance never came up in her discussions with Marg Garey when she took over her position in Oakville.

[20] The Complainant first met with her new supervisor on June 21, 2001. According to Debby McIntyre's notes, this meeting was requested by the Complainant. Her notes further indicate that the Complainant told her during this meeting that she was experiencing a reoccurrence of a health issue in the area of her neck which was causing her stress and anxiety. The Complainant admitted that she had had a growth removed in the area of the neck in March 2000.

[21] Debby McIntyre also noted that the Complainant told her that she had consulted her doctor but had not shared with her the full extent of her situation and concerns for fear the doctor would advise her to stop working. Ms. McIntyre added that the Complainant indicated that in the past she had not given her former manager, Marg Garey, all her medical notes, choosing instead to ignore the advice of her doctor to take sick leave during previous illnesses. The Complainant disagreed with this statement, saying that she had never ignored a medical certificate issued by her doctor. She added that it was true that she was hesitant about taking medication because of the bad reaction she had had in the past while on medication.

[22] On June 25, 2001, Ms. McIntyre met with Monica Kington and Esther Davis, two officers in the Foreign Workers Unit. In her notes, she states that they came to her office to let her know that they had some concerns regarding the Complainant. She noted they had observed that although the Complainant was at her work station, her work was piling up and was not getting done.

[23] On June 27, 2001, the Complainant was invited to a meeting with Monica Kington, Esther Davis and Pat Richard, all officers of the Foreign Workers Unit. The purpose of the meeting was to discuss how to deal with the extra workload in the unit which was created by the fact that Diann Luksa was on sick leave. Ms. Luksa was absent from work from June 18 to July 13, 2001. During the meeting the Complainant was asked if she would take on the extra work. She testified that she tried to discuss her health but that Monica Kington replied that "they didn't need to hear that." Monica Kington testified that she had no recollection of this exchange. She added that she remembered that the Complainant was upset during this meeting and that she indicated that she wanted to speak with her supervisor. Pat Richard testified that the Complainant had indicated that she would not do the work. The Complainant said that at the end of the meeting she agreed to take on this extra work.

[24] The Complainant stated that following this meeting, she felt that the perception of her co-workers was that she did not want to do her work. She felt that because of this, her relationship with them was falling apart.

[25] Immediately following this meeting, the officers went to Ms. McIntyre to give her some feedback. Ms. McIntyre noted that they had concerns that the Complainant did not want to join or participate in the meeting and that she became agitated and upset. Ms. McIntyre was also informed that the Complainant had raised issues regarding her health during this meeting. During her cross-examination, Ms. Kington said that she had not given this information to Ms. McIntyre. Pat Richard did not recall any discussions regarding the Complainant's health during that meeting. Since Esther Davis did not testify, I either have to accept that she is the one that told Ms. McIntyre that this issue was discussed at the meeting or that both Ms. Kington and Ms. Richard do not have a proper recollection of what was said at that meeting. Ms. McIntyre certainly did not make this up and I conclude that the Complainant's health was raised at the meeting and afterwards discussed with Ms. McIntyre.

[26] Ms. McIntyre added that the fact that someone ended up being upset was not helpful in finding a solution to how the work would get done. She further noted that the officers had indicated that the Complainant seemed to like doing the lower priority work, like mailing out kits and typing letters, instead of doing data input. At that point, she indicated

that she was mainly preoccupied with understanding what was needed operationally to get the work done, but did not become directly involved.

[27] Pat Richard also met with Rick Levert to inform him about what was discussed during this meeting. On cross-examination, Mr. Levert said that he was not aware that it was during this meeting that the Complainant was first informed that she was to assume all the duties of the Foreign Worker Unit. He added, that while he could not remember when, she must have been informed of these changes before that meeting, though probably not formally. However, he agreed that it was possible that this issue came up for the first time at that meeting.

[28] The Complainant testified that the added workload started to have an effect on her health. By the end of June 2001, she said that she was experiencing anxiety attacks and was feeling very stressed. She added that she did not have the "skills" to do Ms. Luksa's job, although she did attempt to do it. She felt that she was letting down the officers of her unit because she was unable to complete all of her work. Up until then she had been responsible for the "live-in caregiver applications" which, in her words, were simpler to learn. She was now expected to do the "industrial applications data entry" for which she says she had no training except for maybe twenty minutes with Diann Luksa.

[29] The Complainant described her anxiety attacks as causing "difficult[y] to breathe and think clearly". She added that they would last from five to ten minutes and afterwards she would be fine. The Complainant said that on or about June 28, 2001, she had explained her situation to her supervisor, Rick Levert. Mr. Levert testified that during this meeting the Complainant was very emotional. She kept repeating that she felt that they were taking the jobs of two people and compressing them into one. He said that he tried to explain that the duties were reasonable for one person to perform. The issue of training was also discussed. He indicated that she did make reference to the fact that she could not let her health be negatively affected by her work. He also added that she had indicated that she was seeing her doctor and that after she had seen her she would get back to him.

[30] On June 28, 2001, the officers met again with Ms. McIntyre. Ms. McIntyre's notes indicate that there was then a real concern in the unit. The officers told her that the Complainant had gone home sick without telling them, which, according to Ms. McIntyre, would be the normal practice. She added that at that time she was looking "at this whole issue of controllables and knowing that Mary was perhaps dealing with a previous health condition, a recurrence of this neck situation... and I didn't know what that was. You know, my mind was taking me to tumours and things like that?" She further added "I looked at what Mary's job was in the Foreign Workers Unit and I looked at what the jobs were in talking with the other supervisors and the other clerk... I was trying to do an analysis of what is the best clerical job in the office in terms of controllables, in terms of flexibility, stress level." It is clear that by this time Ms. McIntyre knew that there was a health issue, although she did not know the extent, and that this health issue was having an impact on the Complainant.

[31] The Complainant left a voice mail with Ms. McIntyre on June 29, informing her that she would not be at work since she was not doing well. She also mentioned that she needed to resolve some issues before returning to work. On that same day, she saw Doctor Huschilt, who at that time was covering for Doctor Mander. She was then complaining of neck pains and stress at work. Doctor Huschilt decided to send her for x -

rays of her neck. He also prescribed Flexeril, a muscle relaxant, and Tylenol, an analgesic.

[32] Rick Levert also received a voice mail from the Complainant on June 29, 2001. She informed him that her doctor had put her off work indefinitely and that she would keep him up to date. He also received a medical note dated June 29, 2001 from Dr. Mander indicating that she was under medical care and unable to work.

[33] The Complainant was absent from work from June 30, 2001 to July 23, 2001. A medical note dated July 19, 2001 indicated "work stress". The Complainant added that she had given this medical note to her employer.

[34] Rick Levert contacted the Complainant on July 3, to inquire about the length of her absence. On July 9, the Complainant left a voice mail for Rick Levert in which she indicated that she hadn't received the "test result" from her doctor. She also added that "it might be possible for her to come back to work soon but before she returns however, if she does return back, she does need to clarify a few things." On cross-examination, the Complainant explained that what she was referring to in this voice mail was the problem she was experiencing with the workload and the stress this was causing her.

[35] On her return to work on July 23, 2001, she said she felt that nothing had changed. According to the Complainant, the attitude of management was that her position could be done by one person. The Complainant testified that during this period she was trying desperately to hold on to her job. She added that she felt really bad because the relationship that she had with her co-workers in the unit had disappeared.

[36] She said that she met Rick Levert on July 25, 2001. The Complainant added that she got the feeling from this meeting that there would not be any help with her workload. The message she was getting was that her job was doable by one person.

[37] Rick Levert took notes of this meeting. This was the first time that he took notes of a meeting with the Complainant. He said that he felt that the situation was getting complicated and that after discussing the matter with Debby McIntyre they had decided that it would be a good idea to take notes of these meetings. During this meeting he noticed that the Complainant was not as emotional as the previous meeting. He added that she seemed more determined. She informed him that her health was not good and that this was a permanent condition. She felt that her illness was work-related. Mr. Levert remembers telling her that the duties associated with her job were reasonable. He also remembers discussing with her the question of her reverting back to her CR-03 job. He advised her that in the new organization of the office, that job was no longer required. The Complainant was very definite that she could not handle the job and that she had decisions to make. Mr. Levert did not ask her to elaborate on her medical condition.

[38] The Complainant wrote a note to Rick Levert and to Debby McIntyre on July 26, 2001. She was requesting clarification regarding her duties and responsibilities. She also mentioned that she wanted this issue solved "as the health problem due to the stress/workload in the past is now returning and [the] extra workload has contributed to this problem."

[39] On that same day, Rick Levert met with Monica Kington, Esther Davis and Pat Richard to discuss the operational working of the Unit. Mr. Levert made some notes of this meeting. Most of these notes refer to the performance of the Complainant in the Unit and are observations made by her co-workers.

[40] Debby McIntyre was away on vacation from July 23 to August 7, 2001. On her return, the Complainant was starting her two weeks' vacation, so, as Ms. McIntyre stated, they were "like two ships passing in the night."

[41] On August 8, 2001, Ms. McIntyre prepared another note which reflects a visit to her office by Esther Davis. Ms. Davis related to her that since the Complainant's return to work from her sick leave, she had observed that she had "resumed her duties to a degree" and that she "was working at about 50% of her normal productivity level." Ms. Davis, according to the note, also referred to a meeting between the Complainant and Rick Levert on July 25 where she "observed" that the Complainant burst into tears. Rick Levert testified that this did not happen during the July 25 meeting, but at the previous meeting, on June 28, 2001.

[42] On August 9, 2001, Ms. McIntyre wrote a memo to the Complainant answering the Complainant's note of July 26, 2001. She informed the Complainant that Rick Levert had reviewed her job duties, in consultation with other staff members, and had come to the conclusion that the job was reasonable for one person. She further added: "I share your concerns regarding your health, and want to discuss your concerns".

[43] The Complainant returned from her vacation on August 20, 2001, and on that day she met with her manager. At this meeting, Debby McIntyre presented to the Complainant a copy of the memo she had prepared on August 9, 2001. The Complainant testified that her manager looked irritated and seemed frustrated that she was still requesting help. The Complainant recalls having discussed her health condition with her manager during this meeting but stated that she received no suggestions from her on how to approach this problem. She said that she had taken that "extra step" to explain to her manager that she was suffering from anxiety attacks and stress. The Complainant testified that she left this meeting feeling very upset and convinced that her job in the Oakville office "was gone."

[44] According to Debby McIntyre's notes, the Complainant indicated that while she felt that she was capable of doing the whole job, she still felt that her health was an issue. She added that the Complainant mentioned that she would do her best and see how her health would hold out. The Complainant told her that she was suffering from increased anxiety attacks which were triggered by job-related stress. According to Ms. McIntyre, this was the first time that the Complainant had mentioned this to her.

[45] Esther Davis and Monica Kington approached Debby McIntyre on August 21, 2001, regarding the Complainant. Again according to Ms. McIntyre's notes, they were observing that although the Complainant appeared "very busy" her work was lagging behind. They indicated that they were having difficulties with her ability to set priorities and to perform her duties.

[46] On August 23, 2001, the Complainant went back to see her manager to bring her the statistics she had compiled regarding the phone calls she had to deal with in the Foreign Workers Unit. According to the Complainant, her manager told her that she was too busy to deal with them and told her to bring this matter up with Rick Levert. In her evidence, Debby McIntyre does not disagree with this. In her note, she indicates that the Complainant was teary during this meeting. She added that she inquired how she was doing and the Complainant answered that she was not doing very well and that she had to make some decisions about her job and her health. Ms. McIntyre added that she did

encourage the Complainant to see her doctor and to take time off if that is what she needed.

[47] August 30, 2001 was the Complainant's last day at work. The Complainant recalls that the files kept piling up and that she was getting "sicker and sicker". She also recalls that Pat Richard was getting upset that she wasn't getting through the files. She testified that on that day she had a lot of Foreign Recruitment files for the industrial applications which needed attention. She remembers sending an e-mail to Debby McIntyre at 8:05 a.m., requesting help with these files because there was a deadline and they needed to be dealt with.

[48] In her written notes of that day, Ms. McIntyre indicates that she went over to the Complainant's work station after she received the e-mail. The Complainant mentioned that she was still having problems with some of the filing. Ms. McIntyre then indicated that Pat Richard was busy and that she would ask Diann Luksa to help her. Around 10:45 a.m., she noted that Glen Harris, a co-worker of the Complainant, told her that the Complainant was in the lunch room crying. She added that she went over to get the Complainant and offered her office to help her compose herself before she was driven home. The Complainant said to her that she was having an anxiety attack. After she had calmed down, she added that the CR-04 job "was just too much for her". She also indicated that her health was being affected and that she could not continue working.

[49] The Complainant testified that during this "attack", she was having difficulty breathing and that she felt as if she was going to pass out. She added that she was shaking, that she was emotionally upset and that she could not think clearly. She further added that this was not the first time that she had experienced a panic attack during that summer. These "attacks" would last for about ten minutes and afterward she would feel "unwell".

[50] In her evidence, Ms. McIntyre stated that she asked the Complainant whether she had seen her doctor recently and the Complainant indicated that she had the day before and that the doctor wanted her to take some medication. Ms. McIntyre testified that she encouraged the Complainant to see her doctor again as soon as she could and to seriously reconsider the medication.

[51] Ms. McIntyre indicated in her notes of August 30, 2001 that she had told the Complainant that she felt that, for her own well-being as well as the functioning of the unit, she could not offer her the CR-04 job after September 30, 2001. During her examination, she added that she didn't want the Complainant leaving that day thinking that she had to come back to that job. Ms. McIntyre also stated that she informed the Complainant that there were no CR-03 jobs available for her in the Oakville and Burlington offices. She offered to approach the corporate services manager of the Respondent in Mississauga East to see if there might be CR-03 opportunities elsewhere.

[52] On September 28, 2001, the Complainant received a letter from Debby McIntyre informing her that her current term CR-03 contract was extended for one month "as an interim staffing measure, in order to make you aware of other CR-03 vacancies in Peel-Halton-Dufferin, and market you accordingly, if you wish."

[53] On October 10, 2001, Debby McIntyre had a telephone conversation with the Complainant at which time she told her that there was possibly a CR-03 position in the Mississauga West office of the Respondent. The Complainant said that she would be

happy to meet with Vicky Shea, the manager of that office, to discuss this possibility but she never heard from Ms. Shea.

[54] On October 22, 2001, the Complainant wrote a letter to Ms. McIntyre in which she referred to her employer's obligation to accommodate her. She was requesting to be kept on leave without pay until she was well enough to return to work.

[55] She received an answer to this letter on October 29, 2001. Her manager stated, amongst other things, "[t]he "Duty to Accommodate" pertains to technical aids in the context of workplace accommodation for persons with disabilities - and I believe there is some confusion in your suggestion that accommodation includes contract extensions, in a location where there is no job."

[56] On May 27, 2002, the Complainant filed a complaint with the Canadian Human Rights Commission.

IV. THE EVIDENCE OF DOCTOR CHARANJEAT MANDER

[57] The only medical evidence presented by either party was that of Dr. Charanjeat Mander, the Complainant's family doctor.

[58] Dr. Mander studied medicine at the Christian Medical College, in the City of Ludhiana, Punjab, India, where she obtained her medical degree in 1965. After her graduation, she moved to Glasgow, Scotland, with her husband, where she did one year of residency in psychiatry. In 1974, the family moved to Canada where she did her internship in internal medicine at St. Joseph Hospital (now the Queensway Health Centre) in Toronto. In 1979, after having successfully passed her licensing exam, she started her medical practice, in Burlington, where she has been practicing as a general practitioner ever since.

[59] Dr. Mander was qualified as an expert in general family clinical practice and was allowed to give opinion evidence as the treating physician of the Complainant.

[60] According to Dr. Mander, anxiety is a very common complaint in a practice such as hers. She added that because of the shortage of psychiatrists, general practitioners play an important role in treating people with anxiety. The most common symptoms of anxiety are nervousness, palpitations and lack of sleep. Normally, when a patient comes forward with these symptoms, the doctor must listen to them carefully and identify the reasons for the anxiety. In such cases the patient's history is the most important thing.

[61] Dr. Mander indicated that she would, in these cases, recommend first rest or a few days off work. The second step in the treatment would be to prescribe a mild tranquillizer, for example Ativan. She said that she would usually prescribe, at this stage, five milligrams sublingual to see how the patient responds. If this does not work she would consider moving up to a stronger tranquillizer. The third step would be to refer the patient to a specialist.

[62] Dr. Mander testified that she first saw the Complainant, as her family doctor, on October 5, 1999, although she had seen her on October 29, 1997, when she was replacing the Complainant's previous family doctor.

[63] Dr. Mander's clinical notes indicate that the Complainant was seen on June 26, 2001, by Dr. Huschilt, who at the time was covering her practice. In her notes she indicates that Dr. Huschilt mentioned that during this visit the Complainant complained of neck pain and stress at work. The Complainant again saw Dr. Huschilt on June 29, 2001, complaining of "stress at work". Dr. Huschilt's diagnosis was "anxiety" and he prescribed time off-work.

[64] Dr. Mander saw the Complainant on July 19, 2001. She noted "stress at work - too much work. Neck pains. Needs some changes at work. Doing work as two people. Emotional stress. Extremely distraught." At that time the Complainant had been off work since June 29, 2001. The Complainant told Dr. Mander that she wanted to return to work but with some changes in the workplace.

[65] The doctor saw the Complainant again on August 3, 2001. Although there is no reference to this in her notes, Dr. Mander testified that the Complainant was still tense. She informed her doctor that she had written to her manager about her work-related problems, but that the manager at that time was on holidays. She told Dr. Mander that she was going to take 10 days of vacation which should help her get a "little bit more settled."

[66] The Complainant's next appointment was on August 28, 2001. She had just returned to work. In her notes Dr. Mander wrote: "Anxiety attacks, palpitations, nervous, shortness of breath once or twice a week [...] typical anxiety." At the hearing, Dr. Mander added that during this visit the Complainant was crying, was very nervous and had shaky hands. The Complainant told her that she was very nervous and had difficulty sleeping. Dr. Mander prescribed Ativan, a tranquillizer, at 0.5 milligrams, sublingual, to be used as required. She also noted that the Complainant was quite upset about her workload.

[67] Dr. Mander saw the Complainant again on August 31, 2001. She noted that the Complainant told her that she could not handle her job; that it was too much pressure. She also noted that the Complainant was crying and that she was very upset. The Complainant told Dr. Mander that she did not want to go back to her job under the present circumstances. She wanted management to take away the extra duties which she claims had been given to her. Dr. Mander noted that "panic attacks are starting from pressure." She gave the Complainant a note which indicated that she was "to stay off work for [an] indefinite period. Extreme stress at job situation. Too much work was loaded on her."

[68] The Complainant returned to see her doctor on September 4, 2001. Dr. Mander noted that she was feeling better because she was off work. The Complainant told her doctor that she was sleeping better and had "no more panic feelings." Dr. Mander added that the Complainant was not on antidepressants at this time because she was not "depressed."

[69] On September 10, 2001, Dr. Mander made arrangements to refer the Complainant to a specialist, Dr. V. M. Celine Kumiranayake, a clinical psychiatrist in Burlington. According to Dr. Mander, the Complainant saw Dr. Kumiranayake on September 18, 2001. Dr. Kumiranayake, who is now retired, was not called as a witness. She sent a report of her evaluation of the Complainant to Dr. Mander which she received on September 20, 2001. After this meeting, Dr. Kumiranayake did not see the Complainant again.

[70] According to Dr. Mander, Dr. Kumiranayake's diagnosis of the Complainant was "acute panic attack secondary to work related stress." In her report, Dr. Kumiranayake wrote "[t]his lady seems to have had an Acute Panic Attack secondary to Work Related Stress." (Emphasis added)

[71] The next notation by Dr. Mander is for September 25, 2001. The doctor noted that the Complainant was feeling "happier", had a "positive attitude" and no "panic". The Complainant told her doctor that she didn't want to take any medication as she was now feeling better.

[72] On October 18, 2001, the Complainant again saw Dr. Mander. According to the doctor's notes, she was beginning to feel stress due to "some problems with [the] employer...regarding disabilities." Dr. Mander did not make any physical observations of the Complainant.

[73] The next appointment was on November 9, 2001. The doctor noted that the Complainant was "tired, depressed, anxious, very, very tense". She decided to prescribe Paxil, an antidepressant, because she felt that the Complainant was not improving despite being off the job. On cross-examination, she added that the Complainant told her afterwards that she never took the antidepressant.

[74] On December 14, 2001, Dr. Mander saw the Complainant. The Complainant seemed to be doing better and she verbalized her intention to go back to work. Dr. Mander gave the Complainant a "Doctor's Note" indicating that she was ready to return to work full time.

[75] During her cross-examination, Dr. Mander admitted that she personally didn't have any idea of what was going on in the Complainant's workplace and that for this information she relied solely on the Complainant. She further added that her role was to observe the patient and not to get involved in what she described as the "legal hassles between the workplace and the patient." She also indicated that the Complainant was suffering from "reactive depression" to her workplace which does not mean that the Complainant was suffering from "clinical depression".

V. LEGISLATION

For the purpose of this case the relevant sections of the *Act* are:

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, marital status, family status, disability and conviction for which a pardon has been granted.

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.

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.

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, 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.

25. In this Act

"disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

VI. THE ISSUES

The issues in this proceeding are the following:

(1) Has the Complainant established a *prima facie* case of discrimination?

(2) If a *prima facie* case is established, did the Respondent fail to accommodate the Complainant?

VII. LEGAL ANALYSIS

[76] In the Supreme Court's decisions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [also referred to as "*Meiorin*"] and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [also referred to as "*Grismer*"], the Court indicated that the initial onus is on the complainant to establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent.[See *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985] 2 S.C.R. 536, at p. 558.]

[77] In *Canadian Human Right Commission v. Attorney General of Canada*, ("*Morris*") 2005 FCA 154, the Federal Court of Appeal stated that the legal definition of a *prima facie* case does not require the Complainant to adduce any particular type of evidence to prove that she was a victim of a discriminatory practice. A flexible test is more appropriate.

[78] Section 3 of the *Act* declares that "disability" is a prohibited ground of discrimination. Disability is defined at section 25 as "a previous or existing ... mental disability."

[79] A key issue in this case is whether or not the Complainant has a disability. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal City and Boisbriand (City)*, [2000] 1 S.C.R. 665 [also referred to as "*Mercier*"], the Supreme Court of Canada made some important comments about the ways in which courts need to think about and view disabilities. The Court sets out a broad legal test for how one establishes whether or not there is a disability within the meaning of human rights legislation.

[80] Although the *Mercier* decision arose out of the Quebec *Charter of Human Rights and Freedoms* and not the *Act*, the comments of the Court are just as applicable to the latter since both provide similar protections. The Court focused its attention on the meaning and scope of the term "handicap", which is the term used in the Quebec *Charter* to refer to a disability. More specifically the Court had this to say:

75 The following definition of the term "handicap" appears in the *International Classification of Impairments*:

In the context of health experience, a handicap is a disadvantage for a given individual, resulting from an impairment or a disability, that limits or prevents the fulfilment of a role that is normal (depending on age, sex, and social and cultural factors) for that individual.

76 I completely agree with Philippon J. that the ground "handicap" must not be confined within a narrow definition that leaves no room for flexibility. Instead of creating an exhaustive definition of this concept, it seems more appropriate to propose a series of guidelines that will facilitate interpretation and, at the same time, allow courts to develop the notion of handicap consistently with various biomedical, social or technological factors. Given both the rapid advances in biomedical technology, and more specifically in genetics, as well as the fact that what is a handicap today may or may not be one

tomorrow, an overly narrow definition would not necessarily serve the purpose of the Charter in this regard.

77 Generally, these guidelines should be consistent with the socio-political model proposed by J. E. Bickenbach in *Physical Disability and Social Policy* (1993). This is not to say that the biomedical basis of "handicap" should be ignored, but rather to point out that, for the purposes of the Charter, we must go beyond this single criterion. Instead, a multi-dimensional approach that includes a socio-political dimension is particularly appropriate. By placing the emphasis on human dignity, respect, and the right to equality rather than a simple biomedical condition, this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a "handicap". In fact, a person may have no limitations in everyday activities other than those created by prejudice and stereotypes.

78 In "Legal Rights for Persons with Disabilities in Canada: Can the Impasse Be Resolved?" (1997-98), 29 *Ottawa L. Rev*. 153, I. B. McKenna described the scope of the word "handicap" as follows, at p. 164:

It is the combined effect of an individual's impairment or disability and the environment constructed by society that determines whether such an individual experiences a handicap.

Similarly, Professor Proulx, supra, at p. 416, states:

[TRANSLATION] . . . what matters with respect to discrimination based on handicap is not so much whether the victim of the exclusion has a "real handicap" or is "actually a handicapped person" within the meaning of other legislation enacted for other purposes or even within the ordinary meaning of these terms.. Central to the analysis is not so much the concept of the handicap itself, but the discrimination based on the handicap.

See also Lepofsky and Bickenbach, supra, at p. 343.

79. Thus, a "handicap" may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a "handicap" for the purposes of the Charter.

[81] Therefore in order to determine whether a person suffers from a disability the Tribunal will have to consider not only the medical condition of the Complainant, but also the circumstances in which a distinction is made. The Court adds: "In examining the context in which the impugned act occurred, the court must determine, *inter alia*, whether an actual or perceived ailment causes the individual to experience "the loss or limitation of opportunities to take part in the life of the community in an equal level with others.". (Para. 80.)

[82] A disability may exist even without proof of physical limitations or the presence of an ailment. Although the Supreme Court is reminding us that an overreliance on medical information is not necessary in order to establish that a disability does or does not exist, there needs to be more that just a bare statement that one suffers from a disability to meet the test. There has to be evidence that the disability is there. This evidence can be drawn from the medical information and from the context in which the impugned act occurred.

[83] In a recent decision, *Desormeaux v. Ottawa-Carleton Regional Transit Commission*, the Canadian Human Rights Tribunal had decided that there was a *prima facie* case of discrimination on the ground of disability by relying heavily on the evidence of the Complainant and her family doctor. On review, the Federal Court found that the

Tribunal's finding on disability was unreasonable, mainly on the ground that the medical evidence in support of the finding was that of an expert in family medicine and that it was unreasonable to find that this doctor's evidence should carry more weight than the opinion of a specialized physician. The Federal Court judge concluded that there was no *prima facie* case to answer as she was not satisfied that there was properly admissible evidence to support a finding of disability.

[84] The Federal Court of Appeal [2005 FCA 311] decided that the reviewing judge's decision was incorrect. It concluded that the Tribunal's decision on the issue of whether or not there was a disability was clearly one that deserved considerable deference. As the Supreme Court established in *Granovsky v. Canada, [2000] 1 S.C.R. 703*, at para. 34, and in *Mercier, supra*, at para. 71, disability in a legal sense consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment. In light of this test, the Court of Appeal concluded that there was evidence before the Tribunal upon which it could reasonably find that there was a disability.

[85] In the present case, as in the *Desormeaux* case, the Respondent argued that the medical evidence was not conclusive. Although it might be possible to qualify the medical evidence as not completely convincing, combined with the Complainant's and the Respondent's evidence, it is consistent with a finding that there is a disability.

[86] The Respondent also relied, in its oral arguments, on a decision I rendered in *Beauregard v. Canada Post Corp*, [2004] C.H.R.D. N° 1 (upheld, 2005 CF 1384). It is important to note that the factual situation in the *Beauregard* case was somewhat different than in the present case. In *Beauregard*, the medical evidence on which the complainant relied had been contradicted by the respondent's own psychiatric and expert evidence. Furthermore, in that case there were no `at work' incidents clearly indicating that the complainant was experiencing medical issues.

[87] Regarding "panic attacks", the British Columbia Council of Human Rights, in *Sansome v. Dodd (c.o.b "Portside Paul's Fish & Chips)*, [1991] B.C.C.H.R.D. No. 17, determined that they constituted a disability for the purposes of the B.C. *Human Rights Code*. (See also *Cameron v. Fletcher Challenge Canada Limited* (1995), 24 C.H.R.R. D./506 (B.C.C.H.R.))

[88] The *Act* does not contain a list of acceptable and unacceptable mental disabilities. It is not just the most serious or most severe mental disabilities that are entitled to the protection of the *Act*. Additionally, it is not solely those that constitute a permanent impairment that must be considered. Where appropriate, even mental disabilities described as minor with no permanent manifestation could be entitled to protection under the *Act*. However, sufficient evidence still needs to be presented to support the existence of the disability.

[89] For the purposes of the *prima facie* test, I find that there is clear evidence that the Complainant was suffering from a disability, namely, panic attacks. I also find that her manager at the time, Ms. McIntyre, should have been able to conclude from her conversations with the Complainant and her observations that health-wise things were not going normally.

[90] During the meeting of June 21, 2001, the Complainant told Ms. McIntyre that she was experiencing a reoccurrence of a health issue. Ms. McIntyre also knew that the Complainant had consulted her doctor. She was further informed on June 27, 2001, that

during a meeting with her co-workers, the Complainant had raised issues regarding her health. She was also told that the Complainant was very upset during this meeting.

[91] On June 28, 2001, the Complainant explained her situation to her supervisor Rick Levert. He testified that during this meeting the Complainant was very emotional. He added that at one point she burst into tears. The Complainant also informed her supervisor that she was seeing her doctor. On that same day, Ms. McIntyre was informed by the Complainant's co-workers that she had gone home sick. Ms. McIntyre also knew that "Mary was dealing with a previous health condition."

[92] Rick Levert was informed on June 29, 2001 that the Complainant's doctor had put her off work indefinitely. Actually, the Complainant was absent from work from June 30, 2001 to July 23, 2001, and the medical support documentation tendered to the employer indicated "work stress". Just after her return to work, on July 25, 2005, the Complainant met with her supervisor and informed him that her health was not good and that this was a permanent condition.

[93] In a letter written to Debby McIntyre and Rick Levert on July 26, 2001, the Complainant mentioned that her "health problem due to the stress/workload" was returning. In her reply to this letter, on August 9, 2001, Debby McIntyre stated "I share your concerns regarding your health".

[94] On August 20, 2001, in a meeting with Debby McIntyre, the Complainant indicated that she still felt that her health was an issue. She mentioned that she was suffering from increased anxiety attacks which were triggered by her job. During another meeting on August 23, 2001, Debby McIntyre noted that the Complainant was "teary". Ms. McIntyre inquired about the Complainant's health and she told her that she was not doing very well and that she had to make some decisions about her job. Ms. McIntyre encouraged her to see her doctor and to take time off if needed.

[95] Then there were the events of August 30, 2001, which made it clear that the complainant was dealing with a medical situation.

[96] Ms. McIntyre testified that she did not have the impression that the "anxiety attacks" referred to by the Complainant were an illness. Rather, she stated that her understanding was that the Complainant's stress and anxiety came from the fact that she was struggling with doing the duties of a CR-04. I understand this as being an acknowledgement on her part that she knew the Complainant was experiencing "stress" and "anxiety" but that she had made up her mind that these were performance issues.

[97] All of the events described above should have sent up a red flag. I conclude that, from all of these events, the Respondent knew, or ought to have known that the Complainant was experiencing anxiety from work-related stress. The fact that she did not tell them in so many words does not disentitle her from the protection of the *Act* (see*: Mager c. Louisiana-Pacific Canada Ltd.*, [1998] B.C.H.R.T.D. No. 36.) For its part, if the respondent felt that work induced stress is not a disability it should have sought a professional assessment of the Complainant.

[98] It is not enough for the Respondent to say that they were not advised of or aware of the Complainant's condition. Certainly, from the evidence presented at the hearing, it is clear that they must have been aware that she was suffering from what might be described as a delicate emotional state. Knowing what it did, it was up to the employer to determine whether the complainant's health was affecting her performance. It had the

responsibility to at least inquire as to whether the complainant's condition might impact upon its decision to terminate the Complainant.

[99] Even if the Complainant did not present the employer with a medical diagnosis of her disability, this does not disentitle her to the protection of the *Act*. An individual with a disability and, in particular, somebody with a mental disability may not know the exact nature and extent of that disability at the time they are experiencing the symptoms. In such circumstances, we cannot impose a duty to disclose a conclusive medical diagnosis.

[100] I do not minimize the importance for an employee to submit to the employer medical notes informing the employer of his or her medical situation. Employers rely on these notes to inform themselves of the employee's health condition insofar as this is relevant to the need for accommodation. I suspect, though, that most employees would be reluctant to inform the employer that they may have a mental disability. They may fear that an employer may use this information to their detriment and that it is in their best interest to work with their problems as best they can.

[101] The obvious change in the Complainant's behaviour during the summer months of 2001 should have made the employer realize that there was something wrong. The Complainant had alerted her manager and supervisor during this period that the fact her work was not getting done was not because she was not interested in doing it, but because she had a health issue. Her employer, for its part, had decided, based on information that it was getting from her co-workers, that this was a performance issue and not a question of disability.

[102] Ms. McIntyre was convinced that the Complainant was not able to do the CR-04 job. She truly believed that the Complainant felt that the job wasn't doable and that she had shut her mind to ways in which she could make it doable. Ms. McIntyre felt that the manager had a responsibility to ensure stability in the unit to support the officers. She added that the Complainant had a "history". By this she meant that she had determined that the Complainant had a pattern of absence where she would work for a period of time and then go off on leave. This conclusion is interesting in view of the fact that it did not come up during the time that Marg Garey was the Complainant's manager and no mention of this "history" was made to Ms. McIntyre when she took over the position of manager. The evidence does not support this conclusion.

[103] The Respondent should have explored why the work was piling up; why the employee's performance was going down. Based on the evidence before it, the Respondent could not simply jump to the conclusion that this performance problem was stemming from a poor attitude.

[104] In this particular case, it is clear that the ultimate decision not to renew the Complainant's contract was influenced by her disability. In this regard, one has only to look at Ms. McIntyre's notes on August 30, 2001, which reflect a conversation that she had with a representative of staffing relations at the Respondent's regional headquarters, and in which she mentions "that to renew Mary's contract of 30 Sept/01 in my opinion is not wise for Mary's continued good health." (*Emphasis added)* This, by itself, is sufficient to establish a *prima facie* case of discrimination. The Complainant's health or disability was manifestly present in the Respondent's mind when it decided not to continue to employ her.

[105] Once a *prima facie* case of discrimination has been established, the onus shifts to the Respondent to prove, on a balance of probabilities, that the seemingly discriminatory

standard or policy that it applied is a *bona fide* occupational requirement. In order to establish this, according to *Meiorin* and *Grismer* the Respondent must prove that:

i) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;

ii) it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose, with no intention of discriminating against the claimant;

iii) the impugned standard is reasonably necessary for the employer to accomplish its purpose. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship.

[106] In the present case the standard or policy applied by the Respondent would be the decision to abolish the CR-03 position which the Complainant held and not to renew her term contract.

[107] The *Meiorin* and *Grismer* decisions address parameters for determining whether a defence based on undue hardship has been established. In *Meiorin*, the Court observed that the use of the word "undue" implies that some hardship is acceptable. It is only "undue" hardship that satisfies this test. An uncompromisingly stringent standard may be ideal from an employer's perspective. Yet, if it is to be justified under human rights legislation, the standard must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

[108] The Supreme Court observed that in order to meet this onus, the Respondent bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship. [See *Grismer*, supra, para. 32.] It is incumbent on the Respondent to show that it has considered and reasonably rejected all viable forms of accommodation. The onus is on the Respondent to prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship. [See *Grismer*, supra, para. 4.]

[109] In *Gardiner v. British Columbia (Attorney General)*, [2003] B.C.H.R.T.D. No. 40, the British Columbia Human Rights Tribunal had this to say regarding the duty to accommodate (paras. 168 and 169):

It is important to make the distinction between the fact of a disability and the functional impact of the disability at any given period. An individual may have a continuing illness or injury which is found to be a disability under the Code, yet suffer no functional impact for long periods of time as a result of the disability: Morris v. B.C. Rail 2003 BCHRT 14. In such circumstances, if the fact of the disability is not brought to the attention of the Respondent, and accommodation is not requested, the Respondent may very well not be aware of the disability and indeed could not reasonably be assumed to have this knowledge. Where the Respondent is not aware of a disability, and no accommodation is requested, the duty to accommodate is not triggered.

In the circumstances of this case, I am satisfied that the Respondent was not aware, nor could it reasonably be presumed to have been aware, of the Complainant's disability for the period from February 13, 1995 to April 1998. The Respondent was not on notice that accommodation was required and the evidence before me does not support that the Respondent had reason to suspect that the Complainant required accommodation during this period. (*My emphasis.*)

[110] The factual situation in this case is, in many ways, different from the *Gardiner* case. Here, taking into consideration the context, I have concluded that the Respondent was aware or should have been aware of the Complainant's disability. Although there was no formal notice requesting accommodation before October 22, 2001, the various discussions that the Complainant had with her supervisor and manager, as their written notes clearly indicate, show that this is what was being sought.

[111] In this case the Respondent led no evidence with respect to its efforts to try to accommodate the Complainant. The fact that it reviewed the Complainant's job description and made one or two phone calls to "market" the Complainant cannot be seen as an effort to accommodate her up to the point of undue hardship. Following the Complainant's formal request for accommodation on October 22, 2001, what the Respondent could have done is explore with her whether she was willing to have them discuss the issue with her doctor. This would have allowed them to ascertain what accommodation measures she needed and make an informed decision as to whether these measures were reasonable or imposed an undue hardship. They chose not to adopt this course of action because they had made up their minds that this was a performance issue. It is important to remember that performance and disability are not unrelated, especially inasmuch as disability can affect an employee's performance. Not all performance problems are rooted in disability, but those that are usually require some measure of accommodation.

[112] Ms. McIntyre acknowledged that she was aware that the Complainant had, in the past, asked for a lower level deployment because of health reasons. When asked if she had that kind of flexibility in the situation at issue here, she answered that this would not have been a "wise decision from a managerial point of view". She added that to take such a course of action would have gone against the business decision that had been made. Ms. McIntyre added that she considered that the Complainant was a term employee and "we don't change our total organizational structure and business decision when we could market a term employee to another office." After having discussed the Complainant's situation with a staffing consultant at the Respondent's regional office, the decision was made not to renew the Complainant's term contract on September 30, subject to a 30 day extension for job searching. In her evidence Ms. McIntyre indicated that it was not "wise" for the Complainant's continued good health and the operational requirements of the Foreign Workers Unit that the contract be renewed.

VIII. CONCLUSION

[113] Considering the factual situation of this case and the governing legal principles, I find that the Complainant was discriminated against on the basis of a disability contrary to section 7 of the *Act*. Hearing dates will be set in order to address the issue of damages and other relief sought.

"Signed by"
Michel Doucet

OTTAWA, Ontario

January 25, 2006

PARTIES OF RECORD

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APPEARANCES:	
Alison Dewar	For the Complainant
No one appearing	For the Canadian Human Rights Commission
Chris Leafloor Andrea Horton	For the Respondent