

Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

BETWEEN:

EDITH WONG

Complainant

- and -

ROYAL BANK OF CANADA

Respondent

REASONS FOR DECISION

T.D. 06/01

2001/06/15

PANEL: J. Grant Sinclair, Chairperson

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I. Introduction

[1] The complainant, Edith Wong, was hired by the Royal Bank on September 26, 1994, as a Senior Telebanking Agent at the Royal Bank Direct Call Centre located in Mississauga, Ontario. Ms. Wong's primary responsibility was to sell various financial products of the bank by proactively telephoning customers or potential customers of the Bank.

[2] After completing a training program, Ms. Wong moved into the position full-time in late October or early November 1994.

[3] In March 1995, Ms. Wong received her annual performance review covering the period October/November 1995 - January 1996. She was given an overall rating of 3 out of a maximum of 7. The appraisal was done by her supervisor, Ian Turner.

[4] Ms. Wong was very upset at this rating which she felt did not reflect her job performance or the value of her contribution.

[5] Over the next few months, Ms. Wong received quarterly appraisals in which her overall rating improved to 5 and 5/6. Ms. Wong was still not satisfied because the individual rating for quality of leadership was not high enough and because of the comments of her supervisor that she could be more of a team leader.

[6] Ms. Wong raised her concerns with Mr. Turner about her annual appraisal seeking to have the rating revised upward. Mr. Turner's view was there was no basis to do so. Ms. Wong brought her concerns to more senior management in the Call Centre, but with no satisfactory result.

[7] From that time on, what had been an amiable working relationship between Ms. Wong and Mr. Turner deteriorated significantly, to the point of hostility between them and little ability to communicate with each other.

[8] In the summer of 1995, Ms. Wong decided that she wished to apply for the AMPB training program. This was a program offered by the Bank's Metro District Human Resources Department to qualify candidates for the position of assistant manager, personal banking, in a branch.

[9] Ms. Wong's application was strongly supported by Ian Turner and her team manager, James McGuire. Her application was submitted as one of the Call Centre's best candidates.

[10] On February 7, 1996, Ms. Wong was advised, that her application had not been accepted. She was very upset and disappointed and did not come to work the next day. In fact, Ms. Wong never returned to work at the Bank.

[11] On February 8, 1996, Ms. Wong consulted with her family doctor who recommended that she be off work for two weeks.

[12] On February 8, Ms. Wong called her former employer, Canada Trust, and told them she wanted to return. She signed an employment contract on February 9, 1996, with Canada Trust and returned to work there on March 18, 1996.

[13] Ms. Wong was subsequently diagnosed as suffering from depression and went on short term disability with the Bank on February 7, 1996, and then on long term disability benefits with the Bank.

[14] In August 1997, the Bank learned that Ms. Wong had been working for Canada Trust, investigated this and on January 13, 1998, terminated Ms. Wong's employment for the reason that Ms. Wong was working at Canada Trust while collecting disability benefits from the Bank.

[15] Ms. Wong filed a complaint with the Canadian Human Rights Commission on August 23, 1996, alleging that the Bank discriminated against her by refusing her job opportunities on the grounds of race (Asian) and national or ethnic origin, (Chinese) and refusing to accommodate her disability, (stress and depression) in contravention of section 7 of the *Canadian Human Rights Act*.

[16] At the commencement of the hearing before the Tribunal, Ms. Wong sought to amend her complaint to allege that the Bank had discriminated against her by terminating her employment, contrary to section 7 of the *Act*; and to add an allegation of retaliation contrary to section 14.1 of the *Act*. Her application to amend her complaint was argued as a preliminary motion and I reserved my decision to amend her complaint until the hearing of the complaint on the merits was concluded.

II. Failure to Provide Job Opportunities - The AMPB Program

A. The AMPB Application

[17] An assistant manager, personal banking has the responsibilities of a loan officer in a branch. It does not involve supervision of any other bank employees. But it does provide the opportunity to move into a higher managerial position.

[18] In the summer of 1995, Ms. Wong indicated to James McGuire, the Manager of Ms. Wong's sales team, that she wanted to apply for the AMPB training program. Mr. McGuire told her that he would support her application for the March 1996 training program. He also told her that the Centre would choose the top applicants from the Centre and forward their applications to Metro District Human Resources. There was no guarantee that she would be accepted even if she had had strong support from the Call Centre.

[19] The program criteria required applicants to have two years in their current position, two years satisfactory performance rating and their manager's approval.

[20] AMPB training programs are offered at various times depending on branch needs. An upcoming program is posted on the Bank's Jobline, a phone line which employees can access to learn of job postings. In this case, the Jobline indicated that the Bank was looking for candidates for the March 1996 AMPB program who spoke Cantonese or Mandarin. Ms. Wong spoke English, Cantonese and had a working knowledge of Mandarin.

[21] Ms. Wong was not in her position for two years and did not have two annual performance appraisals. Nonetheless, the Centre put forward her application, because as Mr. McGuire wrote in his letter of support, Ms. Wong had superior sales skills, was extremely diligent and devoted to her work and had the language skills the program was looking for.

[22] Ms. Wong's application was submitted to Metro Human Resources by the Call Centre. Included in her application was her Jobline Application form, her Employee Profile and Resumé, the Career Program Application, James McGuire's memorandum of support, Ms. Wong's March 1995 Annual Performance Appraisal, and her Quarterly Performance Appraisals, covering the three quarters for February 1, 1995; March 1, 1995; and August 1, 1995. Normally, quarterly appraisals are not part of the Jobline Application. In this case, the Call Centre did submit Ms. Wong's quarterly appraisals because they showed an upward improvement in Ms. Wong's performance ratings. This made her more competitive for the program, given her short tenure and only one annual appraisal.

[23] Ms. Wong, on her own initiative, submitted additional documentation to Metro Human Resources. This included three job shadow evaluation forms provided by the branches in which she had done job shadowing prior to her making the application for the AMPB program. She also included a "sunshine letter" from a customer of the Bank praising Ms. Wong's service, copies of sales performance awards that she had received, and copies of her sales activity report showing her sales results for 1995.

[24] Ms. Wong was not supposed to do this. The process at the Call Centre at that time was that an employee interested in applying for the AMPB program would first receive clearance and support from their manager. All documentation was compiled, and the candidates screened by a management committee at the Call Centre. The applications of those selected were then forwarded by the Call Centre to Metro Human Resources, who selected those candidates from across the Bank, who were the most competitive. Ms. Wong's evidence was that she was told by Metro Human Resources that she could submit additional documentation directly and on her own initiative, and was free to call about her application or if she wanted further information. Ms. Wong did call a number of times.

[25] This is at odds with the evidence of Susan Simopoulos, then Manager, Customer Service and Operations at the Call Centre. She was called by Susan Carter, at Metro District Human Resources who asked that she speak to Ms. Wong and tell her to stop sending information to Metro Human Resources and stop calling about her application.

[26] Ms. Simopoulos also testified that Ms. Wong persisted in calling her about the status of the application and would not let it rest.

[27] Ms. Simopoulos met with Ms. Wong, told her that the selection process takes time and she should not call Metro Human Resources or Ms. Simopoulos about her application. Ms. Wong apologized to Ms. Simopoulos and agreed to this.

C. The March 1, 1995, Annual Performance Appraisal Report

[28] Throughout this hearing, Ms. Wong has alleged that all of her current problems were caused by what she says was unfair treatment by the Bank. It is apparent from the evidence that Ms. Wong's unhappiness started with her March 1, 1995, annual performance appraisal.

[29] There is no doubt that Ms. Wong was an intelligent, dedicated employee of the Bank. It is also true that she was a very successful sales agent who consistently exceeded her sales objectives. But Ms. Wong's ambition was to move beyond a sales agent and into a position in a branch.

[30] Ms. Wong's overall rating on her performance appraisal was 3. Her appraisal was written by her supervisor, Ian Turner, and signed off by her sales team manager, James McGuire.

[31] Mr. Turner noted in his comments that Ms. Wong had demonstrated considerable improvement over the past few months and she had a real flare for sales. He also noted that she could improve in the areas of product knowledge, operational skills, and quality leadership, which was understandable, given her short tenure in the job.

[32] Ms. Wong's reaction was that she considered the 3 rating to be totally unjustified and unfair, given her sales performance over the past few months. In her view, no recognition or encouragement whatsoever was given for a job well done.

[33] Ms. Wong did not hesitate in communicating her unhappiness with this rating to Mr. Turner. Mr. Turner's response was that the rating was certainly acceptable and she was on track, bearing in mind that she had been appraised for a very short period. Ms. Wong insisted that Mr. Turner upgrade her rating. Mr. Turner would not agree as he felt there was no basis for doing so apart from her insistence.

[34] From that time on, their relationship begun to deteriorate to the point so that by October 1995 they could barely communicate with each other.

[35] A 3 rating means that the employee is progressing on the job but needs more time to master it. Consistency of performance is a major factor in the appraisal. As the employee becomes more familiar with the job requirements, their rating increases. From the Bank's viewpoint, a 3 rating is a strong rating for a new employee.

[36] In fact, Ms. Wong's performance ratings in her February, May and August 1995 quarterly appraisals did improve significantly. Her overall rating for Quarter 1 was 5, for Quarter 2, 5/6 and Quarter 3, 5+. Quarterly appraisals are informal reports that are used to build the annual appraisal and give an employee a sense of how they are progressing over time.

[37] But Ms. Wong was not content with these results. In particular, she objected to Mr. Turner's comments on the appraisals that she should, as the senior agent on the sales team, take more of a leadership role. Ms. Wong interpreted this as meaning she was not a team player and was concerned that this would be interpreted as a negative comment and could affect her mobility within the Bank.

[38] Ms. Wong next raised her concerns with Mr. McGuire. His position was that her performance appraisal was very good given the time she had been at the Bank. He fully expected that future appraisals would show higher ratings and her quarterly appraisals confirmed this.

[39] But Mr. McGuire agreed with the ratings and could see no reason to revise them as Ms. Wong wanted.

[40] Maureen Belza, who has worked in the Bank for a number of years in various human resources positions was Manager, Human Resources at the Call Centre for part of the time Ms. Wong worked there.

[41] Ms. Belza said that a 3 rating after three or four months on the job means that the employee is doing well. It translates as the employee is meeting expectations but not consistently. This is to be expected because the Bank has a multitude of financial products and it takes time to learn all of the products. In addition, a new sales agent must become familiar with the operating and reporting procedures and can only achieve this through time and experience in the job.

[42] Ms. Wong also approached Susan Stauth who was Manager at the Call Centre at that time and discussed her dissatisfaction with the rating. Ms. Stauth told Ms. Wong that she considered that a 3 rating was acceptable and that Ms. Wong had since demonstrated considerable improvement.

[43] They also discussed Ms. Wong's quarterly appraisals and Ms. Wong again indicated that she was unhappy with some of Mr. Turner's comments. Ms. Stauth also told her that her quarterly results were above average for someone with less than a year on the job. Ms. Stauth told her that she would not change the appraisals because there was no basis to do so.

C. Other Sources of Conflict

[44] There were a number of other matters that increased Ms. Wong's sense of unfair treatment in particular by her supervisor, Mr. Turner. I will only refer to two that seemed to distress Ms. Wong, the telephone usage activity reports and Ms. Wong's job shadowing activities.

[45] Telephone usage activity reports or TUA's refer to the procedures used by the Bank to track a sales agent's productivity (in addition to sales) including number of calls, number of call backs, referrals, customer contacts, etc. Mr. Turner was told that Ms. Wong was not following the proper procedures and was allegedly inflating her TUA's. Ms. Wong denied this and claimed she was following what she understood to be the proper procedures. The matter was ultimately resolved through Mr. McGuire's intervention, but only after Ms. Wong received a rather harsh

memorandum from Mr. Turner accusing her of unacceptable behaviour, threatening to revise downward her Quarterly 1 and 2 appraisal ratings and making her ineligible for bonus prizes. Mr. McGuire's assessment was completely different. He characterized the matter as a misunderstanding and in no way questioned Ms. Wong's honesty or integrity.

[46] As to the job shadowing issue, Ms. Wong began job shadowing at Bank branches mainly in Mississauga over the spring and summer in 1995. Initially, arrangements had been made by the Call Centre with the branches to allow her to do so.

[47] Job shadowing involves going to a branch on an occasional basis and spending time with an assistant manager, personal banking to learn about the branch environment and the job responsibilities. It is done on the employee's own time, and they are not paid for this.

[48] Because the Call Centre is located in Mississauga, there was a high demand from people in the Call Centre to do job shadowing in branches within the Mississauga area. The evidence of Paul Martin, the Mississauga North Area Manager for the retail branches, was that he had agreed with the Call Centre to allow Ms. Wong to job shadow. At first, the branch managers considered Ms. Wong to be very enthusiastic and were willing to accommodate her. However, this acceptance disappeared because Ms. Wong would show up on weekends to job shadow at a branch without prior arrangements having been made.

[49] This became a problem. Job shadowing imposes a burden on branch staff because it requires additional supervision. According to Paul Martin, he called Mr. McGuire and asked him to ensure that Ms. Wong did not job shadow at the branch without arrangements having been made in advance.

[50] Ms. Wong's version is that Mr. Martin called Mr. McGuire because he was concerned that Ms. Wong was job shadowing on her time, was not getting paid and this was against Bank policy. Instead he wanted Mr. McGuire to allow Ms. Wong to job shadow at his branches one or two days during the week. I do not find Ms. Wong's explanation credible and prefer the evidence of Mr. Martin on this point.

[51] This job shadowing issue was discussed in a meeting on October 27, 1995 between Mr. McGuire, Mr. Turner and Ms. Wong. She was asked not to job shadow without prior arrangements made by the Call Centre. This understanding was documented by quite a heavy handed memorandum from Mr. Turner to Ms. Wong setting out the terms of job shadowing and telling Ms. Wong that her failure to meet the terms could result in corrective action. Ms. Wong adhered to these terms and did no more job shadowing.

[52] Perhaps the tone of Mr. Turner's memorandums can be explained by the hostility and lack of respect between Mr. Turner and Ms. Wong at this point in time. From Mr. Turner's point of view, whenever they met, all Ms. Wong did was complain about her performance appraisal and his team player comments. Ms. Wong could see in Mr. Turner only unfair treatment which was confirmed by the way he handled the TUA and job shadowing incidents.

[53] These two recurring themes reached the point whereby the two could not work on the same team. Finally, on November 8, 1995, Ms. Wong's family doctor, Dr. Mary Alexander, requested that she be transferred to another sales team in the Call Centre. The Call Centre agreed and Ms. Wong moved to another sales unit with a different supervisor and manager on December 1, 1995. Ms. Wong seemed satisfied with this move and did not have any problems.

C. Non Acceptance into the AMPB Program

[54] The second and probably most catastrophic event for Ms. Wong in this saga was when she learned that she had not been accepted into the AMPB Program.

[55] On February 7, 1996, Ms. Wong was told by Ian Middaugh, her supervisor at that time, that her AMPB application had not been accepted. Ms. Wong did not report for work on February 8, 1996, and never did return to work at the Bank.

[56] Ms. Wong went to see her family doctor, Dr. Mary Alexander, on February 8, 1996. She repeated her problems with her supervisor and her performance appraisal. She did not say anything about the AMPB program.

[57] Dr. Alexander gave Ms. Wong a medical certification on February 8, 1996, advising that Ms. Wong would be off work for two weeks and would be reassessed at that time.

[58] On that same day, Ms. Wong called Gary Ford, the Area Supervisor for Canada Trust, who was in charge of the Canada Trust branch where Ms. Wong had worked before she joined the Bank. She told Mr. Ford that she wanted to return to Canada Trust and she was sent a job offer which she accepted on February 9, but left the starting date open. More on this later in the decision.

[59] Also, on February 8, 1996, Ms. Wong wrote to Susan Stauth, the Call Centre Manager, raising again the matter of her performance appraisals and Mr. Turner's comments about her not being a team player. Ms. Wong felt that these were the reasons that she was rejected for the AMPB program.

[60] Ms. Stauth had a number of discussions with Ms. Wong's supervisors at the Centre and concluded that Ms. Wong's appraisal rating and her supervisor's comments were appropriate and would not be changed. Ms. Stauth also told Ms. Wong that she would try to find an opportunity for her outside the Call Centre, but she couldn't guarantee this.

[61] Ms. Wong continued in her attempts to have what she considered to be unfair treatment by Mr. Turner, dealt with by the Bank. To this end, on February 15, 1996, she wrote to RSVP, a department of the Bank, to which employees can write on a confidential basis about any concerns they may have. In her letter, Ms. Wong reiterated her complaints about Mr. Turner's appraisal and comments and that this was why she was not accepted into the AMPB program.

[62] At this point in time, Ms. Wong had nothing in writing as to why she had been refused. However, in her earlier discussions with Ms. Stauth, Ms. Stauth told her that one of the reasons she had been turned down was because she was somewhat aggressive and not a team player.

[63] Ms. Wong's concerns were addressed by P.A. Palmer, Senior Vice-president, Operations and Service Delivery. In his reply dated April 23, 1996, he indicated that Ms. Wong was not selected for the highly competitive program because of the overall "3" rating, the perception that she was somewhat aggressive and the assessment that she was particularly suited to the Asian market where her more assertive approach would be effective in making sales. There were also teamwork and leadership issues. Mr. Palmer concluded that Ms. Wong had been treated fairly on all issues. He advised that he had asked Francine Dyksterhuis, the new Call Centre Manager to speak with Ms. Wong further about her concerns.

[64] Ms. Wong replied to Mr. Palmer on May 25, 1996, setting out again what she considered to be unfair treatment by Ian Turner and explaining why she thought she had been characterized as aggressive.

[65] She concluded her letter by referring to the assessment that she was particularly suited to Asian market and telling Mr. Palmer that she made some excellent plans, and she was confident that she could gain more business for the Bank from the rapidly growing Asian community in the greater Toronto Area. In her letter she concluded by asking Mr. Palmer to support her for the AMPB program or find her a job in a branch.

[66] There were a number of reasons why Ms. Wong was not accepted into the AMPB program. The main reason was that she was not competitive with the successful candidates. This was the evidence of Susan Carter, Assistant Manager, Recruitment and Career Development Programs at the time.

[67] All of the candidates were compared, one against the other. The decision was made by a committee, all experienced in human resources and experienced in the selection process. This committee placed considerable weight on the two annual performance appraisals, tenure with the Bank, mobility and language skills. Not all departments in the Bank had quarterly appraisals so that not much weight was given to them in the selection process.

[68] Although Ms. Wong had received good job shadow evaluations, job shadowing experience was not of particular importance for the committee. This was because the employee was not doing a particular job, but basically paired with a branch staff person on an ad hoc basis.

[69] Ms. Carter had written a memorandum dated February 7, 1996, to Susan Simopoulos setting out the fact that Ms. Wong was not competitive with the other candidates. She added that Ms. Wong had come across as somewhat aggressive and teamwork is important in the branch environment, and Ms. Simopoulos had acknowledged this. Ms. Carter also stated it would be beneficial if the employee is able to work both in an Asian and non-Asian environment and, as Ms. Simopoulos indicated, at that point in time, Ms. Wong was suited for the Asian market only.

[70] It is this latter comment, her suitability for the Asian market only, that Ms. Wong has focused upon to support her allegation that she was rejected for the AMPB program because of her race and national and ethnic origin. Ms. Wong did not receive a copy of this memorandum until sometime in June 1996.

[71] Ms. Carter said that she considered Ms. Wong somewhat aggressive based on her information that Ms. Wong had called Metro District Human Resources a number of times concerning her application and also because she had submitted supporting documentation directly without going through the Call Centre.

[72] Ms. Simopoulos, confirmed Ms. Carter's description of Ms. Wong's somewhat aggressive behaviour. She based her conclusion on her experience with Ms. Wong's frequent enquiries as to the status of her AMPB application and Ms. Wong dealing directly with Metro District Human Resources.

[73] In my opinion, "somewhat aggressive" was not used in a pejorative sense. There are numerous examples in the evidence such as her job shadow activities, her attempts to have her appraisal revised, her persistence in having Mr. McGuire put her forward as an AMPB candidate, her direct submission of documents to Metro Human Resources. Rather, it was descriptive of Ms. Wong as a person who is forceful or self-assertive when seeking her goals. Viewed in the context of the evidence, I do not find this comment racially or ethnically based.

[74] The more problematic aspect of Ms. Carter's memorandum is her reference to Ms. Wong being suitable for the Asian market only. The Bank does not have exclusively Asian branches. Nor was there any question as to Ms. Wong's ability to serve with both Asian and non-Asian customers of the Bank.

[75] In my opinion, this comment must be viewed in the context of Ms. Wong's application and the evidence of both Ms. Carter and Ms. Simopoulos. Ms. Carter, in her evidence, explained that she questioned why the Call Centre put Ms. Wong forward as a candidate given her short tenure and her 3 appraisal rating.

[76] From the Metro District Human Resources perspective, this application on its face was not competitive. In her evidence, Ms. Simopoulos explained that she wanted to emphasize to Ms. Carter, Ms. Wong's abilities and attractiveness as a candidate in a way that would make her more competitive, given the deficiency in her tenure and performance appraisals. Both Ian Turner and James McGuire had told Ms. Simopoulos that Ms. Wong was a very successful sales agent and seemed to enjoy working with Asian customers. Because Ms. Wong had the language skills that the AMPB program was seeking, this, together with her sales abilities, and her affinity for the Asian market would make her an excellent candidate.

[77] Rather than being a negative comment, Ms. Simopoulos saw this as further support for Ms. Wong, whom the Call Centre had put forward as one of its top candidates.

[78] At least four persons who were accepted in the March 1996 AMPB program were Chinese. They are Fanny Young, Winnie Lo, Anne Tse and Judy Huang. All had greater tenure with the

Bank than Ms. Wong; all spoke Cantonese; and with the exception of Judy Huang for which no appraisal was put in evidence, all had at least two annual performance appraisals with a higher rating than Ms. Wong.

[79] The evidence belies Ms. Wong's allegation that her AMPB application was rejected because she was Chinese. Through the Jobline, the Bank was specifically looking for candidates who spoke Cantonese and/or Mandarin. The most likely candidates would be those of Chinese ethnic or national origin. Four candidates who were chosen for the program were Chinese. In my opinion, there is nothing in the evidence to support the conclusion that there were any discriminatory practices in the selection process carried out by Metro Human Resources.

[80] Further, at no time did Ms. Wong ever assert that her alleged unfair treatment by Mr. Turner was because of her racial or ethnic origin, that is, because she is Chinese. Indeed the evidence is to the contrary. The two certainly had their disagreements. They did not get on well together. Yet Mr. Turner together with Mr. McGuire strongly supported her AMPB application.

[81] In fact, Ms. Wong never raised any question of discrimination with respect to her AMPB candidacy until many months after her rejection. This is noteworthy because Ms. Wong has never been reluctant to express her concerns if she thought she had been unfairly treated or improperly labelled. Indeed, in her May 25, 1996, letter to Mr. Palmer, she endorsed the assessment that she could be particularly effective in the Asian market.

[82] It is well established that a complainant, in order to succeed before a human rights tribunal, must first establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict for the complainant, in the absence of an answer from the respondent. ⁽¹⁾

[83] In my opinion, the evidence does not support the conclusion that Ms. Wong's AMPB application was rejected because she was Chinese. Rather, she was not selected because she did not meet the program criteria and was not competitive.

[84] Accordingly, I have concluded that Ms. Wong has not established a *prima facie* case that she was refused job opportunities because of her race and national and ethnic origin.

III. Failure to Accommodate Her Disability - Stress and Depression

D. February 6, 1996 - June 30, 1996

[85] After Ms. Wong went off sick on February 7, 1996, Ms. Wong advised the Bank that she did not want to return to the Call Centre because of the stress and health problems she suffered while working there. Ms. Wong's position is that the Bank promised, but did not find her another position outside of the Call Centre and thus failed to accommodate her disability.

[86] Further, in July 18, 1996, the Bank discontinued her short term benefits (which were subsequently reinstated three weeks later) and threatened to terminate her employment if she did not return to the Call Centre.

[87] Finally, because of the Bank's actions, her LTD application submitted in August 1996 was initially denied. It was ultimately approved in November 1996 but the process took about three months. This, she alleges, caused her considerable emotional stress and financial hardship.

[88] On February 8, Dr. Alexander, Ms. Wong's family doctor wrote a letter to whom it may concern, advising that Ms. Wong would be off work for two weeks for medical reasons. Apparently, on the strength of this letter, Ms. Wong began to receive STD benefits starting on February 7, 1996.

[89] All medical matters were handled by the Bank's Health Centre. The Health Centre doctors would assess the medical claim and then advise the appropriate Human Resources department as to whether the disability claim was accepted, refused or whether further information was required. Human Resources would then advise the employee as to their status. The employee's medical records were confidential and dealt with on a doctor to doctor basis.

[90] The procedure for claiming STD benefits was that the employee's doctor would submit a Form 2932 to the Health Centre, which included the diagnosis, prognosis for recovery, the date of the most recent examination, the expected return to work date, and whether the doctor wished to discuss the employee's illness with the Bank's doctor.

[91] The Call Centre was not privy to any medical information relating to Ms. Wong and did not make any decisions based on medical information. It relied solely on the Health Centre's assessment.

[92] A Form 2932 was to be submitted to the Health Centre to commence the STD benefits. Thereafter the employee's doctor was to submit this Form at least every month (or sooner based on the doctor's previous assessment) to update the Health Centre as to the employee's medical status. Continuation of the STD benefits was assessed on the basis of these updated medical reports.

[93] The STD plan was self administered by the Bank through the Health Centre. Under the plan, Ms Wong received 100% of her salary for a period of six months.

[94] Normally, about one month before the STD benefits were to expire, the employee was sent an application for long term disability benefits. This was done so that there was no interruption in the employee's disability benefits.

[95] The Bank's LTD plan was administered by Sun Life on behalf of the Bank and it was Sun Life which made the decision, based on the medical evidence and the employer's and employee's statements, whether or not to approve the LTD claim. Long term disability benefits were 70% of salary and extended for one year, after which time the claim was reassessed on a periodic basis.

[96] Ms. Fitzjohn was responsible for the non-medical administration of the STD plan at the Call Centre. According to her evidence, at this time Ms. Fitzjohn was focused on ensuring that Ms. Wong continued to receive her STD benefits. This was because the Health Centre was not receiving Form 2932 on a timely basis from Ms. Wong's doctor. Ms. Wong continued to receive STD benefits, although on a number of occasions Ms. Fitzjohn had to write to Ms. Wong requesting that her doctor submit the necessary Form to the Health Centre to support her STD claim.

[97] The first Form 2932 submitted by Dr. Alexander to the Health Centre was on February 19, 1996. Dr. Alexander's diagnosis was depression, diagnosis good and return to work, uncertain.

[98] Ms. Wong next consulted with Dr. Alexander on March 1, 1996. Dr. Alexander wrote a letter advising that Ms. Wong was to remain off work for one month. She did not submit a Form 2932.

[99] Ms. Wong started working full time at Canada Trust on March 18, 1996, in a position and at a salary somewhat higher than she received from the Bank. She did not tell Dr. Alexander that she was working. Obviously, she did not tell Canada Trust that she was receiving STD benefits from the Bank.

[100] Dr. Alexander saw Ms. Wong again on April 1, 1997. Dr. Alexander submitted a Form 2932 with a diagnosis of depression, prognosis good, unable to cope even at home, and not ready to return to work and should remain off work for another month. Dr. Alexander also referred Ms. Wong to Dr. Nesta Gordon, a psychotherapist, for treatment of depression.

[101] On April 23, 1996, Ms. Wong, after being advised by Ms. Fitzjohn, told Dr. Alexander that the Health Centre required an update on her current medical condition. Dr. Alexander wrote to Dr. Waddell, the medical director at the Health Centre that same day. In her letter, Dr. Alexander stated that Ms. Wong was diagnosed as having a depressed mood and continued to have difficulty coping with day to day activities. Dr. Alexander concluded that Ms. Wong was not ready to return to her usual job.

[102] The next Form 2932 that Dr. Alexander submitted to the Health Centre was dated May 30, 1996. On this Form, Dr. Alexander indicated that the diagnosis was depression and the prognosis was good. She also indicated that Ms. Wong could return to her regular occupation on June 17, 1996. There is nothing in this Form or in Dr. Alexander's clinical notes that explains why this date was chosen. Dr. Alexander, in her evidence, could not give any reason for this date. However, in her June 12, 1996, clinical notes, Dr. Alexander noted that Ms. Wong wanted to start work on June 17, 1996.

[103] On May 10, 1996, Ms. Wong first consulted with Dr. Nesta Gordon, a psychotherapist who carried on her practice in Oakville, Ontario. She told Dr. Gordon that she was very stressed and depressed because of her work situation at the Bank, and recounted the whole story about her performance appraisal, the AMPB program and her unfair treatment. She also reported that she had a happy home life, although her arranged marriage had some problems over the years. She

also reported problems with sleeping, disinterest in doing things including daily activities in the home. Ms. Wong did not tell Dr. Gordon that she was working at Canada Trust.

[104] From February 8, 1996, to May 30, 1996, Dr. Alexander had represented to the Bank that Ms. Wong was unable to return to work. Dr. Alexander also consistently indicated in the Forms 2932 that she did not wish to discuss Ms. Wong's illness with the Bank's doctors. The Bank accepted Dr. Alexander's opinion (which, she agreed, to a certain extent was based on what Ms. Wong reported to her) that Ms. Wong was not medically fit to work and continued her STD benefits.

[105] In the meantime, Ms. Wong was working at Canada Trust and receiving two full salaries. Her explanation for this was that she wanted to go back to work but not to the Call Centre. Her doctors would not agree to her working, so she did not tell them she was working at Canada Trust.

B. The Job Shadow Search

[106] In February 1996, Susan Stauth, following up on her discussion with Ms. Wong asked Earla Fitzjohn, then Manager, Human Resources at the Call Centre to take over this matter and try to arrange a job shadowing position for Ms. Wong in Mississauga or in Toronto District.

[107] In February and March 1996, Ms. Wong had a number of conversations with Ms. Fitzjohn about a job shadowing position. She told her that she had previously done job shadowing in 1995 at two branches in Mississauga, the Streetsville branch and the Creditview and Eglinton branch. She had received good evaluations from the managers and she preferred these branches, although she would go elsewhere. Ms. Wong believed that there would be no problem arranging a job shadow at one or other of these branches. Ms. Wong also told her that she was ready to go back to work but not at the Call Centre.

[108] Ms. Fitzjohn did not initiate a job shadow search until later in May or June. The reason was that she had to be satisfied that Ms. Wong was medically fit to return to work and that required her doctor's advice to the Health Centre that this was so. Ms. Fitzjohn told Ms. Wong that this was the Bank's procedure and any job shadow position was conditional on Ms. Wong's ability to return to work, certified by her doctor.

[109] In his RSVP letter to Ms. Wong dated April 23, 1996, Vice-President Palmer had indicated that he had asked Francine Dyksterhuis, who had succeeded Susan Stauth as Call Centre Manager to speak to her about her concerns. Ms. Dyksterhuis had three meetings with Ms. Wong.

[110] The first meeting in early May 1996 was held off site, away from the Call Centre at Ms. Wong's request. Ms. Dyksterhuis viewed this meeting as an opportunity to hear Ms. Wong's story and her concerns. At that meeting, Ms. Wong reported her complaints about unfair treatment, her annual appraisal, her failure to get into the AMPB program and her problems with Ian Turner.

[111] This meeting concluded with Ms. Dyksterhuis telling Ms. Wong that she would discuss her concerns with the appropriate persons at the Call Centre so she would have both sides of the story, which she did.

[112] The two met again on May 22, 1996. At that meeting, Ms. Dyksterhuis told Ms. Wong that she had followed up on her concerns and had concluded that Ms. Wong had not been treated unfairly.

[113] Ms. Wong's response was that she could not, because of the stress, return to her job at the Call Centre. Ms. Dyksterhuis did not endorse this and she told Ms. Wong that she had a job at the Call Centre if she chose to return. But she would explore other options, including one being a job shadow. She did not, however, promise Ms. Wong a job shadow position because that was not within her control. The Call Centre could request, but it was up to the branch to agree to such request.

[114] Ms. Wong asked Ms. Dyksterhuis whether she knew of any upcoming AMPB programs and Ms. Dyksterhuis said she would ask Ms. Fitzjohn to inquire but said she would not promise to support Ms. Wong for the AMPB program at that time.

[115] Ms. Dyksterhuis and Ms. Wong met for a third time about in early June 1996, again off site. Ms. Fitzjohn also attended at Ms. Dyksterhuis' request.

[116] At that meeting, Ms. Dyksterhuis laid out three options for Ms. Wong. First, they would try to locate a job shadow that may or may not end up in a permanent job. Ms. Wong's understanding was that they would try to do so by June 27, 1996. The Call Centre would pay her salary for three months. Or Ms. Wong could access the Jobline for another permanent job and the Call Centre would release her from her position there. The Jobline is a designated phone number which posts current job opportunities and which can be accessed by Bank employees 24 hours/day, 7 days/week. Or they would facilitate Ms. Wong's return to work at the Call Centre.

[117] As to returning to the Call Centre, it was Ms. Dyksterhuis' evidence that when Ms. Wong first started there, it was a start up operation. Since then, the Call Centre had expanded significantly and there were numerous opportunities that were available, both in terms of jobs and different locations within the Centre. Because of the rapid growth of the Centre, the opportunities were changing almost weekly. Ms. Dyksterhuis was willing to place Ms. Wong in a different job in a different location well away from where she had previously worked. Ms. Wong was not willing to consider this possibility. Her position from beginning was that she could not and would not return to the Centre.

[118] As to the upcoming AMPB program, there was one scheduled for September 1996. But Ms. Dyksterhuis reiterated that the Call Centre would not support Ms. Wong's candidacy for this program. The reason was that Ms. Wong had been off work since February 1996, and the Call Centre did not have any basis for assessing her performance or whether she would be competitive. The Call Centre may have supported her at a later date. As James McGuire had told

Ms. Dyksterhuis, it was not a matter of "if" but "when" she would be accepted into the AMPB program.

[119] Ms. Dyksterhuis' position was that an employee can not always have exactly the job they want. The Call Centre was prepared to consider a range of possibilities for Ms. Wong, but she had to be flexible and work with them to achieve a mutually acceptable solution.

[120] Ms. Fitzjohn contacted the Streetsville branch about a job shadow for Ms. Wong. The manager called her back and said he had referred it to Paul Martin, the area manager, who declined to offer a position. The manager at the Creditview and Eglinton branch called Ms. Fitzjohn and told her he was not interested in a job shadow for Ms. Wong.

[121] Ms. Fitzjohn had earlier in May, called the Chestnut and Dundas branch, and at the time they indicated that they might have a job shadow opportunity which she communicated to Ms. Wong. But when Ms. Fitzjohn called back in June, after she learned Ms. Wong could go back to work she was told that the situation had changed, the branch had been restructured and did not have the staff to train Ms. Wong. The branch, however, was interested in Ms. Wong for one of two full time positions, because of her language skills. But Ms. Wong would have to commit to the job for at least eighteen months. The branch had asked that Ms. Wong submit a Jobline application for either position, both of which were at a lower salary level. But the branch would maintain Ms. Wong's current salary level.

[122] Ms. Fitzjohn called Ms. Wong and spoke to her about this permanent job possibility. Ms. Fitzjohn's evidence is that Ms. Wong told her that she was not interested in a full time job at the Chestnut and Dundas branch. Rather, she wanted a job shadow for three months because she wanted to apply for the September 1996 AMPB program.

[123] Ms. Wong did not agree with this. Her version was that Ms. Fitzjohn never told her about the Chestnut and Dundas opportunity and she would have applied if she had known. On this question, I accept the evidence of Ms. Fitzjohn. It is consistent with other actions of Ms. Wong's in June.

[124] Ms. Fitzjohn and Ms. Wong met on June 27, 1996. Ms. Fitzjohn told Ms. Wong that she had not been able to find her a job shadow position. She also told Ms. Wong, as she and Ms. Dyksterhuis had a number of times before, that the Call Centre would not support her for the September AMPB program. If Ms. Wong had not been competitive on the day she left on short term disability, there was nothing to show that she would be competitive for the September AMPB program because she had not returned to work.

[125] Nonetheless, on June 28, 1996, Ms. Wong submitted her application for the September 1996 AMPB Program directly to Metro District Human Resources. She noted on her application that the Call Centre Manager, Francine Dyksterhuis, was not aware of her application because she was on vacation. Ms. Wong also advised that she would talk to Ms. Dyksterhuis about the application when she returned from holidays and Ms. Dyksterhuis would submit further documentation. Her application was subsequently returned because the Call Centre did not support it.

[126] Prior to this time Ms. Wong had contacted Clara McLaughlin, Human Resources Advisor at Canada Trust and told her that she could not continue to work at Canada Trust because of personal problems. Ms. Wong's evidence at the hearing was that she could not concentrate or focus and could not master the new systems required for the job. Ms. McLaughlin agreed and Ms. Wong was given a leave of absence without pay starting on June 2, 1996, to be reviewed in August.

[127] In my opinion, the evidence demonstrates that Ms. Wong's objective from mid-1995 was to get an AMPB position in a branch. She did not accept that her application was not competitive and instead attributed her decline to the actions of Ian Turner. Ms. Wong believed that, given her abilities, experiences and sales performance, she should have been accepted into the program.

[128] Ms. Wong was encouraged by the prospect of a job shadow as a path to the AMPB position. The reasonable inference is that her actions particularly in late May and June were directed to that goal. When she believed that she would get a job shadow by June 27, she took a leave of absence from Canada Trust on June 2. She protected her position at Canada Trust because of the uncertainty of a job shadow or a permanent position at a branch. She told Dr. Alexander that she wanted to return to work on June 17, 1996. She did not apply for a position at the Chestnut and Dundas Branch. She asked Vice-President Palmer to support her to an AMPB position. She applied for the September 1996 AMPB program although she knew that the Call Centre would not support her candidacy.

[129] Ms. Wong was questioned as to why she did not terminate her employment with the Bank after she was hired by Canada Trust within hours of calling Gary Ford on February 8, 1996, at a higher level and at a higher salary. Ms. Wong's answer was that she was preoccupied with the issues at the Bank and what the Bank did to her. Even though she had a good opportunity at Canada Trust, she was very angry at the Bank and the way they had treated her and she did not think that the Bank had been fair to her. She felt that the Bank had promised her for a long time that she would be accepted into the AMPB program and then she got turned down.

D. Short Term Disability Benefits and Failure to Accommodate

[130] Ms. Wong did not return to work at the Call Centre on June 17, 1996. On July 3, she went to see Dr. Alexander and told her that the Bank wanted her to return to her old job. Dr. Alexander submitted a Form 2932, dated July 8, 1996, in which she advised that Ms. Wong could return to work but not to her old job. Job stress was a major factor in preventing permanent improvement in her condition.

[131] Dr. Alexander agreed that she had based this assessment on what Ms. Wong had reported to her about job stress. Dr. Alexander did not contact anyone at the Call Centre nor is she experienced in occupational or workplace assessment.

[132] The Bank had a different perspective. Dr. Alexander had advised the Health Centre that Ms. Wong was cleared to return to her regular job on June 17, 1996. On June 27, Ms. Fitzjohn had advised Ms. Wong that there was no job shadow position at that time. Ms. Wong had said that she would not return to the Call Centre. Subsequently, the Health Centre received

documentation from Dr. Alexander that Ms. Wong could return to work but not to the Call Centre. The Health Centre advised the Call Centre that the medical information they had received did not support her not returning to the Call Centre.

[133] Ms. Fitzjohn had consulted with the Bank's Human Resources Advisory Services Group which provides advice to managers on difficult employment issues. On their advice, Ms. Fitzjohn wrote to Ms. Wong on July 8, 1996, advising that her doctor's medical information was not sufficient to continue her STD benefits and she had to return to work at the Call Centre by July 17, 1996, or her STD benefits would be discontinued.

[134] Understandably, Ms. Wong was upset by this letter, and asked Dr. Alexander to respond which she did by letter to Ms. Fitzjohn on July 16. In her letter, Dr. Alexander reiterated that Ms. Wong was suffering from depression as a result of job stress and it would be detrimental for Ms. Wong to resume her current job. Dr. Alexander requested that someone from the Health Centre contact her. No one did.

[135] Ms. Fitzjohn passed this letter on to the Health Centre. The Health Centre advised her that there was no new information to justify Ms. Wong's refusal to return to the call Centre. Thus, on July 18, 1996, Ms. Fitzjohn wrote to Ms. Wong advising her that since no new information was provided, the Call Centre had no alternative but to discontinue her salary as of July 18. She also advised Ms. Wong that she must return to work at the Call Centre by July 24, 1996, or they would recommend termination of her employment with the Bank.

[136] Both Dr. Alexander and Dr. Gordon now wrote to the Bank and were emphatic that Ms. Wong was suffering from a relapse of depressive illness and was unfit to return to work. Dr. Gordon also wrote to Dr. Waddell at the Health Centre, that in her opinion, Ms. Wong could return to work, but not to the Call Centre. Dr. Gordon concurred. She did not think that Ms. Wong was fit to work anywhere.

[137] Ms. Fitzjohn wrote to Ms. Wong on July 29, 1996, telling her that the Health Centre had received further medical information, but had concluded that it was insufficient to continue her STD benefits. Therefore, it was essential that she return to work on August 6, 1996, or her job would be terminated.

[138] This resulted in more letters from Dr. Alexander advising that Ms. Wong could not function effectively in her current employment. She was also highly critical of the Bank's actions and the Bank's failure to contact her as requested.

[139] In the result, Ms. Wong's STD benefits were reinstated on August 8, 1996, and backdated to run from July 18, 1996, to August 6, 1996, that is for the full six month term.

D. The Long Term Disability Benefits and Failure to Accommodate

[140] Ms. Wong applied to Sun Life, the administrator of the Bank's LTD plan, for LTD benefits. Her application, which was made in late August 1996, would normally have been in July before her STD benefits ran out. However, this did not happen because her STD benefits

had been temporarily discontinued. Ms. Wong's application was approved by Sun Life on November 10, 1996, and backdated to August 6, 1996, the date her STD benefits ended.

[141] Ms. Wong contended, however, that the Bank did not accommodate her disability by causing her LTD disability payments to be delayed for three months. She says that she suffered emotional stress and financial hardship as a result.

[142] The source of this delay seems to be the Employer's Statement dated August 6, (26?) which the Bank submitted to Sun Life in response to Ms. Wong's LTD claim. Ms. Fitzjohn noted in the Employer's Statement that there was a full time position available for Ms. Wong at the Call Centre. But when she was not accepted into the AMPB training program, she felt this is not fair, had refused to return to her job at the Call Centre, and has been on sick leave ever since.

[143] Joyce Johnson, the Co-ordinator for Disability Benefits at the Health Centre, also commented that Ms. Wong's situation appeared to be work related, but noted that Ms. Wong had been approved for full STD benefits. Ms. Fitzjohn's explanation was that the Statement required any information relating to performance issues or workplace conflicts and she considered this information responsive.

[144] Sun Life initially declined Ms. Wong's application. On September 19, 1996, Sun Life wrote to Joyce Johnson giving the reason that the medical information did not support a total disability and Ms. Wong appeared to be dissatisfied with her work situation.

[145] Ms. Wong again mobilized her doctors and in the months of September and October 1996, her doctors wrote a number of letters to Sun Life, Ms. Dyksterhuis and Ms. Fitzjohn. Dr. Gordon, Dr. Alexander and Dr. Karl O'Sullivan, a psychiatrist who treated Ms. Wong at the Oakville Trafalgar Hospital Day Psychiatric Program, were of the unanimous opinion that Ms. Wong was suffering from major depressive illness and was unfit to return to work. While all this was going on, Ms. Dyksterhuis wrote to Ms. Wong on October 16, 1996, advising her that, because she had not been accepted for LTD benefits, she had to return to work at the Call Centre by October 23, 1996, or her employment would be terminated.

[146] This resulted in another series of letters from Ms. Wong's doctors again confirming their previous medical opinion. Dr. Gordon and Dr. Alexander were particularly emphatic that Ms. Wong was unfit for work of any kind and her failure to improve over the part time months likely indicated a long standing, even permanent disability. Ms. Wong also wrote to Ms. Dyksterhuis on October 23, 1996, advising her that she had been admitted to the Oakville Trafalgar Hospital suffering from major depressive illness.

[147] The Bank withdrew its recommendation to terminate her employment and Sun Life approved her claim, Ms. Wong continued to receive LTD benefits until October 31, 1997, when they were discontinued.

D. Conclusion - Failure to Accommodate Ms. Wong's Disability

[148] The respondent does not dispute that Ms. Wong suffered from depressive illness. This was the opinion of all the doctors who gave evidence at this hearing.

[149] Rather, the issue is whether the Bank differentiated adversely in relation to Ms. Wong in the course of her employment contrary to section 7(b) of the *Act*. Ms. Wong's claim is that the Bank failed to accommodate her disability. But before any question of accommodation of her disability can arise, Ms. Wong must first show a *prima facie* case of discrimination.

[150] Did the bank differentiate adversely in relation to Ms. Wong because of her disability. In my opinion, the answer to this question is no. There are numerous examples in the evidence where the Bank acted to deal positively with Ms. Wong's needs and employment situation. The Call Centre, with strong support from Ian Turner and James McGuire, put Ms. Wong forward as an AMPB candidate even though it was clear that she did not satisfy the criteria of tenure and two annual performance appraisals. This was exactly what Ms. Wong wanted and asked for.

[151] When it became apparent that there were irreconcilable differences between Ms. Wong and Mr. Turner, she was transferred to another sales team in the Call Centre as requested by Ms. Wong through her doctor. Ms. Wong was generally satisfied with this arrangement.

[152] When Ms. Wong did not return to work after February 7, 1996, the Bank put her on STD benefits on the strength of Dr. Alexander's letter and without the required Form 2932. The Bank continued Ms. Wong on STD benefits at least until her doctor advised that she was able to return to work and ultimately for the full six month term. Ms. Fitzjohn made special efforts to ensure that Ms. Wong's doctor provided the necessary documentation to support these benefits.

[153] The Bank also accepted, without question, Dr. Alexander's diagnosis of depression, her opinion as to Ms. Wong's ability to return to work, and Dr. Alexander's position that she did not wish to discuss Ms. Wong's illness with the Bank's doctor.

[154] The Bank agreed to try and locate a job shadow and pay her for three months. This was in response to Ms. Wong's stated position, consistently held from February 7, 1996, that she would not return to work at the Call Centre. Ms. Wong had no medical support for this stance until at least the middle of July 1996, but she took and maintained this stand from February 1996.

[155] Ms. Fitzjohn did look for alternatives outside of the Call Centre. She did not begin her search immediately as Ms. Wong wanted. She needed medical advice that Ms. Wong could return to work. Ms. Wong's doctors were telling the Bank the opposite.

[156] Ms. Fitzjohn contacted the two branches where Ms. Wong preferred a job shadow and where she told Ms. Fitzjohn she had job shadowed before. Neither of their two branches were interested in offering Ms. Wong a job shadow position. The Call Centre could not require a branch to take on Ms. Wong.

[157] Ms. Fitzjohn was able to locate an opportunity for a permanent position at the Dundas and Chestnut Branch. Ms. Wong was not interested in this opportunity.

[158] The Call Centre would not support Ms. Wong's application for the upcoming September 1996 AMPB program. This decision made sense. If Ms. Wong was not competitive when she had been working full time, she could not expect to be competitive when she had been off work for five months.

[159] Both Ms. Dyksterhuis and Ms. Fitzjohn encouraged Ms. Wong to return to the Call Centre when she was fit to return to work. They told her that they would facilitate her return. The Call Centre had expanded considerably both in terms of size and available jobs. They were willing to place her in a different position in a different department on a different floor. Ms. Wong was free to access the Jobline for another position and the Call Centre would release her if she found another job.

[160] Ms. Wong wanted the perfect solution. And for her the perfect solution was the AMPB training program or something that would lead to an AMPB position in a branch.

[161] Can the Bank be criticized for cutting off Ms. Wong's benefits in July 1996 and requiring her to return to work or be terminated. Or for causing the delay in the approval of her LTD benefits. Ms. Wong thinks so. She argued that the Bank was particularly insensitive and unsympathetic to her medical condition and the impact of these actions decision on her condition.

[162] But consider the situation on the basis of the facts known to the Bank. Ms. Wong confirmed many times that she would not return to the Call Centre. From February 8, 1996, to May 30, 1996, Ms. Wong's doctor advised that Ms. Wong was not fit to return to work. On May 30, Dr. Alexander advised that Ms. Wong could return to her regular occupation on June 17, 1996. Ms. Wong did not return to work on that day. She did not agree to any other options given to her by the Bank.

[163] On July 9, 1996, Dr. Alexander advised the Bank that Ms. Wong could return to work but not to the Call Centre. The Health Centre did not consider Dr. Alexander's medical information adequate to support further STD benefits. In my view, given the historical background, Ms. Wong's actions and the medical advice received from Dr. Alexander, the Call Centre was justified in taking the actions it did.

[164] Similarly, I do not find that the Bank acted in a discriminatory fashion in dealing with Ms. Wong's LTD claim. The same historical background was at play here, except perhaps it was more explicit in Ms. Fitzjohn's and Ms. Johnson's comments in the Employer's Statement. In any case, I do not accept that Ms. Wong suffered any financial hardship. Ultimately she received her full STD benefits and received LTD benefits from August 7, 1996, to October 31, 1997. In addition, Ms. Wong had received a double salary from March 18, 1996 to at least June 2, 1996.

D. Conclusion

[165] I have concluded on the evidence that the Bank did not differentiate adversely in relation to Ms. Wong in the course of her employment. Ms. Wong has not established a *prima facie* case of discrimination on this aspect of her complaint. Having made this finding, there is no need to

consider whether or not the Bank accommodated Ms. Wong's disability. There is no obligation in law for the Bank to do so.

IV. Termination by the Bank and by Canada Trust

A. The Return to Canada Trust

[166] In August, 1996, Clara McLaughlin called Ms. Wong about returning to her job at Canada Trust. Ms. Wong told her that she had been in a car accident. Ms. McLaughlin said that she would ask Mutual Life, the benefits administrator for Canada Trust, to provide her with short term disability benefits. Ms. Wong did not want to apply for these benefits and told Ms. McLaughlin that she was covered under her husband's insurance policy which was not true. At this time, Ms. Wong was about to or had applied for LTD benefits from the Bank. Ms. McLaughlin insisted and between August 12, 1996, and October 2, 1996, Mutual Life deposited approximately \$5,000 in Ms. Wong's bank account.

[167] When Mutual Life asked Ms. Wong to submit a STD application, Ms. Wong wrote them on October 2, 1996, asking to cancel the STD benefits because she had received disability benefits from her personal insurance company. Ms. Wong paid back the money that she had received from Mutual Life.

[168] Clara McLaughlin agreed to extend Ms. Wong's leave of absence.

[169] In June 1997, Clara McLaughlin called Ms. Wong and told her that she had been on leave of absence for one year, and it would be difficult to hold her job if she did not return to work.

[170] Ms. Wong returned to work at Canada Trust around June 12, 1997, and stayed there until August 21, 1997. When she went back she, in effect, did a job shadow to learn the new practices and procedures. Within that period, Ms. Wong said that she was absent a number of days because she didn't feel up to the job. She received her full salary from Canada Trust while at the same time she was receiving seventy per cent of salary from the Bank by way of LTD benefits.

[171] In time, Ms. Wong decided that she could not manage the job at Canada Trust. She arranged with Clara McLaughlin to take a six month leave of absence starting on August 25, 1997. She told Ms. McLaughlin that her daughter was sick in the hospital, and she wanted to come back to work with a clear mind.

[172] In late June or early July 1997, Ms. Wong told Dr. Gordon that she had the opportunity to enrol in a training program with Canada Trust. Dr. Gordon had the impression that this was a trial program and Ms. Wong was not getting paid. Ms. Wong did not tell Dr. Gordon that she had been working at Canada Trust since the beginning of June at full salary.

[173] Dr. Gordon's medical opinion was that Ms. Wong was unable to work. But she did not want to discourage Ms. Wong from going ahead with this work trial because she felt that it was important for Ms. Wong to realize that her symptoms were preventing her from functioning in a job. Hopefully, Ms. Wong would then try to implement some strategies to improve her condition.

[174] Dr. Gordon considered this to be a therapeutic exercise for Ms. Wong, but believed that Ms. Wong would only last one or two days. For this reason, she advised Ms. Wong not to tell Sun Life about this situation and Ms. Wong did not.

B. Investigation and Termination by the Bank/Sun Life

[175] On July 29, 1997, Ms. Wong met with Dr. Allan Rosenbluth, a psychiatrist, and Chief of the Department of Psychiatry at Toronto East General Hospital. Dr. Rosenbluth has extensive credentials and experience in the area of psychiatric disability and vocational impairment.

[176] Dr. Rosenbluth had been retained by Sun Life to provide an independent person assessment of Ms. Wong's medical condition for the purpose of maintaining her LTD benefits. Sun Life was not satisfied on the basis of the medical information received, that Ms. Wong was totally disabled and unfit to return to work.

[177] Ms. Wong reported to Dr. Rosenbluth that she had become depressed because of her difficulties at the Bank. Her supervisor had treated her unfairly and rudely and she had received a negative evaluation even though she was the top sales agent in the department. That had resulted in her not being accepted into the AMPB program.

[178] As a result, she had become extremely anxious and depressed and this prevented her from doing almost anything during the day. In fact, she said, she did nothing except sit home and ruminate about her problems with the Bank. She also told Dr. Rosenbluth that she did not trust herself to go out alone, would not take short walks by herself and had to be accompanied to all her doctor appointments. Ms. Wong did not tell Dr. Rosenbluth that she was working at Canada Trust at that time.

[179] Ms. Wong also reported that she had a normal childhood, had a stable marriage and no problems until she became depressed because of how the Bank had treated her.

[180] Dr. Rosenbluth's assessment was that Ms. Wong's situation reflected a combination of depressive illness, significant work problems and some degree of exaggeration of her symptoms. He was somewhat sceptical about what Ms. Wong reported to him. Ms. Wong presented as a person who was unable to leave her house and did nothing but sit home and ruminate about her problems with the Bank. Yet she was able to go through an intense psychiatric examination without confirming any of the usual symptoms of impairment consistent with major depressive illness.

[181] Dr. Rosenbluth did not come to any definite conclusion as to whether Ms. Wong was totally disabled. If what Ms. Wong reported was true and if her previous medical assessments

were accurate, then she was disabled. But he had a number of reasons, based on objective evidence, to not completely believe what she was telling him.

[182] Dr. Rosenbluth set out these conclusions in his medical report to Sun Life and also suggested that Sun Life consider independent observation to confirm that Ms. Wong was as restricted in her daily activities as she reported.

[183] Dr. Frank Mace is currently Ms. Wong's treating psychiatrist. When Ms. Wong first consulted with Dr. Mace on April 4, 1999, she reported to him an unhappy childhood and her childhood family as a dark, unempathic place where she felt discriminated against and unappreciated. She also reported that her arranged marriage has been chronically unhappy and she had sought refuge in her work.

[184] In August 1997, Sun Life had requested a non-medical investigation of Ms. Wong's activities. As a result, Sun Life learned that Ms. Wong had been working at Canada Trust starting on March 18, 1996. Sun Life had also received confirmation that Ms. Wong had continued to work for Canada Trust for various periods of time until August 1997, and had been paid a total of approximately \$20,000.

[185] Sun Life passed this information on to the Bank's legal counsel who asked the Call Centre to investigate this matter. In the meantime, Sun Life suspended Ms. Wong's LTD benefits as of October 31, 1997.

[186] When Ms. Wong did not receive the next LTD payment, she called Sun Life who told her to call the Bank. She did and spoke to Maureen Belza. Ms. Belza told Ms. Wong that the Bank had learned from Sun Life that she was working at Canada Trust and asked her whether this was accurate.

[187] Initially, Ms. Wong told Ms. Belza only about the second time she had worked at Canada Trust, that it was a training program and she was only paid a minimum salary. Anyway, Ms. Wong said, her psychiatrist, Dr. Gordon, had advised her to do this and not tell Sun Life.

[188] Ms. Belza asked Ms. Wong to send her explanation to Sun Life and have Dr. Gordon also write a letter to Sun Life.

[189] Ms. Wong did write to Sun Life on December 2, 1997 stating that her doctor told her not to work at the Call Centre and the Bank did not offer her a job at another location. She also stated that her long term disability had been cut off, which wasn't true and with no income coming in, she had accepted a training program with training allowances offered by Canada Trust, also not true. None of these facts were accurate, bearing in mind that she had asked and accepted a job at Canada Trust on February 9, 1996. Her psychiatrist, Dr. Gordon, advised her to work at Canada Trust to see if she could handle the job.

[190] Dr. Gordon, at Ms. Wong's request, wrote to Sun Life on December 3, 1997. In her letter, Dr. Gordon stated that Ms. Wong had insisted on returning to work, and she approved her decision to accept Canada Trust's offer, on the condition that it was to be a therapeutic work trial.

Dr. Gordon stated in her letter that she had advised Ms. Wong to delay in notifying Sun Life because she believed that Ms. Wong would not succeed in a return to work because of her depressive condition.

[191] Dr. Gordon was still unaware at this time that Ms. Wong had worked at Canada Trust between March 18, 1996, and June 2, 1996.

[192] On December 8, 1997, Ms. Belza and Ms. Wong had a further conversation. At that time, Ms. Belza told Ms. Wong that she had details that Ms. Wong worked at Canada Trust on two occasions, one in 1996 and one in 1997 and asked Ms. Wong to confirm and explain this. Ms. Wong's response according to Ms. Belza, was that the Bank had cut off her salary for five months, she had no money and had to go to work. Again she blamed the Bank for all of this. She did offer to pay back to Sun Life for the STD benefits she had received while working for Canada Trust between March-June 1996. But she never considered paying that amount back earlier, she said, because she couldn't tell the Bank that she was working elsewhere.

[193] The next occasion that Ms. Belza and Ms. Wong spoke was around on December 23 or 24, 1997. In that conversation, Ms. Belza told Ms. Wong that her file would be reviewed at senior levels in the Bank and dismissal was a possible outcome because her honesty and integrity were in question.

[194] After an extensive review of the situation by senior management, the Bank decided to terminate Ms. Wong's employment. Ms. Belza wrote to Ms. Wong on January 13, 1998, advising her that as a result of Ms. Wong knowingly collecting disability payments while employed elsewhere, the Bank had lost confidence in her honesty and integrity. Consequently, she was dismissed from the employ of the Bank for just cause effective immediately. Ms. Belza, in her letter, invited Ms. Wong to submit any further information that was not previously available or was not given to the Bank for its consideration. Ms. Wong did not do so.

[195] Sun Life also wrote to Ms. Wong on February 10, 1998, regarding the status of her LTD claim. In the letter, Sun Life pointed out that Ms. Wong had declared to both Sun Life and the Bank that she was totally disabled from performing her job, when she was working for Canada Trust. Since this representation was not true and since she was no longer an employee of the Bank, Ms. Wong was no longer eligible for disability benefits.

E. Canada Trust/Mutual Life Disability Benefits

[196] When by December 18, 1997, Ms. Wong had not heard back from Sun Life with respect to her request for reinstatement of her LTD benefits, she called Mutual Life inquiring about STD benefits from Canada Trust. Ms. Wong received an application and submitted her claim to Mutual Life on December 23, 1997. Ms. Wong's evidence was that she wanted her STD benefits to start on December 23, 1997, so there could be no overlap with any Sun Life LTD payments.

[197] Under the Canada Trust, a STD plan had to be made within three months of going off sick. In Ms. Wong's case, this was August 21, 1997. However, Mutual Life waived this requirement and approved the claim. In March 1998, Ms. Wong received a lump sum payment of four

month's salary backdated to August 21, 1997, covering the period August 21, 1997, to November 21, 1997, which overlapped with the LTD benefits from Sun Life.

[198] Ms. Wong applied for LTD benefits from Mutual Life on March 28, 1998. Her claim was approved and she received fifty per cent of her salary. Ms. Wong also claimed and received disability benefits under the Canada Pension Plan starting in January 1998.

[199] When Ms. Wong submitted her LTD claim to Mutual Life, Clara McLaughlin called her and asked if she had received any form of payments from any other source from August 1997 forward. Ms. Wong's answer was no. Her explanation was that she was stuck, and, anyway, she was not an employee of the Bank and was not receiving any benefits from the Bank.

[200] The evidence also shows that Ms. Wong took other steps to avoid disclosing all of the facts to Canada Trust. In her STD application to Mutual Life, Ms. Wong did not disclose her period of employment with the Bank. In addition, she instructed Dr. Gordon not to provide Mutual Life with any medical reports that would show the period she was employed by the Bank. Ms. Wong also instructed Dr. Gordon to disclose to Mutual Life only information as to her clinical state and not any background or work information.

[201] Ms. Wong was also very selective in the information she gave to a representative from Mutual Life whom she spoke to and met with in April 1998 regarding her LTD claim. Ms. Wong reported to her that, since the death of her mother, her depression was more pronounced. She also attributed many of her difficulties from the lack of support of her spouse of 26 years which was an arranged marriage. Other significant factors for her depression, she said, were her unhappy childhood, her car accident in 1996, the hospitalization and subsequent diagnosis of mental illness of her daughter in 1977, and her current financial situation. She made no mention of her difficulties with the Bank.

E. Conclusion - Termination Because of Disability

[202] I had reserved my decision on Ms. Wong's request to amend her complaint to add the allegation that the Bank had terminated her employment contrary to Section 7 of the *Act*.

[203] I have concluded that I have jurisdiction under the *Act* to amend the complaint and I am satisfied that in doing so, the Bank has not been prejudicial and has received a full opportunity to respond to the complaint.

[204] There are numerous examples in the evidence of Ms. Wong being selective in what information she disclosed and adopting a strategy of deception or untruths. Examples of this include:

- (i) her failure to tell the Bank that she had accepted a position with Canada Trust;
- (ii) her failure to tell Dr. Alexander and Dr. Gordon that she was working at Canada Trust;

(iii) her failure to disclose to Gary Ford at Canada Trust that she was still an employee of the Bank;

(iv) her instruction to Dr. Gordon not to release to Mutual Life information relating to her period of employment at the Bank and failing to disclose this on her Mutual Life LTD claim;

(v) telling Clara McLaughlin that she did not require STD benefits in 1996 after her car accident because she was covered by her husband's insurance;

(vi) telling Clara McLaughlin that in April 1998 that she had not received any payments from any source prior to that time;

(vii) reporting to Dr. Rosenbluth in July 1997 that she had a normal childhood and adolescence and had a stable marriage and had no problems until she became depressed because of her unfair treatment by the Bank. But telling Dr. Mace and the Mutual Life representative that her depression was attributable to a number of personal factors;

(viii) not disclosing to Maureen Belza initially that she had only worked at Canada Trust on the occasion and did so on Dr. Gordon's advice;

(ix) telling Sun Life that her doctors had advised her not to work at the Call Centre and her disability payments had been cut off and Canada Trust had offered a training program with training allowances, which was not the case at all in March 1996.

[205] Ms. Wong does not dispute that she did not tell her doctors, or the Bank or Canada Trust or Sun Life or Mutual Life, the whole truth. I agree with the Bank that this certainly raises the question of Ms. Wong's honesty and integrity and the Bank's ability to continue to employ her in an industry where these are key factors.

[206] In her evidence, Ms. Wong said that her decision to keep her job with the Bank and claim disability payments while working at Canada Trust was based in part, on her feelings of anger towards the Bank and in part, on her feelings that the Bank had treated her unfairly. And this was poor judgement on her part. But she attributed her poor judgement and her actions to the fact she was so stressed, anxious and depressed that she did not know what she was doing and because of her depressive illness, she should not be held responsible for her actions.

[207] Both Dr. Rosenbluth and Dr. Mace commented on this question in their evidence. Dr. Mace pointed out that depressive illness does not preclude rational decisions unless the depression is of a psychotic nature, that is, where an individual is unable to tell truth from fantasies. Ms. Wong was not, in his medical opinion, psychotic. Dr. Mace also said that a depressed person remains competent to endorse all kinds of decisions. It is not an illness that is likely to cause a default on that question.

[208] Dr. Rosenbluth was equally definitive. In his view and experience, psychiatric patients do not lie more than the general public. One is probably more at risk of being lied to by non-

psychiatric patients than with psychiatric patients. Psychiatric illness does not make you lie. Depressive illness does not make you lie. It is unrelated. Lying is not an illness issue.

[209] Ms. Wong for whatever reason, be it anger at the Bank, or her feelings of unfair treatment; or wanting to get what she thought she was promised or entitled to; or because of financial reasons or because of her unhappy home life, chose to mislead and withhold key information. But more so, she chose a course of dishonesty with both the Bank and Canada Trust.

[210] The Bank did not fire Ms. Wong because she could not do her job, because of her disability. In fact, the Bank recognized her disability by approving both her STD and LTD claims. Rather, the Bank dismissed Ms. Wong because of her dishonesty and lack of integrity in working at Canada Trust while representing to the Bank that she was totally disabled from working.

[211] In my opinion, based on the expert evidence of Dr. Mace and Dr. Rosenbluth, Ms. Wong has not established the necessary link between her lack of honesty and integrity and her depressive illness. Lying is not an illness issue.

[212] Accordingly, I have concluded that the Bank did not terminate Ms. Wong's employment because of her disability. Rather, this was the fruit of her disingenuous action. Ms. Wong has not established a *prima facie* case on this issue.

V. Retaliation by the Bank

[213] Ms. Wong requested that her complaint be amended to add an allegation of retaliation under section 14.1 of the *Act*. I have considered this request and the Bank's submissions opposing the amendment.

[214] In my opinion, this amendment is incidental to and is derivative of the original complaint and should be dealt with in this hearing.

[215] My understanding of Ms. Wong's position is that the Bank had contacted Canada Trust/Mutual Life to obtain information concerning Ms. Wong's employment with Canada Trust during the time she received LTD with the Bank. Ms. Wong did not give any authorization to the Bank to do so. As a result of the Bank's enquiries, Canada Trust/Mutual Life investigated the matter and this led to Canada Trust/Mutual Life terminating Ms. Wong's employment and her disability benefits. Ms. Wong argued that the Bank did this in retaliation for her human rights complaint.

[216] It was not clear from Ms. Wong's evidence or argument exactly what actions that the Bank took and when the Bank took these actions. This can be important because section 14.1 of the *Act* came into effect on June 30, 1998. If the actions of the Bank occurred before this date, Ms. Wong has no claim. I will, however, for the purpose of this issue, assume that the putative actions of the Bank were after June 30, 1998.

[217] Section 14.1 of the *Act* makes it an offence to retaliate against an individual who has filed a complaint under the *Act*. There have been no decisions by this Tribunal as to what constitutes retaliation under this section of the *Act*.

[218] There have been a number of decisions dealing with retaliation/reprisal/provision under provincial Human Rights Codes. The decision most often referred to is *Entrop v. Imperial Oil Ltd. (No. 7)*.⁽²⁾ In *Entrop*, the Ontario Board of Inquiry dealt with interpretation of section 8 of the *Ontario Human Rights Code*. The wording of this section is different from that of section 14.1 of the *Act*. Nonetheless, in my opinion, the purpose of and protection offered by section 8 of the *Ontario Code* is similar to section 14.1. It prohibits reprisal against an individual for exercising their rights under the *Act*.

[219] According to *Entrop*, to prove a violation under this section, there must be a link between the alleged act of retaliation and the enforcement of the complainant's rights under the *Act*. Where there is evidence that the respondent intended the act to serve as retaliation for the human rights complaint, the linkage is established. But if the complainant reasonably perceived that the act to be retaliation for the human rights complaint, this could also amount to retaliation, quite apart from any proven intention of the respondent. Of course, the "reasonableness" of the complainant's perception must be measured. Respondents should not be accountable for unreasonable anxiety or undue reaction of the complainant.⁽³⁾

[220] There have been a number of provincial human rights tribunals that have not agreed with the *Entrop* analysis. These tribunals have taken the position, that under the retaliation/reprisal provisions of their legislation, the complainant must prove an intention to retaliate on the part of the respondent. The retaliation/reprisal provision is not like the other provisions in the legislation that confer rights and should not be interpreted as extending to apparently neutral actions of the respondent that may have an adverse impact on the complainant.⁽⁴⁾

[221] As the Supreme Court of Canada stated in *Robichaud v. Canada (Treasury Board)*⁽⁵⁾, the *Canadian Human Rights Act* is aimed at eliminating invidious discrimination. The *Act* is remedial and not punitive and, therefore, the motives or intention of those who discriminate are not central to the concerns of the *Act*.

[222] In my opinion, the logic of *Robichaud* tells us that section 14.1 should not be interpreted as requiring a complainant to prove an intention to retaliate. Nor, in my opinion, should section 14.1 be viewed as different in operation from those sections in the *Act* that confer rights. The language of section 14.1 makes it a discriminatory practice to retaliate. The remedies for a contravention of this section are the same as for any other discriminatory practice under the *Act*. In this respect, section 14.1 should be contrasted to section 59 of the *Act*.

[223] On this analysis, can it be concluded that the Bank intended to retaliate against Ms. Wong because she filed a human rights complaint? Can it be concluded that Ms. Wong's perception that the Bank retaliated against her was a reasonable one? In my opinion, the answer to both these questions is no.

[224] Ms. Wong filed her complaint on August 23, 1996. In August 1997, Sun Life learned that Ms. Wong had been working at Canada Trust and gave this information to the Bank. The Bank followed up this information and contacted Canada Trust/Mutual Life seeking confirmation and details of Ms. Wong's tenure there. There is nothing in these facts to suggest or support Ms. Wong's contention that the Bank did this because Ms. Wong filed a human rights complaint.

[225] Sometime in 1996 or 1997, Ms. Wong filed a complaint against the Bank under Division XIV - Part III of the *Canada Labour Code* alleging unjust dismissal. The adjudication in this matter commenced on August 11, 1997 and continued for a number of days in 1997, 1998 and 1999. There were a number of issues in this hearing, including a disagreement between Ms. Wong and the Bank as to how much money she had received from Canada Trust. The Bank subpoenaed Clara McLaughlin and she gave evidence on this issue of the adjudication on October 21, 1998.

[226] According to an internal, Canada Trust/Mutual Life memorandum dated October 30, 1998, filed as an exhibit by Ms. Wong, it was during the course of this adjudication, when Ms. McLaughlin gave evidence, that Canada Trust/Mutual Life discovered that Ms. Wong had another disability claim with another insurer while on claim with Mutual Life. Mutual Life pursued this information and confirmed with Sun Life that, in fact, this was so.

[227] On November 24, 1998, following her discussion with Ms. Wong, Ms. McLaughlin wrote to Ms. Wong that her employment with Canada Trust was terminated for cause, effective immediately. On December 13, 1998, Mutual Life wrote to Ms. Wong advising her that her LTD benefits had been terminated.

[228] Neither the Bank, Sun Life or Canada Trust/Mutual Life has asked Ms. Wong for reimbursement.

[229] Again, I have concluded on the evidence that the Bank did not retaliate against Ms. Wong because she filed a human rights complaint.

VI. Conclusion

[230] For all of the forgoing reasons, it is my decision that the complaint of Edith Wong, filed with the Canadian Human Rights Commission on August 23, 1996, and as amended, should be and is hereby dismissed.

J. Grant Sinclair, Chairperson

OTTAWA, Ontario

June 15, 2001

CANADIAN HUMAN RIGHTS TRIBUNAL
COUNSEL OF RECORD

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APPEARANCES:

Edith Wong On her own behalf

Hal Rolph Counsel for Royal Bank of Canada

1. *O'Malley v. Simpson-Sears Ltd.*, [1985] S.C.R. 536.

2. (1995), 23 C.H.R.R. D/213; aff'd (1998) O.A.C. 188 (Div. Ct.); varied on other grounds (2000), 50 O.R. 3^(d) 18 (C.A.). Other cases include: *Abouchar v. Metropolitan Toronto School Board* (1998) 31 C.H.R.R. D/411; *Moffatt v. Kinark Child and Family Services* (1998) 35 C.H.R.R. D/205; *Gerin v. I.M.P. Group Ltd.* (No. 2) (1996), 29 C.H.R.R. D/21; *Honey v. Coquitlam* (1999) 34 C.H.R.R. D/415; *Donaldson v. 463963 Ontario Ltd.*; (1994) C.H.R.R. 26; *Jones v. Amway of Canada, Ltd.* [2001]O.H.R.B.I.D. No. 9; *Jamieson v. Victoria Native Friendship Centre* (1994) 23 C.H.R.R. D/250.

3. *Supra*, p. D/219, para. 38, 39

4. See for example, *Guerin v. I.M.P. Group Ltd.* (No. 2); *Jamieson v. Victoria Friendship Centre*; *Jones v. Amway Canada Ltd.*; *Supra* footnote 2.

5. [1987] 2 S.C.R. 84