CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

MARIE-THERESE FAHMY

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

GREATER TORONTO AIRPORTS AUTHORITY

Respondent

REASONS FOR DECISION

MEMBER: Matthew D. Garfield

2008 CHRT 12
2008/05/07

I. INTRODUCTION

[1] It was an extremely busy and stressful time. It was 2002 and the new Terminal 1 at Pearson International Airport in Toronto was rushing to completion. The employees in the Information Technology department of the Respondent Greater Toronto Airports Authority ("GTAA") were on a tight time-line to get the computer system in operation for the new Terminal 1. This was the context in which the Complainant, Marie-Therese Fahmy, found herself when she joined the GTAA's IT Systems Operations as a network analyst in July 2002.

[2] At first, things seemed fine for Ms. Fahmy. However, as time went on, from her perspective and that of her employer, issues emerged. This began with the arrival of her new manager a few weeks after she started work at GTAA. The relationship deteriorated. From the employer's perspective, her work performance was simply not consistently satisfactory. However, because her work performance had improved since the first performance appraisal, her probationary period was extended. On May 1, 2003 - ten months after she began - GTAA terminated her employment. She filed a grievance alleging wrongful termination and a complaint with the Canadian Human Rights Commission ("Commission") alleging discrimination contrary to section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended ("*CHRA*") based on the prohibited grounds of race, national or ethnic origin, colour and sex.

II. BACKGROUND

[3] The Commission referred the complaint to the Canadian Human Rights Tribunal ("Tribunal") on December 30, 2005. The parties estimated ten days for the hearing. The Commission did not attend or participate at the hearing. At the first day of the hearing, counsel for the Complainant requested that the hearing be bifurcated. The Respondent consented. The Complainant's counsel indicated that she had recently taken over the case from previous counsel and was not able to get medical reports in time for the remedial portion of the hearing. Counsel also indicated that there were some "mental health" issues of the Complainant that her client did not wish to reveal unless it became necessary. They were not relevant to the liability part of the hearing. Because I was doubtful that the entire hearing could be completed in the agreed ten days in any event, I reluctantly agreed to bifurcate the hearing.

[4] Unfortunately, my suspicions were confirmed. The hearing ended up taking 21 ½ days, including a motion for non-suit. While counsel for the parties underestimated the time needed, in fairness to them, there were other factors involved. Some of the witnesses took an inordinate amount of time on the stand. For example, the Complainant's testimony alone took almost eight days of hearing. Questions had to be repeated as answers were simply not responsive to the questions. There were many objections made throughout the hearing, mainly by counsel for the Respondent. I should add that many of her objections were sustained.

[5] Aside from the length of the hearing, I was concerned about the length of time over which it was spread - one year exactly. This was due to the busy schedule of counsel. It was very difficult finding blocks of time that both counsel had available. I mention this because it has been five years since Ms. Fahmy's employment ended at GTAA. The Commission took 2 ½ years to refer the case to the Tribunal; the hearing itself was spread over one year. It is obviously not in the interests of either party (or the non-participating Commission) to have the matter take so long to reach a conclusion. From the parties' and the witnesses' points of view, memories fade and giving testimony becomes more difficult. From the Tribunal's perspective, it made it more challenging to adjudicate. However, I am satisfied that the *viva voce* evidence, along with the documentary evidence, was cogent enough that I am able to make findings of fact and law and come to a disposition.

III. THE USE OF INITIALS

[6] One will see throughout my Reasons for Decision that I make some strong findings regarding the credibility of the Complainant and certain witnesses, and their respective

evidence. Because of this and the harsh accusations by the Complainant toward her manager in particular and against other witnesses, and by other witnesses against each other, I have decided to use initials for some of the witnesses, to protect their privacy and reputations. I have not used initials for the parties.

IV. THE COMPLAINT

[7] Ms. Fahmy claims that her rights under subsections 7(a) and 7(b) of the *CHRA* were violated by the GTAA. Section 7 reads:

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,

based on a prohibited ground of discrimination.

Ms. Fahmy is claiming the grounds of race, national or ethnic origin, colour and sex. She is a woman of colour, and of Egyptian origin.

[8] The Complainant filed her Complaint on June 14, 2003. She had reformulated it several times. Indeed, the Commission initially refused to deal with her Complaint. I should add that this does not factor into my determination, as the hearing before the Tribunal is a *de novo* one. In my Reasons I address the particular allegations.

[9] The gist of her Complaint (based on the actual Complaint form filed, her Statement of Particulars filed with the Tribunal (akin to a pleading) and her *viva voce* testimony) is against her manager, S.M., who became her manager a few weeks after she began to work at GTAA. His predecessor had hired her. In her Complaint form, she also mentions that A.W., project manager, operations, who supervised her from January-April 2003, "...tried to destroy my self-esteem," notwithstanding her testimony that he was "very nice" to her. But her focus is on S.M. He is not a party; the GTAA is the only respondent. In her letter to GTAA President and CEO Louis Turpen dated May 4, 2003 following her termination, she said she did not blame the GTAA, only S.M. for discriminating against her. She wrote: "...he didn't like me for my background." She did not mention any discrimination based on her gender. As well, in a letter to the Commission which was stamped received December 11, 2003, Ms. Fahmy wrote, "I strongly believe that my Human Rights complaint is about giving my job to white people." There is no mention of gender or sex discrimination. She only claims discrimination based on sex later. As well, in the hearing, Ms. Fahmy alleged that A.W. secretly assigned technical jobs to the "white contractors" - nothing about gender-based discrimination.

[10] Notwithstanding S.M. is not a party, of course GTAA may be deemed liable (analogous to vicarious liability under tort law) for any discriminatory conduct by him (or any other manager, employee, contractor/consultant as agent) in the course of his employment, pursuant to section 65 of the *CHRA*. This is so unless the respondent employer can show it did not consent to the discriminatory practice, took reasonable due diligence to prevent it and mitigated its effect.

[11] In her Complaint form, Ms. Fahmy claims that her job was given to a less qualified "white contractor". She also says her white manager, S.M., favoured the "white guys" over the "accented" people of colour. She writes that he made sexist comments to her. As well, Ms. Fahmy states that S.M. gave her an unfair performance appraisal, "full of wrong accusation [*sic*]." She says she complained to Maria Maack, the human resources manager, about S.M.'s treatment of her, but to no avail. She also writes, "[S.M.] avoided me and refused to acknowledge my good performance". [Her underlining.]

V. MOTION FOR NON-SUIT

A. The Election Issue

[12] At the conclusion of the Complainant's case, counsel for the Respondent indicated she intended to bring a motion for non-suit. I received written submissions about the issue of whether GTAA would be put to an election not to call evidence if the motion was heard. I ruled that GTAA would not be required to make an election.

[13] Regarding the issue of the election, I have a few comments. First, the Tribunal has the jurisdiction to decide whether an election is required and to hear a motion for non-suit: *Filgueira v. Garfield Container Transport Inc.*, 2006 FC 785. Hughes J. pointed out at para. 22 that the matter of requiring an election is one of procedure, not of law or natural justice: 'Tribunals should be allowed reasonable latitude when it comes to procedure..." Second, there are thoughtful decisions at the Tribunal-level both requiring and not requiring an election to be made prior to hearing a motion for non-suit. In both decisions, the respective members agreed that the question should be decided in the circumstances of each case: *Chopra v. Canada (Department of National Health and Welfare)*, [1999] C.H.R.D. No. 5 and *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 30. In the civil context, most jurisdictions in Canada do not require an election.[1] While there are sound legal and policy reasons for both determinations, I am more persuaded by the arguments in favour of not requiring an election. In the *CHRA* context, there is no pre-trial oral discovery process available to the parties. There is no motion for summary judgment.[2] Indeed, an award of costs is not available to a victorious respondent in the *CHRA* proceeding before the Tribunal. A respondent dealing with a frivolous or vexatious complaint has little recourse to a summary determination short of a full hearing at the Tribunal, once the Commission has referred the complaint to the Tribunal. Accordingly, I do not believe it is fair to require a respondent to make an election not to call evidence as a condition precedent to having his motion for non-suit heard. No evidence was presented to me to suggest that not requiring elections increases the number of non-suit motions made, thus prolonging the hearing process.

B. Ruling on the Motion for Non-Suit

[14] On July 3, 2007, I heard argument on the motion for non-suit. Soon thereafter, I advised the parties of the following ruling:

The motion for non-suit is dismissed. I am satisfied that there is some evidence which, *if believed*, *could* trigger liability under the *CHRA*. This does not suggest that the evidence *will* be believed and liability established at the conclusion of the hearing, whether GTAA elects to call evidence or not. In either situation (*i.e.*, if GTAA calls evidence or not), when the hearing closes, I will undertake the usual weighing and assessing of the evidence, including credibility, which I am not permitted to do on a motion for non-suit.

In the circumstances of this case, where the Respondent was permitted to bring the motion for non-suit without having to make the election not to call evidence, I think it would be inappropriate to issue detailed Reasons now. Accordingly, my Reasons for Decision will be issued upon the completion of the hearing.

... ...

[15] One will see from my ruling above that I essentially gave no reasons, with the promise to give full reasons at the conclusion of the hearing. This addresses the commentary in the various cases dealing with elections and non-suits concerning whether

reasons should be given, and when and to what extent, where an election is not required. Obviously it is not an issue where the motion for non-suit is successful or where an election is required to be given. Adjudicator Slotnick in *Potocnik v. Thunder Bay (City)*, [1996] O.H.R.B.I.D. No. 16, at para. 16 cites with approval the approach taken in *Tomen v. O.T.F. (No. 3)*, (1989) 11 C.H.R.R. D/223 not to give reasons. At para. 10, Adjudicator Slotnick states:

...where an adjudicator does not require an election and ends up rejecting the motion to dismiss the complaint, the proper procedure is to give no reasons. Otherwise, the party that is about to present its evidence would have the advantage of the adjudicator's thoughts on the evidence of the other party.

In *Filgueira*, *supra*, Member Groarke refers to a respondent "taking the temperature" of the Tribunal. I agree that a respondent should not get an advantage from bringing an unsuccessful non-suit motion by getting to "test the waters" of a tribunal. The adjudicator should not give reasons, other than to say whether a *prima facie* test has been made out. That is the approach I have taken in this case.

C. The Law With Respect to Non-Suit Motions

[16] Sometimes referred to as a motion for dismissal in the case law, the purpose of the motion for non-suit makes sense. In the adversarial process, a defendant is not forced to lead evidence. The burden of proof rests with the proponent of the case - the plaintiff. The defendant should not be relied upon to help prove a plaintiff's case. As well, if a plaintiff is not able to present sufficient (or any) evidence to prove in fact and in law that liability should ensue, the defendant should not be obligated to run his or her case, at great expense to the parties and the public court system.

[17] While a defendant's resources and the public purse should not be burdened to pay for frivolous or vexatious claims, the courts have set a high bar for non-suit motions to succeed. This is done through various means: the *prima facie* test requiring a presumption that a plaintiff's evidence be believed, in essence the benefit of the doubt going to the plaintiff; forcing an election to be made by a defendant (in those jurisdictions that require it); and the awarding of costs against an unsuccessful moving party. The courts have clearly determined that it should not be too easy for a defendant to knock out a lawsuit on a motion for non-suit. Perhaps there is a fear of delay to the process if unsuccessful non-suit motions became the norm. On the other hand, as Adjudicator Wildsmith stated in *Gerin v. IMP Group Ltd.*, [1994] N.S.H.R.B.I.D. No. 4, at para. 21: "...I note that the motion for non-suit is a potential safeguard against abuse."

D. The *Prima Facie* Case in Non-Suit Motions

[18] There have been differences espoused by the courts over the years regarding the proper test to be applied to non-suit motions. For example, does the plaintiff need to adduce sufficient evidence or simply any evidence on the elements of the case to defeat a motion for non-suit? Is there a difference in the criminal vs. civil context?

[19] On the civil side, and this includes for my purposes, the present case before me, the test for the moving party is: has there been some evidence led which, if believed, could trigger liability, in the absence of an answer from the defendant (or respondent in the *CHRA* context)? In other words, is there a case for the defendant to answer? If "yes", the motion is dismissed; if the answer is negative, the motion is granted. An unsuccessful motion for non-suit does not mean that the plaintiff will win the day at the conclusion of

the hearing proper. It simply means this high bar for a preliminary dismissal has not been reached.

[20] It is important to note the different analytical approaches used in the non-suit and "on the merits" determination. As Member Groarke noted in another decision in *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32, at para. 12, in a motion for non-suit there is a different kind of analysis undertaken than that carried out "on the merits" at the end of a hearing. The courts have been quite clear that a trial judge or adjudicator should not do the regular weighing and assessing of evidence, including credibility, that is done in the normal course at the conclusion of a trial or hearing. To confuse the two processes is an error in law. The trier at the non-suit is measuring the case from a *prima facie* perspective - very superficially, "at first glance or sight" as the Latin term *prima facie* literally means. No in-depth perusing of the evidence or assessment of the credibility of the witnesses is done. As Adjudicator Wildsmith correctly pointed out in *Gerin*, *supra* at para. 7: "...the quality of the evidence should not be assessed at this point." Further, as Adjudicator Baum wrote in *Tomen*, *supra* at para. 29: "I am bound to view the evidence through a narrow prism. I am not, as such, evaluating conflicting evidence." I would add that that includes conflicting evidence within a complainant's own case, unless of course, it is simply so unbelievable. At the non-suit stage, there is almost an evidential presumption of truth - "evidence if believed". The plaintiff or complainant gets the benefit of the doubt. Indeed, the bar is cast so high that it is only if the complainant's case is totally unbelievable or far-fetched (*i.e.*, one would have to suspend one's belief to accept it) that it should be disbelieved.[3] The result is that it is difficult for a moving party to be successful on a motion for non-suit. Furthermore, if the court or tribunal requires an election, given the high threshold, very few defendant or respondent lawyers would take that risk.

[21] The role of the trial judge in a motion for non-suit was recently canvassed by the Ontario Court of Appeal in *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.* (2007), 85 O.R.(3d) 561. The Court held that the trial judge applied the wrong test in granting the non-suit motion "...by going beyond his limited mandate..." on the non-suit motion. Laskin J.A. wrote at paras. 35-36:

On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences...

In other words, on a non-suit motion the trial judge should not determine whether the competing inferences available to the defendant on the evidence rebut the plaintiff's *prima facie* case. The trial judge should make that determination at the end of the trial, not on the non-suit motion. See John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths Canada, 1999) at 139.

I assume that the Court is not suggesting the "assumption of truth" of the evidence includes evidence that is unbelievable in the extreme, or simply preposterous.

[22] I also wish to point out that there is some confusion in the case law about whether the test requires that the evidence *would* or *could* trigger liability. Courts and tribunals have taken both approaches and some avoid the issue altogether. In *Filgueira*, *supra*,

Hughes J. quotes with approval at para. 6 the following passage in Sopinka, Lederman and Bryant: "The judge must conclude whether a reasonable trier of fact *could* find in the plaintiff's favour if it believed the evidence given in the trial up to that point." [My italics.] It appears clear that the Supreme Court of Canada has adopted the "*could*" approach, at least in the civil and criminal context, which I have followed here.[4] I see no reason to deviate from it in proceedings before the Tribunal.

[23] Is there a different evidential burden to establish a *prima facie* case of discrimination at the non-suit stage than outside such a motion, in the normal course of a hearing after both parties have led their case? This was not in issue before me in the instant case. Consequently, I leave that issue for another day.

E. Particular Allegations and Facts in this Non-Suit Motion

[24] I now turn to apply the law on non-suits to the allegations and facts in issue here. GTAA argues that there is no evidence which, if believed, is capable of supporting a finding of liability against it on either subsection 7(a) or 7(b) of the *CHRA* and in respect of any of the claimed prohibited grounds. The Complainant argues the opposite.

[25] Having carefully examined the evidence, both *viva voce* and documentary, by the Complainant and her witnesses, as I indicated in my ruling, I was satisfied evidence existed which, if believed, could trigger liability. For purposes of the non-suit, I do not have to go through each of the allegations. A *prima facie* case need only be established on a single "count" under section 7 for each claimed prohibited ground, in order for the motion to be dismissed. I appreciate that some of the allegations involve the prohibited ground of sex and others the grounds of race, national or ethnic origin, and colour. Some of the allegations also involve all of the claimed prohibited grounds, as it is often difficult to parse people's immutable characteristics in the finding of discriminatory practices.

[26] I have done this analysis on the motion for non-suit following these legal parameters: giving the benefit of the doubt to the Complainant, putting the absolute best interpretation on the evidence of her and her witnesses, and not taking into account questions of credibility.

[27] With regards to the question of liability under section 7 on the basis of sex, for purposes of the non-suit only, I find that the allegation of improper sexual statements against Ms. Fahmy on two occasions by S.M. or A.W. (but not M.G.) could trigger liability of GTAA. In particular, S.G.'s evidence is believable, for purposes of the non-suit, that either S.M. or A.W. made disparaging comments behind Ms. Fahmy's back in two meetings among the three of them. The comments were sexually degrading and involved the Complainant performing fellatio and were made by a manager of GTAA. Such comments, even though not brought to her attention until after her employment termination, could have constituted adverse differential treatment and factored into her employment termination on account of her gender. Included in this determination is the evidence of Ms. Fahmy that S.M. made sexist comments like, "It's still a man's world" and "let the men win". I also factor in the fact that Ms. Fahmy was the only woman in the IT department under S.M.'s supervision.

[28] I also find for purposes of this non-suit only that there existed some evidence, which if believed, could result in liability contrary to section 7 on the basis of race, national or ethnic origin, and colour. In particular, the following incidents in totality show on a *prima facie* basis, adverse differential treatment of Ms. Fahmy culminating in the

decision to terminate her employment on the basis of her race, national or ethnic origin, and colour:

(1) she was hired to be the technical lead on the MS Windows 2000 infrastructure project, but it was taken away from her and given to a white contractor with fewer qualifications than she, M.G.;

(2) Pre-Production Centre work was taken away from her and given to another white contractor, B.M., who was also less qualified than she;

(3) Ms. Fahmy was excluded from meetings, including one on January 30th, while the white contractors were not (*i.e.*, A.W., D.M., B.M., M.G.);

(4) S.M. made a disparaging comment that could be viewed as being directed at "accented" employees/contractors of colour: "I want people who can communicate better";

(5) white employees got training, but not the Complainant or the other people of colour;

(6) white, male colleagues had access to the Campus Area Network, but not her or the other employees/contractors of colour; and

(7) with respect to all claimed prohibited grounds, there is evidence that D.M. was told by S.M. to "make-up" performance/deficiency issues to justify terminating Ms. Fahmy's employment. This was said prior to her probationary period being extended and thus taints the *bona fides* of the whole performance appraisal process and extension of the probationary period.

VI. REASONS FOR DECISION ON THE MERITS

[29] Having dismissed the motion for non-suit, I asked counsel for the Respondent if she wished to call evidence. Understandably, Ms. Rusak answered "yes" and I proceeded to hear her witnesses and the brief Reply evidence of Ms. Fahmy. What follows are my Reasons for dismissing the Complaint on the merits.

A. The Law

[30] The initial onus of establishing a *prima facie* case of discrimination under the *CHRA* rests with a complainant or the Commission[5]: *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 536, at para. 28. Once that is established, the burden then shifts to the respondent to establish a justification or explanation for the discriminatory practice or action. The respondent's explanation should not figure in the determination of whether the complainant has made out a *prima facie* case of discrimination: *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 2004, at para. 22.

[31] Also relevant to the instant case is the legal principle that: "It is not necessary that discriminatory considerations be the sole reason for the actions in issue in order that the complaint may succeed. It is sufficient that the discrimination be one of the factors for the employer's decision": *Morris v. Canada (Armed Forces)* (2001), 42 C.H.R.R. D/443 (C.H.R.T.), at para. 69.

[32] The case law recognizes the difficulty of proving allegations of discrimination by direct evidence. Discrimination is frequently practised in a very subtle and subterranean manner. Overt discrimination is rare: *Basi v. Canadian National Railway Company (No. 1)* (1988), 9 C.H.R.R. D/5029 (C.H.R.T.), at para. 5038. Rather, it is the Tribunal's task to consider all of the circumstances to determine if there is, in what is described in the *Basi* case as, the "subtle scent of discrimination."

[33] The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. According to this standard, discrimination may be inferred where the evidence offered in support of the discrimination renders such an inference

more probable than the other possible inferences or hypotheses: *Premakumar v. Air Canada (No. 2)* (2002), 42 C.H.R.R. D/63 (C.H.R.T.), at para. 81.

B. Findings of Credibility

[34] As an adjudicator, I am mindful that the hearing room is an artificial environment where witnesses react in individual and different ways to the stresses of giving testimony, etc. Accordingly, their demeanour is used as only one *indicium* of credibility. More important is the content of their testimony and what they did, said and wrote (as documentary evidence is important too) in the past events that form the basis of the subject matter of the Complaint before me, and how their evidence fares in the context of the totality of the evidence presented. I also wish to add that finding a witness credible or not does not mean that everything the witness says or writes is accepted or rejected. I have tried to make sense of all the evidence and make findings of fact about what actually occurred.

[35] As in many cases, credibility played an important part here. In my Reasons, I comment on the credibility of various witnesses. Here specifically, I wish to comment mainly on the credibility of the two most important witnesses in the hearing: the Complainant; and S.M. Although S.M. was not named as a party in the referral by the Commission, the Complaint and the theory of the Complainant's case always focused on S.M. as the alleged discriminator of Ms. Fahmy.

[36] Ms. Rusak submits that the Complainant, D.M. and S.G. perjured themselves before the Tribunal; their testimony was so unbelievable. While I won't go so far as to find that they perjured themselves, by the end of the hearing their credibility was damaged.

(i) The Complainant

[37] The Complainant's credibility was in question throughout the hearing, both in terms of what she said on the stand and what she wrote in emails and letters, and juxtaposed against other witnesses' evidence. She was not very credible and her evidence not reliable in many instances. She was on the stand for almost eight days. Ms. Fahmy was frequently evasive. She did not answer many questions the first time asked; some required repeated asking, particularly in cross-examination. Sometimes she would contradict herself within the span of minutes, and certainly from the examination-in-chief to the cross-examination. I do not believe language was the problem. While English is not her first language, and while she may not be totally fluent, her language facility in English is very good: both verbal and written. I judge this by her testimony and the numerous documents she wrote that were entered into evidence. I even asked her if she was having difficulty understanding the questions. She answered "no". I sometimes noticed that she would try to anticipate the cross-examiner's question before it was asked. I interjected numerous times, letting her know I understand it is stressful, but to listen carefully to the question and answer the question directly.

[38] Aside from her evasive demeanour, the content of many of her answers was unbelievable. I do not think she answered many of the questions honestly. Indeed, there was one instance where Ms. Rusak was asking her a question and the Complainant said she wasn't concentrating because she was reading the performance appraisal exhibit. Counsel replied that that was not true, that the Complainant was looking right at her, "staring her [counsel] down". Ms. Fahmy replied: "Yeah. Okay...You don't know...I'm looking and I'm reading." I was watching Ms. Fahmy during the whole exchange. Ms. Rusak was correct.

[39] Later in my Reasons under the specific headings of allegations, I will deal with some of the Complainant's evidence and that of other witnesses regarding her which raised concerns about her credibility. For now, I will give some examples. First, it was quite apparent that Ms. Fahmy misrepresented her experience in her *curriculum vitae* that was presented to GTAA via the placement agency, Agelon, when she was hired. In particular, in the *curriculum vitae* she gave to the Commission post-GTAA employment, she writes under the heading "Work Experience" that she was a "Senior Network Analyst" at GTAA. This is clearly untrue. In her testimony she acknowledged that she was hired at the GTAA as a "Network Analyst" and not as a "Senior Network Analyst". She knew that there was a clear difference between the two jobs, in terms of classification, salary, duties and responsibilities. She did the same thing with other former employers on this *c.v.* (*i.e.*, adding "Senior"). The *c.v.* she gave GTAA, via the placement agency, in April 2002 is different than the one produced to the Commission by the Complainant and which includes her employment post-GTAA. In addition, the dates she worked at several employers were not the same on both resumés: in one case, the Ontario Financing Authority, there was a seven month discrepancy. She also left out a company for which she had worked for over one year on her *c.v.* given to GTAA. When cross-examined on the discrepancies, she replied that a priest had told her it was alright to do so, "...it's not a lie if you put the same amount of years of experience. It doesn't matter how many companies." Ms. Fahmy indicated that she also was told it's okay to shrink your *curriculum vitae* as long as you highlight the important things. She also testified that she spoke with some human resources person in an Ontario government ministry "about how to do the resumé and how to make it short." She implied that the Ministry employee told her it was alright to alter work periods so as to avoid "gaps" in employment. She also stated, "...when I apply for a job that's not senior, I go remove all my senior or put them back. It's not about how accurate it is. It's about answering questions for the employer and being able to do the job." In cross-examination, she admitted that the *c.v.* she presented to get her job at GTAA was not completely "true and accurate".

[40] Another area damaging her credibility and making her evidence unreliable involves the question of her being busy or not while working at GTAA, and whether she accepted the evaluation of her work in the performance appraisals. Suffice to say that her evidence was contradictory. At one point, she testified that she was not busy 50-60 percent of the time from January-May 2003, because work had been taken away from her. This is so notwithstanding she had put in consistently for overtime and the evidence of several witnesses was that it was a busy time and there was lots of work for everyone. As well, she had replied in an April 8, 2003 email to S.M.'s request of his employees' work schedules that she was quite busy: "Daily activity: Support WNT/2000, and Exchange servers 90% of my time." In cross-examination, when it was put to her that her email reply was simply untrue, she replied that S.M. should know how busy they are: "...the manager should know what we are doing." She also testified that she was concerned if she had said she wasn't busy, that she might have been fired.

[41] Ms. Fahmy's evidence about the work appraisals also raised credibility concerns about her. She testified that she had not read the entire November 8, 2002 appraisal; she had read parts of it; she didn't understand part of it. Later, she stated, "A big part, I read but didn't agree with. A small part, I never read." This is coupled with the written response she gave to that issue. Having reviewed the appraisal and her written response, I

conclude she could not have written what she did without having read the entire appraisal. Furthermore, in her May 5, 2003 letter to the Commission, Ms. Fahmy wrote at p. 2: 'Then I went home and read the performance appraisal and I found too many wrong accusations." Clearly she read it, as she should have, given it was her responsibility as a probationary employee to read the appraisal to understand what areas she needed to improve.

[42] Regarding the content of the performance appraisal, she testified she didn't agree with it. There are clearly documents indicating her concern with some of it, including the suggestion that she missed many deadlines and the later giving of examples. Yet she also wrote that she agreed with it and would try to do better. She explains this by saying she was "trying to win him over" and that she didn't mean what she wrote. She wrote to S.M. that she likes him "sooo [*sic*] very much," when in fact she testified she thought S.M. was a racist at that time, but was "trying to win him." In essence, I find it difficult to determine whether she was telling the truth in the first instance, or telling the truth that she wasn't being truthful.

[43] Her evidence regarding her December 6, 2002 meeting with human resources manager Maria Maack is not believable in the main as well. She avers that she showed Ms. Maack emails demonstrating S.M. was "harassing" her and didn't like her because she is a woman. There is no email corroborating this. She says she wanted Ms. Maack to start an investigation into the matter. She says Ms. Maack refused to do anything. Ms. Fahmy also wrote, 'The sex discrimination was raised between Maria Maack and me only." I find her evidence utterly unbelievable. I do not accept her testimony that she alerted a seasoned human resources manager, who trains others regarding discrimination and harassment issues and investigates such matters, and that Ms. Maack refused to do anything. This would be contrary to the collective agreement and internal anti-discrimination/harassment policies of the GTAA. As Ms. Maack stated, if she failed to respond like that, she (Ms. Maack) would no longer have a job. I accept Ms. Maack's *viva voce* evidence and her email to S.M. and "to file" dated December 9, 2002 as reflective of what occurred at the meeting. I wish to add that I found Ms. Maack quite credible on the stand.

(ii) S.M.

[44] S.M. was Ms. Fahmy's manager. He started several weeks after she began working at GTAA. He was a new manager and indeed, he testified that he had never done a performance review before. While I do not accept all of his testimony, for the most part, I find S.M. was quite credible as a witness and his evidence reliable. He answered the questions succinctly and his *viva voce* testimony was generally consistent with his emails and letters, and with the preponderance of the evidence in the case.

[45] One area that I did not accept his evidence on concerned Ms. Fahmy remaining the technical lead on W2000 "even to the last day." Having reviewed the testimony of the other witnesses and the documentary evidence, while still a network analyst (the position for which she was hired), by the time her employment was terminated, she was no longer the technical lead on W2000. For example, I accept Ozgur Erkucuk's evidence that she was eventually "taken off the project." This will be discussed further in my Reasons.

C. The Allegations: Introduction

[46] I will deal now with the numerous allegations of the Complainant and issues that flow from them, under subsections 7(a) and 7(b) of the *CHRA*. Some involve all the

claimed prohibited grounds, others involve sex only and some race, national or ethnic origin, and colour only. Unless stated otherwise, each allegation deals with all four claimed prohibited grounds. Ms. MacKinnon, counsel for the Complainant, argues that each allegation of adverse differential treatment may not on its own attach liability to GTAA, but collectively they do.

[47] In final argument, Ms. MacKinnon submits that I make a finding of harassment, although she was not advancing a section 14 "harassment" claim. GTAA's counsel objected. GTAA was not put on notice of this and I indicated I would not allow the Complainant to do indirectly what she could not do directly. This case was always presented as one of a section 7 violation only; the Respondent did not receive reasonable notice. For natural justice reasons, no allegations of harassment will be considered against the Respondent.

D. Allegation #1: S.M. Took Away Her Work and Gave It to B.M. and M.G.

[48] This was a major part of Ms. Fahmy's Complaint. Ms. Fahmy says she was the technical lead of the Windows 2000 project at first, that her core duties were taken away from her, and given to two white, male consultants - B.M. and M.G. - who were less qualified than she. She claims that, as a consequence, she was relegated to less important duties. To deal with this allegation, I must examine exactly what her job was at GTAA.

[49] Ms. Fahmy was hired as a network analyst. "Technical lead" was not the job title. Within the job description, she could be assigned various projects at the discretion of her manager, such as that of "technical lead". A "position vacancy notice" and a "job analysis data" document outlining the job requirements and duties for a network analyst by GTAA were entered into evidence. Ms. Fahmy said they were applicable to her with some modifications. It included any assignments given to her by her manager. In her reply to GTAA's response to the Commission, she wrote: "The position is strictly Windows 2000/NT implementation and support." Her major duty, according to her, S.M., A.W. and M.G., was to be technical lead for the Windows 2000 project, migrating data and users from Windows NT to Windows 2000. This was the biggest and most expensive project in the IT department at the time. D.L. was the project manager and D.M. was the architect. Ms. Fahmy was to work closely with D.M.

[50] To have a better understanding of what her job was, let us examine what Ms. Fahmy wrote describing her job in her *curriculum vitae* post-GTAA employment at p. 2:

Greater Toronto Airport Authority July 2002-May 2003

Senior Network Analyst

Planned/implemented Active Directory Services and Windows 2000 Advanced servers' rollout.

Maintained/monitored 72 NT/2000 servers including DHCP, WINS and DDNS.

Configured Vlans and port security on Cisco switches 1900, 2900 and 3500 series.

Maintained Exchange 5.5 server and Exchange 2000.

Implemented SMS 2.0 and SQL 2000 server.

Provide backup for RSASecurID.

Involved in the computer's room layout and prepared all purchased cabinets and servers.

[51] The above job duties in her own written words belie her Complaint and testimony that her job was reduced, and part of her duties given to others, leaving her in a lesser role. She writes that she "Planned/implemented Active Directory Services and Windows

2000 Advanced servers' rollout." These are the technical lead duties which she both initially claimed she wasn't getting credit for by D.M. and V.J., and then later after it was apparent the system architecture didn't work and needed to be replaced or fixed, that she wasn't at all responsible, because the work was taken away from her. In her *c.v.* above, she conveniently doesn't mention that the rollout of the Windows 2000 system that she "[p]lanned/implemented" was a failure.

[52] Throughout the hearing, there was confusion as to exactly what Ms. Fahmy's role was, including the nomenclature - "technical lead", "primary", "senior", and "coordinator". I accept the evidence that "technical lead" and "primary" were interchangeable. The term "senior" was used by different witnesses to mean: longest tenured, most knowledgeable, lead. "Senior network analyst" is also a term of art in the industry and indeed is a separate classification under the collective agreement at the GTAA. A.W., who came into the picture in January 2003 to deal with the W2000 system design and implementation problems, said the Complainant "was the senior windows technical resource" on the W2000 project. S.M. testified that she was the coordinator for Windows 2000 for his department: the "senior, primary." He averred: 'The overall coordinating responsibility belonged to D.M. and D.L. ... She was the only permanent resource on the team [for the Windows 2000 project]. It was always her. It was never taken away; even to the last day, she was the main person responsible, even though I had concerns about her performance." He also said B.M. and M.G. were originally brought in to assist her as it was a big project.

[53] Her contradictory testimony about her role and responsibilities is evident in these exchanges between her and Ms. Rusak:

Q. ...you said that you misunderstood because you thought you were the senior on Windows 2000.

A. When I was hired - yes, I'm not a senior with a title, but I am in charge of making sure that things go right with Windows 2000. And if there was a problem I fixed it.

Q. ...You weren't hired as a senior, however you were trying to assume the role of a senior.

A. I am not assuming the role...I know my Windows 2000 at the level of senior, yes. I'm not a senior. I just know my stuff as a senior...I'm the only one in charge. Only one person. And I was allowed to fix errors done by other people. So this is my responsibility. If they do a problem I fix it. So this is most knowledgeable person of Windows.

... ...

Q. So you're saying that as the technical lead you couldn't determine who, to use your terminology, screwed up the systems, because there were too many people using the system.

... ...

A. I'm not the technical lead. I wasn't totally technical lead.

Q. You said you were the technical lead. I asked if you were the technical lead on the W2K project, you said yes. Now you're not the technical lead.

A. No. I am not the technical -- my problem is [S.M.] undermined me and he did not want me to -- he didn't respect my knowledge, so I wasn't the technical lead. I supposed to, but I wasn't.

[54] S.M. testified that: "Her job was to understand what was being built so she could support it and accept the system on behalf of the department and then support it." In his email to Ms. Fahmy dated November 12, 2002 (after she received her first performance

appraisal and replied that she was unclear as to her role), S.M. outlined her responsibilities:

... ...

You are assigned to the Windows 2000 project team. The team is being managed by [D.L. and D.M.]. Your primary role (as always) was to assist with the building and rollout of the W2K technology while becoming our department's expert in the area of administration and future growth (design) of the W2K technology.

I [*sic*] other words, continue to support the W2K team and make sure you understand how W2K was setup at L.B.P.I.A. Once the W2K environment is fully in production, you will be the main administrator for W2K in our group. [M.G.] will be your backup and should be involved in all W2K issues. Outside of this role, I expect that you continue to support any other production issues that might arise that do not impact you [*sic*] role on the W2K project. I also expect you to continue to respond to any pager calls you receive.

I expect you to continue to contribute to the team and offer your ideas and suggestions when problems arise.

... ...

[55] Several comments flow from the above email. First, I find it accurately reflected her role as of November 12, 2002. Second, her manager is clear in his expectations and in his communication of them to Ms. Fahmy.

[56] S.M. gave testimony that following the sending of the above November 12th email to Ms. Fahmy in response to her saying she was confused about her role, she replied, "Thank you for the update." She was not confused as to her role and responsibilities. However, he stated: "One day, she understands it; a week later, she's confused again. I have to send her an email. It happened four or more times; she needed constant feedback." He later said that he never had to manage an employee or contractor so much.

[57] The Minutes of the July 17, 2002 meeting regarding the "Windows 2000 Network Infrastructure Design", attended by D.M., Imran Asmal and the Complainant and copied to D.L. and S.M. stated: "Future management of the project will be based on equal participation of the three core team members [three attendees]." The Minutes were recorded by Ms. Fahmy.

[58] Having examined the evidence in detail, I find that she was originally hired as a network analyst with the main responsibility of being the technical lead for the W2000 project, run by D.L. and D.M. Ms. Fahmy would have other duties and tasks assigned to her from time to time, but the W2000 project was to occupy most of her time. Consistent with this are the notes that confirm that S.M. had to tell her to stay focused on the W2000 project and not worry about other work projects. Ms. Fahmy's email to S.M. dated September 6, 2002 complaining that D.M. and V.J. were not sharing any of the credit for the build with her confirms her key role in the project: "My help was totally denied and forgotten." I note that in the email, she sets out her role in the project which shows that she was integral to the build process. Ms. Fahmy is also very critical of D.M.'s work in that email. Indeed, in that same email, she wrote in bold, "[D.M.] didn't have any experience with W2K Domain Migration. He said it clearly when we started this project. Now you call him the expert and I am the one who is learning." Whether she was right or not, this confirms S.M.'s evidence about her constantly challenging D.M. and not accepting his role. Interestingly, when the project looked successful, she was not denying

her involvement or role and was complaining about the lack of credit being given to her. However, when it later became apparent that the system-build was a failure and would require an expensive fix or complete rebuild, she changed her tune. She downplayed the importance of her role and stated that she had no decision-making power.

[59] While I accept the Complainant was originally hired to be the technical lead or "primary" on the W2000 project, I do not find that she discharged that function to the end of her employment on May 1, 2003. I don't accept S.M.'s evidence on this point. In that regard, I accept the evidence of A.W. and S.G. when they testified that the people associated with the unsuccessful first W2000 system-build were tarnished with its failure. Many of them were no longer there in February 2003 when GTAA hired a well-respected Microsoft expert to find out what went wrong and make recommendations. The Microsoft Report, which was released on February 28, 2003, was a devastating condemnation of the system designed and built by the D.L./D.M./V.J./Fahmy team.[6] Ms. Fahmy was not one of the major players let go. I should add that GTAA stipulates, and S.M. stated this in his testimony, that the MS Report and Ms. Fahmy's role in the unsuccessful W2000 infrastructure build and implementation played no role in his decision to end her employment. While I believe this was not an explicit reason, I find that she was tainted by her involvement and association with the project as technical lead, as S.G. testified. This tainting, along with her other work and negative interactions with S.M., led to his losing confidence and trust in her abilities, and some of her responsibilities being taken away (*i.e.*, technical lead on the W2000 project).

[60] As well, it is natural that S.M., being a new manager, would want to bring in new people, especially after such a disaster, financial and time-wise. Further, I note the email from S.G. to M.G., and copied to Ms. Fahmy dated March 18, 2003 "recapping this morning's meeting" among S.M., S.G. and M.G. In that email, S.G. confirms that it was decided that M.G. would be the "Primary" or technical lead and Ms. Fahmy the "Secondary" for the "Administration and Support of WINS" [Enterprise W2000 system].

[61] I find that B.M. and M.G. were not brought in to replace Ms. Fahmy, as she claims. They were there originally to assist her in this major project in the fall of 2002. As well, M.G. was to be her back-up. I accept the evidence of M.G. and A.W. that it was standard practice and common sense to have a back-up for each technical lead or primary in case something happens to that person, they're on vacation, become ill, etc. A.W. testified that, "...in January, February, she was still technical lead and it was a major undertaking for one person." However, when it became apparent that the system was not working, the major people involved were tarnished - D.L., D.M. and Ms. Fahmy. It was a credibility smasher. Along with the issues of bad attitude and insubordinate/unprofessional behaviour by Ms. Fahmy in the eyes of S.M. (*e.g.*, always challenging him and D.M., the November 13th door closing-opening incident in S.M.'s office, walking out on him during the November 8th meeting, etc.), I believe that S.M. decided to lessen her duties as the technical lead in the W2000 project. By the end of February 2003, with the Terminal 1 deadline fast approaching, and the Microsoft Report in, a decision had been made by those above S.M. to re-build the W2000 system, at a great monetary cost. I do not believe that S.M. had the confidence in Ms. Fahmy to leave her as the technical lead for the system-rebuild. S.G., A.W. and M.G. would be the major players in the new Enterprise W2000 project. She was technical lead "in name only" for the first W2000 project from March 2003 to the end of her employment.

[62] While I find that, as of approximately March 2003, she was technical lead for the inoperative first W2000 project in name only and not the new Enterprise W2000 project, I do not see any liability under the *CHRA* attaching for several reasons. First and foremost, the decision was not related to any of the prohibited grounds claimed by Ms. Fahmy. It was based on her involvement in the unsuccessful first W2000 project, her inconsistent work performance and her personality conflict with her manager, S.M. Second, she did bear some responsibility for the first W2000 system's failure, along with D.L. as project manager and D.M. as the architect. Third, she was given additional important duties to fulfill such as purchasing equipment and doing the inventory. She also provided user support and responded to Heat tickets. As well, she was offered work at the Terminal 1 building construction site by S.M. and she turned it down. B.M. ended up being assigned the task. It is important to remember that she was hired as a network analyst, and that was what she was to the last day of her employment at GTAA. Her job description provided for flexibility in terms of assignments, as many jobs in workplaces do. As there were several network analysts working in IT Systems Operations and with overlapping duties, it is not surprising that management would juggle assignments among them.

[63] With regards to the role of B.M. and M.G., I do not find that they replaced her. They had similar roles, but there were differences too. M.G. became the coordinator for the second W2000 project (Enterprise) in March 2003. He was promoted the following month by Gary Long on April 28th to "coordinating the day to day Systems Operations activities while [S.M.] is focusing on the terminal." S.M. was still in charge of IT Systems Operations, but was essentially working out of the Terminal 1 construction site. I do find that the "primary" role on the W2000 system project was taken away from her and given to M.G. on the Enterprise system - the successor to the failed first system-build. According to the March 18, 2003 confirmatory email from S.G., it was decided that Ms. Fahmy would become the "secondary" for the "Administration and Support of WINS." I find that this amounted to adverse differential treatment. However, I also find that the decision was not based on any prohibited ground of discrimination claimed by Ms. Fahmy. Accordingly, there is no violation of subsection 7(b) of the *CHRA* here.

[64] Ms. Fahmy alleges that the Pre-Production Centre ("PPC") work was taken away from her and given to B.M. I heard evidence that S.M. originally assigned Ms. Fahmy the coordination of the PPC work. However, S.M. testified that the project was late "for many reasons." He asked Ms. Fahmy if she needed more resources. He averred that she said she was "getting by". Later, she agreed to bring someone else in to assist - B.M. S.M. stated that in October more work came in and she agreed to have B.M. do it. S.M. advised the IT group in an email on November 13, 2002 that, "[B.M.] will schedule and coordinate IT System Operations activities related to the PPC." The need for the PPC testing facility grew so S.M. eventually hired and dedicated a "permanent resource" to handle the work, David Piatek. Ms. Fahmy disputed S.M.'s version of these events; in particular, she said that she neither was consulted in advance nor agreed to B.M. taking over her role as coordinator of the PPC work.

[65] I find that the work was initially assigned to her, but it wasn't getting done on time and more resources were required; hence, B.M. being brought in to assist. I also find that S.M. subsequently decided to reassign the coordinator's role for the PPC to B.M. and then later, to have the work done by Mr. Piatek. The foregoing may well constitute adverse

differentiation of Ms. Fahmy. However, I find no nexus between the decision to initially bring in B.M. to assist and then take on the coordinating role for the PPC work, and any of the prohibited grounds of discrimination claimed by Ms. Fahmy. They were legitimate business decisions on the part of S.M.

[66] I wish to add that, on another occasion, S.M. took away work from Imran Asmal and reassigned it to Ms. Fahmy. Mr. Asmal was not happy about this decision.

[67] In the hearing and in her documentation, Ms. Fahmy alleges that not only did B.M. and M.G. replace her, but they were less than qualified to do so. It was challenged by S.M. As well, A.W., who was described as well respected in the IT field and "senior" by S.M., said that B.M. was a "superstar" and that many people sought his assistance. M.G.'s abilities were also lauded. He was promoted three times since he first joined GTAA. Indeed, at one point, Ms. Fahmy testified that, "As long as he [M.G.] is not touching my job he is qualified." That suggests that she was less than sincere in her earlier assertions about their competence. Even D.M., who was predisposed to Ms. Fahmy in his testimony, stated that he saw no real difference in terms of technical competence among Ms. Fahmy, B.M. and M.G. I find that B.M. and M.G. were qualified to do the jobs GTAA hired them to do and assigned to them during that period.

E. Allegation #2: The September 3 or 4 Conversation Between S.M. and Ms. Fahmy

[68] Ms. Fahmy testified that S.M. told her to leave the W2000 system-build to V.J., an IT consultant who worked on the project and D.M., the architect who was responsible for the design of the infrastructure. When questioned by her, S.M. allegedly said, "Are you challenging me? You're on probation." S.M. says Ms. Fahmy was repeatedly challenging the authority and decisions of D.M. and V.J. He said D.M. repeatedly complained to him about this. This was not corroborated by D.M. in his testimony. S.M. averred that he simply told her "to let them do their jobs." I accept S.M.'s evidence on this point. He denies the part about saying, "Are you challenging me. You're on probation." I do not believe he made that statement.

[69] With regard to Ms. Fahmy constantly challenging D.M.'s role and decisions, perhaps in a way she was right. The first design and build for the Windows 2000 project was unsuccessful. However, she never brought this to the attention of S.M. at any stage. Indeed, during cross-examination, she at first refused to even agree that the first build was a failure. She eventually agreed. I believe she was resistant because of her involvement and association with the unsuccessful project. Or perhaps it was due to the strategy she was advised to adopt and that she set out in her September 6th email to S.M. complaining about not being given credit for her work in the W2000 project by D.M. and V.J.:

I would like Gary Long to know what my role in W2K was.

First I recall that I did have a similar problem at Nortel Networks. A co-worker advised me to do the following:

1. **Not to be pro-active.**
2. **Let problems first escalate to top management**, and then solve them. Everyone would learn that you resolved these problems. You would get noticed and you would be like a hero.

[Her bolding.]

Of course, it didn't turn out that way. She didn't resolve the problems and she was associated with the failing project.

[70] By way of the prohibited ground of sex only, the Complainant argues that on September 3 or 4, 2002, S.M. made certain sexist comments. First, he said he didn't see many women in the IT field, and there were few in his graduating class. He allegedly said, "It's a man's world", "let the man win". Notwithstanding the comments appear in her Complaint as having been made on the same day, in the hearing Ms. Fahmy testified that they occurred on two separate occasions. "I didn't separate them [allegations] by dates when I made my Complaint." S.M. admits to the first comment (*i.e.*, lack of women in IT and his class). They are simply factual statements and certainly do not trigger liability under the *CHRA*. He denies the latter statements. I accept his testimony.

[71] During the hearing, the Complainant testified that when she joined GTAA, she was told that "[S.M.] doesn't like non-white people and all the people hired were white." This is hearsay evidence at its worst: no names, just pejorative, damaging accusations being made. Ms. Fahmy was reluctant to name those individuals. Her counsel stipulated that, "The people that she has named and who will be called as witnesses will testify to what they told her of their views and -- of their views and how they came to those views, so we're content to rely on that and not to rely on the Complainant's evidence that there were other unnamed individuals who gave her their opinions as well." However, not one witness corroborated this hearsay statement about S.M. not liking non-whites. I give this evidence no weight and reject it. Regarding only white people being hired, this is not true, and indeed white employees were not all kept on. There is no pattern of discriminatory hiring and firing practices by S.M. Indeed, the majority of employees in his department were people of colour. Counsel for the Complainant did not argue there was a systemic discriminatory hiring pattern here.

[72] I also heard evidence that Ms. Fahmy was the only female employee under S.M.'s supervision. Again, Ms. MacKinnon does not submit that there is a hiring pattern *per se* that constitutes a discriminatory practice. The fact that Ms. Fahmy was the only woman under S.M.'s supervision does not prove anything discriminatory *per se*. I have reviewed the evidence to determine if her being the only woman resulted in her being treated differently in a negative way. I don't find that to be the case.

[73] I would like to comment on the testimony of one of the Complainant's witnesses, Ozgur Erkucuk. He worked as a network analyst with Ms. Fahmy. Like her, he is a person of colour and was a unionized employee. He later returned there as a consultant and currently reports to M.G. He testified that the GTAA workplace was multi-cultural and multi-racial. While he could not remember some of the statements he allegedly made to the Commission investigator, he was clear in his *viva voce* evidence. He testified that he did not hear or see anything that suggested the Complainant was discriminated against based on the prohibited grounds she claimed. He said it is true that she was the only woman in S.M.'s IT group. He also stated that it was "understandable" for a new manager, who doesn't know his employees' skills and performance levels, to bring in new people. Ms. MacKinnon insinuates in argument that the witness perjured himself. I note that she did not attempt to have him declared a hostile witness. While his evidence was undoubtedly not what the Complainant had hoped for (he was their witness), I find Mr. Erkucuk was a credible witness and I accept his evidence above. He was not able to corroborate any adverse differential treatment of Ms. Fahmy based on the claimed grounds under the *CHRA*.

[74] I do believe the Complainant was a challenge for S.M. to manage, and he did not like her challenging his authority. I note that he complained about S.G. doing this, going over his head, etc. Perhaps as a new manager, S.M. was sensitive to employees/contractors "challenging" him. It appears the more Ms. Fahmy questioned him about things, such as why he was extending her probationary period, the more impatient he became. It's a fine line between "questioning" and "challenging". I also believe that Ms. Fahmy's obsessive, constant haranguing of S.M. (*e.g.*, by sending numerous emails on a single day on one issue and approaching him in person), who was extremely busy and away from the office often at meetings, got on his nerves. However, I don't see any connection based on the claimed prohibited grounds. Indeed, S.M. dealt with women in other departments at GTAA, including Maria Maack, and with a range of people from different racial and ethnic backgrounds. I accept Ms. Maack's evidence that there have been no complaints about S.M., other than Ms. Fahmy's, concerning his treatment and relationships with women or people of colour.

F. Allegation #3: Issue of Accents and Communication Level of Employees

[75] This allegation deals with the grounds of race, national or ethnic origin, and colour. Ms. Fahmy claims that, in the late summer of 2002, she overheard a conversation between S.M. and D.M. whereby S.M. allegedly remarked, "I only want people who could communicate at a certain level." She claims he said he "needs to hire more senior people that can communicate at my level." The Complainant testified that it was only said about non-white IT workers and that S.M. had a problem with accents. I note that Ms. Fahmy admitted that she never actually heard S.M. say he had problems with accents, only that he wanted "better communication". D.M., who was the person to whom S.M. allegedly made the comment, testified that he remembered discussing separately with D.L. and S.M. the issue as to whether Ms. Fahmy could communicate "at the appropriate technical level on projects." The discussions were about Ms. Fahmy, and not general in nature, which I interpret to mean they were not about other people. He didn't mention anything about accents. S.M. denied saying what Ms. Fahmy alleges. He said his only comment was that he wanted everyone, including clients, to communicate effectively in their emails. It had nothing to do with accents. I accept his explanation. S.M.'s testimony is more consistent with D.M.'s evidence. Ms. Fahmy also stated that S.M. only hired white contractors without accents. This is not so: for example, S.M. rehired Ozgur Erkucuk, who has an accent.

[76] In her reply to GTAA's response to the Commission, she wrote: "Two staff members said that he criticized our accents. They were very upset." She did not name the individuals. I accord no weight to this evidence.

G. Allegation #4: Security Clearance

[77] Ms. Fahmy asserts that she was delayed in starting her employment by two months because she was not given the proper security clearance. She says white contractors were allowed to start immediately without the clearance (*i.e.*, B.M. and M.G.). Maria Maack and S.M. testified that this was a requirement for all employees in every department at GTAA, given the nature of the work at the airport. Sometimes an independent contractor could begin work immediately with restricted access. It depended on the circumstances. Employees needed to get the security clearance. I accept this explanation and fail to see any nexus between the practice and a prohibited ground of discrimination.

H. Allegation #5: Security Gateway and Other Training

[78] The Complainant alleges that she requested and was denied training for Internet Security Gateway and it was a pattern. The white contractors got training, while she and the other people of colour did not. S.M. testified that both Param Singh, a Senior Network Analyst and Ozgur Erkucuk, a full time employee of Turkish ancestry, received the training as they were the primary and secondary respectively for the I.S.G. No one else had access. As well, Ms. Maack testified that an employer is not obligated to provide training to a probationary employee, beyond what is required for their job. I have no evidence before me about whether she was treated any differently than other probationary employees, if any, under S.M's supervision. S.M. testified that race played no part in his decision as to who got what training. Indeed, some of the most expensive training went to contractors/employees of colour. I accept the above evidence of GTAA. I see no adverse differential treatment and certainly none tied to a prohibited ground of discrimination under the *CHRA*.

I. Allegation #6: S.M. Excluded Her From Meetings

[79] Ms. Fahmy claims that S.M. excluded her from meetings. She had difficulty providing detailed examples; her testimony focused on a January 30, 2003 meeting. She testified that she knew M.G. was going to meetings she should have been at because she could see notations of meetings on his desk. She averred: "Meetings were behind my back about Windows 2000 so I did not know when [they took place]." She acknowledged, in cross-examination, the September 11, 2003 e-mail she sent to D.M. (entered into evidence) to help her remember the date of the Windows 2000 meeting she was excluded from: "I need to use it as an example of excluding me from Windows 2000 meetings." D.M. replied that, as far as he could remember, the meeting took place at "the very end of January". I find that the January 30, 2003 meeting was the only one from which she was excluded, and for legitimate and non-*CHRA* reasons, as will be addressed below.

[80] The January 30th meeting was called by S.M.'s boss, Gary Long, to discuss the problems with the first W2000 system, including the crashing and major outages. It was of great concern to GTAA. I accept S.M.'s evidence that Mr. Long determined who would attend. Given the discussion would be very critical of the system-build, it was thought that the two major people involved, D.M. and Ms. Fahmy, would not be present. I accept the evidence of A.W. that he didn't want it to turn into a shouting match and blaming exercise. He asked Ms. Fahmy to stay behind to monitor the centre and any emergencies by users. It was a mandatory requirement that someone always be present in the control centre at IT. D.M. was not invited either. Unfortunately, he "crashed" the meeting. I am satisfied that Ms. Fahmy was not unfairly excluded from this meeting, but if she was, it was not connected to a prohibited ground of discrimination. Ms. Fahmy has not established on a *prima facie* basis that she was kept out of any other meetings and if so, that said action was linked to a prohibited ground.

J. Allegation #7: Access to the Campus Area Network

[81] The Complainant alleges that she was denied access to the Campus Area Network ("CAN"), but B.M. and M.G. were not. This prevented her from doing her job sometimes. Both S.M. and A.W. said she did not need access to CAN to do her job. S.M. averred that B.M. and M.G. weren't given access initially either. Later they were because S.M. was moving over in February-March onsite to Terminal 1 and they needed access to CAN. M.G. testified that B.M. was working on the T1 project and required access and

M.G. was his "back-up" when B.M. went on vacation, etc. and thus, he too required access. "We wanted to keep tight control on access to CAN. This came from both Bell Canada and GTAA." I accept the explanation given by GTAA and do not find any engagement of section 7 of the *CHRA* here.

K. Allegation #8: CD Cabinet Key

[82] Ms. Fahmy testified that at one point the cabinet containing the CDs of all departments was locked and she wasn't given a key, and this prevented her from doing some of her tasks. She wrote, "Later, [M.G.] put a new lock on the cabinet and he gave the key to [B.M.], Calvin Ni [a person of colour] and kept one for himself." S.M. denied this, testifying: "Everyone had access to the Cabinet with the CDs. The custodian was Vishwa [Surajram, a database administrator and "senior" person]. The key was in the top drawer. Everyone knew that. She could have accessed it. CAN and the CD key were never raised as issues prior to this hearing." Even if Ms. Fahmy was not aware the key was in the top drawer readily accessible, I find no connection between this and section 7 of the *CHRA*.

L. Allegation #9: Sexual Comments About Ms. Fahmy at Two Meetings

[83] This was the most serious allegation. It emanated from S.G., who joined GTAA in January 2003. He was on contract from MicroAge Consultants. He was technical project manager and senior solutions architect for the W2000 Enterprise project. Ms. Fahmy learned about these alleged comments in general terms from S.G. following her employment termination.

[84] The allegation from S.G. at the time he testified was different from what he had told the Commission investigator some two years earlier. Differences are also apparent from his emails to and from Ms. Fahmy prior to the hearing. I should add that the emails were from Ms. Fahmy asking S.G. to assist at the hearing. She appears to be coaching him as to what to say, going over specific issues and what his response might be. He indicated to her that he would "only tell the truth" and that "I am not sure how I can help since I did not get to work with you very much and can't really speak to your technical abilities."

[85] Regarding the degrading sexual comments, in one undated email replying to Ms. Fahmy's email to him, S.G. wrote: "...I was also disgusted by his [S.M.'s] level of unprofessionalism and his sexist attitude when it came to discussing you. I will not repeat some of the things he said when I met with him in his office, but I can tell you that between him, [M.G. and A.W.], their discussion about women disgusted me." Although there is a reference to "discussing you" meaning Ms. Fahmy, he then says their discussion was "about women", not specifically about Ms. Fahmy.

[86] At the hearing, S.G. testified that there were two distinct incidents, both in S.M.'s office. He said "there were probably more" but he couldn't recall. At both meetings in February-March 2003, S.M., A.W. and he were present. He wasn't too sure if M.G. was present at either meeting. I find it odd that he wouldn't remember more about such meetings or have taken some action. He says he was "shocked" and in his email "disgusted", yet he was almost condoning what was allegedly said by not leaving the meetings and/or reporting them. In an incident involving an employee who played a joke on someone else's computer pretending he was that person and gay, when A.W. learned of it, he quickly reported it to S.M. The latter reacted promptly and made the offending individual apologize both in writing and verbally.

[87] S.G. testified that, at one of the two meetings, "...I remember one of the comments was she [Ms. Fahmy] would be less uptight if she got it more often... They didn't use that word, but I'll use that word." He said the words were "more blunt". The witness did not recall who said it. He thinks there were laughter and chuckles. At the other meeting, S.G. averred that a comment was made about "how well she [Ms. Fahmy] performed fellatio." The exact words were more graphic. Again, he thinks there was laughter and he's not sure who said it.

[88] Later in his testimony, he became clearer:

I don't know who actually said those comments. My guess is the conversation would have started with [A.W.]. Who made the comments I don't know. My guess is it started with [A.W.] but I don't know...I simply speculate based on the fact that every time he [A.W.] was around there was always a conversation that somehow had something to do with sex.

As I indicated earlier, the relationship between S.G. and A.W. was visceral. A.W. testified with candour, "We hate each other."

[89] S.G. was cross-examined on numerous prior inconsistent statements. He was asked why he didn't tell the same story that he told the Tribunal to the Commission investigator two years earlier, when his memory was much better. He testified: "...I don't generally speak to women in that type of language and, like I said, I didn't know who this person was...I also appreciate the fact that it was a phone interview with a woman that I had never talked to and I didn't even know if she was from the Human Rights Commission....Well, she called and said she was, but I don't believe anything at face value over the phone." Ms. Rusak then responded, "So you proceeded to tell her all this information about the GTAA and about [S.M.]. You're now saying that you talked to a woman that you didn't know [was a Commission investigator], you thought she may be, but maybe not, and you're just blurting all this stuff out?...But you divulged. You said you didn't use obscenities. You said "a good fuck". That's an obscenity..." S.G. admitted to being more graphic with the Commission investigator. Ms. Rusak was also able to elicit from the witness that he didn't say anything about "fellatio" to the Commission investigator.

[90] Further inconsistencies were revealed in the following exchange between Ms. Rusak and the witness:

Q. You're identifying one person, you're not taking a broad-brush approach. You're not saying [A.W.] may have said this. You actually never said to her, "And by the way, [A.W.], any time he's around it's always sort of that kind [of] conversation." You didn't tell her that, did you?

A. No, probably not.

Q. And you identified [S.M.] as saying certain things, but certainly not the way you represented them yesterday when you said two comments were made specifically with respect to the complainant, but you don't remember who it was. That's different, isn't it?

A. It is different. But like I said, that's four years ago.

[91] The foregoing testimony is strikingly unbelievable. I give it no weight. It is also surprising that, if these comments had been made, he didn't leave the office, he didn't complain about them, and he only told Ms. Fahmy after she left the GTAA. This was also after S.G. ended his relationship with GTAA and MicroAge (with whom he was contracted), and he was angry at the GTAA (and A.W. and S.M.). In addition to A.W.'s

testimony about his relationship with S.G., I accept S.M.'s testimony that his relationship with S.G. was poor, and that he was difficult to manage.

[92] In cross-examination, S.G. testified that at the time he spoke to the Commission investigator he thought it was S.M. who made the comments. "Now years later, I don't know." Ms. Rusak put it to him, "Then you said it was [S.M.]. Later you tried to expand the net because the Complainant told you the decision-maker was [A.W.], not [S.M.]. He replied, "That is news to me...I can say that [M.G.] was generally reserved and quiet in those kind of conversations...That's why I said I don't know if it was [S.M.], I don't know if it was [A.W.]. I can tell you it was not [M.G.]."

[93] S.M., A.W. and M.G. denied these comments outright. S.M. and A.W. could not remember if the two meetings among the four of them even took place. M.G. was asked if he was ever present in a meeting with S.G., S.M. and A.W. He answered, "Possibly... one time for sure." When asked in cross-examination if he would agree that if made, these comments would be offensive, A.W. replied, "Not only sexist, but disgraceful and repugnant." Each of them testified that they had never heard sexist comments or seen sexist behaviour exhibited by the others. S.G., A.W. and M.G. were examined and cross-examined on these two alleged incidents. S.M. was examined, but not cross-examined about the two alleged meetings in his office. I also heard evidence that S.M. never made jokes of any type. Mr. Surajram testified that not only did he never hear S.M. make a sexist or racist comment or act in such a manner, he added that he never even heard him make a joke. A.W. said, "I don't think [S.M.] even knows how to tell a joke." I was most troubled by S.G.'s evidence that it was common when A.W. was around for the conversation to degenerate into sexual banter. Based on S.G.'s inconsistencies about these incidents and his and A.W.'s poor relationship, I do not find that A.W. made those comments.

[94] Based on my findings above and my earlier comments about S.G.'s credibility, and the unequivocal denial by S.M., A.W. and M.G. (tested or able to be tested in cross-examination), I am not prepared to find on the sole basis of S.G.'s testimony that such degrading sexual comments were made about Ms. Fahmy in those two alleged incidents.

M. Allegation #10: Her Work Performance Was Good: Her Employment Termination was Discriminatory

[95] Ms. Fahmy claims that her work performance was good and that her employment was terminated because she is a woman of colour of Egyptian origin. GTAA counters, indicating that while her performance was satisfactory *at times*, it was not consistently of a good enough quality for her to be retained.

[96] The decision to terminate her employment was officially that of Gary Long, S.M.'s "boss". Being a contractor, S.M. was not permitted to officially hire or terminate people's employment; notwithstanding, he signed her performance appraisals and letter of termination. He recommended to Mr. Long that her probationary employment be terminated effective May 1, 2003 - 10 months after she began working at GTAA. S.M. said he consulted A.W. S.M. was away onsite at the Terminal 1 building most of the time from March 2003 onward. S.M. was also influenced by the complaints on April 29th and May 1st from M.G. and B.M. respectively about her work. He was concerned too about Vishwa Surajram, a senior person at GTAA and Lynn Child, a systems administrator, having complained about Ms. Fahmy's work and not wanting her to work on their

equipment in the future. S.M. was also concerned about the issue of Ms. Fahmy taking easier and fewer Heat tickets.

[97] A.W. testified that from his perspective, the "triggering event" was that people didn't want Ms. Fahmy to work on their equipment or do work for them; the RFC (request for change) issues; and the inventory taking longer than expected. "I escalated these issues to my supervisor, [S.M.]" A.W. denies that he was asked to concoct reasons to justify terminating her employment. A.W. stated: "If so, I would have nit-picked on everything. She was already on probation and we weren't seeing anything getting better." In the May 1, 2003 termination meeting, S.M. did indicate to her that she had done good work, but that it wasn't consistently of a satisfactory quality. As well, he mentioned that her Microsoft Exchange skills were poor. The May 1st letter of termination says in part:

Although some improvement was noted for a period of a month, that improvement has not been consistent nor has it been on a continuous basis. In reviewing all your work from December 18, 2002 to the present, it is with regret that we find that you do not meet the requirements of the job as you have demonstrated weak technical skills and little or no understanding of your position's role and responsibilities.

[98] GTAA stipulates that Ms. Fahmy had done good work. I reviewed the exhibits that spoke to this fact: *e.g.*, emails from S.M. to her; and emails from clients thanking her for her work. The issue has always been the same: one of inconsistency. Aside from the one month period from November 12-December 17, 2002 when the second and last formal appraisal noting her improvement came out, GTAA says her performance was not consistently at a satisfactory standard. S.M. testified that he had prepared a performance appraisal in April 2003 (not entered into evidence), but it was never given to her because the decision was made to terminate her employment at the end of April.

(i) Was She Competent and Qualified to Do the Job?

[99] S.M. testified: "On paper [she was qualified]; in the end based on results [over the ten months], she was not qualified." I so find. "On paper" she had the qualifications to be a network analyst at GTAA. She graduated with an engineering degree from Cairo University, she had certifications from Microsoft and a number of years' experience in the IT field in Canada (notwithstanding my finding about her misrepresentations on her *curriculum vitae*). Obviously GTAA agreed; they hired her. I also find that she demonstrated while working at GTAA a degree of technical knowledge and competence. However, competence includes other factors such as an ability to perform consistently at a proficient level. And "performing" and "doing your job" also include not just technical knowledge, but a positive attitude and cooperative approach to your supervisor and co-workers. In these areas she was lacking. In this regard, I accept A.W.'s testimony that he had a conversation with Ms. Fahmy in the cafeteria at the end of January 2003 about her "autocratic style" whereby he urged her to be "more effective and less argumentative." He also stated: "She wanted more projects. She wanted to be in charge of everything, and the other guys to do the mundane stuff...I told her by getting along better with people that would make her more effective." Ms. Fahmy denies this conversation.

[100] Based on the testimony I heard from S.M. and the documentary evidence I have reviewed, I find that S.M. was consistent in advising Ms. Fahmy that her work was not consistently of a satisfactory standard. This included not just technical concerns, such as the RFC issue and the missed deadlines, but attitudinal concerns too (*e.g.*, November 13th incident in his office, the constant challenging of D.M. and S.M.), and the issue of her

requiring so much supervision and management. Ms. Maack testified that the Complainant was "very high maintenance." S.M. testified that he has never since Ms. Fahmy had to spend so much time managing an employee. "More management was required of her than normal for a probationary employee." I have indicated earlier in my Reasons my views that some of her behaviour was clearly unprofessional.

[101] It is clear from the evidence, as stated in the termination letter, that Ms. Fahmy did not understand her role and responsibilities. The emails between her and S.M. show this, including the one from S.M. dated November 12, 2002 where he reiterates her responsibilities, and the one from her that generated S.M.'s response.

[102] I also find part of the problem was that Ms. Fahmy had a rather unrealistic view of her work performance. In an email to GTAA President Turpen dated May 4, 2003, she wrote: "After that [extension of her probationary period][7] he [S.M.] stopped giving me any projects because he found me too successful and he received much e-mail from customers thanking me for a good job." In a letter she writes that S.M. "worried I was too successful." She also wrote that her work was "perfect". Clearly this wasn't the case. Even if I accept half of the assertions of technical mistakes about her work, and don't even factor in the inappropriate behaviour toward S.M., she was assuredly not "too successful" and her work was far from perfect. Coupled with this assessment of her work was her inability to take direction from her supervisors on a consistent basis. I accept the evidence of S.M. that D.M. complained many times to him about what could be characterized as her insubordination and constant challenging of D.M.'s authority and decisions. This is believable given her email to S.M. dated September 6, 2002 where she was highly critical of D.M.'s work. In the Minutes of the November 13th meeting (with S.M., Ms. Maack and Ms. Erbiceanu of human resources, Ms. Fahmy and union representative Mark Daniels) at p. 4, Ms. Maack cautioned Ms. Fahmy that she was not the project lead: D.M. was the architect; and she wasn't a Senior Network Analyst; she was a Network Analyst. The above factors into one of the reasons the GTAA gave for her employment termination: she didn't understand her role and responsibilities.

[103] Finally, while I find Ms. Fahmy has technical knowledge and IT training and education, her comportment was less than professional, specifically toward S.M. First, I heard evidence regarding her following S.M. around demanding that he meet with her regarding her November 8th negative performance appraisal, notwithstanding a follow-up meeting had been set to take place in the near future. Ms. Fahmy wrote in her reply to GTAA's response to the Commission: "He walked to his desk and I followed him. Then I insisted to know whether [M.G.] would be my replacement, I just could not let it go."[8] Her insistence culminated on November 13, 2002 with her coming to his office and closing the door, his opening it, her closing it, his opening it, etc. He had to raise his voice and direct her to leave his office. He testified that he was scared, not knowing what she was capable of doing or saying. He immediately called his wife and then human resources, wanting to meet with the vice-president of human resources. This encounter really shook him up and has affected him thereafter, according to S.M. I appreciate that the Complainant was stressed by her negative performance review. Even so, such action was unprofessional on her part. I find this incident contributed to the breakdown of trust and confidence between S.M. and Ms. Fahmy.

[104] As well, Ms. Fahmy had written emails to S.M. saying she wanted "to be close to him" and respect him. In an email of October 4, 2002 she wrote in part: "Please smile,

have a good weekend. I was not challenging you but I liked you soooo [*sic*] much, and carred [*sic*] about [you] so much as a manager." In a November 13th email she wrote, "You did not allow me to talk to you. I wanted you to make me feel better. I refuse to believe that you don't want to." As with the above interaction, this is unacceptable behaviour in *any* workplace. Having worked in Canada for thirteen years, Ms. Fahmy should have known better. These actions led to the deterioration of her working relationship with S.M. and in my view, even though not specifically asserted by S.M., damaged her credibility with him.

[105] Based on the *viva voce* and documentary evidence as outlined below, I find the GTAA has provided a reasonable non-discriminatory explanation for its actions:

(ii) Inventory of Equipment

[106] A.W. testified that when he began his work at GTAA in January 2003 he was shocked to learn that there wasn't an accurate, up-to-date inventory of all IT equipment. He indicated an inventory is critical to running any IT department and the organization in general. He assigned several people to compile the inventory, including a portion to Ms. Fahmy. He testified that the others completed their parts much faster than Ms. Fahmy. Indeed, he had to keep after her, to find out when her work would be completed. She sent an email saying the inventory was complete on March 18, 2003. He found out afterward that it was not and asked her to fix the oversight. She did. He said, not only was it incomplete, but it took her much longer. And it was not a technically difficult task. I also heard evidence that he had wanted them to do a *physical* inventory, not just remotely from their desk computer. She did not do that. Further, after she had left the employ of GTAA, it came to A.W.'s attention that there were other errors in the inventory done by Ms. Fahmy. He averred: "It was so inaccurate...it couldn't be used and had to be redone."[9] A.W. testified that he had to ask her a couple times a week about the progress on the inventory. When asked why she wasn't doing it, he replied, "I was of the view she didn't want to do it." I accept the evidence above. I would add that it was clear from Ms. Fahmy's evidence that she did not want to do this task; she felt it was menial and beneath her expertise. I don't think the deficiencies in it and her lack of timeliness speak to her technical competence. Rather, I find she simply did not want to do the inventory. Again, it comes down to a miscomprehension of her role and responsibilities on her part.

(iii) Missed Technical Deadlines

[107] I heard evidence from several witnesses about the issue of the technical deadlines missed by Ms. Fahmy. Ms. Fahmy denies she missed any deadlines. I have carefully reviewed the *viva voce* evidence, and the document outlining each of the missed deadlines. In particular, I note that D.M. prepared a list for S.M., at the latter's request, which S.M. then used to send to Ms. Fahmy. D.M. testified that he thought there were several contributors to the missed deadlines list, and that the list prepared by S.M. and entered into evidence, was "probably a summation of those items". D.M. claimed that he was told by S.M. to "make it up", "use your imagination if necessary". I don't accept this. Furthermore, D.M. testified that he did not fabricate anything; the list he set out was accurate and true. He stated: "...I have my own moral codes to live by, and that doesn't include making up information that is not wholly truthful." I believe him when he averred that he honestly made the list.

[108] It was clear in his evidence that D.M., who was called to testify on behalf of Ms. Fahmy, had no warm feelings toward GTAA, and S.M. in particular. There was a mutual

parting of the ways on February 15th. He was overly antagonistic to GTAA's counsel during cross-examination; he essentially threatened legal action against her. Indeed, after hours of cross-examination and with pages of questions remaining, Ms. Rusak took the decision to end her cross-examination and allow me to draw my own conclusions about the witness' credibility. Suffice to say that he was not a particularly credible witness. In addition, I believe he was trying to give the absolute best interpretation or "spin" in Ms. Fahmy's favour in his evidence.

[109] D.M. was cross-examined in great detail about each of the twelve specific items on the "missed deadlines" list. Even with his inclination to be as supportive as possible to Ms. Fahmy, he indicated that four of the twelve missed deadlines were her responsibility; others partly her fault; some she was responsible for in terms of delegating them; and others that may not have been her fault or responsibility. Even if I accept his evidence that not *all* of them are totally her fault, there are still considerable missed deadlines by Ms. Fahmy, as outlined in D.M.'s and S.M.'s testimony. I note that S.M. testified that after the meeting with Ms. Fahmy, she sent him a number of emails correcting him on only three of the twelve missed deadlines; she had no issue with the remaining nine or ten. He added that he thought all twelve were her responsibility.[10] It is not necessary that I determine the exact number of missed technical deadlines. Suffice to say that I find that she had missed a number of deadlines.

(iv) RFC "Change Management" Protocol

[110] S.M. instituted a new system for managing changes to servers, etc. in the IT department. This was for security reasons. "If not done properly, it can bring down the entire system and increase your risk." He sent an email to his team outlining the new procedure, including having a Request for Change (RFC) form filled out and approved by him before changes were made. Upon reviewing the evidence on this issue, I find that Ms. Fahmy did not consistently follow the proper RFC protocol. I accept A.W.'s testimony that she had to be given one-on-one training on this: "She required supervision until the day she left." She also received the group training by Jeff Gardiner that the others received in March 2003. A.W. said they didn't have this problem of compliance with the RFC protocol with any employee or contractor other than Ms. Fahmy. S.M. averred that she never seemed to master the RFC form and process. S.M. testified: "She wouldn't follow the one page procedure; it's "101" stuff, not challenging. After introducing the policy, I'm still supporting a resource. And she was confusing people as to the policy." I accept their evidence. However, I infer that her problem was not that she couldn't master or understand the form or procedure. She did understand; she is an intelligent person. The problem was she didn't want to follow the procedure. That's why she was not consistently compliant. Again, it comes down to a question of her attitude and her inability to consistently follow direction. I also find that she was unwilling to accept that her role sometimes included doing the administrative and menial part of her job.

(v) Heat Tickets

[111] The Heat ticket system involved the escalation of technical problems by GTAA's employees to the "help desk". Ms. Fahmy and the others were responsible to resolve the computer and other IT problems of employees in the Heat queue, at the third-level tier of escalation. S.M., A.W. and M.G. testified about problems with Ms. Fahmy's performance in this regard. M.G. stated that the Complainant took on fewer tickets (requests from

users to fix a problem) than B.M. or himself. As well, he claimed that she was selective in the ones she did. "Marie took easier ones that could be resolved quickly; ones that took longer she didn't touch." S.M. corroborated M.G.'s testimony. S.M. said he was concerned about the quantity and selective choosing of less technically difficult "tickets" by Ms. Fahmy. "[B.M.] did three or four times as many as Ms. Fahmy did in a month....I sent an email to the department; needed everyone to `pull their weight'. It was a very busy time. I spoke to her and she frowned and said, `I'll do it. I'll be careful.'" The Complainant denied that she took fewer and easier Heat tickets. I accept the GTAA's evidence on this issue.

(vi) Showing "Aelita" Migration Tool to M.G.

[112] On the issue of her competence and inconsistent work performance, GTAA presented evidence that she was instructed twice to train M.G. on the Aelita migration tool before she did so. And even then, M.G. testified that, "She demonstrated it at a basic level only; not how to use it. And she was the only one who knew how to use it." Ms. Fahmy denies this. I find GTAA's evidence on this point accurate.

(vii) Lynn Child's Complaint

[113] Lynn Child is a systems administrator at GTAA. S.M. and A.W. asserted that she complained about Ms. Fahmy's work building servers for her. Ms. Child and Vishwa Surajram were two examples given by GTAA to show that clients didn't want to use her services because of work performance issues.

[114] Ms. Child testified that she was supposed to have a new server configured and installed on the new Windows 2000 domain. She said Ms. Fahmy "eventually did it." However, she had difficulty getting information from her about the status of the work and it took inordinately long to complete. "I had to go downstairs every day to find out what was going on with our servers...Should be Marie's task, not mine...Once Roger got involved, things moved and the problem got fixed." She said she hasn't had a similar problem since then with any other IT person at GTAA. She asked S.M. not to have Ms. Fahmy work on any of their projects ever again. Ms. Child conceded that Ms. Fahmy did in fact work for her again: "Maybe small things, like rebooting."

[115] In cross-examination, Ms. MacKinnon suggested to the witness that there may have been a communication problem. The delay may have been due to Ms. Fahmy thinking one of her colleagues had ordered a SAN cable that was required. Even if that were so, Ms. Fahmy was responsible as the contact person for Ms. Child. It was incumbent upon Ms. Fahmy to have kept on top of it and advise Ms. Child of the status.

(viii) Vishwa Surajram's Complaint

[116] I heard evidence that Mr. Surajram was a senior person at GTAA, a data base administrator who worked at GTAA for seven years. He was a major client of GTAA's IT Systems Operations. A.W. said that his area accounted for half the system work. Mr. Surajram testified that he had asked Ms. Fahmy in February or March 2003 to build a server. She did. Soon thereafter, he had problems with it. He asked that she rebuild it and she did. The same problem persisted. He then asked A.W. to assign someone else in the department to build it for a third and, hopefully, final time. Mr. Surajram didn't want Ms. Fahmy to attempt a third build. B.M. rebuilt it successfully.

[117] Mr. Surajram was also asked about Ms. Fahmy's technical competence. He said that Ms. Fahmy took one or two weeks to do the two builds; it should have only taken one-half to one day. That's how long it took B.M., testified Mr. Surajram. The witness

was candid. He said, "It's hard to judge based on one example of her technical skills. But for the server build, she didn't have the technical skills. It's a standard request; not difficult. I would ask her technical questions and she said wait until the next day for the answer. That was unusual."

[118] Ms. Fahmy denies that she ever built the server for Mr. Surajram. In cross-examination, Mr. Surajram conceded that he had no documentation to show the server was built. But he added, "The server exists." While I find it odd that no documentation was entered to show the actual work was done, I am satisfied from the *viva voce* evidence of Mr. Surajram and A.W., along with the documentation referring to Mr. Surajram's complaint, that his evidence is reliable. I find Ms. Fahmy failed to properly build the server twice for Mr. Surajram, and that it took much longer than usual for that type of work to be completed.

(ix) Conclusion About Work Performance and Employment Termination

[119] Based on the foregoing, I conclude that Ms. Fahmy's work performance was not consistently satisfactory. There were numerous examples of work that were lacking in quality, hence "weak technical skills", as indicated above. According to S.M., one example of her "weak technical skills" was with her faulty migration of his laptop. Another example involved her incorrectly shutting down the system. S.M. remarked, "If [V.J.] did it, maybe one time. With Ms. Fahmy, it was seven to nine times when the server just rebooted on its own. I checked the log. Twice I know it was happening when she came out of the computer room and at that time, we didn't have remote control. It hasn't happened since she left the GTAA." She denies these allegations. She did not perform anywhere near the "perfect" level that she ascribed to her work. In a letter to the Commission undated but marked received on December 11, 2003, she wrote, "Investigation is my only way to prove what I wrote in my complaint and how I performed my duties perfectly. See also her January 6, 2004 reply to the Commission at p. 20: "My performance was constantly perfect....There was nothing wrong with my performance." This is not to say that she should have performed perfect work, and I am not suggesting that she failed to do any good work. She clearly did, and GTAA concedes as such. Included in "work performance" are her sometimes inappropriate interactions with her manager, S.M. and display of poor attitude. I find this is encapsulated in the clause "little or no understanding of your position's role and responsibilities" found in the May 1st termination letter.

N. Allegation #11: Performance Appraisal and the Process was a Sham or Pretext

[120] Ms. Fahmy alleges that the performance appraisal given to her on November 8, 2002, did not accurately reflect her work and was in fact part of a sham process designed to justify her discriminatory treatment and termination from employment.

[121] Ms. MacKinnon argues that Ms. Fahmy was used as a "scapegoat", set up to fail and the performance review system was a means to the end of terminating her employment. She also submits that there was evidence to show a hostile or poisoned workplace, although falling short of a systemic problem. Ms. Rusak objects, citing a lack of notice and an earlier ruling by me disallowing the Complainant from pursuing this avenue by asking about the conduct of managers in other departments towards female employees at GTAA. Consistent with my comment earlier in my Reasons about the issue of harassment, I will not make a finding about harassment or poisoned workplace at

GTAA. The question of whether Ms. Fahmy was used as a scapegoat is one that I will determine.

[122] I have reviewed carefully the *viva voce* and documentary evidence about the performance appraisals (November 8 and December 17, 2002) and numerous meetings addressing her work performance. I also note and accept S.M.'s evidence that while he may not have had many meetings with Ms. Fahmy since March 2003 when he was mostly working onsite at the Terminal 1 building, the ones he did have were "significant". Under the collective agreement, GTAA is only required to have one performance review for a probationary employee, at mid-point in the period. It did that: the November 8, 2002 appraisal and the meetings to discuss it. S.M., Ms. Maack, the union representative, and human resources consultant Jennifer Erbiceanu, met with the Complainant on November 13 and 15, 2002 to discuss the appraisal. Detailed notes taken of these meetings were entered as exhibits. On December 17, 2002 Ms. Fahmy was given a second written performance appraisal, noting improvement in all areas to a satisfactory level, for the over one month period since the last one. Her probationary period was extended for another six months. Ms. Fahmy claims that she received no feedback on her performance after December 17th until her termination from work on May 1, 2003. I note that S.M. testified that he completed another performance appraisal of Ms. Fahmy in the second or third week of April. It was never given as Ms. Fahmy's employment was terminated on May 1st and it was not entered into evidence.

[123] I find that the content of the performance appraisals given and the process were reasonable and satisfactory. The purpose of the process is to give feedback to the employee and to allow for improvement and for the employer to be able to assess the employee during this probationary period. I am satisfied that the November 8th appraisal, along with the November 13, 15, 22 and 29 meetings and the December 17 appraisal provided her with a reasonable assessment of her work from the perspective of GTAA. The appraisal process included the employer providing her with a list of missed deadlines. I also accept S.M.'s and A.W.'s evidence that she was provided with notice of concerns of her performance, in less formal situations than the written performance appraisals, including in 2003.

[124] The process was not a pretext or a sham. The performance appraisal process was not a vehicle to facilitate a discriminatory dismissal. I also find that part of the problem was that Ms. Fahmy simply did not agree with the evaluation of her work by S.M. It is highlighted in the notes of the November 13, 2002 meeting among S.M., union representative Mark Daniels, Maria Maack, Jennifer Erbiceanu and Ms. Fahmy. This meeting was called as a result of the office incident that day involving the closing and opening of the door, and where S.M. was so concerned that he called his wife. GTAA made it quite clear in this meeting that if her work didn't improve by the end of her probationary period in December, her employment would be terminated. The notes indicate Ms. Fahmy indicated the problems with S.M. "all started when she didn't want to be on just one project - [she] wanted more." Ms. Fahmy acknowledged that in her testimony. The one project she didn't want to *exclusively* work on happened to be the most expensive and significant one the IT department was working on at the time.

[125] Even when she wrote and said to S.M. that she agreed with his criticisms, she was not genuine. It is clear from her testimony and her documents to the Commission that she didn't believe it when she wrote it and said it. She was trying "to win him". Part of it may

be understandable in that she was terrified of losing her job, but the sheer disingenuousness of it all makes one less sympathetic. To this day, she does not accept the critique of the GTAA.

[126] I do find that GTAA did not bring the Lynn Child and Vishwa Surajram complaints about Ms. Fahmy's work to her attention. GTAA should have done so. However, its failure to do so does not amount to a violation of section 7 of the *CHRA*. There is no connection with a prohibited ground of discrimination. However, there were enough issues brought to her attention through the formal and informal processes that it should have been clear to Ms. Fahmy that there was a problem with her work from her employer's perspective.

[127] Ms. Fahmy also asserted that the extension of her probationary period was a ruse or pretext to terminating her employment. I do not accept this. If GTAA had wanted to get rid of her as an employee, it could have done so at the end of her term in December 2002. GTAA had ample evidence. GTAA didn't have to extend her probation for six months. Ms. Fahmy says her former employer did so because it wanted to make sure it didn't get involved in litigation. If that was GTAA's motive, it didn't work out very well - five years later having dealt with the Commission, the grievance arbitration process and the hearing before the Tribunal. I accept S.M.'s testimony that he told her "to relax, be yourself" and wanted to give her more time to improve. I find that GTAA extended her probationary period in good faith, with the expectation and intention of allowing her the opportunity to improve, instead of with a view of better documenting its case for dismissal.

[128] I appreciate that Ms. Fahmy does not believe GTAA was genuine in its decision to extend her probation. She testified, "Around December, I knew there was a plot." However, based on the evidence, I see no plot, no sham, and no pretext to find a way to terminate her employment. As I indicated earlier, I do not accept D.M.'s testimony that he was asked by S.M. to "make up" deficiencies in Ms. Fahmy's work. D.M. himself said he did not do that. His "missed deadlines" list was accurate and prepared in good faith. And I find that the emails from A.W., M.G. and B.M. to S.M. complaining about Ms. Fahmy's work on April 29 and May 1, 2003 were not concocted or made in bad faith. I believe this cluster of emails was the "last straw" that prompted S.M. to recommend her employment be terminated on May 1st. I do find that S.M. and A.W. had properly advised employees who were complaining about Ms. Fahmy to "put it in writing." That's a far cry from soliciting or making up false criticisms of her work performance.

VII. CONCLUSION

[129] In one of her letters outlining the particulars of her complaint to the Commission which was produced on March 12, 2004, Ms. Fahmy wrote at para. 6: "My only sin was that I was not white and not a man." She also wrote at p. 14 of her response of January 6, 2004: "...I was treated as a slave because of what he [S.M.] did to me." It is unfortunate that she feels this way. However, the most persuasive evidence establishes otherwise. Any differential treatment that may be characterized as adverse, and her termination from employment, were based on non-*CHRA*-related reasons, as outlined in my Reasons for Decision. They had nothing to do with her being a woman, a person of colour, or of Egyptian origin. Accordingly, the Complaint is dismissed.

"Signed by"

Matthew D. Garfield

OTTAWA, Ontario

[1]See J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. Toronto: Butterworths, 1999, at pp. 139-41 for a discussion about the requirement (and lack thereof) of an election in non-suit motions across Canada and in England.

[2]A moving party on a motion for summary judgment is not required to make an election similar to the one on a motion for non-suit.

[3] See Adjudicator Ratushny's comment about "far-fetched" testimony in *Abary v. North York Branson Hospital* (1988), 9 C.H.R.R. D/775 (Ont. Bd. Inq.), at para. 38202.

[4] See Sopinka, Lederman and Bryant, *supra*, at pp. 138-39.

[5]The Canadian Human Rights Commission, while still remaining a party, participates less frequently in hearings before the Tribunal.

[6] A.W. testified about the respective roles: "The architect [D.M.] does the design; the project manager [D.L.] does the plan; and the technical lead [Ms. Fahmy] does the testing and works with both on the deployment."

[7] Ms. Fahmy was told on November 29, 2002, and formally advised by letter dated December 16, 2002, that her probationary term would be extended a further six months to July 1, 2003.

[8]I believe M.G. when he testified that, on his second day on the job, on October 4th, Ms. Fahmy told him in the cafeteria that she thought he was there to take away her job, "which kind of shocked me." He said he told her he wasn't there to take away anyone's job, but brought in on a contract. "There was a lot of work. We didn't have enough bodies."

[9]This post-termination evidence may not be used by GTAA to buttress its decision to terminate Ms. Fahmy's employment.

[10]In S.M.'s "missed deadlines" list of November 14, 2002, there were twelve specific items and one general item ("Many other tasks associated to her role on the Windows 2000 project team.") listed under the heading "W2K project deliverables". There was also one specific item listed under the heading "Department related issues".

PARTIES OF RECORD

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APPEARANCES:	
Mary MacKinnon	For the Complainant
No one appearing	For the Canadian Human Rights Commission
Paula M. Rusak	For the Respondent