

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE
LA PERSONNE

SHELLEY ANN GRAVEL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

PUBLIC SERVICE COMMISSION OF CANADA

Respondent

REASONS FOR DECISION

MEMBER: Réjean Bélanger

2010 CHRT 3
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I. INTRODUCTION:

[1] The Complainant, born June 29, 1944, claims to have worked for the Department of Foreign Affairs and International Trade (DFAIT) for around 20 years, in Canada and abroad. During this time, she provided administrative support to senior-level government employees. At one point during this period, from 1989 to 1995, she had to take disability leave due to fibromyalgia.

[2] On January 5, 2001, the Complainant asked for a transfer from the DFAIT to the International Programs Unit, which was part of the Learning, Assessment and Executive Programs Branch (LAEPB) of the Canada Public Service Commission, where she was a Portfolio Coordinator, a clerical position classified at the CR-5 group and level.

[3] Since its structure had not changed since 1918, the Public Service Commission made many modifications to it in 2003 without reducing its staff. Furthermore, it made sure changes were made in accordance with the recommendations made by the Task Force on Modernizing Human Resources Management in the Public Service and taking into account legislative changes as established in Bill C-25.

[4] Two of these changes were made to the LAEPB and had significant consequences for the Complainant: first they led to the closing of the International Programs Unit on June 30, 2003, where the Complainant worked. This automatically led to the elimination of 11 positions, including the Complainant's position.

[5] Secondly, on October 31, 2003, senior executives also closed the rest of the LAEPB, which had been renamed the Learning and Development Programs Branch, to which the Complainant had been transferred. This second closing led to the elimination of 10 other positions. Once again, the Complainant's position was eliminated. She found herself without a specific assignment.

[6] In the next while, until the beginning of 2005, the Complainant, who held the "affected employee" status, held various positions at the Public Service Commission, sometimes with "written assignments", sometimes without; she also spent several months on disability leave during this period. On January 13, 2005, deciding her situation was intolerable, the Complainant resigned from the Public Service and retired.

[7] On February 28, 2006, the Complainant filed a complaint with the Canadian Human Rights Commission against the Respondent, her former employer, the Public Service Commission. She claims that the Respondent discriminated against her based on her age and her disability, which is in contravention of sections 7 (Employment) and 10 (Discriminatory policy or practice) of the *Canadian Human Rights Act* (the "Act").

[8] She alleges that her health deteriorated primarily as a result of the behaviour of the Respondent's representatives. For these reasons, she felt forced to resign. Her early retirement prevented her from working another five years and being able to add five years worth of contributions to her pension plan, which went against her career plan. She claims that she planned to work until the age of 65. The consequences of her premature retirement were very damaging both economically and health-wise. As a result, she is claiming compensation for the damages incurred.

A. THE COMPLAINANT IS SELF-REPRESENTED

[9] The Complainant, at the start of the hearing on September 14, 2009, through a preliminary motion, verbally asked the Chairperson of the Tribunal for permission to schedule the hearing for a later date because she needed more time to get new counsel and better prepare herself.

[10] She then told the Tribunal that when she filed her complaint, she had access to counsel that her union had offered to pay for.

[11] She then consulted a non-lawyer who offered to represent her on the condition that she waive doing business with the union-provided counsel. The Complainant preferred this advice and decided to take on the file with this individual's assistance without the presence of the union's counsel.

[12] Finally, the Complainant informed the Tribunal at the beginning of June 2009, a few days before the scheduled start of the hearing at the end of June and beginning of July, that the advisor who agreed to help her with her file decided for medical reasons to cease representing her.

[13] It was agreed upon with the Tribunal that the hearing scheduled for the end of June and beginning of July 2009, would be rescheduled for the week of September 14 to 18, 2009, to give the Complainant time to get new counsel and prepare herself.

[14] However, to justify the motion for an extension, although the initial application in June set forth only one reason, being the health of the advisor that would not allow her to proceed, she added a second reason: there was a disagreement between herself and the representative in how to proceed with the file. It is for these two reasons that she decided to go ahead without the advisor's services.

[15] To support the second application for postponement, she specified that she was so sick during the summer of 2009, that she could not take care of the file in the manner she would have liked and to this day, she could not find counsel who would agree to represent her on a contingency basis.

[16] The Tribunal, pursuant to the stipulations of section 48.9 of the *Act*, which says that the proceedings before the Tribunal shall be conducted as informally and expeditiously as the requirement of natural justice and rules of procedure allow, found that the additional 2.5 month extension gave the Complainant sufficient time to prepare and find new counsel and respected the principle of natural justice. It therefore ordered to proceed with the hearing without further delay.

[17] To facilitate comprehension of this judgment, we have decided to start by setting out in section II the facts and allegations that gave rise to the Complainant's complaint while respecting the chronology of the events. Then, in section III, we will analyze the Complainant's other facts and allegation that we were unable to include in this chronology, as they are facts of a prolonged and continued nature. We will then focus, in section IV on the legal criteria applicable and then in section V, we will analyze the issues in dispute, finishing with section VI, which contains our observations on the appropriate remedy applicable to this file.

II. CHRONOLOGICAL OUTLINE OF FACTS AND ALLEGATIONS THAT GAVE RISE TO THE COMPLAINT

A. Closing of the International Programs Unit

[18] At the beginning of January 2003, the then Deputy Chairperson for the Learning and Development Programs Branch, met with the employees of the International Programs Unit, which was a part of her Branch, including the Complainant, to inform them that, as a result of the restructuring of the Public Service Commission, their unit would be closing on June 30.

[19] She assured them that following this reorganization, no one would lose their job and the Human Resources Office, then represented by its director, would handle their situation by assisting them in the process of finding a new position within the same group at the same level.

[20] In March of 2003, the Complainant started working for the Deputy Chairperson for the Learning and Development Programs Branch in an administrative support role. When she was replaced on April 1, 2003, the new Deputy Chairperson invited the Complainant to continue working for him as a correspondence assistant; she continued to provide administrative support for the Director of Special Projects.

[21] According to the Complainant, of the 11 people who worked at the Branch, some took the opportunity to retire and others, who were much younger than her, as she was 59 years old at the time, found a job before the end of June, 2003, except her.

[22] According to the Respondent's witnesses, the version is a little different. They claim that it was also the Complainant's case and that she continued to benefit from the "affected employee" status.

B. Closing of the Learning and Development Programs Branch

[23] The senior executives of the Public Service Commission also decided to close what was left of the Learning and Development Programs Branch on October 31, 2003. The Complainant was part of this Branch, which was only made up of 11 people.

[24] According to the Complainant, some of these people took the opportunity to retire while others, who were much younger than the Complainant, then 59 years of age, found another job. Only the Complainant could not find a job.

[25] Again, the version of the Respondent's witnesses is slightly different. They claim that the Complainant continued to be employed by the Public Service Commission and that she continued to take advantage of her "affected employee" status.

C. Abandonment of Complainant for six weeks

[26] The Complainant complained about being left alone for a 6-week period in a large, recently vacated space on the 21st floor of Esplanade Laurier, after the employees of the Learning and Development Programs Branch left. This situation lasted from the beginning of November until mid-December, 2003.

[27] The Director of Human Resources recognized that his unit was supposed to take care of the people looking for work whose Unit or Branch had been removed, said that at the

time, he was not aware of the 6-week period the Complainant alleged having spent alone on the 21st floor of Esplanade Laurier.

[28] When questioned as to whether they frequently lost employees, he admitted that it was the first time, to his knowledge, that he had heard of this case and that he had never been confronted with a situation like this one before. Neither he nor the other Respondent's witnesses could shed any light on this situation.

[29] The director of Human Resources added that the Complainant continued to receive a salary during that time, right until she retired. Two of the Respondent's witnesses, who had already left the office to work elsewhere at the time, were not in a position to comment on what occurred during this 6-week period.

D. The Complainant becomes the administrative support for the Director of the Equity and Diversity Directorate

[30] Following the Complainant's submissions to the Senior Strategic Advisor, a manager she knew, she explained the whole situation to him and asked him to help her find a new job. With his efforts, she quickly found short-term work with the Director of the Equity and Diversity Directorate, as an administrative assistant, where she started mid-December, 2003. It was, again, a temporary position.

E. The Complainant's disability

[31] On January 19, 2004, after having worked for the Senior Strategic Advisor for about a month, the Complainant became ill and went on disability leave. At the time, she was experiencing digestion and memory problems. According to the Complainant, these symptoms were caused primarily by her job and the worry that plagued her, as she was afraid of not having a job.

[32] Though the Complainant claims her symptoms were primarily because of the problems she experienced at work, the Respondent's witnesses expressed the idea, during the hearing, in light of the Complainant's medical reports, that the Complainant's work was not the sole trigger for her health issues and; that problems of a personal nature could also cause a good portion of her health problems, as reported in the medical reports, particularly of her psychiatrist.

[33] The Complainant's family doctor explained to the Tribunal that the stress experienced by the Complainant at work was not the cause of her depression but one of the major triggers for it.

[34] This very same doctor wrote a note stating that the Complainant would be on disability from January 19 to March 1, 2004. The Complainant stressed that this notice did not state that she would be ready to go back to work on March 1 but that the medical situation would be reviewed at the end of that disability period and until then, she was on disability leave for an indeterminate period. Her family doctor confirmed this during his testimony.

F. January 2004, Offer for "Program Coordinator"

[35] The then Director of Executive Resourcing, who had a position to fill, informed Human Resources of his needs. The Complainant's appointment was suggested and he

was informed of her precarious situation. They indicated that she should be strongly advised to accept the position offered as time could work against her. Given she had the "affected employee" status, she must fear being given "surplus status". This meant that in the near future, she would become surplus and eventually laid-off. Human Resources sent the Complainant's C.V. to the Director of Executive Resourcing.

[36] After examining the Complainant's C.V., the Director of Executive Resourcing consulted some people to get some references, including the then Director of Special Projects. The responses were sufficiently favourable for the Director to decide that the Complainant's application was adequate.

[37] He called her January 20, 2004, to tell her that the position of "Program Coordinator" with Executive Resourcing Directorate, that he managed, was available and was being offered to her, and specified that it was a CR-5 position.

[38] The Director of Executive Resourcing explained to the Tribunal that he had difficulty recruiting and keeping staff. This is why he took the time to speak to or phone potential candidates to promote himself by demonstrating enthusiasm in the obvious goal of making them want to work in his directorate. He did his best to motivate people, which is what he did during this phone call.

[39] He therefore offered the Complainant the position of "Program Coordinator" that he described as being administrative but that was, in fact, according to the Complainant, nothing but a clerical position where she would have to work primarily on a computer about 7 hours a day and do "copy/paste" type work.

[40] The Complainant maintained that this position did not correspond in any way to her skills and qualifications, which were clearly outlined on her C.V., which the Director of Executive Resourcing had. Not to mention that this kind of work went against the note written by her family doctor in 2001 (see Exhibit R-1, tab 5) that was in her file and referred to her pre-existing condition of fibromyalgia. She reaffirmed her interest in an administrative position. Despite the Complainant's lukewarm reaction, the Director of Executive Resourcing continued to insist and attempted to reassure her with respect to her ability to do the job.

[41] He painted her a picture of the tasks associated with the position offered, tried to reassure her by telling her that even if she did not have experience with this kind of work, they could give her training. He did his best to make her feel like she was welcome in his Directorate.

[42] The Director of Executive Resourcing also suggested, in a manner interpreted as menacing by the Complainant, that if she did not accept the position being offered, there could be unpleasant consequences for her: that she may be put on a priority list and after a year, she would be unemployed. He ended the telephone call by asking her to seriously consider his offer and that he would call her back in two weeks.

[43] For his part, the Director of Executive Resourcing, explained that it was not until he sensed the Complainant was going to refuse his offer that he risked tell her about the consequences of her refusal. He told her about the situation as explained to him by

Human Resources. He estimated that it was in the best interest of the Complainant that she be informed of the danger of her situation.

[44] The Complainant, over the course of the telephone call, explained him that she was very sick and unable to return to work at that time and could not give him an approximate date of return. She alleges also having discussed her fibromyalgia problem with him and her worries about a relapse resulting from the type of work proposed for a person with her specific condition.

[45] Also, according to the Complainant, even though she was very sick, she took notes about the telephone call as accurately as possible. She transcribed them immediately after.

[46] The Director of Executive Resourcing claimed that at no time during the telephone call did the Complainant mention to him that she would need to make specific arrangements as a result of her particular medical condition; never did she refer to her issues in terms of fibromyalgia. He added that at no time, even after this conversation, did the Complainant and he discussed her needs in the matter.

[47] He specified that he himself had worked in a Human Resources department for several years and has been confronted numerous times with requests for accommodation from employees returning from long term disability leave. In these situations, he would start by asking the employee for a medical certificate, issued either from the employee's doctor or from the employer's doctor supporting the needs of the employee in terms of accommodation. Then, upon receiving the certificate, he would discuss with the employees how he could accommodate them. In his eyes, it goes without saying that you have to make things easier for the employee and have them come back in the best condition.

[48] He added that if the Complainant had told him about her fibromyalgia, he would have taken that approach. He added that he never knew that she had a disability of any kind.

[49] Despite the Complainant's reticence expressed during the January 20 phone call, on January 21, 2004, she signed the document R-2, tab 6 signed by the then Director General of Executive Resourcing, dated January 16, 2004, entitled "Response to a letter of offer"; this letter of appointment stated that she would come in to work on March 1, 2004.

[50] The Complainant claims that two weeks later, at the beginning of February 2004, the Director of Executive Resourcing called her back, as promised. He insisted again that she accept his offer and provide him with a return to work date. She reiterated that she could not confirm the date for her return and the position offered was not suitable for a person with fibromyalgia and furthermore, she was not offered any accommodation. Here is an excerpt from this telephone conversation that the Complainant claims to have faithfully reproduced by typing out its contents immediately after hanging up. (C-1, Tab 58)

«... I told him that I still could not give him a date and re-stated that the job he was offering me did not accommodate my disability and that I had serious doubts about taking it. Mr (...) repeated his threat of my taking a huge risk of landing up unemployed at the

end of one year and landing up on the street. This time he scared me much that I told him that I would take his job offer but did not feel that I could not return to the work place until early March. Therefore, despite reports from 2 specialists (Drs X and Y) that stated that they did not feel that I was well enough to return and were even doubtful that I could so with a gradual return of one or two days a week, out of sheer terror of being unemployed, I went back and accepted (...)’s job offer and started work in his shop, still quite ill on March 8, 2004... »

(Emphasis added)

[51] It is difficult to imagine this conversation that the Complainant alleges having had with the Director of Executive Resourcing in February 2004. How can she say, "This time he scared me much that I told him that I would take his job offer" when she had already signed the "Response to a letter of offer" on January 21?

G. Ms. Gravel's return to work from March 8 to April 14, 2004

[52] On March 1, 2004, the Director of Executive Resourcing waited in vain for the Complainant to arrive at work. She did not show up for her new job until March 8, later claiming that she was still sick during the first week of March. She worked until April 14, 2004, and had to stop working due to illness. This was her last day of work. The disability period that followed would continue until her resignation and the beginning of her retirement at the start of 2005, supported by a series of reports and medical certificates.

[53] During this short work period of March 8 to April 14, 2004, in the Director of Executive Resourcing's opinion, the quality of the Complainant's work left a lot to be desired. Her training period was difficult. She took a long time learning her position's tasks. The Complainant knew herself that her work was not satisfactory and that it was at her immediate superior's insistence that she came back to work, which was evidently too quickly.

H. Complainant's long-term disability period

[54] The complainant's family doctor wrote a note on May 20, 2004, in support of these facts, see Exhibit R-2, tab 7, indicating that his patient, the Complainant, would be "completely disabled" for the period from April 28, 2004, until September 3, 2004.

[55] On June 10, her family doctor specified that his patient was in a state of "severe depression" and would not be back to work before September 3.

[56] With the exception of the insurance company's psychiatrist, the three other doctors who examined the Complainant during the summer and/or autumn months of 2004, all recognized that the Complainant's depression rendered her incapable of working.

[57] In a letter dated October 15, 2004, exhibit R-1, tab 11, the insurance company accepted to pay the Complainant disability benefits from July 28 to October 31, 2004.

[58] In a letter dated January 21, 2005, Exhibit R-1, tab 13, the insurance company agreed to pay the Complainant disability benefits from October 31, 2004, until March 31, 2005. Unfortunately, she had already resigned when the letter arrived.

[59] At the beginning of September 2004, the Director of Executive Resourcing claims to have called the Complainant for an update. She told him that her doctors did not think she should go back to work.

I. The Respondent, who was aware of the Complainant's depression, should have taken this into account and made the necessary adjustments when she asked to return to work on November 8, 2004.

[60] The Complainant said that at the time, a change in her medication had a positive impact on her health and she felt well enough to think that November may mark a good time to slowly return to work even if the psychiatrist who was treating her did not share this opinion. During the trial, she said:

Despite what Dr. (...) had stated that she was not sure I could do part time, I, the one, knew how I felt and I felt much better that I contacted Mr. (...) and asked him if I could do a gradual return to work.

[61] Then, the Complainant alleges having called her immediate superior on November 8, 2004, and offered to come back to work gradually, offering at the start to work two days per week and later, moving up to five days a week. She offered to take the position of telephone operator currently occupied by a temporary employee and suggested to switch tasks with that employee so the receptionist could do her own tasks. He categorically refused this suggestion: "No, no, absolutely not."

[62] His reaction left her speechless, especially because in the time she worked for him, her impression of him was as follows: (excerpt from her notes taken following the telephone call of November 8, Exhibit C1- tab 57)

N.B.: I am truly shocked at what Mr. (...) said and at the harshness of his words and his tone because for the short period of time that I did work for him he was always soft spoken, always calm, prim and proper and always behaved in a professional manner. A very distinguished gentleman ...

[63] When asked about the telephone call that the Complainant alleged she made to him on November 8, 2004, the Director of Executive Resourcing stated that he did not remember this at all. He went as far as saying that he had no recollection of the Complainant asking for accommodations, neither by phone nor any other means, not on that day, nor at any other time.

[64] The medical evidence and the letters from the insurance company included in the file say that the Complainant was on total disability from April 14, 2004 until March 1, 2005.

[65] The following excerpt, from the last paragraph of page 2 of Dr. (...)'s medical report, who assessed the patient in November 2004, at the request of her family doctor, (Exhibit R-1, tab 10), illustrates what the psychiatrist then thought about a possible gradual return to work by the Complainant:

...I do not feel she can currently return to the workplace full-time and I am not at all optimistic that that will ever be achieved for her given both her age and her past history and her current mechanism of coping. I doubt even that she will manage a part-time

reintegration into the workplace to give that a trial. It may be possible but I would start at a low level such as half a day a week.

[66] As a result, the observation indicates that at the time when the psychiatrist met the Complainant in November 2004, she did not recommend a gradual return to work. She even raised doubts regarding the Complainant's eventual return to work.

J. Last day of work, Complainant's letter of resignation

[67] In fact, the Complainant worked until mid-April 2004 and was still on disability the day she decided to resign and retire in January 2005.

[68] On January 10, 2005, the Complainant sent her immediate superior a resignation letter (R-1, tab 12) informing him that she was retiring on January 13. In this letter, the Complainant blames the insurance company that, by depriving her of an income and refusing to assume the cost of the treatment that would have given her the opportunity to return to work in December 2004, as recommended by her doctor, she felt obliged to resign and retire as soon as possible.

[69] The reasons given by the Complainant to justify her decision to resign do not mention the role played by the Respondent in this case and do not cover any allegations against her immediate superior. Questioned on the absence of allegations against the Respondent's representatives, she said it was a diplomatic gesture and she wanted to leave on good terms; that she was a diplomat in this world that ignored diplomacy altogether.

[70] Here is the response to the resignation letter, written by her boss, as a handwritten letter attached to the Complainant's letter:

Ann

I assume you mean January 13, 2005. If it is, I concur with your retirement at the end of the business day January 13, 2005. I wish you all the best and I thank you for your continued dedication.

(...) (signature)

01.01.12

[71] On February 28, 2006, the Complainant filed a complaint with the Canadian Human Rights Commission.

III. COMPLAINANT'S OTHER FACTS AND ALLEGATIONS

A. Human Resources did nothing to help the Complainant

[72] The Complainant claims that Human Resources did nothing to find her a job. The following is the reaction of the Respondent's witnesses to that reproach.

[73] According to the Respondent's witnesses, all the necessary measures were taken to help the Complainant find a new job.

[74] The Director of Human Resources for the Public Service Commission, who was very familiar with the Complainant's situation, explained how Human Resources worked.

[75] Pursuant to the rules established for the reassignment of personnel affected by unit closures, an attempt to find a job within the work unit is the first step; then, if no position is available, there is an attempt to place the employee in the same position and level within the Directorate, then within the Department, then outside the Department; the witness said that to understand this approach, you just need to imagine [TRANSLATION] "concentric circles"; the smallest circle representing the employee's unit of work, the next circle representing the directorate, then the Department, and finally, the last circle is outside the department. This approach is designed to have as little impact as possible on the employee and is less traumatizing for the employees involved.

[76] The witness added that the Complainant was considered a CR-5 and that there were always many positions at this level to fill, that each year, there were 10 to 12 positions that became available. In his opinion, he was not remotely concerned that it would have been simple at any point to find the Complainant a job.

[77] However, Human Resources did not take any proactive or specific measures: they let the Complainant search for herself. She had expressed a preference for an administrative position when she met with the Deputy Chairperson for the Learning and Development Programs Branch in January 2003 and later, during a second interview with the chief of Human Resources, as such a position would better suit her qualifications and experience. While waiting to find what she was looking for, she continued to be paid and to work; there was therefore no great urgency to move things forward.

[78] The witness told the Tribunal that by giving the Complainant time and by not pressuring her, she would have the opportunity to find a job that would suit her.

[79] According to the person who replaced the Deputy Chairperson for the Learning and Development Programs Branch, it takes a minimum of six months before an employee, who submits an application for employment and attends an interview, can obtain the results. The Respondent's responsibility consisted of helping employees affected by the unit closure in finding a job at the same group and level and not finding them a job at a higher level. However, the Complainant demonstrated an interest in administrative level work, which she considered more suitable based on her experience and qualifications when, in fact, this meant that she was interested in a job at a higher level.

[80] He took measures to have someone train her in financial matters; however, the Complainant complained that this training was insufficient given the lack of availability of trainers.

[81] Two people gave reference letters to the Complainant.

[82] According to the Director of Human Resources, the Complainant's name was put on a priority list by Human Resources and internal managers were informed of her availability.

[83] The Complainant continued to work for the Deputy Chairperson for the Learning and Development Programs Branch, until the branch closed at the end of October 2003. Before leaving, on September 30, 2003, he signed an "assignment agreement" covering the Complainant from September 1 until December 31, 2003.

[84] The Director of Human Resources stated that, following the closure of the Learning and Development Programs Branch at the end of October 2003, Human Resources took the same approach as when the International Program Unit closed with respect to helping employees who lost their jobs; they left the employees to take the necessary steps to find a new job. This was also the case for the Complainant until the end of 2003.

[85] Some further clarification by a witness, who retired in 2008, after 37 years in the public service, who was the Deputy Chairperson of the Corporate Management Branch, was provided during the hearing. He explained the approach the Public Service Commission took and that it promoted to transform and modernize the PSC and specified that he used this approach in the Complainant's case.

[86] At the time that the PSC was being reorganized, this person had approximately 1,400 employees. With his team, he proceeded with the writing of the two following documents: "PSC Transformation Realigning for Modernization - Background" Exhibit R-1, tab 2 and "PSC Transformation Realigning for Modernization - Questions & Answers" Exhibit R-1, tab 2.

[87] The second document, which had: "Prepared by the Transformation Secretariat, February 18, 2003" on the front page, was distributed to all PSC employees; the Complainant would have received a copy.

[88] It was clear for all those involved that the public service modernization would not reduce the staff in place. This is the reassurance that was sent to everyone. Here is a relevant excerpt from page 10 of the Questions and Answers (Exhibit R-1, tab 5):

Q. Will all PSC staff have jobs after the April 1 reorganization?

A. The April 1 reorganization is not a job reduction exercise. In the unforeseen circumstance of reductions, we will identify opportunities for employment elsewhere in the PSC, opportunities for retraining, as well as provide employee assistance and career counselling. In some cases, we may also look to other departments. Although it is not anticipated, if it becomes necessary, the Treasury Board Workforce Adjustment Directives will apply....

[89] Given the concerns raised by the Complainant, who claimed she went a long time before finally receiving a "Written Assignment Agreement", the Director of Human Resources was invited to shed some light on the subject.

[90] He said that a "written assignment" specifically had an administrative advantage in determining who from the Home Organization or the Host Organization or from Corporate Reserve would pay the employee. He then specified that the Complainant continued to be paid even when she did not have a "written assignment agreement". In fact, it is sufficient for there to be a verbal agreement between the employee and the managers of the Home Organization and the Host Organization.

[91] The Director of Executive Resourcing explained that the absence of a "Written Assignment Agreement" was normal and that it was common practice to give employees

non-written assignments. He specified that managers sometimes signed written assignments to reassure worried employees or if there was mistrust between managers.

[92] It became clear during the hearing that Complainant had a "written assignment agreement" from April 1 to June 30, 2003 and from September 1 to December 31, 2003.

[93] When asked about how employees found new job, the Deputy Chairperson for the Learning and Development Programs Branch said there were three ways:

- a) The block transfer of a group of people and their functions; this was the case for employees of Language Training Canada, that after being part of the Learning Programs Branch were transferred as a block elsewhere in the Public Service.
- b) Employees who found work using their own resources; this was the case for the staff of the International Programs Unit, except Ms. Gravel. Not much help was given these people.
- c) Employees incapable of finding a job using their own means, like Ms. Gravel, who, consequently, needed more support.

[94] He explained that he did for Ms. Gravel what he usually did for employees in the last category. In addition to still receiving a salary, he gave her less work to give her the opportunity to put more time and energy into finding a new job; he gave her access to a closed office with a telephone and a computer with e-mail access. He gave her a letter of reference (Exhibit R-1, tab 3). No pressure was put on the Complainant; he said he was aware that when applying for a competition, the process could take up to six months.

[95] In fact, the Complainant applied to three competitions; unfortunately, she did not get a job through these competitions.

[96] The witness said he was not in a position to say how much time the Complainant had to find a new job. This issue was never raised before he left the Corporate Management Branch at the end of October 2003. He added that a period of one year or more would be normal.

[97] There was no financial pressure on the Complainant or the Branch as her salary was covered by Corporate Reserve.

[98] When asked about the age of the Complainant, he answered that this issue had no bearing for him. In any case, he did not know the Complainant's age. Sometimes he learned an employee's age; as an engineer, he signed the passport forms of some employees who requested it but this was not the Complainant's case.

[99] When asked about his relationship with Complainant, he answered that their work relationship was pleasant but infrequent in the 5 months that they worked in the same office. When asked about her performance, he said that the work requested was well done and he did not notice that she may be disabled in any way. He never received a request for accommodation from her. He never had to consult the Complainant's personal file and obviously, did not know about the medical certificate issued in 2001 that was in her file

that described the Complainant's fibromyalgia. He specified that it was not current practice for managers to consult employees' personal files.

[100] However, at the beginning of 2004, given the Complainant's fate had not yet been sealed and that she still had not managed to find a permanent position using her own means, the Human Resources Office decided to take matters into its own hands. It was even considering the Complainant a "surplus employee" as of March 2004.

B. No one at Human Resources answered the Complainant's messages

[101] The Complainant repeated several times and discussed the many ways she regularly contacted the Human Resources office to get its director's help, by leaving him phone messages, sometimes daily, and e-mails to his attention but no one ever followed up.

[102] She claimed that she went in person to the Human Resources Office and asked for help. She was told that the Director would call her back.

[103] When the Director of Human Resources was asked about the Complainant's accusation, he categorically denied having received any messages from the Complainant that he did not follow up on. He specified that this accusation did not make any sense and that, in the event that he could not respond, he would have delegated this responsibility and asked an employee to follow up.

C. Unfair treatment

[104] The Complainant claims that other employees, who are younger than her, got a new job and received better treatment than she did.

[105] The Tribunal recognizes that the evidence collected did not give her the opportunity to learn that exact status of other employees of the International Programs Unit: did they have the status of "affected employee", were they working with a written assignment agreement in hand or without assignment, no evidence was filed in this regard.

[106] The only confirmation we have is from the Director of Human Resources who said that to his knowledge, most found a job using their own means.

[107] Despite the confirmations made by the employer regarding the ages of other employees in this unit, it appears that each employee, except those who resigned to retire, were younger than the Complainant most of which were significantly younger than the Complainant.

D. Human Resources ignored the Complainant's experience, qualifications and interests

[108] The Complainant tried to demonstrate her qualifications and her experience, as outlined in her Curriculum Vitae, and claimed that Human Resources did nothing to find her a job suitable to her skills.

[109] She presented the Tribunal with letters of recommendation in support of this and filed them with the Tribunal file; the letters said her work was generally appreciated by all. She repeated several times that she was proud of her accomplishments.

[110] She recognized that her work left a little to be desired, but only for a short period of time, between 4 and 5 weeks, from March 8, 2004; she justified this by claiming that, following a disability leave from January 19 to March 8, 2004, with pressure from her immediate superior, she came back to work too quickly and additionally, as the position of "Program Coordinator" was new for her, she needed training, which was not carried out to her satisfaction due to the lack of trainers.

[111] She had a civil servant now retired testify. He told the Tribunal that he had known the Complainant at DFAIT since 2000. He specified that she replaced his administrative assistant and that he was so completely satisfied with her services that when he was transferred to the International Programs Unit in 2001, he asked the Complainant to come with him, which she did. During the time he worked with her, he never heard anyone complain about the Complainant or heard anyone say she was dishonest.

[112] In the 4 to 5 week period that the Complainant spent in his branch between March 8 and April 14, 2004, the Deputy Chairperson for the Learning and Development Programs Branch maintains that she was very pleasant, even when he made recommendations, she was respectful, positive, smiled often, offered to help, even offered to be his assistant; he said he could not follow up on this request as other arrangements had been made within the organization.

[113] The Respondent's witnesses, the Deputy Chairperson for the Learning and Development Programs Branch, the Director of Human Resources and the Director of Executive Resourcing were of the same opinion: the Complainant was looking for an administrative not clerical-level position, which she estimated as matching her experience and qualifications. The Complainant herself said so several times.

[114] But, according to these witnesses, the Complainant was looking for the equivalent to a promotion when the rules adopted as part of the Public Service modernization provide for the transfer of employees to the same group and level. The Complainant had a CR-5 classification: a clerical level.

E. The Respondent was aware of the Complainant's fibromyalgia and refused to make the appropriate accommodations

[115] The Director of Special Projects at the time testified to the effect that in 2001, his immediate supervisor at the time, asked him to include in the Complainant's file a note from the Complainant's family doctor, dated June 2001, referring to her fibromyalgia. He also remembers, after producing this note, his boss changed the Complainant's work task, keeping in mind her fibromyalgia, which gave her less data entry and more secretarial-type work.

[116] When questioned whether he had ever had to deal with a request for accommodation from an employee with some kind of disability, he answered affirmatively, specifying that it had occurred several times. However, he also specified that it is not enough to be aware of your staff and observe them; the employee has to talk to his or her supervisor to let this person know what he or she needs in terms of accommodations.

[117] The Complainant maintains that the Director of Executive Resourcing, who was aware of her fibromyalgia, refused to take this into consideration when he gave her the position of "Program Coordinator". However, this position required a lot of typing, which was not suitable for a person like her who has fibromyalgia.

[118] She alleges having informed the Director of Executive Resourcing during their phone conversation in January 2004, that there was a certificate in her personal file, written by her family doctor in 2001, describing her fibromyalgia. She alleges having spoken to him about the disability during their phone conversations in January and February 2004.

[119] The latter denies having been told by the Complainant about her fibromyalgia.

F. The executive assistant position should have been offered to the Complainant instead of Ms. C.J.

[120] The Complainant claims she was not offered the position of Executive Assistant for the Deputy Chairperson of the LAEPB, as it was given to Ms. C.J. She specified that Ms. C.J. was younger than her. She was around 28 years old at the time and the Complainant was 59.

[121] Faced with this claim, the Deputy Chairperson specified that he knew Ms. C.J. better than he knew the Complainant, having seen her work for a longer period of time. In the 5 months that he spent at the LAEPB, he was in daily contact with Ms. C.J.

[122] Because of her frequent absences from the office, he met the Complainant less often. He remembered her as a pleasant person who always did her work.

[123] He found that the Complainant's work experience, which was mainly in Foreign Affairs, was less useful to the Public Service Commission, which had almost eliminated its involvement in international programs.

[124] He remembered the Deputy Chairperson who brought Ms. C.J. to work in her branch as an acting CR-4. In February 2003, shortly before he arrived, she appointed Ms. C.J. to an acting AS-5 position for a year.

[125] In the five months he spent in the LAEPB as Vice-Chairperson, Ms. C.J. handled his work life and did an excellent job.

[126] In July 2003, he offered Ms. C.J. an acting AS-02 for a few months and she accepted. She carried out the duties of the position since she had started working for the previous Deputy Chairperson, without being entirely recognized for it.

[127] As it was only a temporary position, given the LAEPB was about to close, and the position was going to disappear, he decided to offer it to Ms. C.J. without a competitive process, as is generally the practice in such circumstances. However, he opted for a three-week appeal period, even though he could have opted for a shorter one. Neither the Complainant nor anyone else appealed.

[128] The AS-2 position was given to Ms. C.J., while the Complainant held a CR-5; going from a CR-5 to an AS-2 represented a promotion. The modernization commitments made by the PSC limited them to replacing employees at the same group and level.

[129] The Respondent, though the Complainant was considered a "priority", was not obliged to offer the position to the Complainant as it was at a higher level than a CR-5. When questioned about whether the Complainant showed an interest in the position given to Ms. C.J., the Deputy Chairperson indicated that the response was not clear but he remembered that she would have liked to follow him to his new office at Industry Canada. He could not specify if she expressed this wish explicitly or not.

[130] Finally, the Tribunal did not see any documents nor hear any witnesses that could have shown that the Complainant requested the position occupied by Ms. C.J. The same is true for the position that Ms. C.J. would have at Industry Canada.

[131] Asked about Ms. C.J.'s transfer to Industry Canada, the Deputy Chairperson specified that when he got to Industry Canada in September 2003, he decided to observe the office and analyze the situation before deciding on the kind of personnel he would need.

[132] He became aware that he would need an assistant who was a tough fighter with a business background; the office was difficult and conflicts occurred often. He felt that Ms. C.J. had the necessary qualities for this position. Until then he made no promises with respect to this. It was not until after his evaluation and he had left for Industry Canada that he offered the job to Ms. C.J.

[133] Following the explanations provided by the Deputy Chairperson, the Complainant added a comment; she was not testifying but completing her cross-examination:

I would like to agree with your statement, now that you said the job was like at Industry Canada, knowing (C.J.) I agree with you completely.

[134] Pursuant to the powers conferred on the member conducting the inquiry by paragraph 50(3)(c) of the *Act*, I admit into evidence the Complainant's comment, which to me means that the Complainant confirmed that Ms. C.J. seemed to be the better candidate for the position.

[135] It would be helpful at this point to repeat the explanation already made by the Director of Human Resources regarding the concentric approach outlined in the rules that apply to the Public Service Commission to replace staff. The first effort is to place the employee in the same unit, then in the same branch, then within the department and finally, outside the department.

[136] The position filled by Ms. C.J. at Industry Canada was open outside the department. As a result, it would have been premature of the Complainant to claim the right to a position at Industry Canada. Moreover, the position in question would have represented a promotion in her case.

G. The Respondent is responsible for falsely spreading the news of her retirement

[137] The Complainant claimed that the Director of Executive Resourcing sent the Director of Human Resources an e-mail on May 13, 2004, produced as Exhibit C-1 (6) containing false information; here is an excerpt of the text that is false:

[TRANSLATION]

"She says she would like to retire when she turns 60 on June 29, 2004, buy 10 years of service and not return to work thereafter."

[138] The Complainant specified that she did not provide this information to the Director of Executive Resourcing as at the time, she had not yet decided to resign.

[139] The Complainant also had a Pay and Benefits Officer, testify; she came to explain that the Complainant asked her for details about her file but never indicated that she intended to retire. She also specified that this is what explained the fact that the letter she sent to the Complainant on March 28, 2004, did not have an official letterhead on it. See Exhibit C-1, tab 25.

[140] We are of the opinion that the error the Complainant identified in the Director of Executive Resourcing's e-mail does not have a negative impact on the Complainant. The position that was offered to her in January 2004 was maintained until the Complainant resigned in January 2005.

H. The Respondent is responsible for the Complainant's resignation

[141] The Complainant claims the Respondent treated her in such a way that when the International Programs Unit and the LAEPB closed, she felt forced to resign in January 2005, 5 years sooner than anticipated.

[142] To properly evaluate this accusation, we need to keep in mind that in her letter of resignation, the Complainant blames the insurance company. She does not accuse her employer, which she has brought before the Human Rights Commission, of the serious allegations of discrimination.

[143] During the hearing, when questioned about this anomaly, the Complainant explained that if her letter of resignation did not contain any accusations against the Respondent, it is because she was acting "diplomatically" in an area that did not recognize the concept. It seems to us that the Complainant could have resigned and demonstrated diplomacy without blaming the insurance company.

[144] Where is the truth: when the Complainant wrote her letter or when she came to testify? We believe the most probable answer is that the Complainant identified the cause of her problems at the time she wrote her letter of resignation. It is not until she learned about the existence of recourse under the *Canadian Human Rights Act* that she became aware that recourse was only open against the employer and not the insurance company. Moreover, this recourse is only available if her employer discriminates against her in a manner that is prohibited by this *Act*.

I. The Respondent is responsible for the deterioration in the Complainant's health

[145] During the hearing, the Complainant claimed that the treatment she suffered by the Respondent, the Public Service Commission, in 2003 and 2004 was the main cause for the deterioration of her health.

[146] To better demonstrate this claim, the Complainant had a member of her immediate family testify. He told the Tribunal what the Complainant told him, following telephone conversations with her immediate superior. He said that he was never present during these conversations. He described the Complainant's state, following the conversations, as a person who was angry. She told him that since her unit at work closed, she found herself in an unstable situation and the position offered by the Director of Executive Resourcing did not suit her. She felt very out of sorts.

[147] On the other hand, the medical report of the psychiatrist, following examination of her patient in November 2004, which is produced as Exhibit R-2, tab 10, indicated that other factors of non-professional origin could explain, in part, the Complainant's health problems.

[148] Finally, the Complainant's resignation letter produced as Exhibit R-1, tab 12, puts the blame on the shoulders of the insurance company and does not address any issues with the Respondent. See above for what was said about this resignation.

[149] In our opinion, the Complainant's health problems could be attributed to factors of a personal nature and, largely, to difficulties experienced by the Complainant following the closing of the International Programs Unit and the LAEPB. It must be determined if the Respondent is responsible, pursuant to section 7 of the *Act*.

IV. APPLICABLE LEGAL CRITERIA

[150] The Complainant, who filed a discrimination complaint with the Human Rights Tribunal, first must convince the Tribunal of the existence of a *prima facie* case of discrimination by the Respondent. (*Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202). In this case, as the Complainant claimed discrimination based on age and disability: she would have to convince the Tribunal that the evidence submitted, which deals with the claims made, is complete and sufficient, as outlined by the Supreme Court in *Ontario Human Rights Commission v. Simpson-Sears Ltd.* [1995] 2 S.C.R. 536, paragraph 28:

...The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one that covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent employer...

[151] As a result, to make a decision in this first step, the Tribunal must limit itself to analyzing only the testimonial and documentary evidence, filed by the Complainant. It must disregard the evidence submitted by the Respondent. See *Lincoln v. Bay Ferries Ltd.* 2004 FAC 204 paragraph 22:

[22] The approach taken by the Tribunal and upheld by the Trial Judge in determining whether a *prima facie* case of discrimination had been made out is not supported by the authorities. The appellant's *prima facie* case was that he sought a position of chief engineer on board the M.V. "Princess of Acadia", that he was qualified for the position, that someone else was hired for the position and that his race played a part in the respondent's decision to hire the other candidates. By these allegations, the appellant might have established a *prima facie* of discrimination as explained in *O'Malley, supra*, that is, a case "which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer". Instead of determining whether these allegations, if believed, justified a verdict in favour of the appellant, the Tribunal also took into account the respondent's answer before concluding that a *prima facie* case had not been established. As is clear from *Etobicoke, supra*, and *O'Malley*, this latter element does not figure into a determination of whether a *prima facie* case of discrimination has been established.

[152] If the Tribunal finds that a *prima facie* case has not been established regarding the essential elements of the allegation or finds that the evidence submitted is incomplete or not satisfactory, it must reject the complaint. See *Canada (C.H.R.C.) v. C.N.* (2000), 38 C.H.R.R. D/107 (F.C.T.D.) In fact, it is really a question of knowing if each essential aspect of a discriminatory act is supported by evidence.

[153] However, if it is of the opinion that a *prima facie* case was made, the burden of proof changes. It is then up to the Respondent to provide "reasonable" or "satisfactory" explanation for discriminatory practices (see *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 (CANLII), 2004 FCA 204, paragraph 23; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 (CANLII), 2005 FCA 154, paragraphs 26 and 27).

[154] However, an employer's conduct will not be considered discriminatory if it can show that any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement (BFOR) (paragraph 15(1)(a) of the *Act*). For a practice to be considered a BFOR, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost (subsection 15(2) of the *Act*).

[155] The Respondent must also prove that the justification was not just a pretext to mask discriminatory practices. This was decided by the Federal Court in *Canada (A.G.) v. Lambie* (1996) C.H.R.R. D/438.

[156] The degree of proof required to determine the existence or non-existence of discrimination is the one that is required in civil cases, the balance of probabilities. The requirements of such evidence are less demanding than those required by a Court hearing a criminal case. Here is what the Court declared in *Dawson v. Canada Post Corporation*, 2008 CHRT 41 in paragraph 73:

[73] This said, as stated in *Wall v. Kitigan Zibi Education Council*, (1997) C.H.R.D. 6, the standard of proof in discrimination cases remains the ordinary civil standard of the balance of probabilities and that in cases of circumstantial evidence, the test is the following: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses (B. Vizkelety, *Proving Discrimination in Canada*, Carswell, 1987, p. 142).

V. WHAT ARE THE ISSUES

[157] In reading the complaint filed by the Complainant against the Respondent, regarding discrimination based on age and disability, here are what appear to be the issues for determination:

First Issue

When the International Programs Unit closed June 30, 2003, and the LAEPB closed on October 31, 2003, did the Respondent differentiate adversely against the Complainant in the course of employment by reason of her age pursuant to section 7 of the *Act*?

Second Issue

At the time when the position of Program Coordinator was offered to the Complainant and at the moment when the Complainant held this position, did the Respondent differentiate adversely against the Complainant in the course of employment because of her disability and, if so, did the employer meet its obligations in terms of accommodation pursuant to section 15 of the *Act*?

Third Issue

In November 2004, did the Respondent differentiate adversely against the Complainant in the course of employment based on her disability by ignoring or refusing to agree to her request to return to work gradually and, if so, did the employer meet its obligations pursuant to section 15 of the *Act*?

Fourth Issue

Did the Respondent differentiate adversely against the Complainant in the course of employment as a result of her age, preferring to give the administrative assistant position to Ms. C.J. instead of the Complainant? Did the Respondent differentiate adversely against the Complainant in the course of employment in terms of her age pursuant to section 7 of the *Act*?

Fifth Issue

Did the Respondent's conduct deprive the Complainant of employment opportunities and consequently contravene section 10 of the *Act*?

A. First Issue

[158] When the International Programs Unit closed June 30, 2003, and the LAEPB closed on October 31, 2003, did the Respondent differentiate adversely against the

Complainant in the course of employment by reason of her age pursuant to section 7 of the *Act*?

(i) *Prima facie* evidence

[159] The Complainant's arguments state that on June 30, when the International Program Unit closed and on October 31, 2003, when the LAEPB for the Public Service Commission closed its doors, she was without a job when all other employees, except for those who retired, who were all much younger than she, found a job.

[160] The Complainant showed that all the other employees, except those who retired, were actually much younger than she, who was 59 at time; she claimed that all of them, except her, had found a job.

[161] She showed, using letters of recommendation and supporting witnesses, that her work at DFAIT and at the Public Service Commission was generally very satisfactory and that no one could complain about her performance.

[162] She claimed that she was of the opinion that only her age, 59, played against her and because of this, the Respondent demonstrated discrimination based on her age. She also blamed the Respondent for neglecting her, abandoning her and offering preferential treatment to other employees younger than she.

[163] In the absence of any explanation that could justify why the Complainant remained jobless while her work seemed satisfactory, it would seem to us that the Complainant's age could be the only means to explain this situation.

[164] For these reasons, the Tribunal is of the opinion that the Complainant has made *prima facie* case that the Respondent discriminated on the basis of age.

(ii) Respondent's position

[165] From the period starting with the closing of the International Programs Unit and the LAEPB and finishing the day when the Complainant resigned, she continued to be paid; she was employed and was assigned tasks considered to be at her level, except for a period of six weeks at the beginning of November, lasting until mid-December 2003.

[166] It seems to us that this six-week period the Complainant spent alone in an empty office, that none of the witnesses, including the Chief of Human Resource Operations for the Public Service Commission, were able to explain, represents an aberrant and unimaginable situation.

[167] The evidence adduced does not, however, allow us to confirm that representatives of the Respondent deliberately caused this. However, it is a neglectful and/or an unpardonable oversight by Human Resources. Given everything we have learned about the Complainant, we are of the opinion that she certainly did not deserve to be treated in such a way.

[168] We can easily imagine the anguish and the depression that the Complainant might have felt or experienced during this extended period. If an employer wanted to discourage or destroy an employee, there is no better way to do so.

[169] Despite such a grievous mistake by representatives of the Respondent, we cannot blame this action, or lack thereof, on the Complainant's age.

[170] It does not seem very relevant that the Complainant spent a considerable period of time without a "written assignment"; it seems that it is common practice and in this case, did not result in terrible consequences for the Complainant.

[171] We accept the explanation provided by the Director of Human Resources that they gave the Complainant a year for her to find a new job, using her own means, particularly as the position that seemed to interest her appeared to be a promotion and the Respondent was not obligated to act in this situation.

[172] We consider it normal that after realizing that the approach being used until the end of 2003 did not result in the Complainant finding a new job using her own means, that Human Resources decided to take matters into their own hands and to put pressure on the Complainant to find her a new job. This is why, through the Director of Executive Resourcing, a job was offered to the Complainant in January 2004.

[173] The Complainant's claims that the Respondent did not take care of her and that her calls were not returned does not seem accurate to us. We would like to specify that the Respondent can only act through its employees. For this reason, we are of the opinion that we must evaluate the assistance received by the Complainant by considering the assistance from all other sources, namely the two Deputy Chairpersons for the Learning and Development Programs Branch, the Director of the Equity and Diversity Directorate, the Senior Strategic Advisor and the Director of Executive Resourcing.

[174] During the hearing, we were able to establish that work had been done by Human Resources to help the Complainant find a new job. In summary, even if Human Resources did not return the Complainant's calls, which was challenged by the Chief of Human Resources, it seems to us that the Complainant was assisted in several ways.

[175] However, we are of the opinion that the Complainant was not really informed in a timely manner.

[176] This is a fact confirmed by the Deputy Chairpersons for the Learning and Development Programs Branch during the hearing when he said that all employees were supposed to have received the document, "PSC Transformation Realignment for Modernization - Questions & Answers", Exhibit R-1, tab 2. But did Human Resources take the time to meet the Complainant every now and again to explain to her what they had done for her? Did they explain to her how they would help her in the future? Did they fully explain her situation to her? Did they offer to answer her questions? Was there not a communication problem?

[177] If everything that was said during the hearing had been explained to the employee at the right time, there probably would not have been reason to file a complaint with the Canadian Human Rights Commission...nor would there have been a hearing and maybe the Complainant would have continued working for the Public Service until age 65.

[178] With respect to the claim that *special treatment* was given to other employees who were moved to other positions, no proof of this was submitted.

[179] With respect to the Complainant's allegation against the Respondent that her qualifications and experience were ignored, it would seem to us that this allegation hides the fact that the Complainant was more interested in an administrative-level position than a clerical one; however, we cannot lose sight of the fact that the Complainant was a CR-5.

[180] Therefore, she cannot hold it against the Respondent for looking to assign her a clerical position and for not helping her find an administrative position. The Respondent's obligation is limited to placing the Complainant in a position of the same group and level.

(iii) Conclusion

[181] The evidence filed before the Tribunal is to the effect that the Respondent was not without blame. For example, the six-week period the Complainant spent alone and the lack of communication, as we have just explained.

[182] However, our mandate does not allow us to act in such cases. We are limited to determining if the Respondent discriminated based on the Complainant's age, pursuant to section 7 of the *Act*.

[183] We conclude in this situation, that the Respondent, despite the allegations we have already addressed, did not discriminate against the Complainant on the basis of her age.

B. Second Issue

[184] At the time when the position of Program Coordinator was offered to the Complainant and at the moment when the Complainant held this position, did the Respondent differentiate adversely against the Complainant in the course of employment because of her disability and, if so, did the employer meet its obligations in terms of accommodation pursuant to section 15 of the *Act*?

(i) Prima facie evidence

[185] The Complainant claims she told the Director of Executive Resourcing during a phone call on January 20, 2004, about her fibromyalgia and that the position that he was offering was not compatible with her condition. According to her, he ignored this issue. She therefore informed him that there was a note from her family doctor dating back to 2001 in her file describing her fibromyalgia.

[186] One of the complainant's witnesses declared he was aware of the existence of this note, having himself put it in the Complainant's file. At the time, in 2001, the Complainant benefited from special arrangements as a result of her disability.

[187] Worried about losing her job, the Complainant felt obliged to accept the position offered and return to work. The Respondent did not take any note of the request for accommodation made by the Complainant.

[188] For these reasons, the Tribunal is convinced that the Complainant showed that the Respondent demonstrated *prima facie* discrimination based on her disability.

(ii) The Respondent's position

[189] The Director of Executive Resourcing denies that the Complainant referred to her fibromyalgia during the telephone conversation on January 20, 2004, or on any other occasion. He described, however, what he would have done had the Complainant submitted such a request.

[190] The Complainant stated that she called the Director of Executive Resourcing in February 2004, 2 weeks after the January 20 conversation. She gave the impression during this conversation that he scared her so much that she decided to accept his offer. However, the evidence shows that the Complainant had already signed a letter accepting this position on January 21.

[191] Confronted with two diametrically opposed versions, what is to be done?

[192] We must specify in the first place that the Director of Executive Resourcing being retired since, had no interest in the matter and would not have any reason to lie, given his Branch had been dissolved. However, the Complainant had a lot to gain or to lose.

[193] The witness would have a little lose in consenting to the Complainant's accommodations. In fact, he could have made a solid ally at the time of her eventual return to work.

[194] How could she say in this same letter in February that the Director of Executive Resourcing scared her so much during the telephone conversation that she decided to return to work and sign a contract as she had already signed the "Response to the letter of appointment" on January 21?

[195] How could she, in this same letter in February, mention the names of doctors, a psychologist and a psychiatrist, when we were discussing accommodations related to the Complainant's fibromyalgia? These doctors were not involved until the summer of 2004 when the family doctor of the Complainant indicated that her patient was depressed.

[196] In the circumstances, in the presence of two contradictory versions, we retain the Director of Executive Resourcing's version because this one seems most credible. We are of the opinion that the Complainant did not tell him that her fibromyalgia prevented her from carrying out tasks for the position offered to her and did not ask him for any accommodation.

(iii) Conclusion

[197] In this case, we conclude that when the Director of Executive Resourcing offered the Complainant the position of Program Coordinator, the Complainant did not tell him that she could not fulfill the duties of the position due to her fibromyalgia and did not make any requests for accommodation. We would like to specify that the Complainant, who would like to be accommodated, also has obligations to fulfill. One of these obligations is to inform the employer of the medical situation and the resulting needs. See: *Central Okanagan School District No. 23 v. Renaud* (1992) 2 S.C.R. 970, pages 30 and 31.

[198] As a result, we find that the Respondent did not discriminate against the Complainant based on her disability.

C. Third Issue

[199] In November 2004, did the Respondent differentiate adversely against the Complainant in the course of employment based on her disability by ignoring or refusing to agree to her request to return to work gradually and, if so, did the employer meets its obligations pursuant to section 15 of the *Act*?

(i) *Prima facie* evidence

[200] The Complainant claimed that at the beginning of November of 2004, the medications she had been taking for some time started to have a positive effect on her health. The effects of her depression began to subside.

[201] She called her immediate supervisor, on November 8, 2004, to ask him if she could come back to work gradually, starting with 2 days per week.

[202] He would have categorically refused her request for accommodation.

[203] For these reasons, the Tribunal finds that the Complainant proved *prima facie* discrimination by the Respondent based on her disability.

(ii) The Respondent's position

[204] The Director of Executive Resourcing knew that the Complainant was on disability leave for depression. He claims having called her in September 2004 to determine the state of her health. He was told that her doctors did not want her to return to work.

[205] However, he denies having received a call from the Complainant on November 8, 2004.

[206] He reiterates not having been informed by the Complainant that she could not, due to her fibromyalgia, take the position he was offering and he never received, at any time, a request for accommodation from the Complainant.

[207] He claims not having any memory that the Complainant told him that she felt well enough to return to work gradually in November, despite the recommendation of her psychiatrist.

[208] None of the medical reports filed, referring to the period between May 2004 and March 31, 2005 indicate that the Complainant could return to work.

[209] None of these medical reports suggested a gradual return to work by the Complainant.

(iii) Conclusion

[210] The medical reports from various doctors show the Complainant's inability to work. As a result, the actions taken by the Respondent's representatives were justified pursuant to section 15(2) of the *Act*.

[211] The Complainant did not file with the Tribunal, any medical report supporting her ability to return to work gradually over the course of May 2004 to March 31, 2005.

[212] The Respondent denies having received a request for a gradual return to work following her depression and as a result, denies having refused this request by the Complainant.

[213] For these reasons, we are of the opinion that the Complainant did not show that the Respondent discriminated against her based on her disability.

D. Fourth Issue

[214] Did the Respondent differentiate adversely against the Complainant in the course of employment as a result of her age, preferring to give the administrative assistant position to Ms. C.J. instead of the Complainant? Did the Respondent differentiate adversely against the Complainant in the course of employment in terms of her age pursuant to section 7 of the *Act*?

(i) *Prima facie* evidence

[215] The Complainant claims she was not offered the position of Executive Assistant for the Deputy Chairperson of the LAEPB, when the position was offered to Ms. C.J., who was younger than her. Ms. C.J. was around 28 at the time and the Complainant was 59.

[216] At first glance, the position seems important. Ms. C.J. is very young to hold such a position. The Complainant has several years of experience. Her experience seems to have more weight.

[217] One factor could have been working against her: her age.

[218] For these reasons, the Tribunal is of the opinion that the Complainant provided *prima facie* evidence of discrimination based on her age.

(ii) The Respondent's position

[219] The Deputy Chairperson for the Learning and Development Programs Branch does not remember if the Complainant showed any interest in the position given to Ms. C.J.; the Complainant did not indicate that she had applied for this position; she was not denied the right of appeal when Ms. C.J. was promoted to the said position.

[220] Because of her status as "affected employee", the Complainant was not in a position to be given a job in a preferential manner because the position was at a higher level than her, meaning a promotion.

[221] The Deputy Chairpersons for the Learning and Development Programs Branch showed that Ms. C.J. had the experience necessary for the position as well as for the position that was given to Ms. C.J. at Industry Canada. In the latter situation, the Complainant herself supported his decision.

[222] The Complainant cannot invoke her priority status at Industry Canada. Her priority is limited to the Department in which she works.

(iii) Conclusion

[223] For these reasons, we are of the opinion that the Complainant did not show that the Respondent discriminated against her based on her age when Ms. C.J. was given the position.

E. Fifth Issue

[224] Did the Respondent's conduct deprive the Complainant of employment opportunities and consequently contravene on section 10 of the *Act*?

(i) Prima facie evidence

[225] The complaint being examined claims that the Respondent discriminated against the Complainant based on her age and disability, in contravention of sections 7 (Employment) and 10 (Discriminatory policy or practice) of the *Canadian Human Rights Act*.

[226] Throughout the hearing of her evidence, the Complainant did not blame the Respondent for having applied a discriminatory policy or practice on the basis of age and disability. Moreover, she did not present evidence suggesting the Respondent used discriminatory policies or practices.

[227] For these reasons, the Tribunal is of the opinion that the Complainant did not demonstrate *prima facie* evidence that the Respondent exercised discriminatory policies or practices based on her age or disability.

(ii) Conclusion

[228] The Complainant did not demonstrate that the Respondent was in contravention of section 10 of the *Act*.

VI. WHAT IS THE APPROPRIATE REMEDY?

[229] The Tribunal concluded that the Complainant could not establish evidence of discrimination by the Respondent based on her age or her disability.

[230] For this reason, the Tribunal finds it unnecessary to make any specifications regarding remedies.

"Signed by"
Réjean Bélanger

OTTAWA, Ontario
February 3, 2010

PARTIES OF RECORD

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APPEARANCES:	
Shelley Ann Gravel	For herself
(No one appearing)	For the Canadian Human Rights Commission
Marie Crowley Korinda McLaine	For the Respondent