

T.D. 4/99

Decision rendered on November 10, 1999

CANADIAN HUMAN RIGHTS ACT

R.S.C., 1985, c. H-6 (as amended)

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

RITA CONTE

Complainant

and

ROGERS CABLESYSTEMS LTD.,

Respondent

DECISION

TRIBUNAL: J. Grant Sinclair, Q.C. Chairperson

APPEARANCES: Rita Conte, Complainant
Appearing on her own behalf
Susan Paish and Lorene Novakowski
Counsel for Rogers Cablesystems Ltd.

DATES AND PLACE OF HEARING: July 5 to 9, 1999

July 12 to 16, 1999

Vancouver, British Columbia

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I. INTRODUCTION:

The Complainant, Rita Conte, was employed as a part-time Customer Service Consultant with Rogers Communications Inc. (Rogers) in the Burnaby Call Centre from May 29, 1995 to November 24, 1995. During this period, Ms. Conte was a full-time political science student at the University of British Columbia. She obtained her university degree in 1996.

Ms. Conte had worked previously as a consultant with Rogers from January 1992 to September 1994. In 1994, Rogers made the decision to transfer the operations of the Call Centre to Toronto. Rogers closed the Burnaby Call Centre and all the consultant positions were terminated.

In the spring 1995, Rogers decided to reopen the Burnaby Call Centre. Ms. Conte learned of this, applied for and was hired again as a part-time consultant, starting on May 29, 1995. All of the consultants were hired on a six-month probationary basis irrespective of whether they had worked previously with Rogers. The new hires were required to go through a three-week training program, consisting of two weeks in the classroom learning the new software program, policies and procedures. The third week was spent on telephone training. Ms. Conte completed the training session and moved on to the consultant's job.

On November 24, 1995, Rogers terminated Ms. Conte's employment. Rogers had concluded that Ms. Conte had an ongoing, persistent voice problem that prevented her from doing her job. Her termination was within one week of the end of her probationary period.

Ms. Conte filed a complaint with the Canadian Human Rights Commission on January 17, 1996, alleging discrimination on the ground of disability contrary to section 7 of the *Canadian Human Rights Act*.

II. THE REQUIREMENTS OF THE JOB:

The essential element of the consultant's job is to talk on the telephone in response to customer calls. A consultant is expected to deal with all aspects of the call, including general inquiries, billing matters, resolving customer problems, processing new orders and promoting and selling Rogers' products. A consultant is also required to input customer data into the computer arising out of a customer call. Part-time consultants are expected to work a minimum of 16 hours per week, but can work longer (including a full shift of 7.5 hours) depending on their availability and the scheduling needs of the Call Centre.

Rogers has specific job standards for consultants in the Call Centre. A consultant is required to talk on the telephone, clearly and continuously, for 95% of the scheduled shift time. And 80% of customer calls must be answered within 20 seconds of being received in the Call Centre.

Consultants are expected to meet these performance standards as well as other evaluative criteria. Rogers monitors their work performance to ensure that these standards are met. This is done either by a live coaching session in which a team manager will sit with a consultant and monitor the incoming calls. Or, it is done by a way of a taped session in which the team manager, on a random basis and without advising the consultant, will review taped calls answered by the consultant. The evaluation is recorded on a quality performance checklist, which is prepared by the team manager and reviewed with the consultant. If a consultant does not meet the performance standards, she/he would be coached by their team manager to improve their performance. If after a time, a consultant does not improve her/his performance, they may be terminated.

Rogers agreed that Ms. Conte was terminated for "non culpable" reasons. That is, Ms. Conte was able to meet the performance standards when she was able to talk on the

telephone. Rather, Ms. Conte was terminated because, in Rogers' opinion, she had a voice condition which prevented her from working as a consultant on a regular and consistent basis.

III. THE POSITIONS OF THE PARTIES:

Ms. Conte's position is that, admittedly, she had voice problems from time to time, but these were only temporary. For the greater part of her stint with Rogers, she was able to do her job effectively. On those very few occasions when she was unable to perform, Rogers should have accommodated her in a position requiring less intensive voice use or given her a leave of absence while she rested her voice. Rogers, on the other hand, considered Ms. Conte to be a probationary employee, the purpose of which was to allow both parties to evaluate the employment relationship. From Rogers' point of view, because of her persistent voice problems, Ms. Conte was not suitable for continued employment and she was terminated within her probationary term.

IV. MS. CONTE'S EMPLOYMENT RECORD AND MEDICAL HISTORY, PRE-MAY 1995:

As stated earlier, Ms. Conte was first employed with Rogers as a Customer Service Consultant from January 1992 to September 1994. Ms. Conte was able to do her job during that period except on one occasion when she experienced total voice loss and was unable to work. This was during the week of August 17 to August 24, 1994.

Ms. Conte saw her family doctor, Doctor Gorfinkel on August 17, 1994, regarding her voice problem. In her clinical notes, Doctor Gorfinkel noted that Ms. Conte was experiencing worsening hoarseness and recommended that she consult with Doctor Maloney, an otolaryngology (eye, nose and throat) specialist. Earlier that year, in May 1994, Doctor Gorfinkel had noted that Ms. Conte suffered from a sore throat, hoarseness and was always coughing. Her clinical notes also indicated voice overuse from her job with Rogers.

Ms. Conte filed a Workers' Compensation Board claim dated October 2, 1994. In this claim, she reported that her voice loss started on April 15, 1994. She also reported that there was not one main cause for her voice loss, but her job required her to speak eight hours per day and this put a strain on her vocal cords causing her speech to fade out. Doctor Gorfinkel filed a Physician's First Report dated August 17, 1994 with the Board. Her medical diagnosis was increasing hoarseness, voice overuse and possible vocal cord nodules. She also advised that Ms. Conte could return to work but not for duties involving her voice.

Rogers also filed an Employer's Report of Injury dated August 18, 1994, which was signed by Ms. Conte's supervisor. In that report, Rogers noted that the injury was first reported on August 17, 1994, and that Ms. Conte has been complaining of throat irritation for the past three months.

Ms. Conte's Workers' Compensation Board claim was accepted by the Board in March 1995, on the basis that her vocal cord nodules were related to voice overuse at work. Subsequently (when considering a further claim by Ms. Conte in 1995) the Board reversed its decision, because it

concluded that the vocal cord nodules were not work-related but rather, were the result of pre-existing conditions.

Ms. Conte consulted with Doctor Maloney on August 24, 1994. She reported that Ms. Conte had dysphonia (bad voice) for at least four months. Her diagnosis indicated vocal cord nodules, a mild reflux condition and laryngitis. She prescribed an anti-reflux diet and medication. Doctor Maloney also recommended further assessment and speech therapy at the Voice Clinic, Vancouver General Hospital.

Ms. Conte was next examined by Doctors Morrison, Rammage and Bosch on October 25, 1994, at the Voice Clinic. Doctor Morrison is an otolaryngology specialist, Head of the Otolaryngology Division, University of British Columbia and Director of the Pacific Voice Clinic, V.G.H. He has practised his speciality for more than 20 years. Doctor Rammage is a speech therapist and jointly administers the Voice Clinic with Doctor Morrison. Doctor Bosch is an eye, nose and throat specialist. In their November 4, 1994 reporting letter, the doctors noted that Ms. Conte recalled first having problems with her voice in April 1994. She believed that the heavy vocal demand in her job as a consultant contributed to her voice problems. She was laid off in September and her voice was less of a problem to her. Their medical opinion was that Ms. Conte had developed vocal cord nodules caused by a number of factors. Doctor Morrison identified these factors as being voice technique, behaviour, voice overuse and gastroesophageal reflux. At this point in time, they recommended anti-reflux treatment and voice therapy.

Ms. Conte registered in the Voice Clinic program in the spring 1995. This program consists of ten weekly group sessions. Each weekly session builds on the previous session. It is possible to miss a session and catch up with the techniques taught in that session, but it is not possible to catch up if more than half of the sessions are missed. Ms. Conte attended four of the ten sessions, being the first, third, fourth and eighth.

After the program is completed, a participant is invited for a follow-up appointment to evaluate their voice techniques and, if necessary, arrange for a refresher session. Only those who complete the program are put on the follow-up list. Once the evaluation is completed, a report is sent back to the participant's referring doctor. Because Ms. Conte did not complete the program, she received no evaluation.

V. MS. CONTE'S EMPLOYMENT RECORD AND MEDICAL HISTORY, MAY 1995 - NOVEMBER 1995:

In February 1995, Ms. Conte, now a full-time student at the University of British Columbia, telephoned Laura Stark whom she knew as the Director of the Call Centre. She arranged lunch with Ms. Stark because she wanted to discuss a project she was working on in one of her courses.

Ms. Conte and Ms. Stark met for lunch for about an hour and a half at the Call Centre to discuss the project. During the lunch, Ms. Stark asked Ms. Conte about her voice, knowing that she had voice problems in August 1994. Ms. Conte told Ms. Stark that she was going through

speech therapy and her voice was fine. She also mentioned that she was taking steps to deal with her reflux condition including dietary restrictions.

Later in the spring, Ms. Conte heard that the Call Centre was reopening. She called Laura Stark and told her that she was interested in working again as a consultant. Ms. Stark asked her if the consultant's job was the right job for her, given her previous voice problems. Ms. Conte's response was that she had not experienced any laryngitis or voice loss since August and she could do the work of a consultant.

When the Call Centre reopened, all applicants for the consultant positions were interviewed. At her interviews, Ms. Conte was asked a number of questions including her previous experience as a consultant, her flexibility for hours of work and her availability on evenings and weekends. She was also tested for dealing with customer calls, problem solving and selling Rogers' products. The interviewers asked her whether she thought she could do a consultant's job and she confirmed that she could. At the time of the interviews, she had vocal cord nodules. Ms. Conte did not advise the interviewers of this condition because her vocal cords were not inflamed, she had no laryngitis, she was able to speak clearly and believed that she could do the job.

In terms of her availability, Ms. Conte made a point of telling the interviewers that she was enrolled in summer courses from July 3 to July 20 and from July 22 to August 12. As a result she could only work limited hours, three to four-hour shifts on evenings and weekends and she needed one week's notice for scheduling. This was noted on the interview sheets.

Ms. Conte did not tell the interviewers that she intended to take off the week following the end of training, June 17 to June 24 for vacation. This vacation had been tentatively planned since November 1994.

Ms. Conte was off that week. There is considerable dispute as to whether Ms. Conte took the week for vacation or to rest her voice. Ms. Conte's evidence was that she had approval from the Rogers scheduling coordinator. Ms. Stark testified that it is very unusual for vacation time to be approved, particularly for a probationary, part-time employee so soon after completing the training and before starting the job. I have concluded that she was on vacation.

Ms. Conte started the first training session on May 29, 1995. In the first two weeks, the emphasis was on learning the new software program. There were also group presentations and role playing that involved some voice use. The third week involved the consultants taking practise customer calls.

A number of persons who were in the training program with Ms. Conte gave evidence that Ms. Conte had problems with her voice. Her voice was hoarse and she frequently cleared her throat. Her voice would go in and out and occasionally she would experience temporary voice loss. One of the trainers noted that Ms. Conte was having voice problems and asked her if something was going on with her voice. He also observed that Ms. Conte's voice had gotten worse during the training session and that her voice was often cracking and was hoarse.

The training session ended on June 16, 1995. The previous day, Ms. Conte was in the training class for 5.5 hours instead of the usual 7.5 hours. She took the time off for an appointment with Doctor Morrison. In his June 26, 1995, reporting letter, Doctor Morrison noted that Ms. Conte had taken voice therapy in February 1995 and her voice seemed much better then. However, she had dryness and soreness of her throat for the past few weeks. She also had inflamed vocal nodules and her reflux symptoms were worse as she had slipped away from her anti-reflux treatments.

Ms. Conte's time sheets show that she worked a full five-day shift (7.5 hours) during the week of June 26 to June 30. However, from July 4 to July 21, she worked 3.5 hours per day; and from July 24 to August 12, she worked a four-hour shift. This accorded with her limited availability because of her summer courses. Beginning in the middle of August, Ms. Conte worked a full shift, five days per week until September 4, when her university classes started and she reduced her shift times to four hours. About the end of September, she varied her hours so that she worked 7.5 hours one day, 4 hours the next day and continued this pattern until October 24 when she suffered complete voice loss. Ms. Conte did not return to work as a consultant with Rogers after October 24, 1995.

It is apparent that the more intensive her voice use, the more problems Ms. Conte had with her voice. She did not work as a consultant from September 1994 to May 1995. Although, she experienced hoarseness or sore throat from time to time, she did not have voice loss during that time.

When she returned to work with Rogers, although the training session did not involve excessive voice use, it did involve moderate voice use and Ms. Conte had increased problems with her voice. That she had gone off her reflux treatment perhaps contributed to her voice condition during training.

She took a week vacation before starting the job and basically for the next few weeks, she worked only a few hours per day when she was in her summer courses. It was only when she increased her hours that she began again to have more serious voice problems leading to complete voice loss.

This pattern is also shown in Ms. Conte's evaluation. She was evaluated on July 5, 1995 and again on August 16. Both evaluations were live coaching sessions. In both cases, Ms. Conte's evaluation was positive although there were certain aspects that required improvement.

On October 25, 1995, Tess Wong, Ms. Conte's team manager did a taped performance evaluation. In a taped session, the team manager listens to taped calls which the consultant previously answered, as opposed to a live session, where the team manager sits beside the consultant and listens in to customer calls as they are being answered. In a taped session, a consultant does not score as well as in a live session. The reason is that a taped session is done randomly and the consultant does not know that they are being evaluated.

Ms. Wong evaluated Ms. Conte's performance on October 23, the day before Ms. Conte lost her voice. Ms. Wong's conclusion was Ms. Conte's results were well below average, particularly for a consultant with Ms. Conte's experience. Ms. Wong discussed Ms. Conte's performance with her the next day and specifically discussed with her the fact that Ms. Conte made no attempt to sell Rogers' products during the customer calls. Ms. Conte's response was that she had serious voice problems and did not want to prolong the calls. Ms. Wong advised her to consult her doctor and Ms. Conte replied that she had seen her doctor recently.

In fact, Ms. Conte had visited Doctor Gorfinkel on August 5, 1995, who noted that Ms. Conte had increased hoarseness and inflamed vocal nodules. She recommended an appointment with Doctor Morrison. Ms. Conte saw Doctor Morrison on September 20, 1995. In his follow-up letter to Doctor Gorfinkel, Doctor Morrison reported that Ms. Conte had bronchitis four weeks ago and lost her voice after a couple of weeks. She had moderately large vocal nodules and has not been focusing much on her reflux therapy, partly because of the cost. Doctor Morrison prescribed another anti-reflux medication and recommended that Ms. Conte focus more on her diet.

Ms. Wong did speak to Ms. Conte on the phone after October 24, 1995. She asked her about voice problems and how she was progressing. Ms. Conte told her that her doctor required her to take longer leave. Ms. Wong asked Ms. Conte to provide doctor's notes as to her medical condition and prognosis. Ms. Conte did provide Ms. Wong with two notes from Doctor Petrovic, one dated November 8, 1995 and the second, dated November 17, 1995. Ms. Conte delivered these notes to the Call Centre and left them on Ms. Wong's desk. She did not see Ms. Wong personally. The first note from Doctor Gorfinkel advised that Ms. Conte was still unable to use her voice for prolonged periods without pain and needed another week to rest her voice. The second note from Doctor Gorfinkel advised that Ms. Conte had a voice overuse injury and could not work if she needs to use her voice exclusively. There was no prognosis in this note as to when Ms. Conte would return to work. Ms. Wong forwarded these notes to the Human Resources department. Ms. Conte did not provide Rogers with any further medical prognosis.

Ms. Conte filed a report on injury with the Workers' Compensation Board on November 2, 1995. She stated that the cause of her injury was talking on the phone for long periods of time which stressed her larynx and produced laryngitis.

On the same date, Doctor Petrovic filed a Physician's Progress Report in which it was noted that Ms. Conte had pain with speaking, a hoarse voice and vocal nodules. She was to rest her voice and was to see Doctor Morrison again. She could not return to work for seven to thirteen days.

Doctor Petrovic filed a further Physician's Progress Report on November 8, 1995 and again November 17, 1995. These reports repeated the nature of the injury and treatment from the earlier reports and both stipulated that Ms. Conte could return to work but was not to use her voice.

VI. ROGERS' DECISION TO TERMINATE:

In November 1995, Ms. Wong told Laura Stark, Director of the Call Centre, of Ms. Conte's voice problems, and that her scores on the coaching session were below average. She also told Ms. Stark that Ms. Conte had given her two doctor's notes and in the second note, Ms. Conte's doctor extended her absence from work without any prognosis as to when she could return. Ms. Wong also mentioned that Ms. Conte had told her that she was trying to improve her condition by speech therapy and that she might need surgery to deal with her voice problems.

Some time later, Ms. Stark asked Ms. Wong to call Ms. Conte and ask her to attend a meeting at the Call Centre on November 24, 1995. Ms. Stark, Ms. Conte and Diana Rose were at the meeting. Ms. Rose is a Human Resources consultant with Rogers and her role is to provide support and advice to the Call Centre. At this time, Ms. Stark told Ms. Conte that she was terminated and gave her a termination letter dated November 24, 1995. Ms. Stark told Ms. Conte, and the termination letter set out that, given the nature of her injury and the fact that it was a reoccurrence of a previous injury, Rogers had no alternative but to terminate her employment. It was an essential element of the consultant's job that Ms. Conte be able to speak on the telephone and she was unable to do so.

At the November 24, 1995, termination meeting, there was no discussion as to if or when, Ms. Conte would return to work. Ms. Stark took that position because, in her view, she was at the meeting to complete a termination. It was not her role to inquire about Ms. Conte's condition and prognosis. That was the function of her team manager, the Human Resources consultant and Ms. Conte. And although Ms. Conte experienced total voice loss only once since May 29, Ms. Stark, as she put it, was looking at the big picture of somebody who had continuous voice problems throughout the several contacts Ms. Stark had with her. Ms. Conte had voice problems in 1994. In February 1995, at the lunch, Ms. Conte told Ms. Stark that her voice was fine. When Ms. Conte called her later regarding the reopening of the Call Centre, she assured Ms. Stark that she could do the job of a consultant. Yet Ms. Conte suffered voice problems in the training session and ultimately complete voice loss in October 1995. From Ms. Stark's point of view, Ms. Conte was hired on her assurances that her voice was fine. Ms. Stark took this at face value. In fact, this was not true. It is clear that Ms. Stark was not willing to do anything more for Ms. Conte.

VII. WHAT DID ROGERS KNOW AT THE TIME OF TERMINATION:

Sometime after October 25, 1995, Ms. Rose spoke to Ms. Conte on the phone. Ms. Conte had called to inquire about her Workers' Compensation Claim. During that call, Ms. Rose did not ask her about her voice or how she was progressing or what her prognosis was. Nor did Ms. Conte offer any such information.

Ms. Stark first became aware that Ms. Conte was having problems with her voice when Ms. Wong came to her in the fall because Ms. Conte had not performed well in the coaching session. She told Ms. Stark that Ms. Conte was having voice problems which affected answering customer calls. Ms. Stark also learned that Ms. Conte was off work and had not returned.

In November 1995, she had a number of discussions with Diana Rose with respect to Ms. Conte's continued employment. It was decided that Rogers would terminate Ms. Conte while she was still in the probationary period.

In making this decision, Ms. Stark knew that Ms. Conte had filed a Workers' Compensation claim in August 1994, for voice loss and the claim had been accepted in March 1995. She was surprised that it was accepted because she did not feel that the environment in the Call Centre would have caused Ms. Conte's voice problem unless there were some other pre-existing factors. Diana Rose also advised her that Ms. Conte had made another Workers' Compensation claim in November 1995.

Ms. Stark had also been told by Ms. Wong that Ms. Conte had voice problems in the training session and that Ms. Conte had taken the time off at the end of the training, presumably to rest her voice.

Ms. Stark had not seen the two November notes from Doctor Gorfinkel. This is because any medical information given by an employee is considered confidential and would go from the employee to the Human Resources department directly. Ms. Rose had seen and reviewed the two Workers' Compensation claims filed by Ms. Conte and had also seen Doctor Gorfinkel's two November medical notes. She had not seen the Physician's Progress Reports as they are not usually provided to the employer. Nor had she or anyone else at Rogers been given any of the reporting letters of Doctor Morrison or the clinical notes of Ms. Conte's family doctor.

Ms. Rose's review of Ms. Conte's employment file indicated to her that to her that Ms. Conte's voice problems were persistent and chronic. She was not aware that Ms. Conte might be undergoing voice therapy or that Ms. Conte's doctor was considering surgery to improve her vocal nodules condition.

Ms. Rose did review Doctor Gorfinkel's November notes, but in her view these notes did not indicate when Ms. Conte would return to work. If she had information that Ms. Conte's condition was temporary, she would have raised that in the meetings in which Ms. Conte's continued employment was discussed.

VIII. POST-TERMINATION MEDICAL EVIDENCE:

First of all, I refer to the evidence of Doctor Morrison. Doctor Morrison, who was called as an expert witness by Ms. Conte at the hearing, gave evidence regarding his consultations with Ms. Conte both before and after her termination by Rogers.

Doctor Morrison's first post-termination consult with Ms. Conte was on December 13, 1995. He noted in his reporting letter that Ms. Conte was still having a lot of trouble with her voice, and that she has been off work for the last six weeks. His diagnosis was that the combination of vocal nodules, throat clearing, tense muscle state and reflux, in a vocally demanding job, had collectively produced a significant vocal disability. Doctor Morrison recommended further tests for reflux and suggested that Ms. Conte find alternative employment

which would not be as demanding on her vocal cords. Surgical treatment of the vocal nodules should also be considered.

After a January 24, 1996, consult with Ms. Conte, Doctor Morrison reported that tests confirmed her reflux condition. He recommended further speech therapy and a possible surgical date for the vocal nodules of April 26, 1996. Ms. Conte agreed to the surgery for the vocal nodules and it was done on May 17, 1996.

Doctor Morrison reported on May 29, 1996, that Ms. Conte's vocal cords had healed nicely, she was to begin post-operative voice therapy and continue her anti-reflux treatment. This was the last consultation that Doctor Morrison had with Ms. Conte.

At the hearing, Doctor Morrison testified that, although the vocal nodules had been removed and healed well, only one part of her voice problems was eliminated by the surgery. There still remained the underlying factors which contributed to the voice nodules, namely vocal technique, voice overuse and reflux. Thus, there still a risk of future voice problems.

Doctor Morrison stated that Ms. Conte's reflux condition could be controlled with treatment, but could not be eliminated. With respect to voice overuse, as far as he knew, this related to her employment with Rogers.

In this regard, Doctor Morrison was asked whether Ms. Conte should return to work as a consultant with Rogers. His response was that it depended on how passionately she wanted to do that. Her voice problems were not life threatening. But knowing her vocal technical issues and her reflux condition, there would be a good chance she would run into voice difficulties again. If she could find a job that was not vocally demanding, that would be the smarter thing to do. He would advise against a job that requires her to talk for a long period of time without many breaks.

IX. PRE AND POST-OPERATIVE SPEECH THERAPY:

Ms. Conte did take some pre and post-operative therapy with Paula Coughlan, a speech pathologist at the University of British Columbia Voice Clinic. Ms. Conte was referred to her for pre and post-operative speech therapy by Doctor Morrison.

Ms. Coughlan first saw Ms. Conte on April 3, 1996, for pre-operative therapy. The purpose of the therapy was to instruct Ms. Conte on certain exercises that would make post-surgery easier. In her clinical notes, Ms. Coughlan noted that Ms. Conte performed the exercises moderately well and she believed that Ms. Conte had learned some of these exercises at her previous speech therapy sessions.

Ms. Conte attended post-operative sessions with Ms. Coughlan on June 17, June 24, July 10 and August 14, 1996. Generally at these sessions, voice exercises were practised and reviewed and Ms. Conte was then to do the exercises at home. Ms. Coughlan's clinical notes for the July 10 session indicated that her voice had improved, but there was still some strain.

Ms. Conte was given some more home exercises to practise. The session on August 14 consisted of reviewing the exercises that Ms. Conte learned in the previous sessions.

Ms. Conte did not return to the Clinic after August 14, 1996. The Clinic had scheduled an appointment for September 9, 1996, but Ms. Conte did not show up for the appointment. The Clinic attempted to rebook the appointment, but was unsuccessful.

X. DISCRIMINATION AND BONA FIDE OCCUPATIONAL REQUIREMENT:

Ms. Conte was terminated because she could not do the job of a consultant. As far as Rogers is concerned, she could not do the job because of her ongoing, persistent voice problems. Ms. Conte was terminated because of her voice disability. Rogers does not dispute this. In my opinion, Ms. Conte has made out a *prima facie* case of discrimination.

The job standard applied by Rogers required a consultant to talk clearly and continuously for 95% of the shift. As I have concluded there is a *prima facie* discriminatory practice, the onus is now on Rogers to establish whether that standard is a *bona fide* occupational requirement.

Rogers argued first that the job standard was not discriminatory. Alternatively, if there was discrimination, it was direct discrimination, the job standard was a *bona fide* occupational requirement and there was no duty to accommodate. I do not agree. This standard, though neutral on its face, has a discriminatory effect on persons with a voice disability. Thus, it amounts to adverse effect discrimination and all that follows from that characterization. Further, the distinction between direct and adverse effect discrimination has been eliminated by the Supreme Court of Canada in its recent decision in *British Columbia (Public Service Employee's Relations Commission) v. BCGSEU (Meiorin)*.

This case was decided after the parties had completed the evidence and argument in this complaint. Given the relevance of this decision, I asked the parties to make further submissions and both parties have done so.

In *Meiorin*, the Supreme Court of Canada adopted a unified approach to characterizing discrimination. Further, the Court essentially restated the law relating to *bona fide* occupational requirement, as that law has been developed by the Supreme Court from *O'Malley* to *Central Alberta Dairy Pool* to *Chambly*.

In *Meiorin*, the Supreme Court of Canada enunciated a three-step test for determining whether an employment standard is a *bona fide* occupational requirement. First, the standard must be for a purpose rationally connected to job performance. Secondly, the standard must have been adopted by the employer in good faith and with an honest belief that it was necessary for the fulfillment of the work-related purpose. Third, the employer must show that the standard is reasonably necessary to accomplish the work-related purpose. For the standard to be reasonably necessary, the employer must demonstrate that it is impossible to accommodate the employee without imposing an undue hardship on the employer.

The job description for both permanent and part-time consultants at the Call Centre requires that the consultants provide professional, informative, and timely responses to customers' requests for information and assistance.

The job standards are voluntary standards set by the Canadian Cable and Television Association. These standards were adopted as a response to the public perception that cable companies do not give good customer service; that they do not care about their customers. A call to the Call Centre is often the first contact that customers have with Rogers. If a customer is put on hold for a period of time, that reinforces this adverse perception. The standards operate to ensure that there are enough consultants on the phone to provide optimum service.

Ms. Conte challenged the 95% talk time standard. She did not question the purpose of this standard. Rather she argued that Rogers had not demonstrated that the level of customer service would decline with a lower talk time percentage.

I do not accept this argument. This is not the same situation as in *Meiorin* where Ms. Meiorin was able to do the job even though she could not meet the aerobic capacity standards. In this case, the essence of the job is talking on the telephone. If, as Ms. Conte suggests, the plugged-in percentage was reduced, say to 50%, what would a consultant do for the rest of the shift? Would the result not be that a consultant would work for half of the shift, but get paid for a full shift? If Ms. Conte found talking for a full shift was too much, she had the option of working less hours and cause less stress to her voice. Surely, if Ms. Conte wanted to challenge the 95% talk time standard, she must also challenge the job requirement of talking on the phone. Ms. Conte did not do this.

I find that these job standards were adopted by Rogers for a purpose rationally connected to the job. On the second test, there is no argument that Rogers adopted these standards in good faith with the honest belief that the standards are necessary to the work-related purpose.

XI. ROGERS' DUTY TO ACCOMMODATE:

There was considerable evidence that Rogers does accommodate employees who have physical disabilities. Hearing-impaired consultants are provided with a modified workstation. Visually impaired consultants are given magnified screens and white lines are painted on the floor so that they can reach their workstation safely. Rogers has modified workstations and access for employees who are not ambulatory. Rogers also accommodates employees through flexible hours and by extending the probationary period or through medical leave. A number of examples were given in evidence where Rogers gave extended medical leave to Call Centre consultants, both part-time and full-time.

In general, Rogers' policy is that if the medical problem is temporary and the employee gives a prognosis as to when they will likely return to work, Rogers will try to accommodate their situation. In Ms. Conte's case, Rogers had no information that her condition was temporary. Rogers believed it to be permanent.

In *Renaud*, Mr. Justice Sopinka said that more than mere negligible effort by the employer is necessary to satisfy the duty to accommodate. And the duty involves more than just investigating whether an employee can do the existing job. It is the employer who has charge of the workplace and thus is expected to initiate the process of accommodation. At the very least, the employer is required to engage in an examination of the employee's current medical condition, the prognosis for recovery and the employee's capabilities for alternative work.

Rogers fell far short of meeting this obligation. Neither Tess Wong, Ms. Conte's team manager, nor Ms. Rose, the Human Resources consultant followed up with Ms. Conte as to her medical condition or her prognosis. It is not enough for Rogers to argue that an employee's medical information is confidential and the company can not require that an employee disclose such information. Rogers' requires a consultant, who is off work for more than three days, to provide a doctor's note advising of the illness and the likely return to work date. Both Ms. Wong and Ms. Rose spoke to Ms. Conte on the telephone after she experienced voice loss and was off work. Neither of them, in these conversations asked about her condition.

It is also clear on the evidence that Rogers did not consider whether there was any alternative work that Ms. Conte could perform, either at the time Rogers became aware of her voice problems, or at the time Rogers made the decision to terminate her.

At the hearing, Ms. Conte presented evidence of a number of jobs in the Call Centre or related jobs that she may have been qualified to do. In response, Rogers called evidence challenging that Ms. Conte was qualified to perform these job functions. In my view, it is not enough for Rogers to wait for Ms. Conte to originate a solution and then argue at the hearing of her complaint that she was not qualified for any of these job options.

In considering whether Rogers has met its duty to accommodate Ms. Conte, the relevant inquiry is: at the time of making its decision to terminate Ms. Conte, did Rogers make proper inquiries to determine the nature of her disability, what was the prognosis, what accommodation was required, and was there other work that Ms. Conte could do? It is clear that Rogers did not make any of these inquiries.

XII. ACCOMMODATION AND MS. CONTE'S DUTY:

In *Renaud*, Mr. Justice Sopinka made the point that accommodation is a multi-party inquiry. There is duty not only on the employer, but also on the complainant to offer assistance. The complainant need not originate or initiate the solution. But the complainant must do their part. Thus, the conduct of Ms. Conte must be considered.

Ms. Conte's conduct was certainly not beyond scrutiny. There were a number of examples in the evidence where Ms. Conte was not forthcoming or candid with Rogers, particularly as to her medical condition and her limitations to do the work of a consultant.

When Ms. Conte called Ms. Stark to inquire about the reopening of the Call Centre, she told Ms. Stark that she was in speech therapy and was treating her reflux symptoms. In fact, she

started, but did not complete the speech therapy program, and as noted in Doctor Morrison's clinical notes, she had fallen away from her anti-reflux treatment.

Although Ms. Conte was very specific when advising the interviewers of her availability to work as a consultant, she did not advise them of her plan to go on vacation after completion of the training. Nor did she advise her supervisor or anyone in the Human Resources department. The inference is that she knew she would not have been given approval had she advised these persons.

Ms. Conte first visited her family doctor a number of times in October and November 1995 prior to her termination. Her doctor filed Physician's Progress Reports with the Workers' Compensation Board. In all of these reports, her doctor advised that she could only return to work if she did not use her voice. Yet Ms. Conte did not tell Rogers of this prognosis or that it was uncertain as to when she would return to work.

It is also puzzling why Ms. Conte did not contact Ms. Stark when seeking alternative work. She had no hesitation to call Ms. Stark for assistance on her course project; or to call Ms. Stark about the reopening of the Call Centre. But when looking for alternative work, Ms. Conte contacted two persons in the Call Centre who did not have the authority to offer job options. Nor did Ms. Conte advise the Human Resources department that she was seeking other work; nor did she inform them as to her availability or capabilities for other jobs.

XIII. CONCLUSION:

I have concluded that Rogers did not meet its duty of accommodation and, as a result, Rogers has not established a *bona fide* occupational requirement. I have also concluded that Ms. Conte's conduct does not vitiate Rogers' failure to accommodate Ms. Conte. Accordingly, I find the complaint is substantiated.

Because of the inadequacy of the information concerning Ms. Conte's prognosis at the time of her discharge, Rogers took some risk in making the decision it did on November 24, 1995. However, on the basis of the medical evidence provided to me by both parties at the hearing, in particular, the post-termination medical evidence, I find that Rogers was correct in its assessment that Ms. Conte's would not be able to do the work of a consultant in the foreseeable future, if at all. I will not review this evidence again. Suffice it to say that Ms. Conte continued to experience serious voice problems at least until her surgery in May 1996.

Further, the consistent advice of her doctors was that she could not or should return to work if she had to use her voice. After her surgery, it was Doctor Morrison's opinion that her voice problems could reoccur and she would be well advised to seek employment that did not involve using her voice.

At the hearing, it became apparent that there was not enough time to hear evidence and argument on the question of remedy if the complaint was substantiated. I have found that Rogers engaged in a discriminatory practice. Thus, it is necessary to hear evidence if any, and submissions on remedy. The Tribunal will contact the parties to arrange for a hearing date.

In preparing their evidence and/or submissions, the parties must take into account both my findings on the medical evidence that Ms. Conte should not return to work as a consultant with Rogers and it was very unlikely that she could return to work in the foreseeable future. Further, the parties must take into account my findings as to the conduct of Ms. Conte. I retain jurisdiction on the question of remedy.

DATED at Ottawa, Ontario, this 5th day of November, 1999.

J. GRANT SINCLAIR