

**CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES
DROITS DE LA PERSONNE**

SANDRA GRAHAM

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

CANADA POST CORPORATION

Respondent

DECISION

MEMBER: J. Grant Sinclair 2007 CHRT 40
2007/10/02

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I. BACKGROUND

[1] Sandra Graham, the complainant in this matter, has worked for Canada Post Corporation (CPC) since 1977 and has worked in various positions at the Winnipeg Mail Processing Plant (WMPP). On June 4, 2001, she assumed the position of superintendent in the Urban Transportation Services Unit (UTS) on an acting basis. Her substantive position at that time was supervisor in UTS. Ms. Graham did so in order that the superintendent, Dave Smook could temporarily leave his position to represent management in a joint initiative of CPC/CUPW known as the "Appendix AA" project.

[2] When Ms. Graham took over as acting superintendent, WMPP was about to launch the Appendix 'AA' project, which involved significant changes to CPC's parcel pickup/delivery service. As acting superintendent in UTS, she had a very large responsibility for the implementation of the project.

[3] On May 21, 2002, Ms. Graham did not go to work, and remained absent until November 2005, when she returned to full time work. She claimed that she was totally committed to the project and was determined to see it successfully completed. But she said, the stress, the long hours and lack of management support caused her to burn out. She became ill and could no longer work.

[4] On September 12, 2003, during the time she was off work, Ms. Graham filed a complaint with the Canadian Human Rights Commission. Her complaint followed some months after she had asked a co-worker at CPC to intercede on her behalf with senior CPC management to try and resolve the difficulties she was having with her manager because of her absence.

II. MS. GRAHAM'S ALLEGATIONS OF DISCRIMINATION

[5] In her complaint, Ms. Graham alleged that:

- (i) CPC had discriminated against her by failing to accommodate her temporary disability;
- (ii) CPC treated her in an adverse differential manner by failing to accommodate her disability; both contrary to s. 7 of the *Canadian Human Rights Act (CHRA)*.
- (iii) CPC terminated her status as acting superintendent because of her disability, but she did not specify which sections of the *CHRA* were contravened; and
- (iv) in her Statement of Particulars filed for the Tribunal hearing, Ms. Graham added another allegation, namely, that her disability and her inability to work was caused by CPC's inability to provide sufficient staff and support for her to carry on her duties.

[6] As a preliminary question, the Tribunal has also addressed whether there was evidence before the Tribunal upon which it could reasonably conclude that Ms. Graham had a disability at the relevant time.

[7] Ms. Graham would not produce any medical documentation outlining the nature of her disability as part of her pre-hearing disclosure obligations and chose not to present such medical evidence at the hearing. Throughout, she has taken the position that this information was confidential and should not be given to CPC. It was left to the Tribunal, in the absence of such evidence, to determine whether Ms. Graham had an illness that prevented her from working during the relevant period and whether this illness constituted a "disability" under the *CHRA*.

[8] Ms. Graham's final argument was very wide-ranging and was marked by a lack of precision and focus in identifying both what she considered to be CPC's discriminatory practices and the supporting evidence. Her final argument was of little or no assistance to the Tribunal in terms of drafting a decision in response to her complaint. Accordingly, the Tribunal's decision has addressed the four allegations of discrimination set out in her complaint and Statement of Particulars.

III. DECISION

[9] For the reasons that follow, I have concluded that there was sufficient evidence to conclude that Ms. Graham suffered from a disability during the period in which she was absent from work.

[10] With respect to Ms. Graham's claim that CPC failed to accommodate her temporary disability, and that CPC treated her in adverse differential manner, and her claim that CPC did not support her with sufficient staff, thereby causing her disability, I have concluded that Ms. Graham has not established a *prima facie* case of discrimination.

[11] As to her claim that CPC terminated her acting superintendent position because of her disability, I find that Ms. Graham has made out a *prima facie* case of discrimination. However, CPC was unable to discharge its duty to accommodate Ms. Graham because of her failure to facilitate the accommodation process. In the result, Ms. Graham's complaint of discrimination against CPC has not been substantiated and her complaint is dismissed.

IV. FACTS

(i) The Appendix "AA" Project

[12] In May 2001, Mr. Dave Smook, the UTS superintendent, asked Ken Gordon and Ms. Graham, both UTS supervisors, if either was willing to take on the superintendent job on an acting basis while he worked as the management representative on the CPC/CUPW joint Appendix AA project. Mr. Gordon was not interested. He believed that it would involve considerably more work than he was doing as a supervisor. He had a life outside the post office. Ms. Graham thought it would be a tremendous opportunity to do so and accepted the position willingly.

[13] Ms. Graham took over as acting superintendent on June 4, 2001. Prior to leaving the unit, Mr. Smook attempted to train Ms. Graham on the responsibilities of the superintendent position. But because he was focused on other more pressing issues, Ms. Graham could only observe and there was little time to practice what she had observed before Mr. Smook left.

[14] Ms. Graham said that at the time she accepted the acting superintendent position, the project had not yet been implemented. Even though she did not know what all of her specific responsibilities would be, she was willing to take over the job and make the

project work. She took the job knowing that it would be much more work than she was previously doing as a supervisor. Ms. Graham also accepted the acting superintendent position because she thought that it would assist her in her career goal of obtaining a superintendent position.

[15] The purpose of the Appendix AA pilot project was to determine the feasibility of bringing back into UTS, the urban expedited parcels and small and medium customer pickups and eliminating that portion of the delivery service that was done by outside contractors.

[16] CUPW was in favor of this change because it meant more jobs for its members at the WMPP. CPC wanted this change hoping it would bring its parcel delivery service up to industry standards and make it more competitive with other parcel delivery companies.

[17] In addition to contracting-in the parcel delivery system, the Appendix AA project introduced other major changes, including moving from an "item-based" system to a "stop-based" system and introducing the dynamic workday rather than static shifts. The operation also moved from a six day to a seven day operation.

[18] A dynamic workday meant that mail service couriers, i.e. the drivers who picked up and delivered the parcels, no longer worked a fixed hour shift. For example, a driver might make deliveries in the morning and not go out again until late afternoon or early evening. It did not matter how quickly a driver did their job, their day would still be maximized. Depending on the volume, a driver may work more hours on a Monday, less hours on Tuesday, etc.

[19] Another change introduced by the Appendix AA project was the labeling, keying and sequencing of the parcels. This was done by computers so that the drivers would no longer sequence their routes. The sorting the parcels and loading the delivery trucks was now done postal clerks who worked in the newly created composite section.

[20] The implementation of phase 1 of the Appendix AA project began in October 2001 and covered the downtown area, about half of the city of Winnipeg. The implementation of phase 1 caused a lot of stress in UTS because the project was new, the operational criteria were being developed and revised as the project moved forward.

[21] Initially, there was considerable resistance from the drivers. They were upset that their workday was disconnected. Also they were unfamiliar with the new procedures. The contracting-in resulted in a major increase in volumes, which together with the normal increased pre-Christmas volumes created even more stress and unhappiness among the drivers.

[22] Another reason the drivers were unhappy was because they lost a lot of control over their work. Prior to Appendix AA project, the drivers would decide the sequence of their deliveries. This was now done by a computer sequencing system and this decision process was taken away. Further, many drivers had delivered to the same businesses for years and had developed a relationship with them. Now they did not necessarily continue to deliver to these customers.

[23] According to Ken Gordon and Thomas Zarzycki, both UTS supervisors, the period from October 2001 to just before the implementation of phase 2 in February 2002 was particularly stressful for both the supervisors and the drivers.

[24] Because the drivers were unfamiliar with the new procedures, they would call the supervisors, which meant the supervisor spent considerable time on the phone dealing with the drivers' problems. So they could not always get their other work done within

their regular hours. Supervisors also had to deal with customer calls which increased because they were unfamiliar with the new procedures and that consumed more of the supervisors' hours than previously.

[25] Phase 2 of the Appendix AA project, which brought in the rest of the city, came in February 2002. Mr. Gordon and Mr. Sylvester testified that there was less pressure and stress in UTS. By that time, the drivers, the customers and the supervisors had become more knowledgeable/familiar with the new system, the Christmas volumes had passed, and the "bugs" in the system had been worked out.

(ii) Ms. Graham and the Appendix AA Project - June 4, 2001-February 2002

[26] When Ms. Graham was promoted to the position of acting superintendent, she was determined to find a way to have the drivers enjoy their jobs, and be able to see supervisors leave after their eight-hour day and feel satisfied that the job had been well done. As acting superintendent, she was responsible for the supervisors and ensuring that they carried out their duties on a daily basis. She was not directly responsible for the drivers. That was for the supervisors.

[27] At first Ms. Graham was not totally familiar with all the duties and responsibilities of the job. But gradually, she said she was becoming comfortable in the job, somewhat stressed but confident that they would succeed through phase 1.

[28] But as phase 1 progressed, Ms. Graham felt under more pressure because of the compressed timeline to implement the phase and because she believed the resources were not there. Sometime after the very hectic Christmas period, she began to have the physical symptoms of the flu and she was not getting better. She had been working long hours, seven days a week and was very tired.

[29] Because of the long hours that she was working, she began having trouble prioritizing her daily duties. She could not focus on one thing and even the simplest things were overwhelming to her. There were occasions when she felt she was a failure. She was not being supportive of the people for whom she was responsible.

(iii) Ms. Graham and phase 2 of the Appendix AA Project - February 2002-May 21 2002

[30] Dan Sylvester took over as UTS manager of Operations in January 2002. He had been with CPC for 20 years and had previously been a manager in UTS. When he took over, phase 1 was about completed and UTS was moving to implement phase 2 in early February 2002.

[31] Mr. Sylvester met with Ms. Graham on February 5, 2002 to discuss the 2002 Winnipeg Operations Business Plan, her Performance Improvement Plan and Annual Competencies Review. The Performance Plan deals with detailed objectives specific to areas requiring improvement and performance objectives including personal development objectives. The Annual Competencies Review is designed to identify training needs with respect to specified competencies.

[32] Ms. Graham testified that at this meeting, she told Mr. Sylvester that she was overworked and stressed and was feeling sick. Mr. Sylvester did not recall that Ms. Graham, at that meeting, had raised any concerns about being overworked or being sick. She also testified that at this meeting, she persisted in her belief that phase 2 required more supervisory hours.

[33] On February 28, 2002, Ms. Graham wrote to Mr. Sylvester and asked to return to her substantive position as a UTS supervisor. She said that as the acting superintendent, she had given her all and done what she could to make the project a success. But she was

insulted by the rating given in her 2001 performance appraisal, that CPC did not consider her best to be good enough. She felt that CPC's expectations were unrealistic given the current staffing for the implementation of the Appendix AA project.

[34] Mr. Sylvester agreed that she could do so and he would post the position for acting superintendent assignment on the CPC Career Network. But Ms. Graham felt that it would take at least one to two months to get a replacement and that person would likely be someone who would not be familiar with the UTS operation. She was concerned that it would have a negative effect on the Appendix AA project to have someone new come in at this stage. She wanted to persevere, even though she was burned out. She was focused on the success of the project and she cared about UTS. So two days later, Ms. Graham called Mr. Sylvester and told him that she would stay as acting superintendent.

[35] Mr. Sylvester said that one of the things that he had discussed with Ms. Graham was delegation of some of her duties to her supervisors, which as superintendent, she could do. But all that Ms. Graham requested was to return to her previous supervisor position and never asked to be otherwise accommodated.

[36] In March 2002, Ms. Graham gave a powerpoint presentation at a meeting of UTS supervisors and management. One of her proposals was that more supervisors should be added to UTS. Mr. Sylvester recalled Ms. Graham's powerpoint presentation in which she asked for more supervisory resources. He discussed her proposal with his director, Fred Pollard, who questioned the need for more supervisors and concluded that no more supervisors should be added.

[37] Prior to January 2002, there was one superintendent and four supervisors in the UTS unit. It appears from the documentary evidence that by February 2002, the number of supervisors in UTS had increased to six. They were: T. Zarzycki, L. Macario, K. Gordon, B. Friesen, N. MacLean and P. Hamel.

[38] Mr. Sylvester again met with Ms. Graham on April 26, 2002. As a manager, Mr. Sylvester would meet with those he supervised every quarter. He did this so he could spend some time on one on one coaching and it allowed him to share successes with the employees.

[39] Mr. Sylvester knew that Ms. Graham was working long days but he didn't track her hours. He provided a lot of flexibility and as superintendent, she could basically set her own work hours. Mr. Sylvester testified that at that meeting, Ms. Graham did not indicate that she was sick nor ask for any accommodation.

(iv) Ms. Graham's absence from work and Sylvester/Graham communications - June 2002

[40] On May 21, 2002, Ms. Graham went off sick. Diana Quilty, a very good friend of Ms. Graham, who also worked at the WMPP, testified that Ms. Graham was very committed to the Appendix AA project and wanted to make sure that it succeeded. After phase 2 came in, Ms. Quilty noticed that Ms. Graham was becoming increasingly stressed and on edge. She tried to convince Ms. Graham to take some time off but Ms. Graham continued to go to work on a regular basis.

[41] On that day, Ms. Graham called Ms. Quilty and asked her to come to her home because she was very sick and needed help. She found her lying on the floor and could not get up. She could not go to work.

[42] Mr. Sylvester learned of Ms. Graham's absence from work when Mr. Tom Zarzycki called him and told him that Ms. Graham was not in, she hadn't been in the last couple of days and asked if Mr. Sylvester had heard from her. Mr. Sylvester said he hadn't and

would try to track her down because it was unlike Ms. Graham not to contact anyone at UTS that she would be absent from work.

[43] He tried to contact Ms. Graham on her cell phone, with no success. So he sent her an e-mail and asked her to call him. He was concerned about her and he wanted to know how she was, not only as an employer but also he said, as a friend. Shortly after that, Mr. Sylvester did get a voice mail message from Ms. Graham that she wasn't feeling well and she would be off the remainder of the week and the next week.

[44] When Mr. Sylvester learned that Ms. Graham would be off the rest of the week and the next week, he was concerned that maybe there was something major wrong. He presumed she would be seeing her doctor. He followed up with a letter dated May 27, 2002 to Ms. Graham, in which he indicated that he had information that she would be off work for a while. He enclosed an Occupational Fitness Assessment form (OFA) and asked to have her doctor complete and return it by June 3, 2002. The purpose for sending the OFA form was so that he could understand Ms. Graham's work restrictions and limitations and provide an accommodation if necessary.

[45] Ms. Graham arranged an appointment with her doctor, Dr. Ibbitt, who did a number of tests. The test results showed that there was nothing physically wrong with Ms. Graham and Dr. Ibbitt concluded that she would do fine with rest and that her symptoms would be alleviated.

[46] Dr. Ibbitt completed the OFA dated May 30, 2002, which did not provide any details of Ms. Graham's illness or set out any work limitations/restrictions. He did indicate that Ms. Graham could return to work in seven days. The OFA was received by CPC's Occupational and Health Services (OHS) on June 3, 2002.

[47] Mr. Sylvester expected Ms. Graham to return to work on June 6, 2002. When she did not, he wrote to her on June 6, pointing out that her doctor had indicated she would be off for seven days. He had no details of her absence or any leave that she was requesting. He also indicated that he had tried numerous times to contact her by phone and e-mail but she failed to contact him directly. Letters sent by Xpresspost was the only way he could communicate with her and ensure that she received the letters.

[48] In this letter he also told Ms. Graham that he was moving her out of the acting superintendent position and reassigning her to the relief supervisor position until the next job bid or her return to her previous supervisor position. He did this, he said, because it was in the best interest of her illness and the Appendix AA project. She was replaced by Tom Zarzycki in June 2002.

[49] Ms. Graham testified that she left a message on the UTS voice mail that she would be reassessed by Dr. Ibbitt on June 6, 2002. She also testified that whenever there was a change in her status, she would leave voice mail messages for Mr. Sylvester at his office or on the UTS voice mail. There were various reasons why she would not contact him personally. Her sleeping patterns were disrupted. Her ability to act rationally was out of kilter. She was not confident in speaking with him personally because she did not feel that he would be supportive.

[50] When an employee is absent from work, CPC's policy is that the employee should call their supervisor or if not available, someone else and tell them when they expect to come back to work. When they return, they usually provide a medical note if it was more than a short absence. If the length of the absence is not known, the OHS would ask for an OFA to be completed by their doctor which provides some indication of the nature of the

illness or injury, the estimated return to work date, whether there are any work limitations and whether there is a need for accommodation. This is given to the OHS.

[51] When Ms. Graham was reassessed on June 6, 2002 by Dr. Ibbitt, he completed a medical absence certificate saying that Ms. Graham had been under his care from June 6, 2002, she was off for medical reasons and she would be able to return to work on June 10, 2002. Ms. Graham said that she either sent this certificate to Mr. Sylvester directly or to the OHS.

[52] When he wrote the June 6 letter, Mr. Sylvester had not yet received the medical certificate from Dr. Ibbitt indicating that Ms. Graham would be off until June 10. Ms. Graham agreed that as of June 6, 2002, had she been in Mr. Sylvester's position with the information he had, she would have considered an employee away without leave (AWOL) at that point in time. But when he received Dr. Ibbitt's medical certificate, he would have had the proper documentation to indicate that her leave had been extended to June 10. And she said that she did leave a voice mail at the numbers Mr. Sylvester provided in his letter and on the UTS voice mail as to her current status.

[53] Ms. Graham was not able to return to work on June 10. She wrote to Mr. Sylvester requesting annual leave because she had medical appointments and they could not be postponed. Mr. Sylvester replied on June 11 and confirmed her leave status to be - sick leave up to and including June 7, 2002, and - annual leave from June 10-14. He wrote again to Ms. Graham on June 13 requesting that she report to work at 7:00 p.m. on June 16, as the UTS Night Supervisor.

[54] Mr. Sylvester followed this up with a letter dated June 17, 2002, indicating that he had received her voice mail message the previous evening that she would be scheduling a medical appointment and would be off for the rest of the week. He requested that her doctor complete and return another OFA by June 19 so that he could understand her work restrictions/limitations. He also asked her to advise her doctor that CPC can provide modified/alternative duties.

[55] Ms. Graham was seen and treated at the St. Boniface General Hospital Emergency Department on June 19, 2002. The attending doctor gave her medical note saying that she would need two to four weeks off due to illness. The two to four weeks was the estimated time that it would take to get an appointment with a specialist.

[56] On June 21, Mr. Sylvester wrote to Ms. Graham saying that he had received the doctor's certificate from St. Boniface Hospital saying that she would be off work for two to four weeks due to illness. Again he asked that she submit the OFA which he sent on June 17 and return it by June 24. He reiterated that the OFA was necessary to understand her work restrictions and limitations and also she should tell her doctor that CPC has modified/alternative duties.

[57] At this point, Ms. Graham had not returned to work. And Mr. Sylvester still did not know the nature of her illness or whether she required modified/alternative duties. He said that Ms. Graham was communicating with him but only by voice mail and at odd hours such as 2:00 a.m. or 3:00 a.m. Although in his letters Mr. Sylvester gave Ms. Graham three numbers at which she could call him, she never did.

(v) Sylvester/Graham communications - July 2002

[58] Ms. Graham did not return the OFA Mr. Sylvester had requested on June 17. His next letter to Ms. Graham was on July 3, 2002. He requested that her doctor now complete the OFA by July 5. As a reminder, he asked her to advise her doctor that CPC

has modified/alternative duties. But if he did not receive the OFA by July 5, he would have no choice but to put her on AWOL status.

[59] On July 10, 2002, Mr. Sylvester wrote to Ms. Graham enclosing her mid year review. Mr. Sylvester said that normally he would meet personally with her to discuss the review. But because Ms. Graham was off, he couldn't do this. He did tell her that when she returned to work, he would gladly meet with her to discuss her appraisal.

[60] Mr. Sylvester persisted in his letter writing and on July 19, 2002, wrote to Ms. Graham that the note received by him from the St. Boniface Hospital indicated that she would be off two to four weeks. Therefore she should have reported for work on July 18/19. Because she did not report to work on those days, nor call in to report her absence, he would put her on AWOL status and without pay for those two days.

[61] Ms. Graham's response was that Mr. Sylvester was already aware of her situation through her voice mails. In fact, in his July 23, 2002 letter to Ms. Graham, Mr. Sylvester acknowledged that Ms. Graham had left him two voice mail messages, one at 11:46 p.m. and at 2:20 a.m. that she had an appointment with a specialist on July 25, and that she would have the OFA completed at that time.

[62] He apologized in his letter that Ms. Graham felt inconvenienced and harassed by his requests for information, but he had no alternative but to proceed in this way by sending her letters by Xpresspost. He asked that she provide the OFA by July 25. And in the meantime, she would remain on AWOL status without pay from July 18.

[63] In July 2002, in the course of her medical treatment, Ms. Graham had consulted with Shannon McGunigal, a therapist/social worker at St. Boniface Hospital and asked her to provide a note concerning her condition. Ms. McGunigal wrote a note dated July 30, 2002, stating that Ms. Graham was being seen for psychiatric care at the St. Boniface Hospital outpatient clinic and could not return to work at this time. She had a scheduled appointment with Dr. Calhoun on August 12, who would provide CPC with the appropriate documentation and assessment following the appointment.

[64] Ms. Graham realized that CPC might not accept this because Ms. McGunigal was not a doctor. But she felt she had to submit something before her next appointment or she might lose her job. She asked Ms. Quilty to take this note to Neil Spiring, a CPC employee, and the divisional Vice-President of APOC, whom she knew well and trusted. Ms. Graham was very concerned to keep confidential any information relating to her medical condition and expected that Mr. Spiring would call Mr. Sylvester, and tell him that Ms. Graham had an upcoming appointment and not to put Ms. Graham on AWOL status. Mr. Spiring did speak to Mr. Sylvester and also faxed Ms. McGunigal's note to Mr. Sylvester at the UTS office on August 2. Ms. Graham was very upset about this especially because the fax machine in the UTS office was generally accessible.

[65] Ms. Quilty had also spoken to Mr. Sylvester and told him that she was a good friend of Ms. Graham and that she was taking care of Ms. Graham. She also asked Mr. Sylvester to stop sending the letters because they were having a detrimental effect. She told Mr. Sylvester that Ms. Graham needed time to get better and needed time away from work. She said that Mr. Sylvester's response was that this had nothing to do with her. He wanted to talk to Ms. Graham personally.

[66] Mr. Sylvester testified that he had discussions with Dave Smook, APOC President, and with Neil Spiring as to the process that he was following with Ms. Graham. He said that their view was that there was nothing else he could do.

(vi) Sylvester/Graham communications - August 2002

[67] The day before, on August 1, Mr. Sylvester had written to Ms. Graham telling her that he had not received any further written medical information and she would remain on AWOL status without pay. He asked her to provide medical information by August 2 or he would expect her at work on this date. If she did neither, he would have no alternative but to continue to take the necessary disciplinary action up to and including discharge from CPC.

[68] When Mr. Sylvester received the note on August 2 from Ms. McGunigal, he asked OHS to confirm whether this was sufficient medical information. OHS said no because it was not from a medical practitioner. OHS decided that Mr. Sylvester should write to Ms. Graham and ask her doctor to complete an AMI (Acquisition of Medical Information). He did so on August 8, 2002 and asked her to have her doctor return the AMI by August 26.

[69] OHS also wrote to Dr. Laura Calhoun on August 8, requesting that she complete the AMI for Ms. Graham so that OHS could assess her functional abilities. Dr. Calhoun was the specialist at St. Boniface Hospital with whom Ms. Graham had an appointment on August 12. In their letter, OHS specifically noted that suitable modified duties could be made available for Ms. Graham if such accommodation was necessary.

[70] On August 12, 2002, Dr. Calhoun wrote to Mr. Sylvester that Ms. Graham had been off sick from June 18 for medical reasons and advised him that a detailed medical report would follow. In fact, Dr. Calhoun did complete the AMI and a detailed medical report on August 12 and it was received by OHS on August 15.

[71] On August 22, 2002, Dr. Lori Koz from OHS sent a field report to Mr. Sylvester regarding Ms. Graham. The field report set out Ms. Graham's fitness for work but did not reveal her medical condition as is the normal practice of OHS. The field report was based on the medical assessment from Dr. Calhoun and indicated that Ms. Graham was temporarily unfit for work and her potential return to work date was approximately six months.

[72] After he received the field report, Mr. Sylvester stopped all his communications with Ms. Graham. He did so on the basis of the field report from OHS. Ms. Graham's AWOL status without pay was changed to reflect Dr. Calhoun's assessment in her August 12, 2002 letter that Ms. Graham was off work since June 18 because of medical reasons.

(vii) Ms. Graham's attempts to resolve her employment situation - October 2002- January 2003

[73] On October 31, 2002, Ms. Graham wrote a letter "to whom it may concern" that Ron Kohut, one of her sources of support and a good friend with whom she shared a common work history at CPC, had offered to act on her behalf. Mr. Kohut was a supervisor in Depot B, Letter Carrier Depot.

[74] He wrote a letter on October 22, 2002 to Mary Traversy, Vice-President, Human Resources for CPC. He outlined in detail Ms. Graham's work background at CPC, her difficult medical circumstances and how she felt about how she was treated by Mr. Sylvester in his attempt to communicate with her, which in her view, caused her even more distress. He requested Ms. Traversy's intervention to help resolve the situation whereby Ms. Graham would receive what she was entitled to.

[75] Ms. Traversy replied on November 28, 2002 to Ms. Graham, and said that she had asked Roy Nias, General Manager, Mail Operations, Prairie Region, to review this

matter. Ms. Traversy replied to Ms. Graham on January 21, 2003. In her letter, she referred to the Attendance Management Program and specifically Ms. Graham's concerns about the number of letters Mr. Sylvester had sent her requesting information on her condition. She pointed out that although the number of Mr. Sylvester's letters was somewhat excessive, her absence had been handled within the guidelines of that Program. [76] As to Mr. Sylvester returning Ms. Graham to her substantive position and ending the acting superintendent job, Ms. Traversy said that was done in accordance with current CPC policy, and also to ensure continuity in the CPC operations.

V. REASONS FOR DECISION

(i) Has Ms. Graham established a *prima facie* case of discrimination?

[77] In a human rights case before this Tribunal, the complainant must first establish a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if believed, i.e. credible, is complete and sufficient for a decision in the favour of the complainant, in the absence of a reasonable answer from the respondent. The respondent's answer should not figure in the determination of whether the complainant has made a *prima facie* case of discrimination. (See *Ontario (Human Rights Commission and O'Malley v. Simpson Sears Ltd.*, [1985] 2 S.C.R 536; and *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 2004; *Dhanjal v. Air Canada*, (1997) 139 F.T.R. 37 at para. 6).

[78] As noted earlier, Ms. Graham's allegation of discrimination against CPC are:

- (i) that CPC failed to accommodate her temporary disability;
- (ii) that CPC treated her in adverse differential manner by failing to accommodate her temporary disability;
- (iii) that CPC terminated her status as acting superintendent because of her disability; and
- (iv) that CPC caused her disability and her inability to work by its failure to provide sufficient staff and support for her to carry on her duties.

(ii) Did Ms. Graham have a disability at the relevant time?

[79] An allegation of discrimination under the *CHRA*, must be based on a prohibited ground of discrimination. Thus it must be determined whether there was *prima facie* evidence that Ms. Graham suffered from a disability during her absence from work commencing on May 21, 2002.

[80] The pertinent evidence includes:

- Ms. Quilty's evidence was that on May 21, 2002, Ms. Graham called her to come to her home because she was very sick and needed help.
- Mr. Sylvester's statement was that it was unlike Ms. Graham not to contact anyone at the UTS that she would be absent from work.
- Ms. Graham's voice mail message to Mr. Sylvester was that she was sick and would be off work for one to two weeks.
- Dr. Ibbitt's May 30, 2002 OFA form that she had been ill since May 21 and could only return to work on June 6.
- Dr. Ibbitt's June 6, 2002 medical absentee certificate that, for "medical reasons", Ms. Graham could not return to work until June 10.
- St. Boniface Hospital staff member's June 19, 2002 note indicating that Ms. Graham had been seen and treated at the St. Boniface General Hospital Emergency Department and would be off work for two to four weeks due to illness.
- Ms. McGunigal's July 30, 2002 note indicating that Ms. Graham was referred to the St. Boniface Hospital outpatient clinic for psychiatric care and could not return to work at this time.

Dr. Calhoun's August 12, 2002 letter to Mr. Sylvester advising that Ms. Graham has been off work since June 18 for medical reasons.

The August 22, 2002 OHS Field Report indicating that Ms. Graham was temporarily unfit for work, and that she would not be returning to work for approximately six months.

[81] "Disability" in the legal sense consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment. A chronic or debilitating condition that periodically causes an individual to become significantly incapacitated and interferes with their ability to do their job, is a disability within the meaning of the *CHRA* (see *Desormeaux v. Ottawa*, 2005 FCA, 111, paras. 13, 15).

[82] This evidence strongly supports the conclusion that Ms. Graham had a medically-based inability to participate in the workplace. I find that *prima facie*, she suffered from a disability during her absence starting in May 2002.

(iii) Ms. Graham's allegations of discrimination

a) Failure to accommodate her disability

[83] As to Ms. Graham's complaint that CPC discriminated against her by failing to accommodate her disability, I cannot emphasize enough that "failure to accommodate" is neither a prohibited ground of discrimination nor a discriminatory practice under the *CHRA*. There is no free-standing right to accommodation under the *CHRA*.

[84] The duty to accommodate only arises in the context of s. 15(2) of the *CHRA* and only when a respondent raises a *bona fide* justification by way of defense to an allegation of discrimination. For Ms. Graham to show a *prima facie* case, she must rely on something other than the failure of CPC to accommodate her.

b) Adverse differential treatment

[85] With respect to her claim that CPC treated her in an adverse differential manner because of her disability, Ms. Graham did not point to any evidence that showed adverse differential treatment. It is not for the Tribunal to sift through the evidence to make this case for her.

[86] For these two claims, Ms. Graham has not established a *prima facie* case of discrimination.

c) Causing her temporary disability

[87] Ms. Graham alleged that, while she was still carrying out her duties in the acting assignment, CPC failed to provide her with sufficient staffing resources to implement the Appendix AA project. The resulting stress of managing an understaffed project caused her to be temporarily disabled.

[88] It is not clear whether the *CHRA* makes it discriminatory for an employer to cause an employee to become disabled. Putting that question aside, however, Ms. Graham's allegation assumes that she was disabled prior to going absent from work. Unfortunately, she did not present any evidence suggesting that prior to going on sick leave, she had a disability within the meaning of the *CHRA*. Or if she did, CPC's failure to accede to her request was the cause of her temporary disability. Accordingly, her allegation that CPC caused her to become disabled must fail.

d) Terminating her acting superintendent position

[89] Finally, there is the question of whether CPC's termination of her acting assignment contravened s. 7(a) of the *CHRA*, in that it amounted to a refusal to continue to employ. While the termination of her acting position did not sever the employment relationships,

it constituted a loss of a temporary position and her reversion to a pre-existing and less advantageous position.

[90] The loss of this acting assignment was linked "directly or indirectly" to her disability. CPC's decision to terminate her acting position was based on her absenteeism, which in turn was caused by her disability. Thus, she has established a *prima facie* case of discrimination.

[91] The obligation then rests on the CPC to demonstrate that it accommodated Ms. Graham to the point of undue hardship. In the accommodation analysis, there is also a duty on the complainant. The Supreme Court of Canada stated in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2. S.C.R. 970 at pp. 16-17, stated that the search for accommodation is a multi-party inquiry. Along with the employer, the complainant must assist in securing an appropriate accommodation. That is, to facilitate the search for an accommodation, the complainant must do his or her part as well. And in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

[92] In this case, Mr. Sylvester, in his letters to Ms. Graham, repeatedly asked her if she had any work limitations/restrictions and pointed out that CPC provided alternative or modified duties for employees who can not perform their regular duties. He also asked her to advise her doctor, when completing the OFA, of CPC's policy of accommodation.

[93] Ms. Graham did not do her part. Although she did leave voice mail messages from time to time indicating her status and she did provide medical assessments, neither she or her doctor responded to Mr. Sylvester's request for information as to her work limitations or restrictions. It was only on August 25, 2002 when OHS received Dr. Calhoun's AMI that CPC learned that Ms. Graham was temporarily unfit for work and her potential return was approximately six months.

[94] It was not possible in these circumstances, given this lack of information, for CPC to devise an appropriate accommodation for Ms. Graham. Further, Ms. Graham's position of acting superintendent was crucial to the successful implementation of the Appendix AA project. It could not await her indeterminate return to the workplace. CPC had no choice but to replace her as acting superintendent.

VI. CONCLUSION

[95] I have concluded that Ms. Graham's complaint of discrimination against CPC has not been substantiated for the reasons set out in this decision. As a result, her complaint is dismissed.

"Signed by"

J. Grant Sinclair

OTTAWA, Ontario
October 2, 2007

PARTIES OF RECORD

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DECISION OF THE TRIBUNAL DATED:	October 2, 2007
APPEARANCES:	
Sandra Graham	For herself
No one appearing	For the Canadian Human Rights Commission
Zygmunt Machelak	For the Respondent