

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Ravi Lally

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Telus Communications Inc.

Respondent

Decision

Member: Wallace G. Craig

Date: October 25, 2012

Citation: 2012 CHRT 27

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I. Complaint

[1] On October 26, 2009, Ms. Ravi Lally filed a complaint, Exhibit C-1, under the *Canadian Human Rights Act (CHRA)* against Telus Communications Inc. (Telus). The Canadian Human Rights Commission investigated Ms. Lally's complaint, and then referred it to the Canadian Human Rights Tribunal for inquiry.

II. Relevant sections of the CHRA

[2] The relevant sections of the *CHRA* that apply are as follows:

3. (1) For all the purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted or in respect of which a record suspension has been ordered.

7. It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or to continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

III. Inquiry

[3] An inquiry into Ms. Lally's complaint commenced on October 9, 2012, and continued on October 10, 11 and 12, 2012, presided over by Tribunal member Wallace Gilby Craig. The Complainant presented documentary evidence and oral testimony to establish, on a balance of probabilities, (a *prima facie* case), that Telus had subjected her to discrimination while she was disabled by clinical depression. At the end of the Complainant's case, Telus argued that the Complainant had failed to establish a *prima facie* case of discrimination.

IV. Shifting Burden of Proof

[4] Every complainant must present evidence that establishes a *prima facie* case of contravention of the *CHRA*. Failure to do so results in dismissal of a complaint. However, once it is determined by the adjudicator that a *prima facie* case has been established then the evidentiary burden shifts to the respondent to prove, on a balance of probabilities, that the conduct complained of either didn't occur or doesn't constitute a discriminatory practice.

V. Standard of Proof and Assessing Credibility

[5] In *F. H. McDougall*, 2008 SCC 53, the Supreme Court of Canada clarified the law with respect to the standard of proof in civil cases: nothing more, nothing less than a balance of probabilities. Evidence must be clear, convincing and cogent in order to satisfy the balance of probabilities test.

[6] The Court also affirmed that a trial judge must not consider a witness' evidence in isolation, but should consider the totality of the evidence in the case, and assess the impact of any inconsistencies on questions of credibility and reliability pertaining to the core issues in the case.

VI. Background

[7] Ms. Lally testified that she had been a Telus employee for 16 years, beginning as a telephone operator, ultimately achieving accredited status as a project manager. Ms. Lally explained the courses she had taken and the instruction and training she had received to achieve certification as a Project Management Professional.

[8] In 2003, Ms. Lally worked on an on-loan basis for Mr. Brett Holt in Telus' Small Business Solutions division. In the aftermath of her on-loan work, Mr. Holt asked her to work full-time with him. She declined due to on-going commitments in another project, promising to

call him when she was finished. In their subsequent discussions, Ms. Lally agreed to work for Mr. Holt in Telus' Small Business Solutions as a Project Manager and Senior Business Analyst.

VII. Project Clearwater

[9] Between March and October 2007 Telus engaged in a project to persuade underperforming sales managers and sales employees to voluntarily accept severance packages ending their employment with Telus. Four severance packages were for sales managers, and sixteen severance packages were for unionized sales employees. It is reasonable to infer that this project was approved by Telus Chief Executive Officer or his/her delegate.

[10] The project was code-named Project Clearwater, it was managed by Mr. Holt under the direction of a senior executive, Dan Goldberg. Based on the totality of evidence in the Complainant's case, I conclude that Project Clearwater was abnormal and stressful. It was a critical and confidential project to create greater sales potential and it was accomplished between March and October 2007.

[11] Exhibit C-5 is an insightful email exchange on August 14 and 15, 2007, between Mr. Goldberg and Mr. Holt.

[12] In Exhibit C-5, Mr. Goldberg on August 14, 2007: "... Frankly I worry that once we deploy the VDIP, the union will essentially claim that we are targeting people for exit through this move. Now I don't know if there is any recourse from the union – we might be technically within the letter of the law (contract). That said, I worry about our exposure and moreover, it just feels unfair."

[13] In my opinion it is significant that Mr. Goldberg referred to the unfairness of the project. I conclude that Mr. Goldberg was sensitive to the fact that good, loyal employees would be forced to leave Telus simply because they were not high performance sales people.

[14] Ms. Lally testified that she made a firm oral commitment to work on Project Clearwater based on Mr. Holt's reciprocal oral assurance that she would receive one of the management severance packages. Ms. Lally testified that from time to time she reminded Mr. Holt of their understanding, however in October 2007 he avoided any conversation about it, finally agreeing to discuss her severance package on October 16, 2007. Mr. Holt delayed meeting with her until 4:30 in the afternoon when he telephoned Ms. Lally and told her that she would not be given a severance package. Mr. Holt said "We don't pay for good people to leave". When Ms. Lally reminded him that she had held up her end of the bargain, Mr. Holt replied "You'll have to live with it."

[15] The words Ms. Lally attributed to Mr. Holt – "We don't pay good people to leave" suggest that Mr. Holt was instructed to bring an end to the supposed agreement.

[16] I conclude that Mr. Holt and Ms. Lally struck a private, unenforceable bargain concerning one of the four management severance packages; that if it had come to fruition, which is highly unlikely, then Ms. Lally would have terminated her employment. In testifying to the existence of her "bargain" with Mr. Holt, Ms. Lally revealed a failure to understand the ramifications of this unsanctioned under-the-table agreement including the possibility it might be construed as an attempt to defraud Telus of a significant sum of money.

[17] It is bizarre that while Ms. Lally was persuading targeted employees to accept severance packages, specifically intended for underperforming employees, she had bargained surreptitiously with Mr. Holt to receive one herself.

[18] However, if I am wrong in characterizing Ms. Lally's severance package deal as an act of malfeasance, then in the least she revealed herself to be dishonest in entering into an unsanctioned bargain. In this regard it is significant that Ms. Lally neglected to ascertain whether Mr. Holt had been authorized by Telus to reward her if the project was successful. At the very least she ought to have queried Mr. Holt whether he had Mr. Goldberg's assurance that a package would be set aside for her.

VIII. Insight into Ms. Lally's Work on Project Clearwater

[19] Exhibit C-6 is a 27-page internal Telus Performance assessment for the period January to June 2007. Of significance is the manager's comment at page 14: "Ravi's strategic thinking and planning skills have excelled with Proj. Clearwater. Thank you for taking the lead on this initiative and driving this growth within SBS."

[20] Exhibit C-7 is September 20, 2007 email exchange between Ms. Lally and Mr. Holt in which she details progress with specific selected employees, and he concludes his response: "Good work again – Thank you".

[21] Ms. Lally testified that her contribution to the success of Project Clearwater was recognized, in part, with a gift: a three-day holiday.

[22] It is likely that Ms. Lally was at the ultimate point of her mental endurance when Mr. Holt telephoned her and callously dashed her illusory expectation of a severance package. It is extremely regrettable she was very ill with depression, unfit to respond to ill-conceived communications from Telus. It is significant that in 2007 Ms. Lally was emotionally fraught with a rebellious teen-age son and a seriously ill mother, matters which compounded the stressful aspect of Mr. Holt's inability to provide her with a severance package.

IX. Clinical Depression

[23] Exhibit C-29 is an email from Ms. Lally to Adriana Eanga, Catherine McColl and Brett Holt dated November 2, 2007 with attached doctor's note also dated November 2, 2007. Ms. Lally consulted Doctor S. Gnui, her family doctor. He certified that Ms. Lally was not able to return to work. "Ravi is suffering from severe mental and physical stress and is not able to continue at work. Kindly excuse her from work."

[24] On November 13, 2007, Dr. Gnuai was again consulted. He completed Telus' "Practitioner's Assessment Form", marked as Exhibit C-37, stating that Ms. Lally was ill with "major clinical depression", and he recommended that Ms. Lally utilize psychological services available through work or at a psychiatrist. Dr. Gnuai indicated that Ms. Lally was unfit to work, that her return to work was unknown, and that if her depression persisted he would refer her to a psychiatrist.

[25] Exhibit C-38 is an internal Telus email exchange between Adriana Eanga, Alan Dabb and Corinne Wilander, commenting on Dr. Gnuai's "Practitioner's Assessment Form". On November 16, 2007, Eanga writes to Wilander and Dabb: "Hi Corinne, Can you please advise where we stand with assessment of the PAF that we received from Ravi earlier this week? Your initial assessment seemed to be that leave would not be approved beyond 4 weeks. Can you please inform us of the final decision? Alan, should the communication be from you or is it okay to come from health services given her last email to us. AE" On November 19, 2007, Wilander replies to Dabb and Eanga: "Hi, The medical information received is inadequate to support a continued abs cense (*sic*) from work. Having said that would it be prudent to arrange an IME? My rationale is this: 1. She will refuse to attend and we then we (*sic*) can say we did due diligence. 2. She attends and is not found to be disabled. 3. She is disabled which explains her behaviour. Regardless of the outcome it will give us the information we need to either close this file or manage the disability. Your thoughts? " Finally, still on November 19, 2007, Wilander writes to Eanga and Dabb: "Hi Adriana: IME: request a Specialist, in the correct field, to see the Team Member for diagnosis, prognosis and treatment recommendations as well as their fitness for work. Depends on the Specialist so no longer than 1 – 2 months. She should be unpaid until it is verified that she is disabled. The business can't really replace her if she is disabled. Question: she was AWOL for 5 weeks and left as if she was not coming back. Should we be concerned now that she is medicalizing (*sic*) the situation? Frankly the medical produced is weak and certainly would not support her continued absence.

[26] At Telus' request, Ms. Lally agreed to undergo an independent medical assessment.

[27] On February 6, 2008, Dr. Jeffrey M. Claman, a Clinical Associate Professor, Department of Psychiatry, UBC, provided Telus with a 10-page report which resulted from his interview of Ms. Lally the same day. The document was filed as Exhibit C-59. At page 8, current diagnosis based on the DSM IV criteria: Major Depressive Disorder.

[28] I note that doctors use the term "clinical depression" on an inclusive basis when referring to the more severe forms of depression one instance being "major depressive disorder."

[29] Exhibit C-58 is an email from Corinne Wilander RN, Service Manager, Telus Corporate Health Services, to Joni Kert, subject Ravi Lally: "Hi Joni, the specialist report from the Independent Medical Exam, which we arranged for her, indicated that Ravi is disabled and unable to work. Please correct the coding so that she is paid, if she has not been. I don't know what the long term plan is however it is unlikely that she will return to her current position."

[30] Exhibit C-60 is an email continuing the conversational string in Exhibit C-58. Adriana Eanga informs Brett Holt in a fashion that is not an acknowledgment of her own erroneous assessment concerning Ms. Lally's absence from work: "Yes, this is per Alan's last note to us. Looks like she was in fact ill and (it) would have been simpler all around had she been communicating openly with her manager."

X. The Core of Ms. Lally's Complaint

[31] Ms. Lally began her testimony by affirming the truthfulness of her complaint, which was filed as Exhibit C-1. In the second paragraph she states the core element of her complaint: "He stated he wanted someone reliable and trustworthy as it was a confidential and critical project. I was already under extreme personal stress due to family challenges with my rebellious teenager and an ailing mother. I communicated that I needed the ability to focus on family but also required a salary to make ends meet. Brett and I discussed this in detail and found a solution.

Brett confirmed he would hold one of the management departure packages for me upon successful completion in fall 07. We both were benefitting and both verbally committed to this agreement and I began execution. I regularly checked in with Brett during our private meetings to confirm our agreement was understood and solid. I successfully completed Project Clearwater by the end of SEP07. Brett and I had discussed my transition and as a result, I had nearly half the month of OCT07 scheduled off as well as NOV07. This was to ease the team's dependency on me and allow Brett time to complete my exit with minimal interruption to the business.”

XI. Credibility of the Complainant

[32] Ms. Lally's viva voce evidence and tendering of documents amounted to an orderly assertion of the details of her complaint. However, under rigorous cross examination concerning attempts by manager Joni Kert to contact her in the weeks following October 17, 2007, Ms. Lally claimed, speciously, that she was being subjected to harassment therefore discrimination. Though framed in blunt and insensitive language, the communications express Telus' right to know the reason for Ms. Lally's absence and I conclude they were not harassment, neither were they acts of discrimination within the reach of s. 7 of the *CHRA*. I make the same determination in connection with the bureaucratic manner in which Telus employees facilitated Ms. Lally's entitlement to short and long-term disability payments and ultimately to coverage by Sun Life Assurance.

XII. Argument of the Respondent

[33] Telus argues that it was unaware that the Complainant was disabled by clinical depression until October 29, 2007; and that the non-existence of a disability on October 16, 2007 (the day Mr. Holt informed Ms. Lally she would not receive a severance package), is fatal to the complainant's allegation that she was subjected to a discriminatory practice based on disability. The same argument is made concerning Ms. Lally's allegation that she was subjected to harassment when Telus employees' attempted to communicate with her to determine why she was absent from work and to obtain business updates.

[34] Telus argued that after it was informed of the disability, Ms. Lally was not subjected to adverse differential treatment; that Telus' requirement for an independent medical examination was legitimate and necessary to confirm the Complainant's medical status thereby justifying her leave of absence and entitlement to disability benefits.

[35] Telus acknowledged that it made administrative errors in overpayment of salary to Ms. Lally, and in processing her entitlement to long term disability benefits which included failure to ensure that she made a timely application to receive extended coverage from Sun Life Assurance. Telus asserts that where possible it corrected these errors; and that the test for discrimination is not whether the employer acted perfectly in its dealing with a disabled employee, rather it is whether it acted reasonably and did not, by reason of her disability, differentiate adversely against the employee.

[36] The Respondent's arguments are persuasive.

XIII. Decision

[37] Based on my findings in this matter, and on a balance of probabilities, I conclude that the Complainant has failed to establish a *prima facie* case of a discriminatory practice contrary to s. 7 of the *CHRA*, engaged in by the Respondent, in the period October 16, 2007, to October 20, 2009.

[38] Accordingly the complaint is dismissed.

Signed by

Wallace G. Craig
Tribunal Member

OTTAWA, Ontario
October 27, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1733/8811

Style of Cause: Ravi Lally v. Telus Communications Inc.

Decision of the Tribunal Dated: October 25, 2012

Place of Hearing: Vancouver, British Columbia

Appearances:

Ravi Lally, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Gregory Heywood and Michael R. Kilgallin, for the Respondent