Federal Court  Cour fédérale

Date: 20130812

Docket: T-2092-12

Citation: 2013 FC 858

Ottawa, Ontario, August 12, 2013

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

RAVI RALLY

Applicant

and

TELUS COMMUNICATIONS INC.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Ms. Ravi Rally, challenges the legality of a decision of the Canadian Human Rights Tribunal [tribunal], rendered by tribunal member Wallace Gilby Craig, dismissing her complaint of discriminatory conduct against the respondent, Telus Communications Inc., leading to the present judicial review application.

[2] The applicant's complaint alleges a discriminatory conduct based on her disability. Under the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], the disability of a person constitutes a prohibited ground of discrimination, and it is a discriminatory practice, directly or indirectly, in the

course of employment, to differentiate adversely in relation to an employee, on such prohibited ground: subsection 3(1) and paragraph 7(b) of the CHRA.

[3] On or around October 26, 2009, the applicant filed a complaint with the Canadian Human Rights Commission [Commission] based on the respondent's conduct from October 2007 onward, essentially alleging that following her absence caused by a clinical depression, she was subjected to harassment and discriminatory treatment because of her disability. On September 28, 2011, the Commission referred the matter to the tribunal to institute an inquiry into the applicant's complaint.

[4] A two-week hearing was scheduled for October 9 to 12 and 22 to 26, 2012. The first day, the tribunal disposed of the preliminary motions and received an opening statement from respondent's counsel but not from the applicant, after which the applicant testified and filed a number of documents. On the fourth day, following the applicant's testimony and her cross-examination, respondent's counsel asked the tribunal to decide whether the applicant had established a *prima facie* case [the motion for dismissal]. Respondent's counsel made arguments, but not the applicant.

[5] At the end of the fourth day, the motion for dismissal was taken under reserve while the tribunal also disposed of the applicant's request to force the attendance of a certain witness on the second week of the hearing. I pause to mention that although the applicant had been represented by counsel throughout the tribunal proceedings – that is by Mr. Joe Coutts who acts as the applicant's counsel in this proceeding – she chose to represent herself during the first week of the hearing

before the tribunal. However, Mr. Coutts was present on October 22, 2012, when the hearing resumed and the impugned decision was delivered orally by the tribunal member.

[6] The tribunal decided that the applicant had failed to establish a *prima facie* case of a discriminatory practice [the *prima facie* issue], finding in this regard that the respondent's arguments were "persuasive" (later edited and referenced 2012 CHRT 27). The applicant now submits to the Court that the tribunal breached the principles of procedural fairness, and she also makes arguments that, although framed as a breach of procedural fairness, ultimately question the merits of the tribunal's decision.

THE PROCEDURAL ISSUES

[7] The first issue to be decided is whether the tribunal has breached natural justice or procedural fairness. There has been no suggestion in this case that the behaviour of the tribunal member raises a reasonable apprehension of bias. Procedural fairness and bias issues are reviewable against the standard of correctness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 [*Dunsmuir*]; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12; *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2005] FCJ No 2056.

[8] The applicant submits that she was prevented from making an opening statement and also that, right after the *prima facie* issue submissions of the respondent had been taken under reserve, the tribunal refused to assign a proposed witness (Ms. Shaine Rajwani), but her most important reproach concerns the fact that the tribunal did not hear any argument from the applicant on the *prima facie* issue, which proved to be decisive (see paragraphs 33 to 36 of the tribunal's decision).

Accordingly, the applicant submits that the Court should intervene: *Iossifov v Canada (Minister of Employment and Immigration*) (1993), 71 FTR 28, [1993] FCJ No 1318 at paras 2-4; and *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2012 FC 445, [2012] FCJ No 425 at para 192 [*First Nations Child and Family Caring Society*].

[9] On the other hand, the respondent submits that the applicant has waived her right to seek judicial review over any breach to natural justice or fairness by her silence or failure to speak-up in a timely manner. She should have raised the breaches she now complains of at the "earliest practicable opportunity" as required by the jurisprudence: *Canada (Human Rights Commission) v Taylor*, [1990] SCR 892, 1990 CanLII 26 (SCC) at para 175 [*Taylor*]. It is patent that following the adjournment of October 12, 2012, neither the applicant nor her counsel asked to make or submit submissions, and that her counsel who appeared before the tribunal on October 22, 2012, did not outright ask for leave to make submissions or to present another witness before the tribunal would render its decision on the motion to dismiss made by the respondent.

[10] The specific content of procedural rights afforded to unrepresented parties is "context-dependant" as explained by Justice Danièle Tremblay-Lamer who summarized the general principles in *Law v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1006, [2007] FCJ No 1303 at paras 14-19:

> 14 In determining the content of participatory rights, L'Heureux-Dubé J. noted in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (QL), at para. 21, that "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case." She went on to indicate at para. 22 "[...] that the purpose of the participatory rights contained within the duty of procedural fairness is to [provide] an opportunity for those affected by the decision to put

forward their views and evidence fully and have them considered by the decision-maker."

15 Thus, the IAD is to be shown much deference in its choice of procedure so long as that procedural choice permits those who are affected by its decision to present their case.

16 Specifically, in the context of the procedural rights afforded to a self represented party, this Court has held that an administrative tribunal has no obligation to act as the attorney for a claimant who refused counsel, and that:

> [...] it is not the obligation of the Board to "teach" the Applicant the law on a particular matter involving his or her claim. (*Ngyuen v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1001, [2005] F.C.J. No. 1244 (QL), at para. 17)

17 However, while administrative tribunals are not required to act as counsel for unrepresented parties, they must still ensure that a fair hearing takes place. In *Nemeth v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 590, [2003] F.C.J. No. 776 (QL), at para. 13, O'Reilly J. asserted:

> [...] But the Board's freedom to proceed in the absence of counsel obviously does not absolve it of the over-arching obligation to ensure a fair hearing. Indeed, the Board's obligations in situation where claimants are without legal representation may actually be more onerous because it cannot rely on counsel to protect their interests.

18 It has also been recognized that an unrepresented party "[...] is entitled to every possible and reasonable leeway to present a case in its entirety and that strict and technical rules should be relaxed for unrepresented litigants [...]" (*Soares v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 190, [2007] F.C.J. No. 254 (QL), at para. 22).

19 Therefore, it is evident that the specific content of procedural rights afforded to unrepresented parties is context-dependent. The paramount concern is ensuring a fair hearing where the unrepresented party will have the opportunity to fully present their case.

[11] I am satisfied that sufficient guidance was offered by the tribunal member to the applicant and that she had full opportunity to present her evidence at the hearing. That said, by no means, I condone any unfortunate or paternalistic comment on the part of the tribunal member, which I venture to note, are isolated and do not alter my general conclusion that there has been a "fair hearing" with respect to the specific allegations of breach made by the applicant.

[12] I will first deal with the specific reproach made by the applicant that she was not allowed to make an opening statement. It is unclear to me how this has prejudiced her in practice. At the tribunal's direction, the applicant and the respondent had filed their respective Statement of Particulars months before the actual hearing (on February 15 and March 14, 2012 respectively). The tribunal already knew the applicant's position and had a general knowledge of her testimony and proposed evidence.

[13] Be that as it may, after having closely read the transcripts of the October 9, 2012 hearing (pages 19-20), it appears that the applicant was offered the possibility – although it would have been after respondent's counsel had made his opening statement – to make her opening statement, but implicitly declined to do so at the tribunal member's suggestion as appears from the exchange below:

> Member Craig: And you know, he's being very generous, he's being very detailed and he's being very precise in putting you in a position where you lack credibility. That is, you were, as he called it, AWOL. You didn't -- so you've been forewarned. And when he comes to his opportunity to cross-examine you, he will be as forceful in his cross-examination, I'm sure, as he was in making his statement about the fact that Telus has an answer to everything that you've done. And that's the -- what's what he's communicated to me, that Telus has an answer to everything.

And you must understand, you're not here to have a debate with him in -- from the witness box. What you have to do is give me evidence and tell me under oath what your case is and if you can establish on a likelihood, that is the reference he used is a *prima facie* case. The burden on you is to establish simply that it's likely that it happened, the occurrence that is your -- the discriminatory practice. It's a standard of proof that's very low but having said that, even if you establish a *prima facie* case, Telus is entitled to put witnesses in the box, as you heard, they're going to come, several of them, and they will testify -- testify to relevant aspects of your claim and if they establish there is a response on a likelihood, if they satisfy either that the discrimination didn't occur or that your testimony is not believed, then they will succeed. So you have the burden initially to establish a *prima facie* case that is likely but they then have a similar opportunity to establish that they have a defence to it. Do you understand?

Ravi Lally: Yes, I understand. Could I --

Member Craig: So you're the prime witness and you -- are you prepared to go over here and work from there or do you want to stay where you are?

Ravi Lally: I'd prefer to stay here but could I also have 10 minutes of the court's time to say my opening statements that I've prepared?

Member Craig: Sure, you can, but you might be better off to do it under oath through evidence. It's up to you. Go ahead. He's had the opportunity.

Ravi Lally: Okay.

Member Craig: But I don't make notes of this because look, none of what he said, I don't -- he's competent counsel. He has witnesses. But in the normal course of events, there's no point in me making notes until I actually start hearing the evidence and that's oral testimony and documents that come in. And so I'll ask you to go ahead and tell me but this doesn't - this doesn't advance your case. It just simply illuminates it a little. And you alert counsel to where you're going.

What I'm saying to you is you can't -- once you're in the witness -- I don't make notes of what you're going to say because once you're in the witness box, I will make notes and you can't read your testimony, you have to give it from memory. Where your memory fails and you want to refer to a document, you'll have that

> opportunity. So you'll be able to get through your evidence in chief and then you'll be cross-examined. So which way would you like to go?
>
> Ravi Lally: I'd like to do it from here but when I had contacted the CHRC they had advised that I could keep some notes because I actually made my own leading questions, my questions that I need to tell the story, to trigger it and because I don't have anyone else to -- a lawyer here to do that. So they said I could have some notes of my own so that I can get through the four or five years of events that have taken place. Because I don't have a lawyer to tell me, okay [indiscernible/overlapping voices] --
>
> [emphasis added]

[14] The applicant also complains that the tribunal member refused to allow her to make oral submissions on the *prima facie* issue because she was not represented by counsel or because of time constraints stemming from the tribunal's decision to adjourn the hearing at 15h00 at the end of the first week. The tribunal member also refused to assign Ms. Rajwani for improper reasons, a point which will be re-examined as well as when we examine the merits of the impugned decision.

[15] The relevant passages of the hearing transcripts of October 12 (pp 101-102) read as follows:

> Member Craig (to counsel for the respondent): ... I have nothing more to hear from you. I appreciate very much your argument, it's a powerful one. It's going to cause me concern to work through it. I don't need her to respond because she's not going to make a response that a lawyer would. I'll hear from you when we start again a week Monday. But that was – I appreciate your submission. It's got me thinking. But I wont deal with the motion until we come back on the, whatever date it is.
>
> Mr. Heywood: So how do you –
>
> The Clerk: The 22nd.
>
> Mr. Heywood: – just to say that happened – I mean [indiscernible] on Monday. So we'll hear the complainant –

Member Craig: The first thing you'll get from me is the ruling on your motion.

Mr. Heywood: Oh, okay.

Member Craig: And you have to – unfortunately, I can't tell you what it is because I don't know yet. And when you get here you'll have your witnesses and they may well have to start testifying or they may not.

Mr. Heywood: All right.

Member Craig: And that would be easier for you on either eventuality than it will be with respect to the complainant because that's a personal involvement. I don't mean that Telus isn't concerned about these things but they – you'll work it through with them as to what might happen on the next time we sit.

Ravi Rally: May I make a submission?

Member Craig: No, I don't need to hear from you on the –

Ravi Rally: No, it's regarding the witness for next week.

Member Craig: Pardon me?

Ravi Rally: It's a Telus employee, Shaine Rajwani. We had subpoenaed her during the –

Member Craig: I don't know what authority I have to order that person to be arrested. I'm not a Superior Court judge and I don't see that person being brought before me.

Ravi Rally: Okay.

Member Craig: There is obviously unwillingness on the part of that person, for whatever reasons, to appear. I don't think it's critical to your case.

Ravi Rally: Okay.

[emphasis added]

[16] I find the applicant's silence problematic. Context is very important in this case. The *prima facie* issue came as no surprise to the applicant. Although there was no formal motion in writing, respondent's counsel promptly informed the tribunal, in his opening statement, that the respondent would ask, after the applicant's cross-examination would be over, to rule on whether the applicant had established a *prima facie* case of discrimination against the respondent. This is what effectively happened on the fourth day of the hearing.

[17] Although she had prepared her own submissions and, her counsel, on October 11, 2012, had prepared written arguments and a case brief, the applicant, did not raise these at any point in the hearing. Moreover, the motion to dismiss was not decided on the day it was presented; it was taken under reserve. Accordingly, the applicant had a whole week after the hearing was adjourned on October 12, 2012 to communicate with the tribunal and express any desire she had to make submissions or present another witness after she had declared that it was "Okay" (transcript, page 102). There has been no serious attempt before me to explain this long silence and this must be held against the applicant.

[18] It is clear that a party should not be allowed to hold a procedural fairness concern in reserve only if the outcome of her case turns out badly, whether it concerns an apprehension of bias or a breach of procedural fairness: *Taylor*, above at para 175; *Eckervogt v British Columbia (Minister of Employment and Investment)*, 2004 BCCA 398, [2004] BCJ No 1492 at paras 46-48; *Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1391, [2008] FCJ No 1753 at para 69); *Yassine v Canada (Minister of Employment and Immigration)* (1994), 172 NR 308, [1994] FCJ No 949 [*Yassine*]; *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA

1991, [2001] FCJ No 916 at paras 22-26; *Stetler v Agriculture, Food and Rural Affairs Appeal Tribunal* (2005), 76 OR (3d) 321, [2005] OJ No 2817.

[19] Accordingly, on the basis of the evidence before the Court, I find that the applicant had renounced the opportunity to make an opening statement and submissions on the *prima facie* issue, and to assign another witness before the *prima facie* issue would be decided by the tribunal. This is fatal to the applicant's claim that the Court should now intervene because there was a breach of procedural fairness.

THE MERITS OF THE IMPUGNED DECISION

[20] The second issue to be decided by the Court concerns the merits of the impugned decision, as the tribunal found that the applicant had failed to establish a *prima facie* case of a discriminatory practice contrary to section 7 of the CHRA, engaged in by the respondent during the period of October 16, 2007 to October 20, 2009 [the *prima facie* issue].

[21] While the legal test respecting the requirement for *prima facie* discrimination should be correctly adopted by the tribunal, it is not disputed here that "[t]he standard of review applicable to the Tribunal's finding of *prima facie* discrimination necessarily involves application of the law to the facts, a question of mixed law and fact," which invokes a standard of reasonableness: *Johnstone v Canada (Border Services)*, 2013 FC 113, [2013] FCJ No 92 at paras 92-98.

[22] In *Willoughby v Canada Post Corporation*, 2007 CHRT 45 at para 50, the tribunal defined a *prima facie* case of discrimination as follows:

> A *prima facie* case of discrimination is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favor, in the absence of an answer from the respondent employer. The respondent's answer is not to be considered when determining whether a *prima facie* case has been made out. (*O'Malley* v. *Simpson-Sears Ltd.* [1985], 2 S.C.R. 536 at para 28, see also *Dhanjal* v. *Air Canada*, (1997) 139 F.T.R. 37 at para. 6 and *Moore* v. *Canada Post Corporation and Canadian Union of Postal Workers*, 2007 CHRT 31 at para. 85). A complainant is not required to prove that discrimination was the only factor influencing the conduct which is the subject of the complaint. It is sufficient that a complainant make out a *prima facie* case that discrimination is a factor. (See *Basi* v. *Canadian National Railway Company*, (1988) 9 C.H.R.R. D/5029).

[23] In the case at bar, there is no allegation that the tribunal applied the wrong test. As the Supreme Court of Canada explained in *Dunsmuir*, above, at para 47, reasonableness is concerned with "the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[24] The applicant essentially submits that the tribunal relied on the respondent's arguments and justifications as evidence in reaching its decision to dismiss the applicant's complaint. This is not the case in my opinion when the decision is read as a whole and in light of the totality of the evidence on record. The applicant also questions the deficiency or lack of reasons, particularly the last part of the impugned decision (paragraphs 33 to 36). In this respect, I see nothing objectionable in summarizing the arguments of the respondent and then finding that they are "persuasive", as long as there is evidence on the record to support these arguments and that the Court can understand why the tribunal has found them "persuasive".

[25] In this respect, I am satisfied that the tribunal considered the totality of the evidence on record. The applicant began her testimony by affirming the truthfulness of her complaint (Exhibit C -1) and this was specifically acknowledged by the tribunal (paragraph 31), subject to its stated reserves with respect to the applicant's interpretations or conclusions derived from these facts (paragraph 32). It is apparent in reading the reasons that the tribunal did not consider that the facts proven by the applicant amount, *prima facie*, to "discriminatory practices regarding her employment". The reasons could have been more articulated or detailed but they are generally transparent and provide intelligible reasoning and rationale for accepting the respondent's arguments for dismissal.

[26] In particular, the tribunal specifically examined the evidence that the applicant considered to be "the core element of her complaint" (paragraph 31). According to the evidence presented by the applicant and summarized by the tribunal in its decision, the applicant started to work for Telus in 1989 as a telephone operator and eventually worked her way up to the accredited status of project manager. In March 2007, the respondent's acting vice-president, Mr. Brett Holt, who had the experience of working with the applicant in Telus' Small Business Solutions division in 2003, asked the applicant to work on a special project, code-named Project Clearwater, which was going to be managed by Mr. Holt under the direction of Mr. Dan Goldberg, senior executive. The said project was accomplished between March and October 2007 and consisted of an unusual strategy intended to create greater sales potential. It essentially involved the consensual termination of at least twenty of the most underperforming sales managers and sales employees in exchange for an advantageous severance package. Four severance packages were intended to be paid to terminated sales managers and sixteen were intended to be paid to unionized sales employees.

[27] The applicant's testimony and documentary evidence produced at the hearing shows that the employer was entirely satisfied by the applicant's performance during the Project Clearwater (Exhibits C-6 and C-7), and also that people depended on her in another project which involved a floor move and was not yet completed. Be that as it may, the applicant testified that she accepted the assignment to work on Project Clearwater, allegedly in view of securing one of the designated severance packages, and only after receiving Mr. Holt's oral assurance that she would receive a management severance package once Project Clearwater was finalized in October 2007. The applicant testified that although she reminded Mr. Holt of the mutual understanding regarding the severance package, during this period, Mr. Holt avoided any conversation about this issue. On October 16, 2007, Mr. Holt telephoned to inform her that she would not be given a severance package: "we don't pay good people to leave".

[28] By itself, assuming that one entirely believes the applicant, her testimony and evidence on Project Clearwater does not *prima facie* support any claim that she was subjected to a discriminatory practice based on disability when Mr. Holt informed her she would receive a severance package. Accordingly, the tribunal did not act unreasonably in accepting the respondent's argument in this regard (paragraph 33). It was sufficient for the tribunal to endorse the respondent's argument that there was simply no *nexus* between the termination of any such agreement and the applicant's disability. I simply fail to see how Mr. Holt's change of mind about the agreement has anything to do with the applicant's later diagnosed disability.

[29] Incidentally, the tribunal earlier noted in its decision (paragraph 16) that Mr. Holt's promise regarding the applicant's potential entitlement to a severance package resulted from a "private, unenforceable bargain" that would have terminated the applicant's employment if it had come to fruition. The tribunal blamed the applicant for her "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."

[30] The tribunal further stated at paragraph 18:

> [I]f 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.

[31] Those comments by the tribunal member are totally gratuitous. Mr. Holt never testified, nor did any other Telus employee, about this agreement or their knowledge of it. At this point, it was highly improper for the tribunal to make, in passing, the comments or findings above. After all, the tribunal was not asked to determine specifically whether there was a breach of contract, but to determine whether there were, *prima facie*, any discriminatory action taken by Telus as a result of the applicant's disability. I find that there is no reason to intervene in view of the other findings made afterwards by the tribunal in its decision and which sustains its ultimate conclusion to dismiss the complaint (paragraphs 19 to 37).

[32] This brings us to the crux of the complaint made to the Commission which naturally called for an assessment of the applicant's credibility. The tribunal considered the applicant's testimony and evidence in this regard (see paragraphs 19 and following). The applicant testified at the hearing that, at that time, she was going through a difficult period and had family issues, she was emotionally fraught with a rebellious teenage son and a seriously ill mother. In particular, the tribunal specifically noted (paragraph 22) that "[i]t is likely that Ms. Rally was at the ultimate point of her mental endurance when Mr. Holt telephoned her and callously dashed in illusory expectation of a severance package."

[33] The applicant also alleged that she began to be harassed because of her disability on October 26, 2007. The tribunal specifically considered the applicant's testimony and evidence with respect to her "clinical depression" which was not immediately diagnosed (paragraphs 23 to 30) and it was not unreasonable for the tribunal to accept the respondent's arguments that she was not subjected to adverse differential treatment because of her disability during the period that followed the October 16, 2007 conversation with Mr. Holt (paragraphs 33 to 35).

[34] The applicant testified that she was scheduled to take vacation, in mid to late October 2007, and then starting November 2nd until the end of the month. The applicant stated that she consulted her family doctor on October 22, 2007 as her stress and anxiety were worsening. She testified that on October 23, 2007, she left Ms. Kert a voicemail advising her that she was ill and requesting the employer to provide her with the necessary forms to apply for medical leave. The applicant alleges that despite the voicemail, she received two letters from Telus on October 26, 2007 (dated October 25 and October 26, 2007) accusing her of being absent from work with no prior authorization.

[35] However, the respondent has always maintained that it was only on October 29, 2013 that it became aware of the fact that the applicant was sick and asked medical proof from the applicant. The applicant was submitted to a severe cross-examination by respondent's counsel and the applicant confirmed that she had not spoken personally to Ms. Kert on October 23, 2007 and did not know if she had actually listened to her voicemail. The applicant testified that she contacted Telus' workplace department on October 29, 2007, indicating that she was ill and was feeling harassed by the respondent's attempts to get in touch with her.

[36] At paragraph 32 of the impugned decision, the tribunal deals specifically with the applicant's credibility and notes in this regard:

> 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.

[37] The applicant's learned counsel invited the Court to reweigh the totality of the evidence, and notably to infer that, on October 23, 2007, Ms. Kert had actually received and listened to the voicemail advising her that the applicant was ill and asking for the required forms to apply for medical leave. However, it is not the role of the Court to substitute itself for the tribunal, and in any

event, I do not find the alleged failure to consider the voicemail left for Ms. Kert on October 23, 2013 as a determinative error. The sending of the voicemail in question does not prove that Ms. Kert had personally received it, but more importantly, according to the applicant's own evidence, she had not been yet diagnosed as suffering from "major clinical depression". The applicant's testimony regarding when and how the applicant informed Telus of her diagnosis of depression supports the tribunal's acceptance of Telus' argument that "it was unaware that the Complainant was disabled by clinical depression until October 29, 2007" (paragraph 33).

[38] Indeed, the evidence on record contains an email from the complainant to Adriana Eanga, Catherine McColl and Mr. Holt, dated November 2, 2007, with the attached doctor's note also dated November 2, 2007, wherein Dr. Gnui, the applicant's family doctor, certified that she was "suffering from severe mental and physical stress and [was] not able to continue to work." Dr. Gnui was again consulted on November 13, 2007, to complete Telus' "Practitioner's Assessment Form" [PAF] wherein he stated that the applicant was ill with "major clinical depression" and "unfit to work" and recommended that she consult psychological services available through work or a psychiatrist (Exhibit C-37).

[39] With respect to allegations of differential treatment based on her disability, the applicant's evidence is scarce and inconclusive at best, if not totally inexistent. There has been no serious argument made before me by applicant's counsel that in making the requests for additional medical information or proof of the disability, the applicant has been subjected to adverse treatment because of her disability. What the evidence on record merely demonstrates is that there were long delays and administrative errors in the processing of the medical claims. However, what needed to be

proved by the applicant was that she was discriminated by her employer (not a third party, like the insurance company) notably because of her disability.

[40] On a balance of probability, the tribunal could reasonably find that there was insufficient proof to demonstrate a *prima facie* case of discrimination notably based on disability. In doing so, the tribunal notably considered the fact that the email exchanges on record show that the applicant's PAF and leave request were only assessed by the respondent from November 16 to November 19, 2007 (Exhibit C-38). The evidence indicates that the employer was unsatisfied with the applicant's medical evidence and sought to clarify the applicant's health status with an independent specialist. On January 25, 2008, Telus requested that Ms. Lally undergo an independent medical assessment, to which the applicant consented.

[41] Before me, applicant's counsel explained that Ms. Shaine Rajwani of Telus' Health Services was in charge of arranging an independent medical examination for the applicant. The applicant alleges that Ms. Rajwani falsely told the independent medical examiner that the applicant was not meeting the employer's work objectives and requirements, and that her work performance was poor. However, this had no effect whatsoever on her medical evaluation and claim. Thus, the tribunal did not need to consider the applicant's allegation and it was not unreasonable to mention to the applicant at the hearing that Ms. Rajwani's testimony was not "critical to [her] case".

[42] The tribunal also considered the fact that on February 6, 2008, Dr. Claman, a Clinical Associate Professor, Department of Psychiatry, UBC, issued a ten-page report detailing his interview with the applicant on the same day and confirming her previous diagnosis of major

depressive disorder [MDD] although the applicant's family doctor used the more inclusive term of "clinical depression." As a result of the independent medical exam the applicant's pay was re-established. The respondent again stopped paying the applicant in June 2009. On September 28, 2009, the respondent informed her that she owed them over $78,000.00 because she was overpaid as a result of not having applied for long term disability benefits [LTDB] through the insurance agent, Sun Life. Again, the applicant had to prove some sort of differential treatment based on her disability.

[43] The tribunal rejected the applicant's complaint regarding Telus' errors in overpayment of salary to the applicant and the manner in which the applicant's request for LTDB with Sun Life was handled by Telus employees, including its failure to ensure that she made a timely application to receive extended coverage from Sun Life, which the tribunal qualified as merely "bureaucratic" errors. Telus acknowledged these errors but stated that they were immediately corrected where possible. Telus argued that the test for discrimination is not whether the employer acted *perfectly* in its dealing with a disabled employee but whether it acted *reasonably* and did not differentiate adversely against the employee by reason of her disability. Again, the tribunal found the respondent's arguments to be persuasive and I see no reason to interfere with that part of the tribunal's decision.

[44] Applicant's counsel submits that the tribunal was too "quick" in accepting the respondent's arguments on the issue of overpayment. However, he has failed to convince me how any such error affects the result. Mere assumptions or accusations of discrimination are not to be equated with the establishment of a *prima facie* case of discriminatory conduct. This requires from the complainant

the showing of some discriminatory behaviour based on a prohibited ground of discrimination. Here, I fail to see in the evidence presented by the applicant, the required *nexus* that would allow the applicant to succeed in her complaint of discrimination based on her disability.

[45] On the whole, the decision is based on the evidence on record and its conclusion to allow the motion for dismissal comes within the range of acceptable outcomes in light of the law and the facts of this case.

THE EXERCISE OF THE COURT'S DISCRETION IF REVIEWABLE ERRORS WERE MADE BY THE TRIBUNAL

[46] Overall, I find there is no reason to intervene.

[47] In the alternative, if I am wrong in finding that the applicant has effectively waived her right to complain of the alleged breach to procedural fairness, this is a case where it would be justifiable not to set aside the decision and refer the matter for redetermination because "the demerits of the case are such that it would be in any case hopeless": *First Nations Child and Family Caring Society*, above, at para 203; W. Wade, *Administrative Law* (6th ed 1988) at 535, as cited in *Mobil Oil Canada Ltd Et al v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at 228, [1994] SCJ No 14; and *Yassine*, above, at para 9.

[48] There has been no allegation of bias made against the tribunal member. In such a case, the matter would be simply referred back to the same member. The applicant has already testified and been cross-examined. The only additional witness to be heard would possibly be that of Ms. Rajwani. In my humble opinion, there is no reasonable prospect that the result would be different.

[49] The fundamental problem in this case is the establishment of a *nexus* which requires a proof of differential treatment based on the applicant's disability.

[50] In this respect, the applicant has failed to demonstrate how the proposed testimony of Ms. Rajwani would support the claim that she was discriminated on the basis of her disability. I am ready to accept that Ms. Rajwani was instructed by the employer to advise the independent medical examiner that the applicant was not meeting the employer's work objectives and requirements and that she had poor performance at work. If proven, this would certainly be improper conduct, but the fact is that the independent medical report corroborated the diagnosis of depression.

[51] The applicant complained that she should have been allowed to make an opening statement and to make oral submissions with respect to the *prima facie* issue. This supposes that the tribunal member reassesses the evidence in light of the applicant's representations. In this respect, the applicant's chances of convincing the tribunal that there is an objective *nexus* between her disability and the employer's conduct during the whole period of time before her complaint are non-existent or almost nil.

[52] Finally, many of the issues raised in the October 29, 2009 complaint have already been settled or will be pursued by the parties in another competent forum which is not the tribunal in this case. That would be a further ground for the Court to refuse to refer the matter back for redetermination by the tribunal.

[53] With respect to the "administrative errors", it appears that in November 2009, the applicant's application for LTDB was denied by Sun Life because the time limit to apply had expired and it was unsupported by sufficient medical information. The applicant appealed Sun Life's decision in April 2010. On August 14, 2012, the applicant was informed by Sun Life that no response to her appeal had been provided by her employer. Be that as it may, the applicant's LTDB application was ultimately approved. This renders that part of the applicant's complaint certainly academic today.

[54] It is also important to underline that this is not a case of differential treatment based on refusal to accommodate, because of ones disability. The applicant never returned to work and apparently does not wish to work again for the respondent, a point which was well taken by respondent's counsel in his exchanges with the tribunal. Apart from damages the applicant would wish to have as a result of the mental distress, she alleges to have suffered, counsel for the applicant was unable to indicate to the Court what other remedies the applicant would seek from the tribunal.

[55] I was also informed by counsel that the applicant's employment was terminated in November 2012, apparently for "frustration of contract", and that the legality of her termination of employment is currently before the Supreme Court of British Columbia, as well as the respondent's claim to recover the sums of money allegedly overpaid ($78,000) to the applicant.

[56] Even assuming that reviewable errors were made by the tribunal, the factors noted above would justify this Court not to exercise its discretion to set aside the impugned decision and to refer the matter back for redetermination by the tribunal.

CONCLUSION

[57] For all these reasons, I would dismiss this application for judicial review. Despite the result is in favour of the respondent, this is an appropriate case, where in the exercise of my discretion and having considered all relevant factors, there should be no costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed without costs.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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