Federal Court  Cour fédérale

Date: 20200420

Docket: T-157-19

Citation: 2020 FC 535

Toronto, Ontario, April 20, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

KATHLEEN O'GRADY

Applicant

and

BELL CANADA

Respondent

JUDGMENT AND REASONS

[1] I have great empathy for the Applicant in this case, Ms. O'Grady, and admire her tremendous efforts in presenting her case to this Court as a self-represented litigant. Throughout the eleven years she has dedicated to this matter, Ms. O'Grady has demonstrated profound tenacity, intelligence, and determination in explaining the circumstances surrounding her dismissal. Ms. O'Grady sincerely believes that her dismissal from her management-level job was a direct result of a disability.

[2] Ultimately, however, when the decision of the Canadian Human Rights Tribunal [Tribunal] is considered from a legal perspective – in particular, in light of the constraints imposed by legislation and case law – this Court cannot interfere. Ms. O'Grady lost her job as part of a major company restructuring. There was simply no evidence that any other employee replaced her, or that Ms. O'Grady was treated differently or adversely vis-à-vis any other impacted worker on disability leave. These measures happened due to no fault of her own, but rather only due to a difficult corporate decision.

I. Background

[3] Ms. O'Grady has come to the Court seeking judicial review of a decision of the Tribunal. The Tribunal dismissed her complaint against the Respondent [Bell], her former employer, for alleged discrimination on the basis of a disability [Complaint]. While I have great sympathy for Ms. O'Grady, and the loss of her job as part of a massive Bell restructuring in 2008, I find the Tribunal issued a fair and reasonable decision, which therefore withstands this judicial review. My reasons follow.

[4] Given Ms. O'Grady's concerns about privacy expressed on numerous occasions both at the judicial review hearing before this Court and at the Tribunal, I will avoid any references to Ms. O'Grady's disability, including the names of the professionals involved in that regard. Furthermore, for consistency, I will also avoid naming employees who were mentioned in evidence or testified as witnesses before the Tribunal.

[5] Ms. O'Grady began working for Bell in 1990. She held various positions within the company and, in 2004, joined a new team, the Systems and Practices Group of Bell Systems and Technology [BST]. She began as a web specialist. Her role on the team evolved in 2005 – at least in part – when she became responsible for supporting the development, implementation and user-support of a web tool known as the "K-Store" (K standing for "knowledge"), a commercial product made by Microsoft.

[6] Ms. O'Grady went on disability leave on June 1, 2006, and began to receive short-term disability benefits on June 8, 2006, administered by an external provider (Manulife Financial). A year later, when the short-term disability leave ended, Ms. O'Grady's case was transferred to Bell's long-term disability [LTD] plan, administered by Bell's Disability Management Group [DMG]. DMG, overseen by a medical doctor and with a staff that included nurses and disability case managers, provided support and rehabilitation services for disabled workers, and ultimately facilitated any planned return to work, including for Ms. O'Grady.

[7] Therefore, DMG, as part of its role, regularly liaised with medical professionals, and obtained medical information about impacted employees. Testimony before the Tribunal from senior staff at DMG (including its head and Ms. O'Grady's case manager) was clear that all medical information was kept entirely confidential. The confidentiality extended to the employee's business group: no medical information was shared with any direct supervisors or senior management. Ms. O'Grady continued to receive LTD benefits until her termination in April 2009.

[8] From September 2007 to December 2008, as part of Bell's LTD program, Ms. O'Grady participated in an individualized rehabilitation program delivered by Banyan Work Health Solutions [Banyan], a firm hired and paid by Bell, which provided absence management including rehabilitation field visits and related services. In April 2008, Banyan contemplated Ms. O'Grady's gradual return to work in June 2008, and sought input from her physician. Ms. O'Grady's physician felt that would be too early, and recommended September 2008 instead.

[9] DMG then arranged for an independent medical assessment, seeking out the opinion of a specialist. In a report dated October 7, 2008, that specialist proposed a gradual return to work seven weeks later, namely towards the end of 2008.

[10] On October 29, 2008, DMG sent the independent assessment to Ms. O'Grady's physician for comment. DMG consistently followed up, including both with her physician and, when no response was forthcoming, with Ms. O'Grady herself, to try to get her to obtain a response from the physician. These attempts included a follow-up through Ms. O'Grady in mid-January, regarding a need to have the updated medical information required to support continued eligibility for LTD benefits which she wanted and that were originally set to end on January 31, 2009.

[11] Bell DMG contacted Ms. O'Grady in early February and again in March 2009 to advise that her physician had still not responded. The physician's response finally arrived on

March 5, 2009, stating that Ms. O'Grady could return to work on a gradual basis in May 2009, under a progressive plan with support and training.

[12] Meanwhile, during the course of Ms. O'Grady's LTD leave, Bell underwent a large-scale restructuring, coined the "100-day plan" [Plan] which involved the elimination of approximately 2,500 management positions (15% of its management), as well as a reduction of its executives from 17 down to 12 (about a 30% reduction). Bell's then-new Chief Executive Officer announced this Plan on July 11, 2008, with various public and employee communications which followed that summer, setting out the Plan's efficiency, competitiveness and cost-savings objectives.

[13] The evidence that emerged before the Tribunal, particularly through the then-Director of Human Resources [HR] revealed that the Plan's details, and particularly its targeted job cuts, were developed by a team within senior Bell ranks through a highly confidential and secure process that looked at the transformation objectives and areas to eliminate. This restructuring team focused only on management positions to be eliminated, not individuals. It was only after the positions to be eliminated were identified that a list was created matching employees to those positions.

[14] Unfortunately, Ms. O'Grady's position was amongst the 2,500 management positions eliminated through the Plan. In fact, her entire BST group was eliminated. The K-Store, which formed part of Ms. O'Grady's support functions as a web specialist, was transformed into a self-serve, online product. Of the former BST group, all of whom lost those jobs due to

elimination under the Plan, only two individuals remained in the employ of Bell, having applied for roles in other areas.

[15] As a result of the restructuring and disbandment of her BST group, there was no position for Ms. O'Grady to return to at Bell in early May, when she had been cleared for a gradual return to work by her physician. Bell requested a meeting with Ms. O'Grady for April 20, 2009. Ms. O'Grady expected that this meeting would be for the purpose of discussing her return to work. Instead, she learned at that meeting that her position had been eliminated in August 2008 as part of the Plan, that her employment was being terminated as a result, and that she would receive 6.23 months of full salary continuance until October 27, 2009 – longer than the three months typically afforded under Bell's guidelines, according to the testimony before the Tribunal. In addition, Ms. O'Grady's severance package included eight additional months' pay in lieu of notice.

[16] Ms. O'Grady did not accept the severance package or sign its release during the April 2009 termination meeting, but rather retained counsel, with whose assistance she negotiated an improved package that was finalized in February 2010, which provided a higher payout than the original Bell offer, as well as legal fees. Ms. O'Grady signed this settlement agreement, which included an acknowledgement purporting to release Bell from liability relating to her termination.

[17] In October 2010, Ms. O'Grady filed her Complaint with the Canadian Human Rights Commission [Commission]. In September 2011, the Commission decided that it would not deal

with the Complaint on the ground that it was “trivial, frivolous, vexatious or made in bad faith”, pursuant to paragraph 41(1)(d) of the *Canadian Human Rights Act*, RSC, 1958, c H-6 [Act] in light of the settlement agreement reached between the parties, which, as mentioned above, included a provision releasing Bell from liability. Ms. O’Grady challenged the Commission’s decision before this Court.

[18] Justice Kane allowed the judicial review of the Commission’s 2011 decision in *O’Grady v Bell Canada*, 2012 FC 1448 [*Bell I*]. She ruled that the Commission acted unreasonably when it found Ms. O’Grady’s Complaint “may be in bad faith”, because the Commission ignored her particular circumstances. In particular, the Court found that the Commission failed to assess the allegation that Ms. O’Grady had signed the release under mental or emotional duress. The Court therefore sent the Complaint back to the Commission for redetermination.

[19] As a result of the redetermination, the Commission decided to deal with the Complaint and appointed a conciliator to work towards settlement. Despite these efforts, the parties were unable to reach an agreement.

[20] In December 2014, the Commission once again dismissed the Complaint, this time pursuant to subparagraph 44(3)(b)(i) of the Act because, “having regard to all the circumstances of the complaint, an inquiry by a Tribunal is not warranted”.

[21] Ms. O’Grady challenged the 2014 decision before this Court as well. In the ensuing decision, *O’Grady v Bell Canada*, 2015 FC 1135 [*Bell II*], Justice Elliott held that the

Commission's second decision was unreasonable because its reasons – which largely reproduced Bell's submissions and failed to deal with Ms. O'Grady's position – lacked transparency and justification. As a result, the Complaint was again remitted to the Commission for redetermination.

[22] The upshot of this second redetermination was that in November 2015, the Commission referred the Complaint to the Tribunal. After an in-depth hearing consisting of eight full hearing days in March and May 2017, in addition to various case management calls in both 2016 and 2017, the Tribunal dismissed the Complaint in its December 2018 decision [Decision]. Ms. O'Grady now challenges that Decision before this Court.

II. Decision Under Review

[23] The Tribunal found that Ms. O'Grady had not discharged her burden of establishing a *prima facie* case of discrimination, and that while Ms. O'Grady held a sincere belief that her dismissal resulted from her disability, this belief was insufficient to establish that a discriminatory practice occurred.

[24] The Tribunal noted that in order to establish a *prima facie* case of discrimination, a complainant must establish a link between the impugned act and a ground of discrimination. Being terminated while on disability leave does not, by itself, establish such a link. The Tribunal also found no merit in Ms. O'Grady's argument that she was subject to adverse treatment by Bell in connection with her disability by having been terminated while on disability leave, and only learning about the termination when she was deemed ready for a gradual return to work.

[25] The Tribunal acknowledged the argument that a *prima facie* case may be established where an equally or less qualified employee subsequently obtains the position. However, the Tribunal Member [Member] noted that Ms. O'Grady's position had been abolished, and that no other employee had been hired for the position, which had indeed been eliminated along with the rest of the BST Systems and Practices Group, as well as the K-Store.

[26] The Tribunal also rejected Ms. O'Grady's argument that Bell was under a duty to accommodate her disability in the workplace. The Member noted that the situation did not trigger Bell's duty to accommodate, as a *prima facie* case of discrimination had not first been established. The Tribunal further disagreed with Ms. O'Grady in stating "that the burden of proof does not shift to the Respondent at any time in the determination of *prima facie* discrimination" (Decision at para 68).

[27] In short, the Tribunal found that Ms. O'Grady failed to prove, by way of documentary evidence or oral testimony, any connection between her termination and her disability, concluding that "[h]er dismissal was clearly unrelated to her disability, but was rather only the result of [Bell's] corporate restructuring" (Decision at para 61). The Tribunal noted that had Ms. O'Grady not suffered from a disability, Bell would still have terminated her employment.

[28] In light of its above findings, the Tribunal found it unnecessary to address the remedies sought by Ms. O'Grady.

III. Issues and Standard of Review

[29] Ms. O'Grady raises several issues in her Memorandum of Fact and Law [Memorandum] which focus on Bell's decision to terminate her employment and the manner in which it did so. However, as noted by Justice Kane in *Bell I*, this Court's jurisdiction on judicial review is limited to the decision under review – in this case, the Tribunal's Decision to dismiss the Complaint. Ultimately, Ms. O'Grady's submissions can be summarized into two distinct arguments. First, the Tribunal erred by unreasonably (i) focusing primarily on section 7(a) of the Act and insufficiently considering her arguments under section 7(b) of the Act relating to "adverse differential treatment", and (ii) ignoring important pieces of evidence. Second, Ms. O'Grady alleges that the Tribunal breached her rights to procedural fairness.

[30] This judicial review arose in the context of *Dunsmuir v New Brunswick*, 2008 SCC 9. However, it is to be decided under the new analytical framework of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Despite the *Vavilov* decision, the essential standard of reasonableness as to the substance of the Decision and correctness for procedural fairness remain unchanged in the human rights context (*Ennis v Canada (Attorney General)*, 2020 FC 43 at para 18 [*Ennis*]). In fact, this Court's decisions relevant to the issues here at stake are binding authority and have not been altered by *Vavilov*, except to emphasize that reasonableness review is to be a vigorous review.

[31] Where a Tribunal decision involves interpreting its home statute or making a determination of mixed fact and law, the Court reviews the decision on the more deferential standard of reasonableness (*Adamson v Canada (Human Rights Commission)*, 2015 FCA 153 at

para 30, leave to appeal to the SCC refused, 36630 (10 March 2016)). This deference is owed because of the Tribunal's considerable and specialized expertise (*Keith v Canada (Human Rights Commission)*, 2018 FC 645 at para 58 [*Keith*], affirmed 2019 FCA 251, application for leave to appeal to SCC filed). Simply put, this Court must consider the Tribunal's decision from a "posture of restraint" (*Vavilov* at para 24).

[32] The central question addressed by the Tribunal in this case – whether a *prima facie* case of discrimination had been established – is a question of mixed fact and law. This Court's role on judicial review is thus limited to a deferential review of the expert tribunal's conclusions regarding *prima facie* discrimination, in determining whether the Tribunal's Decision was reasonable (*Canada (Attorney General) v Bodnar*, 2017 FCA 171 at paras 21 and 25 [*Bodnar*], citing *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 at para 27 [*Elk Valley*]). This Court's assessment of the Decision must begin with the Tribunal's reasons (*Gunn v Halifax Employers Association*, 2020 FC 344 at para 6, citing *Vavilov* at para 84) and these reasons must be examined "with respectful attention, seeking to understand the reasoning process followed by the decision maker to arrive at a conclusion" (*Desgranges v Canada (Administrative Tribunals Support Services*), 2020 FC 315 at para 27).

[33] Ultimately, a reasonable decision, in light of *Vavilov*, must bear the hallmarks of reasonableness — justification, transparency and intelligibility — and must be justified in relation to the relevant factual and legal constraints that bear on the decision (para 99).

[34] Finally, the standard of review applicable to issues of procedural fairness is correctness in the Canadian Human Rights Tribunal context (*Keith v Canada (Human Rights Commission)*, 2019 FCA 251 at para 6, application for leave to appeal to SCC filed), which *Vavilov* did not impact (see, for instance, *Ennis* at para 18). While Ms. O'Grady appeared to concede her procedural fairness-based arguments raised in her factum during the course of the judicial review hearing, for the sake of completeness of these Reasons and for her benefit, I will comment on the fairness of the Tribunal's proceedings and Decision in the last part of these Reasons.

IV. Analysis

[35] I will begin with Ms. O'Grady's arguments relating to the unreasonableness of the Decision.

> *1. (i) Was the Decision unreasonable with respect to the finding of no prima facie discrimination or adverse differential treatment?*

[36] Section 7 of the Act explains that it is a discriminatory practice to directly or indirectly, on a prohibited ground of discrimination, (a) refuse to employ or continue to employ any individual, or (b) in the course of employment, differentiate adversely in relation to an employee (this and all other relevant statutory provisions are contained in Appendix A to this Judgment).

[37] Ms. O'Grady argues that the Tribunal ignored her arguments under section 7(b), namely that she suffered adverse differential treatment during the termination process, and focused instead on the section 7(a) argument, i.e. that the termination itself was discriminatory.

[38] Specifically, Ms. O'Grady claims to have suffered adverse differential treatment because of her disability, pointing in particular to Bell's practice not to advise employees on LTD benefits of the reorganization until they were declared fit to return to work. In her view, this policy placed Bell's disabled employees at a disadvantage in relation to other employees in obtaining internal employment with Bell following the restructuring. Ms. O'Grady claims that colleagues who were equally or less qualified than her and who were not on disability leave obtained internal positions during her absence as they learned about the termination in the summer of 2008 after the announcement of the 100-day plan, rather than several months later when she did in the context of what she believed to be her "return to work" interview.

[39] I acknowledge that in its Decision, the Tribunal devoted much of its analysis to determining whether the termination itself was discriminatory pursuant to section 7(a), rather than the manner of termination pursuant to section 7(b) of the Act. Indeed, I find the Tribunal's focus on section 7(a) to have been entirely warranted, as it was reflective of and proportionate to the focus and tenor of the eight days of Tribunal hearing, including a great majority of the parties' presentations and submissions, including the focus of both the examination and cross-examination of the numerous witnesses called.

[40] The Member thus cannot be faulted for providing reasons responding to the key points raised in regard to the underlying reason for the termination, and focusing on whether Ms. O'Grady had established a *prima facie* case of discrimination, be that under either arm of section 7 – namely in (a) her dismissal, or (b) any differential treatment.

[41] I agree with the Member's ultimate conclusion that "[a]s a result of the 100-day plan, her position was abolished, and no other employee was hired for the position" (at para 70), and that Ms. O'Grady thus demonstrated no *prima facie* evidence of discrimination in her dismissal.

[42] Regarding the section 7(b) allegation of discrimination based on adverse differential treatment, I find that contrary to Ms. O'Grady's arguments, the Tribunal did not ignore her submissions on this second ground of discrimination under the Act. Rather, the Tribunal framed its analysis under section 7 by considering both section 7(a) and section 7(b) at the outset of its analysis in the following section of its Decision:

> [51] The Tribunal was satisfied that Ms. O'Grady truly believed that her dismissal was directly a result of her [...] disability, the existence of which was not challenged. However in the Tribunal's opinion and as indicated above, evidence engaging a prohibited ground is not sufficient on its own to establish her *prima facie* case of discrimination.
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> [52] Moreover, given the standard of proof in matters of discrimination, a complainant's perception or belief is not sufficient alone to establish a discriminatory practice.
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> …
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> [55] Evidence of an employee's termination while on disability leave does not in itself establish the requisite connection between the loss of employment and the ground of disability.
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> [Emphasis added; footnote and reference to disability removed.]

[43] The Tribunal then explicitly addressed section 7(b) (adverse differential treatment) further on in its Decision:

> [66] The Complainant, in her final argument, suggests that her lack of knowledge of the 100-day plan and the dismissal of affected employees resulted from adverse treatment by Bell in connection with her [...] disability. I find no merit to this position.

> [67] Notwithstanding the belief that her termination was as a result of her disability, the Complainant did not present the Tribunal with any creditable evidence that this was the case. As a result, I do not find that the Complainant was successful in presenting a *prima facie* case that her dismissal was connected to a prohibited ground of discrimination, and in particular, her disability.
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> [68] The Complainant argues that upon presentation of a *prime facie* case of discrimination pursuant to the *Act*, the burden shifts to the Respondent to provide a credible and rational explanation demonstrating on a balance of probabilities that the impugned conduct or decision did not involve a discriminatory consideration. She also makes additional submissions on the obligations of the respective parties to prove or deny various elements on the balance of probabilities. I find, based on *Bombardier*, *supra*, that the burden of proof does not shift to the Respondent at any time in the determination of *prima facie* discrimination.
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> [69] The Complainant, also in final argument, states that a *prima facie* case is established, *inter alia*, where another employee, no better qualified for the position, subsequently obtained the position. As stated heretofore, at the time of Ms. O'Grady's dismissal she was responsible for supporting the K-Store, and in fact no other employee replaced her in this role.
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> [70] As a result of the 100-day plan, her position was abolished, and no other employee was hired for the position.
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> [Emphasis added; footnotes and reference to disability removed.]

[44] Thus, the Tribunal considered the section 7(b) argument and found it lacking in merit. *Vavilov* states that the principles of justification and transparency require that a decision maker's reasons meaningfully account for the central concerns raised by the parties. However, a reviewing court cannot expect administrative decision makers to respond to every argument or line of possible analysis, or to make an explicit finding on each constituent element (*Vavilov* at paras 127-128).

[45] Certainly, the Tribunal amply explained why it felt that no discrimination took place. It based its conclusion on the fact that the position was eliminated as part of a major company restructuring, and that no employee replaced Ms. O'Grady's role. This was an entirely reasonable conclusion for the reasons articulated by the Member, which were all in turn contained in the evidence, and on the record before the Court.

[46] As for Ms. O'Grady's contention that she suffered section 7(b) discrimination by being subject to adverse differential treatment by only being advised of her termination months after others in her group, I note that the evidence presented to the Tribunal showed that Bell took exactly the same approach to Ms. O'Grady's termination as it did to all other employees on disability leave at the time.

[47] When an allegation of discrimination is made, the complainant bears the burden of first proving a *prima facie* case of discrimination (*Ont Human Rights Comm v Simpsons-Sears*, [1985] 2 SCR 536 at para 28; *Elk Valley* at para 23). The complainant must demonstrate that (1) she has a special personal characteristic falling within a prohibited ground; (2) she experienced adverse differential treatment; and (3) her personal characteristic was a factor in the adverse differential treatment (*Moore v British Columbia (Education)*, 2012 SCC 61 at para 33; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para 35 [*Bombardier*]). While citing different sources, I find that the Member correctly identified the legal test.

[48] In terms of the relevant facts, uncontradicted witnesses who had occupied senior positions at the time testified before the Tribunal that Bell's standard practice during the Plan's implementation was to wait until employees on disability leave were declared fit to return to work prior to applying any administrative measure including termination of employment. The DMG head, as well as Ms. O'Grady's LTD case manager, testified that of the 2,500 eliminated positions, between 100 to 200 were on disability leave when their jobs were eliminated.

[49] This standard meeting procedure, according to the then-Director of HR, included the presence of a senior representative from the business unit and HR, along with an outplacement officer and with support personnel often on standby outside the room (such as a representative from the Employee Assistance Program). Such individuals were present at Ms. O'Grady's meeting.

[50] The evidence thus showed that Ms. O'Grady was treated in the same manner as other Bell employees who were on disability leave at the time of the restructuring. While the reasons behind this business choice were not explored before the Tribunal – nor should they have been for the Tribunal to second-guess – there are various humane reasons as to why Bell might choose to advise those on disability leave about the terminations once they had been deemed medically fit to return to work. After all, the testimony was that keeping individuals on LTD pay put the company to greater expense. This is because Bell funded those leaves, and associated rehabilitation services, including the significant cost of those services provided to Ms. O'Grady through Banyan.

[51] I thus find the Tribunal was reasonable in finding that Ms. O'Grady demonstrated no *prima facie* case of being treated differently or adversely with respect to others similarly situated. Indeed, paragraphs 66-70 of the Decision (reproduced above) which rejected adverse treatment under section 7(b) of the Act, must be read in the context of the paragraphs that immediately precede, and which reject the basic notion of any discrimination that linked Ms. O'Grady's termination to her disability or absence from work:

> [62] … the case of *Tutty v. Canada (Attorney General)*, 2011 FC 57… is similar to the present matter. An employee alleged discrimination when his position was eliminated due to restructuring and he was terminated on the eve of his return. The Honourable Mr. Justice Barnes stated at paragraph 25 that "[a]n employer's duty to accommodate does not, after all, require that it hold a legitimate corporate reorganization in abeyance pending the resolution of an affected employee's disability." At paragraph 26 he stated that… "[i]n the face of a legitimate business reorganization, Mr. Tutty had no special 'right' to be maintained in his existing position simply because the accommodation he was receiving had not yet run its course."
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> [63] I believe that the "duty to accommodate" is a very serious obligation, but it is not absolute, and the jurisprudence supports the position that it does not arise unless a complainant has first established a *prima facie* case of discrimination (See *Renaud, supra*; *Roopnarine, supra*, at para. 72).
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> [64] Notwithstanding the Tribunal's sympathy for the disability suffered by the Complainant, the Respondent cites *Hill v. Spectrum Telecom Group Ltd*. [2012 HRTO 133, para. 32] which stated that due to the restructuring of the employer having commenced prior to the employee's returning to work, there was no connection between the Respondent's restructuring and the Complainant's disability:
>
> > There is no evidence, save for the applicant's suspicions and the unfortunate timing, that the applicant's disability was a factor in the decision, directly or indirectly. The respondents started the restructuring before the applicant was declared fit to return to work.

> [65] Upon reading the cases cited by the Respondent, it is clear that there must be a link or connection between the dismissal and the disability. In the case before me, there is no link between the reasons for Ms. O'Grady's termination and her disability. Had she not suffered from a disability, her employment would have been terminated in any event. Cases have held that even where the duty to accommodate is engaged, it does not require an employer to maintain an existing position for an employee while it undergoes reorganization. Moreover, a restructuring employer may even replace the employee, so long as its decision is untainted by discriminatory considerations [*Filion v. Capers Restaurant*, 2010 HRTO 264, paras. 26-27; *Brosnan v. Bank of Montreal*, 2015 FC 925, paras. 25-26].

[52] These conclusions are all reasonable, and they provide an accurate summary of the law that the termination of employment while an employee is on disability leave does not lead to a presumption of discrimination (see also *Kerr v Bell Canada*, 2007 FC 1230 at para 18, as cited by the Member at para 56 of the Decision).

[53] One of the essential pre-requisites for a *prima facie* case of discrimination is proof of adverse impact by a claimant (*Bodnar* at para 26). The Tribunal reasonably held that this had not been demonstrated to the requisite standard of proof, namely a balance of probabilities (*Bombardier* at para 65), in that there was no link between the restructuring and Ms. O'Grady's disability.

[54] Based on the evidence before the Tribunal, I find that it was entirely reasonable for the Member to find that no *prima facie* case of discrimination was established on the basis of either Ms. O'Grady's termination, or adverse differential treatment in only being advised of the termination after having been deemed fit to return to work.

[55] To conclude on Ms. O'Grady's first issue – that the Decision was unreasonable in its treatment of discrimination – a reviewing court must consider whether the Decision as a whole is reasonable, and "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov* at para 90). The reasons should be read holistically and contextually, together with the outcome, in order to understand "the basis on which a decision was made" (*Vavilov* at para 97). Here, the Tribunal justifiably found no discrimination on either ground of section 7 of the Act. The Decision and the explanation it provided in both its legal analysis and findings were anchored tightly to the evidence provided to the Tribunal. The Member's rationale was entirely reasonable in the relevant legal and factual context.

1. (ii) Did the Tribunal unreasonably ignore important evidence?

[56] Ms. O'Grady also argues that the Tribunal ignored important pieces of evidence, and based its Decision instead on what she refers to as "blatant lies". In particular, Ms. O'Grady contends that (1) the Tribunal ignored evidence that she did not "return to work" pursuant to Bell's LTD policy, so she could not be terminated while on LTD benefits; and (2) in determining that her position had been abolished, the Tribunal ignored evidence that her position was more broadly that of a web specialist, and not limited to managing the K-Store.

[57] I note that Ms. O'Grady presented voluminous documentation in her Book of Documents, and took the Member through these documents in a highly systematic fashion. The Member listened patiently through much of the first two hearing days as Ms. O'Grady reviewed this evidence tab-by-tab. She once again reviewed a significant amount of her evidence in closing

submissions. Again, the Member displayed great patience, advising Ms. O'Grady to take all the time she needed, and asked questions where he required clarification.

[58] However, much of this evidence was simply not germane to the findings of the Tribunal. Therefore, it did not need to be addressed in the reasons. Indeed, "[t]he reasons for a decision are not a summary of the hearing itself"; it is not necessary to refer to irrelevant evidence (*Birkett v Canada (Human Rights Commission)*, 2007 FC 428 at para 31, affirmed 2008 FCA 127). A tribunal is presumed to have considered all of the evidence before it, and need not mention each piece of evidence in its reasons (*Gosal v Canada (Attorney General)*, 2011 FC 570 at para 60 [*Gosal*]). That said, if an important piece of evidence is not mentioned, the reviewing court may be more inclined to infer that the decision was unreasonably made without regard to the evidence (*Gosal* at para 60, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 (FC) at paras 14-17).

[59] Here, I do not agree that the Tribunal ignored Ms. O'Grady's evidence regarding her "return to work", pursuant to Bell's LTD policy, for the proposition that she could not be terminated while on LTD benefits. This is because the Tribunal did not make any finding of whether or not Ms. O'Grady "returned to work" under Bell's LTD policy. Rather, the Member simply found that her position had been eliminated, so there was no position to which to return. The LTD return to work policy thus had no relevance. The Member had no reason to address that evidence.

[60] I also cannot agree that in determining Ms. O'Grady's position had been abolished, the Tribunal ignored evidence that her position was more broadly that of a web specialist, and thus not limited to managing the K-Store. I further find no merit to the contention that the Member based his decision on "blatant lies", which Ms. O'Grady alleges in numerous instances in her Memorandum. I note there was evidence before the Tribunal, including from the Director of Ms. O'Grady's BST group who hired her as a web specialist, that she advised Ms. O'Grady at the time of her hire that roles in the group would likely evolve in time, and that Ms. O'Grady's did when a significant portion of her responsibilities changed to managing the K-Store.

[61] Back to the Decision, I note that the Member neither made any factual finding regarding the division of Ms. O'Grady's work, nor did he find that her role was exclusively limited to managing the K-Store. Indeed, I read his Decision to implicitly acknowledge that Ms. O'Grady had other responsibilities when he stated: "Her duties related to implementing and developing a K-store were not transferred to any other employee" (Decision at para 57). Indeed, the evidence provided at the Tribunal hearing, including from the then-BST group's Director, was that the K-Store became a "self-serve" product, i.e. it no longer required Ms. O'Grady or anyone else in her erstwhile team to manage it.

[62] Ultimately, the evidence that Ms. O'Grady claims was ignored was not inconsistent with the Tribunal's central finding, namely that she did not establish a *prima facie* basis of discrimination. Ms. O'Grady has thus not demonstrated any reviewable error in the Member's failure to mention any particular evidence, or that the Tribunal made its Decision without regard to the evidence in general.

[63] I acknowledge that the Tribunal primarily referred to the Respondent's Book of Documents. That was simply the evidence that the Tribunal found more compelling to support its findings regarding the nature of the termination. The crux of the Decision involved the assessment by this specialized Tribunal of the evidence and testimony presented to it. This Court owes deference to that assessment, including the weight accorded to the evidence – an exercise which lies at the heart of the Tribunal's mandate (*Keith* at para 90; *Abenakis of Odanak Council v O'Bomsawin*, 2018 FC 112 at para 36).

[64] Here, the Member concluded that "Ms. O'Grady failed to provide documentary evidence or oral testimony sufficient to persuade the Tribunal that her dismissal was related to her disability" (Decision at para 60). Absent a lack of justification for that weighing and assessment of the evidence, which I do not find occurred in this case, this Court must give deference to the Member's transparent and intelligible justification for his conclusion.

2. Did the Tribunal Commit Procedural Fairness Errors?

[65] At the hearing of this judicial review, Ms. O'Grady made preliminary comments regarding the conduct of the Tribunal hearing, raising concerns that she felt breached her rights to procedural fairness.

[66] First, she felt that certain documents containing sensitive medical information were improperly disclosed. Ms. O'Grady was assured that documents had remained confidential during the course of the Tribunal hearing. However, when the Tribunal provided the certified tribunal record to this Court, certain sensitive documents were included. I have no objection to

issuing the order, particularly in light of the consent of the Respondent, and the nature of these documents, which will remain confidential (see list at Appendix B to this Judgment).

[67] Second, Ms. O'Grady raised procedural concerns about what transpired during the Tribunal hearing. She argued that the Member had not accommodated her medical needs, rendering the process unfair. However, after further consideration, she resiled from the argument, conceding that the concern arose due to "others" in the hearing room rather than the Member. Again, I would agree with Ms. O'Grady, after listening to the recording in its entirety, that the Member provided her with every opportunity to take health breaks as needed.

[68] This leaves only one procedural fairness argument which I will now address. At several instances throughout her Memorandum, Ms. O'Grady faults the Tribunal for demonstrating an "appearance of bias" towards Bell. For example, she claims that by adopting Bell's statement that she was "one of 2,500 Bell employees" whose employment was terminated, the Tribunal begins its Decision with a bias against her argument that she was treated differently from the other terminated employees. Ms. O'Grady further submits that the Tribunal unreasonably believes Bell's "verbal testimony" over her "written concrete" evidence. Once again, at the judicial review, Ms. O'Grady conceded that the Member was not biased.

[69] For Ms. O'Grady's benefit and to allay any post-hearing concerns that she may have had regarding this concession, I will comment on why I agree with her that I do not find a reasonable apprehension of bias.

[70] First, as already mentioned above, the Member showed great even-handedness throughout the hearing, with no display of partiality towards either side. For instance, he made various procedural rulings during the course of the hearing, coming down at times on the side of the complainant, Ms. O'Grady, and at others, on the side of the Respondent, Bell. At various junctions when Ms. O'Grady objected to the fairness of the cross-examination, the Member addressed her concerns directly as they arose, and explained the hearing process to her as a lay litigant, including the role of Bell's counsel presenting its defence on several occasions. Indeed, the Member showed great compassion and patience to Ms. O'Grady, and accommodated her needs at numerous junctures throughout. He provided all the time Ms. O'Grady needed for her presentation of evidence, examination and cross-examination of witnesses, and submissions.

[71] I note that in *Bell II*, in addressing Ms. O'Grady's arguments of bias, Justice Elliott reframed these procedural fairness allegations as an argument that the decision lacked justification, transparency and intelligibility. Justice Elliott held that the Commission's decision was unreasonable, as it largely mirrored Bell's submissions – but in that decision, she noted that only two sentences in the Commission's decision had not been written by the Respondent *(Bell II* at para 25).

[72] Here, I again feel that when referring to "bias", Ms. O'Grady really means that she finds the Decision unreasonable. For instance, Ms. O'Grady claims that the Tribunal was "biased" in refusing her evidence regarding Bell's initiatives, while allowing Bell to obtain her health records (Memorandum at para 21). Without wading into the merits of these claims, the Member excluded the Bell evidence in question, which arose many years after the complaint, while

allowing in the health records because the Applicant had already consented to provide them. The Member decided reasonably in both instances, as he did in all other aspects of the Decision.

V. Costs

[73] In terms of costs, at the conclusion of the judicial review, I pointed out that I found Bell to have taken a very gracious position in not seeking costs. Bell's counsel took this position despite the fact that their case clearly took a great amount of time to prepare, given the breadth of the Tribunal hearing and the record. I find it especially considerate given the amount of the criticism directed at Bell and its counsel both during the course of the tribunal hearings, and before the Court in this judicial review. Having said that, as no costs were sought, none will be ordered.

VI. Conclusion

[74] While this Court sent two previous Commission decisions on Ms. O'Grady's matter back for redetermination, those applications involved very different processes and considerations than the ones raised before me. Indeed, in each of those two judicial reviews, Ms. O'Grady had not yet had the opportunity to present her evidence and submissions at an oral hearing of her Complaint. She has now had that opportunity before the Tribunal. Ms. O'Grady pleaded her case with deep conviction during each of the eight days of the hearing, which I have made a point to listen to completely. I find that the Tribunal came to its ultimate conclusion based on the law and precedent.

[75] Therefore, viewed with the relevant legal constraints in mind, the Decision is both fair and reasonable. Like any other matter, I am obliged to decide this case in accordance with the rule of law, and in keeping with the governing legal principles. I therefore have no choice, based on all of that which I have set out above, but to dismiss this application for judicial review.

JUDGMENT in T-157-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The materials listed at Appendix B to this Judgment will remain confidential.

3. There is no award as to costs.

"Alan S. Diner"
Judge

APPENDIX A

Canadian Human Rights Act, RSC, 1985, c H-6	*Loi canadienne sur les droits de la personne*, LRC (1985), ch H-6
Discriminatory Practices	Actes discriminatoires
Employment	Emploi
7 It is a discriminatory practice, directly or indirectly,	7 Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	a) de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee,	b) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	
Commission to deal with complaint	Irrecevabilité
41 (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that	41 (1) Sous réserve de l'article 40, la Commission statue sur toute plainte dont elle est saisie à moins qu'elle estime celle-ci irrecevable pour un des motifs suivants :
…	…
(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or …	d) la plainte est frivole, vexatoire ou entachée de mauvaise foi;…

Report

44 (1) An investigator shall, as soon as possible after the conclusion of an investigation, submit to the Commission a report of the findings of the investigation.

Rapport

44 (1) L’enquêteur présente son rapport à la Commission le plus tôt possible après la fin de l’enquête.

Action on receipt of report

(2) If, on receipt of a report referred to in subsection (1), the Commission is satisfied

(a) that the complainant ought to exhaust grievance or review procedures otherwise reasonably available, or

(b) that the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under an Act of Parliament other than this Act,

it shall refer the complainant to the appropriate authority.

Suite à donner au rapport

(2) La Commission renvoie le plaignant à l’autorité compétente dans les cas où, sur réception du rapport, elle est convaincue, selon le cas :

a) que le plaignant devrait épuiser les recours internes ou les procédures d’appel ou de règlement des griefs qui lui sont normalement ouverts;

b) que la plainte pourrait avantageusement être instruite, dans un premier temps ou à toutes les étapes, selon des procédures prévues par une autre loi fédérale.

Idem

(3) On receipt of a report referred to in subsection (1), the Commission

(a) may request the Chairperson of the Tribunal to institute an inquiry under section 49 into the complaint to which the report relates if the Commission is satisfied

Idem

(3) Sur réception du rapport d’enquête prévu au paragraphe (1), la Commission :

a) peut demander au président du Tribunal de désigner, en application de l’article 49, un membre pour instruire la plainte visée par le rapport, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is warranted, and

(i) d'une part, que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci est justifié,

(ii) that the complaint to which the report relates should not be referred pursuant to subsection (2) or dismissed on any ground mentioned in paragraphs 41(c) to (e); or

(ii) d'autre part, qu'il n'y a pas lieu de renvoyer la plainte en application du paragraphe (2) ni de la rejeter aux termes des alinéas 41c) à e);

(b) shall dismiss the complaint to which the report relates if it is satisfied

b) rejette la plainte, si elle est convaincue :

(i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, or

(i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-ci n'est pas justifié,

(ii) that the complaint should be dismissed on any ground mentioned in paragraphs 41(c) to (e).

(ii) soit que la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 41c) à e).

APPENDIX B

The following documents will be treated as confidential:

RECORD OF RESPONDENT BELL CANADA		
CONFIDENTIAL		
VOLUME of 11	TAB	PAGE (S)
4	3	807 - 844
** 5	30	1169 . 1178
** 5	32	1180 - 1192
7	10	2003 -2013
* 7	12	2030 - 2031 PP- 67-69
8	59	2322 - 2324
8	61	2400 - 2401 :
8	6126	*Paragraph 26*
8	6127	*Paragraph 27*
8	*6128*	*Paragraph 28*

8	78	2608 - 2635
8	81	2650 - 2654
8	82	2655 - 2657
8	83	2658 - 2661
8	84	2662 - 2665
8	85	2666 - 2669
8	86	2670 - 2674
8	87	2675 - 2680
8	88	2681 - 2685
8	89	2686 - 2690
8	90	2691 - 2694
10	140	3802 -3805
10	142	3808 – 3812
10	144	3816 - 3820
10	145	3821 – 3826
10	147	3830 - 3832
10	148	3833 - 3837
10	149	3838 - 3844
10	150	3845 -3848
10	151	3849 - 3851
10	152	3852 - 3855
10	153	3856 - 3859
10	154	3860 - 3864
10	155	3865 - 3869
10	156	3870 - 3875

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-157-19
STYLE OF CAUSE:	KATHLEEN O'GRADY V BELL CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 3, 2019
JUDGMENT AND REASONS:	DINER J.
DATED:	APRIL 20, 2020

APPEARANCES:

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Maryse Tremblay	FOR THE RESPONDENT

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