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IN THE MATTER OF THE *HUMAN RIGHTS CODE*
R.S.B.C. 1996, c. 210 (as amended)

AND IN THE MATTER of a complaint before
the British Columbia Human Rights Tribunal

B E T W E E N:

Cathy Dumas

COMPLAINANT

A N D:

Simba Technologies Inc.

RESPONDENT

REASONS FOR DECISION
APPLICATION TO DISMIS: Section 27(1)(b) and (c)

Tribunal Member:

Walter Rilkoff

On her own behalf:

Cathy Dumas

Counsel for the Respondent:

Richard E.K. Truman and
Nazeer T. Mitha

INTRODUCTION

[1] Cathy Dumas has filed a complaint alleging that her former employer, Simba Technologies Inc. (“Simba”) terminated her employment in whole or in part because she has a mental or physical disability.

[2] Ms. Dumas says that Simba failed to respond to a request for accommodation for her disabilities and then terminated her employment.

[3] Simba denies that it discriminated against Ms. Dumas and has, in addition, applied to have her complaint dismissed pursuant to ss. 27(1)(b) and (c) of the *Human Rights Code*. The relevant parts of s. 27(1) state:

(1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:

(b) the acts or omissions alleged in the complaint or that part of the complaint do not contravene this Code;

(c) there is no reasonable prospect that the complaint will succeed.

[4] This decision deals with Simba’s application. While I have reviewed all of the submissions, I only refer to the submissions relevant to this decision. I make no findings of fact on the merits of the complaint.

BACKGROUND

[5] Simba is a software company located in Vancouver.

[6] Ms. Dumas commenced working for Simba in May, 2012 in the position of Director of Program Management, Analytics Products. This was a full-time managerial position.

[7] The Analytics Business deals with “interfacing with databases to analyze, rather than simply query data”.

[8] Ms. Dumas’ job duties were to bring customer requirements to the Engineering department and to assist that department’s understanding of those requirements; to

explain and promote sales of existing products, as built, to customers; and to oversee Engineering's execution to ensure that products were responsive to customer requests.

[9] Ms. Dumas reported to the Vice-President of Engineering, who at the time of her dismissal was the Vice President of Engineering and Chief Operating Officer (the "COO"). The COO is also the head of Simba's Human Resources Department.

[10] Ms. Dumas apparently suffers from what she describes as a "cognitive illness" and has done so since before being employed by Simba. That was as much as she shared with the COO until responding to Simba's application to dismiss.

[11] Suffice it to say that, for the purposes of this application, I am prepared to accept that Ms. Dumas at all relevant times suffered from a mental disability.

[12] In November 2013, as a result of her mental disability, Ms. Dumas asked for a modified working arrangement. The modified work arrangement was worked out between a Human Resources Generalist employed by Simba, and Ms. Dumas' doctor.

[13] Apparently the arrangement involved a revised work schedule, an off-site work location paid for by Simba, and alteration of her work tasks to match her work location.

[14] The accommodation set in place was to be re-evaluated in January 2014 to see if Ms. Dumas was able to return to her full-time non-modified duties.

[15] In late November, 2013, Ms. Dumas fractured her left elbow and her pelvis in a bicycle accident and, as a result, she was off work and on Short Term Disability benefits until the beginning of February, 2014.

[16] Ms. Dumas says that the bicycle accident exacerbated her mental disability.

[17] In early February 2014, Ms. Dumas began a graduated return to work commencing at 16 hours per week and increasing to full-time employment by the beginning of April 2014.

[18] She continued to require time away from work to attend at rehabilitation and medical appointments, which Simba provided.

[19] Unfortunately, on April 9, 2014, Ms. Dumas' husband was hospitalized and required to undergo surgery. Complications arose and Ms. Dumas' husband was not

discharged until the latter part of April, 2014. Ms. Dumas requested, and was provided with, flexible working hours during this period.

[20] Ms. Dumas says that her husband's illness exacerbated her mental disability.

[21] Simba employees are evaluated twice per year. Ms. Dumas received a regularly-scheduled performance review from the COO on May 20, 2014, covering the period from November 1, 2013 to April 30, 2014.

[22] Overall, Ms. Dumas was scored as "Beneath expectations". The performance review documented behaviours such as negative thinking, rushing, and starting projects but not finishing them.

[23] Ms. Dumas says that these behaviours are symptoms of her mental disability.

[24] Ms. Dumas says that, in the standard meeting with the COO to follow up on her review, she told the COO it was obvious that she was not capable of performing her job duties at that time and that she had returned to work too soon. The COO advised her that she had almost been fired during the period covered by the review.

[25] Ms. Dumas saw her doctor who she says confirmed that the behaviours covered in her performance review were symptoms of her illness and told her to ask Human Resources to remove the performance review from her employment file. The medical basis for this purported advice is not provided.

[26] Ms. Dumas says that, on May 30, 2014, she passed her doctor's information and advice on to the Human Resources Generalist and asked to have her performance review removed from her employee file. It appears that Ms. Dumas and her doctor felt that the performance review should be removed from her file and not used in any future decisions. She says that the Human Resources Generalist told her she would investigate to see if she could do so. The Generalist says that she told Ms. Dumas that the performance review could not be removed.

[27] In an email written shortly after their meeting, the Human Resources Generalist says that Ms. Dumas told her that Ms. Dumas' doctor could identify how her behaviours were linked to health issues. It appears, according to the Human Resources Generalist, that Ms. Dumas asked if a medical opinion could be placed on her file setting out which

performance scores could not be used, presumably because they were a result of her mental disability.

[28] Ms. Dumas also says that she asked the Human Resources Generalist, at this meeting, for a set of duties that she could perform and said that she was open to the same or another job. She says that she never heard back from the Human Resources Generalist.

[29] The Human Resources Generalist says that Ms. Dumas wanted to know how her job could be restructured or whether she could get a new job or receive no job. If she was to receive no job, then the Generalist said that Ms. Dumas wanted to emphasize that she was not given proper job modification duties/accommodations upon her return.

[30] Curiously, Ms. Dumas would not deal with the COO but only with the Human Resources Generalist, who, like Ms. Dumas, reported to the COO. Ms. Dumas says that her doctor would work with the Generalist but not the COO for confidentiality reasons related to the health issues.

[31] Parallel to the issues that Ms. Dumas was experiencing with her work performance were issues related to the performance of the Analytics department.

[32] The Analytics department had not been profitable for some time, and it was not expected that it would be profitable for another year or more.

[33] Discussion was going on within Simba whether to continue to invest in that part of the business or for Simba to cut its losses.

[34] In mid-May 2014, Simba's Analytics Business had three managers who comprised its leadership team: the Complainant as Director of Program Management, the Development Manager, and the Technical Architect (the "Analytics Management Team").

[35] In mid-April 2014, Ms. Dumas prepared an analysis of the Analytics business which showed that losses in 2014 showed a negative margin of more than 23% projected to double the following year to a negative margin of almost 46%. Only one of six products in the Analytics Business was expected to turn a profit in either the 2014 or 2015 financial years.

[36] The COO was committed to addressing the issue before the end of Simba's financial year on June 30. To this end, he sought the input of the Analytics Leadership Team.

[37] The Analytics Leadership Team, together with the Engineering Management Team, met to discuss the future of the Analytics Business. Ms. Dumas lead the discussion on behalf of the Analytics Leadership Team.

[38] Among those recommendations put forward, was reducing Ms. Dumas' time in Analytics to 50% and redeploying the remainder of her time to Research and Development.

[39] In mid-May, the COO decided to reduce the number of managers in Analytics and, to that end, terminated the employment of the Development Manager.

[40] In early June 2014, Simba's senior management found that one of their major customers had indicated its intention to rely less on Simba Analytics products and more on its own "in-house" products.

[41] At about the same time, Simba's Chief Executive Officer ("CEO") gave the COO the following suggestion:

We have already let go of [the Development Manager]. It makes sense to reduce the [Analytics] team significantly and re-deploy resources. Going forward, per our discussions, I think now is the time to act. Cathy's spreadsheet shows us losing \$700,000 in FY2015. My suggestion is we eliminate the architect and program management functions on [Analytics]... According to Cathy's spreadsheet, if we can get this down to 6-8 people, at least we are not losing money anymore.

[42] Cathy is Ms. Dumas.

[43] The COO, following on the CEO's advice, made a recommendation to put the Analytics Business into "survival mode". He decided to eliminate the two remaining Leadership Team positions, including that of Ms. Dumas.

[44] Four other positions were also eliminated, although it appears that at least three of these involved reassignment to other parts of Simba's business.

[45] On May 30, 2014, Ms. Dumas had requested accommodation, including being transferred to another position at Simba. However, neither Ms. Dumas nor the Technical Architect were offered other positions.

[46] The COO says that he did not offer Ms. Dumas these other positions that were offered to other employees from the Analytics Business or vacant positions because, in his view, there were no other suitable positions at Simba for someone with her skills, qualifications and experience, nor was it expected that there would be in the reasonably foreseeable future.

[47] The COO says that the employees who were transferred to other positions were junior employees who were less costly and who had general skill sets which were broadly applicable to general business units.

[48] In mid-April, the Engineering and Analytics leadership teams had proposed that Ms. Dumas lead Team Microsoft in light of her prior experience working for that company. The COO says that he determined that Ms. Dumas was not suitable for that position because she lacked the requisite engineering management and account management skills, qualifications and experience.

[49] The COO says that he considered the recommendation to re-deploy Ms. Dumas to Research and Development but decided that she did not have the requisite skills for the position. In his second affidavit, the COO says that the available positions in Research and Development were in software engineering and technical roles for which he felt Ms. Dumas' skills, experience and qualifications were not suitable. There was no part-time position in Research and Development and the COO did not consider that it made business sense or would be efficient to create such a position.

[50] Ms. Dumas mentions a technical writer position and says that she was capable of performing those job duties. The COO says that the Technical Writer position was not suitable for someone with Ms. Dumas' skills, qualifications and experience. He does not say why, although he says the position was filled with a junior person at a lower salary.

[51] Ms. Dumas suggests that the Development Manager may have been terminated for performance issues but offers no evidence that could take this beyond speculation.

[52] Similarly, she says that the Technical Architect had performance issues but also says that he was not terminated during his performance review. Rather, she says he was told that there were no other suitable positions for him in the company so he was terminated. She says that she was not so told at her termination.

[53] Ms. Dumas was terminated on June 12, 2014. The letter of termination signed by the Chief Executive Officer includes this paragraph:

[The Human Resources Generalist] has informed me that you have had concerns about your most recent performance review. I want to assure you this played absolutely no part in our recent decision. Our decision was a business decision based on the continuing significant losses we are suffering in the [Analytics] part of our business - this is what you had raised to me on April 15, 2014. Also, to re-iterate this is not anything to do with your performance review and to help you transition to future opportunities, we are happy to provide a positive letter of reference.

[54] From an email exchange between the CEO and the COO, it appears that the COO opposed including this paragraph for the reason that her performance was not part of the decision to terminate.

ANALYSIS AND DECISION

Section 27(1)(b) – No Contravention of the Code

[55] The test of whether to dismiss a complaint pursuant to s. 27(1)(b) is whether a complainant has alleged facts which, if proven at a hearing, could establish a violation of the Code. See: *Stanley v. Prince George Construction Association*, 2009 BCHRT 9; *Bailey v. BC (Ministry of the Attorney General) (No. 2)*, 2006 BCHRT 168, at para. 12:

[56] Assessing an application to dismiss a complaint under s. 27(1)(b) does not involve a consideration of any alternative evidence or explanation which a respondent might put forward in the application to dismiss or in response to the complaint; *Vaughan v. B.C. (Ministry of Children and Family Development) and others*, 2007 BCHRT 17, para. 5; *Dhillon v. Hudd Distribution*, 2007 BCHRT 74, para. 11; *Borojevic v. Pearce and another*, 2014 BCHRT 21. The focus of the inquiry is solely on the allegations made by the complainant.

[57] The elements of a *prima facie* case were recently reaffirmed in *Moore v. British Columbia*, 2012 SCC 61, at para. 33:

- The complainant is a member of a protected class under the *Code*.
- The complainant suffered an adverse impact with respect to a protected area.
- The protected characteristic was a factor in the adverse impact.

[58] To establish a *prima facie* case, it is insufficient simply to allege membership in a protected group and an adverse impact. The complaint must allege facts which, if proven, could support a reasonable inference that there is a nexus between the two. See: *Ingram v. Workers Compensation Board and others*, 2003 BCHRT 57; *Stanley v. Prince George Construction Association*, *supra*, para. 17-19. Without the third element, there is no *prima facie* case.

[59] The threshold for alleging a *prima facie* case is necessarily low.

[60] In this case, there are either direct allegations or allegations from which it could reasonably be inferred that the complainant has a mental or physical disability. Ms. Dumas alleges that she has a mental disability, which she describes as a “cognitive illness”. As stated earlier, for the purpose of this application, I am prepared to accept that she has alleged that she has a mental disability. In any event, Simba does not appear to dispute that Ms. Dumas suffers from a mental disability.

[61] She also describes injuries from a cycling accident. The allegations suggest that she had recovered from those injuries before she was terminated in June 2014.

[62] She also alleges an adverse impact. Clearly, one alleged adverse impact is her dismissal. The other may be the negative performance review.

[63] The final element is a nexus between the two: either her termination or negative performance review is linked in some way to her mental disability and/or her physical disability.

[64] In my view, the allegations in her complaint meet the low threshold for setting out an allegation of discrimination on the basis of mental disability. Ms. Dumas’ allegations are that she received a negative performance review for reasons related to her disability

and, shortly thereafter, her employment was terminated and she was not offered other positions.

[65] However, the same cannot be said with regard to her complaint of discrimination on the basis of a physical disability. The complaint is devoid of any allegations which, if proven at a hearing, would establish, or from which it could reasonably be inferred, that Ms. Dumas suffered any adverse impact in her employment because of a physical disability.

[66] Accordingly, Ms. Dumas' complaint that she was discriminated against in her employment in whole or in part because of a physical disability is dismissed pursuant to s. 27(1)(b). Simba's application to dismiss her complaint of discrimination on the basis of mental disability pursuant to s. 27(1)(b) is denied.

Section 27(1)(c) - No Reasonable Prospect of Success

[67] Simba also applies to have Ms. Dumas' complaint dismissed pursuant to s. 27(1)(c) saying that the complaint has no reasonable prospect of success.

[68] The role of the Tribunal in an application pursuant to s. 27(1)(c) is a discretionary gate-keeping one where it is required to determine whether the complaint has no reasonable prospect of success. In doing so, the Tribunal is not required to make findings of fact; rather the Tribunal assesses the evidence as a whole and applies its expertise to determine whether a hearing is warranted.

[69] The threshold that a complainant must meet is low; a complainant need only show that the evidence presented takes the claim out of the realm of conjecture or speculation. (See *Workers Compensation Appeal Tribunal v. Hill*, 2011 BCCA 49, at para. 27)

[70] On an application to dismiss pursuant to s. 27(1)(c), the burden is on the respondent to show that the complainant has no reasonable prospect of success: *Stonehouse v. Elk Valley Coal (No.2)*, 2007 BCHRT 305.

[71] The complaint has two aspects: that Ms. Dumas received a negative performance evaluation because of her mental disability and that she was terminated in whole or in part because of that disability. I deal with each in turn.

The Negative Performance Review

[72] Ms. Dumas received a negative performance review and says that the negative actions described were symptoms of her mental illness. She says that her doctor confirmed that the negative behaviours were symptoms of her illness and says that he advised her to ask Human Resources to remove the negative performance review and not to use it in any future employment-related matter.

[73] She asked the Human Resources Generalist to strike the review from her record and said that her doctor would be happy to work with her “on this” but not with her manager for confidentiality reasons.

[74] Both Ms. Dumas, and apparently her doctor, misapprehend the nature of a performance review, discrimination and accommodation. Simply put, that negatively perceived behaviours may be related to a physical or mental disability does not mean that they should be ignored or not documented. There was no basis for the negative performance review to be removed, without more.

[75] If Ms. Dumas and her doctor believed that her negative behaviours were the result of her illness, then they should have apprised the employer’s representatives and sought to develop ways in which Ms. Dumas could reasonably be accommodated. The purpose of the accommodation would be to allow her to perform the essential tasks and duties of her position to an acceptable level. Accommodation involves a co-operative endeavour between the employee, human resources, her supervisor and her doctor to attempt to help her to achieve the performance standards of her work. Reasonable accommodation does not require pretending that the negative behaviours do not exist by removing any reference to them in a performance review.

[76] Reasonable accommodation could involve amending the performance review to address its connection to her disability and development of steps to alleviate those effects. Clearly, Simba could not act on the negative performance review without providing reasonable accommodation or establishing that the limit of reasonable accommodation had been reached.

[77] Further, it must be re-emphasized that accommodation is a co-operative endeavour. It would typically involve her, her doctor, human resources and her immediate supervisor. Where sensitive medical information is involved, ways to restrict its unnecessary dissemination may be required. However, that has to be balanced against ensuring that those persons who have a need to know certain information have access to that information.

[78] In this case, the COO may not have needed to know Ms. Dumas' precise diagnosis but, as her direct supervisor and a senior member of management, as part of any accommodation he would need to know what behaviours could be expected, including any side effects of medications, how those behaviours could be addressed, and what to do in those circumstances. Ultimately, it would be for him as COO to determine whether the accommodation being requested was reasonable within Simba's operations, and, if necessary, to suggest other ways her disability could be accommodated. Ultimately, it is the employer who is responsible for not only that all reasonable and practical steps to accommodate are taken but also for the safety of Ms. Dumas and her coworkers while they are at work.

[79] In my view, any aspect of the complaint relating to the performance review itself has no reasonably likelihood of success and, accordingly, that part of the complaint is dismissed.

[80] However, the real issue here is not the negative performance review itself but whether, as a result Ms. Dumas' disability and negative performance review, Simba failed in its duty to accommodate. That is addressed below.

Termination and Failure to Consider for Other Positions

[81] The main thrust of Ms. Dumas' complaint is that she was terminated and that she was not offered other positions for which she says she was qualified, particularly as, at the time of her termination, she was already enquiring about other positions as an accommodation for her illness.

[82] This aspect of her complaint can be broken out into two parts. The first relates to the elimination of Ms. Dumas' position. Simba says that, as part of trying to stem the

losses in the Analytics Business, it decided to terminate the three persons at her level in the Analytics Business. In other words, it says its decision had nothing to do with Ms. Dumas' mental disability.

[83] Ms. Dumas challenges this saying that one of the other members of the Analytics Leadership Group had performance issues and the other had no skills that were transferable elsewhere in the company. In my view, the evidence she proffers of the performance issues of the two other managers dismissed at her level does not rise above speculation. She says, for example, that she and her colleagues on the Engineering Management Team speculated that he was dismissed because of performance issues.

[84] Based on the evidence presented, there is no reasonable prospect that Ms. Dumas would be able to establish that Simba's decision to eliminate her position was based in whole or in part on her mental disability.

[85] I reach a different conclusion with regard to the second aspect of her complaint: that Simba failed to accommodate her disability when, despite her requests, it declined to offer her other, even more junior positions in the company.

[86] Faced with a negative performance review, Ms. Dumas attributed much if not all of her poor performance to her disability. Reacting to the review, and seemingly unaware of her pending termination, she asked for any of a number of accommodations, including being moved to other positions.

[87] She does not say, but must be taken to accept, that these accommodations would likely come with reduced compensation.

[88] The COO's response to why he did not choose her for the positions she outlined and her qualifications in support of this application to dismiss in some cases does not go much beyond words to the effect of "I am the decider" and "because I said so."

[89] For example, the COO states that he determined that the Technical Writer position was not suitable for Ms. Dumas' skills, qualifications and experience. He does not explain how he came to this conclusion. Simba's evidence in this regard does not convince me that Ms. Dumas has no reasonable prospect of success in establishing that her mental disability was a factor in the decision(s) not to offer her alternate employment.

Those decisions were made on the heels of the performance issues Ms. Dumas said were linked to a cognitive illness, and absent a fuller explanation from Simba, a member at a hearing could draw an inference that her mental disability was at least a factor in Simba's decision-making.

[90] Ironically, the mention in the termination letter that her performance review was not a factor highlights the fact that Simba had in its mind the negative performance review and hence her disability. Again, based on the materials presented, it could be open to the member hearing this matter to draw a reasonable inference that the decision not to offer her these other positions was tainted by consideration of her disability.

[91] Further, it does not necessarily follow that, where there is an accommodation request already outstanding, Simba's obligations to accommodate are negated by an unrelated decision to eliminate certain positions in the Analytics Business. The onus is on the Respondent to show that it took all reasonable and practical steps to accommodate Ms. Dumas' mental disability, including by offering other employment she may have been capable of performing elsewhere in the company. Therefore, in addition, I am unable to conclude that there is no reasonable likelihood that Ms. Dumas will be able to establish at a hearing that Simba's duty to accommodate ended on the elimination of her position.

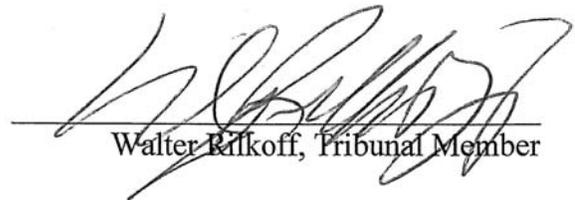
[92] In reaching this conclusion, I want to be clear that I am not finding that the complaint will succeed or even that it is likely to succeed. I simply cannot conclude that, based on the materials before me, there is no reasonable likelihood that Ms. Dumas' complaint relating to Simba's failure to offer her other, even more junior positions, has no reasonable likelihood of success.

[93] I urge the parties to avail themselves of the Tribunal's mediation services to see if this matter might be settled.

CONCLUSION

[94] In summary:

- Simba's application to dismiss Ms. Dumas' complaint based on a physical disability pursuant to s. 27(1)(b) is granted. The application to dismiss the complaint relating to a mental disability pursuant to s. 27(1)(b) is denied.
- Simba's application to dismiss Ms. Dumas' complaint relating to a mental disability pursuant to s. 27(1)(c) is granted excepting the part of the complaint related to Simba's failure or refusal to appoint her to or to offer her other available positions for which she was qualified, allegedly in whole or in part because of her mental disability. Simba's application in that regard is denied.



Walter Rilkoff, Tribunal Member