

File Name: IN THE MATTER OF A COMPLAINT BETWEEN: Elaine Hall (Complainant) and Dr. Patrick Seetharamdoo (Respondent) and/or PAT-TER Limited (Respondent)

Date of Decision: July 31, 2006

Area(s): Employment

Characteristic(s): Physical disability and/or perceived physical disability

Complaint: Elaine Hall worked as a receptionist-secretary for Dr. Patrick Seetharamdoo. Ms. Hall's doctor gave her time off work because of a possible heart condition. Ms. Hall alleged that Dr. Seetharamdoo fired her before her doctor cleared her to return to work.

Decision: The Board found that Dr. Seetharamdoo discriminated against Ms. Hall.

Physical Disability

It is up to the employee to show that they have a disability. Being off on medical leave is not enough to show a person has a disability. The Board found the possibility of Ms. Hall having a heart attack was serious enough to be a disability.

Adverse Treatment because of a Disability

The employee must show that the employer created a disadvantage or burden, and their disability was a factor in that treatment. The disability does not have to be the only factor. The Board found that Ms. Hall's disability was a factor in Dr. Seetharamdoo's termination of her employment.

Duty to Inquire about Health

When an employee has a disability, the employer has a duty to reasonably accommodate that person. The employer has to make inquiries about the disability as part of their assessment on whether they can reasonably accommodate them. The Board found that Dr. Seetharamdoo did not make inquiries into Ms. Hall's medical condition.

Accommodation to the Point of Undue Hardship

The Board noted an employer has a duty to accommodate an employee to the point of undue hardship. The Board found that Dr. Seetharamdoo could have had Ms. Hall return to work without creating undue hardship for his business, but he chose not to.

Company's Liability

A company is responsible for actions of its owner, if the owner runs the company. The Board found that both Dr. Seetharamdoo and PAT-TER Limited were responsible for discriminating against Ms. Hall.

Remedy: The Board awarded remedies as follows:

Individual Remedies

- General damages (emotional harm): \$3,500
- Special damages: 10 months lost wages

Public Interest Remedies

Human rights education for respondent

2006-NSHRC-4

IN THE MATTER OF: The Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c.214,
as amended by 1991 C.12

-and

IN THE MATTER OF A COMPLAINT BETWEEN:

Elaine Hall
Complainant

and

Dr. Patrick Seetharamdoo
Respondent

and/or

PAT-TER Limited
Respondent

DECISION

BEFORE:

Bonita M. Small
Chair, Board of Inquiry

DATE OF DECISION:

July 31, 2006

PARTIES:

Mr. Michael Wood, Q.C.
for the Nova Scotia Human Rights Commission

Ms. Elaine Hall - Complainant
self-represented

Dr. Patrick Seetharamdoo – Respondent
self-represented

PAT-TER Limited
represented by Dr. Patrick Seetharamdoo

Introduction

[1]The Complainant, Elaine Hall began employment as a receptionist-secretary at the Respondent's medical office on September 14, 1987. On May 1, 2002 the Complainant was terminated from her position by the Respondent employer. Following this Ms. Hall filed a complaint with the Human Rights Commission naming Dr. Seetharamdoo and PAT-TER Limited as Respondents. The Complainant alleges that on or about May 1, 2002 she was discriminated against because of a physical disability and/or a perceived physical disability contrary to section 5(1)(d)(o) of the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c.214, as amended by 1991, c.12 (hereinafter referred to as the *Act*.)

[2]I am the Chair of this Board of Inquiry by nomination of the Chief Judge of the Provincial Court of Nova Scotia and appointment of the Human Rights Commission on October 28, 2005. On November 29th, 2005 a telephone pre-hearing conference was held. Participating in this conference were the Complainant, Ms. Hall and the Respondent Dr. Seetharamdoo, both of whom were not represented by counsel. Mr. Michael Wood, Q.C. represented the Human Rights Commission. The hearing into this matter was held on March 29th and March 30th, 2006. During the hearing of the evidence, neither the Complainant nor the Respondent were represented by counsel. Mr. Wood appeared as Counsel for the Commission and PAT-TER Limited was represented by Dr. Patrick Seetharamdoo.

[3]Witnesses for the Commission included Elaine Hall, Sandra Jollimore-Gallant, Dr.

Nancy Robertson and Cathy Miller. Witnesses for Dr. Seetharamdoo included Bill Arsenault, Marie Martin, John David Brown, Lorne Lemoine, Shawna Barnett, and Charyle Erickson. The Respondent Dr. Seetharamdoo also chose to give evidence on his own behalf. As well, there were a number of documentary exhibits which were all tendered by consent.

[4]For the purposes of this decision I have employed the term Respondent, instead of First Respondent to mean Dr. Seetharamdoo who is indisputably the sole employer of the Complainant. The Second Respondent is PAT-TER Limited.

The Evidence

[5]The first witness called at this hearing was Elaine Hall, the Complainant. She is now 59 years old with a grade 11 education and a general secretarial course completed at the Halifax Vocational School in 1966. She worked at the Bank of Commerce until 1974 and as a teller at Nova Scotia Savings and Loans until the late 1970's. She stayed home with her daughter until 1987 when she went back into the full-time workforce as a receptionist-secretary at the Respondent's office. The Complainant testified that her job responsibilities included billing, looking after the patients and doing the accounts receivable.

[6]When asked about any employment-related problems, the Complainant's response was no, just general meetings; no complaints. On January 11, 2002 the Complainant had what she described as a heart episode. She testified that she had a pain in her chest which came on while she was at home. The Respondent, who was not her family doctor checked her and gave her a referral to Dr. Gregor, a heart specialist. She went to see Dr. Gregor that week who wanted to send her for cardiac catheterization; she was initially reluctant to undergo this procedure.

[7]The Complainant then went to see her family doctor, Dr. Robertson, on January 14th, 2002. During that appointment it was decided that the Complainant would be put off work until some tests were done. The Complainant testified that she called the Respondent the next day to advise him that she was being put off work for testing in relation to her heart problems. She stated that she did not tell the Respondent when she would be able to return to work because she didn't know. The Complainant recalls that the Respondent's response was "I wish you had told me sooner." When asked whether or not there was any other discussion about job security, the Complainant recalls the Respondent saying "If you're not back in six months, I'll have to look for somebody else."

[8]The next contact that the Complainant recalls having with the Respondent is the next week after January 14th, 2002 when the Respondent called the Complainant and asked her to do some work outside the office. She did a little bit of it but became concerned because of issues with her employment insurance. She decided that she was not going to do that work anymore and recalls having the typewriter taken back by the Respondent. From there the Complainant does not recall a lot of contact - in her words, there was a wait. Her expectation was that she would return to work - "nothing was ever said differently to her."

[9]The Complainant then described an incident which she says happened on May 1, 2002. Sometime during her sick leave the Complainant agreed to an angiogram and she called the Respondent on May 1, 2002 to tell him that she had an appointment for the angiogram on May 13th, 2002. She recalls telling him that she would know better then. She recalls the Respondent saying the following: "You no longer have a job. I gave it to Ms. Gallant." The Complainant remembers the Respondent saying that he might have something in the fall on a part-time basis. The Complainant recalls that she was "shocked and upset that he would do that

while she was on medical leave,” and that evening she went to see Dr. Robertson because she was so upset.

[10]The angiogram was performed on May 13th, 2002 and everything turned out fine according to the Complainant - she was cleared to go back to work shortly after that. When asked whether or not the Complainant spoke with the Respondent again, the Complainant recalls that she spoke to him the next day or so about obtaining another Record of Employment but recalls him refusing. She does recall getting one a couple of weeks later on a Friday night. The Complainant testified that she looked and looked for a job but wasn't able to find anything until almost 2 years later in November, 2003 at a call center in Lower Sackville. She stated that between the period of January, 2002 and November 2003 she did receive employment insurance benefits but they stopped, she's not sure when, and started living on her RRSP's. She stated that she was “humiliated, embarrassed, very upset and had lots of pain and suffering.” In her words, “at a certain age, it's very difficult to find a job.” As a result of the termination the Complainant stated that she went to the Medical Society, Labour Standards and the Human Rights Commission. The Complainant was not cross-examined in any detail.

[11]Sandra Jollimore(Gallant) was the next witness to testify. She was also employed with the Respondent as a secretary/receptionist. She started working there part-time in 1980 and retired from this position on January 1, 2005. When asked about her working relationship with the Complainant it was described as good. When asked if she noticed anything inappropriate on the Complainant's part the witness stated that the Complainant would “get annoyed a little bit.” She agreed that the Complainant had “moods like everyone.” At the request of the Respondent, Ms Jollimore (Gallant) took over the office until he knew what was going to happen. When

asked about contact with Ms. Hall, Ms. Jollimore(Gallant) stated that they were told not to bother Elaine at home. The witness recalls calling the Complainant herself a couple of times as a friend just to ask how she was, but in Ms. Jollimore (Gallant)'s mind she didn't seem like she wanted to talk. When asked how Ms. Jollimore(Gallant) found out that the Complainant would not be coming back, Ms. Jollimore(Gallant) recalls the Complainant calling and stating that her EI was running out and that she needed to come back to work. She recalls the phone call from the Complainant and recalls seeing the lights on the phone which meant that the Respondent was on the phone. She said shortly after that the Complainant called her and said "he's let me go; do you know anything about this?" Ms. Jollimore(Gallant) recalls the Complainant stating that she was going to "close him down" and that if anyone asked who took her job, "it was you." When asked about when Ms. Jollimore (Gallant) found out that the Complainant's old job was going to be hers permanently she stated that it was shortly after the phone call from the Complainant to the Respondent. On questioning by the Respondent about his alleged offer to the Complainant to work part-time in the fall Ms. Jollimore (Gallant) stated that she could not recall that conversation.

[12]Dr. Nancy Robertson was the next witness for the Commission. She obtained her medical degree in 1987 and practised as a general practitioner in Lower Sackville until 3 and a half years ago. She stated that the Complainant had been a patient of hers since March, 1999. When asked about events on January 14, 2002 Dr. Robertson recalls being told by the Complainant that she may have had a heart attack. Dr. Robertson stated that the Complainant was having a great deal of stress in her work life and personal life and had reported feeling quite distressed emotionally. Dr. Robertson put the Complainant off work that day initially for 2-3 weeks.

[13]There was discussion back and forth between Dr. Robertson and Dr. Gregor about

the Complainant undergoing an angiogram but the Complainant had been reluctant to do so. Around April, 2002 the Complainant agreed to undergo an angiogram and it was scheduled for May 13th, 2002. The Complainant continued to be on sick leave during this period. Dr. Robertson then testified about May 1, 2002 which she described as a rather dramatic visit. Dr. Robertson had been told by her staff that the Complainant had arrived without an appointment and needed to be seen "stat." Dr. Robertson's knowledge was that the Complainant had called her boss to report being scheduled for an angiogram on May 13th, 2002 at which time she had been told she no longer had a job. Dr. Robertson testified that the Complainant's blood pressure was somewhat elevated, she allowed the Complainant to vent and gave her 2 nitroglycerin sprays. Dr. Robertson recalls Ms. Hall in tears that day - "she was very hurt." On May 17, 2002 a note was written by Dr. Robertson. This was after the angiogram. It was Dr. Robertson's opinion now that the "gold standard test" had determined that there were no cardiac blockages that she felt more comfortable with the Complainant's safety, and was able to say that Ms. Hall was now fit for work. On questioning from the Respondent it was noted by Dr. Robertson that she was aware that the Complainant had been seeing a psychologist.

[14]The next and final witness for the Commission was Cathy Miller. She stated that she is employed with Mitchell Miller, which is an accounting practice. She has a Bachelor of Commerce, and is the client services manager within the practice. She does payroll and income tax returns. She testified that her husband is the Respondent's accountant. When asked about the name PAT-TER Limited, Ms. Miller's testimony was that she "believed it was January 31, 2002" when the Respondent incorporated and started running his practice through that company. When asked about the Record of Employment dated November 11, 2002 the witness agreed that it was a document that she had prepared. She recalls advising the Respondent that you were allowed to let someone go as long as you pay the lieu of notice. When asked about the wording in the comments section the

witness agreed that it was her paraphrasing the Respondent. Ms. Miller also confirmed that she had written the letter to Ms. Hall dated October 31, 2002 wherein a cheque in the amount of \$2,877.52 was enclosed which was 8 weeks pay in lieu of notice plus vacation pay.

[15]The first witness called on behalf of the Respondent was William Arsenault. He has been a patient of the Respondent's for 35 years. He also had professional dealings with the Respondent when he owned and operated a ambulance. He stated that he recalls making complaints about the Complainant while she was still working at the Respondent's office. He recalls 3 incidents when specialist appointments had not been made for him. He also recalls smelling alcohol on the Complainant's breath and when he complained about it to the Respondent, the Respondent's response was that maybe his smell was bad. He recalls hearing the Complainant say that "she was going to take the Paki down" and that she was "out to get as much money as she can."When asked by Counsel for the Commission about why his written statement did not include the statements he recalled the Complainant saying, his response was that he was in a rush and had been away since March 15, 2006.

[16]The next witness was Marie Martin. She could remember smelling alcohol on the Complainant's breath and that the Complainant would complain to her (while in the office) that her nerves were getting bad and she could no longer handle the work and the complaints of the patients and she would soon have to do something about getting out of her job. She would complain about the Respondent as an employer and would breach her privacy contract and tell her details about other patients. The next witness called was John David Brown. He recalls a gradual deterioration in the Complainant's demeanor in the office. He recalls that if asked a question the Complainant's answer would be curt - she always seemed to be flustered and unable to cope with business. He

stated that he first heard about the human rights complaint at the office - it was common knowledge. The next witness heard from was Lorne Lemoine. He has been a patient of the Respondent's since 1980. He described the Complainant as initially always professional - pretty good at her job. Then he testified that he recalled a few months' period when he would go into the office and recalls the Complainant talking about the Respondent and how cheap he was and how hard it was to work there. He testified that he used to call and re-arrange his appointments so that the Complainant would not be there.

[17]The Respondent also chose to testify. He stated that he came to Nova Scotia from Scotland in 1973. He recalls the Complainant's mother-in-law coming to see him about hiring the Complainant and he did so without interviewing her. The Respondent stated that he never interviews people; he "takes it at face value." He described the Complainant as being "rather slow, without too much affect", but goes on to say that she was fine and "she seemed to get a bit of composure." He stated that he noticed a decline in her work; she "didn't seem to care too much about the patients." When he asked her to take dictation she refused and she told him she didn't want him to call her after hours. But overall he described the relationship as "reasonable." In the last 2 years he stated that she was absent a lot. He kept a tab and he felt she owed him 3 weeks. He has not been able to locate the tab. Finally in the Respondent's words, the Complainant "seemed to give up heart; she refused to cooperate." He stated that one day she just up and left; she said she was going on sick leave. After about a week of her being off he recalls bringing the Complainant some letters to type. She probably did one and then refused to do any more. The Respondent stated that he didn't hear from the Complainant until May. She said she was coming back to her job on Monday.

[18]He stated that the decision to not want the Complainant back was gradual. After March or April he was getting feedback on her performance and sometime up until the end April he

decided that she was not really welcome there. He said he had had quite a few complaints about her work and a lot of people had said the office was running smoothly. By then he knew he didn't want the Complainant to have the job. He stated that she was a threat to his patients and a threat to his health because the work wasn't being done. He recalls telling the Complainant that Crissy was leaving in September and he would give her a part-time job. In the Respondent's opinion, the Complainant threatened him and his response was "we'll see what happens." The Respondent stated that he should have said her job terminated but instead he offered her a part-time position.

[19]When asked by Counsel for the Commission about when he was going to tell the Complainant that she was no longer needed anymore, the Respondent stated that this was a quandary for him. On questioning by Counsel for the Commission as to the timing of events, the Respondent thinks it was the beginning of January, 2002 when the Complainant told him she was going off work, but he doesn't really know. He also couldn't remember what the Complainant had complained about although he did some blood tests. He doesn't recall if he referred the Complainant to Dr. Gregor although he admitted being aware that he knew the Complainant was getting heart tests done. He stated that when the Complainant went on leave they were scrambling. Ms. Jollimore took over the daytime work and Crissy Lowe and Shauna Barnett "pitched in.".

[20]He stated that he did get some negative feedback before the Complainant left but he "protected his staff." When asked if he ever spoke to the Complainant about her work performance he stated that he never did because "they seemed to be managing." He did speak to her about extending her lunch breaks and having to time her. Some of the work problems described by the Respondent were the following: the Complainant not having sympathy for the patients, appointments not being made, very bad typing, not answering phone calls, problems with the computer, and his inability to reach the Complainant after hours.

[21]When asked about contact with the Complainant after she left in January, the Respondent stated that he had no contact from the Complainant until she called him to tell him she would be back to work on Monday. He claims that she used very strong words and that the conversation lasted about one minute. He stated that the only other time he spoke to the Complainant was when she came in to have some forms signed. When asked by Counsel for the Commission about why work performance issues were not mentioned in the Respondent's letter to the Human Rights Commission that the Respondent wrote on May 15, 2002 the Respondent replied that he didn't know why - that he attributed poor health record to poor job performance.

[22]When asked about the Record of Employment, the Respondent stated that he did not read it, he just signed it. He didn't know that it was for the purpose of drawing employment insurance benefits. The Respondent stated that "no one is employed permanently; just month to month, to see how they are." When asked about the second Record of Employment, the Respondent agreed that he had provided the following statement: "While Ms. Hall was on extended leave to illness, it was found that the office ran smoother with the new employees and with less stress to the Doctor. It was decided to terminate Ms. Hall's employment." When asked about the accuracy of this comment, the Respondent agreed that it was accurate, but not the full story - "what was missing was work performance." The Respondent concluded his evidence by stating that as it pertained to the Complainant he was "more interested in getting his office running." Offering the Complainant part-time work was "the best he could do."

[23]Shawna Barnett was the next witness to testify. She stated that she started working at the Respondent's office on January 15, 2002 and continues to work there. Ms. Barnett described her first day at the Respondent's office as "mind-boggling." She said the office was

full of sticky-notes and the filing system was filed by family groups. In her opinion there was no good alphabetical order. She testified that the reports were all intertwined. She stated that she took it upon herself to get the office more organized and it took 2 years to do that. Ms. Barnett also testified that when the office relocated she found a clear plastic tote on top of the filing cabinet where she noticed a lot of computer software. She discovered them to be software that should have been applied that hadn't been applied.

[24]Ms. Charlye Erickson was the next witness. She testified that she had been referred to a specialist in March, 2002 from the Respondent's office. She claimed that she waited a year to get her referral. When she had a stroke in 2003 she said Dr. Rajah told her he would have seen her sooner but he had never gotten a call.

[25]The Complainant also gave some final evidence in response to the evidence presented by the Respondent. She stated that she did not at any time say she didn't want any contact from the office. She denies threatening the Respondent; she states he hung up on her. She stated that there were no notes in the any drawer and the Respondent would take it upon himself to call a specialist. Ms. Hall stated that she was always friendly and caring to the patients. She did not refuse to do dictation. She was told by the Respondent not to do any filing; she recalls him saying there was other work to be done.

[26]There were also a number of documents tendered by the Commission and entered by consent. Two of these documents are significant and are reproduced in their entirety on the following pages.

1. Letter dated May 15, 2002 to the Human Rights Commission by Dr. Seetharamdoo

Dr. SP. Seetharamdoo, ccs. ar\$ Jtc22.

800 Sackville Drive Lower Sac Ili, Nova Scoda B4E I Tihphane:902-865-45JI '

MAY -2Y 2E-92

Human Rights Commission

6th Floor Joe Howe Building Halifax, NS

VIA FAX 424-0596

May 15, 2002

Re: Elaine Ball

SIN

This lady came into my employment in the latter 1980's as my principle secretary. Over the past few years she suffered from worsening health. This was accommodated by enabling her to use her vacation time plus one week for every year sick time as voluntarily allocated by myself up to 2004. During her latter part of her employment despite worsening health I have found the performance of her duties very satisfactory and always to the best of her ability.

In mid-January she told me that her family doctor advised her to cease work due to ill health. I duly completed a record of employment. I run a very busy practice and had to frantically look for adequate help. This resulted in a restructuring of my clerical staff with two to three employees and other ancillary help resulting in a present main secretary having revised duties.

Mrs. Hall was told that if and when she recovered completely psychologically and physically, favourable consideration would be given to her being re-employed by me. I received a telephone call from her in the latter part of April stating that she was going to cardiac catheterization on May 15 and there after would be fit to resume her original position. This seemed to me to be a rather incongruous statement However, I told her that in the fall I expected some vacancies and she would be reconsidered for possibly an evening time employment She used some threatening language and I gather, expected to have her previous occupation back. At the beginning of this week she requested I dismiss her. I tried to point out to her that she was never dismissed but due to ill health ceased her employment In view of her poor health record in the latter years and her threatening stance, I am extremely reluctant to reconsider her for employment I wish her a speedy recovery and look forward in due course to the customary and reasonable settlement.

Yours very truly,
Dr. S.P. Seetharamdoo

2. Same Letter but this time addressed to Dr. Seetharamdoo (my underlining)

Dr. S.P. Seetharamdoo
800 Sackville Drive,
Sackville, NS

may 15, 2002

Ra Elaine Hall

SIN

This lady came into my employment in the latter 1980's as my principle secretary. Over the past few years she ^{suffered} from worsening health. This was accommodated by enabling her to use her vacation time plus one week for every year sick time as voluntarily allocated by myself up to 2004. During her latter part of her employment despite worsening health I have found the performance of her satisfactory and always to Me - best of her ability.

In mid-January she told me that her family doctor advised her to cease work due to ill health. I duly completed a record of employment I run a very busy practice and had to frantically look for adequate help. This resulted in a restructuring of my clerical staff with two to three employees and *other* ancillary help resulting in a present main secretary having revised duties.

Mrs. Hall was told that if and when she recovered completely psychologically and physically favourable consideration would be given to her being re-employed by me. I received a telephone call from her in the latter part of April -stating that she was going to cardiac catheterization on May 15 and thereafter would be fit to resume her original position. This seemed to me to be a rather incongruous statement However, I told her that in the fall I expected some vacancies and she would be reconsidered for possibly an evening time employment She used some threatening language and I gather, expected to have her previous occupation back. At the beginning of this week she requested I dismiss her. I tried to point out to her that she was never dismissed but due to ill health ceased her employment

In view of her poor health record in the latter years and her threatening stance, I am extremely reluctant to reconsider her for employment I wish her a speed recovery and look forward in due course to the customary and reasonable settlement
Yours very truly,

Dr. S.P. Seetharamdoo

[27]There were also a number of other written statements tendered by Dr.

Seetharamdoo. They are as follows:

1. Statement by Patricia McNeil dated March 21, 2006
2. Statement by Mrs. Debra Hankey dated February 10, 2006
3. Statement by Carol May dated February 15, 2006
4. Statement by Mr. Robert Wagner dated February 13, 2006

5. Statement by Mrs. Bertha St. Laurent dated February 10, 2006
6. Statement by Ms. Lisa Banfield dated February 1, 2006
7. Statement by Karen Warner (not dated)
8. Statement by Chris Mahoney (not dated)
9. Statement by Lois Lively dated February 9, 2006
10. Statement by Mrs. Laura Holland (not dated)

[28]After the hearing concluded other issues arose. I received an e-mail from the Human Rights Commission on April 3, 2006 from another of the Respondent's patients named Frank Donaldson. As a result of this e-mail I forwarded correspondence to the parties advising that it was my view that only exceptional circumstances would necessitate any further involvement on my part while I was in the decision-making process. (See Appendix "A")

[29]Then on April 24th, 2006 I received a yellow envelope in the mail along with a letter from the Respondent. I then arranged for a telephone conference call between all parties to discuss. A telephone conference hearing was held on May 6, 2006. During that telephone conference hearing it was agreed that the contents of the unopened yellow envelope would be vetted by Counsel for the Commission. On May 8, 2006 I forwarded the yellow envelope to Counsel for the Commission who responded on May 11, 2006 with correspondence indicating it was his view that the material in the yellow envelope was not relevant for my viewing. There was no application by the Respondent to have that material viewed by myself.

[30]Then on June 8, 2006 I arranged another telephone conference as a result of concerns I had regarding the document dated May 15th, 2002. In my view there was a discrepancy between what the document purported to be and what Counsel for the Commission submitted it to be. As a result I felt that any discrepancy on its face should be addressed. (See Appendix "B") Another conference hearing was held on July 7th, 2006. During this telephone conference Counsel for the

Commission revealed that the addressee on the document dated May 15th, 2002 in his possession was the Human Rights Commission and not Dr. Seetharamdoo. With the consent of all parties, Counsel for the Commission forwarded that document to me on July 12, 2006.

[31]In the Respondent's reply to my query regarding the jurisdiction to hear other evidence the Respondent also alleged a number of things - that there was material not disclosed, that there was forgotten evidence. As a result I allowed the Respondent to make a written application outlining those concerns and indicated that I would consider the application bearing in mind the applicable legal principles on which such applications should be made. I received a letter from the Respondent dated July 12, 2006. The first paragraph of the letter states the following:

"I will strive not to introduce other evidence, but try and qualify what was already available at the hearing and were somehow mislaid or forgotten at the hearing."

[32]The rest of the letter goes on to further elaborate on matters which I felt had already been canvassed and argued during the hearing. The parties were given a chance to respond. Counsel for the Commission indicated that he was not able to identify any additional evidence that the Respondent wished to introduce which would fall within the criteria for admission. I agree with the submission of Counsel for the Commission and in correspondence dated July 28th, 2006 indicated same to all parties.

PRINCIPLES

[33]In making the following determinations I am guided by some well-established principles set out in our jurisprudence. They are as follows:

Burden of Proof

[34]A reasonable preponderance of evidence has been equated with the civil standard which is one described as being on a balance of probabilities. As pointed out by Adjudicator Bright in *McLellan v. Mentor Investments Ltd.* (1991), 15 C.H.R.R. D/134 (N.S.Bd. Inq.)at paragraph 16:

“The civil burden or “preponderance of evidence” or proof of fact on a balance of probabilities has been described as follows:

"[T]hat degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If this evidence is such that the tribunal can say “we think it is more probable than not,” the burden is discharged, but, if the probabilities are equal, it is not” *Miller v. Minister of Pensions* [1947] 2 All E.R 372 (C.A.) at 374 per Lord Denning."

Credibility

[35]In assessing credibility I am cognizant not only of such factors as the witness’ demeanour, power of observation, opportunity for knowledge, judgment and memory, and ability to describe clearly what was seen and heard, but also whether the evidence of the witness is in “harmony with the preponderance the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.” See *Faryna v. Chorny* [1952] 2 D.L.R. 354 at 357 (B.C.C.A.).

Relevant Legislative Provisions

[36]Discrimination is defined in section 4 of the *Act* which states that:

4 For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) or Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or class of

individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

[37]The Complainant alleges that she was discriminated against by being terminated from her employment on the basis of her heart condition or her perceived heart condition. The relevant sections in the *Act* are as follows:

5 (1) *No person shall in respect of*
(d) *employment*

discriminate against an individual or class of individuals on account of

(o) *physical disability or mental disability*

“Physical or mental disability” is specifically defined in the Act as follows:

3 (1) *“physical disability or mental disability” means an actual or perceived*

(i) *loss or abnormality of psychological, physiological or anatomical structure or function,*

(ii) *restriction or lack of ability to perform an activity,*

(iii) *physical disability, infirmity, malformation or disfigurement, including, but not limited to epilepsy and any degree of paralysis, amputation, lack of physical co-ordination, deafness, hardness of*

hearing or hearing impediment, blindness or visual impediment, speech impairment or impediment or reliance on a hearing-ear dog, a guide dog, a wheelchair or a remedial appliance or device.

(iv) *learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,*

(v) *condition of being mentally handicapped or impaired.*

Analysis

[38]Counsel for the Commission submits that the Complainant has established a *prima facie* case of discrimination. In order to establish this the Complainant must establish, on a balance of probabilities

- (a) that she had a disability or was perceived to have a disability**
- (b) that she was treated adversely by the Respondent**
- (c) that there is evidence from which it is reasonable to infer that the Complainant's disability or perceived disability was a factor in the adverse treatment.**

[39]The Respondent was unrepresented so I will not assume that any of these issues are unchallenged. As such I will address each of them individually.

- (a) Does the evidence establish that Ms. Hall had a physical disability or was perceived to have a physical disability?**

[40]Before deciding whether or not the evidence establishes that Ms. Hall was suffering an actual or perceived physical disability pursuant to the *Act*, which is how the complaint is grounded, it is important to comment on some evidence which I have heard surrounding the Complainant's mental condition. For example Dr. Robertson's notations indicate that on November 14, 2001, the Complainant was "very depressed.", on January 14, 2002, it was noted by Dr. Robertson that the Complainant was "finding the work pressure unbearable - started to cry uncontrollably at work on Friday." I have also heard evidence that Ms. Hall was seeing a psychologist or psychiatrist. The Respondent, in his evidence, also expressed concerns about Ms. Hall's psychological condition. The issue of Ms. Hall's mental health as well as any treatment

she may or may not have received was brought up during this hearing. It was determined that it was not relevant to the issue of whether or not there was a physical disability and as a result the evidence was not explored. There was no request from the Commission or Ms. Hall to amend the complaint to include mental disability. Therefore while there is slight evidence with respect to Ms. Hall's mental state being fragile at the time of these events I am not satisfied that the evidence supports a conclusion that Ms. Hall was suffering from a mental disability, either actual or perceived, as defined by the *Act*, supra.

[41]The determination of what is or is not a physical disability for the purpose of human rights legislation has evolved significantly. As suggested by the adjudicator in *Morrison v. O'Leary Associates* (1990), 15 C.H.R.R.D/237 (NS Board of Inq) each situation should be analyzed on a case by case basis, in a liberal but judicious fashion. (at para. 59). Perhaps the most important comment about the ways in which courts need to think about and view disabilities was articulated by Madam Justice L'Heureux-Dube speaking on behalf of the Supreme Court of Canada in the case *Quebec (Comm. des droits de la personne et droits de la jeunesse) et Mercier v. Montreal (Ville)* (2000), 37 C.H.R.R./271, 2000 S.C.R. As the Court states in paragraph 80:

“The Courts will, therefore, have to consider not only the biomedical condition of the complainant, but also the circumstances in which a distinction is made. In examining the context in which the impugned act occurred, the court must determine, *inter alia*, whether an actual or perceived ailment causes the individual to experience, “the loss or limitation of opportunities to take part in the life of the community in an equal level with others”. (*Mercier*, supra. at para. 80).

And further:

“It is important to note that a “handicap” may exist even without proof of physical limitations or the presence of an ailment.” (*Mercier supra.*, at para.. 81)

[42]The Complainant was determined medically unfit to work for the period between mid-January, 2002 and mid-May, 2002. Notwithstanding the direction that the jurisprudence has taken I’m of the view that being placed off work on a medically approved leave should not be the sole factor in this determination. The danger of taking the approach that medically-approved leaves are always disabilities is that every absence from work for a medical reason could be construed as constituting a disability within the meaning of the *Act*. I don’t believe that is the intention of the legislation. This view is also articulated in *Mercier*, supra. where Madam Justice L’Heureux-Dube states:

"As the emphasis is on obstacles to full participation in society rather than on the condition or state of the individual, ailments (a cold, for example) or personal characteristics (such as eye colour) will necessarily be excluded from the scope of “handicap” although they may be discriminatory for other reasons." (at para. 82)

[43] Thus, other factors such as severity, permanence and persistence should also be kept in mind when making this determination. (See *Nahal v. Globe Foundry Ltd.*, [1993] B.C.H.R. No. 28, [1993] 21 C.H.R.R. D/136, which is applied in *Evans v. Health Care Corp. of St. John's* [2003] N.J. No. 61 2003 NLCA 13 Docket:01/50 at para 32. In balancing these factors against the broad purposive approach suggested by our jurisprudence I am satisfied that the Complainant's condition does fall within the *Act*. The notion of possibly having had a heart attack is severe in and of itself and Dr. Robertson's and Dr. Gregor's treatment and management of the Complainant's condition suggests that Complainant's symptoms were serious. As for the angiogram coming back as not showing any blockages I don't find that such a diagnosis negates a finding under the *Act*. As Dr. Robertson stated, undergoing the angiogram meant that she (Dr. Robertson) was more comfortable with the Complainant's safety but I don't interpret that comment to mean that the Complainant was at that point completely healthy. Therefore, I am satisfied on the balance of probabilities that during the period between January, 2002 and May, 2002 the evidence supports a finding that the Complainant had a physical disability and/or was perceived to have a physical disability within the meaning of the *Act*, during the period between January, 2002 and May 13, 2002.

(b) Is there evidence of adverse treatment of Ms. Hall by Dr. Seetharmdoo?

[44] Adverse treatment has been described as the existence of a distinction, exclusion or preference. (See *Mercier, supra* at para. 84) For the most part in terms of employment situations the termination of an individual's employment is sufficient to constitute adverse treatment. I am persuaded by the Complainant's evidence that she was told by the Respondent on May 1, 2002

that she no longer had a job. This is corroborated by her "dramatic visit" to the Doctor as well as the evidence of the Complainant's co-worker, Ms. Jollimore-Gallant. The Respondent seems to suggest that his offer to provide the Complainant with part-time work in the fall is evidence that he did not terminate the Complainant thereby not constituting adverse treatment. I am not satisfied that the offer of part-time work was intended to be a meaningful one. The Respondent also suggested that the Complainant abandoned her job by going to his office for another Record of Employment. The Respondent's suggestion that such action constitutes abandonment is not tenable given the circumstances of the May 1st conversation. In view of the foregoing I am satisfied on the balance of probabilities that the Respondent's termination of the Complainant's job during the phone conversation on May 1, 2002 constituted adverse treatment of the Complainant.

(c) Has the evidence established that it is reasonable to infer that Ms. Hall's disability or perceived disability was a factor in the adverse treatment?

[45] Counsel for the Commission submits that the Complainant's termination by the Respondent was based in part on her disability or perceived disability. The Respondent's submission is that his decision to terminate was not based on Ms. Hall's disability but rather on legitimate work performance issues.

[46] The Respondent's evidence is that he observed a change in the Complainant's attitude towards the patients; that in the last couple of years of her employment she "seemed to give up heart." He had concerns about the Complainant's lack of sympathy towards patients, poor typewriting, phone problems, computer problems, inability to reach her after hours, confidentiality issues, punctuality issues while she was on her lunch break, imbibing during her lunch break. He stated that he had "heard through the grapevine that there was something not good about the Complainant's lifestyle", that she had "family problems".

[47] In support of the Respondent's evidence he called five of his patients who provided sworn evidence as to their dealings with the Complainant. The Respondent also tendered thirteen letters from his patients which also focused on their separate dealings with the Complainant. In addition he called Shawna Barnett to testify about the state of the office when she started working there on January 15, 2002.

[48] I will deal first with the patient evidence put forth by the Respondent as support for his submission. Overall I do not place a great deal of weight on the patient evidence. Except for the evidence of Mr. Arsenault that he had brought to the Respondent's attention his concerns about the Complainant's lunchtime alcohol consumption it's not clear whether or not the other concerns of the patients were communicated to the Respondent before May 1, 2002. As for the allegation by Mr. Arsenault and Ms. Erickson that specialists' appointments were not being made it is difficult to attribute responsibility to the Complainant for that. It is unclear whose responsibility that was. As well, I don't place a great deal of weight on Mr. Arsenault's evidence about the utterances he heard from the Complainant vis a vis the Respondent given that they were not in his statement/letter. In relation to the other 13 letters, I note that they are unsworn and the ones that are dated, are dated 2006, nearly 4 years after the relevant time period. Again, as with the sworn evidence, there is little, if any, reliable evidence as to when and/or if any other of the concerns expressed by the patients were communicated to the Respondent on or before May 1, 2002.

[49]The other evidence offered in support of performance concerns comes from Shawna Barnett, the Respondent's current receptionist/secretary who started working at the Respondent's office on January 15, 2002. In assessing this evidence I agree with Mr. Wood that Ms. Barnett's concerns about filing are somewhat subjective. In fact, there may be nothing wrong with grouping the families together. With respect to finding the computer software on top of the filing cabinet again I agree with Mr. Wood that there is no basis on which to conclude that that was part of the Complainant's job. In terms of the office being described as a shambles once again I would have to agree with Mr. Wood that that is to expected under the circumstances; this was a very busy workplace and any change in routine might necessarily create some confusion and disorder in a relatively short period of time. As a result I do not place a great deal of weight on Ms. Barnett's evidence as proof that the Complainant's job performance was particularly substandard.

[50]As for the evidence of the Respondent regarding the Complainant's work performance issues, the response by the Respondent to these issues is telling. When asked about his response to what I will call the "routine work performance" concerns such as the filing, typewriting, etc. the Respondent stated he didn't really talk to the Complainant because they "seemed to be managing". When asked about the Complainant's alleged imbibing during lunch his response was "well, she didn't come reeling into the office." When asked about how he handled his concerns about the Complainant's lifestyle or family problems his response was he didn't discuss any of that with the Complainant because he felt that was privileged information. He did admit to timing the Complainant while she was on her lunch break. There were no warnings and no reprimands. When asked about this, the Respondent claimed that a lot of his concerns about the Complainant's work performance were discovered while she was on sick leave through feedback from his patients and others.

[51]In analyzing this evidence I am also cognizant of the May 15th letter to the Human Rights Commission where the Respondent writes:

"During the latter part of her employment despite worsening health, I have found the performance of her duties very satisfactory and always to the best of her ability."

[52]When asked about the obvious inconsistency between that statement and his suggestion that there were work performance issues the Respondent's response was that he was protecting the Complainant.

[53]In view of the foregoing I am not persuaded by the Respondent's submission that he had legitimate work performance issues at the forefront of his mind when he terminated the Complainant on May 1, 2002. It's difficult to accept such a proposition when the person

responsible for taking action to address these issues does not do so. The only inference to be drawn is that the work performance issues weren't that serious because as the Respondent says, they "were managing." I am also not persuaded by the Respondent's suggestion that he was protecting the Complainant when he didn't mention her work performance issues in his May 15th letter to the Commission. Although he didn't elaborate, in my view it is not credible that the Respondent would feel the need to protect the Complainant in a response to a letter of complaint about his actions towards her. Moreover, the evidence of the Complainant's co-worker, Ms. Jollimore-Gallant, who I found very credible, corroborates the view that work performance was not the issue that the Respondent submits that it was.

[54]I lend some credence to the suggestion that while the Complainant was on sick leave it was found that the operation of the office was smoother with the new employees. That may be true from the Respondent's perspective and even from the patients' perspective however in order to accept the Respondent's submission I would have to find that work performance issues were his sole reason for terminating the Complainant. I am unable to do so based on the evidence. Again the May 15th, 2002 memo/letter is telling. The Respondent states that:

“if and when she recovered completely psychologically and physically, favourable consideration would be given to her being re-employed by me.”

[55]This in my view is a clear illustration of the Respondent's thinking about the Complainant's health. And further in correspondence to the Commission dated October 30, 2002 when he states the following:

“I told her that if she proved herself to be 100% well and able to carry her job, she would be reconsidered for employment.”

[56]The second Record of Employment is also telling as it relates to the Respondent's thinking during this period. It states:

“While Ms. Hall was on an extended leave due to illness, it was found that the office ran smoother with the new employees and with less stress to the Doctor. It was decided to terminate Ms. Hall's employment.”

[57]It is noteworthy that there is no mention in the comments section about the Complainant's performance.

[58]To succeed on this issue, the weight of authority shows that a complainant need only show that the ground alleged was one factor in the respondent's conduct; it does not need to be

the sole or overriding factor. (See *Luschnat v. Kotyk* (2002) Doc. 02-013, 2002 BCHRT at para. 16; *Cooke v. Vancouver Island Aids Society* (1999), 35 C.H.R.R. D/56 at para. 52 (B.C.H.R.T.) and *O'Connor v. Town Taxi*, 2000 BCHRT 9 at paras. 54-58. As such I am satisfied on the balance of probabilities that the Complainant's health was a factor in the Respondent's mind when he terminated her on May 1, 2002.

[59] Given the foregoing I am therefore satisfied on a balance of probabilities that the Complainant has established a *prima facie* case.

Employer Justification/Accommodation

[59] I now turn to the second stage of analysis known as the employer justification stage. The relevant legislative provisions are as follows:

Exceptions

- 6 *Subsection (1) of Section 5 does not apply*
- (e) *where the nature and extent of the physical disability or mental disability reasonably precludes performance of a particular employment or activity;*
 - (f) *where a denial, refusal or other form of alleged discrimination is*
 - (i) *based upon a bona fide qualification,*
 - or*
 - (ii) *a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society*

[60] I have determined that section 6(e) of the *Act* is the appropriate section on which to rely in this analysis and in doing so I am employing the same logic as that of Adjudicator Murray in *McLellan vs. MacTara* QL [2004] NSHRBIN No. 6 para. 32. As he stated and I agree, sections 6(e) and 6(f) are distinct inquiries although with similar issues.

[61] The Board of Inquiry in *Jeppeson v. Ancaster (Town)* [2001] O.H.R.B.I.D. - No. 1 dealt with similar legislative wording. In deciding the difference between the two separate "defences", the Board stated that:

"... section 17 (our section 6(e))compels the employer to demonstrate that the complainant was incapable of performing or fulfilling essential duties or Requirements because of handicap. Further, it focuses on whether the needs of the person alleging an infringement cannot be accommodated without undue hardship. Section 11 (our section 6(f) requires the employer to demonstrate that the requirement was a BFOR, which involves proof that the needs of the group of which the person is a member cannot be accommodated without undue hardship." (at para 116)

[62] Similar issues were discussed in *Metsala v. Falconbridge*, supra. at para. 38, also an Ontario case:

"In this case, the alleged Code contravention does not arise from Falconbridge's application of a rule or standard or policy to the Complainant without taking account of her individual circumstances. Rather, it is Falconbridge's failure to apply the same practices to her as it did to other disabled workers in need of accommodation that is the crux of the Complaint. On the Board's analysis, Meiorin, Grismer and Entrop have no application to the facts of this case, which can be neatly characterized as one of direct discrimination. The Board agrees with the Commission's submission that the only defence available to Falconbridge is that found in s. 17 of the Code."

[63]In my view section 6(f) does not have application to this case. If it did, I would have to conclude that the Respondent adopted a standard or rule of policy or purpose rationally connected to the performance of the job.

Having said that I also note the following:

"However, I am also satisfied that the result in this case would be precisely the same whether the Respondents sought to establish that the impugned requirement was reasonable and bona fide in the circumstances under section 11(2) or that Mr. Jeppesen was incapable of performing or fulfilling an essential duty or requirement of employment under section 17(2). Any differences between the operative tests are, certainly for the purposes of this proceeding, immaterial. Laskin J.A. noted that the differences in the tests are largely semantic." *Jeppeson v. Ancaster* supra. at para. 116.

[64]Thus whether reliance is placed on section 6(e) or 6(f) it would appear that the result would be the same given the similar issues of accommodation and undue hardship.

[65]The question which must be addressed in the context of this case is whether or not the nature and extent of the Complainant's physical disability reasonably precluded performance of her work as a receptionist/secretary at the Respondent's office. I can find that the disability reasonably precluded the Complainant's working there if it is found that it would cause undue hardship to the Respondent to accommodate the Complainant's ability to work. Again I'm relying on the analysis of Adjudicator Murray in *McLellan vs. MacTara* supra. The extent of an employer's duty to accommodate physically disabled employees under section 6(e) of the *Act* is to accommodate to the point of undue hardship. The test, taken from *British Columbia (Public Service Employee Relations Commission) vs. British Columbia Government and Service Employees' Union (B.C.G.S.E.U) (Meiorin Grievance)*, [1999] S.C.J. No. 46, at para. 54 is:

"...it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer."

[66]The purpose of accommodating the physically restricted was described in the

Central Okanagan School District No. 23 v. Renaud [1992] 2 S.C.R. 970 at para. 25:

"The case law of this court has approached the issue of accommodation in a more purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry."

[67] Determining what is "undue hardship" is the same as determining what is "reasonable" in terms of accommodation. *Central Okanagan School District No. 23 v. Renaud*, supra. What is reasonable under 6(e) of the *Act* can be based on the following:

In considering whether Rogers has met its duty to accommodate Ms. Conte, the relevant inquiry is: at the time of the making of its decision to terminate Ms. Conte, did Rogers make proper inquiries to determine the nature of the disability, what was the prognosis, what accommodation was required, and was there other work that Ms. Conte could do? It is clear that Rogers did not make any of these inquiries. *Conte v. Rogers Cablesystems Ltd.* (1999), 36 C.H.R.R. D/403 (Can. Trib.), at para. 81. See also *Metsala v. Falconbridge Ltd.* (2001), 39 C.H.R.R. D/153 (Ont. Bd. Inq.) at para. 42.

[68] The issue of accommodation arose when the Complainant notified the Respondent in mid-January, 2002 that her family doctor had advised a medically-approved sick leave. I accept the Complainant's evidence that she called the Respondent the day after she visited Dr. Robertson to let him know that she was being placed on sick leave and was getting tests done in relation to her heart. I also accept the Complainant's evidence as to the response she received from the Respondent. Clearly the Complainant's medical condition did not evoke a lot of sympathy from the Respondent. This is further illustrated by the Respondent's request to have the Complainant work at home while she was on sick leave although admittedly that did end fairly quickly.

[69] In my view proper accommodation would have been the Respondent making inquiries and gleaning information about the Complainant's condition from mid-January onwards however the evidence suggests that when the typewriter was taken away by the Respondent there was no further communication between the Complainant and the Respondent until May 1st when the Respondent terminated the Complainant. Was this reasonable behaviour on the part of the

Respondent? In my view it wasn't. I acknowledge that the duty to accommodate does not require an employer to keep a position open indefinitely, however in my view it would not have been unreasonable or an undue hardship for the Respondent to have accommodated the Complainant's leave by holding her job at least until the results of her angiogram were known. Having said that, the authority also suggests that the dialogue should be a two-way street and I have not heard any evidence about any attempts by the Complainant to keep the Respondent updated on her condition.

[70]However I do not find that this is fatal to the Complainant's case particularly since it was the Complainant who initiated the phone call on May 1, 2002. (See (*McMurchie v. London Drugs Ltd.* [2002] B.C.H.R.T.D. No. 77; 2003 BCHRT82 at para. 26) I also agree with Counsel for the Commission that juggling the staff so the Complainant could return to her job on May 17, 2002 would not have created undue hardship on the Respondent. Ms. Jollimore-Gallant appeared to be more than willing to go back to her other hours and Shawna Barnett stated that she wanted to be home with her daughter.

[71]The duty to accommodate goes beyond investigating whether an employee can perform an existing job but also involves investigating whether or not something can be done to existing jobs to enable an employee to perform a job, (*Re Calgary District Hospital Group and U.N.A. Loc.121-R* (1994), 41 L.A.C. (4th) 319 (Ponak) at para. 326. By declaring the Complainant fit to return to work on May 17, 2002 the inference is that Complainant was no longer disabled to do her job. Having said that and given the dynamic nature of one's health I don't think it would have been unreasonable for the Respondent, with the Complainant's consent, to initiate a dialogue with the Complainant's doctors in an effort to keep abreast of future developments in the Complainant's health. I realize that this was a busy office however I don't think juggling things so that the Complainant's health was better managed would have been unreasonable or onerous.

[72]Either way, the authorities are clear - not making any attempts, as this case

demonstrates, is not the answer. Accommodation necessarily involves communication and that was severely lacking in this case.

[73]The Respondent claims that the Complainant was threatening in her language and stance on the phone and therefore was a threat to the care of his patients. I don't find that there is any evidence to suggest that the Complainant "threatened" the Respondent in the traditional sense of the word. I find that the Respondent equates the Complainant's statements that she was going to complain to the Human Rights Commission, the Labour Standards Board and the Medical Society as threats but I don't find that her words were threats in the sense of causing bodily harm. The suggestion that the Complainant was a threat is in my view without merit.

[74]In view of the foregoing I am not satisfied that the Respondent can avail of this section. By failing to make any inquiries about the Complainant as to the nature and extent of her disability the Respondent has failed to show that the Complainant's disability reasonably precluded her from performing her work to the point of undue hardship on the employer.

Conclusion

[75]In view of the foregoing I am persuaded on the balance of probabilities that the actions of the Respondent, Dr. Seetharamdoo in terminating Ms. Hall's employment violated the Nova Scotia *Human Rights Act* pursuant to section 5(1)(d)(o).

Corporate Liability

[76]There is testimony from Ms. Cathy Miller that she believes it was January 31, 2002 when the Respondent incorporated his company. This has not been challenged by the Respondent. Counsel for the Commission has submitted that if I find that Dr. Seetharamdoo has violated the *Act*, then because of the incorporation in January, 2002 a remedy should be awarded against both of the Respondents. I am satisfied when the termination occurred on May 1, 2002 the practice was being run through the business. There is no issue of the Respondent acting

independently of this company without authority from this company. As a result of my finding that Dr. Seetharamdoo violated section 5(1)(d)(o) of the *Act*, I find joint and several liability on the part of PAT-TER Limited as well. See *Robichaud v. Canada* [1987] 2 S.C.R. 84, 87 C.L.L.C. 17, 025, 8 C.H.R.R. D/2695, 765; *Marchand v. 3010497 Nova Scotia Ltd.*, [2006] N.S.H.R.B.I.D. No. 1 at paras. 76-69.

Remedy

[77]The powers available to award damages in this matter are found in section 34(8) of the Nova Scotia *Human Rights Act*, which states as follows:

A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation thereof.

[78]*Henwood v. Gerry Van Wart Sales Inc.* (1995), 24 C.H.R.R. D/244 (Ont. Bd. Inq) provides some guidance as to the purpose of remedies and damage awards in human rights complaints at para. 33:

"These remedial provisions should be construed liberally to achieve the purposes and policies of human rights legislation; *Cameron v. Nel-Gor Castle Hursing Home* (1984) 5, C.H.R.R. D/2170 (Ont. Bd.Inq.) At D/2196. It is a principle of human rights damage assessment that damage awards ought not to be minimal, but ought to provided true compensation. This is necessary in order to meet the objective of restitution and also to give true compensation to a complainant to meet the broader policy objectives of the Code. The objectives of the Code are to put the complainant in the same position she would have been in had her human rights not been infringed by the respondents: *Cameron* at p. D/2196, paras. 18526-27. The measure of monetary damages in a case such as this is the amount that the complainant would have earned had she not been denied the employment opportunity: *Cameron* at p. D/2197, para. 18532; *Piazza v. Airport Taxicab (Malton) Assn.* (1989), 69 O.R. (2d) 281 at 284 [10 C.H.R.R.] (C.A.). The complainant in this case had a duty to mitigate her damages; however, the onus of proving failure to mitigate lies upon the respondents, as it does in other areas of law." *Gohm v. Domtar (No.4)* (1990), 12 C.H.R.R. D/161 at D/180 (Ont. Bd. Inq.), citing *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324.

Loss of Income and Mitigation

[79]Commission Counsel has indicated that I should consider awarding compensation for loss of wages for the period from the anticipated return of work date which he states was May

17, 2002, to the Complainant's commencement of work at the Call Centre in November, 2003. I don't know the specific day in that month. The Respondent noted that the Complainant has received an eight week pay-in-lieu of notice amount. There is no evidence as to what factors went into that calculation. The Complainant has a duty to mitigate and the onus is on the employer to show a failure to mitigate. (See *Morris vs. British Columbia Railway Company* (2003), 46 C.H.R.R. D/162, 2003 BCHRT at para. 247). The Complainant stated that she looked and looked for a job which included medical secretary work. Then she started looking for other jobs, "anything." In her words, "at a certain age, it's very difficult to find a job." The Complainant is now 59 years old. At the time of her termination almost exactly four years ago she would have been approximately 55 years old.

[80]I accept the submission about the particular challenges of an older individual searching for work. While I would have liked to have been provided with more details about her efforts to seek employment during the period between May, 2002 and November 1, 2003 I'm satisfied that the Complainant has complied with her duty to mitigate. In any event, her efforts or lack thereof were not challenged by the Respondent. I agree with Adjudicator Cusack in *Marchand v. 3010497 Nova Scotia Ltd.* supra. at para. 15 when she states that the unjust dismissal rule or the Labour Standards Code are not relevant; the remedy in a human rights context should attempt as far as possible to put the parties back in the same position that they would have been in had the discrimination not occurred. Having said that, the contingencies of how long the Complainant would have remained employed absent the discriminatory behaviour must be also be taken into account. (*Morris, supra.*, at para. 247). This is of necessity speculative.

[81]The question to be asked is this - if the Respondent had made the proper inquiries into the health of the Complainant and had made appropriate attempts to accommodate the

Complainant's disability, would the Respondent still have concluded that termination was the only option? Given the speculative nature of this inquiry and considering all of the circumstances in my opinion this is an appropriate case to exercise my discretion to award a part of the lost wages. In my view an award of 12 months' salary is appropriate. The 2 months which the Complainant has already been paid will be deducted from that 12 months. (See *Martin v. 3501736 Inc. (c.o.b. Carter Chevrolet Oldsmobile)* [2001] B.C.H.R.T.D. No. 39 *McLellan v. McTara*, supra., and *Morris v. British Columbia Railway Company*, supra. as authority for the view that pay in lieu of notice should be deducted from the loss of income award.).

[82]I will leave it to the Complainant to remit any employment insurance benefits owed as required by law. The appropriate deductions should also be considered in the calculation. I will leave it up to the parties to determine the actual amount. In saying that I acknowledge that both the Complainant and the Respondent do not have counsel and therefore determining the amount between them may be awkward. I would ask Counsel for the Commission and perhaps Ms. Cathy Miller to assist in that regard. I also assess interest at a rate of 2.5% as per other recent Nova Scotia Boards of Inquiry.

General Damages

[83]In terms of general damages, I note the Complainant's statement that she was shocked and upset that the Respondent would terminate her while she was on sick leave. That is understandable given the loss of a position that she had held for approximately fifteen years in such an abrupt insensitive manner. Having said that although things appeared to take a downward spiral in the last couple of years there has been no suggestion that for the other thirteen the workplace environment was a not a satisfactory one. Having regard to all of the circumstances as well as the range of general damages in this province I am of the view that this case merits an award for general damages at \$3500. I don't find nor has it been suggested that

this is a case for exemplary damages.

[84]As for non-monetary damages, bearing in mind that inquiries such as these have an educational component and that human rights legislation is remedial in its purpose I have to consider whether or not this is a situation where training in these issues would be beneficial. I found the Respondent to be affable and intelligent however I do have some concerns about the Respondent's knowledge of his legal obligations as it pertains to human rights law. It is also my own personal view that we can always benefit from "broadening our horizons." In that spirit and in addition to the previous comments I do think the Respondent and his staff would benefit from some training as it pertains to human rights issues in the workplace. I will leave it at the discretion of the Human Rights Commission and the Respondent as to how this training should be implemented however I think a period of six months is a reasonable time frame in which to complete it.

[85]I would ask Counsel for the Commission to draft an Order for my signature reflecting all of the above. If there are any issues that need to be resolved as a result of this award I will retain jurisdiction.

I would like to thank Mr. Wood, Ms. Hall and Dr. Seetharamdoo for their professionalism and courtesy throughout this matter.

Dated at Halifax, in the Province of Nova Scotia, this 31st day of July, A.D., 2006.

Bonita M. Small
Chair, Board of Inquiry

