Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2021 CHRT 14
Date: March 30, 2021
File No.: T2291/4618

Between:

Graham Chisholm

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Halifax Employers Association

Respondent

Decision

Member: Colleen Harrington

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I. Overview

[1] Graham Chisholm (Complainant) alleges that the Respondent, Halifax Employers Association (HEA), discriminated against him on the basis of disability and age during its longshore worker hiring process in 2016. Specifically, he says that being disqualified from the hiring process because he did not pass the mandatory aptitude test was discriminatory, as he did not have the opportunity to request an accommodation before doing the test.

[2] The Complainant says that, at the time he completed the aptitude test in January of 2016, he had one or more disabilities resulting from a motor vehicle accident that occurred in October of 2015. He says the accident caused him to have a back injury and poor manual dexterity. He also says that he was slower to do things, both as a result of the accident, and because of his age. He was 49 years old when he did the aptitude testing.

[3] The Respondent's position is that the Complainant did not have a disability that required accommodation at the time of the aptitude testing portion of the hiring process. HEA also says the Complainant did not provide any evidence that his age resulted in him doing things more slowly than before, or that people over 40 were screened out of the hiring process at a higher rate than those under 40, as he alleges.

[4] During case management, the parties advised the Tribunal that they had agreed to proceed with the inquiry in two parts. They proposed that the Tribunal first hear and decide a threshold issue, something referred to in human rights case law as *prima facie* discrimination. This legal test requires the Complainant to prove three things: i) that, at the time of the aptitude testing, he possessed one or more characteristics protected under the *Canadian Human Rights Act* (the *Act* or *CHRA*, RSC 1985, c H-6); ii) that he received some sort of adverse treatment in relation to employment; and iii) that the adverse treatment was related to a protected characteristic.

[5] The parties proposed that, if after hearing the evidence of both parties with respect to *prima facie* discrimination, the Tribunal concludes that the Complainant was discriminated against, a second hearing would be held to consider the Respondent's defence under subsection 15(2) of the *Act*, including whether the aptitude test is a *bona fide* occupational requirement (BFOR). A second hearing would also address remedies, if necessary.

[6] The Canadian Human Rights Commission (Commission) advised that, if there is a second hearing, it will likely participate as a party, even though it declined to do so in this first hearing.

[7] The parties agree that, if the Complainant is unsuccessful in proving *prima facie* discrimination, the Tribunal must dismiss the complaint. The Tribunal agreed to the parties' proposal, given the unique circumstances of this case.

II. Issue

[8] Did the Complainant experience *prima facie* discrimination on the basis of disability or age when he was removed from the Respondent's hiring process?

III. Decision

[9] I find that the Complainant has not met the initial threshold of proving *prima facie* discrimination. As such, I dismiss the complaint.

IV. Evidence Admitted At The Hearing

[10] Mr. Chisholm testified on his own behalf, while the HEA called its President and CEO, Richard Moore.

[11] The parties agreed to admit a joint book of documents as evidence, which consisted of four volumes. Mr. Chisholm introduced nearly 100 medical records spanning a period from 2014-2019. He did not call any medical professionals to testify about these records or about his medical conditions. While complainants are not required to call witnesses with medical expertise in cases where they allege discrimination on the basis of disability, they must also be aware that the Tribunal's expertise lies in applying the *CHRA*, not in interpreting medical documents.

[12] The Respondent decided to call Dr. Matthew Burnstein as an expert witness to assist the Tribunal to review and understand Mr. Chisholm's medical records. Dr. Burnstein is a physician with many years of experience in the field of occupational medicine.

[13] Mr. Chisholm was opposed to Dr. Burnstein being qualified as an expert witness to assist the Tribunal to understand whether he had a medical disability at the time of the hiring process, because he had not examined Mr. Chisholm personally. Dr. Burnstein testified that he has worked in several roles throughout his career which have required him to review medical files and interpret the reports of doctors, occupational therapists and physiotherapists in order to provide assessments of impairments that could then be used to identify disabilities and appropriate accommodations. The Tribunal appreciated that there was value in hearing from Dr. Burnstein in order to better understand the medical records. He was able to offer insight into what types of examinations a medical professional would be required to undertake when presented with certain information from a patient. This is specialized knowledge that I as a Tribunal Member do not possess.

[14] Mr. Chisholm also suggested that Dr. Burnstein was biased because he had worked for HEA as a medical consultant in the past. With respect to this allegation, I note that Dr. Burnstein last worked in this role with the HEA in 2009. The existence of a past employment relationship alone is not enough to establish bias.

[15] I agreed to qualify Dr. Burnstein as an expert witness to assist the Tribunal to determine whether, based on the medical records provided, Mr. Chisholm had a medical disability in January of 2016. In doing so, I explained to Mr. Chisholm that it was still the Tribunal's responsibility to make the ultimate determination as to whether, at the relevant time, he had a disability as contemplated by the *CHRA*. This is a legal determination that only the Tribunal can make, after considering the evidence, the submissions, and the law.

V. Facts

[16] I make the following findings of fact, based on the evidence presented at the hearing.

A. HEA and Longshore Work at the Port of Halifax

[17] HEA is a non-profit organization representing employers in the longshoring industry (HEA's Members) in the Port of Halifax. HEA and its Members are bound by a Collective

Agreement with the longshore workers union, ILA Local 269 (Union), which requires HEA Members to use Union supplied labour at the waterfront.

[18] Longshore work involves moving large containers on and off of ships, railcars and highway trucks, and around the waterfront, often using sophisticated mechanical equipment. Such tasks must be performed safely, efficiently and accurately.

[19] Halifax is the fourth largest port in Canada. Ninety percent of the cargo moving in and out of the Port is in containers, and, in 2015-2016, a record 5.1 million tons was moved through the Port. While the workload was increasing, the Port was short on qualified labour as a number of people had drifted out of the industry since the last hiring of longshore workers several years prior.

[20] In 2015, the Union and the HEA decided to recruit approximately 50 longshore workers. As such, a hiring process was initiated. A hiring fair was held on November 23, 2015 at which approximately 500 people were given application packages. About half submitted applications. The Union reviewed all the applications and referred a total of 80 people to the HEA.

[21] The HEA used a three-stage hiring process. Stage 1, described in its Hiring Rules, required applicants to pass 5 steps, in the following order, before moving on to Stage 2: i) the Practical Strength and Endurance Test (lashing test); ii) the Aptitude Test; iii) the Test of Workplace Essential Skills (TOWES); iv) an interview; and v) a reference check. Only those who successfully completed all three Stages, including a probationary period, would be placed on the “Cardboard”.

[22] The Cardboard is a list of persons who are trained to work in the longshoring industry and who are given priority over trainees and casual labourers for referral to work in the Port of Halifax, although Union members are given first priority for referral to work. Cardboard positions are highly sought after, as they offer the only path to Union membership, with its considerable associated benefits.

[23] The casual labourers who are the last to be dispatched for work on the waterfront are drawn from what is referred to as the “Bullpen”, which is run out of the Union Hall. Anyone

can walk in off the street and ask to work out of the Bullpen, so long as they are 17 years of age or older. Mr. Moore testified that container lashing relies on the Bullpen to supplement the labour force on the waterfront, although some HEA Members refuse to use Bullpen workers for safety reasons.

[24] Certain equipment, including front end loaders and the cranes, must be operated by Union members, whereas forklifts and yard tractors may be operated by those in the Cardboard. Bullpen workers are largely restricted to manual labour. Mr. Chisholm had been working out of the Bullpen at the time of the 2015-2016 hiring.

[25] Mr. Moore testified that all of the equipment used in longshore work, whether it involves a joystick, levers, controls or foot pedals, requires operators with good motor coordination, spatial aptitude and manual dexterity. This equipment is used to move containers on and off of ships and around the Port quickly and safely, often into and out of tight spaces.

[26] Mr. Chisholm took exception to the HEA directing the Tribunal's attention to the largest and most costly equipment operated by longshore workers at the Port - the gantry cranes - because not every longshore worker becomes a gantry crane operator. HEA acknowledged that not every longshoreperson will operate every piece of equipment at the waterfront. However, Mr. Moore testified that, when hiring longshore workers, HEA and its Members want people who are capable of developing the skills required to operate the equipment used at the waterfront.

B. The Aptitude Test

[27] The HEA relies on aptitude testing to screen candidates to ensure they possess the ability or aptitude to operate equipment. Mr. Moore testified that the aptitude test used by the HEA in its hiring processes since 1997 is called the General Aptitude Test Battery (GATB), which is used in many industries to test for a variety of aptitudes. He said the GATB is used because it gives the employer an indication of a person's abilities in light of the safety risks of the job. HEA uses the GATB to test for three aptitudes in particular: spatial aptitude, manual dexterity and motor coordination.

[28] In order to pass the aptitude testing portion of the hiring process, applicants have to receive a minimum score of “average” on each test. The HEA’s Hiring Rules state that a “below” average score on any test “may not automatically eliminate a candidate as other relevant factors will also be assessed.” However, a “well below” average results in elimination from the hiring process, “unless the applicant establishes that performance on the aptitude test resulted in whole or in part from the Applicant’s disability.”

[29] Mr. Moore acknowledged that not everyone who passes the aptitude test goes on to pass the in-person training in Stage 2 of the hiring process, where equipment such as forklifts and tractors are used.

C. Mr. Chisholm’s Experience in the Hiring Process

[30] At the job fair on November 23, 2015, Mr. Chisholm received the HEA’s Hiring Rules, which stated that applicants who required accommodation during the aptitude testing because of an existing disability must provide the HEA with “a qualified doctor’s report indicating how your disability could affect your performance on the test and suggestions about the appropriate accommodation. … If you fail to provide this information prior to the commencement of Stage 1 or when you report for the lashing strength and endurance test, then no accommodation will be made except in unusual circumstances.”

[31] Mr. Moore testified that it was necessary to impose a deadline for accommodation requests because the aptitude testing was administered by Nova Scotia Community College, and needed to be scheduled in advance to ensure enough staff and space were available on the day of the testing.

[32] Mr. Moore also testified that, if a request for accommodation had been made after the deadline, it would have been considered in accordance with the exception for “unusual circumstances.”

[33] Mr. Chisholm submitted his application to the Union and received a letter on December 29, 2015 advising that the Union had referred his application to the HEA. The letter outlined the next steps in the hiring process, including that the lashing test would take place on January 12, 2016. The letter stated that, upon successfully completing the lashing

test, he would immediately be given a package with details regarding the aptitude and TOWES tests, which were scheduled to commence the week of January 18, 2016.

[34] The December 29, 2015 letter included a reminder that he could seek accommodation during the testing process due to an "existing disability" and, if he required accommodation, he needed to provide HEA with a "qualified doctor's report indicating how [his] disability could affect [his] performance on the test and suggestions about the appropriate accommodation." He was reminded that these were timed tests and so no applicant would be given additional time to write them, "although other accommodations, such as writing the test alone and without distractions, will be considered. This information MUST be submitted to the HEA by 4:00 pm Friday, January 8, 2016."

[35] Mr. Moore testified that three people in the 2015-2016 hiring process with Mr. Chisholm requested and received accommodations to take the aptitude test. All three provided their medical requests in advance and received the accommodation of being permitted to do the test alone, so there were fewer distractions.

[36] The December 29, 2015 letter invited Mr. Chisholm to contact HEA if he had any questions about the hiring process. Mr. Chisholm replied to the HEA on December 30, 2015, thanking them for the information, but he did not ask any questions about the upcoming tests or indicate any concerns about his participation. Mr. Moore testified that, if Mr. Chisholm had reached out, HEA could have given him information about the test to give to his doctor.

[37] Mr. Moore also testified that HEA would have merely required some indication from a medical professional that Mr. Chisholm had a disability, after which the specifics of how this disability could be accommodated could have been discussed. However, Mr. Chisholm provided no indication that he had any disability before taking the aptitude test.

[38] After he passed the lashing test on January 12, 2016, Mr. Chisholm received a letter advising that he would do the aptitude testing on January 18, 2016. Along with this letter he received further information about the aptitude test, which included a picture of a pegboard with the caption "You use your hands as well as your head on some aptitude tests". It also noted that one's physical condition is important in taking the aptitude test, stating: "If you

have any physical problems that may keep you from doing your best, be sure to tell the person giving the test. If you are sick or in poor health, you really cannot do your best on any test. You can always come back and take the test some other time."

[39] Prior to taking the aptitude test on January 18, 2016, Mr. Chisholm signed a declaration stating that he was in good physical and mental health and that he did not need special testing considerations made to the standardized testing procedures or environment due to a physical or mental condition. This declaration form also has a note at the top which states: "Please be advised that if you are not feeling up to writing the test today for any reason, it is in your best interest to write the test on another day."

[40] Mr. Chisholm did the aptitude testing on January 18, 2016. He received an "average" score on the manual dexterity test, a "below average" score on the spatial aptitude test, and a "well below average" score on the motor coordination test. He was notified by HEA the next day that he had been removed from the hiring process as a result of his scores on the aptitude test. Mr. Chisholm subsequently requested a copy of his test results from the HEA and this was denied, as it was not HEA's practice to provide this information at the time.

[41] Mr. Chisholm also spoke to Mr. Moore by telephone about obtaining the test results and Mr. Moore said Mr. Chisholm never mentioned that he had a disability. Mr. Chisholm testified that he could not recall mentioning a disability to Mr. Moore.

[42] The HEA says that Mr. Chisholm has never, to this day, provided a qualified doctor's report in relation to the need for accommodation relating to the hiring process.

D. Mr. Chisholm's Alleged Disabilities

[43] Mr. Chisholm testified that on October 13, 2015 he was in a motor vehicle accident. He went to the emergency room (ER) that day and the Emergency Registration Form from that visit states that he had reported being the rear passenger in an SUV that was T-boned at low speed. Since then he had been having increasing lower back tightness and some stiffness in his upper back. Dr. Burnstein assisted the Tribunal to understand some of what was written on the Form, including that he had normal range of movement of his head and normal sensation and range of movement in his extremities; that examination of his central

nervous system was normal; and that examination of the spinal and muscular systems were normal except for a slight reduction in neck extension, and slight tenderness to palpation of his lower neck vertebrae and his lower back. The ER physician recorded Mr. Chisholm's low back pain as being 5/10, neck pain as 4/10, and headache as 5/10. Mr. Chisholm was diagnosed with whiplash and told to take Tylenol and Ibuprofen, to follow up with his family doctor in one week, and to return to the ER "if worsening, new paresthesias".

[44] Mr. Chisholm testified that he did not follow up with a physician, but that he did receive massage therapy for several weeks following the accident.

[45] On December 1, 2015, Mr. Chisholm saw a physician who signed a form authorizing him to participate in the lashing test as part of the hiring process. By signing the form, the physician indicated that she had seen and examined Mr. Chisholm and was aware of the physical demands of the test, which involved working repetitively with 3 to 10 metre metal lashing rods weighing up to 50 pounds, working at heights, climbing, bending, twisting and lifting, for 30 minutes to one hour. She certified that to the best of her knowledge Mr. Chisholm had "no physical or psychological impairments that would prevent him" from taking part in the lashing test.

[46] Dr. Burnstein's report states that, when Mr. Chisholm obtained this medical clearance to do the lashing test, "standard practice would require the physician who performed the examination to inquire as to any neuro muscular symptoms, recent injuries and perform a neuromuscular exam. If the patient reported the MVA [motor vehicle accident] and ongoing symptoms such as hand weakness, reduced sensation or dexterity, or if the physician found any neuromuscular impairment on physical examination, I find it unlikely that a physician would sign a document clearing such a patient to perform physically demanding activities (activities which would put stress on the spinal column), without first arranging further evaluations such as an MRI of the neck or nerve conduction studies." The medical records submitted do not indicate that any such tests were ordered which, according to Dr. Burnstein, "suggests that the symptoms were not reported or the physical exam was normal, and that no impairment or disability existed at that time."

[47] Dr. Burnstein also testified that Mr. Chisholm would not have been required to use his neck or back much in doing the aptitude tests compared to the lashing test, which is very physically challenging.

[48] After reviewing all of the medical evidence, Dr. Burnstein concluded that there was no evidence of Mr. Chisholm having any ongoing issues from the motor vehicle accident that resulted in limitations by January 2016. He did not deny that Mr. Chisholm may have felt a certain way, and said it is possible that he was still experiencing back and neck pain several weeks after the accident. However, his conclusion was that there was no medical documentation to support this in the file provided to the Tribunal.

E. Age

[49] Mr. Moore testified that 29 of the 80 applicants referred to the HEA by the Union were over the age of 40. He also testified that, contrary to Mr. Chisholm's belief that most of the applicants over 40 were screened out of the hiring process during Stage 1 due to the timed nature of the tests, 50% actually passed the tests and moved on to Stage 2, while 57% of applicants under 40 moved on to Stage 2.

VI. Positions of the Parties

(i) Complainant

[50] Mr. Chisholm alleges that the HEA refused to employ him at least in part because of his disability or his age. According to Mr. Chisholm, the HEA's requirement that applicants in the hiring process provide their medical requests for accommodations before knowing exactly what was involved in the aptitude test amounted to a discriminatory practice.

(a) Disability

[51] Mr. Chisholm's position is that he had at least one disability at the time of the aptitude test on January 18, 2016 which affected his test scores. In his human rights complaint filed with the Commission in April of 2016, he said that his abilities had been limited as a result

of the October 2015 motor vehicle accident. He stated: “I can still do the work, but not with the same speed as before. Also I have lost some dexterity in my hands.”

[52] At the hearing he testified that he did not pass the aptitude tests because of disabilities that developed after the October 2015 accident. He said these disabilities were: i) a back injury; ii) his manual dexterity was not good; and iii) he could not do things as fast as he used to.

[53] In his closing submissions he suggests that he has other health concerns that “would have surfaced had I known what the aptitude testing consisted of”, including diabetes, arthritis, and colour blindness. He suggests that these should also have been accommodated at the time of the aptitude testing.

[54] Mr. Chisholm admits that he did not tell anyone from HEA, nor the people who administered the aptitude test, about any disability prior to taking the test. He said this is because he did not know what was involved in the aptitude testing, so he could not know how his alleged disabilities would affect his performance.

[55] He said he did not tell the doctor who completed the authorization for the lashing test about any of these disabilities on December 1, 2015, because, “the lashing test consists of using gross motor skills whereas the aptitude testing consisted of fine motor co-ordination.” He also says that, as he did not know at that time what the aptitude testing would consist of, he could not request an appropriate accommodation from the doctor. Mr. Chisholm further suggested that the doctor would not have been able to recommend an accommodation in any event because she also had no information about the aptitude testing at that time.

[56] In his closing submissions, he suggests that having more time to complete the aptitude tests would have been an appropriate accommodation but, because the hiring rules stated that there would be no time extensions given, neither he nor the doctor requested such an accommodation.

[57] Mr. Chisholm also argues that the Respondent “made getting an accommodation impossible” because there was not enough time between January 12th, when he received more information about the aptitude test, and the test date of January 18th to make an

appointment with a family doctor. He says a walk-in clinic would not have been able to help him because they would not have had his medical records.

[58] In response to HEA's suggestion that, if he had any questions about the aptitude test, he could have asked them beforehand, Mr. Chisholm says: "It was clearly stated in the HEA Hiring Rules that information about testing would be given out after the lashing test. Without the information on the tests it was useless to ask any questions."

[59] He also says that not being able to provide a full medical report until Stage 2 of the hiring process was adverse treatment, as this prevented him from demonstrating that he had a disability earlier. He says this adverse treatment kept him from being hired to the Cardboard.

[60] Mr. Chisholm says the waiver he was required to sign at the outset of the aptitude test was not voluntary because, if he did not sign it, he would not have been able to proceed in the hiring process.

[61] He also suggests that HEA knows its 2015-2016 hiring process was discriminatory, because in a subsequent hiring process, it provided more detailed information about the aptitude test in the application package given out at the job fair.

(b) Age

[62] Mr. Chisholm also argues that he was discriminated against on the basis of his age, being 49 at the time of the aptitude test. He states: "As a person ages this is typically associated with a reduction in speed but experience provides an increase in quality. A large number of applicants that were eliminated were over 40 years of age." He further states that it is common knowledge on the waterfront that "HEA tends to lean towards younger applicants." He provided no information to support this assertion but did request in his closing submissions that the Respondent disclose documents setting out the ages of everyone who was unsuccessful in the 2015-2016 hiring process.

(ii) Respondent

(a) Disability

[63] The Respondent argues that the Complainant failed to show on a balance of probabilities that he had a disability at the relevant time, and that he failed to establish that he was treated adversely on the basis of a disability in the hiring process.

[64] HEA says the Complainant had the opportunity to identify a disability when he completed the Employment Equity form in his Application for Referral on November 23, 2015. The form specifically asked if he was a person with a disability, defined as: “persons who have a long-term or recurring physical, mental, sensory, psychiatric or learning impairment.” He answered “no” to this question. HEA also says he could have identified a disability requiring accommodation prior to completing the aptitude test on January 18, 2016 when he signed the waiver saying he was in good health to proceed with the testing.

[65] The Respondent points out that the Complainant’s physician also did not identify any impairments that would prevent him from completing the lashing test when he obtained the medical clearance for this test on December 1, 2015.

[66] HEA further notes that the Complainant actually passed the manual dexterity part of the aptitude test despite claiming this was one of his disabilities. While he “failed” the spatial aptitude and motor coordination parts of the test by receiving below average scores, HEA points out that he did not allege or lead evidence to support any disability related to these aptitudes.

[67] The Respondent submits that the Complainant’s October 13, 2015 motor vehicle accident did not leave him with symptoms amounting to a disability when he took the aptitude test three months later. It also points out that only one out of nearly 100 medical documents submitted by the Complainant as evidence at the hearing relates to the October 2015 accident. However, that ER Form does not mention any adverse impact on the Complainant’s manual dexterity. Rather, it notes normal range of movement in his extremities and no red flags.

[68] The Respondent says the medical documents shows no evidence of any impairment relating to manual dexterity or speed at all. It argues that this is supported by the fact that he passed the timed tests for lashing and manual dexterity.

[69] The Respondent also relies on Dr. Burnstein's conclusion that there is no medical evidence in the file to support the conclusion that Mr. Chisholm suffered from a disability when he took the aptitude test on January 18, 2016.

[70] HEA argues that there is no reasonable explanation for the Complainant's lack of medical evidence about his alleged disabilities other than that he did not require medical attention because he did not have a disability. It points out that he had no problem accessing medical care when he required it. Even if he did not have a family doctor, he frequently went to the walk-in clinic near his home.

[71] With respect to the Complainant's argument that he did not know what the aptitude test would involve and therefore did not have time to request accommodations, the Respondent points out that the pamphlet he was provided following the lashing test on January 12, 2016 had a picture of the pegboard used in the aptitude test. It says he could have taken this to his doctor or requested more information. Also, HEA points out that it has used the same aptitude test for many years, so the tests are well known on the waterfront.

[72] HEA says it cannot be faulted for not knowing that the Complainant felt he may have needed accommodation for the testing process. It refers to *Kandola v. Canada (Attorney General)*, 2009 FC 136 (CanLII), in which Justice Zinn stated at paragraph 1:

> An employee who requires accommodation for a disability must inform his employer of the fact of the disability, unless it is self-evident, and then co-operate in the accommodation process; if not, it is he who must bear the consequences. Admitting to a disability and seeking the employer's assistance is difficult for some. However, when disclosure and a request for accommodation have not been made, the employee cannot later ask that the employer's assessment of his performance, made in ignorance of the disability, be set aside, nor can it reasonably be asked that the employer retrospectively assess what the employee's performance might have been if the disability was known and the employee accommodated in the workplace.

[73] HEA says that, had Mr. Chisholm asked for accommodation and provided the requested medical documentation, he would have been accommodated. It submits that there is no evidence that he was treated adversely as a result of any alleged disability.

[74] HEA also says the Complainant did not mention any relationship between the aptitude testing and his diabetes, colour blindness, or arthritis until the hearing, which was more than 4 years after the filing of his complaint with the Commission. In any event, it says there is no evidence to support a claim of *prima facie* discrimination on the basis of such conditions either.

(b) Age

[75] With respect to the allegation of age discrimination, the Respondent says the Complainant did not adduce any evidence showing a connection between his age and his failure to progress through the hiring process. There is no upper age limit requirement for applicants. Any applicant who meets the minimum criteria and passes the screening tests can advance in the hiring process.

[76] The Respondent says the evidence shows that applicants above and below 40 years of age had a similar success rate in the hiring process in question.

[77] The Respondent says the Complainant is merely speculating that age was a factor in the hiring process, and a complaint must be based on something other than "abstract beliefs or suspicions". It says he did not provide the required "concrete observations or independent information to support or confirm" his allegations of age discrimination (*Breast v. Whitefish Lake First Nation*, 2010 CHRT 10 (CanLII) at para 38).

VII. Legal Framework

[78] Mr. Chisholm alleges discrimination by the HEA contrary to sections 7 and 10 of the *CHRA*. Both sections relate to employment. Section 7(a) says it is a discriminatory practice to refuse to employ or continue to employ any individual on a prohibited ground of discrimination. Section 10 says it is a discriminatory practice for an employer or employer

organization to establish or pursue a policy or practice that deprives “an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.” Both disability and age are prohibited grounds of discrimination under section 3 of the *Act*.

[79] As previously indicated, the decision was made to bifurcate the hearing and the purpose of this first hearing is to see if Mr. Chisholm can prove *prima facie* discrimination. The Supreme Court of Canada described a *prima facie* case as “one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer from the respondent-employer” (*Ontario Human Rights Commission v. Simpson-Sears*, 1985 CanLII 18 (SCC) at para 28).

[80] In this complaint, the application of the *prima facie* threshold test requires that Mr. Chisholm demonstrate, on a balance of probabilities, that:

(1) He had one or more characteristics protected from discrimination at the relevant time (“prohibited grounds of discrimination” of age or disability pursuant to section 3 of the *Act*)*;*

(2) The HEA treated him adversely (either by refusing to employ him contrary to s.7(a) of the *CHRA* or by establishing a policy or practice that deprived him of an employment opportunity contrary to s.10 of the *CHRA*); and

(3) A protected characteristic was a factor in the HEA’s adverse treatment of him (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39 (CanLII) [*Bombardier*] at paras 56 and 63).

[81] The protected characteristic need only be a contributing factor in the adverse treatment. A causal connection is not required (*Bombardier, ibid* at para 56*).*

[82] In determining whether discrimination has occurred, the Tribunal may consider the evidence of all parties. A respondent can present evidence to refute an allegation of *prima facie* discrimination, put forward a defence justifying the discrimination under section 15 of the *Act*, or do both (*Bombardier, ibid* at para 64). Where a respondent refutes the allegation

of discrimination, this explanation must be reasonable, it cannot be a “pretext” - or an excuse - to conceal discrimination (*Moffat v. Davey Cartage Co.(1973) Ltd.,* 2015 CHRT 5 (CanLII) at para 38).

[83] In this case, the Respondent has presented evidence in an attempt to refute the allegations of *prima facie* discrimination.

[84] It is only if the Complainant proves *prima facie* discrimination that the Tribunal would hold a second hearing during which the Respondent would put forward a defence to try to justify the discrimination under s.15 of the *Act*. This is the point at which the Tribunal would consider the duty to accommodate, as the “failure to accommodate is neither a prohibited ground of discrimination nor a discriminatory practise under the *CHRA*. There is no free-standing right to accommodation under the *CHRA*” *(Moore v. Canada Post Corporation*, 2007 CHRT 31 (CanLII) at para 86).

VIII. Analysis

(i) Disability

[85] I must first determine whether, at the time of the hiring process, Mr. Chisholm had a disability as contemplated by the *CHRA*. “Disability” is defined very broadly in section 25 of the *Act* as “any previous or existing mental or physical disability …”. The Tribunal has had to determine many times whether a complainant has a disability as protected under section 3 of the *Act*. To assist with its determination, the Tribunal often refers to the decision of the Federal Court of Appeal in *Desormeaux v. Ottawa (City)*, 2005 FCA 311 (CanLII), in which the Court stated at paragraph 15:

> As the Supreme Court established in *Granovsky v. Canada*, 2000 SCC 28 (CanLII) … at para. 34 and in *City of Montreal* [2000 SCC 27 (CanLII)] at para. 71, **disability in a legal sense consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment**. [Emphasis added]

[86] This is not a case where the perception of an impairment is at issue. Rather, I will consider whether Mr. Chisholm had a physical impairment that resulted in a functional

limitation in relation to the hiring process and, specifically, the aptitude test. Given the nature of his complaint, Mr. Chisholm must establish that he had a disability that required accommodation in relation to the aptitude test.

[87] Parties are not required to adduce any particular type of evidence in order to prove they experienced discrimination. In *Mellon v. Human Resources Development Canada*, 2006 CHRT 3 (CanLII) [*Mellon*], the Tribunal concluded at para 82:

> A disability may exist even without proof of physical limitations or the presence of an ailment. Although the Supreme Court is reminding us that an overreliance on medical information is not necessary in order to establish that a disability does or does not exist, there needs to be more than just a bare statement that one suffers from a disability to meet the test. There has to be evidence that the disability is there. This evidence can be drawn from the medical information **and from the context in which the impugned act occurred.** [Emphasis added]

[88] In *Lafrenière v. Via Rail Canada Inc*., 2019 CHRT 16 (CanLII), the Tribunal did not require direct evidence of a mental disability, but instead relied on the facts and circumstances, which led the Tribunal to determine the Complainant did have a disability as protected under s.3 of the *Act*. The Tribunal relied on testimony from the complainant and others, as well as medical notes to conclude that, “Mental health disabilities, though not always major, permanent, or ongoing, are also entitled to protection from discrimination” (para 93).

[89] I see no reason why this same reasoning should not apply to physical disabilities. There is no requirement in the *Act* that they be major, permanent or ongoing in order to be protected under the *CHRA*. However, “sufficient evidence still needs to be presented to support the existence of the disability” (*Mellon, supra* at para 88).

[90] Mr. Chisholm testified about what he considered to be his disabilities at the time of the hiring process. He testified that he had three impairments stemming from the October 2015 motor vehicle accident relating to manual dexterity, speed and a back injury. However, the medical documentation provided does not support his assertion that his manual dexterity and speed were negatively affected following the accident. Also, the Complainant was able to successfully complete both the physically challenging lashing test and the manual

dexterity part of the aptitude test, on which he received an average score. Both tests were timed. While it may have been the Complainant's subjective experience that he was slower to do things than he was before the accident, and that his manual dexterity was not the same, I am not convinced that these amount to disabilities as contemplated by the *Act*.

[91] There is nothing in the evidence aside from his bald assertion that his manual dexterity or the speed with which he did things were disabilities under the *Act*. He did not establish on a balance of probabilities that his alleged issues with speed and manual dexterity were physical or mental impairments that resulted in functional limitations during the hiring process.

[92] With regard to the back injury that he testified was an impairment arising from the motor vehicle accident, I do not find that this amounted to a disability under the *Act* either. Although Mr. Chisholm testified that he could barely walk when he went to the ER on the day of the accident, and that he disagrees with the ER report that says his lower back pain was 5/10, he also testified that the only treatment he received afterwards was massage therapy. This was brought up for the first time at the hearing and he did not provide any proof that he received massage therapy treatments, despite having been able to provide many other medical records.

[93] Dr. Burnstein testified that most people with a whiplash injury like that recorded by the ER physician recover within 6 to 12 weeks and, if they are still experiencing pain, most follow up with a physician. Mr. Chisholm did not do so.

[94] Also, on December 1, 2015, Mr. Chisholm's physician cleared him to do the lashing test the following month, noting that he had "no physical or psychological impairments that would prevent" him from taking part in the lashing test, which involved lifting heavy rods and climbing, bending and twisting. The physician does not refer to the motor vehicle accident or to any limitations relating to his arm, hand, neck or shoulder movement.

[95] Mr. Chisholm's own testimony was that, when he saw this physician on December 1, 2015, he thought his back issues from the accident had substantially resolved themselves, and so he did not mention this to her.

[96] I accept Dr. Burnstein's evidence that a physician following standard practice would have carried out a full assessment prior to providing the clearance for the lashing test. I also accept that such a physician would not have approved an individual suffering from a sudden decrease in manual dexterity or a back injury following a motor vehicle accident six weeks prior, to undertake a demanding physical test without further investigation.

[97] On January 12, 2016 Mr. Chisholm performed the lashing test and passed it. I cannot reasonably conclude that, less than a week later, an alleged back injury from the motor vehicle accident three months earlier interfered with his ability to perform the aptitude tests, which were sedentary and did not involve the neck or back in any meaningful way.

[98] I find that Mr. Chisholm did not establish on a balance of probabilities that his alleged back injury was a physical impairment that resulted in a functional limitation during the hiring process. In my view, he did not present sufficient evidence to support the existence of any disability resulting from the October 2015 motor vehicle accident that impacted his ability to participate in the hiring process, or for which he required an accommodation in relation to the aptitude test.

[99] I also do not accept Mr. Chisholm's suggestion, brought up for the first time in his closing submissions, that diabetes, arthritis, or colour blindness were disabilities that affected his participation in the hiring process or required accommodation to be successful in the aptitude testing. With respect to colour blindness, Mr. Chisholm provided no evidence about whether this impacted his ability to do any of the aptitude tests, including the peg test. He did not testify about what colours he is unable to see, nor whether these were the colours on the pegs used in the aptitude test. The evidence before the Tribunal was also that he passed the peg test, which was evaluating his manual dexterity.

[100] With respect to arthritis, the only record mentioning this condition is a 2017 diabetes self-assessment form. The medical records do not confirm Mr. Chisholm had been diagnosed with arthritis prior to the events in question, nor has he alleged which part of his body is affected by arthritis. Mr. Chisholm also did not testify that arthritis interfered with his ability to complete the aptitude test.

[101] Finally, with regard to diabetes, while it is clear from the medical evidence that Mr. Chisholm had been diagnosed with diabetes and had been prescribed medication for it by January of 2016, he did not provide any evidence about how his diabetes affected him at the time. He did not testify that it caused any functional limitations for him, in his life in general or during the hiring process.

[102] Mr. Chisholm states in his closing argument that diabetes "is a medical issue that a doctor would have included for an accommodation request, had they known what the testing consisted of." This is speculation and not supported by any evidence. It is well accepted that "mere belief, without supporting evidence is not sufficient to support a claim of discrimination" (*Wilson v. Canada Border Services Agency*, 2015 CHRT 11 (CanLII) at para 19). Mr. Chisholm did not call a doctor to testify about his medical conditions and Dr. Burnstein testified that the medical records from prior to the aptitude test show that his blood sugars were well controlled.

[103] While Mr. Chisholm asks the Tribunal to conclude that several of his ailments or medical conditions amounted to disabilities that required accommodation at the time of the aptitude testing, I decline to do so. When he completed the application form to be referred by the Union to the HEA's hiring process on November 23, 2015, Mr. Chisholm specifically indicated that he did not have a disability. At no point has he ever provided medical information that would support this allegation, even after he was removed from the hiring process.

[104] Mr. Chisholm speculates that he could not have gotten an appointment with a doctor in time to request an accommodation for the aptitude testing after he received more information about what was involved in the testing on January 12, 2016. However, his own evidence shows that he was capable of obtaining medical attention when he required it.

[105] Mr. Chisholm also testified that, after receiving the December 29, 2015 letter accepting him into the hiring process, he did not reach out to HEA to ask what was involved in the aptitude testing. When asked why, he stated that he had learned that it is not always easy to reach out to HEA and he assumed that they would tell him to wait until after the lashing test anyway. However, Mr. Moore testified that the HEA could have provided

information about the testing to Mr. Chisholm's physician prior to the test if it had been requested.

[106] Mr. Moore testified that three other applicants managed to obtain medical accommodation requests from their doctors and were accommodated for the aptitude testing in the 2015-2016 hiring process. Clearly the requirement that accommodation requests be provided prior to the aptitude testing was not an impediment to these applicants with disabilities.

[107] Mr. Chisholm has not met the first part of the *prima facie* discrimination threshold test with respect to disability. I conclude that, at the time of the 2016 hiring process, he did not have a disability that would have impacted his performance in the hiring process, or that required accommodation in relation to the aptitude test. As he did not prove on a balance of probabilities that he had a disability, I need not move on to the other parts of the *prima facie* test in relation to this prohibited ground of discrimination.

(ii) Age

[108] I must similarly apply the three-part *prima facie* test to determine if Mr. Chisholm has proven discrimination on the basis of age. Even if I accept that his age – being 49 at the time of the aptitude testing - was a prohibited ground of discrimination under s.3 of the *Act*, I must consider whether it was a factor in the adverse treatment he experienced in relation to the hiring process. He alleges a contravention of both s.7(a) and s.10 of the *Act*.

[109] Section 7(a) of the *CHRA* says it is discrimination for an employer to refuse to employ someone based on a prohibited ground. HEA refused to employ Mr. Chisholm because he "failed" the aptitude test by not receiving the minimum required score on all three tests. I do not find that Mr. Chisholm has proven that he received below average marks on the spatial aptitude and motor coordination parts of the aptitude test due to his age.

[110] Mr. Chisholm's position is that, as people get older, they get slower, and the aptitude tests are all based on speed. However, Mr. Chisholm provided nothing to support his bald assertion that, as he has aged, he has gotten slower in a way that impacted his ability to be successful on the motor coordination and spatial aptitude tests.

[111] While Mr. Chisholm may subjectively feel that he does things more slowly now than when he was younger, he did not prove on a balance of probabilities that this caused him to receive below average scores on these two tests, or that he required an accommodation in the hiring process based on his age. Again, he passed the timed lashing test and the timed manual dexterity test. This is also relevant to his allegation of discrimination under s.10 of the *Act*.

[112] In order to prove discrimination under s.10 of the *CHRA*, one must show that the employer has established a practice that deprives an individual or class of individuals of an employment opportunity based on a prohibited ground.

[113] Mr. Chisholm suggests that he, as an individual, was deprived of an employment opportunity because of HEA's requirement that applicants provide their requests for accommodation before knowing exactly what the aptitude testing entailed. He argues that, if he had known what was involved in the aptitude testing, he would have known that his age-related speed issues would affect his ability to pass the tests and so, presumably, he could have asked for an accommodation. This, however, is based on the premise that he does things more slowly because of his age, and that he failed the two aptitude tests because of his age-related speed issues. Again, the evidence does not support this allegation.

[114] Mr. Chisholm also argues that the Respondent contravened section 10 of the *Act* by establishing a practice that deprives a class of individuals of an employment opportunity on the basis of age. He alleges that most people over the age of 40 were screened out during Stage 1 of the hiring process due to the timed nature of the tests, because people over 40 do things more slowly than people under 40. This allegation is also not supported by the evidence.

[115] Mr. Moore testified that 50% of the people over 40 who were referred by the Union to the hiring process advanced to Stage 2. This means they passed the aptitude tests, as well as the other tests and requirements of Stage 1. Of the people under 40 who were referred by the Union, 57% advanced in the hiring process. The fact that only around 38% of people referred by the Union to the HEA were over 40 is not in consideration, as the

complaint is against HEA and not the Union. Further, Mr. Moore testified that the Union was not aware of the ages or identities of the applicants, as these were redacted during its selection process.

[116] With respect to Mr. Chisholm's request in his closing submissions that the Respondent disclose documents setting out the ages of everyone who was unsuccessful in the 2015-2016 hiring process, this is much too late in the process to be asking for the disclosure of documents. The hearing is complete. I accept Mr. Moore's evidence about the percentage of people over and under 40 who successfully completed Stage 1 of the hiring process in 2016.

[117] When making a decision about whether discrimination has occurred, it is useful to keep in mind the words of the Supreme Court of Canada in *Andrews v. Law Society British Columbia,* 1989 CanLII 2 (SCC) at page 174, which defined discrimination as follows:

> Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[118] In *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal,* 2007 SCC 4 (CanLII), the Supreme Court further stated that "a workplace practice, standard or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics" (para 48). The Court went on to say, at paragraph 49:

> …there is a difference between discrimination and a distinction. Not every distinction is discriminatory. … Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of remedy. And it is the claimant who bears the threshold burden.

[119] Mr. Chisholm has not proven on a balance of probabilities that his age resulted in him being disadvantaged during the hiring process, particularly with respect to the aptitude testing. He was required to establish more than his mere belief that his age was a factor in

his removal from the hiring process. He failed to do so. I cannot draw an inference that, because he is over 40, he received below average marks on two parts of the aptitude test.

[120] Nor has he established on a balance of probabilities that the timed nature of the aptitude tests discriminated against people over the age of 40 generally.

[121] Finally, the fact that HEA provided information about the aptitude test with the application package at the hiring fair in a subsequent hiring process does not prove that Mr. Chisholm was discriminated against by HEA in the 2015-2016 hiring process. He was unable to prove that he had a disability that required accommodation in order to pass the aptitude test, or that his age was a factor in him being removed from the hiring process.

IX. Conclusion

[122] Obviously not everyone who took the aptitude tests as part of the hiring process received a score of average or above on all three of them. The fact that Mr. Chisholm “failed” two of the aptitude tests does not prove that he had a disability that required accommodation, nor does it prove that his age was a factor.

[123] As Mr. Chisholm did not establish on a balance of probabilities that he had a disability at the time of the hiring process, or that his age was a factor in his removal from the hiring process, he has not met the threshold test for *prima facie* discrimination on the basis of disability or age. Therefore, I dismiss Mr. Chisholm’s complaint. As such, there is no need to hold a second hearing.

Signed by

Colleen Harrington
Tribunal Member

Ottawa, Ontario
March 30, 2021

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2291/4618

Style of Cause: Graham Chisholm v. Halifax Employers Association

Decision of the Tribunal Dated: March 30, 2021

Date and Place of Hearing: Hearing held by videoconference

August 17-19, 2020

Appearances:

Graham Chisholm, for the Complainant

Brian G. Johnston Q.C and Jennifer Thompson, for the Respondent