

Canadian Human Rights Tribunal

personne

Tribunal canadien des droits de la

BETWEEN:

TIMOTHY LINCOLN

Complainant

- and -

BAY FERRIES LTD.

Respondent

REASONS FOR DECISION

T.D. 05/02

2002/02/20

PANEL: J. Grant Sinclair, Chairperson

TABLE OF CONTENTS

I. INTRODUCTION

II. TIMOTHY LINCOLN

III. WORK HISTORY

IV. WORK CULTURE ON THE ACADIA

V. THE HIRING PROCESS

A. Initial Screening

VI. BAY FERRIES JOB OFFER - THE MARCH 31, 1997, MEETING - MR. CORMIER AND MR. LINCOLN

A. Filing the Complaint

VII. WHAT BAY FERRIES WANTED IN A CHIEF ENGINEER

VIII. BAY FERRIES - CHIEF ENGINEERS

IX. COMPARISONS BETWEEN MR. LINCOLN, MR. LEWIS, MR. SMITH AND MR. HAMILTON

A. Mr. Lincoln v. Mr. Lewis

B. Mr. Lincoln v. Mr. Smith

C. Mr. Lincoln v. Mr. Hamilton

X. THE BRITISH COLUMBIA FERRIES JOB APPLICATION

A. The Selection Process, Interview and Rejection

B. Return from British Columbia

XI. WHEN DID BAY FERRIES LEARN OF MR. LINCOLN'S COMPLAINT

XII. DECISION

A. The Section 7 Complaint

(i) Conclusion

B. The Section 14(1)(c) and Section 14.1 Complaints

(i) Conclusion

I. INTRODUCTION

[1] Timothy Lincoln, the Complainant in this case, is 39 years old, was born in Trinidad and came to Canada in 1963. He lived in Digby, Nova Scotia, from 1963 until the early 1980's. Mr. Lincoln graduated from high school in 1979, and that year went to work with Canadian National Marine (Marine Atlantic) as an engine room assistant on the ferry ship, M.V. Princess of Acadia.

[2] The Acadia is a passenger/car ship that runs year round between Saint John, New Brunswick and Digby. It is a large vessel, 480 feet long by 66 feet wide, 11,500 BHP with a maximum capacity of 650 passengers and 160 car/truck trailers. Marine Atlantic also operated a ferry service between Yarmouth, Nova Scotia and Bar Harbor, Maine, which was serviced by the M.V. Bluenose.

[3] Through hard work, study and ambition, Mr. Lincoln progressed quickly through the ranks at Marine Atlantic and obtained his Fourth Class Marine Engineering Certification, Motor in 1984, his Third Class and Second Class Certificates in 1987 and 1990 respectively, and his First Class Certification in 1993 which qualified him to sail as a chief engineer.

[4] In 1990, Mr. Lincoln began to work as a relief chief engineer, which he was able to do under the existing Transport Canada regulations although he only had his Second Class Certificate at that time. In total, Mr. Lincoln worked for about 17 years in the engine room on the Acadia, including three years as a junior engineer and almost seven years as a chief engineer.

[5] In 1996, Marine Atlantic decided to privatize the Acadia and the Bluenose ferry services and issued a public call for proposals (RFP). Bay Ferries Ltd., a subsidiary of Northumberland Ferries Ltd. (NFL) was the successful bidder. Bay Ferries' operational plan was that it would take over Marine Atlantic at midnight, March 31, 1997. All Marine Atlantic employees on these two ferry services would be terminated. Bay Ferries would start afresh and hire the personnel it needed, but a significant number would come from the ex-Marine Atlantic pool of employees.

[6] Mr. Lincoln applied for a chief engineer position on the Acadia. This was his preference although he indicated on his application form that he would accept employment anywhere in Nova Scotia. It was his understanding that Bay Ferries was looking for a chief engineer with "hands-on" experience on the Acadia and he considered that he squarely met these qualifications.

[7] As it turned out, Mr. Lincoln was not offered a chief engineer position. Instead, on March 31, 1997, Bay Ferries Ltd. offered him a relief chief engineer position, a position that involved lesser responsibilities and a lower rate of pay. Bay Ferries' thinking was that this would give Mr. Lincoln a wider experience with the view to promoting him to chief engineer on the high speed ferry which Bay Ferries Ltd. had plans, not yet firm, to acquire in the next year or so.

[8] Mr. Lincoln declined the offer. He considered that he was overqualified for that position and found the offer humiliating. He also considered Bay Ferries' refusal to hire him as a chief engineer to be racially motivated.

[9] In April/May 1997, Mr. Lincoln heard of and applied for an engineer's position with the British Columbia Ferry Corporation. He passed the written exam, travelled to British Columbia, and had two follow-up interviews. After the interviews, he claimed he was told that he would be getting an offer, but in fact, he was not offered a job. He later learned that B.C. Ferries had called someone at Bay Ferries who he believed, had given him a negative reference. He concluded that this was the reason for the rejection.

[10] Mr. Lincoln filed a complaint with the Canadian Human Rights Commission on April 21, 1997. In his complaint, Mr. Lincoln alleged that Bay Ferries discriminated against him by refusing to employ him because of his colour (brown) and race (West Indian) contrary to section 7 of the *Canadian Human Rights Act*. He alleged that he was more qualified than the two persons (white) hired for the two chief engineer positions on the Acadia.

[11] Mr. Lincoln subsequently amended his complaint alleging harassment by Bay Ferries under section 14(1)(c) of the *Act* and retaliation under section 14.1 of the *Act*. These allegations arose out of Mr. Lincoln's assertions that Bay Ferries interfered with his attempt to gain employment with B.C. Ferries.

II. TIMOTHY LINCOLN

[12] Timothy Lincoln lives outside Saint John where he has lived for almost 14 years. He is married with three children. At the present time, he is employed as a chief engineer with Secunda

Marine, which operates 17 vessels of various marine types. He joined Secunda on August 25, 1997, at a salary that was comparable to Bay Ferries but which was significantly increased shortly after. However, his Secunda job initially required that he be away from home for long periods of time which meant a major lifestyle change for him and his family. Today, he works on a more acceptable schedule of four weeks on and four weeks off. Mr. Lincoln was encouraged to join Secunda by Bruce Taylor, Secunda's Superintendent, who was a friend of Mr. Lincoln and who had worked with him at Marine Atlantic in the mid-1980's. Mr. Taylor was impressed with Mr. Lincoln's skills which is why he encouraged him to come to Secunda although Mr. Lincoln had no offshore experience.

III. WORK HISTORY

[13] Mr. Lincoln started his career as an engine room assistant (ERA) on the Acadia. An ERA is an entry level position in the ship's engineering department. An ERA is basically a labourer whose duties consist of general cleaning, cleaning machinery, assisting the engineers and operating the large hydraulic doors on the vehicle deck. A certain amount of sea time is required before an ERA is qualified to write the exams for the first level of engineer, i.e. Fourth Class Marine Engineer. As soon as he had the required sea time, Mr. Lincoln wrote the exams for his Fourth Class ticket which he obtained in January 1984.

[14] A Fourth Class engineer has more responsibility than an ERA. As a junior engineer, he would assist with in-service repairs, maintenance and periodic replacement of filters, use of oil/water separators, fuel transfers, all under the supervision of a senior engineer.

[15] Mr. Lincoln obtained his Third Class Engineer Certificate in 1987, his Second Class Certificate in 1990 and his First Class Certificate in 1993.

[16] As a Third Class engineer, Mr. Lincoln's duties included doing engine room maintenance under the maintenance management program, repairs as required and providing direct supervision to the engine room maintenance staff.

[17] As a Second Class Engineer, Mr. Lincoln performed the necessary in-service repairs, supervised the engine room staff, monitored machinery performance and reported directly to the chief engineer. At that time, the Regulations allowed him to sail as a chief engineer on the Acadia with a Second Class ticket. Mr. Lincoln worked from time to time in relief of the regular chief engineers. He was responsible for the safe and efficient operation of the vessel and his responsibilities were to ensure that all of the ship's machinery and equipment operated properly.

[18] Although Mr. Lincoln qualified as an engineer when he received his Fourth Class ticket in 1984, he continued to work as an ERA in 1984, 1985 (11 months) and 1986 (10 months), and as an ERA for 2½ months in 1987. In total, Mr. Lincoln worked as an engineer on the Acadia for about 10 years, of which just under seven years were as a chief engineer.

[19] Marine Atlantic's operational policy was that the chief engineer would be in the engine room for approximately 20 to 25 minutes when arriving in port and when leaving port. Once the vessel had cleared port, the chief engineer would be in his office on deck doing administrative work. He would return to the engine room if something required him to be there. In effect, the work split for the chief engineer was about 70/30 administrative/engine room.

[20] In 1991, Mr. Lincoln worked for about a month as a relief chief on the Sir Robert Bond, which replaced the Acadia which was undergoing certain repairs. In that same year, he also worked as a junior engineer on the Bluenose for about three weeks when the Acadia was in dry dock. Apart from these very short stints, all of Mr. Lincoln's marine experience was on one vessel, the Acadia, and with one company Marine Atlantic, a crown corporation.

[21] About every two years, the Acadia would be dry docked for about six weeks. This was necessary for the planned maintenance which could not be done during sailing. As both a junior engineer and a chief engineer, Mr. Lincoln was involved in the dry dock maintenance program which involved the steering gear, the engine, generator, stabilizer, and the hydraulic system. He participated in at least five dry dock programs on the Acadia while with Marine Atlantic from 1987 to 1997.

IV. WORK CULTURE ON THE ACADIA

[22] Mr. Lincoln's view was that the Acadia had a good operational and safety record and Marine Atlantic provided a very good ferry service. He did not agree that there was a poor work culture on the Acadia or in the engineering room, although it may have been overstaffed in some positions. This was because Marine Atlantic staffed for the maximum capacity of 650 passengers but which was attained usually in the prime tourist months.

[23] Bay Ferries had a different view. Marine Atlantic's operations were not profitable. In fact, in recent years, it had incurred annual losses of \$6 million. During visits to the Acadia prior to the takeover, representatives of Bay Ferries had observed engine room employees sitting around and watching television. Further, through interviews and discussions, Bay Ferries learned that there was a permissive attitude on board which tolerated alcohol and drug use. Bay Ferries recognized that there was a need to make significant changes to the way Marine Atlantic had operated. Staff had to be cut, operating procedures had to be changed and Bay Ferries needed to hire staff who had the experience and flexibility to adapt to change.

[24] After the takeover, the engine room staff was reduced by over 50%, including cutting the number of chief engineers from four to two, on both the Acadia and the Bluenose. The chief engineer was no longer to be an overseer and spend most of the time doing administrative tasks in his office on deck. He was the leader in the engine room and was to be "hands-on" in the sense that the engine room is where he should be. To provide both continuity and also to effect a change in the culture of the engine room on the Acadia, Bay Ferries decided that it would hire one chief engineer from the ex-Marine Atlantic pool and one chief engineer from outside Marine Atlantic to staff the Acadia. By hiring an outside engineer, Bay Ferries was signalling a change

at the top and a change in the way things were done.

V. THE HIRING PROCESS

A. Initial Screening

[25] Bay Ferries advertised in various local newspapers for experienced marine engineers. The stated qualifications were a minimum of a Fourth Class Certificate and two years experience, with preference given to those with higher certificates, graduates of marine institutes and those having ferry experience. Mr. Lincoln responded to the Bay Ferries' advertisement in the Saint John newspaper and submitted his application and resume on February 8, 1997, for the position of chief engineer on the Digby to Saint John run. He also indicated on his application that he would work anywhere in Nova Scotia.

[26] Bay Ferries had retained Ken Murphy & Associates to do the initial screening interviews. For the Acadia, Murphy & Associates recommended seven candidates for chief engineer in rating order as follows, Razi Zaidi, Mark Lewis, Keith Holt, Tim Lincoln. For the Bluenose, Murphy & Associates recommended first, Chris Kenney and Gary Smith and as second choices, Hans Hausgaard, Robbie Chopra and Brian Warren.

[27] Those recommended went for a technical interview. These interviews were conducted by Donald Cormier, General Manager of Bay Ferries and Gerry Stevenson, Technical Superintendent for NFL. The interviews for the Acadia were held in Moncton on March 14, 1997. Five applicants for chief engineer were interviewed at that time, Mark Lewis, Keith Holt, Tim Lincoln, Razi Zaidi and Edwin Millar. Mr. Lewis, Mr. Lincoln and Mr. Zaidi were all former chief engineers on the Acadia. Originally, Rob Hamilton, an ex-Marine Atlantic, was scheduled to be interviewed, but he declined to go forward. Those interviewed for the Bluenose were Chris Kenney, Hans Hausgaard and Brian Warren, former chief engineers on the Bluenose, and Gary Smith, who, at one time had worked on the Bluenose, but had left Marine Atlantic in 1993. They were interviewed in Digby on March 20, 1997.

[28] Mr. Cormier and Mr. Stevenson did not know any of the prospective candidates being interviewed. They had worked out an interview agenda whereby each candidate for the Acadia was to be questioned on work history and experience, management style, cost cutting initiatives, and their strengths and weaknesses. Because Mr. Cormier and Mr. Stevenson had noticed when doing a pre-takeover tour of the Acadia that the watertight bulkhead doors were open during sailing, this practice and the regulations that governed watertight doors were added to the topics on their list.

[29] Prior to his interview, Mr. Lincoln encountered Mark Lewis who had just completed his interview. According to Mr. Lincoln, Mr. Lewis asked him about the ISM Code and about the watertight door regulations. Mr. Lincoln presumed that Mr. Lewis asked him because he could not answer these questions when asked in his interview. Mr. Lewis' version is that he had met Mr. Lincoln after his interview and before Mr. Lincoln's interview. He told Mr. Lincoln about

some of the questions he had been asked. He did this because he thought it would be useful, he considered Mr. Lincoln to be a good friend and he fully expected that both he and Mr. Lincoln would be hired as the chief engineers on the Acadia.

[30] For the first part of the interview, they discussed his experience and cost cutting ideas and some management issues. He was also asked whether he would accept a second engineer's position with Bay Ferries. He was very surprised because he was interviewing for chief engineer. Once he got over his surprise, Mr. Lincoln answered that if other more qualified Marine Atlantic engineers were hired and there was no chief engineer position for him, he would accept a second engineer position if there was an opportunity for advancement. He also expressed that he had a great interest in the new ferry technology and his career goal was to be a chief engineer on a high speed ferry.

[31] Mr. Lincoln felt that he had a good interview as did both Mr. Cormier and Mr. Stevenson. However, they were concerned about Mr. Lincoln's answers in two questions, most particularly on the subject of watertight doors. The practice on the Acadia, with the tacit knowledge of the captain, was to close the watertight doors only when leaving or arriving at port. Otherwise, the doors were left open during the sailing to allow for ventilation and cooling of the engine room. The purpose of the watertight doors was to seal off the bulkhead so that if one compartment flooded, the vessel would stay afloat.

[32] Mr. Lincoln acknowledged this practice, and referred to the relevant provision of the *Canada Shipping Act* which he interpreted as permitting this. In his view, the watertight doors were to be closed, "except when necessarily opened for the working of the ship" as provided in the regulation. Mr. Lincoln did say, however, that if he was incorrect or was instructed otherwise, he would discontinue this practice on the Acadia.

[33] Mr. Cormier and Mr. Stevenson were concerned about Mr. Lincoln's response on this question. In their opinion, this practice could not be justified. Mr. Stevenson went further and categorically stated that ventilation and cooling is not a reason for keeping the watertight doors open. This was a serious safety issue and for Mr. Stevenson, Mr. Lincoln's answers showed a lack of understanding of the purpose of watertight doors. He also thought that Mr. Lincoln took too strong a position of wanting to defend this practice. This indicated that Mr. Lincoln may not initially be receptive to change. This could be a problem because of the need facing Bay Ferries to manage a major change in operational practices.

[34] Mr. Lewis was also asked about the watertight doors. He was not sure what the regulation required and said so. Mr. Stevenson considered this to be an honest response. Interestingly, Mr. Lewis was marked up for his honest ignorance, but Mr. Lincoln was marked down even though he knew the regulation, but interpreted it differently than Mr. Stevenson.

[35] The answer which was less significant was Mr. Lincoln's response that basically he had no weaknesses. Mr. Cormier felt that perhaps this attitude could be an obstacle to change.

VI. BAY FERRIES JOB OFFER - THE MARCH 31, 1997, MEETING - MR. CORMIER AND MR. LINCOLN

[36] Even though Mr. Cormier had some concerns arising from Mr. Lincoln's interview, the overall conclusion was that they very much wanted him to join Bay Ferries. Mr. Lincoln had been interested in high speed ferries and that was of great interest to Bay Ferries. On the night of the takeover from Marine Atlantic, Mr. Cormier was on board the Acadia and had been told by Mr. Lewis that Mr. Lincoln was very concerned about his employment prospects. Mr. Lincoln already knew that Mr. Lewis and Gary Smith had been hired as the two chief engineers on the Acadia.

[37] Mr. Cormier went to see Mr. Lincoln who was in the chief engineer's office. He told Mr. Lincoln that Bay Ferries had worked out a career plan that Bay Ferries felt would serve both of their objectives. The plan was that Bay Ferries would offer Mr. Lincoln the position of Relief Chief Engineer. This was a new position created by Bay Ferries which only required the qualifications of a Second Engineer and paid at a lower level than chief engineer. After the takeover, both the Acadia and the Bluenose would run with the chief engineer staying on board on a twelve hours on, twelve hours off, seven days per week shift. The Relief Chief would relieve the chief engineer on the off hours.

[38] Mr. Lincoln was to be the Relief Chief on the Acadia starting on April 1, 1997. He would move to the Bluenose when it started its seasonal operations on June 1. The two chief engineers on the Bluenose would be Chris Kenney and Hans Hausgaard. Mr. Hausgaard was to be hired on a short-term contract only for the 1997 season.

[39] Bay Ferries wanted Mr. Lincoln to work with Mr. Hausgaard, an experienced chief engineer on that ferry service. This would give Mr. Lincoln both experience on another vessel and also give him knowledge and experience on a vessel operating under international regulations. The Bluenose run was from Canada to the U.S. Although Bay Ferries had not made a firm commitment, it fully expected to replace the Bluenose with a high speed ferry for the 1998 season and Mr. Lincoln would be trained as a chief engineer on that vessel. In fact, Bay Ferries did acquire a high speed ferry, the CAT, which went into operation on May 28, 1998, on the Yarmouth to Bar Harbor service.

[40] Mr. Cormier believed that this was an attractive offer that Mr. Lincoln would accept. It accorded with his career interests and goals. But Mr. Lincoln's response was not what Mr. Cormier expected and he was very surprised by it. He accused Bay Ferries of taking away his job and discriminating against him because of his race and colour. He said that Bay Ferries was hiring only white chief engineers and pushing minorities down where they belong. He also questioned Mr. Cormier as to whether Bay Ferries had a firm commitment to acquire a high speed ferry at that time. Mr. Cormier replied that he could not give any guarantee, but Bay Ferries was seriously pursuing the objective.

[41] Because of Mr. Lincoln's reaction, Mr. Cormier did not get the opportunity to discuss all the details and reasons for this offer. He did assure Mr. Lincoln that he would be guaranteed full-time employment, although the Bluenose operated as a seasonal service.

[42] Mr. Lincoln declined the offer. He said that he was a qualified chief engineer and had applied for this position not a second engineer position. Mr. Cormier asked Mr. Lincoln to reconsider his position and take some time to think about it. Mr. Lincoln agreed to do so, went home and discussed it with his family. He called Mr. Cormier the next morning and at that time Mr. Cormier tried to explain all of the details of the offer including the compensation. Mr. Lincoln said that it didn't matter how much money Mr. Cormier was offering, it was not a chief's position and he was not interested.

[43] As a result, Bay Ferries had to revise its hiring plans and had to do so quickly because the takeover was that day. It so happened that Rob Hamilton had earlier been contacted by Bay Ferries as a reference for another employee. In that conversation, he indicated that he would be interested in working for Bay Ferries as a chief engineer. He had previously worked for Marine Atlantic but had left in 1995. Mr. Cormier knew Mr. Hamilton, who had worked previously for him. He knew his background and had a very high regard for his abilities. Mr. Cormier and Mr. Stevenson interviewed Mr. Hamilton on April 3, 1997, and offered him a chief engineer position on the Acadia, which he accepted.

[44] At this point, Bay Ferries had what it considered to be four very competent chief engineers, Chris Kenney and Gary Smith on the Bluenose, and Mark Lewis and Rob Hamilton on the Acadia. Mr. Hausgaard was not offered a position because he was never a long term prospect. Instead, Gary Smith, who had initially been hired for the Acadia agreed to move to the Bluenose.

A. Filing the Complaint

[45] Mr. Lincoln did not at first consider filing a human rights complaint. However, in the first week of April 1997, Mr. Lincoln took the Acadia to Digby to visit relatives. He did not see any visible minority employees on board the Acadia or working at the Digby terminal. He recalled that there had been a Third Class Engineer of Yugoslavian origin working on the Acadia and two African Canadians who had worked as longshoremen at the terminal. He also learned that Mr. Zaidi, a visible minority and formerly a senior chief engineer on the Acadia, had not been hired by Bay Ferries. He decided to file a complaint with the Commission, because he felt that Bay Ferries had cleaned out all the visible minorities, had not followed the *Employment Equity Act*, or a commitment to achieve and maintain a representative workforce.

VII. WHAT BAY FERRIES WANTED IN A CHIEF ENGINEER

[46] Both Mr. Cormier and Mr. Stevenson gave evidence as to what Bay Ferries wanted in a chief engineer. To be profitable, Bay Ferries had to implement a management style and work culture quite different from that of Marine Atlantic. Marine Atlantic was a federal crown corporation and had much greater financial resources than Bay Ferries. It was a good employer but was not an efficient operator. Bay Ferries' agreement with the Government was that it would receive an operating subsidy for three years. After that, Bay Ferries had to sustain its operation for the long term without losses. Marine Atlantic staffed the ferry services for the full passenger capacity even though it did not operate at full capacity, especially in the non-tourist months. Bay

Ferries considered that there was a redundancy of positions particularly with respect to engineers and stewards. There was a need to rationalize the crew levels in nearly all departments on board and Bay Ferries did so.

[47] All of the candidates had to have a strong technical background to maintain the machinery and equipment on the vessels. Hands-on experience was an important factor in that sense, but hands-on also in the sense that Bay Ferries wanted a chief in the engine room and not spending 70% of the time in the on-deck office.

[48] Hands-on experience was not the overriding consideration in selecting a chief engineer. Both Mr. Cormier and Mr. Stevenson made the point that Bay Ferries was not hiring for a specific vessel but was hiring chief engineers for any vessel it might operate. Over and above technical qualifications, Bay Ferries was looking for a broad and varied experience in the marine industry; exposure to various management styles; well rounded with good communication skills and flexibility to adjust to change and Bay Ferries' future needs. Mr. Cormier and Mr. Stevenson gave evidence that a detailed knowledge of the equipment and machinery on the Acadia was an asset, but it could also be a limiting factor. The Acadia was a relatively old ship built in 1971 with old technology. It could be replaced as was the Bluenose or be refitted with up to date technology.

VIII. BAY FERRIES - CHIEF ENGINEERS

[49] Bay Ferries hired Mark Lewis first, both to provide continuity on the Acadia during and after the transition and because of his qualifications. Gary Smith was initially hired for the Acadia because of his overall qualifications, plus as an outside person, he would champion change in practices that needed to be implemented. Rob Hamilton was chosen because of his known and highly regarded abilities. Chris Kenney was a very good candidate for the Bluenose which Mr. Lincoln did not dispute.

[50] In Mr. Cormier's view, Keith Holt had the most hands-on experience on the Acadia. He was regarded as a very technically competent chief who knew the Acadia very well. However, at his interview, he was not receptive to change and did not demonstrate that he had the managerial skills to handle the transition.

[51] Hans Hausgaard indicated at his interview that he was only interested in short-term employment. Bay Ferries felt that he would be useful to manage the transition on the Bluenose, and would be replaced by Mr. Lincoln as chief engineer. When Mr. Lincoln refused Bay Ferries' offer, it reordered its hirings and Mr. Hausgaard was not offered a position.

[52] Razi Zaidi was not hired because he did not receive good reference checks. As well, Mr. Cormier and Mr. Stevenson felt that as the senior chief engineer on the Bluenose, he was less than forthright on the matter of the watertight doors.

IX. COMPARISONS BETWEEN MR. LINCOLN, MR. LEWIS, MR. SMITH AND MR. HAMILTON

[53] Mr. Lincoln testified that, in his opinion, when compared to Mr. Lewis, Mr. Smith and Mr. Hamilton, he was the most qualified candidate for a chief engineer position on the Acadia.

A. Mr. Lincoln v. Mr. Lewis

[54] According to his resume and his evidence, at April 1, 1997, Mr. Lewis had 19 years experience as a marine engineer on a variety of vessels including tankers, general cargo ships, containers, bulk carriers and Ro-Ro ferries. He is also qualified as a maintenance fitter and has a mechanical engineering certificate. He is trained in machining, lathes, milling shaping machines, electrical work, hydraulics and pneumatics, fittings of bearings and gears, and properties of hand tools, all skills relevant to the engine room.

[55] He has worked for a number of companies in the marine industry both private and public, including T. & J. Harrison, a large British shipping company for eight years, starting in 1976, as a sixth engineer in the engine room assisting the senior engineer in the maintenance and watch keeping of the engine room and working his way up to Fourth Engineer. During his stint at T. & J. Harrison, Mr. Lewis sailed on nine different ships ranging from 6,500 bhp cargo ships to 29,000 bhp container ships. He obtained his Second Class Engineer Certificate in 1982 and his First Class Engineer Certificate in 1995.

[56] Mr. Lewis came to Canada in 1984 and joined Kent Lines as a third engineer. He worked on two different vessels, both as a Third Engineer and as a Second Engineer. In 1988, he moved to Marine Atlantic as a second engineer on the P.E.I. service and sailed on two ferries, the John Hamilton Grey and the Abegweit. In the fall of 1988, he transferred to the Acadia and sailed as a relief chief. In 1989, he went full-time as a chief engineer on the Acadia, sailing with a Second Class ticket. Mark Lewis also was a chief engineer on the Acadia on three occasions when it was in dry dock.

[57] Mr. Lincoln agreed that Mr. Lewis is a very competent chief engineer. He also agreed that Mr. Lewis had worked as a chief engineer on the Acadia longer than he had, but noted that Mr. Lewis had obtained his First Class certificate about five years after Mr. Lincoln.

[58] Mr. Lincoln downplayed the fact that Mr. Lewis had worked on a number of different vessels and the fact that Mr. Lewis had international experience. In his opinion, this was not as important as the fact that he had worked on the Acadia for about 17 years, whereas Mr. Lewis was on board for about nine years. Mr. Lincoln had more hands-on experience on the Acadia. He had come up through the ranks and had worked on every piece of equipment in the engine room. Even though Mr. Lewis had been on the Acadia for nine years, he was not very knowledgeable of the engine room. This was because, said Mr. Lincoln, the chief engineer at Marine Atlantic was more of an overseer who ensured that the maintenance and repair work got done, but did not do the actual physical work himself.

[59] Mr. Lincoln's dry dock experience was also an important factor for Mr. Lincoln in comparing his qualifications to those of Mr. Lewis. He had participated in at least eight dry docks for the Acadia compared to three for Mr. Lewis. The value of dry dock for a chief engineer is that he would be involved in the maintenance of equipment that was not otherwise accessible when the Acadia was sailing.

[60] Mr. Cormier and Mr. Stevenson testified they selected Mark Lewis because he had a well-rounded background. He had a number of years operating as a chief engineer on the Acadia. He had gone through a traditional apprentice program, and had a strong background in the marine industry. He had worked for four different employers, and had a diverse experience on other vessels, under different management and working under national and international regulations. He was straightforward in his interview. In areas where he did lack knowledge he acknowledged that. He came across as a team player with the management style that Bay Ferries wanted.

B. Mr. Lincoln v. Mr. Smith

[61] Gary Smith had worked for Marine Atlantic from 1972 to 1982. He held various engine room positions starting as an ERA and progressing to a Second Engineer on the Bluenose. He worked on the original Bluenose and the replacement Bluenose until 1983.

[62] As to qualifications, Mr. Smith got his Fourth Class Engineering Certificate in 1977; his Third Class Certificate in 1980; his Second Class Certificate in 1982 and his First Class Certificate in 1995. He also obtained a Vocational Teaching Certificate, Level IV, in 1990.

[63] Mr. Smith left Marine Atlantic in 1983 to work as First Engineer with Bow Valley Offshore Drilling. He worked as a relief chief with a Second Class ticket. Mr. Smith pointed out that the obvious difference between a drilling rig and a Ro-Ro ferry, is that one is stationary for the most part, and the other travels between ports. But his evidence was that in terms of machinery, there are similarities. An oil drilling rig has main diesel engines, generating units, hydraulic systems, high-pressure air systems, ballast systems and refrigeration systems, which are also found on a ferry.

[64] At Bow Valley, his responsibilities included taking engines apart, overhauling pistons, pumps, etc., i.e. keeping the machinery in good working order. All of the machinery and equipment on the rig is subject to inspection by the Coast Guard and the insurer as is the case with a ship.

[65] Mr. Smith left Bow Valley and joined the Scotia Prince in 1986. The Scotia Prince is a passenger ferry on the Yarmouth, Nova Scotia to Portland, Maine service. That year he also sailed as crew on the Scotia Prince to Germany where the vessel was reconstructed to lengthen it by about 60 feet. He was one of the company representatives involved in overseeing this operation.

[66] In 1987, Mr. Smith accepted the position of Marine Fitter Instructor at the Nova Scotia Community College. This was a marine engineering course which offered instruction in the

maintenance and repair of diesel engines, hydraulics, pumps and piping systems, refrigeration systems, welding and other aspects of marine related machinery. Mr. Smith considered the skills that he acquired as a Marine Fitter Instructor to be very relevant to the job of a chief engineer on a ferry. While at the College, he took Level I and Level II welding courses, necessary to instruct his students in basic welding. In his view, these skills and knowledge are particularly useful whether on an oil rig, Ro-Ro vessel or other type of vessel.

[67] In 1995, Mr. Smith became the chief engineer on the HLV Svanen (heavy lift vessel) which position required a First Class ticket. Mr. Smith supervised the engine staff room, a second engineer, an electrician and a third engineer.

[68] As a chief engineer, he signed official articles and maintained a seaman's discharge book as is required when working on any ship. Working on the Svanen also qualified as sea time for engineers writing for higher engineering certificates.

[69] The Svanen is a self-propelled heavy lift vessel. It transported the bridge components, weighing as much as 8,200 tons, used in the construction of the fixed link to P.E.I. The Svanen would pick up the bridge components from an onshore location and transport them to the construction site. It would then lift and position the components in place with a high degree of accuracy. Once this was done, it would return for another component and repeat the operation. At the end of each construction season, the Svanen would sail under its own power from Borden, P.E.I., to Georgetown, P.E.I., a distance between 60-80 miles, where it would be docked and winterized.

[70] Mr. Smith described the Svanen as having three diesel generators, which drove two electric propulsion motors, two main thrusters which were large electric motors aft and two tunnel thrusters forward with the diesel generator engines. In his opinion, the motors and propulsion systems were similar to those on the Acadia.

[71] Mr. Smith also compared the technology on the Acadia to the technology on the Svanen. The Acadia was built in 1970 or 1971, so at the time it was approximately 30 years old. The Svanen was built in 1991, is newer and there was much more automation and electronic equipment on board. It also has full capacity for dynamic positioning off satellites.

[72] At the present time, Mr. Smith is a chief engineer on the CAT. He indicated that Steve Brewer, an African-Canadian, works as a deckhand on the CAT. He was previously employed with Marine Atlantic and was hired by Bay Ferries in 1997. Cal Smith, an African-Canadian, who was previously at Marine Atlantic and was hired by Bay Ferries in 1997, works in the galley on the CAT. Stephen Johnson, an aboriginal, works on the CAT as a navigator. Mr. Smith was not sure if he is ex-Marine Atlantic, but believes that he may have worked there in the past. He was hired sometime in 1998.

[73] Mr. Lincoln does not know Mr. Smith and had never worked with him. Based on his review of Mr. Smith's resume, Mr. Lincoln concluded that he had superior qualifications to Mr. Smith. Mr. Lincoln had 17 years on the Acadia. Mr. Smith never worked on the Acadia. The Bluenose was a totally different vessel than the Acadia according to Mr. Lincoln.

[74] Mr. Lincoln discounted Mr. Smith's experience on the Svanen because in his opinion, it does not at all compare to the Acadia. It is not a ship. Rather, it is best described as a large barge. Mr. Lincoln has never been on or seen the Svanen but formed his opinion on the basis of pictures that he had seen, what he had been told by someone who worked on the Svanen, and by its listing in the Fairplay Ships Register as a crane/derrick barge.

[75] Mr. Lincoln also gave little weight to Mr. Smith's experience as a marine fitter instructor at Nova Scotia Community College. He considered that these were courses to prepare students for a Fourth Class Certificate and had no value or relevance for a chief engineer working on the Acadia. He would give no credit to Mr. Smith's experience at Bow Valley.

[76] Mr. Cormier and Mr. Stevenson considered Mr. Smith a very attractive candidate. He had experience working on ferries with Marine Atlantic and on the Scotia Prince. He had worked on different types of vessels and for different management. His teaching experience was a very relevant factor for Bay Ferries because it added the dimension of organization and communication skills. His knowledge of machinery and equipment necessary to instruct, plus his training in welding and hydraulics were also very useful for a chief engineer position. Another important factor in the mix was that one of the other applicants, Chris Kenney, in his interview, highly recommended Gary Smith at the time when they were both competing for a chief engineer position on the Bluenose.

[77] Mr. Cormier agreed that Mr. Lincoln had many more years experience as a chief engineer on the Acadia. Mr. Smith had none. But in his opinion, the responsibilities of a chief engineer on the Svanen was comparable to any other vessel, whether it be a Ro-Ro ferry or otherwise. Perhaps more so because the Svanen was the most critical piece of equipment required in the Fixed Link mega-project. Mr. Smith was directly responsible to oversee and maintain the systems on this equipment.

[78] Mr. Stevenson testified that the more experience on different types of machinery a person has, the greater the ability to solve a problem. He did not consider it a critical factor that Mr. Smith never worked on the Acadia and that Mr. Lincoln had worked on the Acadia for 17 years. If Bay Ferries was hiring for a specific ship, he would agree that specific experience on that vessel would rank high in the evaluation criteria. But Bay Ferries was hiring for all their vessels, current and future.

[79] Mr. Stevenson's own experience was that a chief engineer does not need 17 years on a vessel to acquire knowledge of how all the systems operate. Most chief engineers or engineers see three or four different ships a year, and they are expected to have a basic knowledge and understanding of the machinery within a very short time after they are on the vessel.

C. Mr. Lincoln v. Mr. Hamilton

[80] Rob Hamilton did not give evidence at the hearing. According to his resume, he worked as an oiler (ERA) from 1973 to 1975 with Atlantic Towing Ltd., which operated local and foreign touring operations. In 1975, he moved to Universal Sales as a mechanic trainee in the engine rebuilding department where he trained for 18 months in all aspects of engine rebuilding. In

1975, he went back to Atlantic Towing and progressed through the ranks from oiler to chief engineer. He stayed with this company until 1990 when he joined Marine Atlantic as a chief engineer. He worked on five different Ro-Ro class ferries including the Abegweit, Vacationland, Marine Evangeline, the Grand Manan 5 and the Acadia as a relief chief. The Abegweit, Vacationland and Marine Evangeline are ferries that are comparable to the Acadia. Mr. Hamilton has a First Class Certificate and although it is not clear from the evidence, it appears that he qualified in 1989 or 1990.

[81] Mr. Hamilton also has diplomas in Performance Management and Basic Electronics; is trained and experienced in the Amos Computer Program for scheduled maintenance of vessel equipment and machinery. He also has a teaching certificate in Advanced Education and Labour.

[82] In 1995, Mr. Hamilton left Marine Atlantic and went to New Brunswick Community College where he developed and became an instructor in the Marine Engineering Program and remained there until he joined Bay Ferries. He left because he did not agree with Marine Atlantic's management practices.

[83] Mr. Lincoln knew Rob Hamilton because he worked as a relief chief on the Acadia. He estimated that Mr. Hamilton's total time worked on the Acadia as a relief chief was less than two years. Mr. Lincoln's major point was that he did not consider that Mr. Hamilton's experience on other vessels was at all comparable to his knowledge and experience on the Acadia. As for his teaching experience, Mr. Lincoln's understanding was that as an instructor in the Marine Engineering Program, Mr. Hamilton was teaching entry level students which was not, in his opinion, particularly useful to the role of a chief engineer.

[84] As to why he hired Mr. Hamilton, Mr. Cormier explained that Mr. Hamilton had worked for him on the Grand Manan 5 service and he had first hand knowledge of his abilities and skills. He had a well-rounded experience, had worked on a number of different vessels and for different companies both public and private, which gave him experience with different management styles. He had worked on the Acadia and knew the vessel. As an instructor in the Marine Engineering Program, he would be current on regulatory matters and knowledgeable about marine equipment. He also had good communication and organizational skills from this position. Although he had only been away from Marine Atlantic for only two years, he had left because of Marine Atlantic's management practices. For Mr. Cormier, he was someone who would favour a change in management style and culture.

[85] Mr. Cormier denied that Bay Ferries did not hire Mr. Lincoln as chief engineer because of his race or the colour of his skin. His position was that Bay Ferries hired the best people that were available. Mr. Cormier did not consider that his offer to Mr. Lincoln amounted to a step back in terms of his career. He did agree that Mr. Lincoln was not offered a chief engineer position, but he was to receive a comparable salary to what he had been earning. Mr. Cormier also agreed that at the time, Bay Ferries could not say for sure that it would acquire a CAT. But as he pointed out, Bay Ferries could not give any guarantee where any new employee would be in 12 months. Mr. Cormier could only propose what he expected would happen. That is what he did vis-à-vis Mr. Lincoln.

X. THE BRITISH COLUMBIA FERRIES JOB APPLICATION

A. The Selection Process, Interview and Rejection

[86] For the first time in 17 years, Mr. Lincoln was unemployed. He decided to close the chapter on the Acadia but wanted to stay in the marine industry. On April 1, 1997, he contacted British Columbia Ferry Corporation because it was a large passenger ferry operation, a crown corporation like Marine Atlantic, and operated on an eight hour workday. He spoke to Ms. Blake in the Human Resources Department who advised him that B.C. Ferries was advertising for First Engineers to work in various locations. The qualifications were a First Class Engineer Certificate and recent experience as a senior watchkeeping engineer.

[87] Mr. Lincoln applied for the position of First Engineer - First Class Motor Certificate and his application was accepted. The selection process had a number of phases. First, there was a written exam, and if successful, the next step was an oral technical interview. For those successful on this interview, there was a further oral interview. At least three references from current and past supervisors were required.

[88] Mr. Lincoln was successful on the written exam and was asked to come to British Columbia for the oral examination on May 28, 1997. There were three interviewers, Wayne Ralph, Fleet Engineering Superintendent for B.C. Ferries, Brian Greig, a chief engineer, and Grant Locke. Mr. Lincoln thought that the interview went well and at the end, he provided a list of six references including personal and work references.

[89] The next morning, according to Mr. Lincoln, Wayne Ralph called him, told him he was successful, and that his next interview was scheduled for that afternoon at the B.C. Ferries human resources office. Mr. Lincoln was interviewed by Martin O'Connor, a human resources person and Rusty Deshmuckh, the Engineering Manager for the southern service. It was a short interview, about a half hour. Mr. Lincoln considered it to be a good interview and at the end, Martin O'Connor asked him what were his preferences. Mr. Lincoln told him that he would like to be on Vancouver Island because B.C. Ferries was running the new high-speed ferries out of Nanaimo. Mr. Lincoln testified that Mr. O'Connor told him that in seven to ten days, B.C. Ferries would make him an offer. It might not be the offer that Mr. Lincoln wanted, but Mr. O'Connor recommended that he accept it so he could get into the system.

[90] Mr. Lincoln went back to his hotel and called Patricia Phee, the CHRC complaint's investigator and told her that he would be getting an offer from B.C. Ferries. He also called Bud Harbidge, the Vice-President of Human Resources at Marine Atlantic who was one of his references, and his wife and told both of them that he would be receiving an offer.

[91] On Friday, May 30, 1997, Wayne Ralph called Mr. Lincoln in the late afternoon and told him that he had not been selected for the job because he failed the technical interview. Mr. Lincoln was shocked to hear this. He told Mr. Ralph that Mr. O'Connor had told him he

would be getting an offer. To this, Mr. Ralph replied that he must have been mistaken. Mr. Ralph told Mr. Lincoln that his diagnostic abilities concerning the on-board purifiers was not what it should be. He also told Mr. Lincoln that three vessels in 17 years was not enough experience for a chief engineer on a large vessel. Further Mr. Lincoln did not have a good record and Mr. Ralph knew why Mr. Lincoln did not put any chief engineers on his list of references. When Mr. Lincoln asked Mr. Ralph whether he had checked his references, Mr. Ralph said no because they had their own references but did not elaborate. Mr. Ralph was also bothered by the fact, as he put it, that Mr. Lincoln told people he already had a position with B.C. Ferries and asked Mr. Lincoln whether he thought he could just walk into a position.

[92] Mr. Lincoln's evidence was that because he was a chief engineer, he only gave supervisors and not other chief engineers as his references. But he did not explain this to Mr. Ralph because he said he was too angry at the time.

[93] Mr. Lincoln called Mr. Ralph the next morning, Saturday, May 30, 1997, at his house and asked him who he had spoken to for a reference. Mr. Ralph told him that they had tried to contact one of his references who was not available so he spoke to Mark Lewis who had given him a good reference.

B. Return from British Columbia

[94] Mr. Lincoln first believed that he did not get the job because of Mark Lewis. When Mr. Lincoln came back from British Columbia, he called Mr. Lewis and was very irate. He asked Mr. Lewis what he said to Mr. Ralph. Mr. Lewis told Mr. Lincoln that he gave him a very good reference. Mr. Lincoln told him that B.C. Ferries had withdrawn its job offer based on his conversation with Mr. Ralph.

[95] Mr. Lewis was very concerned about what Mr. Lincoln had said to him and he wrote to Mr. Ralph on June 13, 1997, advising Mr. Ralph of Mr. Lincoln's accusation. Mr. Lewis went on in his letter to say that at no time during their discussion did he say or give the impression that Mr. Lincoln was not capable of filling a chief engineer position. He also believed that he had managed to address Mr. Ralph's concerns regarding Mr. Lincoln's lack of experience on other vessels by endorsing his ability as a quick learner and having good troubleshooting skills. He concluded his letter by saying that he would have hoped any information given by him that had a negative bearing on Mr. Lincoln's job chances with B.C. Ferries would have been kept confidential.

[96] In his July 15, 1997, responding letter to Mark Lewis, Mr. Ralph stated that Mr. Lincoln was not hired by B.C. Ferries because he failed his oral assessment, not because of the reference that Mr. Lewis provided during their telephone conversation. He further stated that Mr. Lincoln was never made an offer of employment, which was later withdrawn because of Mr. Lewis' reference. That was a misconception on the part of Mr. Lincoln.

[97] Mr. Lincoln received a copy of this letter and he too wrote to Mr. Ralph on July 13, 1997. In his letter, among other things, Mr. Lincoln asserted that there was no way that he failed the oral

assessment and that if he had, according to the selection procedures, he would not have moved on to the next oral interview.

[98] One of the documents entered as evidence by Mr. Lincoln was the "Assessment - Chief Engineer - Intermediate Vessel" for Timothy Lincoln, completed by the interview team of Mr. Ralph, Mr. Greig and Mr. Locke. This Assessment set out the questions that Mr. Lincoln was asked and noted "pass or fail" to his response. On the first page, there is written notation "fail no hire", and further in the document it shows "fail" with respect to all of question 3.a, 3.b and 3.c (except for one subquestion).

[99] It is clear from his letter and the evidence that he gave at the hearing, that Mr. Lincoln does not accept that he failed the oral interview. In his evidence, Mr. Lincoln went through some of the questions on the Assessment's Oral Summary to demonstrate that his answers to certain questions which were assessed as a "fail" by the interviewers, should have been assessed as a "pass".

[100] Mark Lewis gave evidence that on May 28 or 29, 1997, there was a telephone call to the captain's room asking for Captain MacPherson who was not there. Mr. Lewis took the call and spoke to Wayne Ralph. Mr. Ralph said he had been looking for the captain, but asked Mr. Lewis as chief engineer if he was willing to give a reference for Mr. Lincoln.

[101] During the conversation, Mr. Ralph pointed out Mr. Lincoln's lack of experience on different vessels which he would have learned from Mr. Lincoln's resume. Mr. Lewis said that he told Mr. Ralph that Mr. Lincoln was a good all around engineer and a quick learner. The conversation lasted about five minutes.

[102] Mr. Lewis felt that he had given a good reference and that he had dealt with Mr. Ralph's concerns about Mr. Lincoln's inexperience. Mr. Ralph did not tell him that Mr. Lincoln had been offered a job. Mr. Lewis did not tell anybody else that Mr. Lincoln had a job. He did speak to Captain MacPherson and told him that he thought Mr. Lincoln had a good chance of getting a job with B.C. Ferries. Mr. Lewis also testified that he did not tell Gerry Stevenson that Mr. Lincoln had a job with B.C. Ferries. In fact, Mr. Lewis does not remember Mr. Stevenson being on the Acadia that day.

[103] Captain Roy MacPherson was the master on the Acadia when the call came from B.C. Ferries. He was not available at the time and Mark Lewis took the call. His evidence was that Mr. Lewis spoke to him after the call and told him that everything was fine. By that he understood that everything went well for Mr. Lincoln in the selection process.

[104] Mr. Lincoln testified that he no longer thinks that Mr. Lewis gave him a bad reference. From what he understands Mr. Lewis to have said to Mr. Ralph, it was not a great reference, but it was not a bad one either. He did have, however, some concerns about Mr. Lewis' comment in his letter to Mr. Ralph that certain things should be kept in confidence. Mr. Lewis explained that by his comment about keeping the information in confidence he meant that he thought that anything he said would be kept in confidence. That was his only point.

[105] After he no longer blamed Mr. Lewis, Mr. Lincoln's attention shifted to Gerry Stevenson as having something to do with him not landing a job with B.C. Ferries. Mr. Lincoln admitted at the hearing that he had no factual basis for this. It was based on his intuition. He also testified that he had no factual information that Mr. Stevenson was on the Acadia when Mr. Lewis had the conversation with Mr. Ralph.

[106] Mr. Lincoln's suspicions about Mr. Stevenson were amplified in some of the very strong comments he made with respect to the Commission's investigation report which recommended that his complaint be dismissed. In his July 20, 1999 letter to the Commission, in addition to being very critical of the investigation report and the way the investigation was conducted, Mr. Lincoln also accused Bay Ferries, and in particular, Gerry Stevenson of racism. Mr. Lincoln's evidence was that he made this allegation against Bay Ferries because, as he put it, Bay Ferries cleaned out all of the visible minorities in the engine room and had not followed either the RFP or the *Employment Equity Act*. Mr. Lincoln directed his attention to Gerry Stevenson because in his view Mr. Stevenson had clearly lead the questions in the technical interview and it was Mr. Lincoln's observation that Mr. Stevenson was responsible for most of the hiring decisions for the engine room on the Acadia.

[107] Mr. Lincoln's suspicions about Mr. Stevenson's role in not being hired by B.C. Ferries boiled over into an incident on the Acadia in early September 2001, just prior to the commencement of the hearing into his complaint. Both Mr. Lincoln and Mr. Stevenson were on the Acadia and Mr. Lincoln waved to Mr. Stevenson to come over and talk to him. Mr. Stevenson did not recognize Mr. Lincoln at first, and, after a time, he went over to Mr. Lincoln. At that point, Mr. Lincoln threatened that if he found out that Mr. Stevenson had given him a bad reference, he would kill him and his family. Very shortly after that incident, Mr. Lincoln had his lawyer write to Bay Ferries' lawyer apologizing on behalf of Mr. Lincoln. Mr. Lincoln never apologized directly to Mr. Stevenson.

[108] Mr. Lincoln told three persons that he would be getting a job offer from B.C. Ferries, Patricia McPhee from the Commission, Bud Harbidge, one of his references and his wife. He agreed that none of them would call B.C. Ferries and give him a bad reference.

[109] Mr. Cormier testified that he never contacted B.C. Ferries. Bud Harbidge had called him and said that Mr. Lincoln told him that he believed someone at Bay Ferries had given him a bad reference. Mr. Harbidge asked if Mr. Cormier had spoken to anybody at B.C. Ferries. Mr. Cormier told him no and said that he would investigate the allegation because he did not support anybody giving Mr. Lincoln a bad reference. It was not consistent with Bay Ferries' positive opinion of Mr. Lincoln.

[110] Mr. Cormier went on board the Acadia to follow up on this. He was told that someone from B.C. Ferries had called asking for Captain MacPherson, who was one of Mr. Lincoln's references, but they ended up speaking with Mark Lewis. Mr. Cormier asked Mr. Lewis if he had given Mr. Lincoln a negative reference and he told Mr. Cormier that he gave Mr. Lincoln what he considered to be a good reference. Mr. Cormier accepted this because he knew that Mr. Lewis and Mr. Lincoln were good friends and there was no reason for Mr. Lewis to do otherwise.

[111] Mr. Stevenson testified that he did not know that Mr. Lincoln had applied for a job with B.C. Ferries. Mr. Stevenson also testified that he did not call B.C. Ferries, does not know and never spoke to Wayne Ralph. The last time he talked to B.C. Ferries was either in 1992 or 1993 after a Canadian Ferry Operators' Association meeting. He was categorical in his evidence that he never spoke to Mr. Lewis about Mr. Lincoln at that time or any other time, nor did he speak to anyone at NFL or at Bay Ferries about Mr. Lincoln with respect to this matter.

[112] Sandra Smith-Muir, Halifax Regional Director for the Commission was called as a witness by Bay Ferries. She was a human rights officer at the time and worked as an investigator on Mr. Lincoln's complaint. During the course of her investigation into the complaint, Ms. Smith-Muir did telephone interviews with Bud Harbidge, Martin O'Connor and Wayne Ralph. She made notes of these communications which the Tribunal admitted as evidence subject to weight, over the objections of complainant counsel. The notes of the telephone interviews, particularly those with Wayne Ralph and Martin O'Connor raise critical issues of credibility. Although this Tribunal can admit hearsay evidence, such evidence should not be given any weight if it is clearly unfair to do so. The notes of Ms. Smith-Muir are hearsay. Bud Harbidge, Wayne Ralph or Martin O'Connor are not subject to cross-examination on their statements. In my opinion, it would be highly prejudicial to the complainant to give any weight to this evidence and I have chosen not to do so.

[113] Both the complainant and the respondent issued subpoenas to Wayne Ralph. At the hearing both parties advised the Tribunal that they did not intend to call Wayne Ralph as a witness and they did not do so.

[114] The complainant also subpoenaed Brian Greig. Mr. Greig now works with Secunda and lives locally. He was unable to appear as a witness during the first week of the hearing, and the hearing schedule was adjusted to allow Mr. Greig to give evidence for the complainant during the second week.

[115] Mr. Lincoln testified that he had discussed his B.C. Ferries application on a number of occasions with Mr. Greig and had told him his theories of what had happened. Mr. Greig was part of the interviewing team for Mr. Lincoln on the technical oral assessment. However, on October 10, 2001, complainant counsel advised the Tribunal that Mr. Greig would not be called as a witness.

XI. WHEN DID BAY FERRIES LEARN OF MR. LINCOLN'S COMPLAINT

[116] Mr. Lincoln's complaint is dated April 21, 1997. Mr. Cormier's evidence was that he would have been notified by the head office almost immediately after it was filed. The Commission wrote to Bay Ferries on April 25, 1997, advising of the complaint and asking for a response which was provided by Bay Ferries' counsel.

[117] As for Mr. Stevenson, Mr. Cormier's evidence was that he did not recall telling Mr. Stevenson that a complaint had been filed. But it was likely that he would have learned of it

within a few days. Mr. Stevenson's recollection was quite hazy. He could not recall when he first heard about it.

XII. DECISION

A. The Section 7 Complaint

[118] In a human right case before a Tribunal, the onus is on the complainant to establish a *prima facie* case of discrimination. Once this is done, the onus shifts to the respondent to provide an explanation for its actions. A *prima facie* case is one which covers the allegations made, and which if believed, is complete and sufficient for a decision in favor of the complainant in the absence of an answer from the respondent.⁽¹⁾ If the respondent does provide an explanation, the onus is then on the complainant to show that the explanation was not a reasonable one. Rather, it was a pretext or a disguise for the respondent's otherwise discriminatory conduct.⁽²⁾

[119] In an alleged racial discrimination case such as this, it is rare to find direct evidence of discrimination. In response, some human rights tribunals have suggested a multi-part test as a guide for determining whether the complainant has established a *prima facie* case.⁽³⁾ Applying these tests, Mr. Lincoln argued that he has established a *prima facie* case. He also argued that the explanation offered by Bay Ferries does not bear scrutiny and is just a pretext for its discriminatory actions.

[120] In terms of a *prima facie* case, Mr. Lincoln argued that he had applied for the position of chief engineer on the Acadia. He wanted to stay in the job he had with Marine Atlantic. He submitted that he was at least as qualified, if not better qualified than the chief engineers Bay Ferries hired for the Acadia, all of whom were white. If these assertions are proved, then in the absence of an explanation from Bay Ferries, Mr. Lincoln must succeed in his complaint.

[121] In my opinion, the success of Mr. Lincoln's complaint depends upon whether Mr. Lincoln was as qualified or more qualified than the successful candidates. That leads to the next question, viz., what was Bay Ferries looking for in a chief engineer?

[122] Bay Ferries' newspaper advertisement called for experienced marine engineers with a minimum Fourth Class certificate and ferry experience. The interview agenda listed work history and experience, management style, cost cutting initiatives, strengths and weaknesses and substance abuse on the Acadia. These provide some evidence as to the selection criteria, but are far from being definitive. More to the point is the evidence of the criteria Bay Ferries used in selecting its engineers.

[123] Mr. Lincoln's assertion that he had the better qualifications was based on his understanding that Bay Ferries wanted a "hands-on" engineer for the Acadia. For him, that translates as an engineer who had an intimate knowledge of the engine room on the Acadia. He was that person, having worked on the Acadia for 17 years, ten as an engineer, who was physically involved in the repair and maintenance of the machinery and equipment.

[124] Mr. Cormier and Mr. Stevenson agreed that hands-on experience was an important factor in that the chief engineer had to have a strong technical background. But hands-on also in the sense that Bay Ferries wanted the chief engineer in the engine room not an overseer working from an on deck office. But hands-on experience was not the overriding factor. Bay Ferries wanted an abrupt shift in the management style and work culture that had prevailed under Marine Atlantic. As well, Bay Ferries was hiring chief engineers to work on any Bay Ferries vessels currently operating or in future acquisition, not on a specific vessel.

[125] To achieve these objectives, in addition to the technical skills, the preferred candidate should have worked on different vessels and experienced different management styles. He would have good communication skills and show a flexibility and an ability to handle change. Other training or skills relevant to the engine room would be a plus factor.

[126] Bay Ferries' hiring plan for the Acadia was to hire one ex-Marine Atlantic chief engineer who had these qualities and who would provide continuity during the transition, and an outside person who would bring a fresh approach to the operation.

[127] If these were the selection criteria used by Bay Ferries, how did Mr. Lincoln rank with the other candidates? Mark Lewis had 19 years as a marine engineer on a number of different vessels working for different management, both private and public. Mr. Lincoln had 10 years experience as an engineer and had worked for 17 years on one vessel for the same employer. Mr. Lewis was trained as a maintenance fitter and with formal training in machinery, latching, hydraulics, hand tools, etc., all skills relevant to the engine room. Mr. Lincoln had no formal training in these skills. It is true that Mr. Lincoln had much more time in the engine room than Mr. Lewis, but as Mr. Stevenson noted, it does not take 17 years on a vessel to learn its systems. Mr. Lewis had been on the Acadia working as a chief engineer since 1988.

[128] As for Mr. Smith, he worked for Marine Atlantic from 1972-1983 in various positions from ERA to Second Class Engineer on the Bluenose and as a Second Engineer on the Scotia Prince. Mr. Smith never worked on the Acadia and certainly Mr. Lincoln had much greater experience on that vessel. Both Mr. Cormier and Mr. Stevenson considered Mr. Smith to be a very attractive candidate. He had ferry experience and had worked on different vessels under different management. He had the responsibility to maintain the Svanen, perhaps the most critical equipment required for the Fixed Link Project. Being an instructor at a Community College enhanced his organizational and communication skills as well as giving him a deeper knowledge of marine machinery and equipment, welding, hydraulics etc. all relevant to a chief engineer.

[129] Finally, there is Rob Hamilton. Mr. Hamilton worked for different marine companies, including Marine Atlantic from 1990-1995 on a number of different ferries including as a relief chief on the Acadia. Mr. Cormier had worked with Mr. Hamilton on the Grand Manan 5 ferry service, had first-hand knowledge of his abilities and, from the beginning was anxious to hire him as a chief engineer for Bay Ferries. He had a well-rounded experience on a number of different vessels, for different companies as well as on the Acadia. He was an instructor in marine engineering with the communication skills and knowledge that that brings.

[130] My view is that Mr. Lincoln's argument that he was as qualified or more qualified than those hired is too narrowly focused. His argument assumes that Bay Ferries was hiring for specific vessels and the overriding, if not the only factor, was which candidate of the four had been on the Acadia the longest and knew the engine room the best. Bay Ferries' focus was much broader. To operate profitably, it had to do things differently and required of senior management those who had a broad experience and skills to bring change or adapt to change.

[131] The question now is whether the selection criteria that Bay Ferries put forward as the reason for their hiring decision were reasonable or just a pretext to cover up its discriminatory conduct in not hiring Mr. Lincoln.

[132] Mr. Lincoln argued that this was the case. He referred to a number of examples in the evidence that showed Bay Ferries had a different explanation in 1997 for not hiring Mr. Lincoln than it offered at the hearing. In both his June 12, 1997 letter and August 19, 1997 letter to the Commission, Bay Ferries counsel stated that Bay Ferries wanted to hire an outside chief engineer for the Acadia. When Gary Smith was moved to the Bluenose, there was a vacancy on the Acadia. But Bay Ferries hired Rob Hamilton, who was ex-Marine Atlantic and who had left only two years earlier. If Bay Ferries wanted to change the culture, it should not have hired two ex-Marine Atlantic employees for the Acadia.

[133] The next example was the relative performance of Mr. Lewis and Mr. Lincoln at the technical interview. Mr. Lincoln had a good interview apart from the exchange between him and Mr. Stevenson on the subject of the watertight doors. Mr. Lewis did not know the regulation, Mr. Lincoln did. Why was Mr. Lewis praised for his ignorance and Mr. Lincoln penalized. The only explanation said Mr. Lincoln was that Mr. Cormier and in particular, Mr. Stevenson were not willing to accept disagreement from a person of colour.

[134] Mr. Lincoln also questioned Bay Ferries' explanation that it wanted to hire Mr. Lincoln but he needed more "seasoning". This was to be achieved by hiring Mr. Lincoln as a Relief Chief Engineer on the Bluenose where he would work for less than one year before he became a chief engineer. Mr. Lincoln challenged the explanation that he would acquire, in such a short time, the broad, well-rounded experience that Bay Ferries claimed that he lacked.

[135] Bay Ferries has been consistent in its evidence both in the two letters to the Commission and at the hearing as to why it preferred Mr. Lewis, Mr. Smith and Mr. Hamilton over Mr. Lincoln. Further, although Mr. Hamilton was not long gone from Marine Atlantic, he had left because he did not like Marine Atlantic's management policies. Viewed from that perspective, it is reasonable to see Mr. Hamilton as an outside person, amenable to change.

[136] As to the relative interviews, it may, at first seem puzzling as to why Mr. Lewis' response on the watertight doors was more acceptable. But viewed from Mr. Stevenson's perspective, this was a safety issue. He felt that Mr. Lincoln's explanation showed inflexibility and perhaps resistance to change.

[137] As to the Relief Chief position on the Bluenose, although Bay Ferries expected it to be for a short time, Bay Ferries argued that it would accomplish a number of things. The Bluenose was

a different vessel with somewhat different equipment than the Acadia. Mr. Lincoln would work with Mr. Hausgaard, an experienced chief engineer, which would provide him with the opportunity to observe a different way of doing things. Mr. Lincoln would learn about international regulations, which he had to know if he was to be a chief engineer on the high speed ferry on that service.

(i) Conclusion

[138] I accept that Bay Ferries' management and operational objectives were legitimate and necessary to operate the two ferry services successfully. It is also my opinion that Bay Ferries' selection criteria for chief engineer were necessary and reasonable to its objectives and were not a subterfuge for discriminatory conduct. I accept Bay Ferries' explanation that it hired Mr. Lewis, Mr. Smith, Mr. Hamilton because, according to these selection criteria, they were more qualified than Mr. Lincoln for chief engineer on the Acadia.

[139] Thus, I have concluded that Mr. Lincoln has not established a *prima facie* case of discrimination. Accordingly, Mr. Lincoln's complaint that he was discriminated against by Bay Ferries, contrary to section 7 of the *Act*, is dismissed.

B. The Section 14(1)(c) And Section 14.1 Complaints

[140] Mr. Lincoln amended his complaint to allege that Bay Ferries interfered with his attempt to get a job with B.C. Ferries, by wrongly denigrating his abilities contrary to section 14(1)(c) and section 14.1 of the *Act*. The basis for this allegation is that an unknown person from Bay Ferries gave Mr. Lincoln a negative reference so that B.C. Ferries did not offer him a position.

[141] Under section 14(1)(c) of the *Act*, it is a discriminatory practice to harass an individual in matters of employment on a prohibited ground. Section 14.1 makes it a discriminatory practice to retaliate against an individual who has filed a complaint under the *Act*.

[142] Mr. Lincoln's argument, in summary, is that he successfully completed the written examination and the two oral interviews and was told that he would be offered a job with B.C. Ferries within seven to ten days. He did not get the job and initially he blamed Mark Lewis for this. He has now abandoned that view. He can not say who from Bay Ferries gave him a bad reference, but he strongly suspects that it was Gerry Stevenson. Mr. Lincoln admits he has no factual basis for this suspicion. It is based on his intuition.

[143] Mr. Cormier learned that Mr. Lincoln had filed a human rights complaint almost immediately after it was filed. Mr. Stevenson could not recall exactly when he heard of it, but Mr. Cormier believed that Mr. Stevenson likely heard of it within a few days after filing. Thus, both Mr. Cormier and Mr. Stevenson knew of Mr. Lincoln's human rights complaint before his interviews with B.C. Ferries.

[144] Mr. Cormier's evidence was that he never contacted anyone at B.C. Ferries about Mr. Lincoln. Mr. Stevenson testified that he did not know that Mr. Lincoln had applied for a job with B.C. Ferries, and he did not know and had never spoken to Wayne Ralph. The last time he

had talked to anyone at B.C. Ferries was in 1992 or 1993. Mr. Lewis said that he had never spoken to Mr. Stevenson about this.

[145] In addition to the above evidence, I am not convinced of the validity of Mr. Lincoln's syllogistic logic. The key premise of Mr. Lincoln's argument is that he passed the oral assessment interview. Mr. Lincoln relies on the fact that the selection process set out consecutive phases. First, he had to pass a written exam, if successful, then an oral assessment, if successful, then a further oral interview. Therefore, he must have passed the first oral assessment conducted by Mr. Ralph, Mr. Greig and Mr. Locke or he would not have moved on to the further oral interview and told by Mr. O'Connor that he would receive a job offer.

[146] The evidence is that on May 30, 1997, Mr. Ralph called Mr. Lincoln and said that he had not been selected for the job because he had failed the first oral interview. He also told him that his knowledge of on board purifiers was deficient.

[147] Mr. Ralph repeated this in his July 15, 1997, letter to Mark Lewis. There he stated that Mr. Lincoln was not hired because he failed the oral assessment, not because of Mr. Lewis' reference. He also stated that Mr. Lincoln was never made an offer of employment which was later withdrawn. This was a misconception on Mr. Lincoln's part.

[148] At the hearing, Mr. Lincoln went through certain questions on the Assessment which showed as "failed" to demonstrate that, on the contrary, his answers should have rated as a "pass". These were very technical questions and on the evidence offered, I am unable to determine whether a "fail" should have been a "pass" as he contended.

[149] It would have been much more probative if either the complainant or the respondent had called Mr. Ralph and Mr. O'Connor to give evidence. However, both parties chose not to. The same can be said of Brian Greig. He was one of the interviewers during Mr. Lincoln's technical assessment. He works at Secunda with Mr. Lincoln and lives locally. Mr. Lincoln had discussed his B.C. Ferries application a number of times with Mr. Greig. Mr. Greig was scheduled to give evidence on behalf of Mr. Lincoln. In the last week of the hearing, Mr. Lincoln's counsel advised the Tribunal that Mr. Greig would not give evidence.

(i) Conclusion

[150] Although there is no evidence as to why Mr. Lincoln was asked to attend the second oral interview, the preponderance of the evidence is that Mr. Lincoln did not successfully complete the first oral interview. In my opinion, this is the reason why Mr. Lincoln was not hired by B.C. Ferries and not because "someone" at Bay Ferries sought to retaliate against him for filing a human rights complaint or sought to harass him. Further, it is not enough to support a complaint under these two sections of the *Act*, to assert, without more, than an unknown person at Bay Ferries denigrated his abilities causing B.C. Ferries to reject his application.

[151] For all these reasons, I have concluded that Mr. Lincoln has failed to establish a *prima facie* case under either section 14(1)(c) or section 14.1 of the *Act*. Accordingly, his complaint under these two sections is dismissed.

ORIGINAL SIGNED BY

J. Grant Sinclair, Chairperson

OTTAWA, Ontario

February 20, 2002

**CANADIAN HUMAN RIGHTS TRIBUNAL
COUNSEL OF RECORD**

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PLACE OF HEARING: Halifax, Nova Scotia

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APPEARANCES:

Colin Bryson For the Complainant

John Mitchell For Bay Ferries Ltd.

1. ¹ *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202, 208; *Ontario Human Rights Commission v. O'Mally*, [1985] 2 S.C.R. 536, 558.
2. ² *Israeli v. Canadian Human Rights Commission and Public Service Commission* (1983) 4 C.H.R.R. D/1616, D/1617
3. ³ *Shakes v. Rex Pak* (1982) 3 C.H.R.R. D/1001, D/1002; and *Israeli supra*, at D/1618