CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

RAMANAN THAMBIAH

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

MARITIME EMPLOYERS ASSOCIATION

Respondent

- and -

LONGSHORE WORKERS' UNION OF THE PORT OF MONTREAL

Interested Party

DECISION

MEMBER: Réjean Bélanger

2010 CHRT 8
2010/04/15

IDENTIFICATION OF WITNESSES ET AL.

To conceal the names of the different persons mentioned in this decision, they are identified as follows. The letter P identifies the Complainant's witnesses, and the number that follows indicates the order in which they were heard. The letter C identifies the candidates for longshore workers' positions whose names were mentioned at the hearing, each of whom has been assigned a number randomly. The Respondent's sole witness is identified as Mr. M., and the Union's sole witness as Mr. R.

I. INTRODUCTION

[1] In December 2008, the Canadian Human Rights Commission referred to the Canadian Human Rights Tribunal complaint #20060812 filed by Ramanan Thambiah against the Maritime Employers Association (the MEA) on January 2, 2007.

[2] In this complaint, the Complainant says that he was a victim of discrimination based on his "ethnicity", "age" and "family status".

[3] These three grounds of discrimination set out in section 2 of the *Canadian Human Rights Act* are prohibited under section 7 of that same *Act*.

[4] In January 2006, at the time the events at issue occurred, the Complainant had been working as a longshoreman in the Port of Montreal for seven years; he had accumulated 10,000 hours of work.

[5] In October 2005, he became eligible for a position in the first reserve, which could eventually lead to job security.

[6] In December 2005, he passed the OLIFT test, which qualified him to operate a lift truck, the first of two tests giving access to the first reserve.

[7] The second test is known as OTUGM and qualifies a candidate to drive a truck.

[8] He failed the first truck test on January 25, 2006, and alleges that the evaluator held a camera and thus interfered with his movements and also made him change direction at the last minute, which caused the incident for which he was penalized. He accuses the evaluator of acting in this way for the sole purpose of sabotaging his test.

[9] Several times he admits that he hit a container with his truck during the first test, and several times he denies that he hit the container; in the latter case, he accuses the trainer of striking the back of his truck with a hammer or a walkie-talkie to make a noise and then be able to accuse him of hitting the container. He admits that he did not see the trainer do that, but that is what he inferred.

[10] He failed the second truck driving test on January 26, 2006, and claims that the sunlight reflected in the truck's mirrors prevented him from performing certain manoeuvres successfully and that the trailer's brakes were faulty.

[11] He complains that, despite his repeated requests, the MEA evaluator refused to give him permission to take a third test, on the ground that company policy limits the number of tests to two and that he could not go against that policy.

[12] The Complainant alleges that he was completely unaware of the policy barring a third test and that he was misled into thinking that the test could be repeated an unlimited number of times. He complains that the policy was established for the sole purpose of failing him.

[13] He alleges that it is common knowledge among longshore workers in the Port of Montreal that many candidates were able to obtain positions as longshore workers because of their family ties to influential members of the MEA.

[14] To substantiate that assertion, he reports the case of a candidate who, after failing the truck driving test twice, allegedly was given a third chance solely because he was the husband of an employee working in the offices of the MEA.

[15] He alleges that given his lack of family ties to a member of the MEA, he was made to fail the two truck driving tests. He concludes that he received differential and discriminatory treatment.

[16] He alleges that he is a member of a visible minority, that he is over fifty years old and that he has been the target of racist remarks.

[17] He states that the financial consequences of the refusal to allow him to take a third test are dramatic for him. This means that he will never have job security as a longshoreman and will not receive the benefits, including monetary ones, that are given to longshore workers with job security.

[18] As a remedy, the Complainant is seeking an amendment of the MEA's hiring and evaluation policies, cancellation of the results of his first two truck driving tests and monetary compensation.

[19] Before considering the merits of the complaint, that is, the Respondent's possible violation of section 7 of the *Canadian Human Rights Act*, the Tribunal will examine the preliminary matters that were raised at the beginning of the hearing.

II. COMPLAINT

[20] In his complaint, the Complainant submits that he was a victim of discrimination based on his "ethnicity", "age" and "family status"; the last of these grounds took the form of nepotism, in that the MEA allegedly rejected his candidacy in favour of candidates connected by family ties with members of the MEA's management.

[21] In her opening statement, Deborah Mankovitz, counsel for the Complainant, stated that she intended to demonstrate each of the three grounds of discrimination alleged in her client's complaint.

[22] However, after the examination of the witnesses and before beginning her argument, after reflection and consultation with her client, Ms. Mankovitz informed the Tribunal that she had decided to drop those elements of the complaint concerning "ethnicity" and "age".

[23] She stated that her argument would therefore pertain to a single ground of discrimination, that is, "family status", which she characterized throughout the hearing as plain nepotism.

III. PRELIMINARY MATTERS

[24] On January 6, 2010, five days before the start of the hearing scheduled for the week of January 11 to 15, 2009, the Canadian Union of Public Employees, representing the Longshore Workers' Union of the Port of Montreal, brought a written motion for the Tribunal to grant it interested party status. It justified its motion by claiming that it had only just learned of the hearing in the matter of *Ramanan Thambiah v. MEA* before the Canadian Human Rights Tribunal.

[25] At the beginning of the hearing, Edith Laperle, counsel for the Union, stated that, for the time being, her client wished only to attend the hearing as an interested party and receive copies of documents filed in evidence, without asking for the right to be heard, call witnesses or cross-examine the witnesses for the two parties.

[26] However, she added that in the event that accusations were made against the Longshore Workers' Union, it would ask the Tribunal for leave to adduce evidence.

[27] Deborah Mankovitz, counsel for the Complainant, and Daniel Leduc, counsel for the Respondent, consented to Ms. Laperle's motion.

[28] The Canadian Human Rights Commission did not take part in the hearing.

[29] The Chairperson of the Tribunal, in accordance with the authority conferred on him under section 50 of the *Canadian Human Rights Act*, and satisfied with the explanation given by Ms. Laperle for her belated motion to intervene and the reasons supporting it, therefore recognized the Union as an interested party entitled to attend the hearing. He also reserved the right to make any further ruling concerning the possibility of broadening that role, at the Union's request, according to circumstances.

[30] The Chairperson of the Tribunal granted the motion to exclude witnesses brought jointly by counsel for both parties.

IV. ROLE OF THE MEA, MEA WORKFORCE & ACCESS TO THE 2ND & 1ST RESERVE

[31] In order to understand the nature of the claim made by the Complainant, a longshoreman at the Port of Montreal, and the context of his employment, it is essential to understand (a) the purpose of the MEA, (b) the workforce used by the MEA in the Port of Montreal and (c) access to the second and first reserve.

[32] At paragraphs 1.1 to 1.22 of his Statement of Particulars, filed prior to the hearing, counsel for the Respondent explains the three above-mentioned elements in detail.

[33] Since the two parties agreed at the beginning of the hearing on the accuracy of paragraphs 1.1 to 1.22, they are worth reading and are therefore reproduced verbatim below:

> [translation]

A- RELEVANT FACTS

1. THE MARITIME EMPLOYERS ASSOCIATION

(a) Purpose of the Maritime Employers Association

1.1 The Maritime Employers Association ("MEA") is an association comprising all longshoring companies in the different ports of Eastern Canada, including the Port of Montreal.

1.2 Every day, the MEA receives from each longshoring company in the Port of Montreal a workforce order for the following day, which specifies the classification required according to the work to be performed by the company.

1.3 The MEA's principal mission is therefore to recruit, train and deploy workers for the different longshoring companies operating in the Port of Montreal.

(b) Workforce

1.4 To meet the needs of those companies, the MEA maintains a pool of qualified workers.

1.5 There are three general categories of workers employed by the MEA: employees with job security (approximately 880); employees in the first reserve (approximately 90); and employees in the second reserve (approximately 30).

1.6 A new employee who joins the second reserve will, provided he or she obtains certain classifications, move up to the first reserve in the relatively long term and, finally, to the group with job security.

1.7 All MEA employees, regardless of category, perform a single function, that of longshore worker, which is divided into different classifications.

1.8 The list of almost all longshoring classifications is found on pages 66 & 69 of the collective agreement between the Maritime Employers Association and the Longshore Workers Union, Local 375, which expires on December 31, 2008 ("collective agreement").

1.9 Some of the above-mentioned classifications are mandatory for employees joining the second reserve and the first reserve, specifically:

Mandatory classifications:

2nd reserve	PCALE: EPAND: ELING: OLASH: SCHRP:	cargo officer; spreader; slinger; lasher; seine carpenter;
1st reserve	same classifications as for the 2nd reserve, plus the following:	
	OLIFT:	lift truck operator - 13 tons and under;
	PLIFT:	lift truck operator - 13 tons and under in the hold;
	OBLOC:	lift truck operator - 13 tons and under and block officer;
	OTUGM:	truck operator.

1.10 The obligation of employees in the first reserve to qualify as lift truck operators and truck operators is set out in clause 13.08 of the collective agreement.

1.11 The "truck operator" classification is an absolute condition for advancing to the first reserve and is among the training programs provided by the MEA.

1.12 In addition to the three general categories of employees mentioned in paragraph 1.5, the MEA uses the services of persons holding "blank cards" to meet occasional workforce needs.

1.13 The "blank card" is a piece of identification that allows its holder to go to the MEA's hiring hall in hopes of obtaining longshoring work for a given day, in the event that there are too few longshore workers with job security and/or in the first and second reserve to meet that day's longshoring needs.

1.14 The procedure requires holders of "blank cards" (of which there are roughly 100) seeking work to go to the MEA's hiring hall at the beginning of a shift and offer their services by showing their cards, which simply allow the MEA to identify the person seeking work.

(c) Moving up to the second and first reserve

1.15 When a place in the second reserve becomes available, the MEA must refer to a "List of Reserve Candidates".

1.16 That List is drawn up by the Longshore Workers' Union, CUPE Local 375 ("the Union"), and the workers whose names appear on it may or may not hold "blank cards".

1.17 Thus, every time the MEA has one or more positions to fill in the second reserve, the Union sends the MEA a letter, signed by the eligible candidate, informing it of the candidate's interest in applying for a position in the second reserve.

1.18 On receipt of the signed letter, the MEA begins the hiring process, which involves:

1.18.1 aptitude tests for candidates;

1.18.2 a pre-hiring medical examination to ensure that candidates meet the psychological, physical and medical requirements of longshoring work; and

1.18.3 a criminal record check.

1.19 These requirements are set out in clause 13.07 of the collective agreement.

1.20 Entry into the first reserve occurs largely through attrition, that is, the voluntary departure, dismissal and retirement of employees with job security.

1.21 The pool of workers considered for a position in the first reserve is made up of employees in the second reserve.

1.22 To join the first reserve, as mentioned in paragraph 1.10, workers must be qualified to operate lift trucks and trucks.

V. APPLICABLE LEGAL TESTS

[34] A complainant must first convince the Tribunal that there is *prima facie* evidence of discrimination by the respondent. (*Ontario Human Rights Commission v. Etobicoke,* [1982] 1 S.C.R. 202). In this case, since the Complainant has alleged discrimination based on "family status", which can take the form of nepotism, he must satisfy the Tribunal that the evidence submitted regarding the allegations made is complete and sufficient, as the Supreme Court held in *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.* [1985] 2 S.C.R. 536, at paragraph 28:

> The Complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is 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.

[35] Accordingly, to reach its decision at this first stage, the Tribunal must limit its analysis strictly to the testimonial and documentary evidence adduced by the Complainant. It must

disregard the evidence submitted by the Respondent in reply. See *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at paragraph 22:

[22] The approach taken by the Tribunal and upheld by the Trial Judge in determining whether a *prima facie* case of discrimination had been made out is not supported by the authorities. The appellant's *prima facie* case was that he sought a position of chief engineer on board the M.V. "Princess of Acadia", that he was qualified for the position, that someone else was hired for the position and that his race played a part in the Respondent's decision to hire the other candidates. By these allegations, the appellant might have established a *prima facie* of discrimination as explained in *O'Malley, supra,* that is, a case "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". Instead of determining whether these allegations, if believed, justified a verdict in favour of the appellant, the Tribunal also took into account the Respondent's answer before concluding that a *prima facie* case had not been established. As is clear from *Etobicoke, supra*, and *O'Malley*, this latter element does not figure into a determination of whether a *prima facie* case of discrimination has been established.

[36] If the Tribunal finds that there is no *prima facie* evidence of an essential element of the allegations or finds the evidence submitted incomplete or unsatisfactory, it must dismiss the complaint. See *C.H.R.C. v. C.N.* (2000) 38 C.H.R.R. D/107 (F.C.). In fact, the question is really whether each essential aspect of the discriminatory act is substantiated by evidence.

[37] To establish a *prima facie* case of discrimination, the Complainant must provide more than sweeping assertions. In this regard, see the Tribunal's decision in *Singh v. Canada (Statistics Canada)* (1998) C.H.R.D. No. 7, at paragraph 197.

[38] To persuade the Tribunal, it is not sufficient for a person to claim discrimination and to be convinced of it without establishing a *prima facie* case. See *Singh, supra,* at paragraph 206.

[39] However, if the Tribunal is of the opinion that a *prima facie* case has been made, the burden of proof then shifts to the Respondent, which must provide "reasonable" or "satisfactory" explanations for the otherwise discriminatory practice (See *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 (CanLII), at paragraph 23; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 (CanLII), at paragraphs 26 and 27).

[40] An employer's conduct will not be considered discriminatory if the employer can establish that any refusal, exclusion, expulsion, suspension, limitation, specification or preference is based on a *bona fide* occupational requirement (BFOR) (paragraph 15(1)(*a*) of the *Act*). For a practice to be considered to be based on a BFOR, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost (subsection 15(2) of the *Act*).

[41] The Respondent must also establish that the justification is not merely a pretext to cover up a discriminatory practice, as the Federal Court held in *Canada (A.G.) v. Lambie*, (1996) 29 C.H.R.R. D/483.

[42] The standard of proof to establish discrimination is the civil standard of the balance of probabilities. That standard is less exacting than the standard applicable in criminal matters.

Here is what the Tribunal wrote in *Dawson v. Canada Post Corporation*, 2008 CHRT 41, at paragraph 73:

[73] This said, as stated in *Wall v. Kitigan Zibi Education Council,* (1997) C.H.R.D. 6, the standard of proof in discrimination cases remains the ordinary civil standard of the balance of probabilities and that in cases of circumstantial evidence, the test is the following: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses (B.Vizkelety, *Proving Discrimination in Canada*, Carswell, 1987, p. 142).

[43] In fact, complainants are faced with a harsh reality. In the absence of direct evidence, they must rely on circumstantial evidence. See *Basi v. Canadian National Railway*, (1988) C.H.R.D. No. 2.

[44] To succeed, the Complainant must also establish a causal connection between his failure to pass the two truck driving tests and the ground of discrimination alleged, that is, family status (nepotism). See *Chopra v. Canada (A.G.)*, 2007 FCA 268.

VI. COMPLAINANT'S CREDIBILITY

[45] We note a great many contradictions in the Complainant's testimony and consider it useful to reproduce some of the more significant ones here.

[46] At one point the Complainant admitted that he had failed the two truck driving tests, at another point he denied it, and finally he tried to justify his failure by advancing unverified and unverifiable hypotheses that changed over time.

[47] Finding the consequences of his failure so disproportionate to the error held against him, he tried desperately to find a way out of this impasse.

[48] He gave the impression of someone overwhelmed by the consequences of his failure, who was trying desperately to understand what could possibly have happened to him. During the hearing, he gave voice to his thoughts and advanced a number of hypotheses.

[49] In his view, discrimination and sabotage by the trainer and the evaluator partly explained his two failed tests. Several outside factors also explained the failed tests. His testimony therefore went in all directions. His hypotheses were sometimes hard to imagine and even harder to verify.

[50] Lastly, the Complainant advanced few substantive facts to support his position and mainly hid behind conjecture or hearsay.

[51] By his testimony, the Complainant clearly showed that he had difficulty distinguishing between the facts of his case and hypotheses that might explain those facts.

[52] In the final analysis, it is difficult to give much weight to the Complainant's version when compared with that of a witness testifying about facts of which he or she has personal knowledge.

[53] In short, in our opinion, the Complainant's credibility is very low.

[54] We will now analyze the different substantive questions that arose during the hearing.

VII. SUBSTANTIVE QUESTIONS

[55] It is important to establish what occurred on January 25 and 26, 2006, during the Complainant's two truck driving tests.

[56] The only two witnesses to testify about these two tests were the Complainant and Mr. M., the evaluator, who is also the MEA's director of labour relations and workforce.

[57] The Complainant explained what happened during the two tests and why he asked to take a third test, which was refused by the MEA's representative.

A. Analysis of the 1st failed test (January 25, 2006)

[58] In a letter dated December 15, 2006, to the vice-president of the MEA, filed as Exhibit R-1, Tab 7, the Complainant acknowledged that during his first attempt, on January 25, 2006, [translation] "... I hit a container". However, he blamed Mr. M., the evaluator, alleging that he put his hand on the front of the truck and asked him to change direction.

[59] In the [translation] "Brief Summary of Facts" produced by counsel for the Complainant, the following is written at paragraph 6:

[translation]

6. His first attempt was unsuccessful. During the test, the evaluator held a camera which interfered with his movements.

[60] In a letter dated October 19, 2007, to an employee of the CHRC, in reference to the incident of January 25, 2006, filed as Exhibit R1, Tab 11, page 2, he wrote again that "there was an accrochage but no containers had moved only a claque sound".

[61] However, during the hearing, he denied hitting the container but acknowledged that there was a noise. He could see only one explanation for the noise: Mr. L., the trainer, who was behind the truck, must have struck the back of the truck with a hammer or with his walkie-talkie. He also explained that he later saw Mr. L. put away his hammer.

[62] He stated that Mr. L. told him: "You hit [it]".

[63] During the hearing, the Complainant argued that if he had hit the container with his truck, the container would have moved because it was very easy to move since it was lying on ice, and that he could even have moved it by hand.

[64] The witness, Mr. M., testified that a man could not have moved the container by hand because it weighed several thousand pounds, had been there for a very long time, its feet had to be anchored in the asphalt because of its weight and the fact that summer heat softens the asphalt, and finally, that at the time of the incident the container was caught in the ice.

[65] The Tribunal was able to verify this last explanation when it viewed the video and is of the opinion that it would have been difficult for the container to move even after being hit by a truck.

[66] Mr. M., who was in front of the truck, testified that he heard the noise, just as Mr. Thambiah did, in fact.

[67] He stated that Mr. L., who was standing beside him during the test, did not have a hammer on him and that hitting a container with a walkie-talkie was unthinkable because it was made of plastic and could easily break.

[68] Mr. M. added that Mr. L., who was nearing retirement, had a spotless reputation; that there was no reprimand or complaint on his record, even though he had taken part in hundreds of tests.

[69] To Mr. M., it was clear that the Complainant had hit the container with his truck.

[70] After viewing the video of the incident, since there is no sound, it is impossible to comment on any noise there might have been. But this is not a problem since even the Complainant said that he had heard the noise.

[71] It is also impossible to say with certainty, after viewing the video, whether or not the truck actually hit the container. One thing is certain: it was very close to the container.

[72] We are of the opinion that Mr. M. was well positioned to see what happened and to say that the Complainant hit the container. We accept his version.

[73] In addition, Mr. M. told the Tribunal that when someone taking a test hits a container, the rule is that the person automatically fails.

B. Analysis of the 2nd failed test (January 26, 2006)

[74] In his letter of December 15, 2006, to Jean Bédard, vice-president of the MEA, filed as Exhibit R1, Tab 7, the Complainant explained his second failed test, held on January 26, 2006, as follows:

[translation]

The second time (around two o'clock) because of the sun that was going down, the sun was 45 degrees from the ground and I had it perpendicularly in my eyes. It prevented me from seeing the mirror properly. After four attempts at backing up, I wasn't able to back up even once!!

[75] We examined the video of the January 26 test closely, looking carefully at the ground to spot any clues as to the sun's position. Since there was no shade around objects such as the cones placed on the ground, it is difficult to claim that the sun was present at the time. At least, we do not believe that the sunlight could be blinding.

[76] The witness, Mr. M., testified that he learned that the Complainant was blaming the sun for his failure of the second test only when he read the Complainant's letter of March 7, 2006, which is filed in the Tribunal's record as Exhibit R1, Tab 2.

[77] Mr. M. did not notice during the test that the sun might bother the Complainant. He alleged that the Complainant made no mention of the problem caused by the sun either during or after the test.

[78] And if the sun was bothering him so much, why didn't the Complainant mention it to the evaluator? Why did he not ask that the test be stopped or that he be allowed to back up in another location where the sun would not have bothered him?

[79] And why did he not mention it at the end of the test when the evaluator told him he had failed?

[80] The Complainant also tried to blame his second failed test, during his testimony before the Tribunal, on faulty brakes on the trailer.

[81] The Complainant had already mentioned that factor in a document he filed with the Canadian Industrial Relations Board. See Exhibit R1, Tab 12, page 6, of which we reproduce the following passage:

On the January 26th, I was deliberately provided with the faulty truck where the brakes were partially applied on to the remorque. As a result I wasn't able to reverse on straight line. This resulted in a failure in the second driving test. The sequence of events came to light only after the video footage of the evenements released by the employer (Maritime employers association).

[82] In response, Mr. M. testified that this allegation did not hold water because the type of trailer that the Complainant was driving had no brakes. The truck, naturally, did have brakes. During that period, no other candidate complained about the poor state of truck's brakes and no repairs were done to those brakes.

[83] Furthermore, the Complainant himself acknowledged that on the morning of January 26, the truck was running well. Here is what he wrote in his letter of March 7, 2006, to the director of training at the MEA, filed in the record as Exhibit R1, Tab 2:

[translation]

I failed the truck on Thursday, January 26, 2006. When I practised in the mornings, I had no trouble with the truck.

[84] In our opinion, after a careful examination of the video, it does not seem to corroborate the Complainant's assertion that the video showed that there was a problem with the brakes.

[85] Contrary to what the Complainant asserted, we are of the opinion that he made no mention of faulty brakes to the evaluator either during or immediately after the test.

[86] We therefore cannot consider that the state of the truck's brakes can explain the Complainant's failure to pass his driving test.

[87] As for the Complainant's allegation contained in the passage quoted above, that "I was deliberately provided with the faulty truck where the brakes...", we are of the opinion that it is based on nothing but the imagination of the Complainant, who is desperately seeking an excuse for his failure.

[88] Nothing in the evidence adduced allows us to believe that the representatives of the MEA committed any deliberate act whatsoever to impair the Complainant in his test or cause him to fail it.

[89] Rather, we note that throughout his testimony, the Complainant said that after he had passed the lift truck test, the evaluator had congratulated him and patted him on the back to show that he was happy for him. No evidence adduced before the Tribunal could explain why the attitude of the same evaluator would have changed to the point where he would seek to sabotage the Complainant's test.

C. The 2-test maximum rule

[90] The Complainant and witness P-1 told the Tribunal that they were unaware of the two-test maximum rule. Both stated that if they had known about it, they would have prepared themselves accordingly. Witness P-1 said that he would have taken the tests more seriously.

Both said that they had never received any notice from the MEA's representatives in this regard.

[91] Witness M., for his part, testified that the rule already existed when he joined the MEA in 1998 but that he did not know how long it had been in effect.

[92] He added that the rule, initially unwritten, was put in writing several months later, after the Thambiah incident, once the mass hiring period was over and they had time to do it.

[93] Confronted with the Complainant's statement that he was never warned of the existence of this rule, he said that the warning was always given during the theoretical phase of training, for both lift truck and truck operators; however, in both cases, he was not present because training was not his responsibility.

[94] He added that the warning also appeared in the manual that was given to each candidate, filed in the Tribunal's record at pages 14 and 15 of Exhibit R-1, Tab 15. The Tribunal's opinion is that this warning is not sufficiently clear for candidates to take notice of it. Furthermore, we believe that the Complainant received a manual that did not include page 14 and that differed from the document filed in evidence by Witness M.

[95] He said that he had personally warned the Complainant on January 25 and during the debriefing and when the Complainant failed the first lift truck test.

[96] Faced with the conflicting statements of the Complainant and witness M., the evaluator of record, we accept the evaluator's version. As we already explained above, the Complainant's credibility is very low.

[97] Regarding the statements made by the Complainant and some of his witnesses alleging that some candidates had been allowed to take a third test, witness M. said that there had actually been only one candidate who was given a third test, Mr. C-1, whose case is discussed farther on in this judgment.

[98] At this time, the Tribunal wishes to note that, given the nature of the complaint, it is not for it to assess the fairness or validity of the two-test maximum rule.

[99] All of the cases submitted for the Tribunal's analysis, including that of the Complainant, showed that the two-test maximum rule was applied regardless of the candidates' age, ethnicity and family ties to members of the MEA. Accordingly, the two-test maximum rule was applied without discrimination against the Complainant.

[100] The Tribunal, which has on several occasions expressed its unwillingness to interfere with the staffing process unless there is discrimination, decided two cases on the principle that any irregularity in the staffing process is not necessarily conclusive evidence of discrimination. This principle was cited subsequently in several other decisions (see *Folch*, cited more recently in *Morin v. Canada (A.G.)*, 2005 CHRT 41. http://www.canlii.org/en/ca/chrt/doc/2005/2005chrt41/2005chrt41.html; *Kibale*, cited more recently in *Chopra v. Canada (Health and Welfare)*, 2001 Can LII 8492 (CHRT) http://www.canlii.org/en/ca/chrt/doc/2001/2001canlii8492/2001canlii8492.html)

D. Nepotism at the MEA

[101] We will now examine the different cases submitted to the Tribunal in order to determine whether or not there was nepotism.

(i) Case of NS (candidate of North African origin)

[102] Some of the witnesses heard, including the Complainant, referred to the situation of a certain candidate of North African origin, identified here as Mr. C-1, married to an office employee of the MEA, who, after failing two tests, was allowed to make a third attempt.

[103] The MEA's witness, Mr. M., acknowledged that Mr. C-1 was the only candidate to take three tests and explained what happened.

[104] After the candidate had failed twice, Mr. M. met with Mr. C-1 and informed him that, under the two-test maximum rule, he was not entitled to a third test.

[105] Subsequently, Mr. C-1 himself and Union representatives made representations to convince the evaluator that Mr. C-1 had been bothered during his test by the presence of a bus operating on the site where the test was being held, near the truck driven by Mr. C-1.

[106] The evaluator agreed to view the video shot during Mr. C-1's test. After viewing it and considering the arguments of the candidate and the Union representatives, the evaluator concluded that Mr. C-1 could indeed have been bothered by the incident.

[107] Since other candidates do not normally have to deal with the presence on the test site of vehicles such as moving buses, the evaluator decided to cancel the second attempt on the ground that it was an exceptional situation and to give the candidate another chance.

[108] The candidate repeated the test and passed, with the result that the MEA gave him the right to drive a truck in the Port of Montreal.

[109] We are satisfied with the explanations given by the MEA's representative. There was no irregularity on the part of the MEA in this case.

(ii) Case of MB (white woman)

[110] Witness P-3 told the Tribunal that according to what he had heard, although he had no personal knowledge of the incident, Ms. C-2 had failed the lift truck tests and some time later he had seen her driving a truck.

[111] Witness P-1, concerning the incident involving Ms. C-2, and without specifying his information sources, testified that she had lost her licence to drive a lift truck and a truck and that after receiving further training, she had recovered her truck driving licence a few months later.

[112] Witness M. said that he was personally aware of the matter, having been the evaluator of this candidate. He stated that Ms. C-2 first passed the lift truck test and then, on December 4, 2006, the truck test. However, after she had an accident while driving the truck, her classification was withdrawn. She took the training again and, a few days later, her classification was restored.

[113] The witnesses for the two parties made conflicting statements. Since the Complainant's witnesses had no personal knowledge of the incident, whereas witness M., having such knowledge, was in a better position to discuss the case of Ms. C-2, we accept his version. There was no irregularity on the part of the MEA in this case.

(iii) Case of C-4 (woman)

[114] Witness P-2 told the Tribunal that the husband of Ms. C-4, a longshoreman in the second reserve, had told him that his wife had failed the test twice. He alleged that two weeks

later he saw her driving a truck in the Port of Montreal. It should be noted that it was only after considerable confusion that this witness managed to situate the incident of Ms. C-4 in time.

[115] Witness M. testified that he was personally aware of this matter. However, he thought it necessary to note that he knew the name of Ms. C-4's husband, and that witness P-2 was not using the right name to identify this candidate. Lastly, he noted that, contrary to what is alleged in the preceding paragraph, this woman, after failing a first test on the lift truck on April 11, 2006, passed the second test on April 12 of the same year.

[116] We cannot give credence to the information provided by this witness, who, in addition to providing inaccurate dates and information, had no personal knowledge of the incident, while witness M. was in a better position to discuss the matter of Ms. C-2, since he had evaluated her. Here again, it seems to the Tribunal that there was no irregularity on the part of the MEA in this case.

(iv) Case of AM (white man)

[117] Witness P-3 told the Tribunal that Mr. C-3 failed the truck driving test twice; that the candidate's father went to the MEA to loudly express his frustration to Mr. G.C. and allege that his son had failed the truck-driving test; that he had better pass him; and that Mr. C-3 had then passed the test, in fact he himself had seen him driving the truck.

[118] Witness M. testified that he had evaluated Mr. A.M for truck driving on March 28, 2006, and that he had passed on the first attempt.

[119] We prefer to believe Mr. M., who, in addition to being familiar with the matter, seemed to us more credible.

(v) Case of the brother of an MEA office employee

[120] Witness M., in order to show that there is no nepotism at the MEA, told the Tribunal that he had evaluated the brother of the wife of the North African candidate, the one who had been given a third test. He added that the man had failed his test, even though his sister worked for the MEA.

(vi) Cases of persons who failed tests

[121] Witness M., as director of labour relations and workforce at the MEA, when questioned about the number of people who had failed tests at that time, was able to state that there were only a few cases out of several hundred candidates whom he had evaluated.

[122] Pressed to provide names, he was able to give the following examples:

(1) Mr. C-7, who failed the fork lift test twice, was over 50 years old, not a member of a visible minority and was referred by the Union;
(2) Mr. C-5, who failed the truck test twice, was between 30 and 40 years old, not a member of a visible minority and, he believed, was referred by the Union;
(3) Ms. C-6, who failed the truck test twice, was about 50 years old, not a member of a visible minority and was referred by the Union;
(4) Mr. C-8, who failed the truck test twice, was over 50 years old, not a member of a visible minority and was not referred by the Union.

[123] Lastly, he pointed out that each of those longshore workers continued to work in the second reserve even after failing the test.

(vii) Document of the Lists Committee

[124] Further to what witness P-1 told the Tribunal about a document that was allegedly posted at the end of 2005, part of which dealt with the age of future candidates for the position of longshore worker, we think it necessary to state our position regarding that document.

[125] During the hearing, Mr. R., a member of the Union, testified that this was merely a working document drafted by the Union's Lists Committee. At no time was the document adopted by the Union or discussed with representatives of the MEA.

[126] For these reasons, we wish to note that this document is not part of the evidence on which the Tribunal will base its decision.

VIII. ISSUE

[127] Having completed our analysis of the many substantive questions, we can now turn our attention to the issue.

[128] At the beginning of the hearing, Deborah Mankovitz, after being invited by the Chairperson of the Tribunal to read closely the Issue that appears on page 6 of the Respondent's Statement, as drafted by Daniel Leduc, and to comment on it, said that she was in agreement with its wording, as reproduced below:

[translation]
Was the Complainant discriminated against by the Respondent on the basis of his age, family status and/or national or ethnic origin in the evaluation of his ability to hold the classification of "truck operator", an essential condition of access to the first reserve?

[129] In view of Ms. Mankovitz's decision, before making her argument, to drop those parts of the complaint that concerned "ethnicity" and "age", the new issue becomes the following:

[translation]

Was the Complainant discriminated against by the Respondent on the basis of his family status in the evaluation of his ability to hold the classification of "truck operator", an essential condition of access to the first reserve?

[130] The Tribunal adopts the issue as framed by counsel for both parties.

IX. *PRIMA FACIE* EVIDENCE

[131] Disregarding the Respondent's evidence, the evidence adduced by the Complainant shows that the representatives of the MEA decided that the Complainant had failed the truck driving test twice and was not entitled to take a third test.

[132] The Complainant disagrees with the outcome of the two tests and accuses the Respondent of having discriminated against him on the basis that he had no family ties to employees of the MEA.

[133] He is of the opinion that both the trainer and the evaluator did everything to sabotage his evaluation.

[134] The Complainant cannot accept that he was denied the right to make more than two attempts to pass the truck driving test.

[135] He asserts that the two-test maximum rule was invented the day he failed his second test.

[136] The Complainant and some of his witnesses told the Tribunal that certain longshore workers had been allowed more than two attempts to pass the lift truck and truck tests.

[137] They said that family ties connecting those candidates with MEA office employees explained why they were not held to the same rules as others, such as the Complainant.

[138] However, the Complainant and his witnesses acknowledged that they had no personal knowledge of the facts they reported to the Tribunal. They admitted that they had the information from people they had talked to.

[139] Although a large portion of the information provided by the Complainant and his witnesses was based on hearsay, we are of the opinion that the Complainant succeeded in establishing a *prima facie* case of discrimination.

X. CONCLUSION

[140] With respect to the first truck driving test, held on January 25, 2006, we cannot accept the explanations provided by the Complainant. We accept that the Complainant hit the container with his truck and refuse to believe that the noise heard was caused by a tool used by the trainer. We do not accept the idea that the MEA representative wanted to sabotage the Complainant's test. The test proceeded normally and the Complainant failed.

[141] With respect to the second test, which was held on January 26, 2006, we cannot accept the Complainant's allegation that he failed because of the sun or that the truck's brakes were faulty. We do not accept the idea that the MEA representative wanted to sabotage the Complainant's test. The test proceeded normally and the Complainant failed.

[142] With respect to the two-test maximum rule, it is our opinion that, although the rule was not written down, it had existed since at least 1998. It was written down after the incident involving the Complainant but not because of him. It was applied to all cases submitted for our consideration, and not only to the Complainant. This rule was in no way applied in a discriminatory manner against the Complainant.

[143] With respect to nepotism at the MEA, the evidence presented before the Tribunal did not demonstrate to our satisfaction the existence of nepotism in hiring practices at the MEA. We found no instance of a longshore worker obtaining the truck operator classification because of family ties to members, managers or shareholders of the MEA.

[144] Based on the evidence submitted, we must answer in the negative the issue as already stated, which is:

Was the Complainant discriminated against by the Respondent on the basis of his family status in the evaluation of his ability to hold the classification of "truck operator", an essential condition of access to the first reserve?

[145] Accordingly, we dismiss the complaint of discrimination filed by the Complainant.

XI. WHAT IS THE APPROPRIATE REMEDY?

[146] During the hearing, the Tribunal informed the parties that in the event that the Complainant succeeded, it reserved the right to receive all necessary evidence to assess the remedy sought.

[147] Since the Tribunal has found that the Complainant did not succeed in proving that the Respondent discriminated against him, we do not consider it necessary at this stage to make any determination as to remedial action.

"Signed by"
Réjean Bélanger

OTTAWA, Ontario
April 15, 2010

PARTIES OF RECORD

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APPEARANCES:	
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(No one appearing)	For the Canadian Human Rights Commission
Daniel Leduc	For the Respondent
Édith Laperle Paul Rivest	For the Interested Party