

certain remarks about this program, including its selection process, as well as the role that some supervisors played in the complainant's disappointments.

A. THE FACTS

(i) The complainant

[5] The complainant, a native of Tunisia, arrived in Canada with his family at the end of October 2002. On November 27, 2006, he received his Canadian citizenship. He says that from the time he arrived in Canada until March 8, 2005, he could not find anything other than part-time employment.

[6] He therefore decided that he would pursue a Master of Mechanical Engineering degree at the École de technologie supérieure in Montréal until he found permanent employment. However, his family obligations prevented him from seeing this through. He then registered in a training program to obtain a teaching permit for vocational training. In July 2003, the Ministère de l'Éducation du Québec gave him his permit.

[7] According to his curriculum vitae, the complainant has sixteen (16) years of experience in railway maintenance, mechanical manufacturing, quality systems and vocational training. He has a Bachelor of Mechanical Engineering degree that he received in Tunisia and an Attestation of Collegial Studies - Train Crews from CÉGEP Gérald-Godin, obtained in 2004. Later on, we will take a more in-depth look at the training program offered by the CÉGEP.

[8] From 1986 to 1988, he worked for the national department of education of Tunisia as a vocational training instructor in mechanical engineering. From 1988 to 1989, he was an office manager for a company in Tunis. On June 1, 1989, he began work for the Société du métro léger in Tunis, as a junior engineer. In June 1990, he was certified for this position. His curriculum vitae states that he also worked at this company as an office planning manager and as an electromechanical maintenance foreman. He also filed in evidence a certificate from Belgium's International Institute for Transportation Education certifying that in 1995 he studied the [translation] "international training cycle in railways and railway transport." There was no description of the substance of this training offered at the hearing.

[9] To demonstrate his knowledge of English, the complainant filed in evidence a diploma from the Tunis "British Council," indicating that his proficiency level in English was "intermediate." According to this document, the candidate must complete 440 hours of instruction to achieve this level. The "intermediate" proficiency level means, according to the document, that the student is able to "initiate and conduct conversation on a wide range of personal and factual subjects; understand the main points of authentic texts on factual topics; follow the gist of lectures and extensive rapid speech; write accurate summaries of discussions or texts and simple discursive compositions on abstract topics. They have an active vocabulary of about 3000 words."

(ii) The labour needs of Quebec's railway industry and the training program offered by CÉGEP Gérald-Godin

[10] Concerned by the manpower succession problems in Quebec's railway industry, the Société de promotion de l'industrie ferroviaire, of which Pierre Fallu, one of CN's

witnesses, is the CEO, created a sectoral table of the railway industry in cooperation with Emploi-Québec. One of the mandates of this sectoral table was to establish a partnership between the representatives of different railway companies in the province of Quebec and training institutions in order to respond to the manpower training needs of the railway industry.

[11] In March 2003, this sectoral table filed a report entitled [translation] "The Railway Industry in Quebec, Manpower and Vocational Training." This report analyzed the problem of the aging labour force in the railway industry, assessed recruiting needs while targeting critical functions, and proposed a new training approach. The assessments made by the authors of the report led to the finding that the annual volume of train crew recruitment in the five years following its publication would be significant enough to warrant the development of a [translation] "pre-employment training program for the functions of train conductor and locomotive engineer."

[12] Generally, a train crew is made up of a conductor and a locomotive engineer. The duties of the train conductor and the locomotive engineer more or less vary according to the type of railway and its scale. Train conductors work as members of the train crew on road service (freight trains or passenger trains) or shunting. They ensure a proper formation of the trains and their safe arrival at the destination. They are also responsible for keeping the register. The main role of the locomotive engineer is to drive locomotives in order to ensure that rolling stock is picked up and delivered, and to ensure the transport of merchandise and passengers. To become a locomotive engineer, an individual must first be a train conductor.

[13] According to the sectoral table, the Quebec railway industry planned to hire between 20 and 25 new locomotive engineers and between 30 and 35 new train conductors every year for the five years following the filing of the report. In order to respond to the industry's manpower training needs, the sectoral table, in cooperation with CÉGEP Gérard-Godin, developed and implemented a train crew training program for 2003 and 2004.

[14] Beginning with an analysis prepared by the Railway Association of Canada, those supervising the new training program called [translation] "Railway transport: train crews" were able to prepare a competency profile for the train conductor and locomotive engineer professions. The training program was developed in cooperation with railway industry representatives and training experts.

[15] The program offered by CÉGEP Gérard-Godin led to an Attestation of Collegial Studies. Its primary objective was to prepare manpower specifically trained to respond to the needs of the railway industry. It contemplated, according to its supervisors, training [translation] "future employees to work as train crew members for road service or shunting." It added that at the end of their training, the candidates [translation] "could be hired by railway companies in Quebec and Canada and be certified as train conductors or locomotive engineers."

(iii) The complainant registered for the training program

[16] On March 31, 2004, the complainant attended an information session at a Montréal hotel. At this meeting, CÉGEP Gérard-Godin, in cooperation with Emploi-Québec and the sectoral table, announced that a new training program would be established. This program was designed for an adult clientele seeking careers, in the words of the document given to the attendees, [translation] "providing sound job opportunities, with attractive salaries and benefits as well as job security." It was also indicated that there would be [translation] "on-the-job training" on the list of courses offered under the program.

[17] At this meeting, the supervisors explained the admissions procedure for the program. First, the candidate had to fill out the forms required by Emploi-Québec. According to Pierre Fallu, 30 or so individuals filled out the registration form and about 25 candidates were called to an admission interview.

[18] Following this information session, the complainant went to Emploi-Québec to fill out the requisite form. He was then called to an interview by the CÉGEP's selection committee, presided over by Pierre Fallu, who was also the sectoral table coordinator and, as we stated earlier, the CEO of the Société de promotion de l'industrie ferroviaire. The committee also included Jacques Lacoste, the CÉGEP's representative, and Yannick Brunet, a railway industry representative. Neither Mr. Lacoste nor Mr. Brunet was called as a witness.

[19] According to the interview synthesis report filed in evidence, Jacques Lacoste gave the complainant a mark of 7/10 for his interview. The other two evaluators, Mr. Fallu and Mr. Brunet, for their part, wrote the comment "over" on their assessment sheets. According to Pierre Fallu, he and Mr. Brunet were of the opinion that the complainant was overqualified for the position of train conductor and, if given such a position, would promptly resign from his train conductor functions once a better employment opportunity became available. It is interesting to note that none of the evaluators referred to any communication problems as a basis for refusing to admit the complainant to the program and none of them expressed any real doubt about whether he had the ability to work as a train conductor, other than that he was overqualified. It was indeed because of this [translation] "overqualification" that the committee initially recommended the complainant not be admitted to the program.

[20] Since Emploi-Québec required a group of 15 to 20 students and the interview results fell short of this number, the selection committee decided to review its recommendations for certain candidates. According to Mr. Fallu's testimony, even though the complainant [translation] "did not demonstrate that he had the skills to work as a train conductor," the committee, in order to meet Emploi-Québec's objectives, decided despite everything to accept him in the program. According to Mr. Fallu, the complainant was admitted to the program only in order to have the number of registrations required by Emploi-Québec.

[21] On cross-examination, Mr. Fallu added that [translation] "I can tell you, Mr. Ben Salem, that my first impression when I saw you at the interview was that you are accident-prone. You do not have the skills to deal with emergency situations." This comment is surprising because it is not mentioned in the interview report. Further, if it is

true that Mr. Fallu had this opinion of the complainant, it is astounding that he agreed to admit him to the program.

[22] Finally, 19 candidates, including the complainant, were accepted for the program. Training began on May 17, 2004. Even though the program was offered by CÉGEP Gérard-Godin, the courses were given on CN's premises at Central Station, in Montréal. Indeed, some of the instructors were CN employees.

[23] The training program was made up of various modules. During the first session, students had to complete modules on [translation] "railway infrastructure," [translation] "the professions of train conductor and locomotive engineer," [translation] "railway safety," [translation] "the railway as a business," [translation] "railway communications" and [translation] "job shadowing and on-the-job training." During the second session, the modules included [translation] "introduction to computers," [translation] "customer service and business relations," [translation] "rail operating rules," [translation] "authorization and record-keeping," [translation] "inspections, manoeuvring and shunting tests," [translation] "locomotive operation," [translation] "operation of the locomotive and the train" and, finally, a [translation] "workplace internship." According to the program description, the internship was supposed to be 255 hours over an eight-week period.

[24] On May 17, 2005, the complainant received his Attestation of Collegial Studies. His "Bulletin d'études collégiales" ["Collegial Studies Transcript"] indicates that his marks were higher than average in practically all of the courses. For example, in the [translation] "railway safety" module, his mark was 96, when the group average was 91; in [translation] "the professions of train conductor and locomotive engineer," his mark was 94, when the group average was 82; in [translation] "railway communications," his mark was 93 and the average was 90; and, finally, in the [translation] "workplace internship," he was given a mark of 91, while the group average was 89.

[25] The mark assigned for [translation] "workplace internship" is interesting to say the least. According to Mr. Fallu, the railway industry had indicated to those supervising the program that, with a few exceptions, it was not accepting interns. He added that the "workplace internship" requirement arose from financing requirements issued by Emploi-Québec. To my surprise, Mr. Fallu testified that the complainant had never completed a workplace internship. When I asked him why the complainant had been given a mark of 91 for an internship, he responded that [translation] "all of the students received the same mark for that course." When I pointed out to him that the group average on the complainant's transcript was 89 and that therefore not all of the students could have received the same mark, he offered the following explanation: [translation] "the CÉGEP had a problem on its hands. It was receiving government funds for an internship, but this internship never took place. To assign a mark, the student's progress in obtaining employment was observed. But there was no workplace internship." When I asked him how a mark could be assigned for an internship that never took place, he added the following: [translation] "I have trouble understanding that, too; it was a delicate situation for the CÉGEP. The CÉGEP had no choice but to assign a mark for this module and they were graded on the steps the students took to find work. You should ask the CÉGEP; I was not involved."

[26] On cross-examination, he added the following: [translation] "Some companies agreed to do internships. The CÉGEP undertook to have internships. After I provided the information to the CÉGEP to the effect that the companies were not offering actual internships, but complementary training, the CÉGEP . . . decided to communicate with industries offering this additional training to see how workplace internships were conducted. I do not know how they worked this out with Emploi-Québec because it is a significant number of program hours." Later on he stated the following: [translation] "There were marks for the internship, but in 95% of the cases, there was no internship." The witness' explanations on this point were far from satisfactory.

[27] Jacques Lacoste, the educational consultant from CÉGEP Gérard-Godin wrote a quite flattering letter of recommendation for the complainant. Unfortunately, Mr. Lacoste was not called as a witness at the hearing. Regarding this letter, Mr. Fallu made another remarkable comment. According to him, those supervising the program had decided to standardize the students' letters of recommendation, to the extent that the letters were, according to Mr. Fallu, [translation] "cut and paste letters." Such a process, if this is really what happened, is not very conscientious and betrays both a lack of respect and professionalism in respect of both potential employers and students registered in the program.

[28] Mr. Fallu did not seem like a credible witness to me and, apart from a tendency to be defensive and blame others for the problems encountered, his testimony did not in any way clarify the issue that I have to decide. I must admit, however, having listened to this testimony, that I am in a better position to understand the complainant's frustration with Mr. Fallu and with the training program.

(iv) The advertisement for the CN position and the candidate selection process

[29] Christine O'Neill, CN's Director of Human Resources for Eastern Canada, testified at length regarding the respondent's hiring process. I found her to be a credible and trustworthy witness. Her answers to the questions were considered and measured.

[30] She explained that, in March 2005, CN was looking for employees to carry out train conductor functions. She was at that time aware of the training program offered at CÉGEP Gérard-Godin because Ms. S. Seebeck, Director of Training at CN, who worked in close cooperation with the sectoral table, had informed her of it. However, she added that CN did not play a role in the recruitment or admission of students for this program and that CN had not made any undertaking to the students who were registered in it. However, Ms. O'Neill added that she was prepared to receive these students for interviews, because she was [translation] "urgently" seeking candidates for train conductor positions and she knew that these students, even though they had no practical experience, had the technical knowledge necessary to perform this work. Ms. Seebeck therefore referred her to Mr. Lacoste and she also sent her the curricula vitae of the students she had received from the CÉGEP.

[31] In 2005, therefore, CN announced on its internet site that it was in the process of building a [translation] "pool of candidates interested in a career as a train conductor." The advertisement describes the requirements of the position as follows:

Good teamwork skills;
Good people skills;
Physically fit to do the work;
Knowledge of the signals and the signal register for the purposes of obtaining the proper information;
Good reading skills;
Information technology skills and computer skills suitable for the work;
Ability to properly analyze a situation and to react appropriately;
Shifts far from home for periods of up to 6 days;
Be on call, ready and able to work on assignment.

[32] Ms. O'Neill added to the list of skills the knowledge of English, deemed essential to work as a train conductor with CN. Although this was not mentioned in the advertisement, when candidates filled out their application forms, they were asked a question regarding their knowledge of English and French.

[33] The candidates who wanted to apply for train conductor positions had to apply through CN's website and fill out a form entitled "Candidate Response Report" which was a sort of a self-assessment done by the candidates. According to Ms. O'Neill, 71 people applied. Of these, 11 were from CÉGEP Gérald-Godin. Without explaining where she got this information, she added that the eight other students from the CÉGEP did not apply either because they had found employment elsewhere or because their knowledge of English was inadequate.

[34] On January 25, 2005, the complainant applied through the website. To the question, "Some of our positions require bilingualism. Can you read and speak fluently in both English [and] French?", the complainant responded "yes." According to Ms. O'Neill some answers given on the "Candidate Response Report" could prompt the candidate's immediate disqualification. She gave as an example the response to the question regarding the candidate's bilingualism. If the candidate answered "no" to this question, the candidate was automatically excluded from the list, barring evidence to the contrary. The complainant was not disqualified at this stage.

[35] The first stage of CN's hiring process consisted of a [translation] "train movement test." This test is described as a [translation] "a test of logic where candidates are asked to move railway cars on paper as they would have to do if they were hired for the job." The candidates had 25 minutes to complete this test. Ms. O'Neill corrected this test.

[36] The complainant, having passed the train movement test, was called to an interview with Christine O'Neill on March 8, 2005. For some candidates, Ms. O'Neill stated that the interview would be held before two interviewers, the other interviewer being there to assess the candidate's technical knowledge. In the case of the students from CÉGEP Gérald-Godin, only Ms. O'Neill was present at the interview, because she presumed that they already had the necessary technical knowledge and that she did not need another interviewer to help her with these questions.

[37] The candidates' interviews began on February 23, 2005, and continued until March 13, 2005. According to Ms. O'Neill, she always begins interview with general questions,

so as to put the candidate at ease. She added that, as a general rule, she takes a lot of notes during interviews, while stating that [translation] "if someone is speaking quickly, I have fewer notes, but if they are speaking more slowly, I can take notes that are more complete." In the case of the complainant, since he spoke slowly, she had the time to take more notes.

[38] For the interviews, Ms. O'Neill referred to a document entitled "Interview Guide for Entry-Level Transportation." According to this guide, the first area to be addressed is the candidate's work background. According to Ms. O'Neill's notes - taken in English even though the interview was held in French - the complainant explained to her at that time that he had a diploma in mechanical engineering and more than 13 years of experience in the railway industry. He also told her about the training program that he had completed at CÉGEP Gérald-Godin. Regarding the issue of why he wanted to work for the respondent, the complainant told her that he had always wanted to work for a Class 1 railway.

[39] The witness stated that she [translation] "assumed" that the complainant had a good technical knowledge of a train conductor's work based on the courses that he had taken at CÉGEP Gérald-Godin and his previous experience. It was therefore not necessary to verify this aspect any further. She stated that during the interview the complainant was generally reserved and shy and that it was sometimes difficult to get answers out of him.

[40] Ms. O'Neill explained that she then proceeded with a series of questions in order to gauge the complainant's reaction in specific work scenarios.

[41] For a series of questions intended to measure what she describes as the [translation] "orientation dimension," she gave the complainant a mark of three out of five on his answers in terms of substance and two out of five for his communication skills. According to her scale, three out of five is equivalent to [translation] "good". With a mark of two, the candidate did not meet her requirements. Ms. O'Neill recognized that the complainant's interview guide is apparently the only copy on which she put numerical marks. She stated the following: [translation] "I do not know why. I do not know if it was because I had time to do it, but that is the only place where I put marks. Often I put plus and minus signs, but I do not know why I did not do that in this case."

[42] Then there were questions intended to gauge the candidate's autonomy. For this part of the interview, the complainant received a mark of two out of five, which indicated that he did not meet the expected requirements. Ms. O'Neill explained that, according to her assessment, the complainant's answers to questions that he was asked did not substantiate her finding that he was autonomous. She stated the following: [translation] "He was passive, but reliable. With his attitude, CN loses money."

[43] In terms of the [translation] "reliability" aspect, the complainant satisfied Ms. O'Neill's expectations. She even added that his answers in this part of the interview were [translation] "very good," hence the mark of three that she gave him for reliability as well as communication.

[44] In the section bearing on [translation] "practical training," Ms. O'Neill explained that all train conductors must complete training and that her objective was therefore to assess

whether the candidate would see this training through to the end, even if this training proved to be difficult. Once again in this part of the interview, Ms. O'Neill was satisfied with the substance of the complainant's answers, but she was quite critical in regard to his communication abilities. She said the following: [translation] "When candidates come to an interview, skills are all very well, but they must be able to sell themselves. He [the complainant] had trouble communicating "one on one" with me. He was very passive at the interview. I had to push him to answer the questions."

[45] In regard to the part bearing on the complainant's "cooperation" skills, Ms. O'Neill said that she was not satisfied with the answers given. She found that he had not managed to show that he had good cooperation skills. She stated that, on a train, the train conductors have no disciplinary power over their work colleagues - they must rather have negotiating skills. They must be in constant negotiation in order to [translation] "make the train run smoothly." She considered that the complainant's answers did not show the necessary cooperative spirit.

[46] Finally, she indicated that she always asks her final question in the other official language - in this case, English. While recognizing that the complainant had replied in English, she added that she had not [translation] "understood his English very well" and that his skills in this language were not sufficient to meet the requirements of the position.

[47] In general terms, Ms. O'Neill explained that, following the interview, she did not have any concerns regarding the complainant's ability to [translation] "learn the rules." What did concern her, however, was [translation] "his ability to use his people skills and his communication abilities." At the end of the interview, according to Ms. O'Neill's assessment, the complainant did not qualify for the train conductor position. She stated that he did not meet the requirements in terms of good teamwork skills or his ability to properly assess a situation and react accordingly. Ms. O'Neill stated on cross-examination that she had not hired candidates who were less qualified than the complainant because she found that he was not qualified.

[48] She added that she used the same interview guide for each candidate and that this guide was in her opinion the best available to her. She said that she relied on the answers she was given during the interview and on no other factors to make her decision.

[49] On cross-examination, the complainant questioned Ms. O'Neill at length regarding the answers that the candidates who were hired gave during their interviews. Without undertaking an in-depth review of the witness' explanations, because my objective is not to rehash the interview process, I must point out that her answers seem credible and reasonable to me and are not at all consistent with a finding that the respondent discriminated against the complainant.

[50] With regard to the allegations that she discriminated against the complainant because he is Arab, Ms. O'Neill, while acknowledging that she had interviewed only one Arab in 2005, namely, the complainant, added that she had tested more than one. For example, she explained that another Arab candidate had been tested, but that he had withdrawn his application because he had found another position with another company. In 2007, this

candidate was again available and since he had already passed the written test, he was called to another interview and was ultimately hired. Today, he works as a train conductor with the respondent.

[51] Ms. O'Neill also referred to another Arab candidate with the same training as the complainant, who in April 2007 applied to work as a trackman with the respondent and who had been hired. She added that he is now an assistant track supervisor. She pointed out that he has not been hired as a train conductor as he is not yet bilingual.

[52] The complainant alleges, without supporting evidence, that the respondent had hired these individuals in response to his complaint, in order to counter it. I cannot agree with these arguments which are no more than suppositions. I note however that the complainant, after his first failure, never again applied to CN for work as a train conductor or for any other work; it is therefore impossible to know whether CN would have hired him.

[53] As a result of its hiring process, the respondent recruited 25 new train conductors. Of the 11 candidates from CÉGEP Gérald-Godin who applied, only six reported for the interview. The remaining five allegedly withdrew their applications because in the interim they had found employment elsewhere. Of the six who were interviewed, five were offered employment. Of those five, Ms. O'Neill stated that there was [translation] "one immigrant" and one woman.

[54] The complainant says that he contacted the CÉGEP a few days after his interview to see whether he had been hired to work as a train conductor at CN. Jacques Lacoste allegedly told him that his application had been rejected. The complainant says that he made several attempts to reach Ms. O'Neill to find out why his application had been rejected, but was unsuccessful.

[55] On June 20, 2005, the complainant filed a complaint against CN. According to the complainant, CN's discrimination was deliberate because the decision not to hire him based on his ethnic origin was, in his opinion, made before he was called to the interview.

B. Legal context

[56] Section 7 of the Act provides that refusing to employ an individual for reasons based on a prohibited ground of discrimination, including *inter alia* national or ethnic origin, is a discriminatory practice (see also sections 3 and 15 of the Act).

[57] The burden of proof, in a matter like this one, is first on the complainant, who must establish a *prima facie* case of discrimination (see *Israeli v. Canadian Human Rights Commission and Public Service Commission* (1983), 4 C.H.R.R. D/1616, 1618; *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029; *Premakumar v. Air Canada*, T.D. 03/02, 2002/02/04; and *Lincoln v. Bay Ferries*, 2004 FCA 204).

[58] A *prima facie* case 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 (*Ontario (Ontario Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, at page 208; *Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, at paragraph 28).

[59] In a hiring context, a *prima facie* case is described as requiring evidence of the following elements:

- a) The complainant was qualified for the employment at issue;
- b) The complainant was not hired;
- c) Someone no better qualified but lacking the distinguishing feature, which is the gravamen of the human rights complaint, subsequently obtained the position.

(*Shakes v. Rex Pak Ltd.* (1982), 3 C.H.R.R. D/1001, at paragraph 8918)

[60] Once *prima facie* evidence has been established, the burden shifts to the respondent, who must then provide a reasonable explanation for the conduct alleged against the respondent (see *Lincoln*, *supra*, at paragraph 23).

[61] The case law recognizes that it is difficult to establish discrimination through direct evidence. As stated in *Basi*, discrimination is often subtle. Overt discrimination is rare (see *Basi*, *supra*, paragraph D/5038). The Tribunal therefore must consider all of the circumstances to establish whether there is what was described as a "subtle scent of discrimination" (*Premakumar*, paragraph 79).

[62] The standard of evidence in discrimination cases is the ordinary civil standard of the balance of probabilities. According to this standard, discrimination may be inferred where the evidence offered in support of the discrimination renders such an inference more probable than the other possible inferences or hypotheses (*Premakumar*, paragraph 81). However, discriminatory considerations need not be the sole reason for the practices at issue for a complaint to succeed. It is sufficient if these considerations are factors in the decision not to hire (*Premakumar*, paragraph 82, *Holden v. Canadian National Railway* (1990), 14 C.H.R.R. D/12 at paragraph D/15).

[63] I must also point out that it is not the Tribunal's duty to determine the merits of the respondent's choice of candidates. There is a subjective element in every hiring process. The mere fact that the respondent used subjective criteria to assess the candidates and that it may have erred in doing so does not in itself expose its decision to challenge on grounds of discrimination, even though the existence of subjective criteria may require greater scrutiny of the hiring decision (see *Folch v. Canadian Airlines International Ltd.* (1992), 17 C.H.R.R. D/261, D/303; *Morin v. Canada (RCMP)*, 2005 CHRT 41, at paragraph 213).

C. Application of these requirements to this case

[64] In *Lincoln v. Bay Ferries Ltd.*, [2004] F.C.A. 204, the Federal Court of Appeal states at paragraph 22 that to answer the question as to whether *prima facie* evidence has been established, the Tribunal must not, at this stage, consider the respondent's answer. Therefore, to answer the question as to whether the complainant had the skills for the employment at issue, I will refer essentially to the evidence filed by the complainant. The evidence shows that the complainant had an Attestation of Collegial Studies from CÉGEP Gérard-Godin, confirming that he did pass the training program [translation] "Railway transport: train crews." According to Ms. O'Neill, this program should have given him the technical knowledge necessary to work as a train conductor. Further, he

had a diploma in mechanical engineering and some railway work experience in Tunisia, even though I acknowledge that this experience was not as a train conductor. The complainant also received a passing mark in the [translation] "train movement test." For the purposes of establishing *prima facie* evidence, we can therefore find that the complainant established that he had the necessary technical qualifications for the train conductor position.

[65] The evidence also established that the complainant was not hired for the desired position. Therefore, the first two tests in *Shakes*, necessary to establish *prima facie* evidence, have been satisfied. What of the third test, however? I cannot find based on the evidence whether the respondent hired someone who was less qualified than the complainant. However, I am prepared to find that *prima facie* evidence was nevertheless established for the purposes of this case.

[66] On this point, I must point out that in *Premakumar v. Air Canada*, T.D. 03/02, 2002/02/04, the Tribunal emphasized that the *Shakes* tests, while useful guides, should not be rigidly or arbitrarily applied. Rather, the circumstances of each individual matter must be considered to establish whether, in the end, the complainant satisfies the *O'Malley* test, i.e., was the evidence before the Tribunal complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent? Therefore, applying this flexible approach to this case, I find that for the purposes of the first part of the decision that the complainant established a *prima facie* case of discrimination in the absence of an answer from the respondent.

[67] With *prima facie* evidence established, the burden now shifts to the respondent, which must provide a reasonable explanation for the conduct alleged against it.

[68] Ms. O'Neill clearly set out how the candidates for the train conductor position were assessed and the reasons why she considered that the complainant's profile was not adequate for this position. She pointed out, *inter alia*, the fact that, in her opinion, the complainant had communication problems, that she was not satisfied with his teamwork skills, that she considered that his reactions in certain circumstances did not meet the respondent's expectations and that his English-language skills were inadequate.

[69] In regard to the train conductor job candidates' English-language skills, even though this requirement was not mentioned in the job advertisement, the uncontested evidence filed at the hearing clearly shows that the candidates knew that this would be a consideration in the decision whether or not to hire them. The "Candidate Response Report" asked the following question: "Some of our position[s] require bilingualism. Can you read and speak fluently in both English [and] French?" Indeed, and despite the fact that I assign little credibility to the evidence submitted by Pierre Fallu, he did testify to the effect that the students from CÉGEP Gérard-Godin had all been told not to apply to a Class 1 railway if their English was not adequate.

[70] The complainant did not dispute this evidence. Rather, he sought to establish that he had this skill by filing in evidence a certificate from the "British Council" of Tunis, stating that he had some English skills. Ms. O'Neill did not seem to be persuaded of this during the interview and considered that the complainant's English-language skills were

inadequate. No evidence was filed that would support my determining that Ms. O'Neill arrived at this conclusion based on the complainant's national or ethnic origin.

[71] Considering all of the evidence, I am persuaded that the respondent met its burden and that it successfully established that its decision not to hire the complainant for a train conductor position was not at all based on discriminatory grounds. Ms. O'Neill explained the reasons why she had not hired the complainant and those explanations do not at all suggest that the complainant's race or national or ethnic origin was a consideration. Further, her explanations are reasonable and do not seem like pretext.

[72] Although I sympathize a great deal with the complainant's situation and I can understand his frustration and disillusionment, *inter alia* in regard to the program offered by the CÉGEP Gérard-Godin, I cannot find that his situation was the result of a discriminatory practice by the respondent. I point out again that the Tribunal is not mandated to decide on the effectiveness, the correctness or the accuracy of the respondent's selection process, but rather to determine whether this process was tainted with discrimination, which, according to my assessment of the evidence filed, is not the case here.

[73] Mr. Ben Salem's complaint is dismissed.

Michel Doucet

OTTAWA (Ontario)
May 8, 2008

PARTIES OF RECORD

TRIBUNAL FILE:	T1190/0207
STYLE OF CAUSE:	Jamel Ben Salem v. Canadian National Railway
DATE AND PLACE OF HEARING:	December 18, 19, 20, 21, 2007 January 28, 2008 Montreal, Quebec
DECISION OF THE TRIBUNAL DATED:	May 8, 2008

APPEARANCES:	
Jamel Ben Salem	For himself
No one appearing	For the Canadian Human Rights Commission
André Sasseville William McMurray	For the Respondent