

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Levan Turner

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Decision

File No.: T1248/6007

Member: Wallace G. Craig

Date: March 7, 2014

Citation: 2014 CHRT 10

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I. Introduction

[1] In a complaint dated February 8, 2005, filed under section 7 of the *Canadian Human Rights Act (CHRA)*, Levan Turner alleged that the Respondent, the Canada Border Services Agency (CBSA), then known as the Canada Customs and Revenue Agency (CCRA), engaged in a discriminatory practice on the grounds of age, race, national or ethnic origin, and colour, in a matter related to employment. In his Statement of Particulars, the Complainant raised the further issue of perceived disability: obesity.

[2] Mr. Turner's claim arises out of the manner in which he was excluded from two staffing processes for employment as Customs Inspector with the CCRA and its Canada Customs and Immigration successor, the CBSA. After being interviewed Mr. Turner was declared not qualified in a Victoria job opportunity posted October 11, 2003 (Victoria Competition 7003), and was declared to be ineligible following a first interview in the other process, a Vancouver job opportunity posted June 9, 2003 (Vancouver Competition 1002).

[3] The Canadian Human Rights Tribunal (the Tribunal) conducted an inquiry in Victoria B.C. on November 17 - 21, 2008, January 19 - 22, 2009, and concluded the inquiry by teleconference on March 17, 2009.

[4] On June 10, 2010, the Tribunal dismissed Mr. Turner's complaint:

[183] I have concluded that CBSA has provided a reasonable explanation as to why Mr. Turner did not qualify for a CI position in either the Vancouver 1002 competition or the Victoria 7003 competition. I have also concluded that there is nothing in the evidence or in CBSA's explanation that can be considered pretextual.

[184] For these reasons, I have concluded that Mr. Turner has not substantiated his complaint. Accordingly, it is dismissed.

[5] The Tribunal's decision made no mention of perceived disability, which had been raised in evidence and argument by the Complainant along with the grounds of age, race, and national and ethnic origin.

II. Judgment of the Federal Court of Appeal

[6] In a unanimous judgment delivered by Mr. Justice Mainville on May 30, 2012, the Federal Court of Appeal set aside the judicial review judgment of the Federal Court and referred Mr. Turner's complaint back to the Tribunal for re-determination by a different member.

[7] Paragraphs 3 to 11 of the decision of the Federal Court of Appeal summarize the background circumstances which are relevant to a re-determination by the Tribunal.

[3] The appellant describes himself as a large black male. He is currently employed with Service Canada. The appellant's complaint arises out of two competitions for full-time regular customs inspector positions with the Canada Customs and Revenue Agency ("CCRA"), to which the Canada Border Services Agency was a successor. At the time he applied for each competition, he was working as a seasonal customs inspector in Victoria, British Columbia, and had done so from 1998 to 2003. As a seasonal customs inspector, the appellant had always received positive written performance reviews from his supervisors.

[4] The first competition, posted by the CCRA on June 9, 2003, was for a customs inspector position in Vancouver. The second competition, posted on October 11, 2003, was for a similar position in Victoria ("Victoria 7003").

[5] In addition to the usual criteria to be satisfied, an eligibility restriction was added for the Vancouver competition, which provided that "[a]pplicants who have been interviewed for this position since January 1, 2002 will not be eligible for this process" (Appeal Book ("AB") at page 822). Because the appellant had not been interviewed for a customs inspector position in Vancouver, he considered himself eligible for the competition and thus applied. He passed the Customs Inspector Test required of all candidates. The next phase in the competition process involved two interviews. The appellant was invited to the first interview, which was held on April 26, 2004 and which he passed. However, one of the members of the interview panel recognized the appellant as having previously been unsuccessfully interviewed for customs inspector positions in Victoria. Although the appellant was successful in the first interview for the Vancouver position, he was subsequently disqualified from the competition because he was deemed to fall within the ambit of the above-described eligibility restriction.

[6] The appellant was the only candidate disqualified from the Vancouver competition on the basis of the eligibility restriction. At least one other candidate had also unsuccessfully applied for customs inspector positions in Victoria. In one

case, the candidate had failed the paper review of her portfolio of competencies for a position in Victoria and had thus not proceeded to an interview for the Victoria position. This candidate was not disqualified from the Vancouver competition. Another candidate bearing the same name as someone who had failed an interview for a Victoria competition was also not disqualified from the Vancouver competition; however, there was some confusion as to his identity.

[7] In the light of this, the appellant questioned the reasons for his disqualification, and requested further information from the CCRA. He received no reply to his inquiry.

[8] The appellant qualified for the Victoria 7003 competition, but he failed to pass the interview for this competition. That interview was held on December 13, 2003. The selection board for the competition failed him on two competencies: (a) effective interactive communication and (b) teamwork and cooperation.

[9] Prior to these interviews, his supervisor had sent a long email to a number of members of the CCRA management group setting out the perceived failings of the appellant. The email was dated October 4, 2003, and was thus sent out approximately two months before the appellant's interview for the Victoria 7003 competition and a little less than seven months prior to his interview for the Vancouver competition. The email noted that the appellant was perceived as someone who "sometimes shies away from the harder tasks, or knows the right procedure (a difficult task) to take but ask to supt [sic] hoping the supt [sic] will use their discretion and go the easier way. It was also pointed out how other inspectors had complained that he had left cash outs for others to do instead of doing them on his shift." The email also noted that "there is a portion of [the appellant] that does look for the easy way out ..." AB at pp. 321-22.

[10] The appellant strongly denied the allegations made in that email, which contradicted the positive formal written evaluations that all his supervisors had given him, including the supervisor who had drafted the email. The appellant was the only seasonal employee who was the subject of such an email.

[11] In light of his years of service as a seasonal customs inspector in Victoria, his positive employment evaluations, and his past experience in law enforcement-related activities, the appellant formed the belief that his disqualification from the Vancouver competition and his failure to pass the interview for the Victoria 7003 competition were the result of his being unfairly stereotyped within the CCRA as a "big lazy black man."

[8] While the appellant raised a number of arguments before the Court of Appeal, the Court found that it need only consider the “principle ground of appeal” – the argument that the Tribunal failed to consider perceived disability as a ground of discrimination. The Court found this argument to be well-founded (para. 2).

[9] The Court observed that the Tribunal made no mention of “perceived disability on the basis of weight” (para. 21), despite the fact that this ground was raised in Mr. Turner’s complaint form and statement of particulars, was discussed many times during the course of the proceedings, and was “argued as an important point in the appellant’s written submissions to the Tribunal” (para. 46). The Court found that “the Tribunal member indicated that he understood that perceived disability was being raised by the appellant” (para. 26). In light of this, the Court found the silence of the Tribunal on this issue to be troubling:

[33] In this context, the complete silence of the Tribunal on the issue of perceived disability is troubling. Did the Tribunal refuse to consider this ground of discrimination on the basis that it lacked jurisdiction to do so? Or was the Tribunal of the view that perceived disability involving weight does not constitute a ground of discrimination contemplated by the *Canadian Human Rights Act*? Or did the Tribunal find that the appellant had failed to establish a *prima facie* case of discrimination on this ground? And if so, why did the Tribunal disregard the arguments of the appellant concerning the importance of intersecting or compound grounds of discrimination, and the principles set out in *Radek*? (cited *infra*) Or did the Tribunal simply forget to address these issues? In the absence of any discussion in the Tribunal’s reasons, we simply do not know the answers to these questions.

[10] Considering these various possibilities, the Court observed that a finding by the Tribunal that it lacked jurisdiction to consider the ground of perceived disability in this case would raise “serious questions... as to the propriety of such a finding in light of the Tribunal’s own past jurisprudence”, and would also raise fairness concerns “in light of the explicit request of the appellant to be allowed an opportunity to submit an amendment in the event of such a finding” (para. 34). Further, in the absence of a finding on whether the ground of perceived disability was properly before the Tribunal, “the [Tribunal’s] conclusion that a non-discriminatory explanation existed may be questioned, since this conclusion may have been reached in circumstances where not all of the alleged grounds of discrimination were properly addressed” (para. 47).

[11] If, in the alternative, the Tribunal made an unstated finding that the appellant failed to establish a *prima facie* case of discrimination on the basis of perceived disability, the Court found that “it failed to state the reasons for reaching such a conclusion” (para. 36). The Tribunal’s failure to deal adequately with this ground was the basis upon which the Court overturned the Tribunal’s decision:

[50] In my view, the appellant’s complaint that he was also discriminated against on the grounds of disability was before the Tribunal and was sufficiently significant that the Tribunal was under a duty to deal with it or to explain why it did not. In the absence of any reasons in the Tribunal’s decision or of a clear answer in the record, it is not the role of a reviewing court to speculate as to why the Tribunal did not deal with the issue of perceived disability or what conclusion the Tribunal would have reached if it had addressed the issue. Insofar as the reviewing court has reasonable concerns as to the potential outcome of the proceeding had the issue been addressed by the Tribunal, the judicial review application should be allowed.

[12] The Court found that it was not in a position to review the legal question of whether perceived disability on the basis of weight is a prohibited ground of discrimination contemplated by the *CHRA*, as this would be a speculative exercise in the absence of a finding and reasons by the Tribunal on this point (para. 35).

[13] In addition to the Tribunal’s treatment of the ground of perceived disability, the Court of Appeal devoted considerable attention to the Complainant’s argument regarding intersecting or compound grounds of discrimination, which it found had been disregarded by the Tribunal (para. 33, quoted above). The Court observed:

[48] In his written submissions to the Tribunal, the appellant also referred to the concept of intersecting grounds of discrimination, which, at a basic level, holds that when multiple grounds of discrimination are present, their combined effect may be more than the sum of their individual effects. The concept of intersecting grounds also holds that analytically separating these multiple grounds minimizes what is, in fact, compound discrimination. When analyzed separately, each ground may not justify individually a finding of discrimination, but when the grounds are considered together, another picture may emerge.

[14] The Court referred to a multi-dimensional approach to defining disability, outlined by the Supreme Court in *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27 (“Boisbriand”):

... Instead a multi-dimensional approach to defining disability that includes a socio-political dimension and which places emphasis on human dignity, respect and the right to equality rather than on simple biomedical conditions. As noted by L’Heureux-Dubé J. at para. 77 of the reasons in that case, “this approach recognizes that the attitudes of society and its members often contribute to the idea or perception of a ‘handicap’. In fact, a person may have no limitation in everyday activities other than those created by prejudice and stereotypes.” (para. 30)

[15] The Court noted that s. 3.1 of the *CHRA* “specifically provides that a discriminatory practice includes a practice based on the effect of a combination of prohibited grounds”, and observed that the analysis of the primary ground of a complaint must not ignore the other grounds and “the possibility that compound discrimination may have occurred as a result of the intersection of these grounds” (para. 49). It quoted with approval at para. 31 the analysis of the British Columbia Human Rights Tribunal in *Radek v. Henderson Development (Canada) Ltd. and Securiguard Services Ltd. (No. 3)*, 2005 BCHRT 302 (“*Radek*”) at paras. 464 – 465:

[464] The interrelationship between a number of intersecting grounds of discrimination is sometimes described as “intersectionality”. The concept of intersectionality has been discussed in a number of recent decisions, including: *Morrison v. Motsewetsho* (2003), 48 C.H.R.R. D/51 (Ont. H.R.T.), *Comeau v. Cote*, [2003] BCHRT 32, and *Baylis-Flannery v. DeWilde (No. 2)* (2003), 48 C.H.R.R. D/197 (Ont. H.R.T.). As described in *Baylis-Flannery*, “[a]n intersectional analysis of discrimination is a fact-driven exercise that assesses the disparate relevancy and impact of the possibility of compound discrimination”: at para. 143. Speaking there in a case of sexual harassment against [*sic*] a Black woman, the Tribunal stated that an awareness of the effect of compound discrimination is necessary in order to avoid:

reliance on a single axis analysis where multiple grounds of discrimination are found, [which] tends to minimize or even obliterate the impact of racial discrimination on women of colour who have been discriminated against on other grounds, rather than

recognize the possibility of the compound discrimination that may have occurred. (at para. 144)

[465] The same could be said in the present case with respect to race, colour, ancestry and disability. While the primary focus of Ms. Radek's individual complaint is her race, colour and ancestry, the analysis of those grounds must not ignore her disability, and the possibility of the compound discrimination which may have occurred.

[16] The Court also found other aspects of the Tribunal's decision to be problematic, including: the Tribunal's choice not to make a finding on whether a *prima facie* case of discrimination had been established in relation to the grounds of race or of national and ethnic origin, but instead to assume such a case was established and examine whether the employer had provided a reasonable explanation (paras. 14-15); and, the failure to make findings of fact regarding "the truthfulness of the alleged failings of the appellant set out in his supervisor's email", and "how and to what extent that email may have influenced the selection processes" (para. 15).

[17] This appellate-directed Tribunal decision by Member Wallace Gilby Craig is based on consideration of all *viva voce* testimony, pertinent exhibits, opening statements and argument of Counsel (written and oral), and, particularly, oral argument of Counsel in Victoria on November 20 and 21, 2013.

III. Legal Framework

A. Prima facie case

[18] The initial evidentiary burden in a case of discrimination under the *CHRA* requires a complainant to adduce credible evidence which establishes facts, directly or by inference, that he/she was the victim of a discriminatory practice as defined in the *CHRA*. The *prima-facie*-standard was established by the Supreme Court in *OHRC and O'Malley v Simpsons-Sears*, [1985] 2 SCR 536, (*O'Malley*):

[28] ... I agree then with the Board of Inquiry that each case will come down to a question of proof, and therefore there must be a clearly-recognized and clearly-assigned burden of proof in these cases as in all civil proceedings. To whom should it be assigned? Following the well-settled rule in civil cases, the plaintiff bears the burden. He who alleges must prove. Therefore, under the *Etobicoke* rule as to burden of proof, the showing of a *prima facie* case of discrimination, I see no reason why it should not apply in cases of adverse discrimination. 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. ...

[19] In *Morris v. Canada (Canadian Armed Forces)*, [2005] F.C.J. No. 731 [F.C.A] (*Morris*), at paragraphs 27 and 28, the Court concluded that:

[27] ... [T]he legal definition of a *prima facie* case does not require the Commission to adduce any particular type of evidence to prove the facts necessary to establish that the complainant was the victim of a discriminatory practice as defined in the Act. Paragraph 7(b) requires only that a person was differentiated adversely on a prohibited ground in the course of employment. It is a question of mixed fact and law whether the evidence adduced in any given case is sufficient to prove adverse differentiation on a prohibited ground, if believed and not satisfactorily explained by the respondent.

[28] A flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely the elimination in the federal legislative sphere of discrimination from employment and from the provision of goods, services, facilities and accommodation. Discrimination takes new and subtle forms. Moreover, as counsel for the Commission pointed out, it is now recognized that comparative evidence of discrimination comes in many more forms than the particular one identified in *Shakes*.

[20] Once a *prima facie* case is established, the onus then shifts to the Respondent to provide a reasonable explanation demonstrating that the alleged discrimination did not occur as alleged or that the conduct was somehow non-discriminatory: *Morin v. Canada (Attorney General)*, 2005 CHRT 41 at para. 189; *Canada (Attorney General) v. Lambie*, (1996) 124 F.T.R. 303 at para. 16.

[21] If a reasonable explanation is provided, the Complainant must then demonstrate that it is pretextual: *Basi v. Canadian National Railway Company*, [1988] C.H.R.D. No. 2 at para. 38474 (*Basi*).

B. The “Subtle Scent” of Discrimination

[22] The fact that discrimination is often subtly practiced within an otherwise appropriate process was dealt with in *Basi*:

Discrimination on the grounds of race or colour is frequently practised in a very subtle manner. Overt discrimination on these grounds is not present in every discriminatory situation or occurrence. In a case where direct evidence is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is at issue. This is not always an easy task to carry out. The conduct alleged to be discriminatory must be carefully analyzed and scrutinized in the context of the situation in which it arises.

[23] In *Basi* it was determined that “the subtle scent of discrimination” permeated the manner in which the Respondent dealt with the Complainant. The Tribunal concluded that the only inference to draw in those circumstances was that the rationale for not hiring Mr. Basi was pretextual.

Frankly, the subtle scent of discrimination permeates the entire manner in which CNR dealt with the Human Rights Commission in attempting to justify their actions regarding Basi. I am left with the conclusion that the rationale for not hiring Mr. Basi, as described by Mr. Symenuk, was not as innocent, direct nor reasonable, as first proposed. It appeared to me, from the explanations provided to the Commission and from information contained in the files of the CNR that the Respondent was attempting to justify the actions taken by Mr. Symenuk. The effect of the conflicting explanations and inconsistencies is to leave an inference, not only more probable but irresistible, that either the explanations of Mr. Symenuk with respect to the method of selection, or the subsequent explanations with regard to qualifications etc. (or perhaps both), are pretextual.

[24] *Basi* was considered and followed by the Tribunal in *Maillet v. Canada (AG)*, 2005 CHRT 48 at paragraph 6:

[6] Discrimination is not a practice that one should expect to see displayed overtly. A tribunal should therefore consider all circumstances in determining if there exists what has been described as the subtle scent of discrimination. In cases involving circumstantial evidence, 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.

[25] Discrimination may, for example, occur in conjunction with an otherwise appropriate employment staffing practice. In such cases, the formal explanation for a decision not to hire an individual will amount to a pretext that masks the discriminatory nature of the hiring decision. The Tribunal has applied a three-step test to determine whether a *prima facie* case of discrimination has been made out in the hiring context. As set out in *Florence Shakes v. Rex Pak Limited*, (1982) 3 C.H.R.R. D/1001 [“*Shakes*”] and *Israeli v. Canadian Human Rights Commission and Public Service Commission*, (1983) 4 C.H.R.R. D/1616 [“*Israeli*”] the complainant must show that:

- (1) the complainant was qualified for the particular employment;
- (2) the complainant was not hired; and
- (3) someone obtained the position who was no better qualified than the complainant, but lacked the attribute on which the complainant based their human rights complaint.

[26] While this test does not automatically apply to every hiring case (see for example *Premakumar v. Air Canada*, [2002] C.H.R.D. No. 3 at para. 77), I am satisfied that it provides, in this instance, a useful guide to assess whether or not the Complainant has made out a *prima facie* case of discrimination.

C. Perceived Disability

[27] In oral argument Counsel asserted that although Mr. Turner was self-evidently obese, nevertheless, he was able to carry out all the duties of a Customs Inspector. Yet despite this, the Victoria superintendents stereotypically perceived Mr. Turner as lazy and untruthful.

[28] As noted above, the Court questioned whether perceived disability on the basis of weight was properly before the Tribunal. It raises the legal question whether perceived disability on the basis of weight is a prohibited ground of discrimination contemplated by the *CHRA*.

[29] Disability is a prohibited ground of discrimination under s. 3 of the *CHRA*. Based on the Supreme Court's analysis in *Boisbriand*, cited above, it is clear that discrimination on the basis of disability can occur even in the absence of an actual physical or mental limitation on activities, based solely on societal perceptions of one's limitations. Applying this reasoning, I find that the ground of disability under s. 3 of the *Act* encompasses perceived disability as well as actual disability. It is also well established that a person's weight is a characteristic that can ground a claim of discrimination on the basis of disability: *Bouchard v. Canadian Armed Forces*, [1990] D.T. 12/90 (CHRT); *Hamlyn v. Cominco Ltd.*, [1989] B.C.C.H.R.D. No. 29. The combined effect of these principles, in my view, is that perceived disability on the basis of weight is a prohibited ground of discrimination contemplated by the *CHRA*.

[30] I also find that this ground of discrimination is properly before the Tribunal in this case, it was raised in Mr. Turner's complaint to the Commission and statement of particulars before the Tribunal, and was argued in the Appellant's written submissions to the Tribunal and discussed repeatedly in oral argument.

D. Intersectionality

[31] As noted above, s. 3.1 of the *Act* specifically provides that "a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds". In my view, this provision reflects a similar concern to that addressed in *Radek*, cited above, regarding intersectionality: tribunals should be alive to the "interrelationship between a number of intersecting grounds of discrimination" (*Radek* at para. 464). As the Federal Court of Appeal noted in relation to the present case, the analysis of the primary ground of a complaint must not ignore other grounds raised in the complaint, and "the possibility that compound discrimination may have occurred as a result of the intersection of these grounds" (para. 49).

E. Racism and Stereotyping in Canada

[32] Counsel for the Complainant argued that racism and stereotyping are relevant factors in assessing the propriety of the hiring processes at issue in this case. Counsel for the Complainant cited, in this regard, *Sinclair v. London (City)*, 2008 HRTO 48 (*Sinclair*) and the adjudicator's acceptance at paragraph 18 that "...anti-Black racism and its subtle manifestations are well-recognized in Canadian law, and expert evidence of the kind presented in this case, while helpful, is not necessary for its effects to be considered by the Tribunal..."

[33] In *Sinclair* the adjudicator relied on *R. v. Spence*, 2005 SCC 71 at paragraphs 31-33, and the Supreme Court of Canada's approval of conclusions of the Ontario Court of Appeal in *R. v. Parks*, (1993), 84 C.C.C. (3d) 353:

[31] *Parks* was a case of second degree murder in which the accused was black and the victim was white. As in this appeal, there was no suggestion that the crime was racially motivated or that race would play any part in the defence (p.361). Nevertheless, Doherty J.A. concluded on the first step that "racism, and in particular anti-black racism, is part of our community's psyche" (p. 369). He continued:

A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil. [page 369]

[34] The adjudicator in *Sinclair* explained the Tribunal's discretion in determining the influence of racialization and stereotypes in the particular situation under inquiry: "... The evaluation of the dynamics of what occurred and witnesses' credibility are issues to be determined by the Tribunal, through an analysis of evidence that has been admitted in accordance with the Tribunal's rules. Dr. Henry's opinion on whether stereotypes played a part in the actions of the City witnesses in this case or how general patterns may have played themselves out here are not within her expertise or appropriately taken into account by the Tribunal ..." (paragraph 22)

IV. The Evidence

A. Complainant's Opening Statement

[35] At the outset of the Tribunal inquiry, Mr. Yazbeck, Counsel for the Complainant, stated that Mr. Turner had been employed by the CCRA as a seasonal term employee in Victoria, B.C., from 1998 until 2003. Counsel described the hiring regime during that period as a competitive process which established eligibility lists of all qualified persons, ranked in order of merit; that in 1999 the process was replaced by the current process, which creates prequalified pools of candidates from which CBSA (formerly part of CCRA) managers may exercise discretion in determining which candidates are to be employed.

[36] To assist the Tribunal, Counsel offered an overview of the Complainant's case:

... But the bottom line for my present purposes is that Mr. Turner has been working in this position. He knows the job, he's qualified. And you'll hear evidence as well of his performance appraisals throughout this period, which demonstrate that he performed well in his position. He was a dedicated employee, well liked, hard worker, very resourceful, and so on.

Transcript: Volume One, section one, page 16, lines 22-25; page 17, lines 1-4.

... This is not a case, unfortunately for me, where I can pull out the so-called smoking gun and say, here's the case for discrimination. As you know, we're looking for the subtle scent here.

And what happened is that you have an employee that's doing well, performing well. But when it comes time to get into the prequalified pools in ... '03 and then in '04, which could result in him having indeterminate employment; secure, long-term employment; something happens. All of a sudden, like that, he's determined to be unqualified.

And with respect to the Tribunal, I will be urging you to ask the question, ask this question: why? Why did this happen? Why did an employee, who was performing well, had no performance deficiencies, all of a sudden become unqualified?

The Complainant, sir, is Levan Turner. He is an older black male, and it's his position that those factors, as well as his size, were the reasons why he was denied this employment.

Transcript: Volume One, section one, page 17, lines 6-25; page 18, lines 1- 3.

[37] Complainant Counsel drew the Tribunal's attention to Exhibit C-2 (the Complainant's Book of Documents, Volume 2, Tab 33) which has particular relevance to the Victoria process:

...This is an e-mail exchange between Mr. Klassen, who was responsible for assessing Mr. Turner's capabilities, his performance... It's an e-mail to himself, so it's like a note to file.

And then what he did was, he copied the email to other persons you'll see listed there. And many of these persons are senior managers, and their names will come up in this hearing as persons involved in the selection processes that we're dealing with.

What's important, Mr. Sinclair, is to look at some of the things that this person Klassen is saying about Mr. Turner....

If you look at the second paragraph ... It started talking about how he is perceived. How he sometimes shies away from the harder tasks, or knows the right procedure to take, but asks the Superintendent to advise.

You'll see later that Mr. Klassen's own reporting of this discussion was that Mr. Turner was shocked to hear this but he wasn't defensive.

Next paragraph... "I went on to explain that this perception has been around for a couple of summers and that it was something he would need to work on next year." Again a perception. And then at the end of that, the next sentence: "I reminded him that this is not how he is perceived all the time."

Transcript: Volume One, section one, page 19, lines 18-25; page 20, line 1

...What is this perception? What is this image? And at the end of the day, what I think you will find, sir, is that it's the perception of an older black male who is large, and you'll see from the complaint form as well that Mr. Turner's size is identified as a, as a basis here as well.

So the credibility of the staffing processes is very much in doubt. And if you have a process like that, and you'll hear how it was flawed – but if you have a process that can so easily fail to respect some of the basic rules governing staffing in the federal public service, it's not surprising that the process would allow somebody to be disqualified because he's an older, black, overweight employee. This is not a rigorous system that the Agency employs.

... And as you know, based upon the, the authorities of this Tribunal and the Federal Court, in those circumstances there will be a case made, a prima facie case made for discrimination that had not been rebutted.

The Chairperson: What is the prima facie case that you're arguing?

Mr. Yazbek: The prima facie case, sir, is that here is an employee who clearly applied for the position, who was qualified for the position, who was denied the position or positions, but denied the positions for reasons which are pretexts. And the prima facie, the prima facie case is that there is no other explanation but for the employee's race or age or perceived disability, which is his weight.

Transcript: Volume One, section one, page 29, lines 1-15

B. Respondent Counsel's Reply

[38] After the Complainant's opening statement, Respondent Counsel was content to make his reply to Complainant's opening statement before Superintendent Ronald Paul Tarnawski began his testimony. At that time, the Chairperson asked Respondent Counsel if Mr. Tarnawski's testimony would be limited to the eligibility restriction in Vancouver Competition 1002.

Mr. Stark: Yes ... there is some essential background that I believe will be of help in terms of explaining the context and how these competitions are put together. He was also assigned to the recruitment unit that came into existence round about the same time – well, before these competitions. And a lot of the standardization and competencies that we have been dealing with that were throughout these competencies, he can explain that and what's behind it.

The Chairperson: Why is that relevant? At this point, given all the evidence we have heard, is that going to be useful evidence? I am sure you have already thought about your argument at this point. Is it useful evidence?

Mr. Stark: Well, I would say this: What's at issue in this matter is an interesting case in the sense that these two selection processes, they are – essentially they are similar to any other federal board in terms of they are charged with a task of selecting; and seeing whether they are qualified based against the competency.

...

The Chairperson: ...as I understand it, the issue is going to be circumstantial because nobody said Mr. Turner didn't qualify for the Victoria process because he is black, he has a disability, or because of his age. So there has to be some sort of inference drawn from the evidence: right?

Mr. Stark: Yes.

The Chairperson: Now we have the Vancouver process where he did qualify except they mistakenly later learn that he shouldn't even have been in the process because he wasn't eligible, as they interpreted the restrictions.

Mr. Stark: I think there has to be some care taken there though because the Vancouver process – again I am paraphrasing what the witness will provide to the court – but the Vancouver process, unlike the Victoria one, was a two-step process. The first interview only dealt with EIC, effective interactive communication. And as shown on that lead sheet, Mr. Turner achieved a bare pass of 70 percent.

During the course of that interview you probably recall Mr. Turner's evidence, he was asked about the eligibility restriction. Based upon the discussion that took place in that first interview checks were made and it was discovered that he had in fact interviewed unsuccessfully in other processes since January 1st, 2002.

The Chairperson: So what's the issue in your view? ... The issue is he didn't get through the Vancouver process?

Mr. Stark: Right.

The Chairperson: And the reason he didn't ...from the evidence I have heard, I haven't heard from Mr. Tarnawski, is because he wasn't eligible because of the restriction...

Mr. Stark: Right.

The Chairperson: And to me the issue is whether that restriction – which on its face didn't seem to exclude him and he didn't think he was excluded – was applied in a different fashion. And that's the issue that maybe was improperly applied or interpreted improperly.

But that's nothing that this tribunal can deal with. It has to be demonstrated that it was applied to Mr. Turner as a subterfuge so that he couldn't get the position because he is black or has a disability or is too old.

Mr. Stark: There has to be a pretext.

The Chairperson: Yes.

Mr. Stark: Proven to be a pretext.

Transcript: January 22, 2009; page 111, lines 1-25; page 112, lines 2-3, 17-25; page 113, lines 1-25; page 114, lines 1-12.

C. Witness: Christopher James Hughes

[39] Mr. Hughes testified about his effort to regain employment with the Respondent in Vancouver Competition 1002, posted June 9, 2003, and Victoria Competition 7003, posted October 11, 2003. As the first witness in this Inquiry Mr. Hughes gave specific testimony concerning the processing of his applications in the two job offerings; he also testified on matters he perceived to be managerial manipulation of job competitions.

[40] In 1995, Mr. Hughes was employed by Revenue Canada in Victoria, B.C., as a collections officer. Initially a term employee, Mr. Hughes became an indeterminate employee in 1996. In March of 2001, he successfully applied for and was employed in 2002 as a seasonal-customs inspector (May to October), which enabled him to continue his employment in the winter as a business service agent with Revenue Canada. Mr. Hughes claimed that his employment was terminated on September 30, 2004, after he was stricken with a depressive illness that prevented him from working.

[41] Mr. Hughes testified that in his work as a customs inspector, he became well-acquainted with a fellow customs inspector, the Complainant Levan Turner. Mr. Hughes explained the duties of a customs inspector in Victoria.

We were assigned to marine, so we were outside. And our duties were to inspect people, vehicles and boats, anything coming in to Victoria. And cruise ships. So, the Clipper coming from Seattle, the Coho coming from Port Angeles, and all the passengers and cars that come off of them. And the cruise ship terminal at Ogden Point.

And we'd either do a primary assignment which is the first person you see when you come off into customs as the primary questioning. And then you'd also take turns doing secondary which is further searching of the person, like strip search or their luggage and that's where the arrests happen and the drug seizures.

And we'd also take turns doing cash officer. So anyone that had to pay duties or taxes, you would do the cash. And we also took turns clearing the float planes that came in from Seattle. So it was very varied jobs with lots of duties.

Transcript: Volume One, section one, page 33, lines 2-23

[42] Mr. Hughes was asked if he heard comments to Mr. Turner concerning Mr. Turner's weight.

There were lots of comments directed to Mr. Turner about his weight. And people worried about whether he'd have a heart attack and were asking him to lose weight. There's lots of jokes about fat Americans that were made in front of Mr. Turner.

And I was teased by a lot of younger, fit customs officers. They'd joke around I was getting fat. And both of them that were teasing me ending up getting hired permanently and I did not.

Q. Those were?

A. Trent Van Helvoirt and Harper Ecare.

Transcript: Volume One, section one, page 36, lines 5-9, 14-20.

[43] Mr. Hughes was asked about student employees and whether they became either term or permanent employees.

My experience, and through investigations, I found out a lot of information. And what I found was almost every student I worked with in 2002, '03 and '04 that wanted to be permanent was hired by CBSA in '04, '05 and '06.

And to me it's apparent that there's preferential hiring to young people either in the selection processes or through the student bridging.

And the student programme itself is overused. And over fifty per cent of the employees in the summer are students. And you don't see that anywhere else in the Federal Government. When I worked at CRA we'd have maybe one or two students in a hundred-person department.

Transcript: Volume One, section one, page 36 line 25, page 37, lines 1-14.

[44] When asked to relate his direct experience with Mr. Turner, Mr. Hughes described the Complainant as professional and a team worker.

I've seen him involved in many enforcement actions. One of which I referred to from primary and he got the seizure of the marijuana. I've seen him involved in arresting a – someone for an outstanding warrant with Terry Klassen. I know he's had use of the proof-screening device to intercept suspected impaired drivers.

And all the training we attended, he was one of the best learners and he understood the material. And I don't think, I've never heard of a complaint filed against him for his interactions with the travelling public.

And, to my knowledge, he is always punctual and took lunch breaks that were acceptable to the managers. I didn't see him abuse time.

Transcript: Volume One, section one, page 38, lines 23-25, page 39, lines 1-12.

Klassen e-mail

[45] Mr. Hughes was asked to comment on Exhibit Tab 33, an e-mail circulated by Acting-Superintendent Klassen to other superintendents detailing their perceptions of Mr. Turner as a person who sloughed off work.

Q. Mr. Hughes, you were present in the room when I made my opening statement?

A. Yes.

Q. Yes. And I quoted from an e-mail message that Mr. Klassen had written in which he talked about a perception of Mr. Turner. Were you personally aware of any kind of a perception like that?

A. Anyone who worked with him knew that he was a good worker. People that did not work with him, there was a perception that he was lazy, and that because of his size he couldn't do that job. ...

A. Yeah, I can give an example. As a cash officer at the night shift if it's over a certain dollar amount you're supposed to cash-out. However, if there's not enough cash to make a proper float you do not cash-out.

So I remember the day shift complained about Levan Turner three or four times that he didn't cash-out. However he didn't have the cash needed to make a proper float. So this gave rise probably to some of the misperceptions.

And I know for a fact that the day crew complained to Terry Klassen about it. And I also did not cash-out numerous times, but I was never asked about it.

Transcript: Volume One, section one, page 39, lines 13-24; page 40, lines 11-24.

Vancouver Competition 1002 – Eligibility Restriction

[46] Complainant Counsel put the eligibility restriction in the Vancouver Competition 1002 employment job poster to Mr. Hughes and asked how he interpreted it and whether he discussed it with other employees.

Q. And then it – there’s a sentence that’s bolded in the middle of the paragraph: “Applicants who have been interviewed for this position since January 1, 2002 will not be eligible for this process.” Did you notice that when you first saw this?

A: I did. Every candidate in Victoria discussed this. That applied to the Vancouver process. ... We had been given advance notice internally that it was coming up. So everyone noticed the first day or the day after. And it was discussed around the office a lot.

Transcript: Volume One, section one, page 45, lines 7-15.

The Chairperson: So what did you interpret the restriction to mean?

A: I interpreted it to mean that, if you had applied since January 1st, 2002 to a competition in Vancouver, you could not reapply. And that’s usually how they did it in the past, they were specific to the location. And they’ve done that in the future too.

The Chairperson: So what was your concern, then?

A. My concern was they would broaden that definition to include any competition anywhere in Canada for customs inspector. Which is what they did to knock Levan out, but I should have been knocked out too and they didn’t knock me out.

The Chairperson: ...in other words your concern was that, if you had applied for a position, a PM-2 position customs inspector, not just at Vancouver Airport, but anywhere in Canada you would be ineligible?

A. That’s --- yes, that’s correct. ‘Cause it’s ambiguous.

Transcript: Volume One, section one, page 49, lines 2-22.

[47] Mr. Hughes testified that he applied for the Vancouver Competition 1002 job opportunity and was screened in; that he completed a written package of competencies which was marked and accepted; and then he was interviewed twice. Mr. Hughes testified that he also applied in Victoria for employment offered under the Victoria Competition 7003, and that he was interviewed in December 2003 for a PM-2 customs inspector position. The Chairperson then asked Mr. Hughes if he was concerned that the eligibility restriction in the Vancouver Competition would apply to him.

A: “Yes, oh twice I interviewed and in February 2003 also. That was actually prior to when this posted. So that’s the interview that actually could have screened me out.

Q. (By Complainant Counsel) So you applied – did you apply for this competition, this selection process?

A. Yes.

Q. And what happened with your application?

A. I was screened and did the written package. I passed that and was called for an interview.

Q. At any point when either you were screened in or you were called for an interview or in the interview; did you participate in an interview?

A. I did.

Q. Okay.

A. Two interviews.

Q. Did – were any questions raised regarding whether you had been interviewed for another PM-2 position since January 1, 2002?

A. They did not ask me whether I'd interviewed since January 2002. But it was obvious from my resume that I had.”

Transcript: Volume One, section one, Page 50, lines 10-13, 21-24; page 51, lines 1-7.

[48] Exhibit Tab 28 was produced to Mr. Hughes. It is a supplementary document to Exhibit Tab 29, a CCRA statement of staffing requirements. Mr. Hughes had seen the document and was asked what information he took from it.

“A: I would make sure that my resume addressed the experience factors. I would make sure I addressed the education requirement. And this document would also ...shows the placement criteria.

Q. And can you just briefly explain to me at the bottom of the first page of this document, so at the bottom of page 224, there's a reference to a customs inspector test?

A. Yes, I took that test in 1997.

Q. This – can you just briefly tell me what that test is about?

A. It's a four and a half hour test, one of the toughest tests I've ever done. And it tests your ability to analyze and to decide, ability to remember things. It has some written communications, some calculations. And it's designed to see if you're a good – would make, have what it takes to be a good customs officer.

Q. Now, you took it 1997. Did you have to retake it?

A. No, if you just receive a passing mark, you can use that indefinitely.”

Transcript: Volume One, section one, page 52, lines 13-25; page 53, lines 1-11.

[49] Mr. Hughes testified that he was interviewed twice in the Vancouver Competition 1002, first in April 2004 by Mr. Tarnawski and Holly Freeland, then in May 2004 by Mr. Tarnawski, Mark Northcote and Karen Warren.

[50] Complainant Counsel asked Mr. Hughes whether he was asked, in the two interviews for the Vancouver job opportunity, about events he had related in his written response to the portfolio of competencies, and why he thought his written responses demonstrated competency.

A: In both they would pick one or two and only talk about one or two, maybe three, at the most. And I had to expand on what I had written and tried to remember more information. And sometimes that was difficult.

Transcript: Volume One, section one, page 57, lines 2-6.

[51] Complainant Counsel then directed Mr. Hughes to Exhibit Tab 34 (Volume 2), the Victoria Competition 7003, posted October 7, 2003, with a deadline of October 17, 2003. Mr. Hughes identified the job posting and testified that it had no eligibility restriction; that he

applied, was screened in and received the written competencies package before he received the Vancouver Competition 1002 package; that he passed the written examination and was invited to an interview which took place December 16, 2003; and Mr. Hughes testified that he was assessed on the Victoria Competition before being assessed on the Vancouver Competition.

Q. And in the interview on the 16th, what transpired. Like you mentioned before, that you always asked what you're being assessed on or marked on, what happened then?

A. Well, part of the – in this selection process I found out actually that my feedback, how they marked it. But they definitely were marking oral communication and they picked I think two or three competencies to talk about so that they could mark my effective communication.

And, when I went to my feedback, they explained that the interview also then – if you're invited to the interview, you had passed all the competencies based on the written exam and you were just getting topped up between 70 and 100 per cent on the other competencies based on if you could give more detail.

Transcript: Volume One, section one, page 60, line 19-25; page 6, line 1-10.

Q. ... So what did you mean by saying you passed that? Can you just confirm that again?

A. Well, right in the written package it says they will – they – if you don't meet the minimum requirement which is 70 per cent, your package is screened out and you're failed. So you'd had to have a minimum of 70 per cent in each competency to even get invited to an interview. And that would have to be demonstrated in the written exam, the portfolio of competencies.

Transcript: Volume One, section one, page 61, lines 18-25; page 62, lines 1-2.

[52] Complainant Counsel referred the witness to Exhibit Tab 43 (Volume 2).

Q. This is something that – that concerns Mr. Turner. But it indicates that at an interview he did not meet two of the competencies here; okay? And you'll see that there's a Pringle and Baird involved in the interview?

A. No, it is not. Based on the way I was explained this competition ran, the only competency he could have failed was effective interactive communication as he would have had a minimum of 70 going into the interview. And they didn't talk about a team work and cooperation question that differed from the written package and it was exactly the same.

... A. Because everyone had a minimum of 70 per cent going into the interview based on the written exam. And that was explained to me by Trevor Baird, the board chair, at my feedback session.

The Chairperson: So was effective interactive communication not one of the seven competencies?

A. No. Because it excluded written communication, it was strictly oral communication.

The Chairperson: So you're saying that team work and co-operation was a written competency?

A. It was, yes.

The Chairperson: And in order to – you had to get at least 70 per cent in all seven competencies?

A. To be invited to the interview. Yes.

The Chairperson: The interview. So that what you're saying ... here is, if it shows 40, it is your opinion or your view that, once you got 70, you couldn't get below 70?

A. Right. Because they talked about the package itself, they didn't talk about give us a different example of team work, they said okay, look at your written submission and talk about it.

The Chairperson: So all you could do was go up?

A. Exactly.

The Chairperson: That's your view?

A. That's my belief, yes. And I was told that by Mr. Baird that it was to top up the marks he didn't mention anything about going down. ...

(Complainant Counsel referred the witness to page 308 of the Exhibit Tab 43).

Q. Is this what you were referring to here?

A. That's correct. The rules for this competition were effective interactive communication excludes any form of written communication.

The Chairperson: Where does it say that?

Complainant Counsel: You'll see the title, Mr. Chair, there's a paragraph and then there's a note. And it describes the competency as simultaneous communication between two or more people. And then it says this competency excludes any form of written communication.

The Chairperson: So effective interactive communication was not part of the written?

The Witness: That's correct. ... Well, they made us talk about three of the competencies that were passed in order to mark our ability to talk orally. So it served a dual purpose, to top up those three we were talking about and to mark effective interactive communication.

Transcript: Volume One, section one, page 66 lines 1-5, 14-25; page 67, lines 1-17; page 68, lines 9-20; page 69, line 5

Grievance complaint to the Public Service Commission

[53] Complainant Counsel put an investigation report dated May 31st, 2006, to Mr. Hughes (received and marked as Exhibit Tab 77, (a document included in the Complainant's Book of Documents)). Mr. Hughes confirmed that the investigator's report resulted from his grievance complaint to the Public Service Commission of irregularities in the Vancouver Competition 1002 and Victoria Competition 7003. During a discussion between the Chairperson and Counsel for the Complainant over the admissibility of the report, Respondent Counsel, who was initially opposed to the report being commented on by Mr. Hughes, agreed that it was relevant.

Mr. Stark: ... I take no issue with it being a relevant document. The Public Service Commission investigator is an investigator assigned under the *Public Service Employment Act*. They have a statutory function to obviously investigate matters where there are concerns about employment processes.

And I have no issue with the conduct of that and I fully concede that it indicates that there were irregularities in the competition processes, both the Vancouver pre-qualified pool and the Victoria pre-qualified pool that are in issue here today.

The Chairperson: The respondent concedes that?

Mr. Stark: Yes.

The Chairperson: There are irregularities?

Mr. Stark: Yes, as found by the investigator.

The Chairperson: But are you conceding there were irregularities in the process?

Mr. Stark: Yes. And it's not my intent to re-litigate those issues, the Public Service Commission investigator has made findings and in fact those findings were acted upon by the Public Service Commission itself.

And they issued corrective measures in relation to these two competitions. And we'll be entering some evidence about what those corrective measures were. And so I take no issue with the fact that their findings are essentially relevant and they will provide yourself with some background as to the events.

Transcript: Volume One, section one, page 74, lines 2-25; page 75, lines 1-9.

... It's conceded there were problems with the way these pre-qualified pools were actually conducted. And they weren't in compliance with the Public Service Employment Act.

Now, further than that, you'll also hear argument as well that these pre-qualified pools were actually initiated under a different legislation under the Canada Revenue Agency. And the irregularities that you are for the most part talking about that are considered irregularities under the *Public Service Employment Act*, they weren't considered to be irregularities under the previous legislation.

And it's all very complicated, but essentially this Canada Border Services Agency took over the port of entry functions upon its creation. And there was a – what I'll argue is a good deal of confusion amongst human resources about how to deal with the change in the applicable legislation. ... I don't mean to re-litigate the issues that were before the Public Service Commission investigator, the irregularities are accepted. Some of the factual issues I don't wish to concede. But certainly the findings I take no issue with.

Transcript: Volume One, section one, page 78, line 25; page 79, lines 1-23.

[54] Mr. Hughes testified that he was improperly failed in the Vancouver Competition 1002 on his ability to deal with difficult situations and his degree of self-confidence, matters that he asserted were not part of the Vancouver portfolio of competencies.

Mr. Yazbeck: Okay. And just, Mr. Chair, I'll just draw your attention to page 612, paragraph 95. This refers to what the witness has just been referring to as well, the definitions of professionalism, enforcement, not set out in the POC or the assessment package. And not mentioned in either – the candidates were never informed about how these qualifications were going to be assessed when they received their POCs and the selection board members did not have the definitions of these two qualifications in front of them when they assessed the candidates.

The Chairperson: And so you're saying those were the two – two of the competencies that you were assessed on at your second interview, but you had already passed those in Victoria?

Mr. Hughes: That's what they failed me on. But they actually substituted those other three for those two. So I was never, ever actually tested on professionalism, enforcement. So I was asking them to redo that portion of the competition so that I could actually be assessed (on) the competencies they're supposed to assess me on.

The Chairperson: Which were the three that they substituted?

A. They substituted in dealing with difficult situations, decisiveness and self-confidence. And those three were not listed on the job poster. And they tried to say they were the same things as professionalism and enforcement.

The Chairperson: When were you assessed on those three?

A. In February through the written package and again in the interview in May '04.

...

The Chairperson: Were all five of these on the job poster, Mr. Hughes?

A. No.

The Chairperson: So which three were, which were and which weren't?

A. The DDS, decisiveness and self-confidence were not on the poster. ... professionalism, enforcement were. ...

The Chairperson: So there was something in the job poster about the written competencies? Is that right?

A. ...In the job poster they said they were going to assess professionalism, enforcement.

[55] Mr. Hughes testified that at his first interview in the Vancouver Competition 1002, he was orally tested on effective communication, but that subsequently, at the second interview in which he was to be assessed on professionalism and enforcement, he was asked questions about dealing with difficult situations, decisiveness and self-confidence and yet was marked on professionalism and enforcement. When queried by the Chairperson how he knew this to be the case, Mr. Hughes testified:

Cause my marks it said beside professionalism 50 and beside enforcement orientation 50. But, when I looked where that matched up to, it matched up to dealing with difficult situations and self-confidence. So they never, ever marked professionalism or enforcement orientation, but they tried to say they did.

Transcript: Volume One, section one, page 99, lines 1-25; page 100, lines 1-10;
page 101, lines 1-11, 22-25.

Historical context of eligibility lists and prequalified pools

[56] Mr. Hughes was asked by the Chairperson to explain whether pre-qualified pools were used by CCRA. Mr. Hughes testified that CCRA had used pre-qualified pools but changes occurred when the agency became subject to the Public Service Employment Act.

The Chairperson: So I read something about Mr. Turner and the eligibility list that was supposed to last for a couple of years and it was extended and he made the eligibility list, but his name was taken off the eligibility list. So is there something about the eligibility list, or are we only talking about the pre-qualified pool? Or do you know?

A. I thought I had (given) historical context to the complaint, that he was qualified in an eligibility list and then in a pre-qualified pool in 2000. And, from 2000 to 2003, they could have hired him either from that pool or from the CCRA staffing programme without competition.

The Chairperson: But do you know when the pre-qualified pool came in?

A. Yes CCRA brought it in right away, around late 2001, I think, they started doing pre-qualified pools.

The Chairperson: All right, one last question. So, if you were on the eligibility list – why would you be on the eligibility list and be in a pre-qualified pool?

A. There's a provision that, when the CCRA came in, that they could still use the eligibility lists. So there was an overlap for a period of time.

The Chairperson: And that's – the eligibility list no longer exists?

A. No. they ceased at the end of '95 – or sorry, 2005. That's when the Public Service Employment Act, (1985) was repealed, but because CCRA came into existence they stopped using it in November 1999, except for ones that overlapped.

Mr. Stark: Mr. Sinclair, perhaps I could interject here. The witness is repeatedly referring to the CCRA and I think he actually means to refer to the CBSA. And that might be adding to some confusion. It's the CBSA that was created in 2003, December, and the competitions overlapped between the Canada Revenue

Agency as it then was and then the pre-qualified pools came under the jurisdiction essentially of the CBSA following December 18, 2003.

Cross-examination of Mr. Hughes

(a) Public Service Commission – report of investigator

[57] Notwithstanding his initial objection during direct examination to Mr. Hughes commenting on the findings of the Public Service Commission investigator, Counsel for the Respondent ventured into that area in his cross-examination.

Q. Mr. Hughes, if we can go to tab 77 of volume 3. And I just want to take you to the investigator's report and in particular to paragraph 91 that my learned friend took you to. If I can actually take you to the paragraph before that, 90, and I'll read it to you because it gives some background that the investigator provides.

“It's clear that some (time) after the competition notice was posted, the hiring manager, Mr. Flagel, decided that he was not satisfied with the assessment criteria which had been established.”

And I'll stop there. This is in relation to the Vancouver pre-qualified pool; correct, this decision?

A. That's right.

Q. Okay.

“Owing to an increasing number of complaints received from travellers, many of which concern the actions and behaviours of relatively new customs inspectors, he felt that certain criteria which were not included in the statement of staffing requirements needed to be addressed when assessing the candidates. As he pointed out he felt that dealing with difficult situations should be one of the qualifications.”

Respondent Counsel: Could you indicate to the tribunal who Mr. Flagel – (is) –

A. Yeah, Mr. Flagel is the district director in charge of Vancouver International Airport.

Q. Right. And then the investigator continues in paragraph 91:

“Consequently he directed the selection board members to define or drill down the enforcement orientation and professionalism qualifications in terms of the three criteria of dealing with difficult situations, self-confidence and

decisiveness.”

“His intent was to ensure that the selection board focussed its assessment of enforcement orientation and professionalism on those elements within each which were the most important for ensuring that competent customs inspectors were hired.

While the intent was noble, it was not carried out in a manner which is fair or transparent for existing and potential candidates or in accordance with the merit principal.”

Now – and you, giving your evidence, that’s the mechanism, that’s the switching, if you like, that you were mentioning in terms of assessing criteria that wasn’t on the poster, the job poster?

A. That’s right.

...

Q. So you’ agree with me, then, that all candidate within that competition were assessed equally and according to the same assessment criteria?

A. They were – we never did know if the marking was reasonable because... the investigator decided not to investigate the reasonableness of the marking considering I had won the first two allegations.

Q. ...I’ll take you to paragraph 104, allegation 3.

“... As I explained during the first fact-finding meeting, the evidence he presented did not support an allegation of bias, rather it brought into question the reasonableness of the assessment of the two competencies.”

Q. You’ll agree with me that the investigator found that there was no bias.

A. Right. ‘Cause he said what I meant was reasonableness. So the next paragraph clarifies that he did not investigate it because I had already won the two allegations prior and that – so, for all we know, there could have been lots of inconsistent marking, but he felt it wasn’t worth investigating since the process was fatally flawed.

...

Q. So, again you have no evidence at all to provide the tribunal that would ... suggest that any candidates in particular in this pre-qualified pool were treated differently? They were all assessed the same way?

A. No, I’d say Trent Van Helvoirt and Brianna Hewson definitely were treated different.

Q. And how were they treated differently?

A. Well, I've reviewed both their packages and there's many deficiencies in both.

Q. So – and they were both employed I take it from your –

A. They were both hired permanently, yes.

[58] Months after the filing of the Investigator's report, The Public Service Commission issued directions implementing corrective measures. One aspect was the fact that the customs inspector position PM-02 had been replaced by a PM-03 status for border service officers.

Q. Now, in these (sic) record of reasons in paragraph 3, the investigator makes reference to the following:

“...the revised statement of qualifications for the PM-03 border services officer positions contain the same additional qualifications that CBSA assessed by error in the PM-02 selection process. On its face it would be redundant and ineffective at this stage to require that CBSA reassess qualifications which are no longer required by the current position. ... Now, with respect to the complainant's own situation, the evidence established that he had failed to attain a passing grade on the qualifications dealing with difficult situations and self-confidence, two of the qualifications now required for the PM-03 border services officer positions. As a result further corrective measures with respect to his (Mr. Hughes) specific circumstances are not required.

Q. Now, you'll agree with that finding that those were the two areas – two criteria that you essentially failed to qualify on the competition?

A. Well, actually, I strongly disagree with that. As you know, I have a judicial review on this. The investigator never investigated the reasonableness of self-confidence and dealing with difficult situations, or took into (account) the fact that I passed these competencies in Victoria. So I strongly disagree with that statement.

...

Q. So these types of competitions, pre-qualified pools, they're the manner that the Agency uses to hire individuals at the entry level?

A. Sometimes. Like I've said before, they bridge over a hundred students. And they've used non-advertised mechanisms too, (and) without competition ones also.

Transcript: Volume One, section one; page 194, lines 21-25; page 177, lines 22-

25; page 178, lines 1-6, 9-10, 18-25; page 179, lines 1-6; page 189, lines 10-23; page 194, lines 1-25; page 195, lines 1-19; page 196, lines 23-25; page 197, lines 1-5.

(b) Student bridging program

[59] In cross-examination, when asked to describe the student bridging program, Mr. Hughes gave a succinct description together with his opinion on its utilization.

A. It's designed by the Federal Government to give some flexibility to departments to bridge exceptional students who showed that they were very good workers.

And, from reviewing the CBSA data, it seems they've been over-utilizing that and not just filling their staffing needs with that instead of using it for the exceptional student.

Q. And what evidence do you have of that?

A. Well, I have copies of every contract they've done over the last – from 2004 to '07. And they hired, I think, over a hundred people through student bridging. And the previous four years I think they did a handful.

Q. ... When you mention the handful, what period are we talking about?

A. When CCRA had control they rarely ever used that function and they hired people through external processes which had a higher standard of competence. When CBSA took over they started bridging many, many students and, to be a student, you don't have as high of a standard to cross to become a student, and then they're sort of brought in through the back door, through this bridging programme, in my opinion.

Q. ... But when did it start picking up?

A. In late 2004, early 2005.

Q. So that (would) have been after the time frame involved in this complaint?

A. Not if you look at – if Levan had made the pool like he should have, he would have been eligible to be hired for a year and a half, two years after that.

Q. Right. But my point is simply that student bridging didn't start to be utilized more frequently until after the end of these complaint periods. We're talking about competitions that started in 2003 and finished in – by the spring of 2004.

A. Well, they didn't finish 'til mid-2007, after corrective measures.

Q. All right.

A. So I disagree with you.

Transcript: Volume One, section one, page 151, line 22-25; page 152, lines 1-25;
page 153, lines 1-16.

[60] Mr. Hughes was asked how he established that fifty per cent of summer staff are students. He testified it was based on personal experience, that in Victoria many shifts would be over fifty per cent students.

Q. Did you keep any records of that, or is that just a mental sort of head count, that you've taken?

A. No. I kept time sheets from '02 and '04 that show that.

Q. Okay. And why would you keep those time sheets, Mr. Hughes?

A. After my experience at tax in '01 I started keeping records on just about everything.

Q. Would it be fair to say that after your experience with CCRA you started to be someone who kept records of everything because you were concerned about your employment situation?

A. I was concerned that people might try to put a different spin on things later. So I wanted to keep an accurate and factual record of what happened.

Q. Did you believe that your employers had it in for you?

A. Not at CBSA. No, I did not get that feeling until after they failed me in Vancouver when I was almost done my third term.

Q. And why did you get that impression? Why did you form that impression?

A. Because, as I stated earlier, that both of the interviews and written packages were exactly the same. I used the exact same submissions. So I felt, if they passed it in Victoria and they know I'm a customs officer in Victoria in a pool, how could they fail me in Vancouver? It just didn't make sense.

...

Q. ...And you were placed into the pool, but you weren't ever appointed from it?

A. No I was not.

Transcript: Volume One, section one, page 154, lines 24-25; page 155, lines 1-25;
page 156, lines 1-12.

(c) Interpretation of the Vancouver Competition 1002 eligibility restriction

[61] Mr. Hughes was cross-examined with respect to the eligibility restriction in the Vancouver Competition 1002 and asked how he interpreted the restriction.

Q. All right. Now, you said that you interpreted that to mean, following discussion, that it was only people who had previously applied in Vancouver competitions that were no long – or who weren't to be eligible?

A. That's what I took it to mean, yes.

Q. Can you indicate, you know, why you formed that interpretation?

A. Because Vancouver always ran their own boards and it was always only open to the lower mainland, we could never apply in the past. And Victoria was kind of the same way, only open to Victoria, they wouldn't let anyone from the lower mainland apply. So we were always separate. This was the first one they opened up to west of the Rockies. And, therefore, we had never applied to a Vancouver Board before. So that's how we interpreted it.

Q. Did it not seem strange to you, though, that they would open up a process where they would stop candidates who may have previously applied in

Vancouver, but not stop candidates who may have previously applied elsewhere?

A. No. Because they had assessed people in Vancouver, and I can see why they wouldn't want to reassess someone they've already determined themselves wasn't suitable. But if they've never had a look at us before, we should be able to have – be able to make an impression on them.

...

Q. So, other than the possibility that they might want to take a look at candidates from outside of the Vancouver area, there's no real explanation for why they would make that distinction?

A. Yeah, I could not figure out why they put that there. I mean, there was – it was ambiguous, is what I mean. I know what they intended.

Q. What did they intend?

A. Well, like previously boards, they intended to screen out people from the lower mainland who had applied.

Q. Is it not a more rational explanation to say what they were trying to do was screen out applicants who had been recently assessed against the same qualifications by other selection boards?

A. Not necessarily. Because like I've heard HR people say different process, different question, might have a different result.

Q. Who said that?

A. I've heard Barbara Lennox say it, Shaliva Sharma say it, and I think Ron Tarnawski said that.

Transcript: Volume One, section one, page 164, lines 1-25; page 165, lines 1-4, 10-25; page 166, lines 1-5.

Re-examination of Mr. Hughes

[62] Counsel for the Complainant questioned Mr. Hughes concerning his testimony about two people being treated differently in the Vancouver Competition 1002.

Q. And you gave an example of two persons Trent Van Helvoirt and Brianna Houston as being treated differently?

A. Yes, I did.

Q. Did you raise that with the Agency at the time or around the time of these competitions?

A. I did, yes.

Q. And, what was done about that by the Agency?

A. I think it was already in the investigation stage, so it was – I don't think I raised it directly. It was during the investigation.

Q. Do you mean this PFC investigation?

A. Yes.

Q. And you said you identified many deficiencies in their – their – I guess their applications?

A. I did.

Q. What were you referring to?

A. I was referring to notes taken by Karen Morin for Brianna Houston that indicated she had told the board that her superintendent told her she should consider another career, and there's also many negative notations about her communication skills, yet she was passed on communication skills, and her background was working as a part-time gas attendant prior to being hired, so, no – no law enforcement background, and she was eighteen or nineteen years old.

Q. And, my friend had asked you a number of questions particularly about the allegation of bias, and you may recall in your evidence you, often, you refer to paragraph 1-0-5, and you said, yes it had to be read together; and in paragraph 1-0-5 the investigator says: 'There was thus no need for this investigator to review this part of the allegation further, or arrive at a conclusion on the matter.'

A. That's right.

Q. Okay, did – did any other person or body investigate that allegation further or arrive at a conclusion on the matter?

A. No, they did not, other than the Human Rights Commission which did find that that was one of the reasons to send this matter here.

The Chairperson: Which matter is that?

A. The matter before the Tribunal.

The Chairperson: So, your allegation of bias is the basis – one of the reasons that Mr. Turner ---

A. No, the way Brianna Houston was treated in the competition.

The Chairperson: Is there reason why Mr. Turner's complaint was sent to the tribunal?

A. One of the abnormalities in the – yes – because she was like eighteen, nineteen years old, not very qualified; notes indicated she should have failed but she gets passed.

Transcript: Volume One, section two, page 9, lines 7-25; page 10, lines 1-25; page 11, lines 1-11.

Mr. Hughes' troubled relationship with Revenue Canada

[63] In cross-examination, Counsel for the Respondent asked Mr. Hughes about the several grievances that he filed against Revenue Canada.

Q. During that time did you have any issues and disagreements with Revenue Canada as to your employment ... in that time period of 2003/4.

...

A. There is an ongoing harassment investigation, a number of grievances and an internal affairs investigation that I had requested (in) ... the early part of '04. ... in late '04, early '05 there was a human rights complaint I filed against CRA ...based on disability ... depression and stress."

Transcript: Volume One, section one, page 138, lines 14-25.

Q. Going back in time for moment. The initial grievances, when did the employment relationship with Revenue Canada start going awry?

A. Well, it started going awry in 2001. And then it went on the back burner for '02 and 03 and then it kind of came up again. ... you actually have to go back to September 2000 is where it started. And that's where I stopped an illegal act at CCRA ... a collections officer had accidentally garnisheed a director of a corporation for the debts of the corporation which you're not allowed to do.

Transcript: Volume One, section one, page 139, lines 1- 25.

And this individual had been ... garnisheed for almost a year, probably \$5,000.00 had been illegally taken from his employment income. And a number of team leaders knew about it and didn't stop it.

Q. And what did you do about that?

A. I involved my team leader and the media-relations officer to ensure that the garnishee was stopped and the money refunded.

Q. And did that actually happen?

A. It did, yes.

Q. ... now what happened and what caused the grievances to be filed?

A. Well, within four or five months all of a sudden I started getting blocked on promotions and being treated very adversely. And I believe it was in retaliation to the whistle blowing.

Q. Do you have any evidence of that?

A. Not with me. There's tons before other tribunals and boards.

Transcript: Volume One, section one, page 140, lines 3-22.

...

The Chairperson:

I'm not sure I understand what – where this is going. You may take it as a sign of credibility of Mr. Hughes. But I haven't heard anything – in the evidence today that's not credible in the sense that – and he may say that this particular individual got a job and they weren't – didn't follow the process of that particular individual

or students that got jobs and then failed or they're in this particular program et cetera et cetera.

...

...I think Mr. Hughes credibility is not really an issue with respect to much of the evidence that he gave. I mean, he may have been somebody who challenged his employers and they didn't like that, so they did this, that and the other to him, or blocked his promotions, et cetera. But that's not an issue in this case.

Transcript: Volume One, section one, page 141, lines 18-25; page 142, line 25;
page 142, lines 1-6

[64] I share the Chairperson's view that Mr. Hughes was a credible witness whose testimony remained unshaken in cross-examination. His detailed account of the Respondent's hiring practices and selection process provided a useful context when examining Mr. Turner's complaint.

D. Witness: Levan Turner

[65] Mr. Turner, originally from Toronto, moved with his wife to Victoria in December 1995 in search of work. He testified that he was interested in becoming a customs inspector or a conservation officer; however, his first job was as a security guard at the Victoria Eaton Centre. His employment as a security guard included instruction in the use of force, techniques for making a proper arrest, and handcuffing a suspect using only as much force as may be reasonably necessary.

[66] Mr. Turner's willingness to work as a security guard was a rational progression from his prior voluntary service as an auxiliary police officer with the Toronto Police Department. He explained the Department's screening process to establish the suitability of potential auxiliary officers, and the training he received to become an auxiliary officer: basic police training including empty-handed control techniques, tactical arrests, handcuffing, and appropriate use of a baton. He also explained that as an auxiliary officer he wore a uniform similar to the regular police uniform, and would assist at public events and on occasion ride-along with regular

officers: “So I went to all kind of calls, regular police calls with a regular force officer and I gained valuable experience from them”. Transcript: Volume One, section two, page 26, lines 14-16.

[67] Mr. Turner described an incident in which he and a fellow auxiliary officer disarmed a suspect and made an arrest: “... because as Auxiliary we were allowed to arrest but we had to immediately turn them over to a parent force officer at the time, because that was what we were supposed to do, and by the time the parent force officer got down to us we were able to get all the information from this individual, and be able to run him on the computer systems, and he was arrested and taken away.” Transcript: Volume One, section two, page 28, lines 4-11.

[68] When asked why he wanted to become a Customs Officer, Mr. Turner replied:

I just love meeting people, as you can see, because of my Auxiliary background as well. ... law enforcement interests me ... and the interaction with the public. So being that and being a security guard gave me sort of the best of, of both worlds, to be able to do that.

And I really, because of my history with my family, and I can go into that later if you like ... I truly believe you know, being a Canadian citizen, that it's important to, you know, protect your country. And that's the reason why I wanted to be a Customs Inspector.

Transcript: Volume One, section two, page 55 line 1; page 56 lines 1-12.

Work experience as Customs Inspector

[69] In 1998, Mr. Turner answered an advertisement for prospective Customs Officers by mailing in his resume. He was invited to write the Customs Inspector Test (CIT), which he passed, and was thereafter interviewed and subsequently placed 10th on a ranked eligibility list. Counsel asked whether he recalled who interviewed him, and Mr. Turner replied: “Yes, believe it or not, yeah I do. It's way back when. It was Joanne Deans (ph) who was a CI, and Catherine Pringle, who was a Superintendent.” Transcript: Volume One, section two, page 53, lines 7-9.

[70] Mr. Turner was hired as a term employee, P-1 Customs Inspector, in the Marine Unit for the period May 1998 to October 15, 1998.

First season as a Customs Inspector, May 1998 to October 1998

[71] In his first year of seasonal work as a customs inspector Mr. Turner worked at 816 Government Street, Victoria, in the Marine Unit. He testified that the Marine Unit dealt with scheduled vessels coming to Victoria from Port Angeles (*Coho*) and Seattle (*Clipper*). He described working long days involving talking to a lot of people, with a clipboard in hand which noted details of certain persons and vehicles that the Marine Unit had been alerted to be on the lookout for, colloquially described as “watch-fors”. Mr. Turner described the clearing of persons arriving in Victoria as a two-stage process: primary inspection and secondary inspection:

Q. I’ve heard these terms before, but can you just describe to us what primary is then first of all?

A. Okay, sure. Primary line or primary inspection line it’s called – it’s referred to as PIL. What that is, is that’s the first contact that people would have coming off the ferry. So they would be your first primary inspection booth, just like even if you’re driving through a border crossing the PIL booth would be the primary inspection or the first line of contact with Customs. And that would be the place where you would make your declaration or Customs would ask you your questions, so that would be the first officer that you would come in contact with.

And at that time after you get to that, that booth [...] the Customs Officer would determine at that time whether you are going to be admitted to Canada or whether you’d be sent to secondary for further examination.

Q. What criteria would you use to make that determination?

A. Well, we’re trained to use basically, you know, standard questions ... where are you from, how long you’ve been out of Canada, what’s your destination. And we look for indicators, you know, whether we believe them, how fast they answer the question, whether they seem to be evasive, where that would sort of, you know, make our conclusion whether we wanted to send them to a secondary examination or whether we wanted to just admit them to Canada.

And usually we take, you know, anywhere, I mean, depending on the circumstances of course, but I guess we're just trying to get through as fast as possible.

Q. And when you were working in secondary then, what was your function there?

A. Secondary examination would be, what we would do is if they were referred to secondary we fill out a referral sheet, which is a yellow sheet of paper. And on the yellow sheet of paper you'd put down the person's declaration and what they said and how long they've been out of Canada for, what they're bringing into Canada. Because that would be a legal document saying, well, this is what the person who came to you said that they had in their vehicle. So that's what we had to go by.

And once we got to the secondary area, the secondary officer would take this referral sheet, look at it and then verify what was said at the primary inspection booth with what was on the referral sheet. And then we'd act on whatever, if there was anything else that was found we'd take appropriate action on that.

Q. And when you say take appropriate action, what, what sort of actions could you take?

A. It all depends on what it is. It could be anything from collecting duties and taxes, to Immigration, if we found any sort of documents that were hidden that would prove that what was said at the primary inspection line wasn't correct, and then we'd take appropriate action at that point.

Q. You just mentioned Immigration. ... What would you have dealt with there?

A. If we found, let's say if they were coming up and, or travelers coming into Canada, and they were saying well they were only coming up here for a visit but meanwhile we have documents showing that they have a house up here in Canada; they're not actually coming to visit, they actually - could be coming up here to live at their house in - in Canada. So that would be something that we refer on to Immigration because maybe they're not actually as a genuine or valid visitor. Maybe they're actually here living in Canada, but you know, they declared they were just coming up here for a visit. So that would be something we'd refer on to Immigration.

[...]

Q. You also mentioned you're searching and arresting of individuals. Did you have occasion to do that?

A. Searching, yes we did. I didn't do any arresting of individuals at the time.

Q. Okay. And any issues with your performance during this period?

A. No.

Transcript: Volume One, section two, page 44, lines 13-25; page 45 lines 1-25; page 46, lines 1-25; Page 47, lines 1-16, lines 19-25; page 48, line 1.

Second season as a Customs Inspector, December 29, 1998 to October 1999

[72] At the end of his 1998 term with CCRA, Mr. Turner found work with the Canada Food Inspection Agency as a Plant Inspector. That Agency needed temporary employees to deal with the urgency of an outbreak of gypsy moths. Mr. Turner was interviewed over the phone, hired, trained and worked with the Agency inspecting and certifying Christmas tree farms. However this winter work was interrupted by a new offer of temporary employment from CCRA.

[73] In late December 1998, Diana Kavalaars, Chief of CCRA in Victoria, telephoned Mr. Turner and informed him he was next on the eligibility list for a temporary CI position. She asked Mr. Turner if he was willing to return to work at that time and offered him a position at the Telephone Reporting Centre (TRC) clearing arriving vessels and planes. Mr. Turner accepted the offer, ended his employment with the Canada Food Inspection Agency on December 28, 1998, and resumed his seasonal term employment with CCRA on December 29, 1998, through to the fall of 2000. Mr. Turner testified that he had accepted the term position in the hopes that it would eventually lead to a full-time position as a Customs Inspector.

The Chairperson: Without more, you didn't have to do any testing or interviews?

A. I didn't have to do any testing at all.

The Chairperson: So she offered that position from December to October?

A. That's correct.

Transcript: Volume One, section two, page 55, lines 8-14.

[74] In Mr. Turner's second season with CCRA he was assigned to work in the TRC, clearing arriving vessels and planes. He described it as a 24-hour communication service that permits masters of vessels and pilots of planes to phone and obtain clearance to enter Canada. He explained that a Customs Inspector working in the TRC would make the same inquiries of these pilots and masters as at ports of entry to Canada, and would make a determination whether they would be permitted to enter. In the event that a secondary inspection was necessary, arriving planes would have to go to a designated airport with a Customs office, and remain there until arrival of a Customs Inspector.

[75] Mr. Turner explained that the lack of direct contact with arrivals was overcome by use of CCRA computer systems to determine whether the person had ever been referred to secondary inspection before, or whether there had been an earlier problem with the aircraft or vessel. Mr. Turner asserted that he was competent in the use of the Integrated Customs Enforcement System (ICES) and the Canadian Police Information Centre (CPIC) to determine whether there were any outstanding arrest-warrants for any traveller, or other information regarding prior legal matters relating to them.

[76] Mr. Turner stated that whenever the Marine Unit was short-staffed, or an exceptionally high number of ship-board passengers were expected, TRC officers would assist in carrying out primary and secondary inspections.

[77] Mr. Yazbeck showed Exhibit C-1, Tab 7, a February 27, 1998 letter to Mr. Turner which confirmed that he had taken and passed the Customs Inspector Test. According to Mr. Turner, the results of the test were still in effect at the end of his last seasonal employment.

[78] Mr. Yazbeck showed Exhibit C-1, Tab 8, to Mr. Turner, a document from CCRA. This was a performance review of Mr. Turner for the period of December 1998 to October 1999. Mr. Turner identified the author of the review as Acting Superintendent Todd Perry of the TRC. Mr.

Turner remembered Mr. Perry as a very good teacher. The review form lists a number of “Goals and Objectives”, which the Superintendent is to indicate as being “met” or “not met”. All of the relevant goals and objectives were listed as being “met”, including the objective stating: “You will become knowledgeable with the legislation and regulations related to the duties performed by a Customs Inspector and TRC operations.” In the comment section Superintendent Perry made the following remarks: “You provided a high level of service in a polite and professional manner. ... You worked well with the rest of the TRC team members. ... Levan I have no criticism of your work. Any guidance I provided to you was accepted willingly. ... I thank you for your assistance with training and guidance you provided to the newer staff that came into the TRC.” Transcript: Volume One, section two, page 64, lines 12-15, page 66-67, line 25-line 12.

[79] Similar comment was made in Mr. Turner’s assessment for the 2000 summer season at Exhibit C-1, Tab 9: “Teamwork & Cooperation has been a very strong point of yours. You were of great assistance to me in training new staff. You are always looking for ways to improve the operation and share this with the rest of the team.”

[80] Mr. Perry noted that Mr. Turner’s appearance was always professional and in accordance with Department guidelines. When asked to explain how he helped to train newer staff, Mr. Turner said he taught them how to use the computer systems, and that he would set up mock scenarios simulating contact with an incoming aircraft. This simulated arrival gave co-workers an opportunity to develop computer skills and to improve their capability as interrogators.

Third season as a Customs Inspector, April 2001 to October 2002

[81] Mr. Turner’s third seasonal term employment was to end in the fall of 2001 however the 9/11 terrorist attack resulted in an extension of his term and his return to Marine during the summer of 2002. He explained that because he had been working since the previous summer he was automatically put into a pool to be eligible for recall.

[82] Mr. Yazbeck produced Exhibit C-1, Tab 12, a 2002 Customs Inspector Midsummer Assessment, prepared by Superintendent Trevor Baird of the Marine Section, and signed by Mr.

Turner. On the first page it makes reference to Mr. Turner presenting himself in a professional manner even in difficult circumstances. Mr. Turner's recalled that the "difficult circumstances" concerned an incident with an agitated American traveller who had arrived on the *Coho*, with whom he was able to deal appropriately. Mr. Turner said he used this incident to illustrate one of his competencies in a posted competition.

[83] Mr. Turner was asked whether his 2001-2002 duties in the TRC and the Marine Section were different from his earlier duties, and he said the difference was that he had more experience and training:

A. They weren't much in the way of difference except me being there longer, I had more experience so I was taking on more jobs, doing clearances, vessels out of front counter in the Long Room, dealing with as (inaudible) CPIC and ICES checks, I had more experience now that I had my training, to do CPIC checks, which is the criminal record checks. I was able to do that now.

So what would happen in that case is when I was in the [TRC], vessels would come in, and if a secondary officer needed extra information on somebody or wanted a criminal record check done, he was able to call up to the [TRC] and there were very few of us in there who had access to the system. And so I was lucky enough, or fortunate enough to be able to have access to the system. And I was able to run individuals for the staff down at the, at the boat docks.

Q. And you also indicate here searching and arresting of individuals. Did you, can you give us any examples of that?

A. Sure. We – I would help out whenever there was, when I was in the Marine section of course, I was able to help out if anybody needed any help in searching uncooperative individuals... So I - helped out of course in doing that, and arresting individuals, you know, if anybody had to be arrested.

I remember helping Terry Klassen one time ...with arresting an individual, searching him and taking him into custody. I also helped out as well with doing, with the approved screening device, which would be a unit that's used, even out on the street with police today, to verify whether a person is intoxicated. And I was able to do it myself when I was working in Marine, I was able to administer an approved screening device to someone who came off the *Coho* which I believed at the time was impaired. And I did my primary questioning and sent the individual over to secondary – or did my primary questioning of the individual.

He was sent over to secondary and when I was searching the vehicle I noticed that there, inside the vehicle there was an odor of alcohol and I noticed in one of the cups that there was a residue of alcohol in there.

So I thought I had better do a check of this individual. So I did, and realized that individual, he wasn't impaired. He blew but a warning. So I just basically cautioned him and let him know that, you know, this wasn't a smart thing to do, he has kids in the car. ... [B]ecause of the indicators I saw in the vehicle I was able to administer an approved screening device.

Transcript: Volume One, section two, page 85, lines 16-25, page 86, lines 1 – 25,
page 87, lines 1-24.

[84] In the same sequence of testimony, Mr. Turner explained his being trained in a Use of Force Course at CCRA head office, which he described as a week-long training in handcuffing, defensive empty-handed tactics, baton and pepper spray, and that it was a requisite for employment. Mr. Turner also participated in an officer-powers course as it related to arrest of persons and their rights, and a course on firearms offered on weekends at a firing range in which he was trained on how to handle different firearms, to fire them, and to safely load and unload ammunition.

[85] At the end of this sequence of testimony, Counsel asked Mr. Turner if his goal was to become a full-time employee of the Agency and if that was something Mr. Turner's managers were aware of.

A. Oh yes, definitely, yes. For my very first interview, which was back in '98, I was advised that these positions that we were applying for were – were full time, permanent positions. And then once they hired us I was informed that they were no longer going to be full time but they were just going to be term positions.

Transcript: Volume One, section 2, page 102, lines 4-10.

[86] After finishing his third seasonal term of employment in October 2002, Mr. Turner testified that he had been informed that there were jobs at Taxation where they needed help in the client service area to take information and answer calls regarding tax questions due to the

upcoming tax season: Transcript, page 347, lines 21-25; page 348, lines 6-7. Mr. Turner worked in this position from December to April 2002.

[87] Mr. Turner's hopes for a permanent career in border services ended during his last seasonal term as a Customs Inspector May 1 to October 28, 2003.

[88] During this period he sought two further job opportunities as a Customs Inspector, but was deemed unqualified.

The Job Competitions

(a) Victoria Competition 7003

[89] CRA Selection Process 2003-2092-PAC-3961-7003 (Victoria Competition 7003) is one of two staffing processes which are the subject of this inquiry into Mr. Turner's complaint. The positions stipulated on the October 11, 2003 poster for the Victoria Competition 7003 were for permanent, term, or anticipatory positions as Customs Inspector, Victoria / Sidney, BC (including Bedwell harbor), with applications due by October 30, 2003 (see Exhibit R-2, Tab 41).

[90] Mr. Turner applied for employment offered in the Victoria Competition 7003, he successfully completed the "pre-requisite" phase of the process, and was interviewed on December 18, 2003 by the selection board Chairperson Trevor Baird, Superintendent, Victoria Marine Section and selection board member Kathryn Pringle, Superintendent, Victoria Telephone Reporting Centre (TRC), and Janet Sabo, Superintendent, Sidney (See Exhibit C-2, Tab 43 and Exhibit R-2, Tabs 42-48 and 51). On March 5, 2004, Mr. Baird sent a letter to Mr. Turner informing him that he was unsuccessful in the competition, as he was "not found to have met all of the assessment criteria required for the position" (Exhibit R-2, Tab 50).

[91] Victoria Competition 7003 was one of three staffing processes for Customs Inspector in Victoria in which Mr. Turner applied and, after interview, was found not qualified to be a customs inspector. The others were (1) Selection Process 2001-CCRA-PAC-3961-7009

(“Victoria Competition 7009”), in which Mr. Turner was interviewed on April 2, 2002 (see Exhibit R-3, Tabs 67 and 69), and (2) Selection Process 2002-1060-PAC-3961-7012 (“Victoria Competition 7012”), in which Mr. Turner was interviewed on February 13, 2003 (see Exhibit R-3, Tabs 62-64).

[92] While the circumstances of the Victoria 7009 (2001) and Victoria 7012 (2002) competitions are not in issue in this inquiry the circumstances of the Victoria 7012 process may have some relevance to the assessment of the credibility of Superintendent Paul Tarnawski. Superintendent Tarnawski was the interview board Chairperson in Vancouver Competition 1002, and in Victoria Competition 7012. These circumstances will be discussed later in this decision.

(b) Vancouver Competition 1002

[93] The Vancouver Competition 1002 notice was posted June 9, 2003, it was a job opportunity described as, “this position,” ... “PM-02, Customs Inspector, Vancouver International Airport District, Metro Vancouver District, Pacific Highway District, ...”

[94] The Job Opportunity advertisement contained an eligibility restriction: “Applicants who have been interviewed for this position since January 1, 2002 will not be considered for this process.”

[95] In April 26, 2004, Mr. Turner was interviewed by a three-member panel – Ron Tarnawski, Mark Northcote and Karen Morin – for the Customs Inspector position stipulated in the June 9, 2003 Notice of Job Opportunity.

[96] Mr. Turner testified that before he applied to the Vancouver Competition 1002, he considered the extent of the eligibility restriction in the Notice of Job Opportunity and concluded that its purpose was to deny eligibility to persons who, since January 1, 2002, had been interviewed in Vancouver for the PM-02 position of Customs Inspector. Since he had not been previously interviewed in Vancouver for the PM-02 position and wanted a permanent position as a customs inspector, Mr. Turner applied and received a competency package (Exhibit C-1,

Tab 23). After submitting a written account detailing his competency, Mr. Turner was invited to an interview which took place on April 26, 2004. Mr. Turner testified that it was a short interview presided over by Superintendent Ron Tarnawski, the other board members being Mr. Northcote and Ms. Morin. Mr. Turner identified Exhibit Tab 64 (Volume 3) as notes of the interview process made by panel members Northcote and Morin recording that he had achieved a passing grade of 70 and had “met” the required standard of competency. Those notes were crossed out and an entry stated: “not qualified to interview, not qualified inside the restriction as on poster.” Transcript: Volume One, section two, page 125, lines 7-11.

[97] Counsel for CBSA conceded that, but for the eligibility restriction, Mr. Turner would have been placed in a pool of qualified potential employees.

Mr. Stark: ... I don't want to put words in the mouths of my witnesses, but in terms of the position generally of the Respondent, (it) is that the intent of the eligibility restriction was not to preclude candidates who had been successful, for example, in Victoria or elsewhere, from applying in Vancouver.

The intent of it was to preclude individuals who had previously been found to be unqualified in – in competitions for the position of Customs Inspector. And in that case, because Mr. Turner had been found unsuccessful in Victoria, he was in violation of that eligibility restriction.

And the rationale for it is quite simply is that if someone has been assessed within the previous two years, it – it's not – again, this is my very simplified term, but essentially it's not worth the time of passing someone up through the competition process when they've previously been – applied and not met the criteria. The feeling is and the belief is that they are better out there getting further experience so that they can come back and after a period of time where they've been able to update their skills, improve them, get more experience, then they can be reassessed at a later time. ...

There is not another reason why he was disqualified; it is the eligibility restriction. There is some other contextual facts as well, which don't go to why he was found not to be qualified but it was certain facts the Selection Board were aware of.

Emphasis added

Mr. Yazbeck: Okay. So, just so it's clear, so he was disqualified because of the eligibility restriction only but you're saying there were other facts that the Board was aware of that might have affected how they dealt with him.

Mr. Stark: Correct.

Mr. Yazbeck: Okay. All right, I think I know what they are. That's fine.

Transcript: Volume One, section two, page 121, lines 20-25; page 122, lines 1-15;
page 123, lines 1-13.

[98] Counsel for the Complainant produced Exhibit Tab 66, notes made by Mr. Tarnawski during the interview, which state that "...we realized that Levan had been interviewed less than one year prior and due to restriction we have on our processes Levan was not eligible to apply for this process."

[99] Counsel asked Mr. Turner if the eligibility restriction was discussed in the course of the interview.

A. No. It was not. You mean to the fact that I was going to be disqualified?

Q. No ... the issue of you participating – the restriction ...?

A. Oh, yes they did mention that to me saying that, you know, asking me if I had interviewed previously for this position.

The Chairperson: Is that fact true that you had interviewed less than one year prior?

A Yes, because I interviewed for the Victoria process, but not for – when they say this position, but for the Victoria process, and that was the reason for the poster.

Transcript: Volume One, section two, page 127, lines 2-18.

[100] Mr. Turner testified that when he entered the interview room he recognized Mr. Tarnawski as the Board Chairperson who interviewed him in Victoria in the spring of 2003, and that he told Mr. Tarnawski that they had met before.

Q. ... and he said yes, I remember the voice and presence.

A. Yeah, and it was the way he said it, he goes, 'Yes, I remember the voice and the presence.'

Q. Okay. You mentioned you were the only black officer in Victoria. Is that your evidence as well.

A. Yes.

Q. So how did the issue of you interviewing previously come up? Like, what was the nature of the exchange?

A. Well, when I sat down for the interview they asked if I had previously interviewed for, and Ron Tarnawski put his hand on the table, and says "for this position". And I said no I hadn't, and then he said okay, and we continued on with the interview." Transcript: Volume One, section 2, page128, lines 22-25; page 129, lines 1-12.

[101] Mr. Turner testified that a week after the interview he received a telephone call from panel member Karin Morin who explained that they had looked into the matter and realized he had been interviewed previously in Victoria, therefore the process would not be continued.

A. And I guess it was about 15 minutes later I got a call from Ron Tarnawski the Board Chair and he said, let me explain exactly what I meant, it's only if you were unsuccessful in the Victoria process were you being screened out because you were unsuccessful. And then we got into a conversation of well, that doesn't make any sense because if you're unsuccessful that's not what the – it doesn't say that on the poster. ...

...But from what I understood it was, if you were in Victoria and you were successful, from what he wanted me to believe, then you could ... apply and re-qualify again for Vancouver but that didn't make any sense to me. ... and I said, 'well, it doesn't make any sense, because people who are coming over that are

already successfully in a board, then why would you have them re-test again in Vancouver?’ And he Said, well, different board, different questions’.

Transcript: Volume One, section two, page 132, lines 1-9, 13-18.

[102] Following this conversation, Mr. Turner received a letter, Exhibit (Tab 68) dated June 1, 2004, sent by Mr. Tarnawski and Mr. Northcott stating that “... if you’ve interviewed for the above-mentioned position since January 1, 2002, you’ll not be allowed to go for this process.”

Q. And just to be clear, the “above mentioned position” is Metro Vancouver position. Had you interviewed for that before?

A. No. ...

The Chairperson: Can I just clarify something here? You said that Mr. Tarnawski said in telephone conversation, because you were unsuccessful in the Victoria Boarding, you were ineligible to apply for the Vancouver position.

A. That’s correct.

The Chairperson: And that was in April 04?

A. Of ’04.

The Chairperson: And you get this letter ... on June 1/04.

A. Yes.

The Chairperson: And looking at the first paragraph, what did you understand that to mean?

A. I understood that to mean that if I had interviewed for the above noted process, which it says there, specifically states Metro Vancouver, Pacific Highway and Vancouver International Airports, that I was ineligible for this process. And I had not interviewed for that specific position and that’s why I was questioning it. Even though it says there, that that’s what it is, it’s still the same thing as in the poster. I had not interviewed for that specific position.

The Chairperson: And then you said you wrote a letter to –

A. I did, yes, because I wanted to make sure that I got something in writing. It says here If I require information please submit request in writing. So I submitted a letter –

Mr. Yazbeck: This is tab 69.

A. Tab 69, thank you. Thanking the Board for the opportunity to compete and I wanted to, I told them that I had received my letter of disqualification and I wanted them to put down in writing what our telephone conversation was about. And I wanted them to make sure, and I said I did not board for the locations as stated in the competition. ...

The Chairperson: I guess their answer is going to be, am I anticipating that the position is Customs inspector and the location is irrelevant? Is that the explanation that they gave you?

A. They said, yes, it's the position. But not according to what the poster is. The poster, what I was led to believe, the poster is what it says, that it was for a position at metro Vancouver. And the position even though it's Customs inspector, is totally different at a big airport than it would be here in a marine port. So I wouldn't even think that (inaudible) it's saying it's the exact same position.

Transcript: Volume One, section two, page 135, lines 20-25; page 136, lines 1-2, 12-25; page 137, lines 1-25; page 140, lines 1-23.

[103] The Chairperson put further questions to Mr. Turner to clarify whether Mr. Turner believed the posting was for the general category of Customs Inspector or for Customs Inspector in Vancouver. Mr. Turner reiterated his belief that job opportunity was for the position of Customs Inspector in metro Vancouver.

The Chairperson: And then when I go to Tab 75, in the Agency's response to your complaint to the Human Rights Commission at page 566, they say "At your interview on April 26, 2004, you were advised of the restriction on the poster, applicants who had been interviewed for this position since January 1, 2002, will not be eligible for this process. When questioned regarding whether he had applied for the position since January 1, 2002 at the interview, Mr. Turner indicated he had not."

A. That's correct.

The Chairperson: Were you questioned during the interview whether you had applied for the position since January 1, 2002?

A. Yes, I was questioned.

The Chairperson: What did they ask you?

A. They said have you ever applied, and Ron Tarnawski said for "this position", and he had a copy of the position, the poster, on his desk, said for "this position". So when you do that, I assume it means, you know, for the Vancouver position. I had never applied for Vancouver before – or sorry, I had never been interviewed for Vancouver before. ...

The Chairperson: And your understanding of the question was?

A. Was that he was simply referring to the Metro Vancouver VIA position. Because before then they were always separate.

Transcript: Volume One, section two, page 155, lines 4-25; page 156, lines 1, 8-12.

[104] Counsel for the Complainant also asked Mr. Turner further questions on this issue:

Q. Mr. Turner, could you turn now to tab 80. ... This is another letter to (sic) [from] the agency to the Commission outlining its position. This is from February 2007. And I'd like to take you to page 624, so the second page of the letter. The second paragraph, full paragraph, starting with: "Mr. Turner has also been found to not be truthful on occasion. For example, when applying for the position and stating he had not been previously been a candidate in a recent process, was found to be untrue." I'm going to stop right there. Until you saw this letter, were you aware that the Agency had concluded that your statement about applying for the position was untrue?

A. No, Not at all. I wouldn't have had any idea until I got this through my (inaudible) request.

Q. And have you at any time been given an opportunity by the Agency to explain, to respond to the allegation that you're untrue (sic).

A. No.

Q. And in the same paragraph, there's a reference to you embellishing on your resume about being a police officer again was untrue. First of all, did you ever state on your resume or otherwise that you were a police officer?

A. No, I didn't.

Q. Okay, what did you say you were?

A. I said I was an Auxiliary police officer with over 2,000 hours of volunteer experience.

Transcript: Volume One, section two, page 164, lines 16-25; page 165 lines 1-19.

Cross-Examination of Levan Turner

[105] In cross-examining Mr. Turner, Counsel for the Respondent was faced with the task of establishing a rational explanation of the determination by a Victoria Competition 7003 managerial review panel that Mr. Turner lacked the competence and capability to be re-hired as a Customs Inspector, a function he had carried out during the prior four years. The finding, that Mr. Turner had failed to demonstrate his competency, was made after a one-two hour interview, during which the interviewing board members disregarded their personal knowledge that Mr. Turner had been assessed yearly and obtained positive performance reviews during his four-year stint as a seasonal term customs inspector.

[106] The thrust of Respondent Counsel's cross-examination was an attempt to demonstrate that Respondent managers, by their positive reviews of Mr. Turner as a customs inspector, could not have engaged in contemporaneous acts of discrimination or differential treatment of Mr. Turner, both before and during the interview process.

[107] At its high point, the Respondent's cross-examination failed to defuse Mr. Turner's allegation of discrimination by reason of race, age and disability. Transcript: Volume Two, section 3, page 137 to 145.

[108] In dealing with “Goals” and “Performance Expectations”:

Q. The first one is ‘provide quality service to our internal and external clients’ and this is the assessment that is given of you, Mr. Turner. It says: ‘Levan continues to show, year after year, quality service to the travelling public and his peers. An example is his on the job training of new staff. Levan extends courtesy and knowledge to the travelling public, so they understand what their rights and obligations are’.

Now, Mr. Turner, you’ve indicated and the basis of your Complaint is that there was something wrong. You’re employer had some issue with you, correct, in terms of either weight ---

A. Yes.

Q. – age? –

A. Right.

Q – race?

A. Yes.

Q. It’s certainly not apparent on your Performance Reviews, is it?

A. No.

Q. Consistently right through these Performance Reviews, they have assessed you in a positive way?

A. Yes. That’s why I was shocked when I had that e-mail from Terry at the end.

Q. So, if there was any calculated intent to treat you unfairly, you would expect quite the opposite? You would expect those – those – the differential treatment, the discrimination, to start appearing in the form of negative assessments in your Performance Reviews wouldn’t you?

Mr. Yazbeck: No, I'm going to object. I'm not – my friend is asking the witness to speculate about what Agency managers might have done in order to engage in this calculated attempt.

The Chairperson: I think it's a fair question, Mr. Stark.

Mr. Turner: Sorry, would you say that again?

...

Q. You wouldn't think that if there was a calculated intent, they would start to make negative remarks about you in terms of your performance?

A. No, and the reason why is because as a government agency, I don't think they would want to put something like that, especially related to race or age or weight into any sort of written document. That would be suicide on their part.

Q. Absolutely, but in terms of the overall assessment of your skills and abilities, they're not neutral, are they?

A. No.

Q. They're overwhelmingly positive.

A. Correct.

Q. They're if they had of been any calculated intent to discriminate against you, they could have given you neutral –

A. And then, I would have argued the point.

Q. They didn't do that, though, did they? They've given you glowing references in pretty much every category?

A. Yes, they did.

Q. All right.

A. Yes

Q. The only concerns that – the two concerns, the one I mentioned to you regarding bringing – how you bring matters to the attention to management and asking to do it in a constructive way, and then there's the issues with Terry Klassen that we'll go on to talk about in a second.? Those are the only concerns brought to you attention.

A. Well, the other one wasn't, not that I remember, but, yes.

Q. Okay.

The Chairperson: But Klassen was not brought to your attention?

A. Well, not at this point here. He was going to bring it up after my Performance Review. Yes, we had that discussion.

Q. Right. All right, and then if we go down to the second goal on this first page, page 2-33 of the Book of Documents, the objective is – goal is 'making appropriate decisions that are consistent with the customs priorities in an ever-changing environment', and your review is: 'Levan continues to learn and apply his knowledge. Thus he is able to provide clients with better service and options. He is able to function on his own in BBO and Clipper Commercial. At times he has taken on a leadership role when the superintendent is not on site.'

Again, that's a very positive review, isn't it – a review of you?

A. Yes.

Q. It's not neutral?

A. No.

Q. It's a clear message that management in terms of your performance is happy with the way you do your job?

A. Yes, with—Terry is anyway, yes.

Q. All right.

A. Because don't forget, it's only signed by one person.

Q. Now, you mentioned that it's only signed by one person. I'm not going to dispute that. I just want you to confirm and acknowledge that above these goals, there's an indication of manager's names or manager's name, and there's three individuals there. There's M. Gibbons.

A. Right.

Q. T. Klassen and R. Pinnering.

A. Yes.

Q. They were, in fact, your management team that had authority over you?

A. Well, Terry was acting superintendent, and the other two were – I think Mara was acting superintendent, and Rick was a superintendent, so, yes. I don't know if they actually read this or signed it – or anything, so I can't attest to that.

Q. All right.

A. You'll have to ask them.

Q. All right, and them, under the third goal, it says, 'Effectively communicates with clients and team members' and then you're assessed in this way: 'Through observation of Levan, he has shown a good ability to be clear and concise with travelers and team members. Communication to superintendents through the Flash Report was minimal.'

A. Correct.

Q. And, I take it 'communication to superintendents through Flash Report was minimal', that's a positive thing, rather than a negative ---

A. Yes.

Q. All right, so again, this is a positive thing, a positive review of you, in this area?

A. Yes.

Q. Next objective is 4, over the page. It reads: 'Works cooperatively with members of the team and with other teams', and then, the response and it relates to you: 'Through observation, Levan assisted often at cruise ships, and with the completion of the daily rosters. Levan was willing to take on a leadership role when asked and provided guidance to new employees.'

A. Yes, it shows I was working pretty hard, yes.

Q. And that's a fair representation of your work?

A. Yes.

Q. Not unfair one? It represents how you performed?

A. Yes. It says I was a good employee and I was working hard, and I was really busy.

Q. Now, finally, on this page and on this document, it says: '5; provides fair, responsible and effective enforcement of our programs', and then the assessment of you is: Levan has a good understanding of the customs enforcement and O.P. process. This can be seen through Seizures 8-1-1, - dash - '6002 - - 6063 and 2OP instance warrant and ASD "Warn"?

A. Correct.

Q. That's a good review, isn't it?

A. It's - yes it is. It shows I would be a good customs inspector.

Q. All right, now, over, over the page, this is where, - this is essentially the signature page here.

A. Yes.

Q. There's a few last - and it assessed you as meeting the overall valuation goals?

A. Correct.

Q All right, there's another category above that I suppose which it exceeds, but you've certainly been found to meet the appropriate criteria?

A. Correct.

Q. And then, the manager has got some comments here. He writes: 'In support of the overall assessment, write a brief narrative, and he has answered this essentially by saying, 'eligible for re-hire'?

A. Right.

Q. So, based upon this Performance Review, and it actually was the last one, I suppose, that you were – that was done of you while you were working at CBSA?

A. Yes.

Q. It's a very positive review?

A. Yes.

Q. And, it's marked very clearly on there that you're eligible for rehire?

A. Correct.

Q. It's a clear indication, at least, that the management wants you back next season?

A. Well, it's a clear indication that I'm eligible for re-hire because of my qualifications.

Q. Right.

A. It doesn't say that management wants me back.

Q. Right.

A. It just says I'm eligible for re-hire. There's a difference."

***Prima facie* case: – Evidentiary threshold**

[109] I conclude that Mr. Turner’s testimony in cross-examination sustained and buttressed his credible direct testimony; that standing alone, his testimony, on a balancing of probabilities, establishes a *prima facie* case of discrimination as alleged against the Respondent.

[110] Moreover, Mr. Turner’s evidence is enhanced when considered in the context of Mr. Chris Hughes extensive evidence concerning the Respondent’s employment practices and procedures.

E. Witness: Terry Berent Klassen

[111] Mr. Klassen testified that he was a Border Services Officer, 18-years into his career with CBSA. He has spent the last 8 years in Victoria, where he became acquainted with Mr. Turner as a co-worker, particularly during the summer of 2003 when, as an acting-superintendent in the marine section, he supervised Mr. Turner.

[112] When Respondent Counsel asked for an explanation of the process to complete a performance assessment of an employee, Mr. Klassen described the goals and objectives which are outlined for the employees at the beginning of the summer, and that “...at the end of the summer we would sit down with them again and take a look at the goals and objectives, and relay to them how we felt, either they met them or did not meet them.” Transcript January 19, 2009: page 15, lines 15-18.

[113] Mr. Klassen identified Exhibit Tab 77, (in Volume 3 - Respondents Book of Exhibits) a document dated September 26, 2003, as Mr. Turner’s performance report that he reviewed with Mr. Turner that evening.

Mr. Stark: Did you have a lengthy discussion with Mr. Turner about his performance that year?

A. The actual performance evaluation that we’re seeing in front of us right now probably would have been, I don’t know, maybe 10 to 15 minutes in length, after

which Levan and I would have signed it off, given him a copy of it, and then we sat down and talked some more, ... about how Levan was perceived, how his work ethic was perceived by the CBSA Superintendents of Victoria.

Transcript January 21, 2009: page 24, lines 3-8.14-16.

[114] During Mr. Klassen's testimony concerning Mr. Turner's perceived work ethic, the Chairperson became involved, told Mr. Klassen he was again being very vague, and directed Counsel to bring him to the point. Respondent's Counsel then produced Exhibit Tab 80, identified by Mr. Klassen as an e-mail sent to himself of what he had discussed with Mr. Turner after the assessment was reviewed and signed off. The email read in part:

... I then went to the point and started talking about how he is perceived i.e. how he sometime shies away from the harder tasks, or knows the right procedure (a difficult task) to take but ask to supt for "advice" hoping the supt will use their discretion and go the easier way. It was also pointed out how other inspectors had complained that he had left cash outs for others to do instead of doing them on his shift. These points were delivered in a very compassionate way and Levan responded with shock but not defensively. He kept on saying this is contrary to his work ethic/nature and the way he sees the world. He asked why he had not been talked to about this in the past and I responded I did not know and thus it was not included on his assessment as he was not made aware of it and could not respond or take corrective action. He felt if supts would have come to him at the time of their concern he could have explained his actions so that it would not be seen as him sloughing things off.

I went on to explain this perception has been around for a couple of summers and that it was something he would need to work on next year by taking on those difficult tasks and being cognisant of his decisions so that he is not taking the easy way out. I reminded him that this is not how he is perceived all the time but rather I see him as a very good communicator that works well with the public and continues to grow in knowledge. ...

[115] When asked about the email, Mr. Klassen stated the following:

Mr. Klassen: This information in here is not reflected in his assessment, because of the fact that these issues hadn't been raised with Levan. So, it's not fair to base his assessment on these perceptions or observations, because they hadn't been discussed with him at this point in time until that point. So, that's why you don't

see any of these observations or concerns or perceptions listed in the performance evaluation of 2003, the summer of 2003.

So, you know, this talk was had with Levan so that coming back to us in the year 2004, which I had recommended that he be rehired for. Then his next Superintendent the next year could have – could see this conversation that had taken place with Levan and, you know, work with him to ensure, you know, that these objectives, these learning points were achieved the next year.

Respondent Counsel: All right. Now, who – did someone, perhaps one of the other Superintendents, ask you to have this conversation with Mr. Turner?

Mr. Klassen: I'm afraid I, don't recall. It would be – I think I initiated it on my own but I'm afraid it's just a guess.

Transcript: Page 26, lines 5-25, page 27, lines 1-3.

[116] The Chairperson again intervened and asked Mr. Klassen if his e-mail related to his after-the-performance-review dialogue with Mr. Turner.

A. I raised these issues, yes, from this e-mail – sorry, I raised -- I talked with Levan about these different issues, perceptions that were out there about Levan, and then I summarized it and sent it off to the Chief in this e-mail.

Transcript: Page 1764, lines 2-6.

[117] The Chairperson persisted and asked why the email, Exhibit Tab 80 was not sent to Mr. Turner. Mr. Klassen's reply appears responsive; however, in cross-examination it is revealed to be an irresponsible exaggeration and not factual.

The Chairperson: You prepared this, according to this it shows you prepared it on October 3rd and it went to Diane Cavalaars and the other Supers on the next day.

A. Yeah, that's – I think I probably had the e-mail in draft form for a while and was – I'm sorry, I don't recall if I started on it immediately after I spoke with Levan or if there had been a couple of days that transpired before I started composing the e-mail.

The Chairperson: So, the e-mail outlining the detail, we've seen it before, I believe, and without going through it in detail, these were concerns that others had expressed and also reflected some of your concerns?

A. Correct, with some of the other superintendents and some of mine. ...

The Chairperson: Why wouldn't you have passed this e-mail on to him and made him aware ...

A. ... I'm afraid I don't know why he hasn't been given a copy of it, why I didn't forward a copy of the e-mail to him at that time."

Transcript: Page 29, line 25, page 29, lines 1-25, page 33, lines 22-25, page 34, lines 8-10.

[118] At one point Respondent Counsel attempted to have Mr. Klassen clarify his evidence concerning the source of perceptions of Mr. Turner.

Mr. Stark: All right. You also make comment there that how he is perceived. Is that the perception of others, or is that your perception

Mr. Klassen: The perception of how he was perceived was – would have been from other Superintendents, as well as some of his co-workers.

The Chairperson: ... where does it say that, how he was perceived?

Mr. Stark: It doesn't. I'm asking him in general a question with respect to that. It's not in his e-mail, although I'm referring, I guess in a sense, to the first line when it says: I went to the point and started talking about how he is perceived?

[119] Mr. Klassen described the end of summer meeting of superintendents as a roundtable, but named only himself, Rick Penneger and Mara Gibbons as participants; that it was Rick Penneger who "... made comments alluding to some of these perceptions of looking for an easy way out, ... not helping out as much as maybe some of the other officers." Transcript January 21, 2009: page 36, lines 19-25; page 37, lines 1-6, 24-25; page 38, lines 1-6.

[120] Under cross-examination Mr. Klassen admitted that the one incident of Mr. Turner supposedly taking an easy way out was not an enforcement incident. Rather, it was a procedural situation involving paperwork that might have taken up to an hour to complete. Mr. Klassen agreed with Mr. Champ, Counsel for the Complainant, that it was likely that Mr. Turner had the interests of the traveler in mind. Mr. Klassen agreed that Mr. Turner had proactively developed a basis for experienced officers to engage in learning circles with newly-employed officers, a positive example of Mr. Turner's work ethic. Nevertheless, Mr. Klassen stubbornly maintained that this one incident with a late traveler was a shortcut, and was in keeping with the superintendents' perception of Mr. Turner.

[121] Notwithstanding that Mr. Klassen's evidence was often hesitant and vague, it does establish beyond doubt that the Victoria superintendents were engaged in an pattern of assuming, without proof, that Mr. Turner was avoiding carrying out the full extent of his duties – assumptions which they intellectualized as negative “perceptions” – knowing full well that perceiving Mr. Turner as a shirker was diametrically opposed to their own effusive managerial assessments of Mr. Turner, documented in performance reviews in each of his five years of employment as a term Customs Inspector.

[122] That Mr. Klassen sent his e-mail to the Chief Superintendent and other superintendents on October 4, 2003, only a week before a poster, dated October 11, 2003, was published, announcing the Victoria 7003 staffing competition, brings into question the impartiality of the panellists in their interview of Mr. Turner and their finding that he was not qualified to continue in employment as a Customs Inspector.

F. Witness: Trevor Baird

[123] At the time of his testimony Mr. Baird had been with CBSA and its predecessor agency CCRA for 15 years, and was employed as Chief of Operations, Port of Prince Rupert. Mr. Baird had prior stints in the Lower Mainland operations of CBSA, including the Flexible Response Team dealing with enforcement, and in Victoria from 1999 to 2004, becoming a superintendent in 2002.

[124] Work assignments of customs inspectors at the port of entry of Victoria.

The Chairperson: When you are a superintendent in marine, you are a superintendent responsible for a particular shift, is it just up to the officer to decide where they are going to go? And if you are working in TRC and things get slow, well, I think I will go wander over to Marine, or I will wander over to secondary on the ferries, or I will just sit here and do nothing, or I'll just wander over. Is it that lax or that loose?

“A. ...the way it's structured, is that we've broken into – Victoria is broken into specific working units. ... And so the telephone reporting centre has a superintendent that is responsible for managing that piece of the operation.

The marine section, which is responsible for doing all the outside processing, which encompasses cruise ships, ferries, aircraft, pleasure craft, float planes, that sort of stuff, will have at times up to three superintendents responsible for it because they are running a seven day week operation encompassing day and afternoon shift.

The long room, or our storefront operations, typically has two staff members working in it and they report to the commercial superintendent. So there are three distinct working units going on.

As it relates to marine activities, there is a roster daily, and staff are assigned specific duties during the day. And if there are a number of ferries coming in, for example the Clipper ferry which comes in multiple times a day; the Coho ferry which comes in, I believe, twice – or at least daily – it did back then – the roster will designate what staff are needing to be ferry and what specific function they should be doing, whether it be primary or secondary.

Now, you know, the roster is subject to change, but it gives you the basic outline of what your day looks like.

Alternatively the TRC, it's a very static location. If you are working in the TRC you know you are going to be there all day unless your task was going out and doing other things.

The superintendents ultimately what they are responsible for in a very simplistic example, is they are trying to manage the resources they have to cover off all the business pressures in a day. And if they encounter problems during the day where there are unexpected arrivals, or perhaps seizures going on that require attention,

they will draw on resources throughout the operation in order to – to keep things moving. So conceivably a marine superintendent could phone the TRC and say, you need to send me some resources, we are backed up.

So it is a very fluid environment and I suspect at times it probably does seem like there is a lack of control, but the superintendents have a large number of factors that cause interruption in their day, and they are really trying to manage that.

Transcript: January 21, 2009; page 93, lines 20-25; page 94, lines 1-25; page 95, lines 1-25; page 96, lines 1-6.

[125] Mr. Baird was Mr. Turner's supervisor in the marine section from May to September 2002. When asked for his impression of Mr. Turner as a customs inspector, Mr. Baird delivered the following backhanded characterization:

And I think that's where my primary impression comes from is my time as supervising Levan and, you know, again, there are things that as an employee I like about Levan and that he does well, but I would not characterize Levan as fully, fully developing into all of the roles that is expected of a Customs Inspector. And when we're talking about a part of the job being client services or dealing with agents or brokers or, you know, working the Telephone Reporting Centre or those sorts of – parts of the job that are more client service oriented, I think, you know Levan has a skill set to do that and I think he's very comfortable doing that and does a good job doing that.

In relation to the parts of the job that are more proactive in terms of enforcement and being out trying to identify non-compliance amongst travellers, doing secondary exams, seeing them through to enforcement, such as seizures, that was not a strong suit, in my opinion, for Levan.

Transcript: January 21, 2009; page 97, lines 19-25; page 98, lines 1-13.

[126] Mr. Baird identified Exhibit R-3, Tab 75 (cross-referenced C-1, Tab 12) as his mid-summer performance review of Mr. Turner, which included the following comments relating to Organizational Competency.

I've always found you to be very polite and courteous when dealing with the public and fellow officers. You always present yourself in a professional manner or even in difficult circumstances. You have a good understanding of Custom regulations and are able to fulfill cash and commercial roles in the ferry terminal.

Transcript: January 21, 2009; page 100, lines 8-15.

[127] The review contained the following addendum: “When bringing work-related questions and concerns forward there is an expectation that it will be done in a constructive manner in order to seek a positive resolution.” Transcript: January 21, 2009; page 101, lines 8-11.

[128] This comment related to non-work times when Mr. Turner was observed with other employees engaging in down-time workplace bull sessions complaining about things happening on the job. Mr. Baird testified that while the complaints were legitimate, the resolution to those problems should be done in a constructive manner.

[129] In this mid-performance review (Exhibit C-1, Tab 12), after the addendum, Mr. Baird added:

You have a demonstrated ability to effectively communicate with clients and fellow officers. You're able to complete well written, detailed reports and accurately complete Customs forms. You're able to effectively ask questions, listen to responses, and respond accordingly. You have the potential to become a very effective interviewer.

Since discussing the need to bring forward issues in a constructive manner, I observe an immediate response from you to rectify this issue. **I appreciate the effort you have made and encourage you to continue dealing with the outstanding issues in this constructive manner. (emphasis added)**

I would like to encourage you to gain more exposure in enforcement through secondary exams.

Transcript: January 21, 2009; page 106, line 25; page 107, lines 1-8; page 108, lines 13-19; page 109, lines 22-25.

[130] In his cross-examination Complainant Counsel, Mr. Champ, focused on concerns of Mr. Baird regarding Mr. Turner's lack of experience in conducting secondary examinations.

A. Within the scope of secondary, interviewing is part of that. The other part to that is examining vehicles, examining baggage, dealing with persons that are

under detention or in custody, personal searches or personal searches is a technical term, strip searches. So, what I'm saying is, you know, that he has an excellent understanding of our primary and secondary procedures, but I'm not specifically notating interviewing.

Q. Would interview be an examination?

A. It would be part of an examination.

Q. Because the last one is: "You also demonstrate good judgment while dealing with secondary examination and enforcement activity." So that would include interviews as part of that, I would gather?

A. It would.

Q. So, I guess on the whole what I'm trying to say, Mr. Baird, is at mid-term you had observed that Mr. Turner, in your view, was not getting involved in many secondary exams; correct?

A. That's correct.

Q. So, in other words, your opinion, once you actually started – once you raised with him that you wanted him to do more of that, he addressed the fact that he had been doing it. In fact you were very pleased with what he had done.

A. Correct. From the time the mid-term assessment was delivered in August -- until the final assessment was delivered in October.

...

Q. And by the end of the year you're saying: "You've been involved in many secondary exams"; correct?

Q. Yes.

Q. ...and in a lot of those secondary exams, I gather that Mr. Turner would have been showing initiative, or he wasn't sloughing things off, he was getting involved and helping out?

A. That's correct.

Q. Because earlier you had suggested that just from your observation he seemed to hang back a bit?

A. Yes, it was.

Q. And I gather that that was also addressed by the end of that term?

A. Yes, it was.

Transcript: January 22, 2009; page 38, lines 20-25; page 39, lines 1-25; page 40, lines 1-24.

[131] When asked about the Victoria Competition 7003, Mr. Baird identified Exhibit R-1, Tab 47 (cross-referenced C-2, Tab 43) as a lead sheet relating to the interview of Mr. Turner that he conducted in Victoria with co-panellists Ms. Pringle and Ms. Zabos. Mr. Baird testified that the entries written on the lead sheet related to the competencies 'Effective Interactive Communication' and 'Teamwork and Cooperation'; that in these competencies Mr. Turner was given failing scores of 60 and 40.

[132] Mr. Baird identified written comments of co-panellist Catherine Pringle, made after the decision that Mr. Turner was not qualified. Ms. Pringle recorded that Mr. Turner had failed to be clear and concise in the matter of his relationship with the Toronto Police Services, leading them to assume that he had been an officer with the Toronto Police Services rather than an auxiliary. The review panel's assumption resulted from the fact that they had not examined Mr. Turner's resume which stated he was an auxiliary officer. Nevertheless Mr. Baird and Ms. Pringle determined that Mr. Turner hadn't been clear in what he was communicating, *ipso facto* he was embellishing and not truthful.

[133] In responding to questions from the Respondent's Counsel, Mr. Baird tended to generalize his answers. One instance of this occurred when Respondent Counsel asked Mr. Baird to indicate where, in Mr. Turners written response to the portfolio of competencies, Mr. Turner had made negative comments of other persons.

Q. ...if we may go to tab 47 again at the assessment we are at ... then under 'comments' you have got another notation: 'Written material. Paints other negatively.' ...where is it in Mr. Turner's written material where he paints others negatively?

In a number of the competencies there were **areas that appeared to paint others in a negative or diminished light** in their involvement in the examples. Dealing with difficult situations was certainly an example. Teamwork and Cooperation **we also notated in our notes some of the articulation we felt was negative or derogatory – not derogatory, but diminished others'** involvement is the example, as well as decisiveness as another example. (emphasis added)

Transcript: January 21, 2009; page 173, lines 21-25; page 174, lines 1-5.

[134] Counsel asked Mr. Baird for a specific example in Mr. Turner's written submission and Mr. Baird chose "dealing with difficult situations".

A. "In this example is an example where there is an agitated traveler. Our detector dog, handler and canine are trying to do an exam of the vehicle. The superintendent is involved, at that time, Nina Patel. And essentially the traveler is agitated and highly aggressive. In the example it appears that the individual is going to be going back to the United States, isn't admissible at this point in time.

And in the example Levan is providing an example where he got involved at some point during the secondary examination and his projection of it was able to calm the traveler and provide an explanation as to what was going on, and essentially resolved the situation. And this example, in written material there are some things that I would point to – and I had come back to point to them – that detract from other's involvements. And that certainly came out at the interview when probed on them. Probed on those specific things that he tended to overstate or embellish his role at the expense of others involved.

If I can just have a moment, I am just going to review the written submission specifically. For example: "Nina stayed behind me and I kept other officers away while I spoke to the individual. When she could see that I was able to calm him down, she approached and started in on the conversation. From this point on I was the only officer this gentleman would talk to."

In this scenario Nina Patel was the acting superintendent of this situation. And you know, an officer with a lot of experience dealing with hostile and aggressive travelers in highly charged situations. And I don't – in my own experience she would not stand back and keep other officers away for somebody else to come in and deal with it. So although subtle, it's not one thing to say I came in and helped, and participated, and tried to calm the individual. But in the sentence he is saying I came in and took over and she stood back and kept others away while I dealt with it. And that – although on its own, is not significant, it's a flag that we noted.

Transcript: January 21, 2009; page 174, lines 18-25; page 175, lines 1-23; page 176, lines 1-12.

[135] With unbridled and inarticulate prolixity, Mr. Baird continued his answer – it spanned a further five pages of transcript – painting Mr. Turner as inarticulate and as an embellisher. In doing so he exhibited subjective partiality. I find that it was egregious of Mr. Baird to re-assess Mr. Turner's written response to the portfolio of competencies which had to have been examined and assessed by one of Mr. Baird's fellow superintendents, and given passing grades.

[136] Mr. Baird testified that Mr. Turner's account of the incident with a difficult traveller was contrary to his own knowledge of Ms. Patel's ability to deal with hostile and aggressive travellers in highly charged situations, and therefore he had rejected Mr. Turner's account of the incident as an embellishment.

[137] Approximately two weeks after the review board made its determination that Mr. Turner was no longer qualified to be a Customs Inspector, Mr. Baird sought out Ms. Patel to get her version of the incident.

[138] Mr. Baird testified that he engaged in a telephone conversation with Ms. Patel on January 22, 2004 and, from his notes, informed her of Mr. Turner's account of his dealings with the difficult traveler and asked her if it was described accurately. Mr. Baird referred to notes of his discussion with Ms. Patel:

There's recognition in that Levan did deal with this traveller that, you know, he was good in dealing with him. There's a comment there that he was, you know, his jovial self, but she went on to disagree with his portrayal of his involvement in

the example and she makes note that you know, he's making others look worse to make himself look better. She maintains that she maintained control of the situation of the individual. She stated that she felt it was, in her words, 'completely embellished.' She also stated, and this was actually in line, too, that she didn't feel that his involvement was – that it was not instrumental in dealing with this traveller. She also noted that she felt he, from his perspective, he may think this was his involvement in the example.”

Transcript: January 22, 2009; page 22; lines 7-24.

[139] In cross-examination, Mr. Baird was asked why he felt the need to contact Ms. Patel, when he and Ms. Pringle had already disqualified Mr. Turner from the selection process.

The Chairperson: So, why did you call her?

Mr. Baird: Well, because, really, I wanted to know whether the example – because in the example, as it was portrayed and it was articulated at interview, it was so inconsistent to me that I wanted to follow this up at reference.

Mr. Champ: What was the difference to you at that point, Mr. Baird? ...

A. Well, the short answer is there was no difference other than I wanted to follow this up.

Q. Other than you wanted to prove that Mr. Turner was a liar?

A. No, I wanted to validate whether or not the example as presented was accurate.

Q. You wanted to validate it was accurate. You wanted to prove Mr. Turner was a liar, correct?

The Chairperson: I think “liar” is a bit strong, Mr. Champ.

Q. It's over a month later. You're far advanced now in the process. Mr. Turner is already out of the competition. Why did you feel it necessary to validate the accuracy of the information at that stage?

A. Because from the interview I had questions and I wanted to allay those questions, but you are quite correct, I did not need to do it.

Q. And what purpose were you going to make of it.

A. No purpose.

...

Q. ...You took a lot of initiative to track down Ms. Patel in Quebec to get her recollection of the events, I'm just wondering why?

A. ...At the time it was presented at interview I had questions and I found that his portrayal was so inconsistent with what my knowledge of the workplace was, my observations that I wanted to validate this example, which as a board member, is an option that I have.

Transcript: January 22, 2009; page 93, lines 18-25; page 94, lines 1-22; page 96, lines 2-13.

[140] At one point in the cross-examination of Mr. Baird, the Chairperson and Complainant Counsel engaged in a discussion of the purpose of questions being put to Mr. Baird.

Complainant Counsel: First of all he (Mr. Turner) is invited by his superintendent (Ms. Patel). And his superintendent is dealing with a difficult traveler. So Ms. Patel is right in front dealing with this difficult traveler. She invited or asks Mr. Turner to help out, to take over the discussion, to talk to this individual. Then subsequently he is dealing with the dog handler ---

The Chairperson: Let's get to the point Mr. Champ. It seems to me I may ask this question – if you were just concerned how Mr. Turner expressed and depicted his colleagues, but you went further than that, didn't you. You said I, in judging this particular example and scoring it, I am going to deduce my knowledge of these two colleagues and I don't believe they would act that way. And thereafter I'm questioning the veracity of the example, which is a different thing than just scoring the way it was communicated. So you would deduce extraneous knowledge that was beyond Mr. Turner's example. Is that correct?

Mr. Baird: That's correct, although we did not score dealing with difficult situations. As it relates to teamwork and co-operation, we were dealing – the issue of – what prompted me – what prompted me to contact Nina Patel ---

The Chairperson: No, before that because you said before you contacted – I understand what prompted you, because she’s a validator. And your evidence in chief – in chief in particular, you stated that you did not think that Nina Patel or Ken Moore would act that way on the basis of you working with them for so many years.

A. Correct.

The Chairperson: So you brought in extraneous information that wasn’t in the – Mr. Turner’s example, and you used that partly, or [indiscernible] as a basis for not qualifying Mr. Turner. That was part of the reasons why you didn’t qualify him. Whereas you are saying I only looked at what was in the package. I looked at how it’s communicated. I asked him some questions in the interview. And I didn’t like the way he communicated, or how he described the situation because it looks like he was making himself look better and everybody else involved look bad. That is not good teamwork and co-operation. Right. You didn’t have to go to your knowledge of these other two people and how you think they would have reacted, because that was extraneous. That wasn’t in the material.

A. That is correct, sir?

...

The Chairperson: Mr. Baird, if you had called Ms. Patel, and she had said he was entirely right in what he said, would you then have changed your score?

A. No.

Transcript: January 22, 2009; page 89, lines 15-22; page 90, lines 1-25; page 91, lines 1-25; page 92, lines 1-25; page 93, lines 14-25; page 94, lines 1-23; page 96, lines 21-23.

[141] I conclude that the foregoing answers by Mr. Baird concerning his post-interview contact with Ms. Patel are implausible. While aware of Mr. Turner’s growing competence as a customs inspector, it was discreditable of Mr. Baird to claim that he had an option, which he exercised after the Selection Board determination, to resort to his alleged personal knowledge of Ms. Patel, Mr. Moore, and the workplace.

[142] In his direct evidence Mr. Baird summarized his views of Mr. Turner's written response to the portfolio of competencies:

In regards to the written package, it was our observation through, not the entire package, but certainly a large percentage of the package he submitted we've talked about dealing with difficult situations; we've talked about adaptability; we've talked about teamwork and cooperation, and it was in his presentation of his examples where he would overstate or embellish his involvement and provide a negative or detracting articulation of others' involvement. So, in essence, making himself look good at the expense of others involved, and that was a consistent tone throughout the interview that the Board picked up on. And, again, in regards to my notes specifically, it's throughout the interview examples as we go.

Transcript: January 22, 2009; page 16, lines 5-19.

Relevance of Mr. Turner's positive performance reviews.

[143] In cross-examination, Complainant Counsel challenged the Board's determination that Mr. Turner was not qualified to be a Customs Inspector, a determination at odds with Mr. Turner's five-year positive work record which included positive performance reviews completed by Mr. Baird in 2003.

A. I would not go so far as to say it was entirely inconsistent; however, there would be inconsistency in that there was observation that he has over the years contributed to the team, but again, we're scoring the example as presented.

Q. And that excluded all other consideration?

A. Yes. Well, we have to score what is presented at the interview.

Transcript: January 22, 2009; page 28, lines 19-25; page 29, lines 1-2.

[144] Complainant Counsel reminded Mr. Baird that Assessment Standards in the posted notice of the Victoria employment opportunity informed applicants that they may be assessed by standardized tests, written examinations, interviews, reference checks, and employment performance reports.

Q. ... it was right in the poster that candidates knew that their performance assessments might be considered?

A. That was an assessment tool we could use.

Q. But you chose not to. Why not?

A. We did not ask any candidate to provide an employee performance management report.

Q. Why not?

A. Well, because not all employees or applicants would have had employee performance evaluations, and we had enough assessment tools within the other ones listed that using that last tool wasn't even considered.

Q. Because there were some people that were hired, in fact, who had no experience in Customs, in that process; correct?

A. I believe so.

Transcript: January 22, 2009; page 58, lines 4-20.

Q. Do you think it would have been reasonable for Mr. Turner to expect that you would have had regard for his performance assessments?

A. No.

Transcript January 22, 2009; page 57, lines 6-9

[145] Mr. Champ put Exhibit R-2 Tab 52 to Mr. Baird, it listed persons found qualified in the Victoria Competition. Mr. Champ named five persons, two had never worked before at customs, two who had only worked one summer with customs.

Q. Just in general, Mr. Baird, though, you recall there were some people who had gotten through the competition who had maybe only one summer or no experience in customs in that pool?

A. I was certainly aware that candidates were applying and had various work backgrounds and some had not worked for customs or had worked for customs for a short time.

Q. And yet – you were satisfied that those people were more qualified than Mr. Turner who had five years ... experience as a customs inspector.

A. In the scope of assessing the competence we are asking for, yes.

...

Q. And in Mr. Turner's case you were very confident that Mr. Turner was completely unqualified?

A. I was absolutely certain that he had not met the qualification standard we were looking for based on his submissions and the assessment tools we were using.

...

Q. But at the end of the day here was someone who had been a customs inspector for five years; someone who you had supervised for a season, were you – in any way had concerns about - the ultimate validity of the process?

A. No.

Transcript: January 22, 2009; page 103, lines 1-14; page 104, lines 3-19,

[146] When considered in the context of his personal supervision and glowing assessments of Mr. Turner's work as a Customs Inspector, Mr. Baird's flat "No" is not worthy of belief.

Klassen e-mail

[147] Mr. Baird testified that it was not unusual for Superintendents to meet and discuss issues in the workplace including various employees. But when asked if he recalled any discussion in superintendent roundtable meetings concerning Mr. Turner, and whether he recalled any negative opinions about Mr. Turner being expressed by Mr. Penneger, Mr. Klassen or Ms. Kavalars, Mr. Baird's answer in each instance was "I do not."

[148] Complainant Counsel put the Klassen e-mail (Exhibit R-3, Tab 80) to Mr. Baird. After reading it, Mr. Baird denied receiving it, then said it would not be unusual to get such an e-mail from another Superintendent and conceded that he had seen similar e-mails before. Mr. Baird also confirmed that "... theres a lot of points that have been raised that are consistent with observations I have made." Transcript: Transcript: January 22, 2009; page 45, line 1; page 46, lines 1-2.

[149] When Complainant Counsel asked if the Klassen e-mail raised flags about Mr. Turner, Mr. Baird responded irrationally, throwing discredit on his testimony: "I don't even know, sir, if I read this e-mail. I get hundreds and hundreds of e-mails and I do not read every one." Transcript: January 22, 2009; page 47, lines 21-23.

[150] Mr. Baird deepened his discredit when he stated:

... If I was tasked to the Portcullis, there's probably a better chance I didn't read it, because it didn't involve me at all. If I was working in Marine that summer – and again, I'm sorry of my confusion – but if I was, you know, **I very well may have read the e-mail, I may not have**, but I get an overwhelming number of e-mails and I certainly do not read every e-mail line by line. So, I can't with any conviction say I read this e-mail. I don't know that I did.

...

Mr. Champ: Well, sir, this e-mail is October 4, 2003, and the competition for which you were the Selection Board Chair was announced about one week after that. ... by the end of October '03, all the applications were due, so you got all those applications. You read them all at some point in November and then you started interviews in December '03. That's roughly accurate?

Mr. Baird: I believe so, yes.

Mr. Champ: I'm just wondering, when you were reviewing Mr. Turner's application maybe less than a month later, a month later, did you consider that in your e-mail box you had an e-mail that said: "subject: Talk with Levan after assessment?"

Mr. Baird: No, I don't even recall seeing this e-mail. So the answer is no, **only to the scope that I don't remember seeing it.**

Emphasis added

Transcript: January 22, 2009; page 48, lines 1-12; page 49, lines 11-25; page 50, lines 1-2.

[151] Complainant Counsel then asked Mr. Baird if he recalled Mr. Klassen's second e-mail to Superintendents dealing with sick leave, Exhibit R-3, Tab 81, and Mr. Baird said he did not.

M. Champ: Did you review these documents to be ready for today?

Mr. Baird: No, I did not.

Mr. Champ: These two e-mails? You did not? Do you think there's any chance that these e-mails influenced how you handled that Selection Board assessment with Mr. Turner?

Mr. Baird: I don't believe so.

Mr. Champ: And why do you say that?

Mr. Baird: Because I don't remember seeing the e-mails.

Transcript: January 22, 2009; page 53 lines 1-12.

[152] I conclude that Mr. Baird's assertion that he never read the Klassen e-mails was evasive and not worthy of belief. I find that Mr. Baird was either negligent in not reviewing the Klassen e-mails when he received them or, more likely, that he reviewed them, and realizing how damaging that admission would be resorted to evasion; and in doing so his actions raise a significant question as to the propriety of the Selection Board process concerning Mr. Turner's application for consideration as a CBSA employee.

Mr. Baird on veracity of Mr. Turner

Mr. Champ: I'll just be a moment, Mr. Chair, and I will be done ... there is one other point I want to make.

Q. Just on the recording of auxiliary officer in hour selection board interview assessment, you said that you felt Mr. Turner was misleading and suggesting that he had been a Toronto police officer?

A. Correct.

Q. Is it possible that was just the way you interpreted it, what he said?

A. That is possible. But ultimately it was – it was him articulating his experience. And it could have been articulated in a manner that was more clear. And so you are correct, it could have been my interpretation of what he said, but that was my interpretation.

Q. It was right in his resume that he had been an auxiliary police officer. Do you believe it was his intent to mislead you ... I am just asking you, you seemed to have a tendency when you were scoring Mr. Turner that at every time whenever you had concerns about something he said that you jumped to the conclusion that he was being dishonest; is that fair to say?

A. No.

Q. No? Or that you just doubted the veracity of what he was saying on many occasions?

A. At times.

The Chairperson: What was your answer Mr. Baird?

A. At times, sir.

Transcript: Jan. 22, 2009; page 105, lines 20-25, page 106, lines 1-13, 22-25;
page 107, lines 1-7.

G. Witness: Nina Patel

[153] In November 2008, at the time the Tribunal conducted its inquiry into Mr. Turner's complaint, Ms. Patel had been a federal employee for thirteen years, initially with Revenue Canada, then CCRA, and after 2003 with CBSA. She spent two summers in Victoria, May to

September in 1995 and 1996 as a student customs officer, then bridged to term employment in Stewart, B.C. 1996 to 1999 – during that time achieving indeterminate status – returned to Victoria until 2002, followed by a teaching assignment in Rigaud, Quebec for a year and four months instructing recruit customs inspectors, thereafter returning to Victoria as an acting-superintendent, and through competition, becoming a superintendent. “And I’m currently an acting-chief of operations for the Ports of Huntingdon, Aldergrove and Abbotsford airport on the lower mainland in the valley.”

[154] Ms. Patel identified a written response by Mr. Turner to a portfolio of competencies (the particular competency being ‘dealing with difficult situations’) and acknowledged that it revealed that Mr. Turner had named her as a person who could validate a particular incident which he relied upon to demonstrate his competency as a customs inspector.

[155] Ms. Patel agreed that the document described an event in Victoria, and that it was endorsed with some notes dated January 22, 2004, presumably made by superintendent Trevor Baird; and she testified that she couldn’t recall whether Baird read it to her over the phone, or showed it to her to read. “I don’t recall the particulars of what I said to him. I do recall that I didn’t validate the competency based on that I don’t know the specifics of it.” Transcript: Volume Two, section 5, page 228, lines 13-16, page 232, lines 2-5.

[156] Respondent Counsel then stated

...perhaps I’ll take you through the notes that Trevor Baird has made of your conversation and perhaps you can tell me whether that assists you with your recollection.” Thereafter Ms. Patel’s answers were qualified by “I think so”, “I don’t by memory recall that those are exact words that I stated ...”, “I don’t recall”, and similar expression of inability to be precise in her recollection.

Q. Right. And then there’s another line: From his perspective he may think this or that – I’m not sure which that is. Again, does that accord with your recollection of the information you provided to Superintendent Baird?

A. Right. ‘Cause when you’re writing competencies and then you’re writing them from your point of view and then when I said it was completely embellished or

that, you know not my character to go behind. However, from Mr. Turner's point of view, he might have felt that that was the situation.

Transcript: Volume Two, section five, page 232, lines 6-10, page 234, lines 21-25;
page 235, lines 1-2.

[157] The following testimony by Ms. Patel provides insight into Mr. Turner's account of his participation in the incident:

Q. ... This male was yelling racial slurs at other officers. What was the – was this individual known to you?

A. This – I can't recall exactly how he was known to us. But I do know that he had been through before. I don't know the circumstances surrounding why he was.

Q. Now in the sentence after that, there's one, it says: I know it's just Nina trying to talk to him and cool him down. But he did not like her at all. What would you say in response to that?

A. ... I don't recall that at all. I felt in that situation that I did relate to this individual and was able to communicate with him. So I didn't see that at all.

Q. ... next sentence says: Nina then came over to me and asked me to talk to the individual. Did you request Mr. Turner to intervene?

A. I don't recall specifically. But that wouldn't be abnormal for me to have asked Mr. Turner to do so.

...

Q. And why would that be? Why wouldn't it be abnormal for you to ask him to do that?

A. Well, because A, if what was going on there as Mr. Turner was coming down to the situation and I needed assistance, I would have definitely have asked somebody to help out. And Mr. Turner does and has always had a demeanor that is calming and is one that he's able to talk to people. So I probably definitely – I

don't remember the specifics of it. But I don't see any reason why I wouldn't have asked him.

Q. All right. And then you have the next line: Nina stayed behind me and kept the other officers away while I spoke to the individual. Is that something you would have done?

A. I don't recall. I don't recall exactly.

I can't see myself totally disengaging from the situation. It's not my personality and not something I would do.

Transcript: Volume Two, section five, page 236, lines 21-25, page 237, lines 1-19, page 238, lines 7-25.

Cross-Examination of Ms. Patel

[158] In cross-examination Ms. Patel was asked to comment on notes made by Mr. Turner recording the incident.

Q. Now do you recall that you didn't validate the event?

A. That's correct.

...

Q. Now, in the notes here – this records you as saying that Levan was good with this person?

A. Mm-hmm

Q. And Levan wrote that you were extremely pleased with the way he handled himself; is that fair to say.

A. That is definitely something that is also of my character. If Levan was involved, for me to say at the end that 'thank you' to him for whatever his participation in it was.

...

Q. When you referred to the comment (by Mr. Baird) about making others looking worse to make himself look better, that's ---

A. Mm-hmm.

Q. So that was your interpretation of whatever was conveyed to you by Mr. Baird? Whatever information he gave you, you interpreted it that way, right?

A. Right, of the event.

Q. You don't know that Mr. Turner was trying to make himself look better, though, right?

A. I don't know.

Q. What was your relation to him at this time, like in reporting, work relationship?

A. So for that summer Mr. Turner was an officer and I was an acting superintendent.

Q. So did you have any sort of supervisory function over him?

A. Yes.

Q. So did any aspect of his performance in that event -- did you comment negatively on any aspect of what he did in that event?

A. No.

...

Q. ...do you have an independent recollection whether you did in fact not stand behind Mr. Turner?

A. I do not.

Q. So Mr. Turner's recollection here may be correct, it may be accurate?

A. That's correct.

Q. ... Mr. Baird records you as saying completely embellished?

A. Mm-hmm.

Q. And your evidence a few moments ago was that you can see yourself saying that at the time, right?

A. That's correct.

Q. And can you say at all with certainty that you used those words in the conversation with Mr. Baird?

A. No.

Q. But you don't have any independent recollection right now of what you were referring to when you said that?

A. No.

Q. And can you say at all with certainty that you used those words in the conversation with Mr. Baird?

A. No.

[159] At the end of cross-examination Ms. Patel conceded that Mr. Turner was involved in dealing with the traveler, "However his versions of what occurred were, in my opinion, exaggerated to make him look better in the situation."

Q. And today you said it painted you in a bad light, right, that's what you thought?

A. In my opinion, yeah.

Q. Did you go and talk to Mr. Turner about what he wrote in ---

A. No.

Q. It didn't concern you that much to speak to him?

A. No.

Q. Have you ever known Mr. Turner to mislead people?

A. Not that I know of.

Q. Or speak untruthfully?

A. No.

Q. He's frank and friendly?

A. Yes.

Q. He's an open person?

A. Mm-hmm.

Conclusions arising from Ms. Patel's testimony

[160] I conclude that Ms. Patel was a credible witness; that her evidence does not support Mr. Baird's opinion that Mr. Turner was untruthful in his portrayal of the incident with a disturbed traveler.

[161] It is to Mr. Baird's discredit that he immediately decided that Mr. Turner had embellished his participation in the incident to the degree that it was an intentionally false account. Mr. Baird's follow-up contact with Ms. Patel, for corroboration of his opinion that Mr. Turner had been untruthful, is significant evidence upon which to infer that Mr. Baird had prejudicially predetermined that Mr. Turner would not be deemed to have the competence to be a border

service officer. Mr. Baird's negative conception of Mr. Turner is contradicted by Ms. Patel's recollection that, because of Mr. Turner's calming demeanour as a customs inspector, she asked him to intercede with the traveler.

[162] Mr. Baird's bias toward Mr. Turner is also evidenced by his assumption Mr. Turner had lied during the interview by saying he had been a police officer with the Toronto Police Service. The truth is that Mr. Turner included a resume as part his written package, which clearly states that he served as an auxiliary police officer with the Toronto Police Service.

H. Witness: Shalina Sharma

Origin of the eligibility restriction in the Vancouver Competition 1002

[163] Ms. Shalina Sharma, Acting Manager of Resources for CBSA, testified that she supervised seven Resource Advisors assisting hiring managers in the selection process, and that her duties also included providing support and advice during investigation of complaints.

[164] Ms. Sharma began her career in 1994 with Revenue Canada. On December 12, 2003, when the federal government created the CBSA, Ms. Sharma was assisting Mainland Customs hiring managers in the Pacific Highway District, Vancouver International Airport (VIA), and the Metro Vancouver Marine District, as well as special divisions dealing with Intelligence, Compliance, Trade, and Investigation. "Those were my clients, and for them I helped them with Selection Boards as well as with any training that Selection Board members needed, and provided them with general staffing advice." Transcript: Volume Two, section four, Page 101, lines 17-20.

[165] In her direct evidence and in response to questions in cross-examination, Ms. Sharma stated that she drafted the Vancouver Competition 1002 eligibility restriction in her capacity as the resourcing advisor to the recruitment unit members Ron Tarnawski and Mark Northcott.

“Mr. Yazbeck: ... Now you testified that, I think you used the word error, that although this doesn’t refer to candidates not found qualified – found not qualified, it was an error because that’s what the intention was behind this.

A. The intent was yes, to not interview again those candidates that were just recently found not qualified.

Q. So you agree with me that this is ambiguous at best.

A. It is ambiguous, yes.

Q. And if an employee interpreted this as meaning that he or she could apply in this position even though he or she had applied say in Victoria, that’s a reasonable statement to make, a reasonable interpretation of this to make?

....

A. I don’t think so. The position, it’s a standard position. This position, same position exists in Vancouver as it does in Victoria. It’s a Border Services officer position, or sorry, at the time Customs Inspector position, it had a national job description. ...

Q. ... If an employee looked at this and concluded that it only referred to Vancouver, you are saying that’s not a reasonable interpretation.

A. It’s my opinion. ...

Q. And so, Ms. Sharma, if an employee were shown this poster and the person showing it to the employee was pointing to it and said have you applied for this position before, would you think it reasonable for the employee to think that it was the Vancouver position only that the person was talking about?

A. Again I don’t think it would be.

Q. ... Now, who was it that asked that this line be put into this notice?

A. When I met with the recruitment unit they had indicated that they seemed to (be) seeing the same candidates over and over again and you know, do we need to assess someone we found not qualified just two months ago yet again on another process. Because at that time we were running multiple processes in order

to combat the shortage of Customs Inspectors. So again, we decided that no, anybody who was found not qualified just recently, and recent being January 1, 2002 we were not going to consider them for this process as not enough time would have lapsed for them to upgrade their skills. ... I felt it could be done.

Q. And did you draft this sentence.

A. Yes.

Q. Did they approve this sentence?

A. They did.

Transcript: Volume Two, section five, page 140, lines 19-25; page 141, lines 1-9,24-25; page 142, lines 1-4, 16-25; page 143, line 8; page 144, lines 7-20; page 145, lines 7-10.

Staffing competitions operate within their own rules

[166] The Chairperson engaged Ms. Sharma in series of questions relating to how staffing pools operate. Her answers are relevant to the question of whether, by inference, “the position” of Customs Inspector is limited to staffing requirements of Vancouver, thereby limiting the reach of the eligibility restriction to persons who were interviewed since January 1, 2002, for the position of Customs Inspector in Metro Vancouver.

The Chairperson: Before you go on, if somebody had qualified for that position in a competition in Victoria (and) they are placed in the pool. Can Vancouver draw from that pool?

A. It depends on what the poster said. If Victoria process was put that staffing will occur in Victoria and in the Lower Mainland then Vancouver could have drawn from that pool. But if it was only for specific areas no, then Vancouver – and Vancouver wasn’t one of those specific areas, Vancouver cannot draw from that pool.

The Chairperson: So you are talking about the previous pool that established the area that you could apply from, is that what you are saying?

A. Right.

The Chairperson: If you have got somebody who is qualified for a PM2 and he did that from a posting in Victoria, he is now qualified. Could Vancouver just say, the hiring manager in Vancouver say 'I need three PM2's, is there anybody who has qualified recently in Victoria?' and just pull them over if they are willing to go.

A. No. ...

The Chairperson: So the pools are distinct.

A. Pools are distinct for the locations that they are being struck for.

The Chairperson: And this Vancouver, would that have included the Victoria area?

A. In this Vancouver process, are you saying could we have staffed for the --- in Victoria? It's PM2, Customs inspector, Vancouver.

The Chairperson: If there was somebody – oh I see, so every pool is determined by the poster and the area –

A. That's identified on the poster.

The Chairperson: So that pool is just for that area.

A. That's correct.

Transcript: Volume Two, section five, page 164, lines 10-25; page 165, lines 1-21.

Aspects of competency which ought to be considered by an interview panel

Q. ... (Tab 28 of Volume 1). This is a Statement of Staffing Requirements for the Vancouver position, the Vancouver customs inspector position. And I'm just trying to fit this value-based approach into a specific concrete example. I notice at the bottom of the page has assessment standards. And this makes it very clear that the agency could use one or more of the following tools.

A. Yes.

Q. It would be up to the discretion of the Selection Board to determine which tools to use?

A. Yes

...

Q. Written exam, interview reference check, they're all self-explanatory. I take it that this says may be used. Are there other factors or other information that could be used as well, like performance of an employee who has already been in the position?

A. Not usually. It's --- especially for an external process, we would not take the performance of an employee into account because that would not be fair to those people that applied that were not employees.

Q. And so from your point of view, you said --- would it never be the case that you can consider employee's performance?

A. No. Usually in an external process, that is not considered. In an internal process, perhaps it might be considered that way. All the candidates are on an equal footing, but it is – I've never done a process where the performance appraisal was considered.

...

The Chairperson: So they send out this Portfolio of Competencies Questionnaire. Now when Mr. Yazbeck says, could they also have decided, the Selection Board for this posting --- could they have decided to look at anything other than, for example, the – when he gave the performance of the person on the job?

A. They wouldn't. I mean it's not something they would advise them to do, only because this was an external process. And you cannot look at the performance of an individual – of one individual and not – everybody that applied on this process were employees, so we couldn't - we could not do that. We could not use performance appraisals. What we could do was to reference check, based on what the candidate provided as to interview and the written competencies. But performance appraisals are not generally used for external process, in assessing a candidate.

...

Q. When somebody (gives) a reference, to do a reference check, they often ask about the employee's performance in the position, right?

A. Yes.

Q. So that's another way of looking at performance, correct?

A. Sure.

Q. So performance is relevant in these kinds of processes, right?

A. Yes. But again it's assessed through a reference check.

Q. There's nothing – you said you haven't been – there's nothing to stop the Selection Board from using a performance appraisal, right?

A. Again, it's a value based system; as long as the Selection Board can justify why they would.

...

Q. And I take it that one of the values of the CCRA's Staffing Program was to ensure that any selection process it used did fairly and accurately assess the qualifications of employees. Is that fair to say?

A. Yes.

...

Q. When you say "strict criteria", what are you referring to – the eight competencies?

A. Each of those competencies have criteria attached to them. ...And that is what the Selection Board assesses the candidate on. Now, what – if a manager is giving a candidate – sorry, an employee – a performance appraisal or saying "you're doing a good job", well, that's fine, but another manager is sitting on the Selection Board.

Q. So if the manager is sitting on the Selection Board, that manager would have some knowledge of the employee's performance, right?

A. They would, yes.

Q. And so that might cause them to wonder why the employee is not performing well in the interview?

A. It may.

Q. And that would be – that could be a relevant factor to consider in assessing the candidate's qualifications?

A. No.

Q. No, it would not be relevant?

A. I don't think so because again, there are strict criteria there. If – the selection process, I mean it's not perfect, but it's what we have to work with. The criteria are there under the qualifications. If the candidate does not exhibit those criteria, the Selection Board can only come up with the – a non-qualified. It happens. It happens a lot – all the time. It happened to me in the past.

Q. But you just mentioned that if the employee's manager is on the Selection Board, he or she may have some knowledge of the employee's actual performance, right?

A. Yes.

Q. And if that manager knew that the employee has performed well – and then in the interview, the employee doesn't seem to demonstrate the competency to the Selection Board's satisfaction, is it your conclusion that you would never doubt the conclusion of the Selection Board, that he's not qualified?

A. No, that's not what I'm saying.

Q. So it would cast doubts on the Selection Board's assessment?

A. Yes.

Q. Right. And generally speaking, Ms. Sharma, when a man – we've seen evidence of appraisals; and when a manager sits down and appraises an employee, they're looking at the whole of the employee's performance, correct?

A. I guess. I mean I can't speak for every manager, but sure.

Q. But if it were you, you'd look at the whole of the – and if there were – you would look at the whole of the performance?

A. Yes.

Q. Because you – and if there were specific issues, you would raise them with the employee?

A. I would have raised it with the employee at the time when the issue occurred.

...

Q. Now, yesterday you were talking about what happens when the Selection board – sorry, when a candidate might fail and the Selection Board could stop. And you alluded to this, this morning as well, I think in response to a question from Mr. Sinclair. Yesterday you said the Selection Board has to be extremely clear that they can do nothing more or do no more to make them pass. In other words the error of the employee has to be egregious, I think was the word you used. Do you remember that?

A. Yes.

Q. So I take it from your evidence, when you said "extremely clear", that there's an obligation on the Selection board to make absolutely certain that the candidate is not qualified?

A. That's correct.

Q. And if they don't do that, then there's a flaw in the process, right?

A. Yes.

Analysis of the evidence of Ms. Sharma

[167] The evidence of Ms. Sharma provides a context in which to assess the manner in which oral interviews of Mr. Turner were conducted by Mr. Tarnawski and Mr. Baird as Chairmen of their respective review boards.

[168] Ms. Sharma's evidence brings me to the conclusion that the staffing process – which rejected Mr. Turner as lacking competency to be a Customs Inspector – was the opposite of rigorous. It was based on a grandiose Portfolio of Competencies (a misnomer), an applicant's written response which, given a passing mark, lead to an oral interview. The interview process was haphazard and subjective, it pretentiously determined whether a candidate was competent to be a Customs Inspector. The fact is that by definition competent means adequately qualified or capable; becoming qualified or capable requires learning on the job and establishing a state of competence.

[169] It is noteworthy that the ineffectiveness of the staffing process was disclosed in a comment by the Director in charge of CBSA Vancouver Airport section, Mr. Flagel, a comment that was attributed to Mr. Flagel by Respondent Counsel during cross-examination of Mr. Hughes:

Owing to an increasing number of complaints received from travelers, many of which concern the actions and behaviors of relatively new customs inspectors, he felt that certain criteria which were not included in the statement of staffing requirements need to be addressed when assessing the candidates. As he pointed out he felt that dealing with difficult situations should be one of the qualifications.

I. Witness: Ronald Paul Tarnawski

[170] At the time of his testimony before the Tribunal Inquiry on January 22, 2009, Mr. Tarnawski was a superintendent at the Pacific Highway Truck Crossing in the Pacific District (lower mainland region) of the CBSA. Mr. Tarnawski's career in border services began in 1990 with stints at various ports of entry including Peace Arch, Pacific Highway, and Huntingdon B. C.

[171] In 2000 Mr. Tarnawski was transferred to VIA where he and Superintendent Mark Northcott established and conducted a regional recruitment unit over the next six years. He explained that each district within the Pacific Region had been responsible for its own recruitment resulting in inconsistent employment processes and, regrettably, competition between districts evidenced on occasion by one district waiting for a staffing pool to be created by another district, then poaching qualified candidates from it. This degree of dysfunction resulted in the directors of CBSA operation in the lower mainland bringing together Marine Operations, Highway Operations and the VIA Operations to be served by a regional recruiting unit.

[172] Mr. Tarnawski explained that, coincidentally, CCRA was also undergoing some huge changes in regards to the job requirements.

... Customs and Revenue at the time was also undergoing some huge changes in regard to job requirements, some of the things that we were now being given authority to do, becoming much more of a law enforcement-type agency. And the directors were also concerned in regards to what we were doing to attract the right candidate in regards to recruitment, or actual recruitment getting out to career [indiscernible] and things like that and then what were we doing to assess those candidates to see that they could actually complete the duties. ... We looked at what other law enforcement agencies were doing; we looked at their recruiting techniques.

Q. And then what were you doing to assess those candidates to see that they could actually complete the duties?

A. That was all part and parcel of the creating of the recruiting units. We looked at what other law enforcement agencies were doing. We looked at their recruiting techniques, what kind of advertising material they had, so we started attending recruiting fairs. We created banners and backdrops and literature; all very unique to the Pacific region.

...

And again, taking from what our partners in law enforcement were doing, what we designed ultimately was a process that would function where a candidate would apply online. ...

Transcript: January 22, 2009; page 122, lines 14-25; page 123, lines 1-8; page 124, lines 12-15.

[173] Mr. Tarnawski and Mr. Northcott ultimately designed a standardized interview process beginning with applications online, the screening of applications by people with experience in screening, the tendering to applicants who passed the screening of a package of seven competencies to be completed in writing and returned, and lastly an interview process for those candidates who had received a passing mark on their competencies.

[174] In describing the staffing process that he and Mr. Northcott had developed, Mr. Tarnawski testified that all they were looking for in an applicant's written package was a threshold level of knowledge which would permit board panellists to converse with them in the interview process. Mr. Tarnawski described the first of two interviews, which dealt with effective interaction communication, as being 30 to 40 minutes in duration with a failure rate of 50%.

[175] Mr. Tarnawski identified Mr. Turner as an applicant that he interviewed in two staffing processes: the Vancouver Job Opportunity and also the earlier Victoria Competition 7012.

[176] In relation to Victoria Competition 7012, Mr. Tarnawski testified that Victoria was running its own processes and needed a demonstration in the use of Vancouver's interview guide and rating guide. Mr. Tarnawski identified Exhibit R-3, Tab 62 as the lead sheet or scoring guide used in an interview of Mr. Turner conducted in Victoria on February 13, 2003, as part of Victoria Competition 7012.

[177] Mr. Tarnawski identified Exhibit R-3, Tab 63 as his notes of the interview he conducted of Mr. Turner. The other panellists were Superintendent Mark Northcott and Victoria/Vancouver Island Superintendents Kathy Pringle and Rob Farrell. Mr. Tarnawski's recollection of the interview was that Ms. Pringle and Mr. Farrell were observers who did not participate in the actual assessment of Mr. Turner.

[178] Mr. Tarnawski identified Exhibit R-3, Tab 63, as his notes of the interview and was asked if they refreshed his memory of the event.

Well, I remember attending – I remember interviewing Mr. Turner. I remember making notes. Do I remember the intricate details of that interview? No, I don't.

...

What my notes are telling me is that after some questions in regards to dealing with the difficult situation and after comments in his interview questions regarding decision making, I notate that: 'He is not getting all the information before making decisions. Errs on side of the importer or the traveller. Although the candidate is making numerous assumptions regarding who he is dealing with and how he should treat them – or how he should deal with them. Compares how you must treat American travellers due to race situation. States: **I am assessing people and make decisions as they are walking up to me or by looking at what type of car they drive.**'

I have put there: 'Concerns over lack of overall officer awareness regarding DDS.' Which is dealing with a difficult situation.

So basically what my notes are saying to me is that he's making assumptions and he's making decisions based on assumptions. And that's not a good thing in the sense that it could go either way. You know, sometimes, sure your assumptions can be correct, but quite often what it can end up with is it can end up as a complaint at the front counter where somebody felt that they didn't receive proper treatment or maybe they received improper treatment, or vice versa. You may not recognize a threat or a risk when it's actually standing there in front of you.

Emphasis added

Transcript: January 29, 2009; page 131, lines 20-23; page 134, lines 1-25; page 135, lines 1-6.

[179] The February 13, 2003 Victoria interview of Mr. Turner is disturbing for two reasons:

[180] First, Mr. Tarnawski used Mr. Turner, without permission, as a teaching aid in demonstrating his interviewing skills to Ms. Pringle and Mr. Farrel. This clearly disturbed Mr. Turner.

Mr. Yazbeck: Mr. Turner, you were just referring to not being called back in the summer of 2004. Your complaint – and we've been talking about the Victoria competition and the Vancouver competition. Do you have the same concerns about those?

A. Yeah, I have the same concerns about those. I think with all the extra board members they had for the process, being the four that I had for – in 2002, and the three I had at the end of 2003 and the three board members I had in the Vancouver process. I felt that I was definitely being intimidated.

I believe the one where Janet Sabo sat in, who is the wife of Trevor Baird, and I think that she was invited just to watch Trevor Baird make a fat, old black man squirm at the interview stage.

Transcript: Volume Two, section three; page 25, lines 6-25.

[181] Second, Mr. Tarnawski's reasoned speciously in concluding that Mr. Turner was making assumptions rather than reasoned decisions in portraying how he dealt with travelers in primary examination. That Mr. Turner's explanation: "I am assessing people and make decisions as they are walking up to me or by looking at what type of car they drive," is decision-making based on assumptions. It is clear to me that Mr. Turner's assessment of people as they approached primary inspection was a process of estimation, a first step in deciding what questions ought to be asked of the traveller. Moreover, Mr. Turner's overall testimony revealed that once he made his initial assessment, and depending on the nature of answers to his questions, then, and only then would he, as a Customs Inspector, make a decision to allow entry or require a secondary interview.

[182] Mr. Stark returned to the Vancouver employment competition and had Mr. Tarnawski identify a selection process poster relating to Vancouver process Number 2003 1727 PACK 39611002 (Vancouver process 1002). Mr. Tarnawski testified that it was "... a career opportunity notice for positions that would be posted to the VIA, Metro Vancouver District, or the PAC Highway District that was run by Superintendent Mark Northcott and myself." Transcript: January 29, 2009; page 135, line 25, page 136, lines 1-4.

[183] The eligibility restriction stated that "Applicants who have been interviewed for this position since January 1, 2002 will not be eligible for this process."

Cross-Examination of Mr. Tarnawski

[184] Under rigorous cross-examination Mr. Tarnawski agreed that he applied a flawed eligibility restriction to disqualify any applicant who, within the two-year period after January 1, 2002, had been deemed unqualified in Vancouver Competition 1002, a staffing process for employing customs inspectors.

Mr. Champ: First of all, let's be clear, the poster, itself, says if you've interviewed before.

A. Right.

Q. It didn't say anything about successful or not successful?

A. Right.

Q. So, we can assume anyone who has read this, they wouldn't have understood any restriction to qualify ...

A. Okay. I'm not going to – I don't assume anything. You can assume that. I don't assume that, because that was neither the intent. I'm sure that that may have caused some issue, and I think I said that very early on this afternoon.

Q. Right.

A. Because I know the wording was incorrect and I knew that we – there were probably gaps when we saw it out on the poster. But I'm not going to jump to conclusion and say people assumed anything.

Transcript; January 22, 2009; page 174, lines 8-25; page 175, line 1.

Q. You note up here, while we're on this poster, it says selection process number, advertising number, then it says: "PM2 Customs Inspector, Vancouver and International Airport District, Metro Vancouver District and Pacific Highway District. So those are three different districts, correct?"

A. That's correct.

Q. So, when you created that pool, those three districts could draw on the pool?

A. That's correct.

Q. And that – isn't it a fair interpretation that's this position? This position means Customs Inspector in these three locations.

A. I'm not going to suggest to you what you should or should not believe. What that's telling you is where these positions are for in this poster. That's what this is telling you.

Transcript: January 22, 2009; page 178, lines 20-25; page; page 179, lines 1-15.

The Chairperson: So if I have been interviewed for a customs inspector position – and you didn't limit to those locations –

A. Right

The Chairperson: So you would have said, if I have been interviewed, for anybody who is an applicant has been interviewed for the position of customs inspector since January 1st, 2002, will not be eligible for this competition?

A. that's what it says.

The Chairperson: Anybody who has been interviewed will be ineligible?

A. That's what it says, yes sir.

The Chairperson: You didn't apply it that way though, did you?

A. No, it's not the way we applied it. Now I can't tell you how many people from Victoria that we interviewed, but if we found people – if people were identified as being qualified in the previous process, we weren't fitting them into that restriction. As I say, the wording causes nightmares I think.

The Chairperson: Well, it would have caused nightmares to applicants too; right?

A. Yes.

Transcript: January 22, 2009; page 177, lines 5-25; page 178, lines 1-3.

[185] Mr. Champ showed Exhibit R-2, Tab 33 to Mr. Tarnawski, a letter dated June 1, 2004, signed by Mr. Tarnawski and sent to Mr. Turner, stating that he was not eligible for the Vancouver Job Opportunity. Mr. Tarnawski testified that it "... was very possible the letter was created specifically for Levan Turner." Transcript: January 22, 2009; 204, lines 9-11.

[186] Mr. Champ suggested that Mr. Turner was the first applicant screened out by the eligibility restriction and Mr. Tarnawski agreed that it was "... absolutely very possible," and also agreed that it was "very possible" that Mr. Turner was the only applicant screened out.

Q. Why was it Mr. Turner that jumped out at you and Mr. Northcott?

A. What do you mean 'jumped out' at us?

Q. Why is he the only one? Out of the seven –six or seven, eight – six or 700 applicants to the Vancouver competition, why was he the only one screened out on that basis?

A. Well, I think this was the first process we ran the restriction; okay?

Q. Right.

A. And there was obviously some recognition.

Q. Right. So, you recognized him, but not anyone else?

A. I would say yes.

Transcript: January 22, 2009; page 205, lines 6-7; lines 5-18.

[187] In his testimony during cross-examination, Mr. Tarnawski agreed "absolutely" that an applicant who did not make it through the Victoria Competition 7003 could have made it through the Vancouver Competition 1002 even though the competency packages were the same. Yet he

also acknowledged that the eligibility-exclusion of Mr. Turner from the Vancouver Competition, midway through the interview process, was, as the Chairperson put it "...kind of a mess."

[188] With respect to Exhibit R-2, Tab 33, the template letter dated June 1, 2004 sent to Mr. Turner informing him he had been disqualified by virtue of restricted eligibility, Mr. Tarnawski agreed that no other applicant was sent this letter; that it was "absolutely very possible" that of the six or seven hundred applicants it was "very possible" Mr. Turner was the only one disqualified.

[189] Exhibit Volume R-3, Tab 91, a master list of candidates in Vancouver Competition 1002 was put before Mr. Tarnawski, and, in a somewhat lengthy cross-examination, it was established that the vast majority had no experience as customs inspectors. Moreover it was established that several candidates with minimal qualification were deemed qualified and placed in the staffing pool, while Mr. Turner, an experienced customs inspector, a candidate who had achieved a passing mark in the interview process, was subjected to an irrational disqualification. Therefore, the circumstances of the disqualification must be examined to determine whether the technical disqualification of Mr. Turner was a pretext used to deny Mr. Turner the opportunity to continue in the employment of the Respondent. Was it a pretext to conceal that an older black man with a perceived disability of obesity did not fit the image of law enforcing Border Service Officer? If so, it subjected Mr. Turner to differential treatment as a former employee of the Respondent and was a discriminatory practice contrary to the *CHRA*.

[190] Mr. Champ ended his cross-examination by challenging Mr. Tarnawski's explanation that it was Mr. Turner's voice and presence that enabled him to recall their earlier contact in the interview process for Victoria competition 7012.

Q. So Mr. Tarnawski, you appreciate now that Mr. Turner feels a bit aggrieved because he was apparently the only person who was screened out of this competition on the basis of this restriction?

A. Okay.

Q. And it would seem that he was picked out at least because both of you – because you recognized his voice and presence from meeting before?

A. Yeah. When you say that, I can see how that might be taken in the wrong light. If I can maybe just suggest something here, Levan walks into the room, he is a happy guy, okay?

Q. Yes.

A. And Levan had a smile, right? And Levan liked to do things like he was bright in the room and you knew Levan was here. And Levan would put his name on cards and put it in front of them at the interview, because he is looking at the upside of things all the time. Levan always seemed to be an up person. Now, if you say I said I remembered him because of his presence and you are trying to imply something that might be inappropriate, that's not my character, sir. Okay? If I said that somewhere it would be because of the up things that I have seen of Levan, not because of something inappropriate. So I'm not sure what you are attempting to – what you want somebody to infer from that.

Q. Mr. Tarnawski, I will just put it this way: without any ill intent on your part, far from it ---

A. Okay.

Q. ---is it possible that just the fact that Mr. Turner is a larger man and a black man that he stood out to you, you just recognized him more than others?

A. Well I didn't interview, I don't think, a whole pile of people that would meet the same physical characteristics as Mr. Levan Turner. But I interviewed a lot of people that were very happy people just like Mr. Turner. Okay? So Mr. Turner, you know, every time we meet there is conversation that occurs between the two of us because he an up kind of guy, and he is an easy guy to talk to. And that's what I remembered about Mr. Turner. And it was easy to remember one of four or six that was in the room that day. I didn't have to remember 500 or 600 that I was going to come back to the Lower Mainland and interview.

Transcript: January 22, 2009; page 244, lines 3-25; page 245, lines 1-25.

Analysis of the last question put to Mr. Tarnawski in cross-examination

[191] The question put to Mr. Tarnawski – (... is it possible that because Mr. Turner is a large man and a black man that he stood out to you, and you just recognized him more than others?) – is a question that Mr. Tarnawski could have answered with a ‘yes’ or ‘no’; instead he became reticent, which in itself raises the question whether he was phobic and had an aversion to saying “Yes, I remember Mr. Turner because he is a large black man who had a positive personality.” Mr. Tarnawski’s reticence is wrapped in the coincidental circumstances (1) that Vancouver Competition 1002 included a restriction, co-authored by Mr. Tarnawski, which denied eligibility to persons who had been interviewed in any prior job posting within the previous two years; and (2) the eligibility restriction was flawed by an ambiguity which Mr. Tarnawski became aware of immediately after the competition was announced; and (3) despite being aware of the ambiguity of the restriction Mr. Tarnawski applied it only to Mr. Turner’s candidacy soon after he and his fellow members of the reviewing panel had deemed Mr. Turner qualified to be placed in a pool of potential customs inspectors; and (4) the disqualification effectively ended Mr. Turner’s aspiration to become a Border Services Officer.

V. Analysis**A. Preface to Reasons for Determination**

[192] In his opening remarks Complainant’s Counsel asked:

“Why? Why did this happen? Why did an employee, who was performing well, had no performance deficiencies, all of a sudden become unqualified? The Complainant, sir, is Levan Turner. He is an older black male, and it’s his position that those factors, as well as his size, were the reasons why he was denied employment. ... there will be a prima facie case made for discrimination, that had not been rebutted. ...that there is no other explanation but for the employee’s race, age or perceived disability which is his weight.”

[193] In written argument Complainant’s Counsel stated:

At law, the question is whether he is perceived by others to have some type of disability, and is treated in a discriminatory manner as a result. People who are overweight often face this stereotypical view that obesity equates with laziness.

Mr. Turner's opinion on why he was denied further employment

[194] During the inquiry Chairperson Sinclair asked Mr. Turner what conclusions he reached upon learning that other seasonal term employees were called back to work in the summer of 2004, while he was not offered work; and Complainant Counsel asked Mr. Turner a similar question regarding the Victoria and Vancouver staffing processes at issue here. Mr. Turner testified:

A. It was mostly students and – it was most of the staff that was there the previous year.

The Chairperson: So when you heard that, you concluded, you were angry and you concluded what.

A. I was extremely angry and I was extremely upset. Because all the work that I had put in and all the years that I had been there, I mean, my qualifications were, as far as I was concerned, were top notch. And they had – working for the government, I know now there are many recourses or other avenues that they could use to hire somebody.

So it must have been that they really didn't want me back and I figured, it must be because of my race and, you know, I don't look good in a uniform that they would expect me to look, and I'm too old. They probably figured I'm going to be a draw on the system.

Transcript: Volume Two, section three; page 24, lines 1-21.

Determinations: Vancouver Competition 1002/ Victoria 7003

[195] On a balance of probabilities I am satisfied that the respective Review Panels in both the Vancouver Competition 1002 and the Victoria Competition 7003 denied Mr. Turner adjudicative impartiality. I conclude that both processes were conducted without propriety and incorrectly with respect to Mr. Turner's applications to become an employee of CBSA, a border-police

agency with a developing law enforcement culture, working synergistically with Canada's other law enforcement agencies. The key question for the Tribunal in this case is whether adjudicative partiality and its corollary, adverse differential treatment experienced by Mr. Turner – by inference that an older, obese black man does not fit the image/mold of border police – is linked to discrimination based on a prohibited ground under the *CHRA*. This matter will be discussed at greater length, later in this decision.

Credibility of witnesses

[196] In *R. v. R.E.M.*, 2008 SCC 51 (*R.E.M.*), Chief Justice McLachlin commented at paragraph 49 that findings of fact on credibility may involve factors that are difficult to explain:

While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore embellishing why a particular witness' evidence is rejected may involve the judge in saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him, but adding negative comments about his demeanour. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

[197] In *F.H. v. McDougall*, 2008 SCC 53 (*McDougall*) at para. 76, rendered at the same time as *R.E.M.*:

In the end, believing the testimony of one witness and not the other is a matter of judgement.

[198] In *Van Berkel v. MPI Security Ltd* (1997) 28 C.H.R.R. D/504 (B.C.H.R.C.) Member Designate Kenneth Attafuah, referring to *McDougall*, stated:

In accordance with these judicial guidelines, the testimony of each witness has been examined for consistency with the preponderance of probabilities which surrounded the existing circumstances of the complainant's employment with [the corporate respondent]. I have also scrutinized the evidence for plausibility under the circumstances and weighed the witnesses' motives. In addition, I have paid

attention to their powers of observation, memory and recall, as well as their attitude and demeanor under oath, and the manner in which they testified. Finally, I have checked their testimony for lack of internal coherence or any significant inconsistencies and contradictions.

(a) Complainant witness Christopher Hughes

[199] Mr. Hughes testified about his unsuccessful efforts to regain employment with the Respondent in Vancouver Competition 1002, posted June 9, 2003, and Victoria Competition 7003, posted October 11, 2003. As the first witness in this inquiry, Mr. Hughes gave specific testimony concerning the processing of his applications in the two job competitions; he also testified on matters which he perceived to be managerial manipulation of job competitions.

[200] In 1995, Mr. Hughes was employed by Revenue Canada in Victoria, B.C. as a collections officer. Initially a term employee, Mr. Hughes became an indeterminate employee in 1996. In March 2001, he successfully applied for, and was employed in 2002 as a seasonal-Customs Inspector which enabled him to continue his employment in the winter as a business service agent with Revenue Canada. Mr. Hughes became ill with a depressive illness and was terminated on September 30, 2004. Mr. Hughes openly testified that he challenged his employer, initially as a whistleblower, then through grievance procedures relating to hiring processes, with a complaint to the Public Service Commission which produced an investigation report of employer irregularities, and finally, with complaints of discrimination under the *CHRA*.

[201] In accordance with the judicial guidelines cited *supra*, I have considered Mr. Hughes' testimony with particular attention to its plausibility and coherence. Finally, I am satisfied that Mr. Hughes direct testimony remained intact under cross-examination.

[202] Mr. Hughes testimony reflected detailed knowledge of the Respondent's staffing processes, acquired in the course of his own disputatious dealings with the Respondent's management. In particular, he was diligent in ferreting out a considerable amount of documentation which gave him information on other applicants who had applied successfully for employment with the Respondent.

[203] I find as a fact that Mr. Hughes was a credible witness. His evidence may provide context in which to consider the evidence of the Complainant and the Respondent witnesses.

(b) Complainant Levan Turner

[204] I paid particular attention to Mr. Turner's evidence given under lengthy cross-examination. It remained significantly consistent with his evidence in chief on the core issues of the case, and it verified the competency he achieved during his five years of seasonal term employment with the Respondent. I conclude as fact that Mr. Turner was a credible witness.

(c) Respondent witness Shalina Sharma

[205] Ms. Sharma gave plausible testimony concerning the CBSA staffing processes, and the changes in the staffing processes over the years, particularly the difficulties caused by the unanticipated creation of CBSA in late 2003. In her direct testimony, Ms. Sharma was openly partial on the core issue of the ambiguous eligibility restriction which she authored for the Vancouver Competition 1002 staffing process. However, under vigorous cross-examination, Ms. Sharma conceded that the flawed restriction, on the face of the Notice of Job Opportunity, could have been interpreted as applying only to persons who had applied for employment as a PM-02, customs inspector to work in the location specified in the Notice, namely VIA District, Metro Vancouver District, and the Pacific Highway District.

(d) Respondent witness Ron Tarnawski

[206] On the core issue of the eligibility restriction in Vancouver staffing process and the manner in which he interviewed the Complainant, Mr. Tarnawski's seemingly plausible direct testimony became inconsistent and argumentative when tested by rigorous cross-examination, particularly as to his intractable and incomprehensible application of the eligibility restriction on a broad basis. The result was inevitable, Mr. Turner said "no" in answer to a preliminary question in the interview process, (whether he had previously applied to be a customs inspector in Vancouver), making no mention of a prior application in the Victoria region. It was a catch-22 trap created by Mr. Tarnawski's decision to shamelessly apply an ambiguous restriction

which he co-authored, and applied solely to Mr. Turner, upon whom he cast the shadow of untruthfulness.

(e) Respondent witness Terry Klassen

[207] Though often vague and inconsistent, Mr. Klassen, an Acting Superintendent, gave a truthful account of a meeting with the Complainant and their discussions concerning an annual performance review he had completed for the Complainant. I am satisfied that Mr. Klassen was frank in relating a further conversation with the Complainant which took place after their discussion concerning the performance review, a discussion in which Mr. Klassen revealed to the Complainant that the Victoria superintendents held negative perceptions of the Complainant as being lazy and tending to avoid the more difficult work expected of a customs inspector. I also accept that in the aftermath of these discussions, Mr. Klassen prepared two emails to himself in which recorded his discussions with the Complainant, emails which he subsequently forwarded to all fellow superintendents, including Trevor Baird and Catherine Pringle.

(f) Respondent witness Trevor Baird

[208] Mr. Baird's testimony was paradoxical, verbose rather than direct. Too often when asked a simple question Mr. Baird would respond with argument rather than with a dispassionate and objective answer.

[209] I conclude that Mr. Baird was not a credible witness on the core issues raised by the Complainant.

[210] In particular, by refusing to bring into the interview process the fact that he had given positive performance reviews of Mr. Turner's work as a customs inspector, coupled with his attempt in the aftermath to get Ms. Patel to agree that Mr. Turner's account of dealing with a difficult traveller was exaggerated and untruthful, Mr. Baird revealed himself to be unscrupulous. And it raises the question: Was the interview process a pretext, predetermined by a stereotypical discriminatory perception of the Complainant, that he was lazy and untruthful

because he was older, black and clinically obese and therefore unacceptable to be employed as a Border Services Officer?

(g) Respondent witness Nina Patel

[211] Ms. Patel's memory of the incident in which Mr. Turner assisted her in dealing with an aggravated and difficult traveller was understandably diminished by the passage of time. Nevertheless she was a credible witness despite being caught between Mr. Baird's out-of-the-blue telephone call to her in which he pressed her for a negative assessment of Mr. Turner's version of the event and her own opinion of Mr. Turner as a customs inspector gained during one summer in which time he worked under her supervision. At the end of cross-examination, Ms. Patel conceded that she had requested Mr. Turner to deal with the traveller but, in her opinion, his account presented to the review panel was exaggerated to make him look better. Ms. Patel then testified that she had never known Mr. Turner to mislead people, or speak untruthfully, and that he was a frank, friendly and open person.

B. Analysis of Victoria Competition 7003

[212] The Victoria Job Opportunity interview of Mr. Turner was conducted by Mr. Baird as the Chairperson of a review panel in a manner which denied Mr. Turner an adjudicated determination of his competency as a customs inspector, a determination that would have enabled Mr. Turner to continue to seek employment with the Respondent. Under rigorous cross-examination, Mr. Baird revealed that the interview had been rendered extremely unreasonable, it was in fact an absurdity, by the panel's refusal to consider Mr. Turner's positive employment record as a Customs Inspector, a record written in part by Mr. Baird. When considered in the light of all the surrounding circumstances, I infer that Mr. Baird had determined beforehand that Mr. Turner – an older black man perceived to be disabled by obesity – did not meet Mr. Baird's expectations of a Border Services Officer capable of carrying out CBSA's newly mandated law-enforcement role in servicing travellers passing through Canada's ports of entry.

[213] I am persuaded by the argument of Mr. Champ, Counsel for Mr. Turner, that the Victoria superintendents perceived Mr. Turner to be lazy and dishonest, based on their stereotypical

assessment of Mr. Turner who was older, obese, and black. On a balancing of probabilities Mr. Klassen's two e-mails circulated to all the superintendents, including Mr. Baird and Catherine Pringle, establish this racist attitude of the Victoria superintendents. No other candidate was the subject of a similar e-mail.

[214] The Klassen e-mails were circulated to the superintendents on October 4 and October 12, 2003. The Victoria Competition was open from October 11 to October 30, 2003. Mr. Turner was interviewed on December 18, 2003 by Chairperson Trevor Baird, and panellists Catherine Pringle and Cathy Zabo.

[215] When confronted in cross-examination over the Klassen e-mails, Mr. Baird denied any knowledge of them, claiming that he was too busy to have looked at his inbox during the time they were sent to him and the other superintendents. The improbability of Mr. Baird's explanation swept aside the last vestiges of his credibility.

[216] Approximately ten days after the interview panel's decision, Mr. Baird telephoned Ms. Patel to have her corroborate his opinion that Mr. Turner had untruthfully related their respective actions during the incident with a difficult traveller. Based on Ms. Patel's evidence I am satisfied that she asked Mr. Turner to speak with the agitated traveller, knowing from her experience with Mr. Turner that he would be able to calm the man down, which he did. This extraordinary post-interview action by Mr. Baird, Chairman of the review panel, is an aggravating circumstance that underscores my conclusion that the decision to label Mr. Turner as unqualified to be a customs inspector was a pretext to ensure that an older, obese, lazy black man, as Mr. Turner had been stereotyped, would not be employed by the newly created law-enforcement oriented CBSA.

[217] I conclude that the Review Board's decision to determine competency based solely on Mr. Turner's answer in the interview made the interview process arbitrary, discriminatory and pretextual.

[218] On a balancing of probabilities I find that that the interview process was a pretext, it was a process that subjected Mr. Turner to discrimination by reason of a perceived disability of

obesity, his race and age; with the result that Mr. Turner was subjected to differential treatment as a former term employee of the Respondent.

C. Analysis of Vancouver Competition 1002

[219] The Vancouver job opportunity advertisement stated that “Applicants who have been interviewed for this position since January 1, 2002 will not be considered for this process.” The job opportunity also defined “this position” as “PM-02, Customs Inspector, Vancouver International Airport District, Metro Vancouver District, Pacific Highway District, English.”

[220] I conclude that the eligibility restriction was flawed by a latent ambiguity. It has two meanings - one broad, the other narrow. In its broad meaning, the restriction would apply to applicants who had been interviewed anywhere in British Columbia and the Yukon since January 1, 2002, or for that matter anywhere in Canada, for the position of a PM-02 Customs Inspector. In its narrow or literal meaning the restriction would apply to applicants who had been interviewed in Vancouver since January 1, 2002, for the position as a PM-02 Customs Inspector, Vancouver International Airport District, Metro Vancouver District, Pacific Highway District.

[221] At one point the Chairperson put this simple and obvious ambiguity to Mr. Tarnawski, suggesting that the eligibility restriction could have been interpreted as applying only to persons who had previously been interviewed for the position of Customs Inspector in the metro Vancouver region. Mr. Tarnawski admitted that the wording was ambiguous:

Mr. Tarnawski: ... the wording caused us nightmares.

The Chairperson: It would have caused nightmares to the applicants, too, right?

Mr. Tarnawski: Yeah.

Emphasis added

[222] I conclude that the eligibility restriction, authored by Ms. Sharma at the request of Mr. Tarnawski and his recruiting unit partner, Mr. Northcote, was not scrutinized by them, individually or collectively, to ensure that it had a clear and singular meaning to persons seeking employment with CBSA.

[223] It was only after the public posting of the Vancouver Job Opportunity that Mr. Tarnawski realized the restriction was ambiguous. Common sense should have alerted Mr. Tarnawski to the risks involved in applying the restriction to applicants responding to the advertisement of the employment opportunity – it didn't. Instead, Mr. Tarnawski forged ahead with the staffing process, adopting a practice of asking every interviewee whether they had previously been interviewed for the position in question during the restriction period, assuming that the interviewee would assume that it meant anywhere in British Columbia.

[224] In my view, the rule of contractual interpretation that an ambiguous term shall be interpreted against the party that authored it should apply to pre-employment staffing processes carried out by the Respondent CBSA. Accordingly, by this rule of *contra proferentem*, the eligibility restriction ought to have been interpreted by the Respondent in the interests of persons responding to the job posting notice, including Mr. Turner. Had Mr. Tarnawski done so, it would not have disturbed the staffing process of the Vancouver Job Opportunity.

[225] During the interview for the Vancouver competition, Mr. Tarnawski asked Mr. Turner whether he had been interviewed after January 1, 2002, for “this position”, indicating the Customs Position as described in the poster advertising the Vancouver Job Opportunity. Mr. Turner said he had not, relying on his interpretation of the eligibility restriction, and did not disclose his prior interview in a Victoria staffing process.

[226] Mr. Turner testified that he had carefully considered the eligibility restriction and interpreted it to apply only to applicants who had previously applied for employment as a

Customs Inspector in CBSA's Metro Vancouver region. When Mr. Tarnawski asked "Have you ever applied for this position" Mr. Turner replied "No".

[227] Days after the interview, (and based on his recognition of Mr. Turner from his interview in Victoria Competition 7012,) Mr. Tarnawski verified the date of the Victoria interview, immediately disqualified Mr. Turner, then exacerbated matters by assuming that Mr. Turner had been untruthful in failing to disclose the prior interview in Victoria.

[228] Earlier in this decision, I dealt with the February 13, 2003 Victoria Competition 7012 interview and made a finding of fact that Mr. Tarnawski had too quickly concluded that Mr. Turner had been guilty of making assumptions, when Mr. Turner described in the interview how he dealt with travellers. In arriving at this assessment of Mr. Turner, I concluded that Mr. Tarnawski demonstrated his own propensity to make assumptions, and I conclude that this propensity was a factor in the Vancouver interview. When faced with Mr. Turner's narrow interpretation, Mr. Tarnawski rashly applied the ambiguous eligibility restriction broadly, and treated Mr. Turner's 'No' answer as untruthful, and as an attempt to deceive the Vancouver panel.

[229] During the inquiry, Counsel for the Respondent acknowledged that had the eligibility restriction not been applied, Mr. Turner would have been found to be qualified, that he had demonstrated sufficient competency during his first interview to be placed in a staffing pool, carrying with it the possibility of an offer of employment by CBSA. Nevertheless, Counsel for the Respondent maintained that the process was properly terminated by Mr. Tarnawski's interpretation and enforcement of the ambiguous eligibility restriction.

[230] I note that it was clearly established in cross-examination of Mr. Tarnawski that no other applicant for employment in the Vancouver Job Opportunity was subjected to the treatment meted out to Mr. Turner: he was the only candidate screened out on the basis of the eligibility restriction, even though a consistent application of that restriction would have screened out other candidates as well; and he was the only candidate to receive a post-interview letter stating that he had been disqualified.

[231] In that it was Mr. Tarnawski's recognition of Mr. Turner which led him to verify the date of Mr. Turner's prior interview and to apply a broad interpretation of the eligibility restriction solely to Mr. Turner, it is to Mr. Tarnawski's discredit that he did not verify the eligibility of other candidates based on this same interpretation. This amounts to an egregious breach of the panel's duty to act impartially toward Mr. Turner.

[232] In conducting a Selection Board interview to determine the competency of an applicant seeking employment with CBSA, management's review panelists must change modes, shedding managerial partiality, and donning adjudicative impartiality.

[233] Instead, Mr. Tarnawski, as Chairman of the Vancouver Competition 1002 Review Panel exhibited intransigence and was vexatious in deciding to disqualify Mr. Turner because Mr. Turner had interpreted the eligibility restriction as applying only to applicants who had been interviewed in Vancouver for the position of Customs Inspector in the Vancouver Region of CBSA. I conclude that Mr. Tarnawski could have, and ought to have, interpreted the eligibility restriction narrowly without creating any problems in the Vancouver Competition 1002.

[234] That Mr. Turner was subjected to differential treatment with negative consequences in the course of the Vancouver process is beyond dispute. The Tribunal must assess whether this adverse differential treatment amounts to discrimination based on prohibited grounds.

D. Application of Relevant Law

The *Shakes* decision

(a) Applying *Shakes* to Vancouver Competition 1002

[235] As noted above, the *Shakes* and *Israeli* decisions established a three-part test to establish a prima facie case of discrimination:

- (4) the complainant was qualified for the particular employment;
- (5) the complainant was not hired; and

- (6) someone obtained the position who was no better qualified than the complainant, but lacked the attribute on which the complainant based their human rights complaint.

[236] Respondent Counsel acknowledged that, but for the eligibility restriction, Mr. Turner would have qualified for the staffing pool in the Vancouver process; and this, along with Mr. Turner's positive performance reports establishes that Mr. Turner was qualified for employment as a Customs Inspector. This satisfies the first part of the *Shakes* test.

[237] The second element is also met, since Mr. Turner was not hired for the position.

[238] The third element of the *Shakes* test takes on a unique complexion in Vancouver Competition 1002 because the employer's rationale in deciding not to put Mr. Turner in the staffing pool of competent applicants was based on ineligibility, rather than lack of competency.

[239] I am satisfied from the testimonies of Mr. Hughes, Mr. Turner, Mr. Tarnawski and Mr. Baird that it has been clearly established that other candidates who lacked the attributes upon which Mr. Turner based his complaint, namely age, race, and perceived disability due to obesity, should have been screened out based on a consistent application of this eligibility restriction, and were not. In my view, this meets the third element of the *Shakes* test.

[240] In addition, based on Mr. Tarnawski's evidence, I conclude that the vast majority of applicants to the Vancouver Competition 1002, unlike Mr. Turner, had no prior employment experience with either CCRA or its successor CBSA. This reinforces my conclusion with respect to the third element of the *Shakes* test.

(b) Applying *Shakes* to Victoria Competition 7003

[241] The evidence of Mr. Turner, supported by that of Mr. Hughes, and to a significant degree the testimony under relentless cross-examination of Mr. Baird, establishes the three elements required in *Shakes*. The Complainant was (1) qualified for employment as a customs inspector/border services officer; (2) and was not hired; (3) other applicants, without the

qualifications of the Complainant and lacking the attributes on which the Complainant based his complaint, subsequently obtained employment with the Respondent.

(c) Applying *Basi v CNR* to Vancouver Competition 1002 and Victoria Competition 7003

[242] The Respondent argued that the decisions of the respective interview boards were a proper exercise of management discretion; in the Vancouver process, that Mr. Turner, though qualified, was ineligible because of the restriction published in the job poster; and in the Victoria process, that Mr. Turner, though otherwise competent as a customs inspector, had failed to demonstrate his competency to be a customs inspector during the brief interview process. The Respondent's argument is unsound and misleading.

[243] Considering the totality of the circumstances of the two competitions, and both being pretextual, I am convinced that the subtleness of discrimination permeated both staffing processes, and that neither process was as innocent as claimed to be. Since this is a case of circumstantial evidence, it raises the question whether an inference of discrimination ought to be drawn. I conclude that the evidence of the Complainant and Mr. Hughes establishes that such an inference is much more probable than the possible inference of circumspect conduct on the part of the Respondent employees Mr. Tarnawski and Mr. Baird.

(d) Applying the *Radek* decision to the Vancouver and Victoria competitions

[244] *Radek* alerts a tribunal to be aware of the effect of compound discrimination in order to avoid relying on a single axis analysis. In that regard I am mindful that Mr. Turner's complaint of discrimination is based on several grounds of discrimination, and that s. 3.1 of the *CHRA* specifically provides that a discriminatory practice includes a practice based on the effect of a combination of prohibited grounds, raising the likelihood that a primary ground of discrimination may be synergistically intersectional with, and compounded by, other less obvious grounds of discrimination.

[245] I conclude that Mr. Turner's complaint contains intersectional grounds of discrimination and that compounding discrimination did occur, and is a factor in my determination that the Respondent engaged in a discriminatory practice against Mr. Turner.

E. Response of the employer to *prima facie* case

Vancouver Competition 1002

[246] Has the Respondent provided an adequate – which is to say more probable – explanation for the differential treatment of the Complainant in the Vancouver Competition 1002? It is my determination that the Respondent has not provided a reasonable explanation.

[247] Moreover the Respondent failed to provide a reasonable explanation of the broad interpretation of the ambiguous the eligibility restriction and why it was not applied to any other applicant than Mr. Turner. Indeed, on the record before the Tribunal, it appears that no explanation for this differential treatment was offered at all.

[248] That recognition of Mr. Turner prompted an inquiry as to his eligibility, stands in stark contrast to Mr. Tarnawski's admission that no other candidates were disqualified, his excuse being that it would have been too much work, hence the practice he adopted of asking each candidate if they had been interviewed in a prior competition, and acceptance of a negative reply as sufficient to permit the interview process to proceed.

[249] However, I must move beyond Mr. Tarnawski's explanation of the review panel's decision that Mr. Turner was in breach of the eligibility restriction and consider the probability of stereotypical attitudes affecting Mr. Turner's candidacy in Vancouver Competition 1002. In this regard, I am inexorably drawn by the probabilities surrounding this case to conclude that Mr. Tarnawski negatively stereotyped Mr. Turner as an obese, older black man, likely to be lazy and untruthful, and therefore unacceptable as a potential employee of the newly established law-enforcement-oriented CBSA.

[250] I conclude that Mr. Tarnawski's imposition of the eligibility restriction against Mr. Turner was pretextual, and that it was an arbitrary and expedient way to end Mr. Turner's candidacy in the staffing process, thereby denying Mr. Turner an opportunity to become an indeterminate employee with CBSA.

Victoria Competition 7003

[251] Has the Respondent answered the *prima facie* case of discrimination with an adequate – which is to say a more probable – explanation for the differential treatment of the Complainant in Victoria Competition 7003? It is my determination that the Respondent has not provided a reasonable explanation.

[252] It is beyond comprehension that Mr. Baird, Chairperson of the Review Panel, a Superintendent who had worked with Mr. Turner and written positive performance reports of his work as a Customs Inspector, would dogmatically exclude from the panel's assessment of Mr. Turner the fact that Mr. Turner had competently worked as a Customs Inspector in the previous five years. This totally injudicious process was worsened by Mr. Baird's amoral attempt, shortly after the interview, to get Superintendent Nina Patel to verify that Mr. Turner had been untruthful in describing to the panel how he dealt with an agitated traveller, an action Mr. Turner performed at the request of Ms. Patel.

[253] This egregious and injudicious behaviour is not a reasonable explanation for the panel's assessment that Mr. Turner lacked the competence to be a Customs Inspector, rather it is a basis for the inference of fact that Mr. Baird had negatively stereotyped Mr. Turner as a lazy, older, obese, black man, and decided to deny him the opportunity to continue working for the CBSA as a uniformed Border Services Officer.

[254] Considering the foregoing conclusions I have reached with respect to both the Vancouver Competition 1002 and the Victoria Competition 7003, and in the context of the surrounding circumstances testified to by Mr. Turner, and in accordance with relevant case law, I find that the Respondent discriminated against Mr. Turner contrary to s. 7 and s. 10 of the *CHRA* by reason of

Mr. Turner's age, race, and perceived disability of obesity; and subjected Mr. Turner to differential treatment as an employee.

[255] Lastly, I am guided by the *Sinclair* decision, in which the adjudicator relied on *Spence*, a decision of the Supreme Court of Canada, quoting, in part:

A significant segment of our community holds overtly racist views. A much larger segment subconsciously operated on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. Blacks are among the primary victims of that evil.

VI. Determinations

[256] Mr. Turner's evidence established a *prima face* case that CBSA superintendents Ron Tarnawski and Trevor Baird separately subjected him to discriminatory practices, in matters related to employment, on the grounds of age, colour and perceived disability of obesity

[257] Based on reasons stated throughout this decision, and in all the surrounding circumstances of this case, I made findings of fact that Mr. Tarnawski and Mr. Baird were not credible witnesses; they revealed similar characteristics, often reticent, often resorting to prolixity in order to avoid making direct and dispassionate answers. Both floundered under cross-examination. Wherever their evidence differs with that of Mr. Turner, I have accepted Mr. Turner's evidence.

[258] Neither Mr. Tarnawski nor Mr. Baird provided a reasonable explanation demonstrating that the alleged discrimination did not occur as alleged or that the conduct was somehow non-discriminatory.

[259] I find that the interviews of Mr. Turner by Mr. Tarnawski (Vancouver Competition 1002) and Mr. Baird (Victoria Competition 7003) were flawed and injudicious, that they were conducted in a manner which denied Mr. Turner an opportunity to compete for indeterminate

employment with CBSA; and that in each case the decision was arbitrary and pretextual, based on prejudice and constituted discriminatory practices under sections 7 and 10 of the *CHRA*.

[260] Section 7 of the *CHRA* reads:

It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

[261] Section 10 of the *CHRA* reads:

It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

VII. Decision

[262] I find that the Complainant has substantiated his allegation that, because of his age, race, and a perceived disability of obesity, he was subjected to discriminatory practices contrary to sections 7 and 10 of the *CHRA* by CBSA's refusal to continue to employ him and by its pretextual and discriminatory use of the staffing practices in Vancouver Competition 1002 and Victoria Competition 7003, which resulted in the Complainant being deprived him of employment opportunities.

[263] Section 53(2)(e) of the *CHRA* provides that a complainant may be compensated up to \$20,000 for pain and suffering experienced as a victim of a discriminatory practice. After a subsequent hearing on remedy, I will order the Respondent to pay such amount as may be appropriate to the Complainant compensating him for pain and suffering experienced after he was denied employment opportunities.

[264] Section 53(3) of the *CHRA* provides that the Tribunal may order a respondent to pay up to \$20,000 in compensation to the victim if the respondent is found to have engaged in the discriminatory practice wilfully or recklessly. I find that Respondent managers Ron Tarnawski and Trevor Baird acted wilfully in denying the Complainant an opportunity for employment. I will, in due course, after the remedy hearing, make order in compensation for their wilfulness.

[265] Section 53(2)(c) of the *CHRA* provides that a victim may be compensated for any and all wages of which he was deprived as a result of the discriminatory practice. I find that the Complainant did suffer lost wages that he would have earned as a Border Services Officer. The amount of wage loss shall be determined after the hearing on remedy. The wage loss shall be determined by calculating the total earnings the Complainant would have earned as a Border Services Officer and deducting from that sum the amount of salary the Complainant has been able to earn from other mitigating employment. Income earned by the Complainant in his effort to mitigate his loss of earning as a Border Services officer must be supported by particulars and personal income tax returns.

[266] Interest is payable in respect of all awards made in this decision under s. 53(4) of the *CHRA*. The interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the Bank Rate (monthly series) set by the Bank of Canada. Interest is to be calculated from the date of the complaint with respect to the compensation for lost wages, pain and suffering, and special damages.

[267] During the hearing on remedy I will consider whether the Tribunal has jurisdiction to order the Respondent to offer employment to the Complainant.

[268] The Tribunal shall retain jurisdiction to deal with all matters arising out of this decision for a period of one year after its release.

Signed by

Wallace G. Craig
Tribunal Member

Ottawa, Ontario
March 7, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1248/6007

Style of Cause: Levan Turner v. Canada Border Services Agency

Decision of the Tribunal Dated: March 7, 2014

Date and Place of Hearing:

November 17 to 21, 2008

January 19 to 22, 2009

November 19 to 20, 2013

Victoria, British Columbia

March 17, 2009 (Videoconference)

Ottawa-Vancouver

Appearances:

David Yazbeck / Paul Champ, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Graham Stark, for the Respondent