

Canadian Human
Rights Tribunal



Tribunal canadien
des droits de la personne

Between:

Chris Hughes

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Human Resources and Skills Development Canada

Respondent

Decision

Member: Wallace G. Craig

Date: October 11, 2012

Citation: 2012 CHRT 22

I.	Introduction.....	1
A.	Complaints	1
B.	Relevant sections of the <i>CHRA</i>	1
C.	Standard of Proof and assessing credibility	2
D.	Background	4
II.	The Case Presented by Mr. Hughes	4
A.	Circumstances surrounding Mr. Hughes’ complaints of discrimination and retaliation	4
B.	Insurance Processing – CEP Processing Centre – SCC Victoria.....	7
C.	Mr. Hughes’ performance as a CEP employee.....	8
D.	Mr. Hughes’ Continuing Disability	10
E.	Termination of Mr. Hughes Employment.....	13
F.	Mr. Hughes’ claim of retaliation.....	13
G.	Complainant’s <i>prima facie</i> Case.....	14
III.	The Case Presented by HRSDC.....	14
A.	Respondent witness Kenneth Campbell.....	15
B.	Respondent witness James Quinn.....	17
C.	Anne Milne	20
IV.	Conclusions.....	21
V.	Decision	22
VI.	Remedy	22
A.	Pain and Suffering.....	22
B.	Special Compensation.....	23
C.	Interest.....	23

I. Introduction

A. Complaints

[1] In January 2008 and June 2009, Chris Hughes filed complaints under the *Canadian Human Rights Act (CHRA)* against Human Resources and Skills Development Canada (HRSDC). The Canadian Human Rights Commission (Commission) investigated the complaints and referred them to the Canadian Human Rights Tribunal (Tribunal) for inquiry on June 24, 2011.

[2] Member Wallace Craig conducted an inquiry into the complaints in Victoria B.C. from May 23 to 25, May 28 to June 1 and on June 13 and 14, 2012.

[3] In his first complaint, Exhibit C-1, filed with the Commission on January 27, 2008, Mr. Hughes claimed that, between March 2006 and January 2008, he was subjected to a discriminatory practice contrary to s. 7 of the *CHRA*. Mr. Hughes claimed that HRSDC refused to employ him because he suffered from the disability of depression.

[4] In his second complaint, Exhibit C-2, filed with the Commission on June 11, 2009, Mr. Hughes alleged that he had been subjected to retaliation since early 2008 contrary to s. 14.1 of the *CHRA*, and also that discrimination under s. 7 was ongoing.

B. Relevant sections of the *CHRA*

[5] Section 3 reads as follows:

3. (1) For all the purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

[6] Section 7 reads as follows:

7. It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual, or
...
On a prohibited ground of discrimination.

[7] Section 14.1 reads as follows:

14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

C. Standard of Proof and assessing credibility

[8] In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada clarified the law with respect to the standard of proof in civil cases: nothing more, nothing less than a balance of probabilities.

[9] Evidence must be clear, convincing and cogent in order to satisfy the balance of probabilities test.

[10] The Court also affirmed that a trial judge must not consider a witness' evidence in isolation, but should consider the totality of the evidence in the case, and assess the impact of any inconsistencies on questions of credibility and reliability pertaining to the core issues in the case.

[11] In *R. v. R.E.M.* 2008 SCC 51 at p. 56, released at the same time as *McDougall*, supra, Chief Justice McLachlin commented 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; ... In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

In the end, believing the testimony of one witness and not the other is a matter of judgement. (paragraph 76 – *McDougall*)

[12] The Supreme Court's clarification of the standard of proof and assessment of credibility is consistent with what had already been stated in William Pentney, *Discrimination and the Law* (Thomson Carswell 2006) and the case of *Van Berkel v. MPI Security Ltd.* (1997) 28 C.H.R.R. D/504 (.C.H.R.C.) at p. 15-57:

In accordance with these judicial guidelines, the testimony of each witness has been examined for consistency with the preponderance of probabilities which surround the existing circumstances of the complainants employment with [the corporate respondent] and her interactions with [the individual 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 demeanour 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.

[13] The complainant and the respondent each have an evidentiary burden. Initially Mr. Hughes must present a *prima facie* case of contravention by HRSDC of sections 7 and 14.1 of the *CHRA*. If a *prima facie* case is made out by the complainant then the evidentiary burden shifts to the respondent to establish that the conduct complained of either didn't occur or doesn't constitute a discriminatory practice: *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536.

D. Background

[14] From 1995 to 2005 Mr. Hughes was employed as a term employee by Canada Customs and Revenue Agency, the predecessor to the Canada Revenue Agency (CRA) and the Canada Border Services Agency (CBSA), and worked in three capacities which are particularized in Exhibit C-4 Tab 16: as a Business Window Agent, Customs Inspector, and Collections Officer.

[15] Mr. Hughes graduated from Middlesex District High School in Ontario. While working at the CRA, he augmented his high-school education with level-one financial accounting courses at Camosun College and various training courses at the CRA involving tax law and legal remedies. Mr. Hughes also later took a number of training courses in law enforcement while working at the CBSA (Exhibit C-4, tab 16).

[16] Mr. Hughes testified that in these initial years of employment he publicly disclosed an incident in which a taxpayer was subjected to improper attachment proceeding by other employees of the CRA. Mr. Hughes testified that he was labelled a whistleblower, that he engaged the CRA in litigation, resulting in a confidential settlement and payment to him of an amount of money that cannot be disclosed. Mr. Hughes revealed that during this turbulent period he suffered anxiety and stress requiring medical leaves of absence from work.

[17] In his first period of employment with CRA, Mr. Hughes remained a term employee unable to earn sought-after indeterminate employment.

II. The Case Presented by Mr. Hughes

A. Circumstances surrounding Mr. Hughes' complaints of discrimination and retaliation

[18] At the beginning of his testimony Mr. Hughes identified Exhibit C-1 as his January 27, 2008 complaint of discrimination and he stated under oath that all averments in it were true. The complaint establishes that in the spring of 2006 Mr. Hughes had applied as an external candidate and was accepted in a staffing pool (section process number 2006-REH-EA-BC-SC-587) with

respect to a CR-05 Service Delivery Agent 11 position at HRSDC in Victoria. Mr. Hughes claimed that he was interviewed on August 23, 2006, and passed.

[19] The following excerpts from Exhibit C-1 are relevant to the issue of disability:

On October 17 2006 I received an email stating that I was placed in a partially assessed pool. I phoned HRSDC and I was told the email was poorly worded and that I met all essential qualifications and I was in a fully qualified hiring pool (this would have been since August 23, 2006).

On December 19, 2006, I was phoned by a K. Porter and asked for references to finish the process. This made no sense as it contradicted what I was told earlier. She said I had passed all the essential qualifications and the reference was just used to confirm the results.

I told Ms. Porter there would be problems with references as I was a government whistleblower. I had left an Internal Affairs summary with the board at the interview in August. I reiterated that I had very good performance reviews in the past and that copies were handed in to the Board in August. I mentioned my health issues, stress, depression and retaliation by CBSA in regard to references. I asked for accommodation under the Canadian Human Rights Act.

[20] Following his acceptance in the CR-05 pool, a national reclassification of staffing took place bringing with it a change in the education requisite to two years of post-secondary education. Mr. Hughes acknowledged that this reclassification of staffing rendered him technically unqualified as a CR-05 candidate for employment. Mr. Hughes was never hired from the CR-05 staffing pool.

[21] Mr. Hughes testified that notwithstanding the change in education requirement, the CR-05 pool in which he was qualified could have been used to staff at equivalent positions such as PM-02 Service Benefits Canada Officer, PM-01 Citizen Service Agent, PM-01 Payment Services Agent and CR-04 Service Delivery Agent. In his complaint of discrimination Mr. Hughes provided the names of six persons employed on one-year assignments; two on September 14, 2006, two on November 6, 2006, one on November 11, 2006, one on January 2, 2007 (nine months), and he asserted that he should have been considered for these positions.

[22] Mr. Hughes also listed four persons who were hired on May 22, 2007, through a non-advertised process as PM-01, and he asserted that the job poster and qualifications were almost identical to the CR-05 pool he was in. “HRSDC should have used the CR-05 pool I was in but did not due to discrimination.”

[23] Lastly, Mr. Hughes identified a person in a CR-04 pool who was appointed May 22, 2007, for one year as an acting PM-02. “Again, I should have been considered for this position as I had recently shown I had the qualifications for this job and I had 10 years experience as a PM-01 and PM-02.”

[24] Mr. Hughes tendered Exhibit C-5, Tab 23; it includes a completed “Assessment Guide” for Chris Hughes, which ends with a hand-printed endorsement “This Candidate Meets All Qualifications”, referring to the CR-05 competition 2006-REH-CSD-EA-BC-SC-587. Also forming part of Exhibit C-5, Tab 23 is a “Reference Check” which includes a pertinent question and answer: “(Q16) Would you rehire...? Can you tell me why (or why not)?” and a handwritten answer – “currently not working, ‘medical issues’ last few years. (Quote from Mr. Hughes).”

[25] In the course of this inquiry into Mr. Hughes’ human rights complaints, the thrust of his evidence revealed an incorrect assumption: that acceptance into a staffing pool, particularly the CR-05 pool, carried with it a guarantee of employment.

[26] Nevertheless, (a) refusal or neglect on the part of HRSDC to recognize Mr. Hughes’ qualifications, and (b) failure to re-hire him from the CR-05 pool while aware that Mr. Hughes was disabled, is a discriminatory practice. That conclusion is reinforced by the circumstances of HRSDC’s subsequent hiring of Mr. Hughes as a term CR-04 employee, employment that was “non-extended”, i.e. terminated, while Mr. Hughes was suffering an episode of depression.

B. Insurance Processing – CEP Processing Centre – SCC Victoria

[27] In the summer of 2007, Mr. Hughes applied to a CR-04 competition with the respondent. On August 31, 2007, Mr. Hughes was hired from CR-04 pool referenced # 2007-CSD-EA-BC-SC-425 as a Service Delivery Agent 1 to do “Insurance Processing – CEP [Common Experience Payment] Processing Centre – SCC Victoria.” Mr. Hughes testified that he was not known to the panel members, that he did not disclose his whistle-blowing past or that he occasionally suffered from depression. Mr. Hughes claimed that his non-disclosure resulted in his being hired and demonstrated there was a stigma over him that discredited his work record and qualifications.

[28] Mr. Hughes produced a copy of a letter (Exhibit C-4, Tab 12) dated August 31, 2007, sent to him by HRSDC, offering term employment for the period September 13, 2007, to March 7, 2008. On September 5, 2007, Mr. Hughes accepted the offer. Similar letters from HRSDC dated November 22, 2007, and February 28, 2008, (Exhibits R-3 and R-4) extended Mr. Hughes’ term employment to March 28, 2008, and finally to June 27, 2008.

[29] Aboriginal Affairs and Northern Development Canada (AANDC), (formerly Indian and Northern Affairs Canada), provides an Information Update on its website which explains the Common Experience Payment (CEP) stating, in part:

The Common Experience Payment (CEP) is one element of the **Indian Residential Schools Settlement Agreement**. The court-approved Settlement Agreement was implemented on September 19, 2007, and was negotiated by representatives from various Aboriginal organizations, church entities, legal representatives for former students, and the Government of Canada. The CEP is paid to eligible former students who resided at a listed Indian Residential School. Eligible former students receive \$10,000 for their first year (or part thereof) of their attendance at a listed Indian Residential School plus \$3,000 for each additional year (or part thereof).

[30] It was the responsibility of Mr. Hughes (and all other newly employed Service Delivery Agents at HRSDC’s CEP processing unit in Victoria) to process applications, determine eligibility, and to expedite a one-time CEP payment to former students of Indian Residential Schools. A significant part of Mr. Hughes’ work was receiving phone calls from applicants who

often spoke of the trauma to which they had been subjected, causing him increasing levels of distress.

C. Mr. Hughes' performance as a CEP employee

[31] Mr. Hughes explained the manner in which CEP applications were processed in HRSDC's Victoria office at 595 Pandora Street. Mr. Hughes claimed that he processed the most CEP applications earning the nickname Rock Star and go-to-guy of his team.

[32] Mr. Hughes testified that he willingly worked a great deal of overtime during the first few months of the CEP, illustrated in part in Exhibit C-4 Tab 24, email exchanges with his team leader Jacky Smith, "Subject: OT production" and "weekend OT production":

[33] October 22, 2007:

Hughes: I worked five hours Saturday and three hours Sunday. I entered 35 applications and D .E. R. 30 applications.

Smith: That's excellent Chris. Really appreciate your productive efforts.

[34] October 28 and 30, 2007:

Hughes: I entered 39 applications and Data Entry Reviewed 132

Smith: You have consistently had excellent productivity results Chris. Your hard work is appreciated.

[35] Exhibit C-4, Tab 25 consists of two emails which reveal that Mr. Hughes was a conscientious worker.

[36] First, on November 7, 2007, from Lorraine Lewis, an acting Project Officer, an email to Mr. Hughes and Ms. Shelley Spears, cc Jacky Smith: “Thank you to both of you for coming up with an example of a paid client to assist with the training.”

[37] Second, on November 22, 2007, an HRSDC manager, Liz Klempler, alerted CEP employees to two websites, an INAC database website and the Aboriginal Canada website on which they might establish band contact information and the legitimacy of other essential facts. Ms. Klempler: “Thanks to Chris Hughes and others who provided this useful information.”

[38] Aware his CEP term employment was time-limited, Mr. Hughes engaged in an email exchange with team leader Jacky Smith on January 8, 2008, asking how he might request work as an acting PM-02 (or PM-01) in the CPP/OAS area, and stating “I hope that I have shown that I am a reliable, productive employee during my time with the CEP program.” Ms. Smith’s response is significant:

Not sure if you applied on the recent PM01 processed for the CSA position. That position is for the front-end position working downstairs with the clients. I don’t think the CPP/OAS has any PM01 positions any longer, but not positive on that. If you are not in an active pool, I would suggest you submit a deployment request to the manager(s) there.

Here is the official form, the request can be sent via email, memo, or letter to the hiring manager. It is up to that unit to decide whether or not they would accept the request. I do not know all the managers there but the Director is Kim Bergh and the managers would be listed in the electronic directory.

I do think that you have been a reliable, productive and pro-active member of this team and would not have a problem if you wanted to give my name as a reference. (Emphasis added)

[39] On January 30, 2008, Mr. Hughes emailed a request to Kim Bergh, (copied to Mr. Quinn), for deployment, and supported his request with a resume detailing experience in various positions with HRSDC’s predecessors.

[40] In early February 2008, a co-worker embarrassed Mr. Hughes in front of other employees by heatedly and falsely accusing him of incorrectly processing certain CEP applications. Mr. Hughes was unnerved by this verbal attack and went directly to team leader Ms. Smith's office. Not finding her there, he went to the local union president who contacted Ms. Smith and asked her to meet with Mr. Hughes. Ms. Smith discussed the matter with Mr. Hughes but made it clear that in her opinion, Mr. Hughes should not have gone so hastily to the union for assistance. Thereafter Ms. Smith met with the co-worker but did not sanction her for what Mr. Hughes perceived as harassment. This incident soured their relationship and resulted in Ms. Smith being reluctant thereafter to fully endorse Mr. Hughes' employment potential.

[41] In a reference check dated August 6, 2008, Exhibit C-5, Tab 32, Ms. Smith downgraded Mr. Hughes' ability to process CEP applications, contradicting her January 8, 2008, commendation of his work ethic and her offer to be a reference on his behalf.

[42] In a "Reference Check" dated October 11, 2008, Ms. Smith mentioned the incident and stated "A more appropriate approach would have been to personally approach the Team Leader rather than requesting involvement from the Local Union."

D. Mr. Hughes' Continuing Disability

[43] At the end of the intense period of CEP processing, Mr. Hughes began to re-experience health problems. Exhibit C-4, Tab 28 is an exchange of emails on December 14, 2007, between Mr. Hughes, Cherie Nash (Acting Project Officer) and team-leader Jacky Smith. Mr. Hughes reported that he had been ill for two days with a back problem and a bout of food poisoning or flu, rendering him unable to work on the coming Saturday. On December 17, 2007, Mr. Hughes emailed Ms. Smith explaining that his hip pain was still severe, stating "I have suffered from Piriformis Syndrome and/or Spondylolithesis for the last 12 years and usually can deal with the pain and condition without missing much work. It only flares up once or twice a year."

[44] On February 18, 2008, Mr. Hughes received a signed handwritten memorandum, Exhibit C-4, Tab 19, from Dr. John Miller, M.D., a general practitioner in Victoria:

Name – Chris Hughes

Date – Feb. 18/08

Chris has a history of depression and has been somewhat stressed and depressed for the past month. Reduced client telephone contact would be helpful. (Emphasis added)

(Signed) Dr. John Miller, M.D.

[45] The Oxford Dictionary defines depression as “*Med.* a pathological state of extreme dejection, characterized by a mood of hopelessness and feelings of inadequacy, often with physical symptoms.”

[46] Mr. Hughes presented Dr. Miller’s memorandum to Ms. Smith, and she accommodated his episode of depression by changing his duties.

[47] On April 14, 2008, Mr. Hughes made another request for accommodation to Ms. Smith:

This is a further request for accommodation due to my disability. Thank you for modifying my job earlier when I brought this to your attention.

I had a great difficulty getting through last week. I request to be transferred to the CR-04 Service Delivery Agent processing GIS renewal [Guaranteed Income Supplement] on medical grounds.

The current position I hold and the program I am assigned to is making my health condition worse. I believe working in GIS will improve my health. The GIS job involves a lot of number crunching (which I excel at and enjoy) and involves less client contact by phone. The nature of the program is also not depressing.

CEP deals with a lot of stressful and depressing issues of abuse and discrimination. It is not a good fit given my medical history.

The GIS position would be less stressful and should also alleviate my depression.

I am sure there are persons at GIS who are not enjoying it or want to come back to CEP. In any event, I have a medical request that needs to be accommodated per the Canadian Human Rights Act and the Treasury Board's Duty to Accommodate.

Both my current position and GIS are CR-04 jobs. There should be no reason for HRSDC to deny this request as I am in a fully qualified pool for a CR-04 position and the job poster stated it could be used to staff similar positions at the CR-04 level. Exhibit R-5

[48] Mr. Hughes' request for further accommodation with respect to his disability of depression was sent to Ms. Smith at 9:34 am on April 14, 2008. It was followed by a brief exchange of emails with Ms. Smith at 10:02 am and 10:08 am. At 10:09 am Ms. Smith sent Mr. Hughes' request to Mr. Quinn. At 10:21 am Ms. Smith emailed Mr. Quinn, verbatim, Dr. Miller's note dated February 18, 2008, stating that on receipt of the note, she had ended Mr. Hughes' duty to receive client phone calls. At 11:10 am Mr. Quinn forwarded Mr. Hughes' request for accommodation to Human Resources Consultant Caleigh Miller, and she replied immediately:

I agree with the medical being required. Denying a deployment (for other reasons such as right fit etc) does not constitute denying a DTA. We have to make all efforts to accommodate in the current position before we look at a same level transfer. Given that the duties of a CR-04 are relatively similar (ie/clerical in nature) we would need to know specifically which duties he is not able to do. Can he not deal with the public? Use a telephone? Etc etc. He says it should alleviate his depression. It may not. Depression is a medical condition which needs to be treated along with a medical professional. It is presumptive to say how a different job would affect one's health considering he does not know the nature of that specific job.

We can also prepare a letter to send to Chris' physician asking more questions about his abilities/limitations, enclosing a copy of the work description etc even if he brings in a medical.

[49] Ms. Miller's comments informed HRSDC's management of the seriousness of the illness of depression gripping Mr. Hughes. Despite Ms. Miller's recommendations, Ms. Smith and

Mr. Quinn failed to implement them or to otherwise accommodate Mr. Hughes' disability. Ms. Miller made specific recommendations that ought to have been acted upon. The several managers who failed to respond to Mr. Hughes' request for accommodation of his mental illness revealed that they were incapable of identifying themselves with and comprehending the rigours of mental illness and their duty as HRSDC managers as stipulated by the Treasury Board of Canada.

E. Termination of Mr. Hughes Employment

[50] Five weeks after Mr. Hughes' request for accommodation concerning his depressive condition, Anne Milne, Senior Director, Processing and Payment Services, BC/AB Territories Region, HRSDC, notified Mr. Hughes by letter dated May 20, 2008, (Exhibit C-4 Tab 42), that his CEP term employment would terminate on June 27, 2008.

F. Mr. Hughes' claim of retaliation

[51] In June 2009, Mr. Hughes filed a complaint of retaliation against HRSDC. Ostensibly, it stemmed from his January 2008 complaint of discrimination on the prohibited ground of disability. In his complaint of retaliation, Mr. Hughes alleged that in January 2008, he told his team leader that he was suffering from depression, and that he had filed a human rights complaint. He also alleged that the hiring managers knew of his human rights complaint based on disability.

[52] Mr. Hughes asserted that when the HRSDC management learned of his complaint based on disability, he was retaliated against by denial of transfers to other work areas, that ultimately his CEP contract was not extended and, after he was terminated, that he was not selected for re-employment out of two staffing pools in which he had been qualified.

[53] It is pertinent that Mr. Hughes claimed that both discrimination and retaliation were ongoing throughout the period January to June 2008. In considering the merit of Mr. Hughes'

claim of on-going retaliation, I note that throughout his testimony, Mr. Hughes revealed himself to be overly assertive and dogmatic concerning his perceived entitlement to a career with HRSDC. In this regard, he could not accept that HRSDC management staffing decisions focus on the ultimate criteria of the “right fit”; and he perceived management decisions to disregard him as on-going retaliation.

G. Complainant’s *prima facie* Case

[54] Mr. Hughes’ case consisted of his viva voce testimony and pertinent documentary evidence from which I have selected the most cogent and probative. I conclude, on a balance of probabilities that Mr. Hughes has established a *prima facie* case of a discriminatory practice contrary to s. 7 of the *CHRA*, engaged in by HRSDC in its refusal to continue his employment in a manner that would accommodate his disability, and by terminating his employment while he was disabled.

[55] Considering the same evidence, I conclude that it falls short of establishing a *prima facie* case of retaliation arising from and related to his complaint of discrimination contrary to section 14.1 of the *CHRA*.

III. The Case Presented by HRSDC

[56] Since a *prima facie* case has been established, the onus now shifts to the Respondent to provide a reasonable explanation that demonstrates either that the alleged discrimination did not occur as alleged or that the conduct was somehow non-discriminatory. In other words, the Respondent must demonstrate that it did not terminate the Complainant’s employment on the basis that he was disabled or that accommodating the Complainant would have amounted to undue hardship.

A. Respondent witness Kenneth Campbell

[57] During the years 2006, 2007 and 2008 Mr. Campbell was a lower-level manager at HRSDC Victoria, Mr. Quinn was above him in the chain of authority, and Ms. Milne was superior to both of them, having a relatively high level managerial position in HRSDC operations in Western Canada.

[58] Mr. Campbell recalled an interview he had with Mr. Hughes in 2006 in connection with the CR-05 staffing pool 2006-REH-EA-BC-SC-587 in which Mr. Hughes was accepted. During the interview Mr. Hughes tendered a package of work-related information and requested special consideration over his inability to secure references because of unwarranted refusal on the part of managers who had supervised him in his earlier federal employment. In their conversation Mr. Hughes explained that he was blacklisted because of his past whistle-blowing actions and disputes with his managers.

[59] I conclude that at all relevant times beginning in 2006 Mr. Campbell knew that Mr. Hughes had the ability to perform work at the CR-05 level, that in 2007 Mr. Hughes had been accepted into two lesser staffing pools: a CR-03 pool and a CR-04 CEP staffing pool, and knew that Mr. Hughes was employed by HRSDC in 2007 from the CR-04 pool to process CEP applications.

[60] During the training of CEP processors, a training official from Ottawa, Mr. Paul Thomas, engaged Mr. Campbell in a conversation about Mr. Hughes. As a result of this conversation Mr. Campbell, a CEP Team Leader, sent an email on September 18, 2007, marked "Importance: High, Subject: Issues", to Mr. Quinn, the manager of CEP processing, informing Mr. Quinn of negative comments made by Paul Thomas about Mr. Hughes. Mr. Campbell stated in his email "I asked Paul to put this information and any other comments he has in writing as we may want a record of this. I am not sure if Liz has had any issues with Chris but we may want to inquire."

[61] The contractual letter of employment used by HRSDC stipulates that a new employee is a probationary employee without providing any precise meaning to probation. By ordinary

definition, probation is the action of subjecting an individual to a period of testing and trial to ascertain the individual's fitness or lack of fitness in a particular job. In this case, Mr. Campbell and Mr. Quinn ought to have disclosed Mr. Thomas' allegations to Mr. Hughes and given consideration to his explanation. It was unacceptable behaviour and it is to their discredit that they chose to file the information away for some future use against Mr. Hughes.

[62] A significant potential witness, Mr. Hughes' team-leader Jacky Smith, died after Mr. Hughes' employment was terminated. Without any forewarning from counsel, Mr. Campbell attributed some very inflammatory comments to Ms. Smith with respect to her supposed fear concerning prospective behaviour of Mr. Hughes that might be caused by his depressive condition. I excluded this evidence but consider it relevant in determining the credibility of Mr. Campbell.

[63] Later, when asked about one somewhat negative comment about Mr. Hughes made by Ms. Smith in a February 11, 2008 report, "Reference Check – CEP employees," intended to identify top CEP performers, (Exhibit C-4 Tab 17), Mr. Campbell testified that it was generally "something about a co-worker" and that it "raised a bit of a red flag." The truth of the incident is that a co-worker had harassed Mr. Hughes and Mr. Campbell either knew this to be the case or was reckless in his red-flag comment. It was a groundless observation.

[64] After being terminated (or non-extended as HRSDC phrased it) Mr. Hughes continued to bombard HRSDC with applications for employment during 2008, one of which illustrates a very acrimonious attitude toward Mr. Campbell.

[65] When Mr. Hughes applied for employment as a Program and Service Delivery Clerk at the CR-04 level, Mr. Campbell was by then the Service Delivery Manager, Old Age Security BC, Alberta and the Territories.

[66] In an email sent October 30, 2008, Mr. Campbell informed Mr. Hughes that "All references provided by you either could not confirm or would not discuss your past performance.

On October 22, well after the September 10th deadline communicated to you, we received reference information from Mr. Tim O'Neill. In addition to being untimely, the reference indicated someone who was substantively a co-worker with short term acting assignments as team leader. The Assessment board's determination that your qualifications do not meet the requirements of this position stands."

[67] Mr. Hughes responded the same day with a page-length email, a firestorm of accusations beginning "You can expect three Public Service Commission investigations (this one and the two hiring pools I am in that HRSDC is ignoring), an additional human rights complaint and possibly civil suit," and ending "I will be bringing all of this to the attention of my MP and the media. Then I will make a sign and protest in front of your office."

[68] Mr. Campbell immediately sent his email and Mr. Hughes' response to six senior managers stating: "Chris's response. Please note threats including media." Exhibit C-5, Tab 30. Mr. Campbell testified he felt threatened, that it was the first time he had experienced this kind of behaviour.

[69] I find that Mr. Campbell was deeply troubled by Mr. Hughes' hostility towards him, that it negatively affected his testimony to the point that he became noticeably reticent in answering questions put to him in cross-examination. Moreover, in the process of listening to his evidence I detected an undercurrent of antipathy towards Mr. Hughes. In all the circumstances of this case, I conclude that Mr. Campbell's testimony did not provide a dispassionate and objective recounting of his dealings with Mr. Hughes.

B. Respondent witness James Quinn

[70] Mr. Quinn, Service Delivery Manager, Processing and Payment Services at Service Canada, agreed, in 2006, to organize and manage HRSDC's processing of CEP applications. Under the shadow of an unexpected volume of applications, Mr. Quinn moved quickly to find suitable accommodation for an anticipated staff of at least one hundred processors and ancillary

support staff. CR-04 and CR-03 staffing pools were established, approximately 400 applications were received, applicants were tested and approximately 200 were hired as term employees. Mr. Quinn did not participate in the hiring process, although he was aware that Mr. Hughes was hired from the CR-04 pool.

[71] Mr. Quinn testified that the CR-04 CEP competition involved a process of testing that produced a ranking of candidates. Mr. Hughes obtained Exhibit C-5, Tab 40 under a Freedom of Information request. Exhibit C-5, Tab 40 consists of two emails clearly indicating the urgency to secure CEP term employees and stating an intention to rely on several tests to establish a ranking of applicants. The emails state the same subject: “Confidential CR04 board report 2007-CSD-EA-BC-SC-425 (Victoria),” each states “Importance: “High,” and “Sensitivity: Confidential.” The first email was sent in the morning of August 3, 2008, from Linda Granger to Bob McFarland, copied to six management personnel including Mr. Quinn. The first email closes with a specific message for Mr. Quinn: “Jim: Attached is a ranked list of potentially qualified candidates. They have been ranked according to our conversations – Test results: First – Verification & Accuracy, Second – Memo, Third – Grammar.” Mr. Hughes name appears ranked fifth on a list of eighty-eight potentially qualified candidates.

[72] HRSDC anticipated a year-long high volume of CEP applications however the reality was a very intense surge in October, November and December 2007, diminishing dramatically in January 2008. In early 2008, Mr. Quinn was instructed to move remaining files to Calgary by September.

[73] On December 14, 2007, Mr. Quinn addressed an email to BC-YT-DIST-CEP-PEC with cc’s to four HRSDC senior managers, including Anne Milne and Kim Bergh, the subject being “Info – Upcoming CR04 OAS-CPP Processing Centre Staffing activity”:

As you may be aware, over the coming weeks and months OAS-/CPP Processing will be looking to the current CR04 complement in CEP, along with other candidates remaining in the CR04 pools, to fill vacancies in their Processing Centre.

The OAS-CPP Processing Centre Managers have requested that additional reference information be provided in relation to current CR04 CEP employees, as those employed with CEP have had the opportunity to demonstrate the Abilities & Skills and Personal Suitability competencies required for positions responsible for processing applications.

Here is some background on how this process will work. The Hiring Manager requesting the staffing action will determine the “Selection Criteria” based on the Statement of Merit for this Service Delivery Agent 1 (CR04) position that reflects the competencies required for the position being staffed. These competencies will include a combination of both Abilities & Skills and Personal Suitability factors. Resourcing (HR) will identify the individuals from the original pools who have demonstrated the strongest degree of these competencies during the initial hiring process; and along with current reference information provided by your Team Leader, this information will be utilized by the hiring Manager to determine the “right fit” for deployment opportunities.

This process is being utilized to ensure the selections made are based on all available information, in an effort to ensure the “right fit” for the position and the organization. Those identified and selected for deployment opportunities with CPP/OAS will be contacted directly in relation to their interest in a deployment opportunity. Those not contacted remain in the pool and may be selected at a future date as additional vacancies arise.

[74] I conclude that Mr. Quinn’s December 14, 2007 letter clearly shows that it was the intention of HRSDC to offer continuing employment to CEP employees “... (who) have had the opportunity to demonstrate the Abilities & Skills and Personal Suitability competencies required for positions responsible for processing applications.” Occurring shortly before Mr. Hughes’ request for accommodation, this letter demonstrates that HRSDC could have deployed Mr. Hughes to a position that would accommodate his disability.

[75] It is highly likely that all CEP employees, including Mr. Hughes, were on tenterhooks due to the uncertainty of their future with HRSDC; and they would recognize Mr. Quinn as being central to any management decision whether or not to continue their employment.

[76] On May 22, 2008, Mr. Quinn sent an email to Kim Bergh, Director of Service Canada, entitled “Subject: FW- Chris Hughes – timeline – Provided this yesterday in response to a

request from NHQ – Corporate Staff relations. The non-extension letter for Chris Hughes was sent to Anne Milne yesterday” which Mr. Bergh forwarded to Ms. Milne. In response to this email, Ms. Milne sent an email to Mr. Quinn and Kim Bergh and copied to two other senior officials entitled “Subject: RE Chris Hughes – timeline – Jim/Kim . . . should you receive any further calls or emails with respect to this employee please refer them to me or to Debra Pynten. Thanks.”

[77] I conclude that Mr. Quinn could have persuaded other HRSDC management to accept deployment of Mr. Hughes into a job that would accommodate his disability. Rather, as with the negative opinions levelled at Mr. Hughes by training official Paul Thomas, I conclude that Mr. Quinn was the linchpin in a managerial intrigue that was heedless of the rigours of depression which beset Mr. Hughes, and disdainful of s.7 of the *CHRA*. I conclude that Mr. Quinn did not provide an objective recounting of his part in the decision to “non-extend” Mr. Hughes’ term employment, and that he was fully aware that an extension of employment was essential to facilitate the process of accommodating Mr. Hughes’ disability, a matter that might have taken many months to deal with appropriately.

C. Anne Milne

[78] Anne Milne, Senior Executive Director, HRSDC Western Canada, first became aware of Mr. Hughes through his request for deployment. She testified she didn’t make the decision not to deploy Mr. Hughes, “I believe it was Mr. Quinn.” Repeatedly, Ms. Milne demonstrated uncertainty in her answers: she couldn’t recall why she signed the May 20, 2008, letter of “non-extension;” she couldn’t remember when she was first aware of Mr. Hughes’ human rights complaint; she believed being briefed that Mr. Hughes needed accommodation but referred only to stress, making no mention of depression. Under cross examination Ms. Milne asserted that she did not make the decision to terminate Mr. Hughes and when asked “Who did?”, answered “I don’t know.” When asked why she signed the letter sent to Mr. Hughes but did not sign two other termination letters, Ms. Milne’s did not provide a satisfactory explanation.

[79] As demonstrated by the email exchange which took place on May 22nd, significant HRSDC management discussion was engaged in with respect to Ms. Milne's May 20th letter terminating Mr. Hughes' employment. I infer that this action by Ms. Milne was a high-level management rejection of Mr. Hughes and his numerous requests for further employment with HRSDC. Coming just five weeks after Mr. Hughes' second request for help with his depression the closing paragraph is somewhat incredulous: "I would like to take this opportunity to thank you for the services which you have provided while employed by Human Resources and Social Development, and to wish you well in any future undertakings. Should you have any questions about your employment or benefits, please contact your current Team Leader." Copies of the termination letter were sent to Jim Quinn, Service Delivery Manager of the CEP project, Victoria, and Elizabeth Li, Human Resources Advisor, Edmonton.

[80] Ms. Milne's participation in this management action is particularly questionable because it was contrary to the opinion of Human Resources Consultant Caleigh Miller who stated, in part, that "... Depression is a medical condition which needs to be treated along with a medical professional." It was a mistake on Ms. Milne's part to ignore the magnitude of Ms. Miller's advice, and the seriousness of Mr. Hughes's disability, a mistake that was compounded by management's wilful zeal to get rid of him.

IV. Conclusions

[81] HRSDC's witnesses rationalized the fact that Mr. Hughes was not granted a third extension of his CEP employment, or deployment to another department, by asserting that it was a reasonable exercise of managerial authority with its quintessence of the imprimatur, the "right fit." I conclude that an HRSDC management determination whether a qualified applicant for employment or deployment is the "right fit," or not, is an intangible process, subjective rather than objective, and may be coloured by feelings or opinions.

[82] The *CHRA* requires that an employer must continue to employ a worker who becomes disabled. Once a disability is identified, an employer must engage in continuing attempts to

accommodate the employee with work that he/she is able to perform while in a disabled state, to a point at which the employer experiences undue hardship. It is only then that employment may be appropriately terminated.

[83] With full knowledge that Mr. Hughes was disabled by depression and that he had requested work that would accommodate his episodic depression, and scornful of their duties under the *CHRA* to continue his employment, at least until the full extent of his disability was determined, HRSDC's management wilfully disregarded their duty under the *CHRA* and summarily terminated Mr. Hughes' employment.

[84] Considering the entirety of the evidence presented by HRSDC, I conclude that it did not rebut the complainant's *prima facie* case.

V. Decision

[85] I find that Mr. Hughes was subjected to a course of conduct that was a discriminatory practice, namely that HRSDC, knowing that Mr. Hughes suffered from a disability, wilfully refused to continue to employ him contrary to s. 7(a) of the *CHRA*.

[86] I find that the respondent did not subject Mr. Hughes to retaliation or threats of retaliation for filing the foregoing complaint against it.

VI. Remedy

A. Pain and Suffering

[87] Section 53(2) (e) of the *CHRA* provides that a complainant may be compensated up to \$20,000 for any pain and suffering that he experienced as a victim of the discriminatory practice.

[88] As a federal government agency, HRSDC has a paramount duty as an employer to deal promptly and effectively with a disabled employee. By failing to do so and then terminating his employment HRSDC exacerbated Mr. Hughes' state of anxiety and depression.

[89] In these circumstances I order HRSDC to pay the maximum of \$20,000 to Mr. Hughes for his pain and suffering.

B. Special Compensation

[90] 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.

[91] I conclude that it was wilful conduct for HRSDC to refuse to continue Mr. Hughes' employment and deal with Mr. Hughes' disability.

[92] In the circumstances, I order HRSDC to pay \$10,000 to Mr. Hughes in special compensation.

C. Interest

[93] Under s. 53 (4) of the *CHRA* simple interest is payable with respect to compensation for pain and suffering, and special compensation, calculated on a yearly basis from the date of the complaint, at a rate equivalent to the Bank Rate (monthly series) set by the Bank of Canada.

Signed by

Wallace G. Craig
Tribunal Member

OTTAWA, Ontario
October 11, 2012

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1698/5311 & T1699/5411

Style of Cause: Chris Hughes v. Human Resources and Social Development Canada

Decision of the Tribunal Dated: October 11, 2012

Place of Hearing: May 23 to 25, 2012
May 28 to June 1, 2012
June 13 and 14, 2012

Victoria, B.C.

Appearances:

Chris Hughes, for himself

No one appearing, for the Canadian Human Rights Commission

Sid Restall, Kevin Staska and Malcolm Palmer, for the Respondent