Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Chris Hughes

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Transport Canada

Respondent

Decision

File No: T1656/01111
Member: Robert Malo
Date: July 9, 2014
Citation: 2014 CHRT 19

Table of Contents

I. Background

A. Position of the complainant

[1] The complainant, Chris Hughes, maintains that the respondent, Transport Canada, discriminated against him contrary to section 7 of the *Canadian Human Rights Act* (the *Act*) on the basis of certain disabilities that he has, discrimination that allegedly occurred in the course of four competitions that he participated in to obtain a position with Transport Canada.

[2] Furthermore, the complainant claims that the respondent retaliated against him contrary to section 14.1 of the *Canadian Human Rights Act* given that he filed complaints against the Canada Revenue Agency (CRA) and the Canada Border Services Agency (CBSA).

[3] As part of his initial application for a marine security analyst (PM-04) position bearing number 05MOT-OC-VAN-005187, he submits that he demonstrated to the selection board his past performance assessment as an employee of the federal public service in a clear and positive manner.

[4] In his application for the marine security analyst (PM-04) position, the complainant states that he told the selection board that he was discriminated and retaliated against in his previous jobs with the CRA and the CBSA.

[5] In fact, he filed a complaint against the CRA and the CBSA for those alleged discriminatory practices. As a result of the alleged abuse by his former employers, he suffered from stress and depression. The complainant states that his application for the marine security analyst (PM-04) position was rejected even though he demonstrated that he had the essential qualifications for that desired position.

[6] The complainant also states that the respondent rejected his application for the following other three positions: regional security and emergency preparedness inspector (TI-06 competition, selection process 05-MOT-OC-VAN-005467); regional transportation security and

emergency preparedness inspector (TI-06 competition, selection process 06-MOT-OC-VAN-008455); transportation security inspector (TI-06 competition, selection process 07-MOT-EA-VAN-60712).

[7] It is in the course of those four competitions that the complainant claims to have been discriminated against under section 7 of the *Canadian Human Rights Act* and retaliated against contrary to section 14.1 of the *Canadian Human Rights Act* on the basis of prior complaints that he filed against the above-mentioned agencies.

[8] For a better understanding of the applicable legal provisions, the Tribunal refers to section 7 of the *Canadian Human Rights Act*, which reads as follows:

> Section 7: 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.
>
> Section 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.

B. Position of the respondent

[9] In its arguments, the respondent tells the Tribunal that there was no discrimination in any of the competitions that the complainant participated in.

[10] In that respect, the respondent states that each competition that the complainant participated in had specific requirements and, depending on the particularities of each competition and the complainant's knowledge and experience, the complainant's applications were rejected. The respondent claims the complainant's applications were rejected essentially because he was unable to show that he had the required experience for the positions in issue.

[11] Similarly, the respondent states that it was up to the complainant to show or prove that he had the required skills to be able to obtain one of the desired positions.

[12] That evidence had to be submitted by means of written tests, interviews and references, which were required for the positions.

[13] Thus, the respondent maintains that the complainant did not have the required qualifications for any of the competitions that he had applied for.

C. Position of the Canadian Human Rights Commission

[14] At the very beginning of her presentation, the Canadian Human Rights Commission (Commission) representative stated that the Commission's participation is directly related to the aspect of the retaliation and to the interpretation of section 14.1 of the *Canadian Human Rights Act* within the context of the federal public service.

[15] More specifically, the Commission argues that it would be useful to know whether section 14.1 of the *Act* protects individuals who have filed discrimination complaints against a Crown agency and would protect those individuals from retaliation by other Crown agencies. In other words, the Commission is asking whether section 14.1 of the *Act* must be read as covering retaliation by other Crown agencies that are not party to the complaint currently under review.

[16] In this case, if the response to the above question is yes, did the respondent deny the complainant a job opportunity because of his previous complaints against the CBSA or the CRA? That is the Commission's alternate question to the Tribunal.

[17] Finally, the Commission contends that the respondent did not provide arguments with respect to the first above-mentioned question and as a result, it asks the Tribunal to adopt its position for the facts in this case.

[18] In reply, the respondent argues that there is no evidence to support a finding of retaliation by other government agencies or by the respondent against the complainant.

II. The facts

A. Evidence of the complainant

[19] To establish the evidence, counsel for the complainant first referred the Tribunal to a complaint summary dated January 27, 2008 (Exhibit C-3, Tab 128), and had the complainant testify at the hearing; the complainant referred to his first application for the marine security analyst (PM-04) position, which he submitted in 2005.

[20] As part of that competition, the complainant had an interview with the selection board, which was chaired by John Lavers and included two other members, that is, Sonya Wood and Ron Perkio.

[21] The complainant stated that he passed the interview phase for that competition and that, subsequently, his application proceeded to the next phase in which the board checks his references.

[22] In his testimony, the complainant told the Tribunal, while reviewing his curriculum vitae, that he had been a collection contact officer/compliance officer, PM-1, from February 1, 1995, to December 4, 1999, and then from May 1, 2000, to September 14, 2001.

[23] He was then a customs inspector, PM-2, from May 6, 2002, to October 14, 2002, and from April 28, 2003, to September 26, 2003.

[24] Finally, he was a business window agent (PM-1) for the following periods: December 5, 1999, to April 30, 2000; November 28, 2001, to May 5, 2002; October 15, 2002, to April 25, 2003; and September 19, 2003, up until the time he created the curriculum vitae provided at the hearing (Exhibit C-4, Tab 1).

[25] The complainant stated that he then worked in various positions for short periods of time as an inspector, both in the private and public sectors. In July 2011, he was hired by Elections British Columbia to assist the chief electoral officer for a short period of five or six weeks. He was unemployed starting in September 2011.

[26] As previously mentioned, for the purposes of the complainant's application to the respondent, a selection board of three members, specifically, John Lavers, Sonya Wood and Ron Perkio, was formed to determine eligible candidates for that position.

[27] In his testimony, the complainant stated that first he passed the written exam and then he was called to participate in an interview with the board members.

[28] The complainant stated that his oral interview went well and as a result, the third phase of his application was the reference check.

[29] The complainant stated in his testimony that he did not immediately provide references to the selection board because he knew that questions about his previous complaints against the CRA and the CBSA would be asked and/or could influence the scoring of his interview for the PM-04 position. Consequently, he waited to be contacted again for the references.

[30] He told the Tribunal that he went on stress leave in 2001 after a stressful incident at work.

[31] Similarly, he stated that, in 2005, he suffered from depression, which also originated from circumstances in his previous job.

[32] In fact, the complainant told the Tribunal that he had stopped an illegal act allegedly committed by the CRA in 2000 and that he was then retaliated against and was refused several promotions by the CRA.

[33] He also stated that that stressful situation caused him to become depressed in 2005 and that he was then unable to work for some periods of time in 2005. He stated that that was because of stress (stress leave).

[34] Thus, the complainant stated in his testimony that he was contacted in the beginning of February 2006 by the board's chair, John Lavers, for three references in support of his application.

[35] In that respect, the complainant received a call from Mr. Lavers on February 1, 2006.

[36] After that call, the complainant sent Mr. Lavers a few references by email on February 1, 2006 (Exhibit C-1, Tab 26).

[37] Given that the complainant was asked to provide references in support of his application, he contacted some of his former employers for assistance with providing references in support of his file.

[38] The complainant then told the Tribunal that he had difficulty obtaining such references, which he informed John Lavers of, as shown in the various email exchanges in the record (Exhibit C-1, Tab 28, more specifically).

[39] In one of the emails from the complainant to John Lavers, more specifically, in an email dated February 6, 2006, the complainant informed the selection board chair of problems he had obtaining the necessary references. In particular, the complainant told Mr. Lavers that some references could be evasive or refuse to be a reference for him.

[40] Similarly, he told Mr. Lavers that their refusal to be references had nothing to do with his performance or reliability at work or his personality. He told Mr. Lavers that there had been a court settlement with the CBSA and the CRA on December 19, 2005. He stated in that same

email that those two agencies, that is, the Canada Revenue Agency (CRA) and the Canada Border Services Agency (CBSA), had originally been part of one organization called the CCRA.

[41] In the same email, the complainant told Mr. Lavers that he was working at that time for the Insurance Corporation of British Columbia (ICBC), which had hired him without hesitation, and that if Mr. Lavers so desired, ICBC could provide a reference in respect of him.

[42] In his evidence, the complainant also referred to an email from John Lavers to the two other board members, that is, Sonya Wood and Ron Perkio, dated February 6, 2006, in which Mr. Lavers referred to the fact that there were apparently outstanding issues with respect to his references. Mr. Lavers then asked Mr. Perkio if he had any comments in that respect (Exhibit C-1, Tab 28, page 137).

[43] The next day, on February 7, 2006, Sonya Wood sent an email to John Lavers and Ron Perkio, which reads as follows:

> Hi John, it's not an uncommon situation. I've previously encountered supervisors declining to provide references, reasons can vary, e.g. some Employers/Departments have specific policies prohibiting or limiting the release of employee information; or some supervisors aren't comfortable providing reference as didn't supervise the employee for long enough period to gauge performance; and so on.
>
> When/if a can candidate's Reference Contact declines to provide a Reference check, there are other options/tools which the Selection Board can (& should) utilize to assess Personal Suitability...e.g. Board can ask the candidate to provide copies of any Letters of Reference or Performance Evaluations that the candidate may have, and can ask the candidate to provide alternate/additional Reference Contacts.
>
> In the e-mails below Chris has included what seem to be "quotes" from Performance Evaluation Reports & prior Reference checks, from his previous employment. You could ask Chris for copies of those documents.
>
> (See Exhibit C-1, Tab 28.)

[44] Given that email exchange that mentions additional reference requests, the complainant then provided a series of documents, which appear in Exhibit C-1, Tab 30, Sub-tabs A to T, that would assist the selection board in obtaining additional information on his past performance.

[45] In his testimony, the complainant stated that after he provided those documents and the above-mentioned list of references to Mr. Lavers, Mr. Lavers told the complainant, on February 27, 2006, that none of the persons mentioned were available to be references in respect of him.

[46] In his evidence, the complainant referred to John Lavers' handwritten notes (see Exhibit C-1, Tab 36), which show the essence of the communication between him and Mr. Lavers.

[47] More specifically, they show that the complainant apparently stated that he was concerned about retaliation by his former employers and about his civil action against the CCRA, which resulted in him being awarded $51,000.00 in compensation in December 2005.

[48] In his testimony, the complainant also stated that, after his discussion with Mr. Lavers on February 27, 2006, he did not have any other discussions with him. It was not until May 6, 2006, that he got initial feedback further to that discussion with Mr. Lavers, and it was then that he learned that his application had not been accepted for the desired position.

[49] In that regard, at the hearing, it was clarified that a letter dated March 21, 2006, from John Lavers to the complainant stated that his application had not been accepted for the marine security analyst (PM-04) position (Exhibit C-1, Tab 51).

[50] In his testimony, the complainant stated that he again tried to contact Mr. Lavers for information on why his application for the marine security analyst (PM-04) position had been rejected because he had also applied for another position, that is, a TI-06 competition, and

wanted to get Mr. Lavers' impression so that he could make improvements for the other competitions in which he wanted to participate, if necessary.

[51] Also in his testimony, given that Mr. Lavers told him that none of the references submitted agreed to be a reference for the complainant, the complainant stressed in his testimony that he did inform Mr. Lavers of the difficulties that he had experienced in his former positions with the CRA and CBSA and that he was forced to resign in December 2005 with $51,000 in compensation.

[52] He also stated in his testimony that he told Mr. Lavers that he was worried about possible retaliation given his past actions (illegal garnishee issue and filing human rights complaints against the CRA and the CBSA).

[53] As part of his questions to Mr. Lavers as to why his application had been rejected, the complainant told the Tribunal that, sometime around May 15, 2006, he contacted Mr. Lavers, and it was at that point that Mr. Lavers told him that he had not met the detail-oriented criterion and, more specifically, that were no references from supervisors confirming that he was detail-oriented.

[54] During that same telephone discussion, Mr. Lavers allegedly stated that only one person, Bill DiGuistini, had actually agreed to be a reference, but that he purportedly had not provided any negative or positive feedback with respect to Mr. Hughes.

[55] Consequently, the complainant stated that Mr. Lavers had told him that Bill DiGuistini had actually responded, but that no one else had agreed to be a reference.

[56] Similarly, Mr. Lavers apparently told the complainant that he had primarily been seeking references from the complainant's former supervisors to confirm his qualities and abilities, specifically those related to whether he was detail-oriented.

[57] In his testimony, the complainant also confirmed that, subsequent to that first marine security analyst (PM-04) competition, another competition for the same type of job, that is, a PM-04 position, was opened and that it no longer included the detail-oriented criterion.

[58] Later in his testimony, the complainant stated that he had also applied for another position, that is, for a regional transportation security and emergency preparedness inspector position with a closing date of October 3, 2005. It was actually an application for a similar position as described above, but for a TI-06 qualification.

[59] In the same manner as his application for the PM-04 position, the complainant stated that he had to pass a written test to qualify. However, the complainant's application was rejected because he received a mark of 60% on the test and the passing score was 70%.

[60] In this testimony, the complainant expressed disappointment that he was not given a standardized test, which is typical in federal government employment competitions, but a different test, a WCT345 test, for the position.

[61] In his testimony, the complainant also referred to a letter by Sonya Wood dated June 26, 2006, regarding the TI-06 position referred to above (Exhibit C-2, Tab 74). Ms. Wood apparently told him that he had indeed obtained a result of 60% on Written Communication Test 345, and that the passing score for that test was 70%.

[62] In his testimony, the complainant stated that he told Transport Canada about his concerns regarding that issue.

[63] Similarly, he apparently also had discussions with Sonya Wood and/or Debbie Guinn and told them that his hand had cramped up when writing the test. The complainant stated that Ms. Wood or Ms. Guinn did not specifically comment on the fact that he complained about having a hand cramp when writing his test.

[64] The complainant believes that the hand cramp certainly affected his final score in that test.

[65] Then, the complainant stated that he applied for a second regional transportation security and emergency preparedness inspector position at the TI-06 level.

[66] The closing date for that competition was August 3, 2006.

[67] According to the complainant, that second application was for an equivalent TI-06 position with the same classification as those in the first TI-06 position.

[68] Once again, after learning that his application had been accepted, it was subsequently rejected because, according to Transport Canada, the complainant did not have sufficient experience in conducting investigations.

[69] That information was communicated to the complainant in an email dated October 12, 2006, at Exhibit C-2, Tab 96.

[70] Nonetheless, the complainant stressed in his testimony that both jobs were exactly the same according to him.

[71] Regarding his second application for a TI-06 position, the complainant stated that, in his application, he clearly referred to his experience in conducting investigations.

[72] Given his disagreement with the decision regarding the second TI-06 position, the complainant wrote to Transport Canada to express his disagreement and requested that his application be readmitted.

[73] However, he stated that he was never sent a response regarding his request and he consequently filed a formal complaint with the Public Service Commission (see Exhibit C-2, Tab 100).

[74] Finally, in his testimony, the complainant stated that he submitted a third application, once again for position at the TI-06 level, this time for a transportation security inspector position with a closing date of April 2, 2007.

[75] In that regard, the complainant referred to the level of experience required for that type of position, that is, experience in conducting extensive investigations.

[76] Regarding the third application for a TI-06 position, the complainant then modified his curriculum vitae to contain more specific information on his past experience in his various positions, but also his personal experience as follows: “extensive investigation into how I was harassed, black listed and retaliated against by a number of Canada Customs and Revenue Agency (CCRA), Canada Revenue Agency (CRA) and Canada Border Services Agency (CBSA) employees” (Exhibit C-3, Tab 105).

[77] In that additional summary of his personal experience with respect to his most recent investigations, the complainant referred to the incidents he was involved in at the CRA and the CBSA.

[78] In his testimony, he told the Tribunal that the third application was rejected and more specifically, he drew the Tribunal’s attention to page 609 of the exhibits submitted (see Exhibit C-3, Tab 107) that states that his application was not accepted because his experience was as follows: “not extensive, not work related, personal issues”.

[79] Also, he told the Tribunal that he filed a third complaint with the Public Service Commission and that an investigation was conducted.

[80] Subsequently, the witness draws the Tribunal's attention to various email exchanges (see Exhibit C-3, Tab 120), with Paul Martin, a human resources consultant at Transport Canada, Pacific Region, as an attempt at mediation to resolve his complaints.

[81] In particular, he drew the Tribunal's attention to an email to Paul Martin dated June 14, 2007, referring to the various qualifications he stated in his application for the PM-04 position, and also the various pieces of written information he had sent to Mr. Lavers, that is, the documentation shown in Exhibit C-1, Tab 30.

[82] In that email, the complainant stated that his health had greatly deteriorated, but that he still maintained his position that he had met the detail-oriented criterion.

[83] After learning of the various notebooks kept by the board members who had evaluated him for the PM-04 position, the complainant stated that, for him, the situation had become more of a human rights issue than the staffing problem as he had originally thought. Consequently, he decided to abandon his three staffing-related complaints and proceed directly with human rights complaints (see the email in Exhibit C-3, Tab 124, page 710 and see also Exhibit C-3, Tab 125, page 712).

[84] Furthermore, the complainant stated that, on September 21, 2010, in a letter to the Canadian Human Rights Commission, he decided to amend his human rights complaint and include an allegation of retaliation (see Exhibit C-3, Tab 129).

[85] Before finishing his examination in chief, the complainant told the Tribunal about the difficulties he had in finding a job and the financial hardship he had experienced. He told the Tribunal that the whole situation had caused him great stress and had made him depressed. He also told the Tribunal that he had been unable to provide financial assistance to his father, who had Parkinson's disease and had experienced many problems in the last six years.

[86] Similarly, he told the Tribunal that his marriage had fallen apart and that he had been insolvent five to six times over the past few years. He told the Tribunal that he was very depressed because he was told that he did not pass the various tests required for the competitions he participated in, more specifically, because he did not obtain adequate responses.

[87] Finally, he told the Tribunal that the last six years have been a nightmare for him.

[88] In her cross-examination of the complainant, the Canadian Human Rights Commission representative told the Tribunal that she would focus particularly on section 14.1 of the *Canadian Human Rights Act* regarding retaliation.

[89] First, she drew the Tribunal's attention to the various comments in the evaluations made by the selection board for the marine security analyst (PM-04) position (see Exhibit C-1, Tabs 39, 40, and 41).

[90] Regarding Exhibit C-1, Tab 40, dated March 2, 2006, which was signed by John Lavers, she drew the Tribunal's attention to page 231, question 14, regarding the detail-oriented criterion.

[91] She asked the complainant about a possible score that would be reflective of the comment "very good example" at page 231.

[92] The complainant told the Tribunal that the comment would have surely resulted in a score of between 16 and 18 on the evaluation grid at page 236 of the same tab.

[93] However, the complainant told the Tribunal that a score of 12 was attributed to him with the following comment: "failed".

[94] Subsequently, she drew the Tribunal's attention to Exhibit C-1, Tab 41, more specifically to page 247, where the following comment appears: "very good on his interview question". The

complainant told the Tribunal that the same score, 16 to 18, should have been given and not a score of 12 as shown on page 238.

[95] Finally, counsel drew the Tribunal's attention to Tab 39, page 215, where the following comment appears: "nicely handled - he was thorough". The complainant told the Tribunal that once again, he should have been given a score of 18 to 16 instead of a score of 12, which was given to him at the very beginning of the tab at page 206.

[96] The complainant told the Tribunal that he had adequately satisfied the detail-oriented criterion.

[97] In the cross-examination by the respondent, the complainant reiterated his past difficulties for which he acted as a whistle-blower.

[98] More specifically, he stated that the fact that he had reported an illegal activity had created animosity toward him by people who worked for the same agency.

[99] In particular, he stated that he was able to obtain the reference summaries for the customs officer and collections enforcement officer positions that he held around the end of the year 2000. He then uncovered the very harsh language and the negative comments that appeared in those reports.

[100] The complainant stated that as a result of those negative references, he went on a period of stress leave in 2001, which developed into a state of anxiety and then finally in 2005, the medical situation turned into depression.

[101] Regarding the problems he experienced in and around the year 2000, as mentioned above, the complainant stated that he sought, through mediation, to resolve the cases and find employment. However, he stated that after receiving some inaccurate information and threats, he was forced to resign. As a result, he received compensation in the amount of fifty-one thousand

dollars ($51,000.00) on December 7, 2005, but was unable to find a job within the CRA. Also in his examination, he stated that the CBSA had been included in his settlement and was bound by the same conditions.

[102] In addition, he told the Tribunal that as part of his settlement, the parties agreed that Brian Currie would be a reference to allow the complainant to find a new job.

[103] Later in the cross-examination by the respondent's representative, the representative asked the complainant whether Mr. Lavers had actually retaliated against him and the complainant stated the following:

> Q Is it your position that Mr Lavers was retaliating against you?
>
> A Yes, because I explained to him why the references were not providing references and that there had been previous human rights complaints and I provided him with performance reviews from those individuals that were refusing to give references that showed I was a good employee. So he –yes, he was a party to retaliation under 14.1 by failing me in a pretextual manner, yes.
>
> Q A party with who?
>
> A Well, CRA and CBSA should have been providing references, in my opinion.
>
> Q But they're not a party to this action; correct?
>
> A Correct.
>
> (See the testimony excerpt dated March 20, 2013, page 14, lines 7 to 22.)

[104] In his testimony, the complainant reviewed the various comments shown in Exhibit C-1, Tab 30, and told the Tribunal that he adequately met the conditions for the detail-oriented criterion.

[105] In his cross-examination, the complainant also reviewed why his applications had not been accepted for the three TI-06 positions.

[106] As such, regarding his first application for the TI-06 position, he stated that his hand had cramped up, which had prevented him from adequately completing the required written test. In cross-examination, counsel stressed that his hand cramp problem had not been mentioned in the complaint that he had filed in support of this case.

[107] Regarding his second application for a TI-06 position, the complainant maintained that he had the necessary and required skills in the area of conducting investigations. Finally, regarding his application for a third TI-06 position, with respect to the requirement of conducting extensive or more complex investigations, he told the Tribunal that even if the comments he made in his application do not relate directly to a position, the personal experience indicates that he conducted an extensive investigation and as a result, he also qualified for that third TI-06 position.

[108] He also stated that in contrast to the urgency of the situation to recruit staff for TI-06 positions, given his skills, which he believes that he demonstrated, he was discriminated against because his application was not readmitted like those of the other candidates.

[109] In his testimony, the complainant also stated that, because he told Mr. Lavers about his prior psychological problems, he believes that, during the TI-06 competitions, which apparently took place at the same time as his application for the PM-04 position, Mr. Lavers had personal discussions with human resources staff about the complainant’s concerns and had certainly communicated his account of what happened with the CRA and the CBSA. Consequently, the complainant maintains that the information that he provided to Mr. Lavers was disseminated throughout all of Transport Canada.

[110] Furthermore, the complainant stated that he was retaliated against because Mr. Lavers did not, as part of the reference check, communicate with Brian Currie, even though he was unavailable.

[111] Again in his re-examination, counsel drew the complainant's attention to a number of applications, shown in Exhibit C-3, Tab 102, Sub-tabs A to H, from other candidates for the same competitions for which the complainant applied (TI-06 positions).

[112] Similarly, in the re-examination, counsel reviewed Exhibit C-3, Tab 108, Sub-tabs A to H, which also contain other applications and which were compared with the complainant's application for the transportation security inspector (TI-06) position. In that regard, the complainant stated that his qualifications were better or similar to those of the other candidates.

[113] In his testimony, the complainant reviewed the various comments shown in Exhibit C-1, Tab 30 and told the Tribunal that he adequately met the conditions under the detail-oriented criterion.

B. Evidence of the respondent

[114] As previously stated, counsel for the respondent told the Tribunal that, regarding the four applications submitted by the complainant to Transport Canada, there was not a discrimination problem, but a staffing problem.

[115] The respondent called Brian Savelieff as the first witness. Mr. Savelieff was in charge of the human resources program and also helped management with recruitment and with staff performance evaluations at Transport Canada.

[116] According to Mr. Savelieff, the detail-oriented criterion was established to find candidates who were able to pay attention to detail and be precise in their work.

[117] In his testimony, he told the Tribunal that, according to the criteria established in the rating guide for the marine security analyst (PM-04) position, the detail-oriented criterion was a strict criterion that the candidate either met or did not meet.

[118] In cross-examination, the witness stated that he was not the supervisor of the selection board chair, John Lavers, and that he had not worked as advisor for the PM-04 program or for the TI-06 positions.

[119] Consequently, Mr. Savelieff's testimony essentially involved general administrative knowledge of the hiring program at Transport Canada.

[120] In cross-examination, to clarify the detail-oriented criterion, the witness told the Tribunal the following about that qualification:

> You do pass qualifications. You are found qualified or unqualified against each qualification or merit criteria.
>
> (See testimony excerpt dated March 21, 2013, page 18, lines 4 to 6.)

[121] He also told the Tribunal that the detail-oriented criterion was an essential qualification and that it was characterized as non-compensatory.

[122] The witness added the following: "[I]t must be passed unto itself. A candidate must be found qualified or not qualified in that particular area in order to be found qualified overall and potentially be put into an eligibility list or pool. To be hired one must be found qualified against this particular qualification." (Testimony excerpt dated March 21, 2013, page 36, lines 8 to 21.)

[123] In finishing the cross-examination of the respondent's representative, counsel asked the following question about the qualification of the employer, Transport Canada: page 100, testimony excerpt dated March 21, 2013, line 8:

Q So, although the federal government has departments, legally they are not the employer correct?

A Correct. Treasury board is the employer.

Q And in fact it's Her Majesty in Right of Canada as represented by Treasury Board is?

A Yes.

Thank you.

[124] Subsequently, the witness added the following:

The Chairperson: Not the agency. Treasury Board is the employer. Again, it's a simple question?

The witness: That's fair. Treasury board is the employer, yes. We are all departments of the public service. The way it's always been described to me as Treasury Board is the employer.

(Testimony excerpt dated March 21, 2013, page 100, lines 16 to 22.)

[125] The respondent called another witness, William Keenlyside, who was, at the time of his testimony, the regional manager marine security officer.

[126] He told the Tribunal that he has worked in the marine security operation centre since July 1, 2004.

[127] During his testimony, the witness, Keenlyside, referred to the fact that he was involved in the second TI-06 application. More specifically, he testified with respect to the criterion on having experience in conducting investigations.

[128] The witness told the Tribunal that that criterion refers to investigations that originated from situations with respect to law enforcement.

[129] According to him, the complainant's experience was very limited in his ability to conduct investigations under the "experience in conducting investigations" criterion. Consequently, the complainant's application was rejected.

[130] According to the witness, the complainant was unable to confirm his qualifications for the position's required experience. There was a lack of validation in that respect by the complainant.

[131] He told the Tribunal that as part of his duties in other agencies, such as the CBSA and Transport Canada, he has participated in various selection boards some 40 times.

[132] The respondent called Michael Fu, who was particularly involved in the third TI-06 position, as the third witness.

[133] Mr. Fu was one of the three selection board members for that position.

[134] At the beginning of his testimony, Mr. Fu reviewed the criteria for the position (see Exhibit C-3, Tab 103), which consisted of three kinds of experience, one of which was that of conducting extensive investigations.

[135] In his testimony, Mr. Fu reviewed the complainant's application for the third TI-06 position and told the Tribunal that that was the first time that he had seen a candidate describe his personal experience as the required experience for such a position (TI-06).

[136] Namely, he referred to the experience the complainant had listed regarding an investigation into impaired driving. He considered that experience insufficient. Also, given the experience stated by the complainant in his application regarding his problems with the Canada Customs and Revenue Agency (CCRA), he concluded that that experience was as follows: "not extensive, not work related, personal issue".

[137] He once again told the Tribunal that a simple investigation into impaired driving was not sufficient for the criteria sought in the third TI-06 position.

[138] He also told the Tribunal that, given the inadequate experience provided in the complainant's application, the complainant's application could therefore not be accepted and he had written "OUT" (see top right of page 594, Exhibit C-3, Tab 105).

[139] In the cross-examination by counsel for the complainant, in response to a question on whether he knew about Mr. Hughes' complaints against the other departments where Mr. Hughes had previously worked while he was a member of the board for the third TI-06 application, the witness told the Tribunal that he had heard about such complaints, which he considered "managers talking". That information had originated from Brian Bramah and not from Sonya Wood or John Lavers.

[140] He also told the Tribunal that there were no discussions with Ms. Wood or Mr. Lavers regarding Mr. Hughes' complaints in the other departments where he had worked. Furthermore, he stated that no discussion with Ron Perkio regarding the complainant ever took place.

[141] Again in the cross-examination by counsel for the complainant, the witness told the Tribunal that regarding the personal investigation experience the complainant referred to in his application (see pages 595 and 596, Exhibit C-3, Tab 105), he considered that "a hobby" on personal time.

[142] He stated that even if that statement was serious, it was strictly private in nature. He believed that that information could not be considered as an extensive investigation as part of the third TI-06 application.

[143] Thus, he told the Tribunal that he was unable to measure the complainant's understanding of the law. Similarly, he had no basis from which to judge the complainant's knowledge of the law.

[144] Finally, in the cross-examination by counsel for the Canadian Human Rights Commission, on his knowledge of the complainant's former complaints that he found out about in a discussion with Brian Bramah, the witness told the Tribunal that he had only heard the complainant's name and that he had filed human rights complaints, nothing else.

[145] As another witness in support of its evidence, the respondent called Sonya Wood, one of the three members of the selection board for the marine security analyst (PM-04) position.

[146] In her testimony, Ms. Wood told the Tribunal that she did not check the references provided by the complainant. However, in her testimony, she referred to an email dated February 20, 2006, that followed an email sent to her by John Lavers on February 15, 2006, where Mr. Lavers stated that the references provided by Mr. Hughes raised "some interesting questions" (see Exhibit C-1, Tab 33).

[147] Moreover, two responses to Mr. Lavers' email appear in that tab. First, Ron Perkio replied the following to Mr. Lavers' email:

> Not a good sign. Sonya to you for the department policy on this one.
>
> Ron

[148] Subsequently, Sonya Wood replied to the emails from Mr. Lavers and Mr. Perkio on February 20, 2006, as follows:

> Hi, as discussed at my telecon, with John this a.m., if a Selection Board is unable to obtain or to complete verbal reference checks for a candidate (and or if Referees decline to provide verbal info/feedback) the selection board should still proceed with assessing the candidate's Personal Suitability qualifications, using whatever information/tools the Board has access to.
>
> i.e., in this case I recommended to John that he ask Mr Hughes for copies of any Performance Evaluations and Letters of Reference/Recommendation that he may have. I understand John as obtained some PER's written info from Mr Hughes, so in our capacity of Selection Board we'll need to review & consider all the info

> contained in the PER's has well as any/all info we've compiled through the interview process, and finalize our assessment of Mr Hughes in each of the Personal Suitability sub-factors.
>
> Sonya
>
> (See Exhibit C-1, Tab 33, page 188.)

[149] Then, Ms. Wood reviewed the documents provided by Chris Hughes (see R-4) as part of the information Mr. Lavers required to complete the assessment of the references that he could obtain and any other document as described above in Ms. Wood's email dated February 20, 2006.

[150] Generally, Ms. Wood believed that the documents did not make it possible to establish that the complainant has qualities showing that he is detail-oriented and, in some cases, the comments in that respect were very limited.

[151] Ms. Wood also told the Tribunal that the detail-oriented criterion had to be assessed based on consensus among all of the board members. She told the Tribunal that checking Mr. Hughes' references was not possible given that only Bill DiGuistini had responded.

[152] She told the Tribunal that even if Mr. Hughes' interview was adequate, if Mr. Hughes did not provide any references, there was a lack of information. She therefore confirmed that the overall assessment was done in that manner and thus, a score of 12/20 was attributed to Mr. Hughes for that reason.

[153] Again in the cross-examination by counsel for the complainant, he reviewed with the witness, Sonya Wood, the documents shown in Exhibit R-4.

[154] Overall, Ms. Wood claims that the information provided on the detail-oriented criterion was not essentially negative, but did not present sufficient information to be able to characterize the complainant as being detail-oriented.

[155] Finally, counsel for the complainant also reviewed other applications with Ms. Wood and compared them with the complainant's application.

[156] In a question related to Exhibit C-1, Tab 41, that is, an evaluation report signed by the selection board members, counsel referred to the fact that some written comments that had appeared in the other evaluation reports had been erased in that of the complainant (see Tabs 39, 40, 41, in particular page 222 of Tab 40).

[157] In fact, in his cross-examination, counsel referred to the fact that the letters VG (for "very good") had been erased from the evaluation pages in the complainant's report.

[158] The witness replied that she could not understand why the said handwritten comments had been erased.

[159] As the last witness in support of the evidence, the respondent called John Lavers.

[160] In his testimony, Mr. Lavers stated that he had been responsible for finding candidates for the marine security analyst position, a highly sensitive position.

[161] He told the Tribunal that he was the one who had created the requirements shown in Exhibit C-1, Tab 5, for the marine security analyst (PM-04) competition.

[162] Similarly, in his testimony, he referred to the qualifications for the marine security analyst (PM-04) position, which appear in Exhibit C-1, Tab 6, and indicated that some of the requirements had an asterisk, which meant they were non-compensatory qualifications.

[163] Similarly, he stated that "candidates must achieve the minimum established pass mark for each non-compensatory qualification in order to receive further consideration" (see Exhibit C-1, Tab 6, page 23).

[164] He stated that, regarding the definition of “detail-oriented”, it involved finding people who paid attention to detail and demonstrated due diligence to details.

[165] In his testimony, Mr. Lavers stated that, at the references stage, all of the references provided by the complainant had refused to participate, except for one person, Bill DiGuistini. He reviewed the answers to a questionnaire (Exhibit C-1, Tab 37) in which Mr. Lavers noted Mr. DiGuistini’s answers regarding the complainant’s qualifications.

[166] Similarly, he drew the Tribunal’s attention to page 197 (Exhibit C-1, Tab 37) of questionnaire P.S.3 on the detail-oriented criterion, where Mr. DiGuistini’s answers had been noted by Mr. Lavers with a score of 12/20.

[167] When asked about the evaluation form shown in Exhibit C-1, Tab 40, which bears his signature, he stated that, to question 14 (page 231) on the detail-oriented criterion, his comment to the effect that there had been insufficient cooperation had affected the complainant’s overall evaluation.

[168] Following this poor answer, regarding the lack of cooperation from the references provided by the complainant, Mr. Lavers therefore gave a score of 12/20 for the detail-oriented criterion.

[169] He also mentioned that with respect to the detail-oriented question for which the complainant did not receive a passing grade, there apparently was a consensus by the board in that regard (see Exhibit C-1, Tab 41).

[170] In cross-examination, Mr. Lavers mentioned that the search for candidates for the marine security analyst position was conducted in the context of a national security policy established in 2004 with a view to protecting the domain of Canada.

[171] Consequently, the selection board was looking for high-calibre candidates.

[172] In that regard, the bar was set high at that point in seeking quality candidates for the marine security analyst PM-04 position and he mentioned that he apparently raised the evaluation charter for said position.

[173] He indicated to the Tribunal that in the search for candidates, there was no favouritism, exception or exemption and that there was a need to verify the candidates' references. There was no deviation for any candidate in the assessment of candidates.

[174] Because the complainant failed to qualify during his interview with the board, and since the reference check was part of the interview in the assessment process, it was essential to obtain references from the complainant and to verify said references.

[175] Thus, in correspondence with the complainant at the very beginning of February 2006, the complainant provided Mr. Lavers with a series of names of either previous supervisors, validators, or co-workers.

[176] He told the Tribunal that he sought to obtain references from persons in authority or persons in supervisory positions in relation to the complainant.

[177] Specifically, the witness stated that he relied on the instructions of Human Resources to validate each of the candidates' references from supervisors.

[178] He also told the Tribunal that this was in that context that he had email exchanges with the complainant, which appear in Exhibit C-1, Tab 28, and in respect of which he sought the opinion of Sonya Wood.

[179] Thus, the complainant provided him with the exhibits that appear in Document R-4. In reviewing the information regarding the references provided by the complainant in said Exhibit R-4, Mr. Lavers found that none of the references provided agreed to act as references for the complainant except for Bill DiGuistini. As far as Mr. DiGuistini was concerned,

Mr. Lavers stated that he did not answer the detail-oriented question, and that no pertinent information was provided (see Exhibit C-1, Tab 37, page 197).

[180] With respect to all the references that were allegedly provided by the complainant, Mr. Lavers referred to a document appearing in Exhibit C-1, Tab 32, which indicates his notations about each of the references he contacted.

[181] In response to a question posed by counsel for the complainant regarding the requirement to obtain answers from a superior to the detail-oriented question, and in respect of which no mention was made in the evaluation form regarding this requirement (see Exhibit C-1, Tab 40, page 231), Mr. Lavers replied “good question for HR”.

[182] Finally, Mr. Lavers acknowledged that based on Bill DiGuistini’s answers, which were neither positive nor negative, in relation to the detail-oriented criterion for the complainant, he consequently determined that the complainant did not meet the detail-oriented criteria and that he was not detail-oriented.

[183] In response to another question posed by counsel for the complainant as to whether Mr. Lavers wondered why all the contacts provided by the complainant refused to act as references for him, Mr. Lavers replied that it was a big question for him and that he had asked himself that same question but was unable to come up with a specific answer.

[184] In addition, Mr. Lavers stated “obviously there is a consistency or a pattern” (see cross-examination of Mr. Lavers, September 11, 2013), indicating that many people refused to provide references, specifically Bill DiGuistini and Kathryn Pringle.

[185] On cross-examination by counsel for Canadian Human Rights Commission, Mr. Lavers was asked why he had not called the complainant’s employer when the complainant was working for ICBC.

[186] In that respect, counsel drew the witness' attention to an email dated February 6, 2006, addressed by the complainant to Mr. Lavers containing a notation that the complainant was hired by ICBC without reservation and in that regard, the complainant allegedly offered to provide a reference from ICBC if it were necessary for the selection board.

[187] John Lavers answered this question by indicating that in the interview document, there was no reference to ICBC and no telephone number suggested by the complainant in his email of February 6, 2006.

[188] He added that there was no name, title or telephone number provided by the complainant in that respect. Also, in response to another question posed by counsel for the Canadian Human Rights Commission, Mr. Lavers indicated that he did not remember asking the complainant for a name for reference purposes from his employer at the time, that is, ICBC.

[189] In addition, he mentioned that references are provided to the board by each of the candidates and that in the complainant's case, all the references provided were related to the CRA and the CBSA and not to ICBC.

[190] Still during the same cross-examination, Mr. Lavers indicated that he did not contact any of the complainant's co-workers considering that he only contacted the complainant's supervisors.

[191] Moreover, he noted in his cross-examination by the Canadian Human Rights Commission representative that the document pertaining to the reference check, particularly the one he had prepared by contacting Bill DiGuistini (Exhibit C-1, Tab 37), required responses from supervisors of all candidates based on the drafting of the reference check document.

[192] Mr. Lavers also indicated that he had to speak with someone directly and not simply refer to documents that may have been provided by the candidates.

[193] In response to a question regarding emails sent by Sonya Wood dated February 7, 2006, (7:55 a.m.) (Exhibit C-1, Tab 28) and February 20, 2006 (8:49 a.m.) (Exhibit C-1, Tab 33) about Ms. Wood's recommendations for obtaining letters or candidate assessment reports from the candidates, and seeking additional or alternative references from various contacts, Mr. Lavers reiterated that he was unaware of all Human Resources policies applicable at the time, and that he only directly sought out the persons suggested as references required to assess the candidates' abilities.

[194] Consequently, in the case of the complainant Chris Hughes, he contacted persons who were provided by the complainant.

[195] Other questions were posed to him by the representative of the Canadian Human Rights Commission regarding the documents provided by the complainant under Exhibit R-4 which include various assessments as well as potential references, including Kathryn Pringle.

[196] Mr. Lavers indicated that in the case of Ms. Pringle, she refused to act as a reference, but that he did not ask her specifically why she refused to act as a reference for the complainant.

III. Law

[197] In support of their submissions, the parties provided the Tribunal with their written arguments, which were also presented at the hearing.

[198] Was the complainant discriminated against under section 7(*a*) of the *Canadian Human Rights Act*?

[199] First, I will address this first issue for all the applications the complainant submitted.

[200] Thus, it is useful to recall that the provisions of sections 2 and 3 of the *Act* with respect to the purpose of the *Act* and the prohibited grounds of discrimination now refer to prohibited grounds of discrimination involving a complainant with a disability.

[201] Also, the provisions of section 25 of the *Act* indicate as follows with respect to the definition of "disability":

> "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

[202] The legal principles underlying the application of the *Canadian Human Rights Act* are now well known. It is for the complainant to establish on a *prima facie* basis a case of discrimination or at least one of the alleged grounds.

[203] In that respect, the threshold required to establish a case of discrimination is extremely low. Thus, the Supreme Court of Canada indicates that "[*a*] *prima facie case. . . is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.*" (*Ontario Human Rights Commission and O'Malley v. Simpson-Sears*, [1985] 2 SCR 536, at page 558). This answer or explanation from the respondent must be credible.

[204] Also, the response or explanation must be sufficient and not a pretext (*Basi v. Canadian National Railway (No. 1)*, (1988), 9 C.H.R.R. D/5029 (C.H.R.T), at paragraph 38474).

[205] Once the complainant has established a *prima facie* case of discrimination, the complainant is thus entitled to relief in the absence of justification by the respondent (*Ontario Human Rights Commission v. Etobicoke*, [1982] 1 SCR 202, at pages 202 to 208).

[206] To establish a *prima facie* case of discrimination, the complainant must establish that he was subject to differential treatment on the basis of his disability, contrary to the provisions of section 7 of the *Act*. In that regard, the complainant need not show that the discrimination was unintentional. (*Bhinder v. Canadian National Railway Co.*, [1985] 2 SCR 561).

[207] Once the *prima facie* case is established, the burden of proof shifts to the respondent to demonstrate that the alleged discrimination either did not occur or that the behaviour appeared to

be non-discriminatory or justified. It is useful to note that the respondent may establish this proof on a balance of probabilities.

[208] In *Premakumar v. Air Canada*, (2002), 42 C.H.R.R. D/63 (C.H.R.T.), the matter concerned the application of section 7 of the *Canadian Human Rights Act* in the employment context.

[209] Thus, I would like to point out the following passage from the decision of the Chairperson, Anne Mactavish:

> [75] In the employment context, a prima facie case has been described as requiring proof of the following elements:
>
> a) that the complainant was qualified for the particular employment;
>
> b) that the complainant was not hired; and
>
> c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (i.e.: race, colour etc.) subsequently obtained the position. (*Shakes v. Rex Pak Limited*, (1989), 3 C.H.R.R. D/1001 (1982), at paragraph D/1002.)

[210] Furthermore, Chairperson Mactavish adds the following:

> [76] This multi-part test has been modified to address situations where the complainant is not hired and the respondent continues to look for suitable candidates. In such cases, the establishment of a prima facie case requires proof:
>
> a) that the complainant belongs to one of the groups which are subject to discrimination under the *Act*, e.g. religious, handicapped or racial groups;
>
> b) that the complainant applied and was qualified for a job that the employer wished to fill;
>
> c) that, although qualified, the complainant was rejected; and
>
> d) that, thereafter, the employer continued to seek applicants with the complainant's qualifications.(*Israeli v. Canadian Human Rights Commission and Public Service Commission*, (1983), 4 C.H.R.R. D/1616, at page 1618.)

[211] Moreover, it is useful to read paragraph 79 of the decision:

> The jurisprudence recognizes the difficulty in proving allegations of discrimination by way of direct evidence. As was noted in *Basi*:
>
> > Discrimination is not a practice which one would expect to see displayed overtly, in fact, there are rarely cases where one can show by direct evidence that discrimination is purposely practiced. (*Basi v. Canadian National Railway (No. 1)*, (1998), 9 C.H.R.R. D/5029, at para. 38474 (C.H.R.T.)
>
> Rather, it is the task of the Tribunal to consider all of the circumstances to determine if there exists what was described in the Basi case as the 'subtle scent of discrimination'.

[212] Finally, at paragraph 82 of the decision, she indicates that

> [i]t is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient if Mr. Premakumar's race, his color or his national or ethnic origin were factors in the decision not to hire him. (*Holden v. Canadian National Railway*, (1990), 14 C.H.R.R. D/12, at page D/15.)

[213] In addition, as in most cases of discrimination, direct evidence is rarely available. In this context, the case law has developed a test applicable to the submission of circumstantial evidence in discrimination cases.

[214] Thus, in *Basi*, noted above, it is stated:

> I am persuaded by the logic employed by B. Vizkelety in her recent book: Proven Discrimination in Canada, (1987) Carswell, where she states at page 142:
>
> > "it is suggested that the Kennedy (v. Mohawk College) Standard reflects a criminal as opposed to a civil standard of proof and that, as such, it is too rigid. There is indeed, virtual unanimity that the usual standard of proof in discrimination cases is a civil standard of preponderance. The appropriate test in matters involving circumstantial evidence, which should be consistent with this

> standard, may therefore be formulated in this manner: 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." (Page 11 of the decision.)

[215] In formulating my decisions with respect to each application by the complainant in his evidence, I will, therefore, proceed in the same order. Accordingly, each application will be reviewed in the following order:

a. Marine security analyst (PM-04 competition – reference number 05-MOT-OC-VAN-005187);

b. Regional security and emergency preparedness inspector (TI-06 competition – selection process 05-MOT-OC-VAN-005467);

c. Regional transportation security and emergency preparedness inspector (TI-06 competition – selection process 06-MOT-OC-VAN-008455);

d. Transportation security inspector (TI-06 competition – selection process 07-MOT-EA-VAN-60712).

A. Marine security analyst (PM-04 competition – reference number 05-MOT-OC-VAN-005187)

[216] In applying the various jurisprudential tests established earlier, with respect to the complainant's first application for this application, I conclude that in fact the complainant's evidence meets the *Premakumar* criteria based on *Shakes*, as mentioned above.

[217] Indeed, I find that the evidence showed that the complainant was qualified for the particular employment, and

b. that the complainant was not hired; and

c. that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (the complainant's alleged disability) subsequently obtained the position.

[218] As for the criteria mentioned above, I find that a *prima facie* case was made by the complainant.

[219] Thus, criteria “B and C” and the fact that the employer continued to seek applicants with the complainant's qualifications were proven. At least, I will discuss more particularly the first criterion: whether the complainant was qualified for the particular employment, and specifically, the issue of the detail-oriented criterion for which the complainant did not receive a passing grade from the selection board.

[220] In that regard, a number of troubling factors have led the Tribunal to conclude that the subtle scent of discrimination existed with respect to the first application by the complainant for the marine security analyst (PM-04) position.

[221] Indeed, the evidence showed that first, when the complainant disclosed his references to John Lavers, he also mentioned his previous disabilities in relation to his various employers (CRA and CBSA), as well as the difficulties he encountered in obtaining references in support of his application.

[222] Although not overtly admitted, the various persons referred to by the complainant to provide references for him systematically refused support his application despite the fact that the evidence also indicated that some of them had previously agreed to act as references for the complainant.

[223] Considering that said knowledge was acquired by the chair of the selection board, John Lavers, it appear doubtful that the complainant could not have obtained an adequate passing grade, especially in the absence of positive or negative feedback provided by Bill DiGuistini, which in essence Mr. Lavers relied on to negatively annotate the detail-oriented criterion for the complainant.

[224] Also, various documents provided by the complainant (R-4) were provided to the selection board and should have been considered to the complainant's benefit with respect to his abilities regarding the detail-oriented criterion, not to his detriment. (See R-4, pages 182, 188, 195, 198, 199, 209 and 211.)

[225] The evidence showed that Mr. Lavers expressed his preference to communicate with persons directly rather than to refer to the documents provided to him. The Tribunal has difficulty understanding such an attitude on Mr. Lavers' part when the various emails between him and Sonya Wood, then responsible for human resources in support of the selection board, clearly established that the selection board had to rely on all useful and relevant information, including the documentation provided by the complainant.

[226] Nor can the Tribunal accept the testimony of Sonya Wood that the documents provided were insufficient or incomplete as far as she was concerned. Faced with the abundance of documentation provided by the complainant for the purposes of the selection board, in the absence of positive feedback sought by Mr. Lavers and taking into account the complainant's particular circumstances, which were disclosed to Mr. Lavers by the complainant, the selection board should have taken a more liberal approach to the complainant's circumstances.

[227] Without discussing reprisals directly, the Tribunal notes that the selection board was significantly influenced by the lack of references and, in particular, by the rather neutral comments of Bill DiGuistini about the complainant.

[228] However, how is it that some of the references in question agreed to provide positive feedback in the past for the complainant, whereas suddenly, in the context of the application under review, none of them agreed to act as a reference for the complainant?

[229] In that regard, the Tribunal certainly noted the response of Mr. Lavers, who indicated "a consistency or a pattern" with respect to the refusal to obtain positive feedback by said persons in favour of the complainant.

[230] Either directly or indirectly, the lack of positive feedback in the complainant's case should have undoubtedly been offset by the amount of positive documentation showing on a balance of probabilities that the complainant met the detail-oriented criteria.

[231] However, the evidence also showed that other candidates who had applied for the same position received positive comments qualifying them for the detail-oriented criteria, whereas a careful review of their application indicates that their answers were certainly no better than those of the complainant (see Exhibits C-5, C-6, C-7, C-8, and C-10).

[232] The Tribunal notes that with respect to the various applications of other candidates, the comments regarding the detail-oriented question at the reference check stage appear to be in some cases comparable or inferior to those of the complainant.

[233] Based on this comparative analysis of the other candidates' applications with that of the complainant, it is difficult to understand why the complainant's application was not accepted. Mr. Lavers indicated that the analysis of the references provided by a candidate was instrumental in confirming a candidate's interview and thus adequately score the detail-oriented criteria for each candidate.

[234] Indeed, with respect to the complainant's application, Mr. Lavers considered that the only reference available, that is, that of Bill DiGuistini, was the basis for the final score of 12/20 that the complainant received from the selection board.

[235] However, the evidence showed that Mr. DiGuistini did not provide sufficient information as to Mr. Hughes' application and that, at the very least, the information provided by Mr. Hughes could be characterized as neutral.

[236] The Tribunal finds that the score of 12/20 that was granted to the complainant was very severe given that the complainant had provided the selection board with written information that the complainant possessed some aspects of the detail-oriented criterion.

[237] In this regard, considering the emails sent by Sonya Wood to the other members of the selection board, as previously indicated in the facts section of this case, the Tribunal finds that based on the information held by the board, a different mark could have been given to the complainant.

[238] Moreover, the Tribunal cannot ignore the fact that all the board members were aware of the complainant's problems with other agencies, which were disclosed to them in the context of the evidence previously revealed.

[239] Based strictly on the information provided in Exhibit R-4, in comparison with the other candidates' applications and the comments therein, the Tribunal finds that the complainant was discriminated against.

[240] As additional circumstantial evidence, the Tribunal noted that certain VG (for "very good") comments were erased from the candidate's application and that no explanation was provided by any of the members of the selection board. The Tribunal found this situation as being troubling with respect to the facts of the case.

[241] Again, the Tribunal has difficulty explaining the selection board's behaviour, particularly after Sonya Wood in an email dated February 7, 2006 (Exhibit C-1, Tab 33) indicated that the selection board had to and should use all other options or tools to allow the selection board to reach a conclusion in the context of an application.

[242] Consequently, and considering the emails of Ms. Wood to the other members of the selection board to the same effect, the Tribunal finds that said selection board' attitude toward the complainant in the analysis of his case was severe.

[243] Also, the Tribunal must point out that the lack of references certainly was a factor weighing against the complainant, as indicated by Mr. Lavers, and a more detailed analysis of

the information provided in Exhibit R-4 by the complainant should have been considered more positively by the selection board.

[244] Accordingly, the Tribunal finds that the complainant has discharged his burden of proof and has therefore established a *prima facie* case as a necessary condition for indicating a violation of section 7(*a*) of the *Canadian Human Rights Act*.

[245] Has the respondent now discharged its burden of proof in relation to that *prima facie* evidence?

[246] I do not think so.

[247] Indeed, on an extensive analysis of the evidence and most certainly based on the information contained above regarding the *prima facie* evidence adduced by the complainant, I conclude that the selection board offered no credible response with respect to its decision to screen out the complainant's application.

[248] Based on the answers provided by Ms. Wood and Mr. Lavers in their testimony, the Tribunal notes that their answers appeared within permissible limits with respect to their intervention in their analysis of the complainant's application.

[249] The Tribunal finds that Ms. Wood brushed aside all the documents provided by the complainant in Exhibit R-4 with the various comments of the complainant demonstrating some aspects of the detail-oriented criterion.

[250] Thus, she indicated that some passages were interesting or assumed that the complainant met the detail-oriented criterion qualification, but nothing more. Hence, the Tribunal was not satisfied and did not find Ms. Wood's answers regarding her analysis of the documents in Exhibit R-4 credible.

[251] As for Mr. Lavers, the Tribunal finds that he did not conduct a comprehensive and careful analysis of all the documentation provided by the complainant (Exhibit R-4) allowing him to understand that the complainant did meet the detail-oriented criterion. In that regard, the Tribunal finds that at the time of the analysis of the complainant's file Mr. Lavers could have most certainly done more and have been more receptive to the documentation provided by the complainant.

[252] Again, compared with the other applicants' files that were provided at the hearing, the Tribunal finds that the complainant should have received a score that was at the very least equivalent to the other files and thus obtained the required score to meet the detail-oriented criterion.

[253] By acting in this manner, the Tribunal finds that, albeit indirectly or unintentionally, the case for discrimination was established and therefore, the respondent's reasons for screening out the complainant's appear non-credible and as noted in the case law, the tribunal finds that it was a pretext to screen out his application.

[254] Consequently, the Tribunal finds that the complainant's complaint is substantiated with respect to the provisions of section 7(*a*) of the *Canadian Human Rights Act* in relation to his complaint regarding his marine security analyst (PM-04) application.

B. Regional security and emergency preparedness inspector (TI-06 competition – selection process 05-MOT-OC-VAN-005467)

[255] With respect to this application, the same question must be reviewed regarding the conditions required by the case law to determine whether a *prima facie* case was indeed established by the complainant.

[256] In that regard, there is an issue as to whether the complainant was qualified for the particular employment.

[257] First, the Tribunal referred to a document dated May 17, 2006, which provides the results obtained by the various candidates on the written tests (Written Communication Test 345) (See Exhibit C-2, Tab 72). Contained in the document is the fact that complainant Chris Hughes did not pass said test.

[258] For the purposes of this application, the selection board consisted of Ron Perkio and Sonya Wood, who were part of the first selection board for the marine security analyst (PM-04) position, and William Keenlyside.

[259] In his arguments, the complainant's representative indicates that the requirements of the written test were substantially the same as those of the PM-04 position test that the complainant passed.

[260] The complainant's representative questions whether different written tests were used for the PM-04 and TI-06 applications. The Tribunal notes that these types of administrative constraints do not suffice to establish elements of discrimination against the complainant directly.

[261] Indeed, the same criteria were applied for all the candidates, without distinction.

[262] Consequently, the Tribunal cannot accept the complainant's argument on that point.

[263] However, in his testimony, the complainant indicated with respect to his complaint dated January 27, 2008, regarding his application for the first TI-06 position, that he received a mark of 60% and that he was not pleased with the test administered at the time.

[264] As for the mark of 60% that the complainant received on the written test, and the reference in his complaint (see Exhibit C-3, Tab 128, page 721, 3rd paragraph "*after T.C. knew about my health issues they set the pass mark at 70% sometime in April 2006*" (Testimony

excerpt dated March 19, 2013, pages 99-100)), the complainant indicates in a question posed by his counsel that he previously misread the dates in the emails prior to completing his complaint.

[265] Also, in response to a question posed by his counsel in re-examination (Testimony excerpt March 20, 2013 pages 76-77), counsel for the complainant sought the following clarification:

> But I note that in the second to last sentence of this paragraph you say: this was no reason for T.C. to use the WCT over a local test.
>
> Counsel for the complainant later asks: Is that still a part of your complaint?
>
> A No.

[266] And in response to a subsequent question of the undersigned to the complainant, the complainant states the following:

> It is no longer part of the complaint? Is that what you just mentioned Mr. Hughes?

The witness' response was as follows:

> Well, I would have preferred they use a local test, but I don't think there was a prohibited (sic) reason why they used it, if that makes sense
>
> (Testimony excerpt of March 20, 2013, page 77, line 4.)

[267] In light of these excerpts from the testimony, the respondent's representative indicates that the complainant dropped these allegations in respect of his first application for the TI-06 position. The Tribunal indeed notes that through this allegation the complainant did not intend to pursue his complaint regarding the first TI-06 position.

[268] Consequently, the Tribunal finds that the *prima facie* case with respect to the establishment of the first criterion established by the case law, that is, whether the complainant

was qualified for the particular employment, was not satisfied and, therefore, the complainant's complaint regarding the first TI-06 position cannot be upheld.

C. Regional transportation security and emergency preparedness inspector (TI-06 competition – selection process 06-MOT-OC-VAN-008455)

[269] Again, did the complainant discharge his burden of proof of establishing a *prima facie* case of discrimination based on the tests described above?

[270] More specifically, regarding the first question, was the complainant qualified for the particular employment?

[271] The evidence showed that the complainant's application was screened out because the complainant did not demonstrate that he met the experience in conducting investigations criterion. In that regard, it is useful to consult the email of Carole Stidwill dated October 12, 2006, addressed to the complainant (see Exhibit C-2, Tab 96).

[272] In his complaint to the Canadian Human Rights Commission (R-1), the complainant maintains that he was discriminated against, considering that he demonstrated the experience requirements of the application. It is again useful to note that said requirement was mandatory.

[273] In his argument, counsel for the complainant indicates that the complainant possessed the experience required for the first TI-06 application and, therefore, he certainly had the qualifications required for the second TI-06 position in terms of the experience required in conducting investigations.

[274] In reply, the respondent's representative indicates that the complainant's application was rejected because the selection board stated that the complainant did not have the qualifications required to qualify for the experience in conducting investigations criteria.

[275] Strictly in regards to the specific question that the Tribunal consider whether the complainant did, indeed, possess the required qualifications for the "experience in conducting investigations" criteria, it is difficult for the Tribunal to address and review the criteria applied to this specific question by the selection board.

[276] In that regard, the respondent called William Keenlyside to adequately answer the question of whether the complainant did, indeed, possess the required experience for said position.

[277] On cross-examination by counsel for the complainant, counsel asked the witness whether he was able to assess the complainant's performance as a customs inspector. In that regard, the witness replied that if experience was not indicated in the candidate's application he could not read between the lines and subjectively make a positive or negative judgment considering that this would be unfair for the other candidates.

[278] In that regard, Mr. Keenlyside indicated that the experience mentioned by the complainant in support of his application with respect to his experience in conducting investigations was lacking in details (Testimony excerpt dated March 21, 2013, page 131).

[279] This last assertion by Mr. Keenlyside corroborated what was written in a report prepared by the selection board with respect to the results obtained by the various candidates which indicated that the complainant received the comment "insufficient invest" (Exhibit C-2, Tab 88, page 501).

[280] While the Tribunal can accept that the complainant did discharge his burden of establishing that a *prima facie* case that he was qualified for this particular employment, the explanation provided by the respondent's representative does not indicate that the exclusion of the application was based on a pretext. In that regard, although the analysis of this question is subject to the selection board and the criteria considered, based on the evidence presented before the Tribunal, I cannot find that said explanation was not credible or that it was a pretext.

[281] In that regard, the board certainly had all the latitude required to apply the pertinent and necessary criteria in assessing the applications submitted and the Tribunal is not in a position to review such criteria in the absence of evidence that the board allegedly acted unreasonably or on the basis of pretext. I do not find that the evidence revealed such aspects.

[282] Consequently, I find that the explanations provided by the respondent appear credible and the reasons alleged to screen out the complainant's application are maintained. The complainant's complaint regarding the second application does not, therefore, appear to be founded.

D. Transportation security inspector (TI-06 competition – selection process 07-MOT-EA-VAN-60712)

[283] As indicated in the memorandum provided by the respondent's representative, it is stated that the complainant's application with respect to this third TI-06 application was rejected because the complainant did not demonstrate that he had extensive experience in conducting investigations.

[284] Again, the respondent submits that said criterion was a mandatory requirement, as appears in the explanatory pamphlet of this third application (Exhibit C- 3, Tab 103).

[285] Again, the Tribunal must consider whether the complainant established a *prima facie* case that he was qualified for the particular employment in accordance with the provisions of *Premakumar*, *supra*.

[286] In his written submissions, the complainant's representative indicates that the requirements and required experience with respect to this third TI-06 position were modified and that it would be even more difficult to find suitable candidates.

[287] Thus, the evidence shows that in this third application the complainant modified his application to include different notations regarding his suitability and, in particular, he noted past

experiences including the complaints filed against the CRA and the CBSA (Exhibit C-3, Tab 105, pages 595 and 596).

[288] According to the written information provided by the complainant in support of his application for this third TI-06 position, a simple reading of said information leads the Tribunal to conclude that the complainant did, indeed, discharge his *prima facie* burden of proof of establishing that he had the essential qualifications for this third application, and more particularly, whether he possessed extensive experience in conducting investigations.

[289] Accordingly, is the explanation provided by the respondent to reject the complainant's application credible or merely a pretext?

[290] As noted above, it is not for the Tribunal to determine whether the criteria applied by the selection board to select candidates is adequate. The issue for the Tribunal is whether in making the decision which led to the selection board rejecting the complainant's application, did the selection board acted in a biased manner or whether it applied criteria, even unintentionally, that would prove that said selection board engaged in a discriminatory practice in the rejection of the complainant's application. Such are the issues for the Tribunal to determine.

[291] In presenting its evidence, the respondent called Michael Fu as a witness who was one of the members of the selection board with respect to this third application.

[292] Thus, in his testimony, Mr. Fu referred to his notes dated June 20, 2007, in which Mr. Hughes' application was rejected with the note "not extensive, not work-related, personal issue" (Exhibit C-3, Tab 107, page 609).

[293] In his testimony, Mr. Fu indicated that this was the first time he noted that a candidate had included his personal experience outside of work to demonstrate an experience qualification as being extensive investigation.

[294] Mr. Fu characterized what the complainant included as his personal complaints against the CRA and the CBSA as being “personal issues”. He indicated that he considered these responses to be a hobby and, speaking of the complainant, he stated: “I read the legislation at home and I am now knowledgeable about that same legislation”. According to Mr. Fu, even if one becomes conversant with that legislation, this is not sufficient to obtain the required qualifications.

[295] He therefore considered that what the complainant referred to was not “extensive” and, as a result, he made the decision to reject the complainant’s application for that reason.

[296] On cross-examination, Mr. Fu added that he did not know how the complainant had approached this question. More particularly, he indicated that he did not know what the complainant’s understanding of the applicable legislation was. He indicated that there was no basis for assessing such knowledge from the information provided by the complainant (see Testimony excerpt dated March 22, 2013, page 38, lines 1 to 12).

[297] In response to a question posed by counsel for the complainant, as to whether there was an indication in the job advertisement with respect to extensive experience in conducting investigations that said experience necessarily had to be worked-related, the witness stated that there was no mention of that in the job advertisement.

[298] However, it appears to the Tribunal that the answer to this last question becomes more subjective with respect to the criteria appearing in the job advertisement in issue and that the selection board had the necessary latitude to verify whether a candidate did, indeed, possess the experience sought for the purposes of this application.

[299] I therefore find that the explanation provided by the respondent regarding the rejection of the complainant’s third application for a TI-06 position appears to be credible and reasonable in light of all the circumstances of this case.

[300] Accordingly, the complainant's complaint as to the third application also does not appear be founded.

E. The provisions of section 14.1 of the *Canadian Human Rights Act*

[301] In its arguments, the Canadian Human Rights Commission asks the Tribunal to rule on the provisions of section 14.1 of the *Act* and addresses its questions as follows:

> 8. With respect to the allegations of retaliation, this complaint raises the following issues:
>
> a) Whether section 14.1 of the *Act* protects individuals who have filed discrimination complaints against one department/agency of the Crown from retaliatory actions of another department or agency of the Crown. In another word, whether this section should be read as covering incidents of retaliation of another department or agency of the Crown which is not the entity against which the complaint has been filed.
>
> b) If the answer to a) is affirmative, did the Respondent deny Mr. Hughes' employment because of his complaints against CBSA and CRA?

[302] In her written submissions, the Canadian Human Rights Commission representative notes that the respondent did not answer the first question mentioned above and consequently, she indicates that the Tribunal should adopt the Commission's position, which is not in dispute.

[303] Upon verification of the documentation provided by the respondent with regard to the Commission's submissions on the provisions of section 14.1 of the *Canadian Human Rights Act*, the respondent states that the complainant specifically named Transport Canada in his complaint and no other department or agency.

[304] The respondent submits that if the complainant had decided to file a complaint against the other federal government departments, he would have then named the Attorney General of Canada as respondent. Also, the respondent submits that if the complainant had intended to file a

complaint against the CBSA or the CRA, he would have had to have named those agencies directly as respondents, which the complainant did not do.

[305] Subsequently, the respondent indicates that the employer of the respondent, Transport Canada, is the Treasury Board of Canada Secretariat, and that the CRA's employer is the CRA and that the CBSA's employer is the CBSA, as set out in the definition of "employer" in section 2 of the *Public Service Employment Act.*

[306] The respondent also submits that there is no evidence in the record to support a finding of retaliation against any other government department or by Transport Canada. In that regard, the respondent argues that while references were provided using individuals from other government agencies such as the CRA or the CBSA, no negative inference can be drawn from their refusal to act as references for the complainant.

[307] Consequently, the respondent submits that there is no evidence before the Tribunal to support the allegation of retaliation.

[308] As for the complainant's position on this issue, the complainant's representative did not express any disagreement with the Commission's position.

[309] To properly answer the questions posed by the Commission, the Tribunal must consider the specific provisions of section 14.1 of the *Act*, which read 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.

[310] Thus, the text of section 14.1 implies that a discriminatory practice can take place at two levels, namely:

> By 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.

[311] The Tribunal will therefore examine each of these two aspects of section 14.1 of the *Act* with respect to the facts of this case.

a) a person against whom a complaint has been filed

[312] Did the respondent retaliate against the complainant pursuant to the provisions of section 14.1 of the *Canadian Human Rights Act* by means of this part of section 14.1 of the *CHRA*, namely: "a person against whom a complaint has been filed"?

[313] In its memorandum, the Commission refers to *Wong v. Royal Bank of Canada*, (2001), T.D. 06/01. Pursuant to that decision of the Tribunal, retaliation may be proven without a party having to prove the intent of the respondent to do so.

[314] Furthermore, the Tribunal may infer that retaliation did occur within the meaning of section 14.1 of the *Act* through circumstantial evidence established on the standard of proof on a balance of probabilities (see reference cited at paragraph 212 above).

[315] Thus, all the criteria established by the case law with respect to the level of evidence required for the complainant remain applicable, that is to say that, the complainant must establish a *prima facie* case that the respondent retaliated against him pursuant to the provisions of section 14.1 of the *Act* (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears*, [1985] 2 S.C.R. 536, at page 558, *Basi v. Canadian National Railway (No.1)*, (1988), 9 C.H.R.R. D/5029 (Can.Trib.)).

[316] But whom exactly is being referred to when section 14.1 of the *Act* states: "a person against whom a complaint has been filed"?

[317] Is it the respondent or the CRA and/or the CBSA?

[318] The evidence showed that the complaints made by complainant under Part III were against the CRA and the CBSA and not against the respondent.

[319] Indeed, the complainant clearly established in his complaint and testimony that he had disclosed the existence of his previous problems with the CRA and the CBSA to John Lavers in February 2006 when he provide him with his references. No mention was made of complaints made under Part III against the respondent at the time.

[320] Also, upon rereading the Commission's memorandum on this issue, the Commission asks the Tribunal to address the provisions of section 14.1 based on the position of the respondent, who allegedly acted as an agent. Furthermore, upon rereading the reasons for the decision it rendered (see Exhibit C-3, Tab 131, page 727), the Commission only mentions this last aspect.

[321] For the reasons expressed below, the respondent cannot be found liable under the pretence that it allegedly acted as an agent for the CRA and /or the CBSA.

[322] Could have the respondent retaliated on its own initiative, without being the agent of the CRA and /or the CBSA? That is the question to be answered.

[323] An analysis of the text of this part of section 14.1 of the *Act* ("a person against whom a complaint has been made") does not make it possible to make a positive finding that the respondent may be held liable.

[324] Indeed, a careful reading of this statutory text supports a clear inference that a restrictive interpretation must be applied as to the identification of the "person" sought in this case. In fact, the persons named in the complaints made by the complainant under Part III are the CRA and the CBSA, and not the respondent, based on the evidence heard.

[325] The Tribunal must however admit that it questioned, based on the facts of this case, whether or not Mr. Lavers (or the selection board) did retaliate, albeit indirectly or unintentionally, by the

decision that was made to reject the complainant's application, by adopting an attitude that I characterized as severe earlier in the first part of this decision.

[326] The Tribunal's analysis of the complaints made under Part III by the complainant does not allow me to go any further in the interpretation of this provision of section 14.1 of the *Act*. In that regard, the Tribunal cites the following passages from the decision of the Supreme Court of Canada in *Mowat, Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (*Mowat*):

> [33] The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500. **However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament**. (Emphasis added)
>
> . . .
>
> [62] **As we noted earlier, the *CHRA* has been described as quasi-constitutional and deserves a broad, liberal, and purposive interpretation befitting of this special status. However, a liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament: *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at paras. 49-50, *per* Abella J.; *Gould*, at para. 50, *per* La Forest J., concurring.** (Emphasis added.)

[327] Accordingly, the Tribunal finds that the respondent is not the person "against whom a complaint has been made" pursuant to the provisions of section 14.1 of the *Act* and the complainant's complaint against the respondent in this regard cannot be upheld.

b) or any other person acting on their behalf

[328] Initially, the complaint filed by the complainant is addressed directly to the respondent, that is, Transport Canada, and to no other agency/department of the Crown. Also, the appellant did not consider in a broader sense including the Attorney General of Canada either as a respondent or as a third party and no motion to amend was filed with the Tribunal to add the Attorney General of Canada either as a respondent or as a third party.

[329] As a result, the Tribunal is bound to hear the complainant's complaint as formulated, and in response to the first question mentioned with respect to section 14.1 of the *Act*, namely, who is the "person against whom a complaint has been filed", the answer is Transport Canada and no other person.

[330] In its arguments, the respondent argues that Transport Canada's employer was the Treasury Board and that the CRA's employer was the CRA and that the CBSA's employer was the CBSA, as set out in the definition of "employer" in section 2 of the *Public Service Employment Act* (*PSEA*)

[331] Thus, section 4(2) of the *PSEA* that establishes the CRA, that is, the *Canada Revenue Agency Act*, S.C. 1999, c. 17, establishes that:

> 4. (1) The Canada Customs and Revenue Agency is continued as a body corporate under the name of the Canada Revenue Agency.
>
> (2) The Agency is for all purposes an agent of Her Majesty in right of Canada.
>
> . . .

[332] Also, section 3 of the *Act* establishing the CBSA, that is, the *Canada Border Services Agency Act*, S.C. 2005, c. 38, states the following:

> 3. (1) The Canada Border Services Agency is established as a body corporate.

> (2) The Agency is for all purposes an agent of Her Majesty in right of Canada.

[333] Thus, prior to his complaint against Transport Canada, the complainant filed complaints against the CRA and the CBSA, pursuant to section 23(1) of the *Crown Liability and Proceedings Act*, R.S.C.1985, c. C-50 [CLPA], as agents of "Her Majesty in right of Canada" and not against the Attorney General of Canada.

[334] Also, it is useful to set out the provisions of section 23(1) of the *Crown Liability and Proceedings Act*, R.S.C.1985, c. C-50 (hereinafter the CLPA),which reads as follows:

> 23. (1) Proceedings against the Crown may be taken **in the name of the Attorney General of Canada** or, in the case of an agency of the Crown against which proceedings are by an Act of Parliament authorized to be **taken in the name of the agency, in the name of that agency.** (Emphasis added.)

[335] Also, in *Carter v. Canada (Fisheries and Oceans)*, 2014 CHRT 3, the Tribunal interpreted as follows the provisions of section 23(1) *CLPA*:

> [87] Section 23(1), *CLPA* deals with proceedings, and provide the mechanism for proceeding against the Crown. Such proceedings may be taken in the name of the Attorney General of Canada, **unless there is an Act of Parliament which authorizes the Crown entity to be named in proceedings.** (Emphasis added.)
>
> [88] Therefore, to obtain a remedy against the federal departments who are of the Crown, which in turn is Her Majesty in right of Canada, in accordance with section 66(1) of the *Human Right Act*, one names the Attorney General of Canada as respondent, in accordance with section 23(1) of the *CLPA*.

[336] In a complementary manner, the Tribunal also refers to the aforementioned paragraphs 33 and 62 of the decision of the Supreme Court of Canada, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 (*Mowat*) (see paragraph 323 of this decision).

[337] Accordingly, the analysis of that case law and the provisions of section 23(1) of the *CLPA* indicate to me that one cannot substitute the CRA and the CBSA for Transport Canada

and that the converse is equally true, that is, that Transport Canada cannot be substituted for the CRA and the CBSA for actions they did not commit unless an appropriate entity or third party is named to add the CRA or the CBSA directly in these proceedings, which was not done here.

[338] A fortiori, the evidence in the record did not indicate to me that there was either a relationship of subordination, or an agency relationship, between the CRA or the CBSA and Transport Canada, with respect to the facts of this case, particularly regarding the allegation of retaliation the complainant made in his complaint.

[339] Although contact occurred among the members of Transport Canada's selection board for purposes of the various applications, the evidence did not show direct communication between the representatives of the CRA or the CBSA and the selection board so as to establish an agency relationship between these parties, and establish that Transport Canada could have acted on behalf of the CRA or the CBSA in the alleged retaliation.

[340] Accordingly, the Tribunal does not find that the evidence indicates that either agency, that is, the CRA or the CBSA, could have influenced the respondent Transport Canada in not hiring the complainant (*Smith v. Canadian National Railway*, 2005 CHRT 23).

[341] In conclusion, I therefore infer that, based on this part of section 14.1 of the *Act*, Transport Canada did not act on behalf of other entities or departments, that is, the CRA or the CBSA.

IV. Conclusion

[342] For the reasons I expressed earlier, the Tribunal finds that:

(a) The complainant's complaint with respect to the first marine security analyst (PM-04) application is upheld under the provisions of section 7(*a*) of the *CHRA*;

(b) All the complainant's complaints are dismissed with respect to the TI-06 positions;

(c) All the complainant's complaints under the provisions of section 14.1 of the *Act* are also dismissed.

[343] Given the desire of the parties to first obtain a decision from the Tribunal as to the merits of the complaints made by complainant, I will thus refrain from making any other findings at this stage. I therefore retain jurisdiction concerning the issue of applicable remedies and await to hear from the parties about their intention in that regard.

Signed by

Robert Malo
Tribunal Member

Ottawa, Ontario
July 9, 2014

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1656/01111

Style of Cause: Chris Hughes v. Transport Canada

Decision of the Tribunal Dated: July 9, 2014

Date and Place of Hearing: March 18 to 22, 2013
March 25 to 26, 2013

Victoria, British Columbia

September 10 to 11, 2013
September 16 to 17, 2013
November 13, 2013
Ottawa, Ontario

Appearances:

David Yazbeck, for the Complainant

Ikram Warsame, for the Canadian Human Rights Commission

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