Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 15
Date: June 1, 2018
File No.: T1656/01111

Between:

Chris Hughes

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Transport Canada

Respondent

Decision

Member: Olga Luftig

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I. The Liability Decision

[1] On January 27, 2008, Mr. Chris Hughes (Complainant), filed a complaint (Complaint) with the Canadian Human Rights Commission (Commission) against Transport Canada (Transport Canada, or the Respondent). He alleged that the Respondent discriminated against him on the ground of his disability, depression, in a series of four (4) job competitions by failing to appoint him to any of the positions, contrary to section 7 of the *Canadian Human Rights Act,* R.S.C., 1985, c. H-6, (*Act* or *Human Rights Act*). He also alleged that the Respondent retaliated against him, contrary to section 14.1 of the *Act*.

[2] The first Tribunal hearing dealt only with liability. Briefly put, in *Chris Hughes v. Transport Canada*, 2014 CHRT 19 *(Liability Decision or LD*), Member Malo decided, at paragraph 342(a), that the "complaint with respect to the … marine security analyst (PM-04) application is upheld under the provisions of section 7(*a*) of the *CHRA*;"

[3] Member Malo decided that the Complainant did not establish a *prima facie* case of discrimination in the first competition for Inspector, classified in the TI group, sixth level (TI-06 Inspector or Inspector TI-06), and that the Respondent did not discriminate against the Complainant in two other competitions for TI-06 Inspector positions, and dismissed those three allegations. The retaliation allegation was also dismissed.

II. Remedies hearing and decision

[4] The Tribunal held a hearing on remedies (Remedies hearing). This is the Remedies Decision. Unless specified otherwise, all references to testimony in this Remedies Decision are to the testimony at the Remedies hearing.

III. The Complainant's requested remedies

[5] The Complainant requested the following remedies in the Complainant's Requested Remedy document (called at the hearing, Document C-11, which was not made an exhibit), with modifications and additions submitted at the Remedies hearing:

- Appointment to the position of Marine Security Intelligence Analyst PM-04, retroactive to May 8, 2006, and appointment to Inspector TI-06 as of January 1, 2007; this requested remedy was modified at the Remedies hearing to a date in late 2008, when the Respondent did not appoint any Inspectors pursuant to its 2008 TI-06 Deployment Notice;
- Payment representing:
    i. Lost wages in the amount of $581,697.97;
    ii. Lost benefits; expenses totalling $22,500.00; the Complainant also seeks an order that the Respondent continue to pay his medical and dental bills until he is reintegrated into the federal medical and dental plans;
    iii. Expenses totalling $22,500.00, specified later in this Decision;
    iv. Shift premiums, weekend premiums and overtime totalling $225,000;
    v. Return of 15 weeks sick leave credits;
    vi. Restoration, cash payout of vacation pay;
    vii. 9 days' credit for volunteer leave or a payment of the cash value;
    viii. 45 days' credit for family leave;
    ix. Compensation for pain and suffering and special compensation totalling $40,000;
    x. Adjustment of the Complainant's federal government pension and payout retroactive to 2006, as if the Complainant had been continuously employed since 2006;
    xi. Interest on all of the above at the Bank of Canada posted rates;
    xii. Gross-up, calculated by an actuary, for any negative income tax liability arising out of any of the payments.
- As alternatives to the remedies of appointment to Inspector TI-06 and lost wages in the amount of $581,697.97, appointment to a position as an Analyst at the PM-04 group and level, retroactive to May 8, 2006, and lost wages of $508,684.60.
- At the Remedies hearing, the Complainant requested that the Respondent pay for an accountant or actuary to calculate any gross-up;
- At the Remedies Hearing, the Complainant claimed wages and all attendant benefits, as well as reimbursement of health-related expenses for the period from the end date of the claims in Document C-11, which was August, 2015, to instatement, if the Tribunal ordered instatement;

- At the Remedies Hearing, the Complainant requested that the Tribunal retain jurisdiction to deal with any issues that may arise from the implementation of the Remedies Decision.

IV. Marine Security Analyst or Intelligence Analyst

[6] The federal public service (Public Service) classifies the Marine Security Analyst position as being in the PM group, fourth level, namely PM-04. This Remedies Decision will call the position "Analyst", or "PM-04 Analyst", defined as Marine Security Analyst (PM-04). As at the hearing date, the Respondent called the same position "Intelligence Analyst".

A. Comments on the documentary evidence

[7] The Tribunal identified the Complainant's binder titled "Outline of evidence concerning the PM-04 Marine Security Analyst position" as The Reference Document. In front of the Index is a document titled "Complainant's Outline of Evidence". It is essentially the Complainant's written summary of the evidence, referencing exhibits or transcripts from the Liability Hearing, attached as tabs. All other documents in The Reference Document were admitted into evidence during the Liability Hearing.

[8] The Respondent's position was that the Liability Decision and the exhibits speak for themselves. Although the Respondent did not object to the Tribunal permitting the Complainant's Outline of Evidence to be entered, the Respondent noted that it did not agree to the accuracy or truth of its contents. I did not rely on the Complainant's Outline of Evidence in arriving at this Decision.

[9] Unless otherwise indicated, I have relied on: those exhibits from the Liability hearing which were included in the evidence at the Remedies hearing; new documentary exhibits filed at the Remedies hearing; the Liability Decision; and the testimony at the Remedies Hearing which I found reliable.

V. Statute Law on rights, opportunities and privileges denied a victim of discrimination

[10] Subsection 53(2) of the *Act* reads in part:

> "If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may…make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:
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> […]
>
> (b) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, the rights, opportunities or privileges that are being or were denied the victim as a result of the practice;"

VI. Respondent's closing submissions on Marine Security Analyst position

[11] During his closing arguments and submissions, the Respondent's counsel stated:

> "Obviously we accept, as we have to, Member Malo's finding with respect to the PM-04 competition where the finding would leave the result that Mr. Hughes was entitled to have basically been part of a pool of six (6) candidates, of which 4 of them were ultimately selected. We accept that and actually we go as far to say we agree there's a probable chance that of that group he would have become a PM-04 at that time. The reason is because we also heard the evidence from our own witness […forgot name for a moment], Ms. Domae that although only 4 of the 6 candidates were selected initially, the other 2 weren't - one was screened out because they didn't pass the security requirement, the other refused the position - she actually said that the other 2 positions were ultimately filled. So it seems reasonable that if Mr. Hughes had actually not refused the position and if he had passed the security requirements, that he probably, I shouldn't say probably, that he would have become a PM-04 at that time."

When I asked Respondent counsel whether by "at that time" he was saying May 2006, he answered:

> "I think that's about the right time. We weren't able to tell a specific date by looking at the document itself, but we don't dispute the fact that it seems like a reasonable period of time".

[12] Ms. Lea-Anne Domae was the witness the Respondent's counsel referred to. She is the Respondent's Human Resources Manager for the Pacific Region.

Analysis

[13] I found Ms. Domae to be forthright and candid in giving her testimony, and her evidence credible and reliable. For example, she candidly and immediately conceded in cross-examination that she did not personally know the Complainant, nor was she familiar with his resume, because she started working at the Respondent in 2011. However, she knew the history of the 2005-2006 Analyst job competition, knew how Transport Canada filled the Analyst positions at issue from the eligible pool, and knew what happened to the appointed individuals (*i.e.,* as at the hearing date, she knew whether they were still working at Transport Canada, and their status.)

[14] I take into account the Respondent's counsel's closing arguments and agreement that the Complainant would have been appointed as an Analyst, and that the Respondent did not dispute that May 2006 was a reasonable time period for that appointment to have occurred.

[15] I therefore conclude, in accordance with subsection 53(2)(b) of the *Act*, that one of the opportunities denied the Complainant as a result of the Respondent's discriminatory practice was appointment in May, 2006 to the indeterminate [full-time] position of Marine Security Analyst, PM-04.

[16] The Complainant also seeks appointment to Inspector, TI-06 as of January 1, 2007 or another date (I discuss the proposed dates later), on the basis that had the Respondent appointed him to the Analyst position in May 2006, the Respondent would have later promoted him to TI-06 Inspector. The Complainant submits that one of the reasons grounding his claim that he would have become an Inspector is the experience he would have gained as an Analyst.

[17] I find it is therefore necessary to assess the evidence presented on the roles, duties, qualifications and skills required in both the Analyst and TI-06 Inspector positions.

VII. The Complainant's testimony

[18] The Complainant worked as a Collections Officer, at the PM-01 level, at the Canada Customs and Revenue Agency (CCRA), and later at the Canada Revenue Agency (CRA), for ten consecutive years, from February 1995 to December 2005. During that time, in 2002, 2003 and 2004, he was appointed three times as an Acting Customs Officer at the PM-02 level. He left CRA in circumstances he described as being forced to resign as part of a settlement. He had not wanted to leave.

[19] From August 2005 to 2007, the Complainant applied for four positions with Transport Canada: one Analyst position, and three TI-06 Inspector positions.

[20] The Respondent told him he did not advance in the first TI-06 Inspector competition because he scored 60 in the Written Communication Test (WCT345), when the pass mark was 70. In the second TI-06 Inspector competition, the Respondent told him that he did not advance because he did not have enough experience in investigations. In the third, the Respondent told him he lacked experience in extensive investigations.

[21] The Complainant testified that had the Respondent hired him as an Analyst in May 2006, he would have obtained experience in extensive investigations. He based this assertion on his understanding of an Analyst's duties, which he understood to include sifting through large amounts of data about incoming ships, assessing risk, and deciding and targeting which ships required inspection. He thought he would be looking through many different kinds of databases to see if ship crew had criminal records. He felt that as an Analyst, he would be doing extensive investigations every day. He based his understanding on his time at Customs, when they did that kind of checking. He testified he was pretty sure that the Analysts' duties were similar to those he had performed as an Acting Customs Officer.

[22] Prior to the Analyst and Inspector competitions, the Complainant had attended a meeting convened by Mr. John Lavers, Chair of the 3-member Selection Board for the

Analyst competition. Mr. Lavers told the attendees that numerous positions were available. The Complainant described the marine security unit as brand new; the federal government was establishing three of them in response to the terrorist attacks on September 11, 2001, those which occurred in Spain in 2004, and in England in 2005. The government wanted to establish one of the marine security units in Victoria, British Columbia (BC).

[23] The Complainant testified that because in August 2006, only one person qualified as and was appointed a TI-06 Inspector in Esquimalt, B.C., Mr. VK, there would have been three or four Analysts referring work to this Inspector. One could therefore conclude that there was a severe shortage of Inspectors for this marine security unit in August 2006.

[24] Mr. VK is shown on the Government Electronic Directory Services (GEDS) printout dated August 3, 2015 (Exhibit C-12) as still working as a TI-06 Inspector. The Complainant estimated there were 20 TI-06 Inspectors named in this GEDS document.

[25] The first TI-06 Inspector position the Complainant applied for was pursuant to an external job posting, closing October 3, 2005. He testified that an external posting is open to the public, and described closed competitions as internal – that is, only for members of the federal Public Service.

[26] As part of the first TI-06 competition, the Complainant wrote a Knowledge Test which he described as very difficult, and which required the candidate to demonstrate knowledge of relevant legislation and judicial and quasi-judicial procedures. The only person who scored higher than the Complainant was the person hired in that competition, Mr. VK. The Complainant's score of 52 out of 56, or 93%, was higher than four other people who were later hired as Inspectors.

[27] On June 26, 2006, the Respondent wrote the Complainant, advising he had failed the WCT345, and that his score remained valid indefinitely unless he rewrote the test. The earliest he could rewrite was October 7, 2006. The Complainant confirmed in cross-examination that every candidate had to pass the WCT345 in order to become a TI-06.

[28] In the Liability Decision, Member Malo concluded that the Complainant did not make out a *prima facie* case of discrimination regarding the first TI-06 Inspector competition (*LD,* at para 268).

[29] The Complainant tendered Exhibit C-13 as a GEDS printout about Mr. TS, which identifies Mr. TS as a Transportation Security Inspector, Developmental. The Complainant testified that Mr. TS went from a developmental position to a full-time TI-06, because he was an internal employee; the Respondent developed his skills and groomed him from the lower Developmental level, making him a TI-05, and then a TI-06, an opportunity the Complainant did not get.

[30] The competition for the 2nd TI-06 position, Regional Transportation Security and Emergency Preparedness Inspector had a closing date of August 3, 2006. The Complainant testified this competition was for the same position as the first TI-06 competition. He believed that by August 3, 2006, he would have been an Analyst for a few months and would have applied as an internal employee for the TI-06 job, for which he could have been hired.

[31] The Complainant's position and testimony were that usually with internal job postings, the bar is not set as high for experience factors because departments want to promote internally. He had seen this numerous times in numerous departments. The Complainant's position, in brief, was that it was easier to be promoted internally than to be appointed externally.

[32] On September 18, 2006, the Respondent's Ms. S. Wood, a member of the Selection Board for the Analyst competition, who was also in human resources and responsible for providing human resource information to the Selection Board, emailed the Complainant that the WCT 345 pass score had been reduced from 70 to 60, for the second TI-06 competition. In its October 12, 2006 email to the Complainant, the Respondent told him he had been screened out of this second TI-06 competition because he did not have the required experience in conducting investigations. The Complainant believed he would have gained that experience as an Analyst.

[33] The Complainant presented in evidence the Selection Board Report showing seven appointments resulting from the second TI-06 competition. The Complainant noted that since Mr. VK's August 2006 appointment, there were no other appointments until February and April, 2007. The Complainant felt there was a clear need for TI-06s.

[34] The Complainant's position, as reiterated in his testimony, was that after he would have been hired as an Analyst, the Respondent would have very readily given him an Acting TI-06 Inspector assignment. The Respondent would have done so because of his Customs experience, the experience he would have gained as an Analyst, and the need for TI-06s. The change to the passing grade of the WCT345 meant he passed it. The Respondent had already marked him on many of the ability and suitability requirements during the Analyst competition, so he felt he was essentially pre-qualified for the TI-06 position. Further, Mr. Ron Perkio, who was a member of the Selection Boards for both the Analyst and TI-06 staffing competitions, knew the Complainant had done well in the Analyst competition.

[35] Another reason why the Complainant felt he would have been assigned as an Acting TI-06 was because the standards for an Acting assignment are not the same as for a full-blown competition. In response to my question whether there was a need for Acting TI-06s, the Complainant testified that there were lots of openings; they only had Mr. VK in 2006. Then seven more were hired in February and April 2007 as a result of the second TI-06 competition.

[36] From the third TI-06 competition, which closed April 2, 2007, the Respondent hired another six Inspectors in October, 2007. The full complement was 19 or 20. The Complainant noted that three of those hired also scored 60 on the WCT345.

[37] The Complainant testified about Mr. JL, an internal employee. It was the Complainant's belief that an adhesive note attached to Mr. JL's application noted he was originally screened out, then screened in. Tab 26, Complainant's Remedy Book contained a copy of JL's application, on the first page of which was a copy of handwritten note. I could not read the entire note; part of it said "L, Was in the "out" pile. The original note was not produced at the Remedies hearing. The Complainant felt that the Respondent had

given Mr. JL, an internal employee, the benefit of the doubt, which it did not do for the Complainant who was not an employee. He testified that Mr. JL had been screened in on the basis of his experience conducting investigations. However, the Complainant asserted that Mr. JL had less experience than the Complainant (a few months versus the Complainant's seven and one-half years of law enforcement), and had lower knowledge marks than the Complainant in the 2005 Knowledge Test. Yet Mr. JL was hired.

[38] Tab 27, Complainant's Remedy Book, is the job posting for the third TI-06 competition, closing April 2, 2007, for which the Complainant applied. The Respondent appointed six more TI-06s in October, 2007 as a result of this competition.

[39] The Complainant presented in evidence applications from some of the other individuals who also applied in each of the three TI-06 competitions. The Complainant submitted that these applications demonstrate that most of those hired had a Customs Inspector or tax background. The Complainant had both.

[40] Mr. VK was appointed as a TI-06 Inspector on August 8, 2006, and five weeks afterwards, a September 18, 2006 email from Sonya Wood demonstrates that the Respondent lowered the pass mark for the WCT345 test to 60. The Complainant's position was that the Respondent should have hired him as an Analyst on May 8, 2006, and that shortly after Mr. VK was hired, the Respondent would have moved the Complainant from Marine Security Analyst to Inspector, to work with Mr. VK, because it would have made business sense to do that.

[41] The Complainant adduced a document detailing the count of completed staffing actions for TI-06 Inspectors in the Pacific Region between January 1, 2005 and July 10, 2008 (2005-2008 TI-06 Staffing Count). It demonstrates that in the period, the Respondent hired twelve people through external advertisement, two through internal advertisement, and one through a non-advertised internal hire. He felt that he could have been hired either through the internal ad or the non-advertised ad for an internal hire, had he been hired in 2006 for the Analyst position. He noted that one person is listed as "ACIN", which means Acting appointment. He felt this demonstrated that there were Acting assignments, and that the Respondent had the option of using them.

[42] The Complainant testified that the List of Vacant Positions presented in evidence demonstrates that as at July 2008, even after the three TI-06 staffing processes, the Respondent still did not have enough people, and still had five TI openings. (I note that four of those vacancies were for TI-06 Inspectors; the fifth was for TI-05 Inspector.)

[43] The Complainant testified that after he left CRA, whenever he obtained work in the federal government**,** he checked job postings accessible only to government employees.

[44] He presented Exhibit C-14, a Deployment Notice for TI-06 Inspector, closing October 8, 2008 (2008 TI-06 Deployment Notice). The Complainant felt its requirements in respect of the experience or interpersonal relations factors were less strict than the requirements for those same factors for the three Inspector positions for which he had applied. To him, the 2008 TI-06 Deployment Notice was an example of the lower bar for internal employees.

[45] He felt that because he passed the Knowledge Test and personal suitability criteria when he applied for the PM-04 Analyst position, and because he possessed Customs inspector experience, he would have been essentially pre-qualified for the TI-06 position.

[46] The Complainant presented the exhibits below, which he had obtained from the Treasury Board website:

a. Exhibit C-15 is Appendix A-1 of the Collective Agreement between Treasury Board and the Public Service Alliance of Canada (PSAC), for the PM group, which expired June 20, 2011. It contains pay rates for the PM-04 level, as well as provisions for sick leave, vacation leave, family leave, bereavement leave and volunteer leave;
b. Exhibit C-16 is Appendix A-1 of the Collective Agreement effective June 21, 2011 to June 20, 2014, between Treasury Board and PSAC, for the PM group, which succeeded Exhibit C-15;
c. Exhibit C-17 is a document the Complainant identified as containing relevant sections of the TI-Inspectors' Collective Agreement (TI Collective Agreement), expiring June 21, 2011;
d. Exhibit C-18 is an excerpt from the TI Collective Agreement applicable to the period June 22, 2011 to June 21, 2014.

[47] The Complainant used the excerpts from the Collective Agreements to arrive at the amounts for lost wages and other amounts and credits he seeks as remedies, which are set out in Document C-11.

[48] The Complainant testified that the wage amounts in the Collective Agreements are annual. To calculate his wage losses, for each year, he started by using May 8, his proposed 2006 hiring date, to June 21, the yearly expiry date of each pay grid pursuant to the Collective Agreement. He then prorated that and combined it with the remaining part of the year. He then deducted any wages he earned from other employers during the specified period, except the period January 1 to March 31, 2006, prior to the discrimination. He explained that on the anniversary of one's hiring, one goes from step 1 to step 2 in the chart shown in the Collective Agreements, and that each year, one also receives an economic increase until reaching the maximum in one's pay grid.

[49] Tab 42, Complainant's Remedy Book, contains a series of the Complainant's T4s, showing earnings from employment in various years and Employment Insurance (EI) benefits received.

[50] The Complainant testified that as a federal employee, he would have been covered for dental, drug and medical expenses. He sought an order that the Respondent provide him with medical, dental and drug benefits in accordance with its policy for indeterminate employees, retroactive to May 8, 2006. When he was married, his wife submitted his health expenses to her plan, providing the Complainant with 100% coverage. Starting on page 5 of Exhibit C-19, there are medical, dental and pharmaceutical bills from September 21, 2011 to 2015, and the Complainant claims the rounded amount of $7,000.00.

[51] The Complainant testified that John Lavers had told candidates that the Marine unit would be a 24/7 operation, with a lot of shift premiums and overtime. Overtime is anything above the standard 37.5 hour work week. This Decision will call shift premiums, week-end premiums and overtime, collectively, "Overtime".

[52] The Complainant testified that when he was at CRA and CBSA, he never refused Overtime, and he would have done the same at Transport Canada.

[53] The Respondent did not have 2006 and 2007 T4s for Marine unit employees. The Complainant therefore estimated Overtime for those years based on later years, assuming 2006 and 2007 had the higher amounts of Overtime because the Respondent was short-staffed in those years.

[54] Exhibit C-20 are Employee E's T4s for the years 2008 to 2014, on which the Complainant based his Overtime claims for 2009 to 2012. Employee E was an Analyst in the MSOC who worked there from 2006 to 2012; E opted for voluntary layoff in 2012, pursuant to workforce adjustment. The Respondent's Ms. Domae later testified about E.

[55] For 2008, the Complainant lowered his Overtime estimate to $15,000 because he would not have been able to work Overtime due to his eye operations.

[56] Using E's T4s for 2009 to 2012, he compared the basic PM-04 wage in the Collective Agreement to the amount on E's T4s for those years, and attributed any amount over the Collective Agreement wage to Overtime.

[57] E's 2009 T4 was $88,000. The PM-04 wage in the Collective Agreement was $58,000. Therefore, the Complainant estimated E's Overtime at $30,000.

[58] For 2010**,** E's T4 stated $73,000. The Complainant did not know which level on the pay grid E occupied— the pay scale was $57,000 to $62,000. The Complainant assumed $61,000 regular pay, and therefore assumed E made approximately $12,000 in Overtime.

[59] For 2011, E's T4 stated $85,000.00. The Complainant thought E, who he assumed was hired three years prior, would have been at the top of the pay scale by 2011, earning $65,000.00, so he estimated E made just under $20,000 for Overtime.

[60] In 2012, E's T4 stated $94,300. The top of the PM-04 scale in 2012 was $66,400, so the Complainant calculated E's Overtime at about $28,000.

[61] For 2013 and 2014, the Complainant's calculation for each year was $25,000, in keeping with the previous 2 years, because Employee E took voluntary layoff in 2012.

[62] The Complainant testified that the Collective Agreements provided for one day off with pay each year for volunteer work. He seeks either a retroactive credit of 9 days (from

2006 to 2015) if he is instated, or if not possible, payment of the cash value of 9 Volunteer Days.

[63] The Complainant testified that at CCRA/CRA, he had worked his way up to four weeks' annual vacation. Had the Respondent hired him in May 2006, he testified that the Collective Agreements provides that his past service would have counted towards the calculation of his entitlement to vacation hours. As one builds up hours, if one does not use one's entire vacation time every year, one gets a payout of the cash value.

When I asked if he went on vacation when he was working at CRA, he testified he may have gone on one or two, but nowhere near the hours to which he was entitled. The Collective Agreements provide that an employee cannot carry more than 262.5 hours into the next fiscal year. Anyone who has in excess of that amount receives a cash payout. He calculated that the total number of hours for the nine years between 2006 and 2015 was 1,667.8 hours. He subtracted from that 262.5 hours which he could carry into his first year at Transport Canada if he were instated. The Complainant submitted he should start work with 262.5 hours of vacation banked, and a cash payout representing the difference of 1,405.3 hours.

[64] The Complainant testified that he used the same rationale to calculate Family Leave Credits as he had for Volunteer Days. He submitted he would have been entitled to five days of Family Leave for each year in the period 2006 to 2015, for a total of 45 days.

[65] The Complainant testified, and I find, that Article 46 of the Collective Agreement entitles an employee to seven days' Bereavement Leave when a family member dies. The Complainant testified that he would have used that leave in 2010 when his father died. He would have needed at least one additional week, so he would have used a week of Sick Leave.

[66] The Complainant seeks 15 weeks credit for sick leave (Sick Leave), on the basis that if he had been a permanent government employee since May of 2006, he would have accrued 15 days of sick leave per year. He arrived at 145 days by prorating 2006, and then calculating the yearly accrual.

[67] He had a retinal tear followed by two retinal detachments, and consequently had surgeries on his right eye on August 19, September 2 and November 20, 2008, during the recovery for which he could not have worked for at least 14 weeks, leaving an entitlement of 15 weeks which should be credited to him.

[68] The Complainant submitted in Document C-11 that the Collective Agreements provide for 13 paid statutory holidays each year. He submits that statutory holidays might factor into sick leave usage because he would only use four sick days in a week when a paid statutory holiday fell on a day during the period of his medical incapacity.

[69] The Complainant testified that his rationale for requesting that his CRA/CBSA pension be adjusted as if it were continuous – that is, as if he had not obtained the right to access his pension due to financial hardship in December, 2006, was that he would not have accessed it had the Respondent hired him in May, 2006. Therefore, the Pension would have been continuous. He requested that the federal government's pension service (ACURIS) make the calculation as to what his pension would have been, along with employee deductions and/or contributions, and employer contributions.

[70] The Complainant typed Exhibit C-21, a synopsis of evidence on Special compensation, to use as an *aide memoire* at the hearing. The Complainant felt it necessary to do so because of his concern that he would become emotionally distraught and miss something important when he testified because of the nine years between 2006 and the hearing. The Respondent did not object to the Complainant using Exhibit C-21, so long as the Respondent had an opportunity to cross-examine on it. I did review Exhibit C-21, and based my findings and conclusion partially on it, but more on the Complainant's testimony.

[71] Mr. Hughes testified that "over the last nine years", it cost all his savings to survive. He had to cash his federal pension to survive 2009, 2010, and 2011. In late 2006 he foresaw that he would have problems getting jobs, so he took his federal pension out in December 2006 so that he could access it later. He would have not done that if Transport Canada had hired him. As his pension would have grown for the last nine years prior to the hearing, he took a large financial loss in cashing out his pension.

[72] He felt that Transport Canada had known he was depressed from day one, that they would have known the discrimination would make his depression worse, and that it did. His depression, stress and anxiety got worse through the years. It affected his marriage, which had been very rocky for four years, before breaking down in late 2011. He attributed this to the financial hardship caused by discrimination, as well as litigation involving the Commission and Tribunal. He testified that the process of his marriage falling apart was full of stress, arguments and crying. Because of the uncertainty over his finances over the period 2006 to 2015, the couple did not have children.

[73] For much of this period, he was either worried about finances or actually under financial duress, and he almost went broke about 10 times. He twice had to borrow money from his parents, who in turn borrowed $7,500 from their Church in order to lend him the money. He repaid them from the money he received from cashing out his pension. His father was very sick with Parkinson's from 2008 to 2010. He was unable to help his parents, but they were helping him. It caused him great distress not to be able to help his father financially, such as hiring him a caregiver so that he would not have had to be at a care facility for his last six months.

[74] At one point, just before his father died, in the period March to May 2010, his anxiety was very high because he thought he had Multiple Sclerosis, or ALS or Parkinson's disease. He thought this because he had trouble holding his neck up, and had trouble walking on breaks while working at the Coast Guard as his legs couldn't hold him up. He described feeling like he was going to collapse. He experienced nervous twitches. His doctor did tests and told him he did not have any of these conditions. After finding out the Complainant's situation, the doctor told him he had acute stress and anxiety.

[75] He has gone for counselling a number of times over the years, but couldn't specifically recall whether he went during the above period. His doctor talked with him about ways to reduce his anxiety, such as going for walks, trying to stay active, watching comedy or movies, staying away from alcohol and caffeine, and having supportive friends. At 25, he had quit drinking, because it could have been a problem due to his family history. But it was not a problem for him.

[76] The few times he did get jobs, it helped stave off financial hardship. But the jobs he was able to get were short–term, and then he would be back in financial hardship. He worked five months in 2013, and six months in 2014, for B.C.'s Ministry of Children and Family, in what is called an "auxiliary position".

[77] In response to my question about whether his wife worked during the marriage, he testified that she did, and posited that he would have run out of money more quickly than he did, had she not been working.

[78] His mortgage balance had been $200,000, but he had to re-finance it in 2012 and 2013, to get through those years, so it increased to $260,000. By August 2014, he had to sell the home to access the remaining equity. His mother mortgaged her home to lend him $10,000. He had to repay her, and also friends who had loaned him money. His line of credit was at its maximum. The remaining equity from his house didn't last long, and he was in debt again by November 2014. He described himself as homeless by that time, living in a hotel.

[79] From 2006 to 2012, he didn't go to the gym much, put on weight, and was isolating himself from friends. He stopped enjoying life. By November, 2014, although he had won two human rights cases, the government had not paid him. He was going to go on a hunger strike in 2014 until he was paid. The failure of a global settlement meeting on the cases devastated him.

[80] He agreed in cross-examination that after the failed global settlement meeting, he did settle his two complaints against Human Resources and Skills Development Canada (HRSDC), as evidenced by Minutes of Settlement signed January 7, 2015 (Minutes or Minutes of Settlement), pursuant to which he was paid a sum of money. The Settlement was negotiated subsequent to the Tribunal's finding of discrimination in *Chris Hughes v. Human Resources and Skills Development Canada*, 2012 CHRT 22 (*HRSDC Decision*). There were evidentiary issues around the admission and relevance of the Minutes, and with respect to the Complainant's testifying about an aspect of the Minutes. These issues are discussed in detail later in this Decision.

[81] The Complainant testified that he was very upset when, during the 2013 Liability Hearing, he found out that the selection board for the PM-04 Analyst competition had, in assessing his candidacy, in fact noted “VG” [Very Good] in relation to the “Detail-oriented” selection criterion on the original of its report, but that the “VG” had been erased. He described it as “just so upsetting” to know that he should have passed and been hired in 2006, and that the Respondent would have gone to those lengths, and that he has had to go through “all this hell”. He felt the erasure was a “cover-up”, triggered by his access to information request for the selection board report.

[82] Regarding his alternative request of instatement to Analyst and lost wages for that position, the Complainant testified he arrived at the amount of wages he lost by using essentially the same process he used for the TI-06 position. He based his claim on the May 8, 2006 anniversary as the date he should have been hired and used the wages for Analysts found in the Collective Agreements.

[83] The Complainant was asked to comment on the Respondent’s submission that the Tribunal should not instate him to a TI-06 Inspector position, because after his employment at CRA, his employment history consisted only of temporary jobs, never permanent ones. He testified that had the Respondent hired him for the Analyst position, and then promoted him to Inspector TI-06, he would have never had to apply for other jobs in government and private companies, which earned him half the pay of what he would have made at the Respondent. As examples, he took clerical jobs, briefly worked as a courier driver for Howard Johnson, and cleaned bathrooms. None of the jobs were permanent; all of them consisted of temporary employment.

[84] At the hearing, the Complainant submitted into evidence T4s for a number of other employees, in order to support his wage loss claim. They were marked as follows:

Employee R’s T4 for 2010 – Exhibit C22
Employee Q – T4 for 2014 – Exhibit C23
Employee O – T4 for 2014 – Exhibit C24
Employee P – T4 for 2011 – Exhibit C25
Employee N – T4 for 2011 – Exhibit C26

The evidence did not address whether these other employees were Analysts or Inspectors, and I therefore cannot take them into account in determining the claim for lost wages.

[85] The Respondent's March 21, 2006 letter advised the Complainant he had not been accepted for the Marine Security Analyst position (*Liability Decision*, at para.49).

[86] The Complainant wrote other federal government tests besides those for the Analyst and Inspector competitions. In 2006, as part of a different selection process, he wrote General Competency Test 1 (GC1), and scored 47 out of 50. The test is for the clerical stream of work and tests ability with the alphabet, numbers and math. While at CRA Collections, he wrote a legislation exam and scored 100% on policy, procedure and legislation for income tax law. In 2006, when he applied for an Employment Insurance-related position with Service Canada, he had to take the "720 Test" and scored very highly.

[87] The Complainant has an Office Administration Computerized diploma from the Career Development Institute. While he worked at CRA, he completed a first year financial accounting course in Certified General Accounting at Victoria's Camosun College, paid for by CRA.

[88] The Complainant's T4s for 2006 established that in that year, he worked for both the Government of Canada and the Government of British Columbia in temporary positions.

[89] The evidence also established that for the nine month period from September 13, 2007 to June 27, 2008, the Complainant worked for HRSDC in a temporary position, as a Clerk 4(CR-04), specifically, as a service delivery agent. HRSDC extended his term twice, and then did not do so a third time.

[90] The Complainant testified that his three eye surgeries in August, September and November, 2008 affected his sight for about one and a half to two years.

[91] In cross-examination, the Complainant testified that from April 2010 to about the end of August or the first week of September 2010, he worked for the Canadian Coast

Guard as a salary and leave clerk. This was a temporary position which was not renewed. He did not believe there was a possibility of either temporary or permanent employment with the Coast Guard in the future.

[92] In 2011, the Complainant worked for Elections British Columbia in a temporary position for about six weeks during the HST Referendum, opening ballot boxes, counting and verifying ballots, and earning $3,374.80. Everyone hired for the Referendum was short-term. His 2012 T4 indicates income of $648.97 from the Government of Canada.

[93] From July to November, 2013, the Complainant worked at the Childcare Subsidy Branch of the B.C. Ministry of Children and Family Development, in a short-term position, as an account clerk. He worked there again from May 1, 2014 to October 31, 2014 under an auxiliary contract, with other administrative duties. He received EI benefits from November to December, 2014. At the time of the Remedies hearing, he was not receiving EI benefits and had been unemployed since October 31, 2014.

[94] The Complainant presented a T4 indicating earnings in the amount of $14,184.25, for 2014, from the B.C. government. This conforms to the Complainant's testimony.

[95] The Complainant confirmed that as at the date of the hearing in 2015, he has not obtained a permanent job. He referred to Document C-11 which stated at number 2, page 5 and number 12, page 12, that in 2015, he had no income. I note that the 2015 year was not complete as at the date of his testimony and documentary evidence.

[96] The Complainant testified that he looked at internet job sites every day. As examples, he checked Jobs.gc.ca, where most federal departments post their openings; the province of British Columbia's employment website; the HRDSC job bank; the District of Saanich job site; and the University of Victoria's Camosun College site. Besides applying for every job he thought he was qualified for, which he estimated were in the hundreds, he went to the EI office a number of times when he was laid off in order to obtain help finding work from companies to whom EI authorities subcontracted for that purpose.

[97] In 2009, after he had just finished his three eye surgeries, one of those companies assessed him, and determined he had significant barriers to employment, and qualified for a 50% wage subsidy program (2009 EI Assessment).. Under the program, the federal government would pay an employer who hired him 50 percent of his wages He used a letter from the company indicating his eligibility for the program to apply for jobs.

[98] The significant barriers to employment partly arose as a consequence of the retinal detachment and associated eye operations, which caused a bad sensitivity to light and resulted in his vision not being that good then. The Complainant estimated that the vision problems lasted for one and a half to two years. He had told the EI office his history of depression. EI authorities also knew that CBSA was not providing references in support of his job applications, and that he had left CRA pursuant to a confidential settlement, after working there for 10 years. He also applied to a number of temporary job placement agencies, cruise ship companies, and for numerous federal and provincial jobs. He described looking for work as a full-time job in itself.

[99] In cross-examination, when asked about why he has not applied for another TI-06 Inspector position since 2007, the Complainant testified that he did not recall seeing any external postings for another opening. He checked the federal government job web site every day. He believed he would have applied had he seen the postings.

[100] The Complainant acknowledged in cross-examination that he had a back condition. He testified that although it did not affect his employment, in looking for work, he did not apply for farm work, or for jobs where there was constant lifting, or for heavy construction work. He also conceded that when employed at HRSDC, he had to ask for accommodation when his back pain flared up, and he later asked for accommodation for his depression.

[101] The Complainant confirmed in cross-examination that he has not obtained a post-secondary education since applying for the Analyst position in 2005. In re- examination, he testified that as far as he was aware, the Respondent never screened him out of the PM-04 or TI-06 Competitions because he did not have a post-secondary education, nor was it ever raised as an issue that might be blocking his advancement.

A. Evidentiary issue re other human rights complaints

[102] During cross-examination, when Respondent counsel asked the Complainant to confirm that he still had outstanding human rights complaints against CBSA, and that he had made complaints against other employers, Complainant's counsel objected on the ground that this was an irrelevant line of questioning: the Tribunal had already found that Transport Canada should have employed the Complainant, so the fact that he filed complaints against CBSA was irrelevant.

[103] The Respondent's position was that these other human rights complaints against other employers were relevant because they demonstrated that the Complainant's work history was one of having issues with various employers going back to CRA and CBSA, and all the way through since then. The existence of these complaints demonstrated a history of not finding lasting employment, and of trouble holding a position for any length of time, which history may result in his being a person who may not be likely to find lasting employment in the future. This was part of the Respondent's argument, and the complaint forms helped demonstrate that fact, and establish that history as part of this argument. The Complainant filed complaints against other employers that were similar to the complaint he filed against Transport Canada. The other complaint forms detail some of the issues the Complainant has had with other employers.

[104] The Respondent further submitted that although some of the complaints were substantiated, the complaint forms highlighted the issues the Complainant has had with these employers, and demonstrated that he has had issues with many employers which have come up throughout his career. This tendency was relevant to part of the Respondent's overall argument.

[105] The Complainant characterized the Respondent's argument as, in effect, an assertion that the Canadian government would retaliate because the Complainant had filed human rights complaints. In his view, the Respondent's position called into question the Complainant's right to file a human rights complaint.

[106] I have not formed the impression that the Respondent's submissions amounted to saying that the Complainant did not have the right to file a human rights complaint or that

retaliation was somehow inevitable. I stated during the hearing that there is a reason the *Act* exists, and it is to remediate discrimination. Anyone can avail themselves of its processes, as long as their complaint falls within the *Act's* parameters. I also stated that the Complainant had the right to make human rights complaints, and that I would not make any negative inference because he had done so.

[107] I decided to hear the evidence and admit two complaint forms that had been filed against CBSA (Exhibits R-6 and R7). The second form was in fact an amended version of the first, which according to the Complainant, the CHRC did not accept for filing. I told the parties that I would not place a lot of weight on the details in the complaint forms, but that I would pay some attention to the issue of other complaints in relation to the remedies sought in this Complaint.

[108] The Complainant confirmed in cross-examination that on January 25, 2005, he filed a complaint against CBSA (Exhibit R-6), which seeks compensation and retroactive instatement with CBSA. That retroactive instatement would pre-date his proposed retroactive instatement at Transport Canada. The complaint against CBSA was still to be heard by the Tribunal at the time of the Remedies hearing in the present matter.

VIII. Testimony of Respondent's Witnesses

A. Testimony of Respondent's witness Mr. Timothy Shorthouse

[109] At the date of the Remedies Hearing, Mr. Timothy Shorthouse was a manager at Transport Canada. He testified that he was then Acting Manager, a position with a PM-06 classification. His substantive position is the Senior Intelligence Officer, classified as a PM-05, a position which he had for one month before being appointed as Acting Manager. Before becoming the Senior Intelligence Officer, he had been an Analyst PM-04 (now called Intelligence Analyst) for six years, from July 1, 2009. He has a university degree. He was hired for the Analyst PM-04 position pursuant to a 2008 hiring process, and at that time, a university degree was a new requirement.

[110] As the Senior Intelligence Officer, he supervises a team of five Analysts and ensures they are meeting the Respondent's expectations for reporting on national security threats and intelligence. He currently works at the Canadian Forces Base at Esquimalt ("Dockyard"). The Marine Security Operations Centre (MSOC) is co-located there with its various federal government partner agencies. MSOC is an intelligence fusion centre, and is a military-centric facility. Its building is a high security environment.

[111] He described the position of Analyst as a desk job in which, for the majority of the day, the Analyst spends his time monitoring intelligence sources as they come in. There is a lot of report writing, comparable to research and writing at university, evaluation of different sources of information, and working with partner agencies. The Analyst writes assessments for the Deputy Minister, for senior executives in Transport Canada, and for other parts of government.

[112] The Analysts are also subject to changing priorities. Thus, there is not a typical day, because depending on the potential threat, the day may vary significantly; the Analyst may have to drop everything and get an assessment or report out very quickly for actionable intelligence. With that *caveat*, the witness described a typical day for an Intelligence Analyst. It would usually start off with a meeting with the partner agencies, discussing the current priorities of the day, looking with them at new pieces of intelligence that came in, and discussing any threat information. The Analyst would evaluate incoming container and commercial vessels for threat, and work with partner agencies. If there was no potential threat or security concern, then for the rest of the day the Analysts were on their own, researching, evaluating intelligence and preparing reports for the security intelligence community.

[113] However, if, for example, migrant vessels were inbound, the Analysts would have to provide a briefing note by the end of the day, which could add pressure to the position. There could be quite a bit of pressure. If a threat was detected, the Analysts would drop their other work, put their heads together with their partner agencies, and generate some kind of collaborative threat assessment or document to provide advice to senior officials. The Analysts would be using the same skills they used when they were conducting their

strategic work on a day-to-day basis, but working at a different pace and with a different amount of pressure.

[114] Mr. Shorthouse described the TI-06 Inspector position as a regulatory position, now called Marine Security Inspector. He described the TI-06s as the regulatory experts at MSOC. Their role was to ensure compliance with Transport Canada regulations on anything Transport Canada regulated, including ports and vessels. To do that, they would board the vessels in order to ensure compliance and inspect documents. They did the same with ports, making sure that the ports' physical security measures complied with Transport Canada's regulatory requirements.

[115] When asked what type of knowledge a TI-06 would require that was different from what an Analyst required, Mr. Shorthouse responded that the TI-06s were almost uniformly former enforcement officers. There were a lot of former police officers, both at MSOC and in Vancouver. They had significant experience in enforcement. For example, some had 10 or 20 years' experience as police officers in Vancouver or in the U.K., or experience as Canada Food Inspection Agency enforcement officers. The main difference from the Analyst position was that the Inspectors really did understand the technical side of regulations, *i.e.* what constituted compliance, and how to make sure vessels and ports were in compliance. They were the experts in regard to physical vulnerabilities and risks.

[116] Mr. Shorthouse could not provide an exact number of TI-06 Inspectors for the Region. He concurred in cross-examination that he had not examined the background of all the approximately 20 TI-06 Inspectors in the GEDS listing of the Respondent's Pacific Region, in order to determine if they had an enforcement background. In cross-examination, he testified that with respect to enforcement, the requirement for the TI-06 Inspector was to have had experience enforcing regulations. It was up to the hiring manager to decide whether it was a requirement to have actually been an enforcement officer.

[117] He described the Analyst as sitting and evaluating intelligence, tasks which required a very different skill set than those of an Inspector. In the Analyst position, the skill set presently required included a university degree. The position involved a lot of

research, analysis, and evaluation of conflicting pieces of intelligence. One needed significant experience in being able to produce actionable intelligence or a briefing, for submission to a Deputy Minister or group of Deputy Ministers.

[118] He characterized the skill sets and experience required and involved in the job of TI-06 Inspector as being so different from that required for an Analyst that they were almost like “apples and oranges”, and not linked in any way. The TI-06 position required skills related to being in the field and looking at documentation to make sure it was legitimate and not fraudulent. The Inspectors were the subject matter experts on regulations and enforcing regulations.

[119] Mr. Shorthouse testified that a typical day for TI-06 Inspectors was primarily out in the field, conducting inspections. They might visit a few different cruise ships and visit the ports to assess security. They would conduct interviews, physically look at the infrastructure, and make sure access controls were in place. They would then go back to the office and do a *post-mortem* report, deal with any compliance issues and follow up with them.

[120] In his experience, it was not enough to know the regulations. He described himself as having a very solid understanding of regulations because of his 6 years as an Analyst, but still having had to refer any questions regarding regulations to an Inspector. He testified that enforcement and enforcement courses of action was a different tradecraft than the Analyst’s job.

[121] With respect to whether one would develop skills as a PM-04 Analyst which would ultimately lead to a position as a TI-06**,** Mr. Shorthouse testified that he had never seen such progression happen before in either direction, *i.e.*, an Analyst becoming an Inspector or an Inspector becoming an Analyst. He emphasized that they were very “opposing” positions in many ways. One was intelligence and one was regulatory enforcement. The skills for the Analyst related to writing, assessing and briefing; the TI-06 skills related to physically visiting a port or vessel, verifying compliance, and following up with enforcement. Even when working with the Inspectors who were his team members, he noted that the Analysts worked very little with the TI-06s.

[122] Mr. Shorthouse also testified that in his experience, he had never seen an Analyst offered an acting position as a TI-06 Inspector. He concurred with Complainant counsel that acting assignments could happen fairly regularly, and that they could be used to help someone develop their career. He testified that these assignments generally lasted less than four months. He did not know if it was possible for an Analyst to be appointed as an Acting TI-06 Inspector. He thought that the likelihood of this happening would depend on the competition, but he characterized it as highly unlikely for someone to be appointed as an Acting TI-06 without an advertised process. He added that a TI-06 Inspector required delegated authority, which took at least six months to obtain. Without that, the person could not really fulfill the duties and obligations of the TI-06 Inspector job. In response to my question, Mr. Shorthouse testified that Transport Canada would appoint an actor for certain positions, the rule of thumb being that the incumbent's absence had to be for more than three days. An actor was not usually appointed to fill an absence on account of illness.

[123] He was asked to comment on an individual being hired as a PM-04 Analyst in August, 2006 and then being appointed as a TI-06 Inspector on January 1, 2007. Mr. Shorthouse surmised that the proposed progression would not be based upon the Analyst position, because the skills one required and developed as an Analyst were not those one would leverage to become an Inspector. There are no duties common to both jobs, and they require very different skills.

[124] In cross-examination, when asked if he was saying that it was impossible for an Analyst to become a TI-06 Inspector, Mr. Shorthouse responded that nothing was impossible with appropriate credentials and experience. Mr. Shorthouse concurred that he did not personally know the Complainant, that he was not familiar with his background, experience, education, or knowledge, and that he was therefore not in a position to comment on whether the Complainant could have become an Inspector after working as an Analyst.

[125] Mr. Shorthouse also testified in cross-examination that he had never worked as an Inspector, and that he based his testimony about the Inspector position on the observations he had gathered while working with, and across the room from, the four

Inspectors in the MSOC team. He would not accompany them on inspections. He also based his testimony on his experience working closely with the Regional Inspectors in Vancouver, although he did not personally observe them. He also acquired information about the Inspector position because of the Analysts' role providing intelligence support for one specific element of the Inspectors' duties relating to the inspection of vessels and ports. The Analysts provided the Inspectors with threat assessments. To meet their clients' needs, the Analysts had to understand what the Inspectors did and what their responsibilities were. Mr. Shorthouse agreed in cross-examination that the Analysts had a fairly good understanding of what the TI-06s actually did.

[126] Mr. Shorthouse testified that at the time of the hearing there were two educational requirements for the position of TI-06 Inspector: Either a post-secondary degree, which had to be a university degree such as a Bachelor's degree, or a combination of education and experience, which entailed more relevant experience and studies short of a degree. There was no evidence as to whether the degree or the studies had to be related to the duties of the position.

[127] He testified that in the 2008 TI-06 Deployment Notice for a staffing process that closed on October 8, 2008 (Exhibit C-14), the essential qualifications were a secondary school diploma, or equivalency granted by any Canadian educational institution. This reflected the qualification required in 2008. He did not know when it had changed.

[128] Mr. Shorthouse was also asked in cross-examination about the essential education requirements in 2008 for the Analyst PM-04 position, specifically, the addition of a university degree to the essential qualifications, Mr. Shorthouse agreed that if someone who did not have a university degree had been appointed as an Analyst before 2008, the lack of a university degree would not have affected that person's job.

[129] He did not agree with Complainant's counsel's suggestion that sometimes educational requirements for a position might differ, depending on whether the staffing process was external or internal. He testified that they did not differ.

B. Testimony of Respondent's witness Ms. Lea-Anne Domae

[130] Ms. Lea-Anne Domae joined Transport Canada in 2011. She was the Human Resources (HR) Services Manager for the Pacific Region, which was BC. She was responsible for a team of two HR advisors and one HR assistant. They provided staffing, workforce adjustment, labour relations, and other general HR services to their clients in the Pacific Region. She was the lead for staffing and workforce adjustment for the Respondent in the Pacific Region.

[131] Ms. Domae testified that as HR Services Manager, she had become familiar with such positions as the Analyst and the TI-06 Inspector in the Victoria area. She agreed in cross-examination that she did not have personal knowledge of the events related to the staffing processes which were the subject of the present Complaint, *i.e.* the 2005-2006 Analyst competition and the 2005-2007 TI-06 Inspector competitions, together, the Competitions. She acquired her knowledge about the Competitions because, as Regional Manager responsible for staffing, she was generally familiar with the majority of staffing that occurred and had previously occurred in the Pacific Region. She testified that the Respondent kept its staffing files for at least 5 years. She was therefore familiar with the files and the results of the Competitions, and she knew the career paths of those whom the Respondent had appointed in those Competitions.

[132] Ms. Domae testified that all positions in the Public Service had a security or reliability clearance requirement as a condition of employment, which meant the individual had to meet that requirement before they could be hired. This was not a merit criterion, and security clearances were done after the Respondent had chosen the candidates it wished to hire, but before the Respondent had actually hired them. In 2006, the Analyst positions required a "Secret" clearance; at the time of her testimony they required a "Top Secret" clearance.

[133] Six individuals qualified for appointment as Analysts in the 2006 Analyst Competition. The Respondent placed them on an Eligibility List. Of those six, one declined the position and another did not meet the security requirement. Between May and October 2006, the Respondent appointed all four individuals remaining on the Eligibility List.

[134] Ms. Domae testified that as at the date of the hearing, the Respondent no longer employed any of the four appointees, and she went on to describe what had transpired in regards to each individual.

[135] Ms. Domae testified that the 2010 federal budget contained a program called the "Deficit Reduction Action Plan", which required reductions to the Public Service, known as workforce adjustment. The MSOC was required to reduce the number of Analysts from seven to five, so two of them had to be laid off.

Regarding the six then existing TI-06 Inspector positions, they had to be reduced to four.

[136] Employee F had been appointed as an Analyst in May 2006, and in February 2008 accepted a transfer to the Public Safety Agency, and left the Respondent's employ.

[137] Employee E had been appointed as an Analyst in June 2006, and was technically in the position until August 2014. Pursuant to workforce adjustment, E volunteered in 2012 for a lay-off package which included leave without pay from 2012 to 2014. When E was laid off, this employee chose an option entitling them to a lump-sum payment of $60,000, reflected in a 2012 T4 (Exhibit C-20). In 2014, after two years of leave without pay, E would have received their final separation payment, which would have included a cash payout of any banked time they had left, any vacation time left, and severance pay of approximately $4,000.

[138] Analysts who fell under the Workforce Adjustment Agreement, which was part of the Collective Agreement, had various options if they were laid off, including one called the Transition Support Measure, which entailed a lump sum payment and resignation from the Public Service. E's lump sum payment was based on their years of service. The witness did not know how many years of service Employee E had.

[139] Employee G was appointed an Analyst in August 2006 and worked in the position until October 26, 2008, at which point G took several assignments at level. G subsequently accepted some acting assignments as an environmental officer at a different branch. In 2012, G took leave without pay. During 2012, workforce adjustment also impacted G, who volunteered for layoff. The option that G chose led to G's resignation in June 2012.

[140] Employee C was hired as an Analyst in October 2006, and worked in the position until August 29, 2009. C then took two periods of leave without pay, followed by a seven month parental leave. Immediately thereafter, C relocated and took a five year relocation leave of absence. C is currently still employed with Transport Canada, but no longer occupies a position in the MSOC. At the date of the hearing, C was in priority status for a job in the Public Service. If by March 2016, C had not been appointed to a Public Service position, C would be laid off.

[141] In her testimony, Ms. Domae identified a chart naming the then seven existing Analysts to whom Transport Canada had sent letters in April 2012, advising them that workforce adjustment could affect them. She testified that merit, and not seniority, was the basis for layoffs in the Public Service. Essentially, the individuals considered “the most meritorious” were retained, and the “least meritorious” were laid off.

[142] In June 2012, the Respondent notified the five remaining Analysts that they would not be laid off, because the first two Analysts had volunteered for layoff and the Respondent had thereby met the cuts required of it.

[143] The witness identified exhibits concerning the two Analysts who had volunteered for layoffs (Employees E and G) which indicated the options they chose and the Respondent’s written approval of those options.

[144] For the TI-06 Inspector section, there were already two vacant positions. Ms. Domae testified that the Respondent met the cutbacks without any TI-06 layoffs by deleting the two vacant positions.

[145] Ms. Domae testified about the 2008 TI-06 Deployment Notice (Exhibit C-14)**.** It invited individuals to apply who occupied positions in the Public Service at the TI-06 or equivalent level. She described a deployment as similar to a request for a transfer. The TI-06 required a “Secret” security clearance. In the resulting competition, the Respondent did not appoint anyone because no one met the qualifications for Inspector.

[146] Ms. Domae compared the 2008 TI-06 Deployment Notice to the Statement of Qualifications for the 2005-2206 Analyst competition. She described the Technical

Inspector group as a different category altogether from the Analyst group. The 2008 TI-06 Deployment Notice set out those qualifications for an operational inspector which Transport Canada required. For example, a TI position required qualifications related to investigation and inspection work. This was different from an Analyst Statement of Qualifications. The Analyst was a program manager carrying out intelligence work. This work required completely different qualifications, namely, those related to intelligence analysis and report writing. The witness testified that the two positions required very different qualifications, having regard to the work being performed.

[147] When asked whether an Analyst would ever be deployed to a TI-06 Inspector position, Ms. Domae responded that a TI-06 Inspector was a completely different category of employee. It was an operational, working level Inspector—the first level of Inspector in Transport Canada. In order to operate as a TI-06 Inspector, one needed to come with the required experience, the departmental training, and the delegation from the Department which gave the Inspector the authority to conduct inspections on its behalf.

[148] Ms. Domae explained that in order to fulfill all the inspection duties of a TI-06, one must successfully go through training and obtain the departmental delegation to do the inspections. Training usually took between one and two years. In cross-examination, Ms. Domae testified that in some cases, the appointee would occupy the position initially, and then undergo the training to obtain the delegation authorization.

[149] With respect to the possibility of an Analyst obtaining an acting assignment as a TI-06 Inspector, Ms. Domae testified that this would not usually occur. The requirements for experience and delegation of authority to conduct inspections meant that the TI-06 Inspectors were not normally positions that Transport Canada could use actors in; TI-06 was the first operational level of Inspector. She testified that TI-06s could have Acting opportunities at the TI-07 or TI-08 level. In response to my question about whether an Analyst would ever be appointed as an Acting TI-06, Ms. Domae responded that she was not aware of any situations where that had happened, because Analysts did not have the required experience. Essentially, an Analyst would not act as an Inspector, because that was not the work the Analysts did. She acknowledged that she was not aware of what the

Respondent would have done with regard to acting assignments in 2006 and 2007, because she did not work for the Respondent then.

[150] Ms. Domae was questioned about her testimony that Employee G had had some acting assignments as an environmental officer after 2008**.** She testified in cross-examination that **s**uch temporary assignments could happen for different reasons, but that she didn't have the specifics of how G's acting assignments came about. Ms. Domae surmised that given that G had acted as a "PC", *i.e.,* a physical scientist in the Respondent's science group, G would have had the education and qualifications to do environmental work.

[151] In further cross-examination, Ms. Domae testified that she was not aware of any Analysts who had been appointed Acting TI-06 Inspectors. She also testified that the Respondent only looked to actors when there was an absence, for example, arising from a vacation, or for some other reason. Furthermore, being the first operational level of inspection, the TI-06 Inspector position was not one in which the Respondent would have an actor. The Inspectors usually backed each other up during absences. An Inspector required delegated authority to do the job, for which they required training, If the individual didn't have the training, they couldn't be an actor. In cross-examination, Ms. Domae also acknowledged that she would not have been aware of what the Respondent would have done about acting assignments in 2006-2007, when she had not been at Transport Canada.

[152] When asked whether in her experience, it was normal or unusual for an Analyst to eventually become a TI-06 Inspector, Ms. Domae responded that it was not common because they were such different lines of work. They even had different bargaining units in the collective agreement. She explained that a "PM" was a program and administrative category, and the "TIs" were technical categories. TIs were hands-on inspectors and investigators, ensuring compliance with regulations and acts, and issuing penalties. Ms. Domae described it as different work altogether from the work of the Analysts.

Ms. Domae testified that none of the current TI-06s in the MSOC had ever been Analysts, and in her experience generally, she was not aware of any TIs ever having been Analysts.

She agreed in cross-examination that she could not comment on whether the foregoing would necessarily have applied to the Complainant.

[153] Ms. Domae identified Exhibit R-15 as a table that outlined TI Staffing Processes from 2006 to 2010. It showed the number of days during which a job ad was posted; how many applicants there were in each process; the number initially screened in or short-listed at the first point of elimination; the number who qualified, meaning those who met all of the requirements of the job; and the number "Appointed", meaning those applicants who were actually hired by the Respondent. Some of these Staffing Processes were external.

[154] The terminology had changed in 2005: "OC" meant Open Competition, meaning open to the public. "EA" meant External Advertisement, and replaced "Open Competition". EA selection processes were open to the public.

[155] Ms. Domae identified External competitions in 2007, 2008, 2009 and 2010 for TI-06 positions. The 2008 and 2009 competitions crossed over into 2010, but only constituted one process each**.**

[156] The 2010 competition was both an IA (Internal Advertised) and EA process, meaning it was a simultaneously internal and external process. Accordingly, the Respondent had an open poster to Public Service employees across Canada, and to the public nationwide. There were 1,800 applicants in the 2010 process. It was a multi-level process but included TI-06s.

[157] Ms. Domae described the first stage of consideration as what the Respondent called "screening", which was similar to short-listing candidates. It typically involved assessment of the written applications against the position's educational and experience qualifications. Those who met the initial cut were considered "screened-in", or short-listed, and went on to be assessed further in the process. Screening in resulted in a larger number of candidates than those who ultimately qualified.

[158] There were then further stages in the hiring process, such as testing, interviews, and references. At each step, depending on the results in that step, decisions were made to keep a candidate in the running for the position, or eliminate that candidate. It was

usually a multi-stage assessment process, and at each point, candidates were eliminated from consideration until the Respondent ended up with a qualified pool.

[159] Most often, the candidates would undergo knowledge tests. It was very common for the Respondent to use one or more standardized tests. Transport Canada utilized the Personnel Psychology Centre (PPC) standardized tests. There was always an interview.

[160] The final stage was typically reference checks. Candidates went through assessments at various stages, and essentially, if they met the requirements at one stage, they went on to the next.

[161] The Respondent also assessed “asset qualifications”, which were qualifications which were not necessarily requirements, but were desirable to have and helped in performing the job. Those qualifications could be invoked at any time in the process, from beginning to end, and asset consideration was another way for the Respondent to assess candidates’ eligibility for the job.

[162] When asked whether there were differences and difficulties between being able to obtain a position as an existing federal employee versus as an external candidate, Ms. Domae testified that there were not. She gave as an example the 2010 TI-06 competition, which had been simultaneously an internal and external process, and which had used the same Statement of Merit Criteria for each process**.** All candidates had been assessed on the same criteria, with the same assessment tools being used from beginning to end.

[163] Ms. Domae’s testimony included descriptions of specialist positions in the TI group in the Marine Branch in Victoria. The Branch had a TI-05 Inspector position, specifically created to specialize and focus on small vessel compliance. It required the individual to have a small vessel proficiency certificate. There is one TI-06 electrical Inspector position, which required a candidate to have an electrical engineering degree or diploma, or a related electrical technology diploma or certificate. Victoria also had six civil aviation Inspectors, whose positions were specialized in aviation work. They had to have an Aircraft Maintenance Engineering licence, education in that field, and experience with aeronautical products to do that type of inspection.

[164] In Vancouver, Transport Canada also had many specialized Inspector positions, requiring specialist qualifications, but she did not know how many of these positions there were. She confirmed that there were some TI-06 Inspector positions which did not require special training, for example, the Regional Transportation Inspector position.

[165] Ms. Domae was asked whether in her experience, a TI-06 Inspector Knowledge Test was the same as an Analyst Knowledge test. She responded that they were not the same, and that they would be completely different based on the fact that an Analyst position had very different knowledge qualifications than an Inspector TI position. An Analyst required knowledge of research and analysis techniques, as well as knowledge related to security, intelligence and transportation security issues. A TI-06 needed to know about acts and regulations related to their inspection work, investigative, judicial and quasi-judicial processes they would be involved in, and enforcement penalties.

[166] When asked whether the results of a Knowledge Test written for one TI-06 process could be used for a future TI-06 process, or if the candidate would have to re-write, Ms. Domae first responded that in the Public Service, each staffing process is independent and stands on its own. In another TI-06 process, the Respondent would create new assessment tools. They could design a completely different process, based on gaps in the pool or future needs. For example, in a Knowledge Test, the Knowledge criterion or Abilities criterion could be worded exactly the same, but be assessed completely differently, based on the need at that time. HR also kept in mind that if a candidate had written the test recently, they would change the test, just to try to level the playing field.

[167] The results of the Complainant's November 29, 2005 Written Knowledge Test for the TI-06 Inspector position looked to her like a test the Respondent itself had developed, and not like one from the PPC, because the PPC had its own template. Ms. Domae confirmed that a PPC test, which was usually standardized, had a validity period. Her testimony was that candidates could use the result up to a certain date, or until they chose to re-write the test. I note that the evidence established that after the expiry of the validity date, the candidate must re-write the Test if they wish to use the results in another competition. They can choose to re-write the test before the expiry of the validity period.

[168] Ms. Domae testified that it was possible for Knowledge Test results to be re-used in a later selection process, if the hiring manager chose within a short time frame to assess the criteria in the exact same way, using the exact same tools. This would be unusual because managers wanted to ensure that they did not re-use the assessment tools, especially with applicants who had participated in the previous selection process.

[169] Ms. Domae also testified that throughout the year, Analysts would work some Overtime. In the past, they had had shift work, and would be paid shift and week-end premiums, the amount varying depending on the shift. The Respondent allocated overtime based on who was interested and available**.** Typically, over the past several years, Overtime had ranged from $3,000 to $7,000 per year. In the years between 2008 and 2010, leading up to the Olympics, the work around security had increased, and Analysts had averaged around $10,000 to $12,000 per year in overtime.

[170] Ms. Domae testified about Mr. TS, a Boating Safety Officer with Transport Canada in Victoria. Under workforce adjustment, his position had been eliminated in 2012. The Respondent had been looking for options to retain him and his colleagues. The Respondent was trying to do everything it could to keep its employees. Transport was able to transfer a vacant TI-04 position from the Atlantic Region into the MSOC, and place Mr. TS in it. A TI-04 position, which was a junior, lower level Inspector, compared to a TI-06. The Respondent needed to do additional small vessel work, and because of TS' experience in small vessel compliance, inspection, investigation and enforcement, he was a good fit for the position. Ultimately, they were able to place him and did not have to lay him off in 2012. Pursuant to a non-advertised process, the Respondent later appointed him as a TI-06 Inspector, a position that he still occupied as at the hearing date.

[171] In cross-examination, Ms. Domae testified that the Respondent had had direct knowledge of TS working for Transport Canada since he was appointed. In his case, because the TI-04 position was not a regular part of the MSOC, the Respondent had to transfer the position. It was not allowed to create it.

[172] Ms. Domae also explained how the security clearance worked. Once the Respondent found that a candidate met the merit criteria, the candidate still had to meet

various non merit-based conditions of employment before the Respondent could appoint them. These conditions included: obtaining the security clearance; confirming willingness to travel, to work frequent overtime and to work in confined spaces; proof of a valid driver's licence; medical examination; and any other conditions of employment. In cases where proposed appointees required security clearances of Secret or Top Secret, the RCMP and CSIS did the verifications and provided the information to the Respondent, who ultimately decided whether to grant the clearance. Ms. Domae testified that when the Security Clearance for Analysts changed from Secret to Top Secret, in around 2007-2008, the Respondent re-assessed the existing Analysts for Top Secret clearance.

[173] Ms. Domae acknowledged in cross-examination that she did not know the Complainant, and had no direct knowledge of his qualifications and experience, other than what she had learned from looking at the files. She also acknowledged that she could not comment specifically on whether he might have gone from an Analyst position to a TI-06 Inspector position.

[174] Ms. Domae knew that the Respondent had appointed two people to the two remaining Analyst positions, but did not know when or how these positions had been filled.

[175] Ms. Domae testified about Employee M. She was not certain if M had been one of the employees the Respondent had appointed to the remaining two Analyst positions.

[176] Ms. Domae testified that Employee M came to Transport Canada as a UM-7, a classification which was used by the Communications Security Establishment, and was equivalent to the PM group. In 2008, Transport Canada was able to deploy M to a PM-04 Analyst position. M had a lot of experience in military intelligence, and had partnered with the Department of National Defence and many other intelligence agencies on several intelligence projects. In 2011, M was successful in an PM-05 selection process. M had also been responsible for leading several intelligence project teams, which was similar to the work M later did as a PM-06. When appointed as a PM-06, M had a B.A. and an M.A.

[177] At the time of the hearing, there were four Analyst PM-04s in the MSOC, plus one vacant position. Those numbers did not reflect positions elsewhere in the Pacific Region. All four TI-06 Inspector positions in the MSOC were filled.

[178] Ms. Domae confirmed in cross-examination that no current Inspectors were affected by workforce adjustment.

[179] Ms. Domae was asked in cross-examination in what positions and where within the Pacific Region the 26 Inspectors who had been staffed in the period 2006-2010 would be working. She responded that she did not know the current number of TI-06s in the Region. She testified that the total number of 26 Inspectors shown on the Table she had prepared would not be a cumulative total. Data in the Table could represent attrition-related appointments and vacancies, and not necessarily growth. There could be any number of reasons why the Respondent had staffed those Inspector positions. Ms. Domae' data did not contain a breakdown between attrition and replacement hiring versus growth hiring.

[180] The 2010 Staffing Process for the TI-06 Inspector position was a multilevel and very large process and took over two years to complete. The Respondent still had active hiring pools from that process in some of the levels, and that was why there had been no further staffing processes since 2010, as of the time of hearing.

[181] When asked in cross-examination if there were any circumstances where there might be different requirements between internal and external Staffing Processes, Ms. Domae testified that it really depended on what the hiring manager's needs were at the time. The hiring manager could set qualifications based on current or future needs, and these needs were what the qualifications would have to be based on.

[182] Ms. Domae confirmed in cross-examination that, during the period 2005-2008, one Inspector acting appointment had been made and three external, non-advertised Inspector staffing processes had taken place. She explained that an external non-advertised staffing process meant that the process was without competition. The rationale for using it was typically and most commonly to fill a significant shortage. Candidates were still assessed. It was a far less common staffing process, with very limited application, and before the Respondent could use it at least one of eight specified criteria had to be satisfied.

C. Credibility of Respondent's witnesses' testimony

[183] I found Mr. Shorthouse and Ms. Domae to be honest, straightforward and forthcoming in their testimony. I found each of their testimony to be reliable. Ms. Domae forthrightly acknowledged that she did not have personal knowledge of the Complainant's qualifications or attributes, and that she had based her knowledge of him on what was in the Respondent's staffing files, because she had not worked at Transport Canada during the 2005 to 2007 Analyst and Inspector competitions. Mr. Shorthouse also acknowledged that he did not have direct personal knowledge of the Complainant.

[184] Balanced against their lack of personal knowledge of the Complainant, and the fact they did not interact with him during the Analyst and Inspector competitions, I take into account the following:

i. At the time of hearing, Mr. Shorthouse had been an Analyst for six years. He had become the Senior Intelligence Officer at Esquimalt, supervising a team of five Analysts, and as at the hearing date he was the Acting Manager. He therefore had direct knowledge of the qualifications, role, duties and skills required for the Analyst position.

ii. As HR Manager for the Pacific Region, and having worked at Transport Canada for four years at the time of hearing, Ms. Domae was familiar with and knowledgeable about the Respondent's staffing processes, including: workforce adjustment; the career paths of the Analysts who the Respondent hired in the 2006 Analyst Competition; and, the skills required for the Analyst PM-04 position and the Inspector TI-06 position. She was also knowledgeable about the career paths of TS and JL, who were two TI-06 Inspectors to whom the Complainant particularly compared himself in his testimony. Finally, she knew how Acting appointments were used, and could speak to the possibility of an Analyst acting in an Inspector position.

iii. Mr. Shorthouse's and Ms. Domae's evidence was similar regarding the skills required for the Analyst position and the Inspector position. Furthermore their

testimony was consistent regarding the likelihood of an Analyst either obtaining an acting assignment as an Inspector, or obtaining a promotion to this position.

iv. My impression was that neither Mr. Shorthouse nor Ms. Domae had any particular agenda other than to straightforwardly and honestly give their evidence.

v. As well, I accept that after having worked with and provided reports to Inspectors at the TI-06 level for six years, Mr. Shorthouse had gained reliable general knowledge of the role, duties and skills required for the TI-06 Inspector position.

IX. Had the Respondent appointed the Complainant as a PM-04 Marine Security Analyst in 2006, would the Respondent have later appointed him to a TI-06 Inspector position?

[185] The Complainant's submission was that had he been a PM-04 Analyst from May 8, 2006 onward, there would have been a "mere but serious possibility" that the Respondent would have appointed him to a TI-06 Inspector position, pursuant to the test set out by Marceau, J. in *Canada (Attorney General) v. Morgan* [1992] 2 FC 401, 1991 CanLII 8221 (FCA) (*Morgan),* at para. 14**.** The Complainant seeks instatement to the position of TI-06 Inspector as of January 1, 2007, or alternatively, no later than the fall of 2008, when the 2008 TI-06 Deployment Notice failed to fill any of the five available positions.

A. What is the legal test to apply to the remedial claim for promotion to TI-06 Inspector?

[186] To examine this claim, I have set out in more detail the *Morgan* test, as articulated by Marceau, J.:

> "[14] …It seems to me that the proof of the existence of a real loss and its connection with the discriminatory act should not be confused with that of its extent. To establish that real damage was actually suffered creating a right to compensation, it was not required to prove that, without the discriminatory practice, the position would *certainly* have been obtained. Indeed, to establish actual damage, one does not require a probability. In my view, a mere possibility, provided it was a serious one, is sufficient to prove its reality…"

B. The Respondent's position

[187] The Respondent's position is that the "mere but serious possibility" test in *Morgan* is no longer valid. Rather, paragraphs 6 and 44 to 46 of *Chopra v. Canada (Attorney General),* 2007 FCA 268 *(Chopra FCA)* indicate that the test is now whether it is *probable* [my italics] that the Complainant would have become an Inspector. In other words, the civil test of the balance of probabilities applies.

C. The Complainant's position

[188] The Complainant submitted that the "mere but serious possibility" test remains the correct legal test, and that it has been accepted by the Tribunal, the Federal Court and the Federal Court of Appeal. Marceau, JA's opinion was that a complainant did not have to demonstrate a probability that, but for the discrimination, he would have been appointed to the position. Rather, the existence of a mere but serious possibility was sufficient to prove the complainant's loss. Marceau JA went on to say that if there was evidence about certainty, that might affect the extent of damages.

[189] The Complainant submitted that the following cases confirmed and applied the "mere but serious possibility test", and that all the Complainant had to demonstrate was that there was some evidence that it was possible the Complainant would have obtained a TI-06 position:

a. In *Canada (Attorney General) v. Uzoaba,* [1995] 2 FCR 569 (*Uzoaba, FC),* at para. 25, the Federal Court upheld the Tribunal's instatement of Dr. Uzoaba to a higher position, because there was some evidence of a serious possibility that he would have obtained the promotion.

b. In *Canada (Attorney General) v. Brooks* , 2006 FC 1244 (*Brooks*), at para. 41, the Federal Court quoted Marceau JA in *Morgan*, stating that a complainant was only required to prove a serious possibility that, but for the discrimination, he would have obtained the position. The Court in *Brooks* went on to observe that "[d]egrees of probability are only relevant in assessing the *extent* of the damage suffered…" (*ibid,* at para. 42).

c. *Chopra, FCA*, *supra*, at para. 21, quoted Marceau JA in *Morgan,* and at para. 22, stated that the Applications Judge adopted the mere but serious possibility test. In para. 27, the Court of Appeal stated that notwithstanding the lack of majority, the Applications judge treated the mere but serious possibility test as the state of the law. The Court of Appeal noted that the Application Judge's position "…was not attacked in argument before us." The *Chopra, FCA* Court did not apply a different approach, and it did not say that it rejected that test. If the Federal Court of Appeal had wished to overturn years of jurisprudence on the mere but serious possibility test, it would have done so specifically and said why.

D. Analysis on the correct legal test under the *CHRA* for establishing the loss of a position in the employment context

[190] Although the "mere but serious possibility" test articulated by Marceau JA in *Morgan, supra* was one of three judicial opinions in that case, it came to be adopted as the applicable test in subsequent Tribunal decisions and Court judgments.

[191] In 1995, the Federal Court confirmed the mere but serious possibility test in *Uzoaba, FC, supra*, at para. 25. I note that the Court stated:

> "…If Dr. Uzoaba had been reinstated at a higher position in the absence of evidence showing the promotion was reasonably foreseeable then the Tribunal would have erred. …There was some evidence indicating a serious possibility Dr. Uzoaba would have attained [the promotion sought]."

The Court then specifically referred the reader to Marceau, J.A.'s "serious possibility" test in *Morgan, supra*.

[192] In *2006, in Brooks, supra*, the Federal Court sent the issue of instatement and wage loss back to the Tribunal, because the Tribunal had erred by applying the balance of probabilities test rather than the "mere but serious possibility" test to the question of whether the complainant would have obtained a position but for the respondent's discrimination.

[193] The Tribunal's liability decision in *Canada (Human Rights Commission) v. Canada (Dept. of National Health and Welfare) (No.5)* (2001), 40 C.H.R.R. D/396 (C.H.R.T.) (*Chopra liability decision*), found that Dr. Chopra had been denied the opportunity for an acting position on discriminatory grounds. The Tribunal found that had Dr. Chopra been appointed to the acting position he sought, "…he would have acquired the recent management experience required to be screened into that competition…" (*Chopra liability decision*, para. 266; *Chopra remedy decision*, 2004 CHRT 27 at para. 4). It was the Federal Court's dismissal of the application for judicial review of the *Chopra remedy decision* which was on appeal to the Federal Court of Appeal.

[194] In *Chopra, FCA*, *supra*, in addition to the passages the Complainant cited above, the Court described the legal principles that the Tribunal had applied in the *Chopra remedy decision*:

> a)"…the Tribunal held that 'a complainant seeking a remedy with respect to a discriminatory denial of a higher employment position need only present evidence of a *serious possibility* of success'" (*Chopra, FCA*, at para. 4, quoting *Chopra` remedy decision*, at para 11);
>
> b) "On the other hand, the amount of compensation payable is a function of the probability of the complainant being appointed to the position…" *(ibid*, quoting *Chopra remedy decision*, at para 33).

[195] To summarize, the Federal Court of Appeal did not disturb the "mere but serious possibility" test as the legal principle to apply to demonstrate the actual loss of a position, and the Court confirmed that the *probability* [my italics] of the individual obtaining the job was only to be considered in deciding on how much compensation the victim was entitled to.

[196] Therefore, I conclude that the *Chopra* FCA decision confirmed the mere but serious possibility test.

[197] The Complainant submitted the following cases as further examples of the Tribunal ordering promotion:

a. In *Grover v. Canada (National Research Council),* [1992] C.H.R.D. No.12 *(Grover),* the Tribunal ordered Dr. Grover's promotion. I note that *Grover* did not refer to the "mere but serious possibility" test.

b. In *Green v. Canada (Public Service Commission),* [1998] C.H.R.D. No. 5 (*Green*), the Tribunal ordered that Ms. Green be appointed to a PM-06 position. On judicial review, the Federal Court confirmed that the mere but serious possibility test was the test to use, observing that "[t]o establish actual damage, losing a job, her losing a promotion, probability is not required but a possibility is sufficient provided it was a serious one…" (*Canada (A.G.) v. Green* [2000] 4 FC 629, at para. 142.

I further find that while the "mere but serious possibility" standard places a lesser onus on a complainant who seeks the remedy of instatement, it does not negate the requirement that there must be sufficient evidence to demonstrate the serious possibility.

E. Factors to take into account in deciding promotion to TI-06

[198] In the Complainant's closing argument, the proposed timeline for promotion between January 1, 2007 and the fall of 2008 was somewhat muddied, because the Complainant proposed other dates for instatement, including at any time. In both Document C-11 and in his testimony, the Complainant used the January 1, 2007 date as the start of the period of potential promotion. His counsel submitted the fall of 2008 as the end date. For the reasons given in the Analysis dealing with this requested remedy, I find that the period between January 1, 2007 and the fall of 2008 is the relevant period for determining whether the Complainant would have obtained a TI-06 Inspector position.

F. Complainant's further submissions

[199] The Complainant submitted that in paragraphs 209 and 210 of the *Hughes LD*, the Tribunal applied the test in *Shakes v. Rex Pak Limited* (1989), 3 C.H.R.R. D/1001, (*Shakes*), as modified by *Premakumar v. Air Canada* (2002) 42 C.H.R.R. D/63 (C.H.R.T.) to find that the Complainant had made out a *prima facie* case of discrimination in the second and third TI-06 Inspector competitions. *Shakes* and *Premakumar* decided that one

of the elements to establish in making out a *prima facie* case in the employment context is that a complainant had to be qualified for the job the employer wished to fill. In this regard, the *LD* found Mr. Hughes qualified for the second and third TI-06 positions.

[200] The Complainant specified that at paragraph 280 of the LD, addressing the second TI-06 selection process, Member Malo was clear, observing in part that: “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 Complainant submits that this finding was not made in regard to the screening criteria, but rather, in regard to the job itself. In paragraph 288, Member Malo stated that the Complainant had discharged his *prima facie* burden of proof of establishing that he was qualified for the third TI-06 application. The Complainant therefore concluded that, on that basis, those findings were all the Tribunal required in order to promote the Complainant to a TI-06 Inspector position.

[201] The main difference the Respondent relied on between the Analyst and Inspector jobs was the fact that the Analyst job was more or less a desk job, whereas an Inspector job included being out in the field, doing actual investigations, boarding ships, going to ports, etc**.** The correct way to frame the issue was whether the Complainant had the necessary investigative qualifications for the Inspector job. In paragraph 288 of the *LD,* Member Malo found as facts that the Complainant possessed investigative experience, and more particularly, that he possessed extensive experience in conducting investigations.

[202] The Complainant submitted that his application for the TI-06 Inspector position demonstrated he had both enforcement and investigative experience with CRA and CBSA. This included experience working in the Port of Victoria as a Customs inspector for several summers, where people were constantly coming and going in boats, which, he claimed, involved doing similar work to what the TI-06 Inspectors did. His application also set out how, as a Customs inspector, he had done investigations on his own behalf.

[203] Mr. Shorthouse testified that the Analysts were very familiar with what the Inspectors did, because when preparing a report for the Inspectors, they needed to know

what the Inspectors were looking for. If Mr. Hughes had been appointed as an Analyst, he would have gained even more experience and understanding of the TI-06 Inspector position, which would have made him even more qualified.

[204] Further, Ms. Domae testified that for some of the Inspectors, there was a training program lasting 1 or 2 years, and that often, that training program started after the Inspectors had been appointed. In the Complainant's view, this evidence should assuage any doubts about instating him to the position.

[205] In the first TI-06 Inspector selection process, the Complainant had scored 60 in the WCT 345, and the pass mark was 70, so he did not proceed any further. In the next two Inspector staffing processes, the pass mark was lowered to 60, so he would have passed. The WCT was universal. Mr. Hughes' evidence was that it could be used in other situations. The WCT345 test result was evidence in this proceeding of whether the Complainant was qualified.

[206] The applications of successful candidates for the Inspector position demonstrated that many of them, like VK, had customs experience just like the Complainant.

[207] The Complainant had obtained a higher score in the written Knowledge Test for the Inspector position than Mr. TS, who had eventually obtained a TI-06 position.

[208] The evidence established that there was a strong demand for TI-06 Inspectors, and that in the fall of 2008, the Respondent needed to fill five positions, as advertised in the 2008 TI-06 Deployment Notice. However, as Ms. Domae had testified, no one was appointed as a result of the Deployment Notice.

a. The Complainant noted that Mr. Y had been initially screened out, and then screened in, and that Y had less investigative experience that Mr. Hughes. The Complainant's position was that given the availability of Inspector jobs, the high need, and the fact that the Respondent would have known of the Complainant's interest when he was in the Analyst job, the Complainant would have applied for an Inspector position, and the Respondent likely would have found a way to give him the job.

b. The Complainant argued that the differences in the Analyst and Inspector positions were not relevant; the issue was not whether the positions were the same or different. Rather, the issue was whether the Complainant was qualified, and the Complainant submitted that he was.
c. He also noted that in their testimony, both Respondent witnesses had agreed that they could not comment on whether the Complainant had been qualified for the Inspector position.
d. The Complainant asserted that the requirement of a post-secondary degree was not relevant, because in 2007, the period of time in question, it was not a requirement for the Inspector position, and would not have disqualified the Complainant. He noted that Exhibit R-15 demonstrated that the Inspectors did not have an educational requirement between 2006 and 2010, so he could have applied for those positions.
e. In regard to Mr. Shorthouse's testimony that some of the Inspectors used to be enforcement officers, the Complainant noted that the witness had agreed in cross-examination that having been an enforcement officer was not a requirement – it depended on the hiring manager.
f. Finally, the Complainant asserted that workforce adjustment would not have affected him as an Inspector, because the Respondent ended up deleting two already vacant positions to achieve its required cuts. No other Inspectors were laid off, so the Complainant would still be working.

[209] In the Complainant's submission, all of the above considerations removed any doubt that there was a mere but serious possibility that he would have obtained the Inspector TI-06 job.

G. The Respondent's position

[210] The Respondent's submissions regarding the Complainant's prospects of being appointed as an Inspector TI-06 were based on its position that the test for such appointment was the balance of probabilities, and not the mere but serious possibility test. The Respondent submitted that the following evidence demonstrated that it was certainly

less than probable that the Complainant would have been able to obtain a TI-06 position after he became a PM-04 Analyst:

[211] Most significant was that Member Malo had found no discrimination in the competitions for the second and third TI-06 Inspector positions. In the *LD*, Member Malo had accepted that the Complainant had failed to demonstrate that he had experience in conducting investigations (second Inspector application), or that he had extensive experience in conducting investigations (third Inspector application).

[212] Regarding the Complainant's argument that Member Malo had found a *prima facie* case in respect of two TI-06 Inspector processes, the Respondent submitted that Member Malo had only been looking at the first part of the *Premakumar* test. Member Malo was simply deciding whether the Complainant had been qualified. In this context, all that was happening was that the Complainant was being screened out at the applications stage. This was the first stage of the process. Member Malo looked at the Complainant's applications and determined, in his view, whether he thought the Complainant had met the qualifications. At para. 271 of the *LD*, it was indicated that the application looked to the Member to contain the required qualifications. However, the Member was not the one in the position to make that judgment. At paras 275 and 276 of the *LD*, the Member stated:

> "[275] Strictly in regards to the specific question… whether the Complainant did, indeed, possess the required qualifications … 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."

[213] Therefore, in the Respondent's view, Member Malo did not do a classic application of the *Shakes* test. Rather, he did only part of it and then deferred to the Respondent to see if its evidence appeared reasonable.

[214] At para 280 of the *LD*, the Tribunal accepted that the Complainant did discharge the burden of establishing a *prima facie* case of discrimination regarding the second Inspector TI-06 competition. However, the Member went on to decide that "…. 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." This statement, in the Respondent's view, was no endorsement that the Complainant's application should have been accepted by Transport Canada, nor was it a finding that the Complainant should have gotten the position. Rather, this was simply the way in which Member Malo had decided to look at the evidence in order to see whether there was a reasonable explanation for the screening out.

[215] The Respondent pointed to para 288 of the *LD*, where the Member concluded, on a simple reading of the Complainant's application for the third TI-06 position, that he had the qualifications. But in para.299, the Member later found that the explanation provided by the Respondent's witness was credible and reasonable.

[216] According to the Respondent, in the *LD* the Member applied a modified version of the *Premakumar* test, because he did not compare the Complainant's application to those of other candidates, in order to see if others were more or less deserving of the position.

[217] That said, there was no evidence from the Complainant's applications indicating that he should have obtained these positions, or that he should have even been screened in. There were no findings in the *LD* establishing that he should have become a TI-06.

[218] In the Respondent's submission, the findings in the *LD* that a *prima facie* case had been made out only signify that the Complainant had established that he should have been screened in. But following screening in, candidates had to go through a number of hurdles— testing, interviews, references. For the Complainant to suggest that this equaled a finding that he would have been qualified for, or appointed as an Inspector TI-06 was incorrect. For example, for one TI-06 position, there were 240 applications: 61 were screened in; one person obtained the position. A 1 in 61 chance of being screened in did not amount to a probability that he would have gotten the position.

[219] The Respondent contended that appointment to the Analyst position would not have affected the Complainant's suitability for an Inspector TI-06 position. Mr. Shorthouse had testified that it was like comparing apples and oranges, and Ms. Domae had testified

that she had never seen such a career progression. The skills for one position were not transferable to the other. Both Respondent witnesses testified that they were different skill sets, representing very different career paths, and that there were significant differences in the nature of the jobs.

[220] The Respondent also pointed out Ms. Domae's testimony that it would have been no easier for the Complainant to obtain the Inspector TI-06 position internally than it would have been for a candidate applying externally.

[221] The Respondent submitted that it was very unlikely the Complainant would have been given an Acting TI-06 assignment. Further, he would not have been given a deployment from Analyst PM-04 to Inspector TI-06, because the position was at a different level than his, and he would not have had the delegated authority.

[222] The Respondent agreed that the Complainant had passed one Knowledge Test, however Ms. Domae's testimony had been that usually the knowledge tests were different in each staffing process. The specific knowledge test which the Complainant had taken was not a standardized test developed by the PPC, so he would have had to write another. He would have also required a reference check for a TI-06 position, and as the record has shown, he had had a great deal of trouble obtaining references from his former employers. Moreover, there was no Tribunal finding that his inability to obtain these references was due to discrimination.

H. The Complainant's Reply Submissions

[223] The Complainant asserted that Member Malo had quoted the entire *Premakumar* test in the *LD*. In addition to the paragraphs the Complainant had already mentioned, in para 270, Member Malo specifically posed the first question from *Premakumar: i.e.* was the Complainant qualified for the particular employment? At paragraph 280, the Member concluded that he was so qualified. Furthermore, Member Malo stated in the *LD* that the Complainant was qualified for the third TI position. At paragraph 285, the Member stated that the Tribunal had to consider whether the Complainant had established a *prima facie* case that he was qualified for the particular employment. The Complainant submitted that

there were no restrictions or limitations in Member Malo's finding, and that it could only be read one way.

[224] The Complainant argued that evidence about what had happened to other PM-04 Analysts, who were appointed in 2006—when the Complainant should have been appointed - was only relevant if it shed light on what the Complainant's career progression would have been. The Complainant submitted that drawing inferences from the experiences of the other Analysts would be total speculation. What those people did was a result of their life circumstances and choices. There was no indication that the Complainant would have encountered the same circumstances, or made the same choices. This evidence proved nothing about what the Complainant would have done, or what would have happened to him.

[225] In regards to the 2009 EI Assessment that the Complainant had significant barriers to employment, the Complainant's position was that the EI Assessment did not assess the Complainant's suitability for a TI-06 position, but was only a general assessment of his circumstances. It would be speculative to assume that this finding would have affected his qualifications to do the TI-06 job.

[226] More importantly, the barriers mentioned in the EI Assessment related at least in part to Mr. Hughes' disabilities of stress and depression, and the Respondent could not rely on these aspects of the barriers, since this would constitute discrimination. Transport Canada would have to accommodate the Complainant's depression. Therefore, the EI Assessment was an entirely irrelevant consideration.

[227] The key element of the Complainant's submission was that he would have been an Analyst PM-04 at the time in question, and that there was a very good chance he would have been promoted. In essence, there was *a mere but serious possibility* that at some point, he would have been promoted. If he had not been discriminated against, he would have obtained the Analyst PM-04 position. He would have worked there, where there were Inspector TI-06 openings available. Although there was no discrimination in the TI-06 competitions, had he gotten the Analyst PM-04 job, he would have had a better chance of getting a T1-06 job. That is to say, this would have been a "mere but serious possibility".

I. Analysis regarding the Complainant's claim for instatement to a TI-06 position

[228] I note that at the Remedies hearing, many of the Complainant's submissions about how he was qualified for the Inspector TI-06 position were the same as submissions that he had made at the Liability hearing. For example, he submitted that while the Tribunal had found that the Respondent's reasons for rejecting his applications were not discriminatory, the fact that he had done a lot of investigations on his own behalf was relevant experience.

[229] I note, however, that Member Malo accepted as credible the testimony of Mr. Fu, a selection board member in the third TI-06 competition, who had screened out the Complainant's application at the first stage because his investigation experience was neither work-related nor extensive. Member Malo found that the selection board had the latitude to verify whether the Complainant possessed the experience sought in the competition *(LD,* at paras. 132, 133, 136, 138, 141, 142, 292, 295, 298, 299*).*

[230] The gist of the Complainant's testimony and submissions on the issue of appointment to TI-06 focussed on the period commencing on May 8, 2006, when he should have been appointed a PM-04 Analyst, and ending on January 1, 2007 or at the latest, in the fall of 2008, when the evidence was that there were 5 openings for TI-06 Inspectors which were not filled. The Complainant contended that he would have applied as an internal employee for a TI-06 Inspector position, and that the Respondent would have promoted him to that position, for the following reasons:

i. He was qualified for the position, because Member Malo in the *LD* found he had made out a *prima facie* case in two of the three Inspector TI-06 positions, and the Member made those findings based on the *Shakes* and *Premakumar* criteria, which included a determination of whether a complainant was qualified for a position;
ii. As an Analyst, he would have obtained more experience relevant to the TI-06 Inspector position, and would have become familiar with the Inspector's duties;
iii. The Respondent needed TI-06 Inspectors during the relevant period;

iv. There was a serious possibility that he could have obtained a position as an Acting TI-06, which would have provided him with additional relevant experience and bolstered his chances for promotion to Inspector;

v. Internal employee applicants had to meet fewer requirements than external applicants drawn from the general public.

The Complainant submitted that for those reasons, he would have had a "mere but serious possibility" of attaining the TI-06 position.

[231] In *Uzoaba*, *supra*, the Tribunal had before it what it found to be credible evidence that Dr. Uzoaba would have been promoted had he not been discriminated against. That evidence included testimony by the respondent's witnesses about Dr. Uzoaba's abilities, and a positive evaluation the respondent had given Dr. Uzoaba, stating he would likely be promoted if he addressed certain weaknesses (*Uzoaba*, *Tribunal*). The Tribunal also examined evidence of the promotion of some of Dr. Uzoaba's colleagues.

[232] In *Grover*, *supra*, there was accepted evidence that Dr. Grover would have been promoted had the respondent not discriminated against him.

[233] In *Green*, *supra*, there was abundant evidence that Ms. Green was on the trajectory to an accomplished career at the upper levels of management, that she was an exemplary employee who had excellent performance reviews, and that she had prospects of further promotion, but for the respondent's discrimination.

[234] In the matter before me, I find that the evidence does not support any of the Complainant's submissions regarding promotion to Inspector TI-06, for the following reasons:

[235] Notwithstanding that the Liability Decision found that the Complainant was qualified for two of the Inspector positions (*LD* at paras. 203, 280, 288), the Tribunal made that finding in the context of deciding whether the Complainant had made out a *prima facie* case of discrimination*,* applying what Member Malo called the "extremely low" evidentiary threshold required at that time to establish a *prima facie* case (*LD,* para. 203). In so doing, the Member cited the test in *Shakes, supra,* as modified by *Premakumar, supra*.

[236] However, Member Malo's findings that the Complainant had made out a *prima facie* case of discrimination in the two TI-06 Inspector competitions were not the end of the matter. Other relevant findings and conclusions were made in the *LD* regarding the Complainant's applications.

[237] The Tribunal also found that the Respondent's reasons for not screening in or appointing Mr. Hughes were credible, reasonable and not pretextual (*LD,* at paras 280, 282, 298 and 299). The Tribunal in fact found 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" (*ibid*, at para 298).

[238] The fact that the Complainant made out a *prima facie* case with respect to discrimination cannot negate the fact that the Tribunal went on to find that the Respondent's reasons for not hiring him for the second and third TI-06 Inspector competitions were credible, reasonable, and within the selection board's authority and ability to decide. One cannot ignore the fact that in the end, Member Malo accepted the selection board's finding that the Complainant did not have the necessary experience for the two TI-06 Inspector positions.

[239] I find that there is a material difference between making out a *prima facie* case of discrimination that someone was qualified for a position, based on the evidentiary standard for *prima facie* case existing at the date of the *LD*, and ultimately deciding that the person was qualified for the position itself. I do not find that the fact the Complainant made out a *prima facie* case of discrimination in two of the TI-06 Inspector competitions establishes that he was qualified for the position.

[240] It is important to note that prior to the Supreme Court of Canada's decision in *Quebec (C.D.P.D.J)* v. *Bombardier Inc.*, CHRA jurisprudence indicated that a *prima facie* case entailed something less than a complete weighing of the evidence: See *Beattie v. AANDC*, 2014 CHRT 1, para 93*; Filgueira v. Garfield Container Transport Inc.*, 2006 FC 785, paras. 15, 24, 30-31; *Lincoln v. Bay Ferries*, 2004 FCA 204, para. 22; *Canada (A.G.) v. Lambie*, 1996 CanLII 3940 (FC). Hence Member Malo applied the "low threshold" at para. 203 of the LD".

[241] I accept Mr. Shorthouse's testimony that the research, analysis, assessment and writing skills required and utilized in the PM-04 Analyst position were completely different than the inspection and regulatory knowledge skills required and utilized in the TI-06 Inspector position. He likened the skills and experience required in the two jobs to comparing apples and oranges. I understand that statement to mean that there is no comparison because the jobs are too different.

[242] I take into account that Mr. Shorthouse was not an Analyst until July 1, 2009, and that he therefore did not know the Complainant nor the skills that he had. Nor did the witness personally know the promotional systems in place between May 2006 and July 1, 2009. I also take into account that Mr. Shorthouse was not at Transport Canada during the events giving rise to the Complaint, and that he did not have personal knowledge of them.

[243] Balanced against that, the witness had been an Analyst for six years at the time of the Remedies hearing; therefore I find his knowledge of the job reliable. Further, he had never seen the appointment of an Analyst as an Acting Inspector, nor had he seen anyone promoted from Analyst to Inspector.

[244] Ms. Domae's testimony echoed that of Mr. Shorthouse, both in terms of the distinct differences in the duties of the two positions, and in terms of the resulting remote possibility of promotion from PM-04 Analyst to TI-06 Inspector.

[245] I note that Ms. Domae did not personally know the Complainant, nor was she familiar with his skills or experience, as she did not commence working for the Respondent until 2011. Further, she was not personally involved in any of the Competitions at issue. However, balanced against that, I note that Ms. Domae had access to and knowledge of the files regarding the 2005/06 PM-04 competition, and that she had access to and knowledge of the files of those individuals whom the Respondent had appointed as a result of the Staffing Process. Either through the files, or through personal involvement, she also knew the career paths of those appointed individuals. Her testimony established that she also knew the requirements and duties of the different levels of TI Inspector positions. Her lack of direct personal knowledge of the Complainant, or of his skills or experience, is also balanced by the fact that she was the Respondent's Human Resources

manager for the Pacific Region since 2011. During this time, she witnessed the implementation of the Reduction Plan, (referred to also as “workforce adjustment”) which took place from 2012 to 2014. I therefore find that her evidence about the career paths of the 2006/2007 group of PM-04 appointees is reliable. I accept her evidence that none of the four specified PM-04 Analyst appointees in that group went on to a TI-06 Inspector position.

[246] I note and acknowledge that during the period January 1, 2005 to July 10, 2008, there was one non-advertised Acting TI-06 appointment. However, there was no evidence led about whether this Actor came from the PM-04 group or another group, or whether the Actor had been a TI-06 Inspector before. Nor was any evidence led about the individual’s background, their circumstances, or anything else about this Acting appointment. Given the dearth of such relevant evidence, I find that the one Acting assignment is not probative of anything other than the fact that it occurred. It cannot support a finding, even on the standard of the “mere but serious possibility”, that the Complainant would have been appointed as an Acting TI-06 Inspector, had he been a PM-04 Analyst.

[247] I prefer the evidence of Mr. Shorthouse and Ms. Domae to that of the Complainant in deciding whether there was a serious possibility that a PM-04 Analyst would obtain an appointment as an Acting TI-06 Inspector. I accept Mr. Shorthouse’s and Ms. Domae’s testimony that it was highly unlikely that such an appointment would occur. Both cited the requirement for delegated authority, with Mr. Shorthouse including in his reasons that the skill sets for the jobs were too different, and also stipulating that the delegated authority requirement for a TI-06 Inspector to be able to do the job took at least six months. Ms. Domae also testified that because the TI-06 position was the first level of operational Inspector positions, and required the delegated authority, the Respondent did not usually use actors to fill an Inspector TI-06 absence or vacancy.

[248] The evidence also established that moving from the Analyst PM-04 position to the Inspector TI-06 position was not a usual progression, whether on an indeterminate basis or on an acting basis.

[249] I find that the evidence established that from 2006 to 2010, the Respondent needed TI-06 Inspectors. I accept Ms. Domae's testimony that the reason there were no TI-06 staffing processes between 2010 and the hearing was because the Respondent was still placing qualified applicants from the large 2010 competition.

[250] I note that the Complainant compared his superior test results to those of Mr. TS, who was appointed as TI-06 Inspector in 2012. The Complainant submitted that the Respondent wanted to promote Mr. TS, an existing employee, so it did so. The Complainant had not had that opportunity, as he was not an existing employee when he should have been. However, Ms. Domae's evidence established that Mr. TS was already in the TI group of Inspectors, at a lower level —TI-04. He had experience in small vessel compliance. The Respondent needed a person with that particular experience in its Victoria Marine branch. Mr. TS therefore became a TI-06 Inspector, not by way of the Analyst position, but by way of lower level positions in the Inspector group. In other words, he attained the TI-06 position by way of the Inspector stream. He did not obtain the position through the PM stream. Therefore, Mr. TS' career path is not indicative of the career path the Complainant would have had, coming in as a PM-04 Analyst. I conclude that the evidence regarding Mr. TS does not support the Complainant's position.

[251] I accept Mr. Shorthouse's testimony that had the Respondent appointed the Complainant as an Analyst in 2006, his job would have been unaffected by the 2008 changes to the education requirements for the Analyst position (*i.e.* the new requirement for a university degree). That is, he would have been "grand-parented" in the job.

[252] However, based on the evidence, I conclude that experience as a PM-04 Analyst would not have provided investigative experience relevant to the TI-06 Inspector position.

[253] I also find that the evidence failed to demonstrate the mere but serious possibility that had the Respondent appointed the Complainant as a PM-04 Analyst, he would have obtained a subsequent appointment as an Acting TI-06 Inspector.

[254] The Complainant applied for the three Inspector TI-06 positions in 2005 to 2007, and by approximately mid-2007, he had been excluded from all of them. I conclude that the Complainant—even with Analyst experience—would not have been able to obtain less

than one year later what he could not obtain previously. The evidence established that experience gained as an Analyst would not have assisted him in obtaining the TI-06 Inspector position.

[255] I conclude that unlike in *Uzoaba, Grover,* and *Green, supra*, there is almost no evidence to demonstrate that the Complainant had the mere but serious possibility of appointment to the TI-06 Inspector position. His applications for all three TI-06 competitions were unsuccessful, for non-discriminatory reasons; basically, he did not have the required experience for the job.

[256] The totality of the evidence on this issue failed to establish a mere but serious possibility that—had the Complainant been a PM-04 Analyst in 2006—the Respondent would have promoted him to a TI-06 Inspector position by the fall of 2008. The Tribunal dismisses the Complainant's request for the remedy of instatement to a TI-06 Inspector position.

X. Should the Tribunal instate the Complainant to the position of PM-04 Intelligence Analyst?

A. The Respondent's position

[257] In light of Ms. Domae's testimony about the manner in which the Respondent had filled the PM-04 Analyst positions in 2006, the Respondent agreed that, but for the discrimination, the Complainant would have been appointed as an Analyst in about May 2006. But the Respondent did not agree that the Tribunal should instate the Complainant to the Analyst position. The Respondent did not dispute that the Tribunal has the discretion to order instatement, but in this particular case it argued that the Tribunal should not exercise that discretion. The Respondent's submissions were as follows:

1. As suggested in *Ontario (Human Rights Commission) v. Naraine*, 2001 Can LII 21234 (ON CA) (*Naraine*), after an inordinate passage of time, it may be inappropriate to appoint someone to a position.

2. Many factors intervened during the nine-year period between May 2006 and the hearing, which perhaps affected the Complainant's abilities to do what he could do before. For example, the Complainant was now in a situation where he was declared to have significant barriers to employment. That alone should not stand in the way of instatement, but it is a factor the Tribunal should take into account. Situations change over time. His ability to obtain the Analyst position at one time may not have been the same as it was at the time of the hearing.

3. The evidence of what happened to the other individuals whom the Respondent appointed as PM-04 Analysts in 2006 was relevant: two were affected by workforce adjustment; employee E lasted until 2014; another employee lasted until 2013; employee C was employed until 2010, but was in limbo at the time of the hearing; and, employee F was employed between 2006 and 2008. All of these events highlighted the fact that these careers did not last forever. *Naraine, supra* suggested that after a long period of time, it was not appropriate to reinstate.

[258] The Respondent agreed with the Complainant's position that if the Tribunal ordered the Complainant instated, he would have to pass the required security clearance, and the Respondent would have to have a vacant position.

B. The Complainant's position

[259] The Complainant submitted that the *Act* was remedial in nature. The Tribunal in the *LD* found that the Respondent discriminated against him in the 2005-2006 Analyst Staffing Process, on the ground of his disability of mental illness. To place the Complainant in the position he would have been in but for the discrimination, he contended that the Tribunal had to appoint him as a PM-04 Analyst.

[260] The Complainant also submitted the following:

a. The evidence revealed a 2008 change to the education requirements for the PM-04 Analyst position, henceforth requiring post-secondary or equivalent (university degree or equivalent). However, Mr. Shorthouse testified that had the Complainant been appointed in 2006, this 2008 change would not have affected the

Complainant's continuing in the position. As an incumbent, the Complainant would have been grand-parented in.

b. The Complainant was qualified for the position at the time of the Respondent's discrimination. That was the relevant time to consider for the purposes of instatement. Whether he was qualified at the time of hearing was irrelevant.

c. There was no evidence of prejudice to the Respondent if the Complainant were to be instated.

d. Ms. Domae's testimony confirmed that, at the time of hearing, an Analyst position was open.

e. Based on Ms. Domae's evidence, the Complainant would not have lost his Analyst position as a result of workforce adjustment in 2012. Two Analysts had volunteered for layoff, and the remaining five were not affected. But for the discrimination, the Complainant would have been one of the remaining five, and would still have been working there at the time of hearing.

[261] The Complainant submitted that the judgment in *Naraine (supra)* was clearly distinguishable from the within case, and had no bearing on it. There were numerous factors in *Naraine, supra,* which militated against reinstatement, and which were not present here. For example, in *Naraine*, following his discharge by the Ford Motor Company ("Ford"), Mr. Naraine was subsequently employed with General Motors (GM) (para.68). Furthermore, in *Naraine* the Board at first instance had chosen to reinstate Mr. Naraine despite having concluded that Ford's liability had "terminated" when he secured a position at GM (para. 69). Third, in *Naraine*, the Board at first instance clearly found that GM's discharge of Mr. Naraine did not reactivate Ford's liability (para. 68, quoting para. 75 of Board decision). Finally, in *Naraine*, an arbitrator had held that Ford's discharge of Mr. Naraine was justified.

[262] In addition, the Complainant made further submissions on the issue of delay:

a. Delay should not preclude the remedy of reinstatement in the circumstances of this case.

b. The Tribunal should follow the decision in *Hamilton-Wentworth District School Board v. Fair,* 2014 ONSC 2411 (Ontario Div. Ct.) (*Fair*), where the issue of delay was raised at paras. 40 and 43. The Court agreed that the goal of the remedial provisions of Ontario's *Human Rights Code* ought not to be thwarted because of the passage of time that was largely beyond Ms. Fair's control.

c. Similarly, the delay in the current matter was not the Complainant's fault.

d. The *Act* had to be given the proper and broad interpretation; it would be inconsistent with the *Act* to limit the remedy simply because of delay.

e. At best, delay might be evidence that instatement should not be granted, but the sole fact of delay itself could not preclude such a remedy – there must be a reason.

[263] The Complainant cited a number of cases where reinstatement or instatement was ordered after long periods of time, including the following:

- *Brooks, supra,* where the Court found that the Tribunal's 2004 decision not to entertain the remedies of reinstatement or back pay, seven years after the discrimination, was an error, and set the decision aside (at para 48);
- *Culic v. Canada Post Corporation,* 2007 CHRT 1 *(Culic),* in which the complainant had departed the workplace in 2001, and the Tribunal decision returned her six years later;
- *Green*, *supra,* where the bulk of the discriminatory practices occurred in 1987 and 1988, and more than ten years later, Ms. Green was ordered reinstated and promoted;
- *Grover*, *supra*, where most of the discriminatory incidents had occurred in 1986, and the Tribunal's decision to instate and promote Dr. Grover was rendered six years later;
- *Uzoaba, FC, supra,* where there had been many incidents of discrimination throughout the 1980s, and the Tribunal's decision to reinstate and promote was rendered in 1994.

C. Analysis

[264] The thrust of the *Act* is remedial. The *Act* seeks to remedy the effects of discrimination, rather than to find fault or punish.

[265] There was no dispute that in 2008, the Respondent changed the education qualifications for the PM-04 Analyst position, by requiring a post-secondary degree. In cross-examination, Mr. Shorthouse testified, and I accept, that the change in qualification would not cost a previously appointed incumbent their position, or otherwise affect the incumbent. The Complainant would have been "grand-parented" in.

[266] I find that what the Complainant lost on account of the Respondent's discrimination was the indeterminate position of Analyst at the PM-04 group and level (now called Intelligence Analyst).

[267] I also find that there is a direct causal connection between the Respondent's discrimination and the Complainant's loss of the indeterminate PM-04 Analyst position.

[268] I take into account that in closing arguments and submissions at the Remedies hearing, the Respondent submitted that, given Ms. Domae's testimony, the Complainant would have been appointed to the Marine Security Analyst position in about May 2006.

[269] Further, the passage of time cannot be the sole determining factor in deciding whether instatement is appropriate. That would undermine the remedial purpose of the *Act.* What is relevant are the surrounding facts: Was there a fractured relationship between the Respondent and the Complainant? Has the passage of time materially affected the Complainant's capability to do the job? (*Hamilton-Wentworth District School Board v. Fair,* 2016 ONCA 421 (*Fair-CA)*, at para 95.

[270] The Complainant never worked for the Respondent, so one cannot claim that there was a fractured working relationship.

[271] As regards the question of whether the passage of time materially affected the Complainant's capability to do the job, there was no evidence that the Respondent reclassified the Analyst position from an "04" level to a higher level, notwithstanding that in

2008, it had added a post-secondary degree to the position's educational qualifications. I find on the evidence that the position remained at the "04" level, and that this fact is telling and relevant. I consider it reasonable to conclude that notwithstanding the addition of a post-secondary degree to the educational requirements, the change in the security clearance requirement from Secret to Top Secret, and the years that have passed since the 2005/2006 Analyst Competition, the substance and duties of the position have not changed sufficiently to raise the position's classification such that the Complainant would require upgraded skills or attributes other than those he successfully displayed in the aforementioned Competition.

[272] I therefore conclude that subject to s. 54(a) of the *Act*, and subject to Mr. Hughes meeting all the required conditions of employment for the position—including the security clearance, the Respondent must instate him on the first reasonable occasion as a PM-04 Intelligence Analyst. There was no evidence led on whether the Complainant has a preference as to which location he wishes to work in, but given that he applied for the position which was in the MSOC in Esquimalt, and that he lives in Victoria, the PM-04 Intelligence Analyst position should be in Esquimalt, British Columbia, unless a position arises in Vancouver, provided the Complainant is willing to relocate to Vancouver.

XI. Lost Wages and benefits

A. The Complainant's position and submissions

[273] The Complainant's position was that the Respondent should compensate him for all lost wages and Overtime, and all benefits, including pension, disability, medical, dental and drug benefits, from the time he should have been appointed to the PM-04 Analyst position in May 2006 to the date of instatement, if the Tribunal instated the Complainant to either the Analyst or Inspector positions. The Complainant's basis for this argument was that, had the Respondent hired him when it should have, he would still be working for the Respondent. The Complainant clarified that he sought actual losses, that is, any wage rate increases provided for in the Collective Agreements and any such increases negotiated

with respect to the relevant years, minus only the income he had earned from employment during this period.

[274] The Complainant's submissions in support of these remedies were:

a. There was a clear and unequivocal causal connection between the amounts the Complainant claimed for lost wages and benefits, and the Respondent's discriminatory conduct;

b. The Complainant was in the same position as Mr. Willoughby in *Willoughby v. Canada Post Corporation*, 2007 CHRT 45 (*Willoughby*), where the Tribunal stated that "…[h]ad CP not refused to continue his employment, Mr. Willoughby would have remained employed." (para. 96) He would have gotten wages. In *Willoughby*, the Tribunal ordered the employer to pay the complainant any benefits he would have received.

c. Aside from the evidence of the Respondent's witness regarding overtime, and aside from legal argument, there was no evidence which disputed the Complainant's calculations of his losses, which included mitigation. The Complainant's calculations were grounded in his testimony, his documentary evidence of employment income (Exhibit C-18), and the excerpts from the Collective Agreements.

d. The Complainant's evidence basically supported his various claims and calculations.

e. Other than mitigation, there was no principled reason for limiting the claims the Complainant had made. The test for mitigation was that one must try to look for work, although one does not have to take just any job. The evidence in the record was un-contradicted that the Complainant had made great efforts to mitigate his wage loss damages. The Complainant's testimony detailed his efforts to find employment after the Respondent had failed to appoint him as an Analyst. In addition, the 2008 recession made it a difficult time to find employment. These two considerations established that there was no basis to deduct anything as a result of a lack of compliance with the duty to mitigate.

f. The Complainant applied for the 2006 and 2007 Inspector TI-06 Processes. He tried three times for the position. A reasonable person would not have applied for the position after that, because the Respondent kept telling him he needed more experience. The Complainant could not get more experience because he was out of work. Therefore, there was no point to him applying for later Inspector TI-06 positions. Just because someone did not apply for one or two jobs did not mean they had not met their duty of mitigation, particularly when there was unchallenged evidence, including testimony adduced in cross-examination, that the Complainant had sent out hundreds of applications.

g. The evidence before Member Malo was that the Complainant had been taking jobs in some cases at much lower rates of pay than he could have earned at Transport Canada. For example, he had worked for Howard Johnson, doing maintenance. He complied with his obligation to mitigate. He had made every effort one could have made in these circumstances.

h. The Respondent accepted that the Complainant would have been appointed in 2006. The Complainant submitted that hopefully, he would have been working there to the present day. Therefore the Complainant was entitled to full compensation less any employment income he had received.

B. The Respondent's position and Submissions

[275] The Respondent took no position at the Remedies hearing in regard to the accuracy of the Complainant's gross calculations for lost wages. However, the Respondent argued that if the Tribunal compensated the Complainant for lost wages, the Tribunal should take into account that the Crown had already paid the Complainant monies on account of his HRSDC employment, pursuant to the Minutes of Settlement in respect of his complaints and civil suit against HRSDC.

[276] The Respondent submitted that mitigation was a very important factor for the Tribunal to consider:

a. *Chopra, FCA, supra,* indicated that the Tribunal could take mitigation into account. The Federal Court of Appeal, after noting the Tribunal's finding that Dr. Chopra did not properly mitigate his damages (para 7, *Chopra FCA, supra*), saw no error in the Tribunal's exercise of its discretion to limit lost wages on this basis.

b. In the current matter, the Complainant had failed to mitigate his damages, because he had not applied for TI-06 Inspector positions in external competitions held in 2008 and 2009. Given the Complainant's claim for instatement to TI-06, he should have applied in the 2008 and 2009 competitions. Whether he would have gotten the job was unknown, but he should have applied. There was no evidence that he did so. Moreover there was no explanation given as to how he could have missed those competitions when he was checking the relevant websites every day, as he testified he did. Transport Canada's obligations for lost wages should end in 2009 because of the Complainant's failure to mitigate at that stage.

c. The Complainant had an obligation to mitigate his damages by making best efforts to find employment during the period of time following the discriminatory practice. Over the entire nine year period, from the date of the discrimination to the date of the hearing, he had been unable to obtain permanent employment.

[277] The Respondent also submitted that the Complainant's employment history did not demonstrate that he was a long-term employee who built a career in any one place. He would have a brief period of employment, followed by some form of turmoil, resulting in his leaving that employment, being unemployed, then briefly employed again, and so on. This history did not suggest that Transport Canada would have been his career until the present day.

[278] The Respondent pointed to the Complainant's still outstanding complaints against CBSA, filed in January 2005, in which he claimed he should have received an indeterminate appointment which pre-dated his application to Transport Canada. If the Tribunal Member deciding the CBSA complaints were to instate him, it would mean he would never have applied to Transport Canada.

[279] The Respondent submitted that at some point, its obligations to the Complainant should end, and submitted several alternative dates for when the compensation period should end:

- September 13, 2007, when the Complainant commenced employment at HRSDC. After the Complainant had worked at HRSDC for nine months, he filed complaints which resulted in a Tribunal finding that HRSDC should have continued to employ him. Ultimately, the complaints resulted in a settlement. Thus the burden on Transport Canada should end on September 13, 2007, his start date at HRSDC.
- 2008, when the Complainant failed to apply for the advertised TI-06 inspector positions. This date was proposed in light of the Complainant's contention at the Remedies hearing that he would have been entitled to a promotion to TI-06 Inspector;
- At the very latest, sometime in 2009 or 2010, when the Complainant again failed to apply for the advertised TI-06 Inspector positions.

[280] In addition to the foregoing, the Respondent argued that in making a lost wages award, the Tribunal should take into account any amount received by the Complainant as compensation for lost wages pursuant to his Settlement with HRSDC. Such a discount was necessary to avoid double compensation for lost wages, *as per Chopra FCA, supra,* para 46.

[281] The Respondent also submitted that in ending Transport Canada's obligations to the Complainant, the Tribunal should take into account that the Tribunal's Decision in October, 2012 found that HRSDC had discriminated against the Complainant, and that finding of discrimination ought to end Transport Canada's obligations.

[282] The Respondent argued that if Mr. Hughes had become a PM-04 Analyst appointed out of the same pool as the other candidates, it was relevant for the purposes of wage loss calculation to see what happened to those who had been appointed in 2006. As mentioned earlier, two employees were affected by workforce adjustment; Employee E lasted as long as 2014; another employee lasted until 2013; Employee C was employed until 2010, but was in limbo at the time of hearing regarding their position; and Employee F

was employed between 2006 and 2008. This evidence highlighted the fact that these careers were not indefinite, and that just because someone obtained that position, it did not mean that it would last forever.

C. The issue of the Minutes of Settlement

[283] Before deciding whether, in assessing the Complainant's entitlement to compensation on account of lost wages, the Tribunal should take into account any part of the Settlement monies, I must address the evidentiary issues relating to the Minutes of Settlement.

D. The Complainant's position

[284] The Complainant objected to the admission of the Minutes into evidence. He also objected to the Respondent's submission that the Tribunal factor into the amount of compensation it awarded the Complainant, part of the money the Complainant was paid pursuant to the Minutes. The grounds of the Complainant's objections were:

a. The Minutes on their face did not identify any amount of money as compensation for lost wages.

b. Clause 7 of the Minutes made no reference to compensation for lost wages. It only referred to the amount payable as "damages". If one loses one's job, one has an obligation to mitigate one's damages by trying to find other employment, and any income earned from employment during the same period as the lost wages claim can be deducted from the amount of compensation payable in respect of such claim. This principle aims to prevent over-compensation. However, other monies, such as lottery winnings, cannot be deducted from the compensation payable under a lost wages claim.

c. Clause 11 of the Minutes stated: "No T4 will be issued regarding the amounts payable under this agreement." If the monies payable pursuant to the Minutes had been on account of lost wages, the employer would have been legally bound to issue a T4. However the employer, the Government of Canada (HRSDC), did not

do so. The expectation was that the federal government would comply with its own tax laws. HRSDC agreed not to issue a T4, therefore, the monies could not be on account of wages. This was the best evidence that the amounts of money referred to in Clause 11 did not constitute wages.

d. Clause 11 also stated that "…the interest portion of this agreement will be subject to a T-slip". HRSDC was only obligated to issue a T-slip on account of the interest payment.

e. Further, clause 11 stated: "The Respondent confirms that it takes no position on the issue of whether these monies are taxable, and should the issue be raised, will continue to take no position".

f. Respondent's counsel had stated more than once that the Minutes did not indicate whether the monies payable were wages. Therefore, in the Complainant's view, the monies could not relate to mitigation and were irrelevant.

g. The Minutes not only settled the two human rights complaints against HRSDC, but also the Complainant's civil action against HRSDC. Pursuant to the Minutes, he withdrew his civil action and released HRSDC/ESDC from any other legal recourse to which he may have been entitled, based on the facts underlying the complaints and the civil action.

h. The Respondent itself conceded that the language in the Minutes was ambiguous. Although the Respondent submitted that the release in Paragraph 11 with respect to the Respondent not being responsible for any claim the tax authorities might make on the Settlement money bolstered the concept that the money was wages, was a clause which employers always asked for. Therefore, in the Complainant's submission, the tax release did not add anything to the Respondent's argument.

E. The Respondent's position

[285] The Respondent contended that the Tribunal should both admit the Minutes into evidence and take part of the settlement money into account, when deciding the amount of

compensation for lost wages to award the Complainant. The Respondent's position was based on the following considerations:

a. Clause 12 of the Minutes provided that the Crown could introduce the Minutes as evidence in any of the Complainant's other human rights hearing at the Tribunal, (whether liability or remedies hearings).

b. Although Clause 7 of the Minutes did not specify that the amount payable therein was on account of wages, one could deduce that it was not on account of pain and suffering—or special compensation, because the Minutes addressed those categories of compensation and provided payment for them in Clauses 4 and 5.

c. The best evidence indicating that the monies in Clause 7 were on account of wages—and were potentially income—was that the clause specifically stated that the monies served as compensation for damages incurred between March 2006 and January 2008, and between June 2008 and the present day. These periods of time corresponded to the periods during which HRSDC did employ the Complainant, or, in his view, should have employed him. Clause 7 further stated that the monies were paid "…in accordance with Section 53(2) of the CHRA", which provision dealt with compensation for lost wages.

d. Accordingly, to avoid double compensation for lost wages, the Tribunal ought to take into account a portion of the amount paid under the Settlement with HRSDC in the Tribunal's lost wages award. This principle was recognized in *Chopra FCA, supra.*

F. The issue around the Complainant's testimony regarding the Minutes

[286] In re-examination, the Complainant was asked about his understanding of Clause 7, and specifically whether the money referred to in that clause included wages. The Respondent objected on the grounds that:

a. the Complainant's understanding of what Clause 7 meant was not relevant, because he had had legal representation at the time he negotiated the settlement;

b. the Complainant's answer related to settlement discussions leading to an agreement, and those discussions were privileged; and

c. the agreement spoke for itself.

[287] The Complainant's response to the objection, through counsel, was that the Tribunal should permit the Complainant to answer the question, on the grounds that:

- the Respondent had put the settlement in issue, and
- the question related to the Complainant's position in regard to a specific part of the Minutes, and not to the settlement discussions.

[288] I ruled that the Complainant's answer to the question could have possible relevance and directed him to answer. After the Complainant answered, the Respondent renewed its objection to the question and answer, and requested that the Tribunal strike the Complainant's answer from the Record.

[289] The Complainant replied, through counsel, that although he should not receive double compensation, it was unknown which portion, if any, of the Minutes of Settlement constituted wages. Therefore, one could not ascertain an amount to deduct from the award sought in this case.

G. Were the Minutes admissible into evidence?

[290] After hearing the parties' submissions on the issue, and reviewing the Minutes, I admitted the Minutes into evidence for the reasons below:

[291] In Clause 12 of the Minutes, HRSDC/ESDC agreed that all of the settlement's terms would remain strictly confidential, except where disclosure was required by law, and furthermore that:

> "…neither party shall disclose them, whether directly or indirectly, to anyone other than their legal representatives or financial advisors, with the exception that these Minutes of Settlement may be introduced as evidence by the Federal Crown or the Complainant in any hearing before the CHRT (liability

> or remedies) and/or in the course of any other court or tribunal proceeding to which the Federal Crown is a party, in its defence, without prejudice to the Complainant's right to object to the evidence being tendered in the other court or tribunal proceedings or to otherwise argue it cannot affect remedy in those cases."

[292] I concluded that a plain reading of Clause 12's language established that each party to the Minutes had contemplated that the other party could attempt to tender the Minutes as evidence in an inquiry into the Complainant's other human rights complaints, including in any remedies hearing, without prejudice to their right to object to their admissibility, or to any other argument to the effect that the Minutes had no bearing on remedy. I found that the Minutes constituted a prior written agreement by the parties allowing for the scenario which actually arose at the Remedies hearing. As also contemplated in paragraph 12, Complainant counsel objected on the ground that the Minutes were not relevant because, on their face, they included no payment on account of lost wages.

[293] Further, neither party raised the issue of privilege with respect to the Minutes themselves. I noted that subsection 50(3)(c) of the *Act* provided that at a hearing, the Member presiding over the inquiry could "…receive and accept any… other information…that the member… sees fit…", so long as it was not privileged.

[294] Therefore, in light of my interpretation of clause 12, and the fact that neither party raised the issue of privilege regarding the Minutes themselves, I found that the parties waived any privilege that may have existed over the Minutes themselves for the purposes of this hearing. They were therefore admissible for this purpose, pursuant to subsection 50(3)(c). If I am incorrect in admitting the Minutes on the foregoing basis, I rely on the well-established exception to settlement privilege that settlements are admissible to the extent necessary to prevent overcompensation. Accordingly, the Minutes were designated as part of Exhibit R-9. The Minutes are, however, confidential, and may only be accessed from the Official Record as ordered below.

[295] The issues of whether the Minutes are relevant, and the weight—if any—to give them, are dealt with below:

H. Is the Settlement amount, or any part of it, relevant to the Complainant's claim of compensation for lost wages?

[296] The Respondent's position at the Remedies hearing was that:

- Clause 7 of the Minutes stated that the money therein related to paragraph 53(2)c) of the *Act*, which contemplated compensation for "any or all of the wages" lost. The Respondent concluded this because the Minutes dealt with pain and suffering compensation in another clause – therefore, the only compensation logically remaining was for lost wages.
- Therefore, the amount paid pursuant to clause 7 constituted compensation for lost wages in respect of the Complainant's employment at HRSDC.
- The Minutes were ambiguous as to whether clause 7 related to compensation for lost wages.
- Clause 11 stated that the Crown was not responsible for the payment of any sum that tax authorities might levy on any amounts paid under the Settlement. It also stated that the Respondent took no position on whether the monies were taxable, and that should the issue be raised in the future, the Respondent would continue to take no position.

I. Analysis

[297] I accept the Complainant's submission that only income earned from employment in the same time period as the period covered by the claim for lost wages could be deductible from an award for lost wages. The Respondent did not dispute this. Rather, the Respondent's argument was that the Tribunal ought to find that the payment in clause 7 of the Minutes constituted payment on account of the Complainant's employment at HRSDC, as well as on account of when the Tribunal's Decision found he should have been employed by HRSDC.

[298] Clause 7 of the Minutes states (amount and Tribunal file numbers are removed):

“7. The Respondent [HRSDC/ESDC] will pay the Complainant $[] to compensate him for damages incurred between March 2006 and January 2008 (File No.) and between June 2008 to present (different File No.), in accordance with Subsection 53(2) of the CHRA”.

[299] Clause 11 of the Minutes provided that “No T-4 will be issued regarding the amounts payable under this agreement.” Further, in clause 11, the Federal Crown confirmed “…that it takes no position on the issue of whether these monies are taxable, and should the issue be raised, will continue to take no position.”

[300] The Respondent submitted that clause 7 must refer to wages, pursuant to paragraph 53(2)(c) of the *Act,* because clauses 4 and 5 of the Minutes compensate for pain and suffering (53(2)(e) and wilful and reckless damages (53(3)) respectively, and by process of elimination, the only part of paragraph 53(2) reasonably applicable is 53(2)(c). I find it is indisputable that Clause 7 only states that the payments therein are made “in accordance with Subsection 53(2) of the CHRA”. I find that Section 53(2) addresses a range of remedies. I also find that in addition to compensation for lost wages, paragraph 53(2)(c) of the *Act* also authorizes compensation for expenses incurred as a result of the discriminatory practice. Therefore, it cannot be said that Clause 7 of the Minutes only referred to payment for lost wages.

[301] I also note that: HRSDC agreed not to issue a T4 for any amounts provided for in the Minutes, including in Clause 7; that HRSDC agreed not to take any position as to whether the monies were taxable; that if the monies were wages, they would be taxable; that the Respondent agreed that the Minutes were ambiguous as to whether clause 7 related to lost wages; and that “T slips” for tax purposes were clearly contemplated by the parties to the Minutes, because they directed that a T-5 slip be issued for the interest portion of the settlement money. I also note that the Minutes settled a civil action filed by the Complainant, the particulars of which were not put in evidence. This adds further ambiguity into the meaning of the Minutes. I therefore conclude that the Minutes did not indicate that any monies payable thereunder constituted compensation for lost wages. Accordingly, I find that no money the Complainant received pursuant to the Minutes of Settlement is deductible from any compensation for lost wages that the Tribunal orders.

J. Should the Tribunal strike from the record the Complainant's testimony regarding his understanding of clause 7 of the Minutes of Settlement?

[302] The evidence established that the Minutes were irrelevant with respect to the issue of compensation for lost wages. It is therefore not necessary to refer to or analyze the Complainant's very brief testimony regarding the nature of clause 7. However, it will not be expunged from the audio recording of the hearing, which forms part of the Official Record. But the recording of this testimony shall be stored separately, kept "Confidential", and may only be accessed from the Official Record as ordered below.

K. Analysis regarding the potential outcome of the CBSA complaint

[303] I find that the Complainant's complaints against the CBSA are a separate, distinct matter. The CBSA complaints dealt with events that happened prior to the events giving rise to the within Complaint, and I find them irrelevant to the issues before me, and the decisions to be made here. If, as the Respondent suggested, the Tribunal hearing the CBSA complaints finds that the Complainant was entitled to instatement prior to the instatement this Decision orders, that situation will be for the Complainant to address. The Tribunal must make this Remedies Decision based on the relevant findings and exhibits in the Liability Decision, and based on the evidence and submissions in the Remedies hearing. The Tribunal should not have regard to the speculative outcome of another inquiry.

L. Analysis regarding the Tribunal's finding of discrimination in the HRSDC Decision

[304] I accept the Complainant's submission in Reply that Transport Canada should not be permitted to rely on the discriminatory practice of another department, namely HRSDC, to relieve itself of responsibility for its own discrimination. The Complainant submitted that the Tribunal's HRSDC Decision does not change the fact that the Complainant was entitled to a remedy from the Respondent. Also, I note that the Complainant's HRSDC job in 2007-08 was temporary—it was term employment. The Transport Canada Analyst job

would have been indeterminate, that is, full-time, and not temporary, (sometimes called "permanent"),

M. Analysis regarding the amount and duration of compensation for lost wages and benefits

[305] Paragraph 53(2)(c) of the *Act* states that the Tribunal can include the following term in an order against the person who engaged in the discriminatory practice:

> "(c) that the person compensate the victim for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice;"

[306] The concept behind most of section 53 of the *Act,* including paragraph 53(2)(c), is that the loss in respect of which the victim claims compensation or restitution must have occurred as a result of the discriminatory practice. There must be a causal link between the two.

[307] The Complainant did not dispute that there should be limits on compensation for lost wages, as recognized in *Chopra FCA (supra),* at paragraph 37. In discussing paragraph 53(2)(c), the Court noted two such limits:

[308] The first limit was the requirement for "…a causal link between the discriminatory practice and the loss claimed". (See also in this regard *Tahmourpour v. Canada*, 2010 FCA 192, paras. 39-48).

[309] The second limit was the discretion the *Act* gave the Tribunal to make a compensation order "… for <u>any</u> or <u>all</u> of wages lost as a result of the discriminatory practice. This discretion must be exercised on a principled basis."[Emphasis in original]

[310] I find that the most significant issue between the parties regarding the lost wages and benefits claim was the period of time the compensation for those losses should cover.

N. Determining the End-Point of the Wage Loss Compensation Period

[311] The Complainant submitted that compensation for wages and benefits should be retroactive to May 8, 2006, and run until the end date of the calculations in his Requested Remedy Document (C-11), which end date was August, 2015. Further, at the hearing, he requested that if the Tribunal ordered him instated, the Tribunal also order compensation for all wages, all benefits, and reimbursement of all health-related expenses from the aforesaid end date until his actual instatement to either a TI-06 Inspector or a PM-04 Analyst position.

[312] Therefore, one of the issues the Tribunal must decide is whether there was a causal link between the Complainant's income earning capacity in 2015, and the Respondent's 2006 discriminatory practice. For the reasons which follow, I find the evidence failed to establish that there was such a causal link.

[313] The evidence established that the Complainant began working for HRSDC in a "term" or temporary position on September 13, 2007. HRSDC renewed his term twice, but did not do so a third time, and he stopped working there on June 27, 2008. In 2012, in *Hughes v. HRSDC, supra,* the Tribunal decided that in the circumstances, this non-renewal constituted discrimination within the meaning of section 7 of the *Act*.

[314] On June 20, 2007, the Respondent rejected the Complainant's application for the third TI-06 Inspector position for which he had applied (*LD*, para 292).

[315] One of the Complainant's T4s for 2007 (Complainant's Remedy Book, Tab 42) records that he earned less than $1,000 from a B.C. employer constituted as a numbered company. The federal government issued another T4 for 2007, presumably in relation to his job at HRSDC.

[316] His only 2008 T4 in evidence was also issued by the federal government, and I find that the income from employment shown is also in relation to his job at HRSDC.

[317] The evidence established that the Complainant had surgeries on his right eye in August, September and November, 2008, to address retinal detachment. I accept his testimony that he was unable to work for fourteen weeks corresponding to his recovery

from the surgeries. I also accept that for approximately 1.5 to 2 years thereafter, he had compromised vision.

[318] I accept the Complainant's testimony that in 2009, after the eye surgeries, an Employment Insurance contractor assessed the Complainant and found that he had significant barriers to employment. He was therefore eligible to have the federal government subsidize one-half of the wages that would be payable by any employer who hired him. I find that one aspect of these barriers was his depression, which was exacerbated in part by the Respondent's discrimination.

[319] His only 2009 T4 in evidence shows less than $1,000 employment income earned from the federal government. There was no evidence about what employment this represented. There was no other evidence of employment income in 2009.

[320] Exhibit C-19, page 2, is a letter dated January 21, 2010 from the Complainant's optometrist. That date seems incorrect because the letter referred to March, 2010, a date after January 21, 2010, although I do not find this error relevant. The letter stated that in March 2010, the Complainant had two vitreous detachments in his left eye which did not require surgery. However, because of the resulting "floaters", they impeded his vision.

[321] I find that his vision impediments did not stop him from obtaining a temporary clerical position with the Canadian Coast Guard from April 2010 until sometime at the end of August or beginning of September 2010. A 2010 T4 sets out his income from that employment as $14,879.15. He testified that he did not think there were any prospects for any further work with the Coast Guard.

[322] I accept the Complainant's testimony that he applied to other employers between 2006 and 2011, and that he did not obtain all the positions for which he applied. The evidence established that in 2011, he worked for Elections British Columbia for 6 weeks.

[323] In 2012, the Government of Canada issued a T4 to Mr. Hughes for an amount less than $1,000. There was no evidence presented regarding the employment to which that amount related.

[324] For five months in 2013, and for six months in 2014, he worked in temporary positions for the province of British Columbia's Children's Ministry.

[325] I note that on August 19, 2014, the Complainant's doctor provided a medical certificate to Service Canada for Employment Insurance Sickness Benefits. The certificate stated that the Complainant had "Reactive depression", that he needed time away "from workplace", and that he would be incapable of working until September 15, 2014 (Exhibit C-19, page 3). I also note that on December 2, 2014, the same doctor provided another medical certificate for Employment Insurance Sickness Benefits. This certificate stated that the Complainant had "significant anxiety & depression & flare up recently due to various external factors" [*sic* throughout], and that he could not work until "at least" January 1, 2015. He received Employment Insurance benefits in November and December of 2014.

[326] As at mid-August 2015, the Complainant had not worked that year.

[327] I find that by August 2015, the Complainant had applied for and obtained various positions with various employers. He had also applied for positions which he did not obtain. That means that there were employers other than the Respondent who declined his applications after the Respondent's discriminatory practice. There were also other intervening events which served to sever the causal link between the Complainant's wage loss and the Respondent's discrimination.

[328] In its closing submissions, the Respondent agreed that the Complainant would have been appointed in about May, 2006. The Complainant submitted that the date would have been May 8, 2006, as he had a higher mark than another person who was appointed on that date. The Respondent did not dispute May 8, 2006 as the appointment date. I find that it is reasonable to fix the date the Complainant would have been appointed to the Analyst position as May 8, 2006. I take into account that on May 8, 2006, Mr. Hughes was working for HRSDC, albeit in a temporary position. He had eye surgery in 2008, which had nothing to do with the Respondent's discrimination. However, had he been working for the Respondent as an Analyst, he would have been able to access paid sick leave or some form of disability benefits from the Respondent's third party disability insurer. In 2009, EI assessed him as having significant barriers to employment on account of both the eye

surgeries and his vision difficulties. I accept his testimony that he had told EI about his disability of depression. I accept his testimony that his disability of depression was made worse by the Respondent's discrimination. In 2009, I find it reasonable to conclude that he would have been in receipt of some form of long term disability benefits from the Respondent's third party insurer. I further conclude that this would have continued until April 2010, when he would have returned to doing at least some of the Analyst work, as evidenced by the fact that he worked for the Coast Guard in a clerk position starting in April 2010. Further, the Respondent would have had to accommodate him at work if there were any remaining issues with his impaired vision in April 2010.

[329] The evidence also established that a significant number of the other Intelligence Analysts in the cohort hired in 2006—the year when Mr. Hughes would have been hired—had left the position by 2011.

[330] I take into account that the departures of the other Intelligence Analysts from the 2006 cohort were for their own personal reasons, and that Mr. Hughes may not have had reasons to leave. Nonetheless, the fact that five years later, not all of the original six appointees were still working as Analysts establishes that five years was a reasonable period of tenure in the position before incumbents went elsewhere.

[331] I conclude that five years after May 8, 2006, the causal link between the Respondent's discrimination and the Complainant's loss of wages and benefits had been severed, given the accumulation of the intervening facts in that period: the Complainant's new employment with HRSDC; his eye surgeries and the consequences thereof, which were not the result of the Respondent's discriminatory practice; the Complainant's subsequent employment at the Coast Guard in 2010; the Complainant's testimony that he had sent out "hundreds" of job applications which leads to a finding that throughout the period, many other prospective employers had declined the Complainant's applications for employment; and finally, the fact that a significant number of the other Analysts in the 2006 cohort were no longer working as Analysts five years later.

[332] I therefore conclude that it is fair and reasonable to exercise the Tribunal's discretion to award compensation for wages lost "as a result of the discriminatory practice"

pursuant to paragraph 53(2)(c) by imposing the following limits on the Complainant's compensation period for lost wages: The compensation shall be equal to what he would have earned, including the benefits to which he would have been entitled, as a Marine Security Analyst at the PM-04 group and level during the period from and including May 8, 2006 to and including May 7, 2011. The compensation shall include any raises he would have received pursuant to the applicable Collective Agreements. Any income he earned from employment during each of those years shall be deducted from the compensation.

O. Mitigation

[333] There was no dispute that it was appropriate for the Tribunal to take into account whether the Complainant had mitigated his losses in respect of wages. Both parties agreed on the principle that there should not be double compensation for lost wages.

[334] The evidence established that after the Respondent did not hire him in 2006, the Complainant never obtained indeterminate (full-time, permanent) employment in any government position, or full-time permanent employment in the private sector.

[335] The evidence established that in 2006 and 2007, the Complainant applied for positions with the Respondent and with other federal government departments, including HRSDC, where he obtained a temporary position in September 2007. I take into account that the Complainant's applications in the 2006-2007 competitions for TI-06 Inspector reflect efforts towards mitigation. I accept his testimony that he applied for many other positions, including with private temporary placement agencies, cruise ship companies, and others. He testified that he applied for hundreds of positions, and that looking for a job was a full-time job in itself.

[336] The Respondent submitted that the Complainant should have applied for the TI-06 Inspector selection processes of 2008, 2009 and 2010 (Exhibit R-15), given the Complainant's assertion at the Remedies hearing that he was qualified for the TI-06 Inspector position, and given his claim for instatement as a TI-06 Inspector.

[337] I note the Complainant's testimony that had he seen the 2008-2010 notices for the TI-06 positions, he would have applied for them. He also argued that no reasonable

person would have applied for the 2008-2010 processes after having been rejected three times, and being unable to gain the investigative experience they needed for the job

[338] The evidence established that the 2008 TI-06 Deployment Notice, which advertised Inspector opportunities, was only open to those employees in the Public Service who were at the same or equivalent levels as a TI-06 Inspector. I accept Ms. Domae's evidence that a deployment is similar to a transfer. There was no evidence presented regarding the date on which this Deployment Notice had been issued. Its closing was October 8, 2008.

[339] The Complainant stopped working for HRSDC on June 27, 2008. There was no evidence to establish whether his CR-04 group and level were similar or equivalent to those of TI-06. To apply, the Complainant's job classification with HRSDC would have had to be equivalent to TI-06, which was not established. Furthermore, his application would have had to be made no later than June 27, 2008, the day he stopped working for HRSDC. There was no evidence that he was eligible to apply. With respect to the 2008, 2009 and 2010 TI-06 Inspector competitions in Exhibit R-15, Ms. Domae testified specifically that the 2009 and 2010 competitions were combined, and that they were both internal and external postings. Should the Complainant have applied for these competitions?

[340] Even though he testified that he would have applied for these competitions, had he known about them, I find that by 2009-2010, the Complainant had not attained the investigative experience required for those positions. Notwithstanding his consistent assertion throughout the Remedy hearing that he was qualified for a TI-06 Inspector position, the Liability Decision had found him unqualified for the TI-06 competitions held in 2005, 2006 and 2007. I conclude that by 2010, nothing had changed in his qualifications to make him eligible for those competitions. In fact, the 2008 TI-06 Deployment Notice listed as an Asset Qualification the completion of a "Post-Secondary Certificate, Diploma or Degree". Although an Asset Qualification is not an Essential Qualification, and the evidence did not establish that this Asset was included in the 2008-2010 competitions, the fact remains that the Complainant did not possess the Asset, and this would have put him at a disadvantage in the competitions. This raises a further question as to the serious possibility of his having attained a TI-06 position in 2008, 2009 or 2010.

[341] I therefore conclude that the fact that he did not apply for the TI-06 Inspector positions in 2008-2010 does not by itself establish that he failed to mitigate his damages arising from wage loss.

[342] I find that it would have been difficult for the Complainant to obtain employment in 2009, given his eye operations which impeded his vision, and given his depression which he testified was exacerbated in 2008 and 2009. I make this finding notwithstanding the EI program's offer to potential employers to subsidize one half of his wages because of his significant barriers to employment. I also accept and find reasonable that, because of his back condition, he did not apply for jobs which required heavy lifting, construction work, or farm-related work.

[343] The evidence established that by April 2010, he was again employed part-time.

[344] The Complainant's only T4 for 2012 states an amount of less than $1,000 as income from employment. I find from this T4 that any employment income he earned in 2012 was negligible.

[345] I accept that he continued to apply for jobs, and find that he was partly successful, as reflected in his T4s for 2013 and 2014, which reflect part-time work for B.C.

[346] The evidence established that the Complainant did not obtain indeterminate employment in the nine-year period between the Respondent's discriminatory practice (2006) and the Remedies hearing (2015). The evidence also established that he had worked fairly continuously for CCRA, CRA and CBSA between 1995 and 2005, subject to his having to take a stress leave.

[347] I conclude that the evidence established that the Complainant made reasonable efforts to mitigate his damages on account of lost wages.

XII. Does Awarding Lost Wages and Instatement Constitute Double Recovery?

[348] I wish to state that this conclusion on lost wages and benefits is a separate and distinct remedy from the remedy of instatement to Analyst PM-04, ordered above. The two remedies are each based on different factual and legal considerations.

[349] I am mindful of the Court's finding in *Naraine, supra,* where the Board had concluded that Ford's liability to Mr. Naraine had "terminated" when he found comparable employment with another employer. The Court found that such a conclusion was inconsistent with the Board's order reinstating Mr. Naraine to a job at Ford (*Naraine, supra*, at para 71). I note that the Respondent did not put forward the argument that putting an end point to the link between the discriminatory act and lost wages was inconsistent with instatement – the Respondent's argument was based on the concept that the Tribunal ought to avoid double compensation by taking into account an amount of money received by the Complainant pursuant to the Minutes of Settlement, and the Respondent submitted that for reasons previously set out, the Complainant should not be instated into either the Analyst or Inspector positions.

[350] The limits imposed on the award of compensation for lost wages and benefits in the within Remedies Decision are not grounded on the basis that this award "terminates" the Respondent's liability towards the Complainant, notwithstanding that the Complainant found temporary positions in 2007 and 2010. Rather, it is grounded on the basis that the *Act* restricts compensation for lost wages to those that were denied the victim as a result of the discriminatory practice. It is my conclusion that the Complainant's level of income five years after his denial of the PM-04 position was no longer "as a result of" the Respondent's discriminatory practice.

[351] What *is* a continuing and direct result of the Respondent's discriminatory practice is the loss to the Complainant of the indeterminate position of Marine Security Intelligence Analyst, now Intelligence Analyst. It is undisputed that the discriminatory practice did not merely deprive the Complainant of an opportunity to compete for the job. Rather, but for the discrimination, the Complainant would have obtained the job itself.

XIII. Other Compensation and Benefits

A. Analysis re Overtime

[352] The Complainant seeks $225,000 compensation for lost Overtime pay for the period May 8, 2006 to August 31, 2015. In this Decision, "Overtime" means anything over

and above the regular 37.5 hour work week, and includes overtime, week-end premiums and shift premiums.

[353] There was no dispute that PM-04 Analysts and TI-06 Inspectors worked Overtime. There was a dispute about the amount of Overtime pay the Complainant would have earned. The Complainant's and Ms. Domae's evidence differed considerably in respect to how much Overtime an Analyst would work.

[354] I accept the Complainant's testimony that at CRA, he never refused overtime, and that he would have done the same at Transport Canada. I note that the Complainant candidly testified, and acknowledged in his written estimates, that he would have worked less Overtime for part of 2008 because of his eye operations.

[355] Ms. Domae testified that the Respondent offered Overtime to those available and willing to work, and that the Analysts had worked Overtime, especially during the 2008 to 2010 lead-up to the Olympics. This evidence established that the overtime situation for the Analysts in the MSOC was different than it had been at the Complainant's previous employment at CRA and CBSA. He testified that his colleagues at CRA did refuse Overtime. However, had he been hired at the MSOC, his Analyst colleagues would have also worked Overtime. Therefore, I conclude that the Complainant would not have been the only Analyst—or one of very few Analysts—working Overtime. As a result, he would not have made as much money in Overtime as he estimated in Document C-11 and in his testimony.

[356] The Complainant's method for calculating Overtime for the years 2008 and onward was to refer to Employee E's record of income from employment (T4), compare it to what E's salary would have been in the relevant Collective Agreements, and assume that anything above that salary was Overtime. I do not accept that analysis, because the evidence did not establish on the balance of probabilities that it was correct. I find that it is not correct, because Ms. Domae testified that in 2012, Employee E was paid a lump sum of $60,000 as part of her voluntary workforce adjustment layoff package. Ms. Domae testified that this lump sum was reflected in E's 2012 T4, which shows income from employment in the amount of $94,332.93 (Exhibit C-20).

[357] I conclude that the Complainant's calculation that Employee E earned $28,000 in Overtime in 2012 is not established, and that the amount of Overtime, if any, which Employee E earned in 2012 is not ascertainable from the T4. I find that this uncertainty also casts enough doubt on the Complainant's other Overtime calculations, such that it cannot be said that the evidence established, on the balance of probabilities, that they were correct.

[358] The Respondent had no Analyst T4s for 2006 and 2007 to provide the Complainant. The Complainant testified that to calculate Overtime for those two years, he assumed the Respondent had been short-staffed, and therefore estimated the amount of Overtime as $25,000 and $30,000 respectively. Ms. Domae's testimony did not specify potential overtime earnings in 2006 and 2007. She did testify that the average amount of Overtime for Analysts during the several years prior to the hearing had been between $3,000 and $7,000, and that for the years 2008 to 2010, in the lead-up to the Olympics, Overtime had increased to between $10,000 and $12,000 per year.

[359] The $10,000 to $12,000 per year figure reflected an increase in Overtime pay. I find it was a significant increase. Therefore, I find that the Complainant's estimates of Overtime pay in 2006 and 2007 were not reasonable, because they were at least twice the amount of the upper range of average earnings in the years 2008 to 2010, according to the Respondent's evidence.

[360] I have taken into account the following considerations: the Complainant's testimony that he worked Overtime whenever CRA offered it to him; the fact that he could not have worked as much Overtime in 2008 because of his eye operations; and, Ms. Domae's testimony outlining the parameters of the average Overtime worked by Analysts. I conclude that it is reasonable to attribute to the Complainant the higher amounts of average Overtime earnings, within the range to which Ms. Domae testified. From this should be deducted $3,000 in 2008 and $2,000 in 2009, on account of the Complainant's recuperation and recovery from his eye operations. I find that his capacity to work Overtime during this recuperative and recovery period would have been diminished.

[361] There was no evidence led at the Remedies hearing about any Overtime the Complainant earned with other employers during the compensatory period. I conclude that the Complainant is entitled to $46,100 as compensation for lost Overtime wages as a result of the Respondent's discrimination. The attribution of this award in respect of each year is as follows:

2006 (prorated May 8 – Dec.31: $ 4,800;
2007: $ 7,000;
2008: $ 9,000;
2009; $10,000;
2010: $12,000;
2011: (prorated Jan. 1 – May 7): $ 3,300.

B. Compensation for Medical and Dental Expenses

[362] The Complainant argues that but for the discrimination, he would have had health, dental and medical benefits coverage as of May 2006, when he should have been appointed to the Analyst position. He specifically seeks reimbursement of the medical, dental and other health expenses in Exhibit C-19**.**

[363] He also seeks an order that the Respondent reimburse him for any such expenses he may incur between the end date of the claims he made for health, dental and medical expenses in Document C-11, and the date of his integration into the Public Service's medical and dental plans.

C. Analysis

[364] The Complainant testified that while he was married, his health, medical and dental expenses were submitted to his wife's insurer, who reimbursed 100% of those expenses. The evidence did not establish the date of marriage, and did not establish the precise date of separation or divorce, although the Complainant's testimony was that his marriage broke down in late 2011. Therefore, I will leave it to the parties to attempt to come to an agreement as to the medical, dental and health coverages the Complainant would have

been entitled to as a PM-04 Analyst during the period May 8, 2006 to May 7, 2011. The Tribunal retains jurisdiction, and if the parties cannot agree, either party may notify the Tribunal in writing, within 90 days of the date of this Remedies Decision, in the same manner as set out regarding leave entitlement, and as set out in the orders below.

[365] I find that the Complainant incurred all the medical and dental expenses documented in Exhibit C-19 after May 7, 2011. Based on my finding above, there is no causal connection between the Respondent's discriminatory practice and expenses incurred personally by the Complainant after that date. His inability to obtain coverage for them was not as a result of the Respondent's discriminatory practice. The Tribunal dismisses this claim.

Compensation for Expenses related to Re-financing of the Complainant's Home

[366] The Complainant seeks reimbursement of expenses incurred on account of the re-financing of his home in 2012 and 2013, and on account of real estate commission and legal fees paid in relation to the refinancing and the sale of his matrimonial home in 2014.

D. Respondent's position

[367] The Respondent argued that there was an insufficient causal link between the discrimination and the expenses the Complainant incurred associated with the mortgage refinancing and the sale of the matrimonial home.

E. Analysis

[368] I find that the Complainant's 2012 and 2013 re-financings of the mortgage on his matrimonial home did not result from the Respondent's 2006 discrimination. In the interim, he had made unfruitful job applications, worked at other temporary positions, and had experienced vision limitations which had had nothing to do with the Respondent, and which had negatively affected his finances. The sale of the matrimonial home in 2014 was a personal financial decision, and may have also related to the marriage breakdown. The evidence has failed to establish that these expenses resulted from the Respondent's

discriminatory practice. These financial events occurred after the end-point of the wage loss compensation period decided above. To the extent that they may have been caused in part by the Complainant's diminished earning capacity in the period 2006 to 2011 (as opposed to the discriminatory practice itself), this loss has already been compensated by the lost wages award. Section 53 of the *Act* authorizes the Tribunal to compensate the victim of the discriminatory practice of the wages the victim was deprived of, but not for the items that these wages would have been spent on. The Tribunal dismisses these claims.

F. Payment for the cost of an actuary/accountant to calculate gross-up

[369] The Complainant submitted that the Respondent be ordered to pay the costs of an accountant or actuary, who would calculate the amount of the gross-up payment he sought from the Respondent. The gross-up payment would compensate the Complainant for any negative tax consequences resulting from his receipt of several years' worth of lost wages and lost Overtime and other payments in one lump sum. In most cases, however, the Tribunal expects the payor to do the necessary calculations, at the payor's expense (for example, *Chopra, Tribunal*, para. 52). I conclude that the appropriate order is according to the *Chopra* model, and is reflected in the order below

G. Retroactive Pension Adjustment

[370] The Complainant's testimony established that he withdrew his CCRA/CRA pension in December 2006, in order to be able to access funds from it if necessary, because he felt he would have difficulty finding employment. He testified that he would not have done so had Transport Canada hired him in May 2006. His testimony was that had he been hired in May, 2006, as he should have been, his Pension would have been transferred to the Respondent and would have continued to grow undisturbed from 2006 to 2015, in accordance with the Collective Agreement. Therefore, he lost that Pension growth.

[371] Although I recognize that the Respondent's discriminatory practice occurred in May 2006, and that the Complainant withdrew his Pension in late December 2006, temporal proximity does not by itself establish a causal connection to a discriminatory practice. I find

that the Complainant's accessing of his pension resulted from his own voluntary and independent financial decision. I also take into account that he received the benefit of the pension monies he took out. I therefore conclude that there was an insufficient causal link between his accessing the Pension and the Respondent's discriminatory practice in not hiring him as an Analyst. The Tribunal dismisses this claim.

H. Vacation Leave, Sick Leave, Bereavement Leave, Volunteer Leave and Family Leave

[372] The Collective Agreements establish that the Complainant would have been entitled to statutory holidays (which may have impacted on the Complainant's sick leave entitlement, sick leave, vacation leave, bereavement leave, volunteer leave and family leave had he worked as an Analyst PM-04. I leave it to the parties to negotiate and agree upon a resolution of the Complainant's leave claims, based on the Complainant's wage compensation period of May 8, 2006 to May 7, 2011, as an Analyst at the PM-04 group and level. The Tribunal retains jurisdiction, and in the event the negotiations are not successful, either party may seek adjudication of the leave claims by the Tribunal, in accordance with the order below.

I. Confidentiality Order – Claim for Compensation in respect of Pain and Suffering

[373] At the Remedies hearing, the Complainant requested that a small portion of his testimony on pain and suffering be kept confidential. The Respondent took no position as to whether this testimony could be mentioned in the Remedies Decision, but assumed that the Tribunal would take it into account.

[374] Section 52 of the *Act* provides that inquiries shall be conducted in public. However, paragraph 52(1)(c) of the *Act* authorizes a Member to issue orders to ensure the confidentiality of the inquiry, if the Member is satisfied that,

> "there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the

> need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public..."

I am satisfied that disclosure of one particular portion of the Complainant's testimony at the Remedies hearing would cause him undue hardship, and that the harm it would do outweighs society's interest in that part of the inquiry being conducted in public. The testimony in question appears in Schedule "A" of this decision, marked Confidential, and although it forms part of this Remedies Decision, it shall not be published.

J. Pain and suffering

[375] The Complainant seeks the maximum award of $20,000 under paragraph 53(2)(e) of the Act, which provides that the Tribunal can order the person found to have engaged in the discriminatory practice to compensate the victim "…for any pain and suffering that the victim experienced as a result of the discriminatory practice."

The Complainant's position

[376] The Complainant submitted that he had received all the selection process documents, and that only the Complainant's assessment had contained erasures.

[377] The Complainant's testimony was that his depression became worse after the Respondent's discrimination. He hardly went to the gym, gained weight, and began isolating himself from family and friends. The actions of the Respondent had devastated the Complainant.

[378] The Complainant cited several cases as precedents for the Tribunal ordering compensation for pain and suffering at the higher ranges or highest amounts. This Decision refers to only those cases that are considered relevant.

[379] In *Douglas v. SLH Transport Inc.,* 2010 CHRT 1, the employer had terminated Mr. Douglas as he waited to obtain knee surgery. This sudden termination was a cruel blow for a person with a history of anxiety problems. It caused him to suffer anguish, depression and despair. The Tribunal awarded $15,000.00 for pain and suffering (para. 79). In the

Complainant's submission, similar factors were present in the within case: he had experienced an even more extreme form of discrimination and the result was even more acute than it was in the case of Mr. Douglas.

[380] *Stringer v. Treasury Board (D.N.D.) and Deputy Head (D.N.D.),* 2011 PSLRB 110 was an adjudication under the Public Service Labour Relations Act, which grants adjudicators the authority to interpret and apply the *CHRA.* They can therefore order damages for pain and suffering and special compensation. The Complainant noted that the *Stringer* case contained a very good summary of the applicable law, and that it included a lot of CHRT decisions. At para 27, *Stringer* made reference to the decision in *Pepper v. Deputy Head (D.N.D.),* 2008 PSLRB 71. At para 30, *Stringer* made reference to *Johnstone v. Canada (C.B.S.A.)* 2010 CHRT 20, and at para. 35 it mentioned *Hughes v. Elections Canada*, 2010 CHRT 4. The Complainant submitted that his case was similar to the *Johnstone* case as well as to the case of *Richards v. C.N.R.* 2010 CHRT 24, discussed at para 34 of *Stringer.* In *Johnstone* and *Richards*, relatively high amounts were awarded.

[381] In *Warman v. Kyburz*, 2003 CHRT 18, the Tribunal discussed compensation for pain and suffering at paras. 106–110. The circumstances were different from the within case, but the kind of impact experienced by Mr. Warman was similar to that experienced by the Complainant, in the sense that he was concerned for himself, and felt effects on his day-to-day life. The way the impacts continued to affect Mr. Warman in his case was similar to the experience of the Complainant in the within case.

[382] The Complainant emphasized that the Respondent's discrimination had had an extreme impact on him. The first impact was the fact of the discrimination, and the second arose from finding out that he had been discriminated against.

The Respondent's Position

[383] The Respondent submitted that the "VG" was a preliminary comment, which ultimately would result in a numerical score following a reference check. The numerical score was based on the answers and the reference checks, which verified the candidate's

initial answer. This fact emerged from the testimony of Sonya Wood. The Respondent submitted that the numerical score was the key score. All the applications had contained pencilled-in annotations throughout, such as “VG” and “NG”. The Complainant’s application was merely one of these. Further, there was no evidence presented, either at the Liability or Remedies Hearings, that the erasure of this annotation was done deliberately. The evidence was that the files and rating guides were working documents, handed back and forth among a lot of people, and that there was no explanation that pinpointed how the erasure had occurred. The Respondent also submitted that had it wanted to cover up discrimination, it could have gotten rid of the Complainant’s application altogether. The Liability Decision still found that notwithstanding the “VG” erasures, the Respondent’s discrimination was indirect or unintentional discrimination. This finding should reduce the pain and suffering award to less than the $20,000 which the Complainant sought.

[384] The Respondent also submitted that in deciding compensation for pain and suffering, the Tribunal should take into account the fact that the Complainant had filed other human rights complaints against other federal bodies, including a simultaneously filed complaint against the CBSA, which addressed a time period before the period in the within Complaint (Exhibit R-6).

K. Analysis of the Compensation Claim for Pain and Suffering

[385] Subsection 53(2)(e) of the *Act* authorizes the Tribunal to award compensation “…for any pain and suffering that the victim experienced as a result of the discriminatory practice.”

[386] The evidence established that the Complainant had made other complaints against other respondents who had employed him, covering time periods both before and after the Respondent’s discriminatory practice in the within case.

[387] The Complainant had significantly less income as a result of the Respondent’s discriminatory practice of not hiring him as an Analyst, and I accept that this and the attendant litigation would have put a strain on his marriage. His testimony that this caused

his marriage to break down in late 2011 was not challenged, and I accept his testimony. It was evident from his testimony that this caused the Complainant grief and sadness, and negatively impacted his depression.

[388] The Complainant experienced considerable pain and suffering. I find that from the perspective of the Remedy Hearing, there was a certain amount of overlap between the pain and suffering arising from the Respondent's 2006 discriminatory practice and the pain and suffering arising from HRSDC's 2008 discriminatory practice. I find this to be a discounting factor in my assessment of the Complainant's claim under paragraph 53(2)(e).

[389] However, the pain and suffering resulting from the Respondent's discrimination was sustained afresh in 2013, when the erasure of the "VG" ("Very Good") annotation was discovered at the Liability Hearing. The erased "VG" related to the qualification which the Complainant had been told he had failed to meet – detail oriented - resulting in the Respondent not hiring him as an Analyst. The evidence at the Liability hearing and at the Remedy hearing did not establish how and why the "VG" had been erased, and that may never be known. But the undisputed fact is that it happened.

[390] The Complainant's testimony described how, after he was not appointed as an Analyst, his depression became worse. This, combined with how the fresh revelation of the erased "VG" at the 2013 Liability hearing affected him, and his profound depression and distress about his situation in November 2014, leads me to conclude that an award of $15,000 is appropriate for the pain and suffering the Complainant experienced as a result of the Respondent's discriminatory practice. In making this award, I have taken into account that part of the depression and distress manifested by the Complainant's evidence was a result of HRSDC's discriminatory practice.

L. Special Compensation

[391] Subsection 53(3) of the *Act* states:

> "In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or

panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly."

M. Did the Respondent engage in the discriminatory practice wilfully?

Complainant's position

[392] The Complainant submitted that the erasure of the "VG" annotation represented some obvious deliberateness, and amounted to a "cover-up" of the discrimination that was only discovered at the 2013 Liability hearing, at which time the Respondent had provided the original document. Mr. Lavers, the selection board chair for the Analyst competition, had known about the Complainant's depression, and had used a neutral reference to give the Complainant a failing mark on the criterion of being detail-oriented, notwithstanding that the Complainant's answers at his interview had been considered "Very Good" and should have elicited a high mark. The failing mark had cost the Complainant the Analyst position.

Respondent's position

[393] The Respondent opposed the Complainant's request for compensation based on wilful or reckless discrimination. Compensation for wilful and reckless conduct focused on a respondent's conduct, not on the damage a complainant suffered. The only finding in the Liability Decision was that the discrimination was indirect or unintentional. Therefore, in the Respondent's view, there was no wilful or reckless discrimination, and the Complainant was not entitled to any special compensation.

Analysis

[394] The testimony about the "VG" erasure was mainly heard during the Liability Hearing. The Tribunal in the Liability Decision found the "VG" Erasure to constitute "additional circumstantial evidence" of discrimination, and "…found this situation as being troubling with respect to the facts of the case." (*LD*, at para 240).

[395] A finding of wilfulness in a discriminatory practice requires an element of intent (*Canada (Attorney General) v. Johnstone*, 2013 FC 113 (*Johnstone, FC*), at para. 155, var'd on other grounds, 2014 FCA 110.

[396] In paragraph 253 of the Liability Decision, the Tribunal found that "…albeit indirectly or unintentionally, the case for discrimination was established…" in the Analyst competition. The Member made this finding even though he had found the circumstances of the "VG" erasure "troubling" (*LD*, at para 240).

[397] The Member at the Liability hearing was in the best position to assess the witnesses at that hearing, and the credibility of their testimony. Those witnesses included Mr. John Lavers and Ms. Sonya Wood, who had been directly involved in the Analyst selection process. I therefore conclude that the Tribunal's finding in the Liability Decision that the Respondent's discrimination was unintentional precludes a finding in the Remedy Decision that the Respondent wilfully engaged in the discriminatory practice.

N. Did the Respondent engage in the discriminatory practice recklessly?

[398] The Complainant submitted the following in support of a finding of recklessness:

[399] At the Liability hearing, Respondent witness Ms. Woods accepted that the "VG" erasure had occurred, but could not explain it. The issue of the "VG" erasure in relation to the attention to detail criterion was significant for the claim of special compensation, because it demonstrated recklessness.

[400] The Complainant had been trying to give information to Mr. Lavers about his qualifications and experience, particularly about his being detail-oriented, and had had trouble getting references, but eventually got a reference from Mr. Bill DiGiustini. At around the same time, the Complainant disclosed his disability to Mr. Lavers, chair of the selection board. When Mr. Lavers asked Mr. DiGiustini whether Mr. Hughes was detail-oriented, Mr. DiGiustini could not comment, and provided a basically neutral reference regarding this criterion. However, Mr. Lavers failed the Complainant on this criterion on the basis of the DiGiustini reference. The Complainant maintained that there had been lots of evidence at the time to show that the Complainant was detail-oriented. He had submitted a package of

information to show that he was, and there was a note therein that pointed to detail-oriented behaviour. The Complainant characterized Mr. Lavers' actions as reckless. He submitted that his case was similar to *Johnstone (supra)* and *Richards (supra)* , where relatively high amounts were awarded for wilful and reckless discrimination. The Complainant observed that the Tribunal had historically exercised its discretion to award the maximum amount in the most egregious of cases (*Premakumar v. Air Canada*, 2002 CanLII 23561, para. 107).

Analysis

> "Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly." (*Johnstone, FC, ibid)*.

[401] The Tribunal in the Liability Decision found that Ms. Wood had "brushed aside" all the Complainant's documents which contained various comments demonstrating some aspects of the Complainant's capacity to be detail-oriented (*LD*, at para. 249). The Tribunal also found that the selection board chair, Mr. Lavers, did not question why people who had previously provided good references for the Complainant were subsequently refusing to provide references for the PM-04 Analyst position (*LD*, at para. 228). The Tribunal found that Mr. Lavers "…did not conduct a comprehensive and careful analysis of all the documentation provided by the complainant…allowing him to understand that the complainant did meet the detail-oriented criterion." (*LD*, at para. 251) The Tribunal further found that "…Mr. Lavers could have most certainly done more and have been more receptive to the documentation provided by the complainant." (*ibid*) The Liability Decision earlier stated at paragraph 241:

> "Again, the Tribunal has difficulty explaining the selection board's behaviour, particularly after Sonya Wood in an email dated February 7, 2006…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 …an application."

[402] The Tribunal also referred to Ms. Wood's emails advising Mr. Lavers to rely on all useful information in assessing candidates. The Tribunal noted that despite all the documents the Complainant had provided to him, "…[t]he evidence showed that Mr.

Lavers expressed his preference to communicate with persons directly rather than to refer to the documents provided to him." (LD, at para 225).

[403] The above behaviour, when taken together, establishes that the Respondent disregarded and showed indifference to the consequences of its actions. As such, it engaged in the discriminatory practice against the Complainant recklessly.

[404] However, the evidence did not establish that the Respondent's recklessness rose to the level of CBSA's conduct in *Johnstone, supra*, where that party had ignored a previous Tribunal order regarding similar issues of discrimination.

[405] I conclude that it is appropriate that the Respondent pay the Complainant $5,000 compensation for its reckless conduct in discriminating against him.

O. Interest

[406] Subsection 53(4) of the *Act* states:

> "Subject to the rules made under section 48.9, an order to pay compensation under this section may include an award of interest at a rate and for a period that the member or panel considers appropriate."

[407] It is appropriate that the Respondent pay interest to the Complainant on the compensation ordered in this Remedies Decision. The Respondent shall pay the Complainant interest accruing from May 8, 2006 to the date of payment, in accordance with the order below.

XIV. Retention of Jurisdiction Orders

[408] It is the Tribunal's expectation that the parties will attempt to negotiate the resolution of any dispute that may arise in connection with the remedies ordered. That said, the Tribunal hereby retains jurisdiction to decide any dispute that may arise with respect to the quantification or implementation of any of the remedies ordered. A party seeking the Tribunal's adjudication of the foregoing must serve and file a notice to this effect no later than one year following the date of the present Remedies Decision.

[409] It is also the Tribunal's expectation that the parties will attempt to negotiate and agree on the resolution of the Complainant's bereavement leave, sick leave, statutory holiday, vacation leave, family leave, volunteer leave and medical, dental, pharmaceutical and other health-related claims applicable during the wage compensation period of May 6, 2006 to May 7, 2011. If the parties cannot agree on the resolution of the foregoing leave and health-related claims, the Tribunal retains jurisdiction to decide any dispute that may arise with respect to these claims. A party seeking the Tribunal's adjudication of the foregoing claims must serve and file a notice to this effect no later than 90 days following the date of the present Remedies Decision.

XV. Confidentiality Order pursuant to section 52 of the *CHRA*

1. The Minutes of Settlement, being Exhibit R-9, shall not be disclosed except as required by the *Federal Courts Act* or the *Federal Courts Rules*. The Registry shall keep confidential the Minutes of Settlement, and store them in a sealed envelope marked "Confidential".

2. The Registry shall keep confidential Schedule "A", attached hereto, and store it in a sealed envelope marked "Confidential";

3. The Registry shall not publish Schedule "A" on the Tribunal's website;

4. Schedule "A" shall not be disclosed except as required by the *Federal Courts Act* or the *Federal Courts Rules.*

5. The Tribunal's Registry shall keep confidential the Tribunal's audio recording of information relating to Exhibit R-9 and Schedule "A" (Confidential Recording). The Confidential Recording shall not be disclosed except as required by the *Federal Courts Act* and the *Federal Courts Rules*.

6. Where it is not practicable to sever the Confidential Recording from the remainder of the audio recording, the entire audio recording shall be treated as confidential in accordance with the above, and identified as such.

7. Where it is practicable to sever the Confidential Recording from the remainder of the audio recording, the severed portion shall be treated as confidential in accordance with the above, and identified as such.

XVI. Remedial Order pursuant to s. 53 of the *CHRA*

1. The Respondent shall instate the Complainant, subject to the required security clearance, on the first reasonable occasion, and without competition, to the position of Intelligence Analyst at the PM-04 group and level classification, with all attendant employment benefits. The location of the position will be Esquimalt, British Columbia, or Vancouver, British Columbia, provided the Complainant is willing to relocate.

2. Immediately after the Complainant's instatement into the PM-04 Intelligence Analyst position, the Respondent shall provide training to the Complainant appropriate to the position, having regard to the passage of time since the discriminatory practice.

3. The Respondent shall pay to the Complainant compensation for lost wages (excluding Overtime), which the Complainant would have earned as a Marine Security Analyst at the group and level of PM-04, during the period May 8, 2006 to May 7, 2011, including any wage rate increases in accordance with the relevant Collective Agreements, and subject to all usual deductions for an indeterminate employee.

4. From the award in paragraph 3 of this Remedial Order, the Respondent shall deduct an amount equivalent to the Complainant's employment income for each year of the period.

5. The award of compensation for lost wages is subject to the parties' obligations under ss. 45 and 46 of the *Employment Insurance Act.*

6. The Respondent shall contribute all amounts which the Respondent would have contributed to all Pension plans to which the Complainant, as an indeterminate employee, would have subscribed to, for the period May 8, 2006 to May 7, 2011.

7. The Respondent shall pay the Complainant the amount of $46,100 in compensation for lost Overtime wages during the period May 8, 2006 to May 7, 2011, subject to any standard deductions for these kinds of wages.

8. The Respondent shall pay to the Complainant, a gross-up amount sufficient to cover any additional income tax liability arising from the order for the Respondent to pay the Complainant in a lump-sum, regular wages, Overtime and any taxable benefits that he would have otherwise earned over the period May 8, 2006 to May 7, 2011.

9. Pursuant to s. 53(2)(e) of the *Act*, the Respondent shall pay to the Complainant the amount of $15,000, as compensation for pain and suffering resulting from the discriminatory practice.

10. Pursuant to s. 53(3) of the *Act*, the Respondent shall pay to the Complainant the amount of $5,000.00, as compensation for the Respondent's reckless engagement in the discriminatory practice.

11. Pursuant to s. 53(4) of the *Act*, and Rule 9(12) of the Tribunal's Rules of Procedure**,** the Respondent shall pay the Complainant interest on the compensation ordered, accruing from May 8, 2006 to the date of payment. This interest shall be simple interest, calculated on a yearly basis, at a rate equivalent to the Bank of Canada rate (monthly series) set out by the Bank of Canada. In no case shall the accrual of interest on awards made under subsection 53(2)(e) or 53(3) result in a total award that surpasses the statutory maximums therein prescribed.

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
June 1, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1656/01111

Style of Cause: Chris Hughes v. Transport Canada

Decision of the Tribunal Dated: June 1, 2018

Date and Place of Hearing: August 10 to 12, 2015

Victoria, British Columbia

Appearances:

David Yazbeck, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Kevin Staska and Malcolm Palmer, for the Respondent