Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 23
Date: May 29, 2019
File Nos.: T1726/8111 & T1769/12411

Between:

Chris Hughes

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canada Border Services Agency

Respondent

Decision

Member: George E. Ulyatt

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I. OVERVIEW

[1] Chris Hughes (the "Complainant") filed two complaints. The first one was against the Canada Border Services Agency ("CBSA") and its predecessor, Canada Customs and Revenue Agency ("CCRA"). He filed it on January 19, 2005, and alleged age-based discrimination in the context of employment in accordance with s.7 and s.10 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, (the "*Act*"). The second one was filed on December 19, 2008, and was against CBSA only. He alleged discrimination based on age and disability, contrary to s.7 and s.10 of the *Act*. Since both complaints referred to the same competitions and discussed the same events, the Complainant asked for them to be heard jointly.

[2] The Complainant's complaint is based upon s.7 and 10 of the *Act* which state:

> **Employment**
>
> **7** It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.

[3] Section 10 of the *Act* forbids the establishment of hiring practices or policies that deprive a class of individuals of employment opportunities. Section 10 states:

> **Discriminatory policy or practice**
>
> **10** It is a discriminatory practice for an employer, employee organization or employer organization
>
> (a) to establish or pursue a policy or practice, or
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[4] The Complainant argues that the Respondent discriminated against him in a series of hiring competitions for Customs Border Inspector (CBI) and Border Services Officers (BSO) in the above time frame. He alleges that between 2001 and 2006, he was passed over for indeterminate employment in favour of younger candidates, mainly those under 35 years of age, and that he was also discriminated against because of his mental disability and/or perceived disability. He alleges that CBSA contravened to s.10 of the *Act*, which prohibits discriminatory practices and policies "that deprives or can deprive an individual or class of individuals opportunities on a prohibited ground of discrimination" and s.7, which makes it a discriminatory practice to refuse to employ or continue to employ any individual or to differentiate adversely in the course of employment.

II. ISSUES AND LEGAL FRAMEWORK

[5] There were two issues to determine in the Complainant's allegations:

a) Did the Respondent discriminate against the Complainant on the basis of a disability or perceived disability; and

b) Did the Respondent discriminate against the Complainant on the basis of age?

[6] The parties have agreed that if the answers to the questions are in the affirmative they shall be referred to a Remedial Hearing.

[7] There is no question that the grounds of age and disability are both prohibited grounds under s.3 of the *Act*.

[8] It is accepted law that in a claim of discrimination, the Complainant bears the initial onus of establishing a *prima facie* case of discrimination. A *prima facie* case is "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer." (*Ontario Human Rights Commission and O'Malley v.*

Simpsons-Sears, [1985] 2 SCR 536 at p. 558). As explained in *Stanger v. Canada Post Corporation,* 2017 CHRT 8 at 12, this is a three-prong test:

> To demonstrate *prima facie* discrimination in the context of the *CHRA*, complainants are required to show: (1) that they have a characteristic or characteristics protected from discrimination under the *CHRA;* (2) that they experienced an adverse impact with respect to a situation covered by sections 5 to 14.1 of the *CHRA*; and, (3) that the protected characteristic or characteristics were a factor in the adverse impact (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33; *Siddoo v. I.L.W.U., Local 502*, 2015 CHRT 21, para. 28). The three elements of discrimination must be proven on a balance of probabilities (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)* ("*Bombardier*"), 2015 SCC 39 at paras. 55-69).

[9] Moreover, "it is not necessary that a prohibited ground or grounds be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that a prohibited ground or grounds be one of the factors in the actions in issue" (*First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada*), 2016 CHRT 2, at 25, see also *Holden v. Canadian National Railway Co.*, (1991) 14 C.H.R.R. D/12 (F.C.A.) at para. 7; and, *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 (CanLII) at paras. 44-52 [*Bombardier*]).

[10] It is also accepted that a "subtle scent of discrimination" is sufficient to determine that there was discrimination. This quote is often used before the courts and tribunals and the Tribunal is mindful of this. However, the Complainant must sufficiently explain the nature and extent of the problem to allow the Respondent to address and attempt to solve the issue of accommodation. (See the Respondent's factum at page 13, *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 SCR 970).

[11] It is clear that the law is such that the Complainant need not prove the Respondent's intentions to discriminate in order to establish a *prima facie* case (*O'Malley,* supra, para 14).

[12] If the complainant meets his onus, the Respondent can either try to refute the allegations of *prima facie* discrimination, or establish, on the balance of probabilities, a defence based on a *bona fide* occupational requirement (*Bombardier*, paras. 35-37, 55-56). It is trite law that the refutation cannot be based upon a simple pretext.

III. PROCEDURES BEFORE THE TRIBUNAL

[13] This was a very unusual case. A complaint was filed on July 7, 2009, and a second one was filed on December 19, 2011. They were both referred jointly to the Tribunal by the CHRC since the Complainant asked for the complaints to be heard together. The hearing commenced on June 23, 2015, and was adjourned due to the late production of medical evidence by the Complainant. The hearing resumed on April 4, 2016, almost a year later.

[14] Since this matter was referred to the Tribunal in June 2012, there were motions for disclosure, motions for redaction of documents, and numerous case law filings, filed by both parties. The CHRC decided not to participate in this case.

[15] At the end of the Respondent's case the Complainant brought a motion to call reply evidence with respect to new evidence, which he alleged could not have been anticipated. Ultimately, the Complainant was allowed to call limited reply evidence.

[16] Final written submissions were filed by the Complainant on July 4, 2017, and the Respondent filed their submissions on September 21, 2017.

[17] The Tribunal was surprised that in the Complainant's written submissions, there was no reference to the issue of his alleged medical disability or to the medical evidence presented at the hearing.

[18] The Respondent, in their submissions, addressed the issue of disability, alleged disability, the medical evidence, as well as age discrimination.

[19] Furthermore, on October 5, 2017, the Complainant filed a reply submission addressing his diagnosis, medical illness, and doctor's reports to support same.

[20] What was concerning was the fact that the Complainant, in his reply submissions, asserted that the Respondent had never, until his written submissions, taken issue with the Complainant having a disability.

[21] This is simply not true.

[22] A brief analysis needs to be done:

a) In paragraph 82 of the Respondent's Statement of Particulars there is a specific denial of a disability.

b) The issue of disability arose during the first few days of the hearing. At that time the Complainant was adducing into evidence medical reports to deal with that issue.

c) The Complainant brought a motion on March 24, 2016, for:

    i. An order declaring that the Respondent, Canada Border Services Agency, is prohibited from objecting to the fact that the Complainant has a disability;

    ii. An order declaring that Canada Border Services Agency has in fact accepted that Mr. Hughes has a disability;

    iii. That, in light of points 1 and 2 above, Mr. Hughes only needs to provide evidence regarding his disability in the form of his own testimony as well as the medical information supplied to him by his physicians; and

    iv. Such further and other relief as counsel may advise and the Tribunal may permit.

[23] The Tribunal, on April 4, 2016, delivered an oral decision which dismissed the Complainant's motion and stated beginning at page 314 of the transcript:

> The Tribunal has been advised by counsel for the Respondent and the Complainant that all medical evidence has been provided by the Complainant in September 2015, some six months ago.
>
> There has been no objection by the Respondent to these (inaudible) after this juncture, nor has there been any request from the authors of these reports being produced.
>
> At the conclusion of the hearing in June 2015 there was a (inaudible) between Mr. Yazbeck and Mr. Stark where Mr. Yazbeck inquired as to

whether or not the Respondent objected or was denying the client Mr. Hughes was disabled.

Subsequently Mr. Yazbeck followed up letters to Mr. Stark by letters of June 30, 2015; a second of June 2015; February 8th, 2016, which is found in the Complainant's Motion's Brief dated March 24, 2016, at Exhibit D.

Mr. Stark responded to this correspondence by way of a letter of February 22nd, 2016, wherein he stated: "Thank you for your letter dated February 8, 2016, in which you inquired as to whether the Respondent takes issue with the fact of Mr. Hughes' disability. This inquiry is a little unusual in review since the burden is on the Complainant to establish a *prima facie* case of discrimination, an essential component of which is that he establish he had a disability at all material times. If the reason for your inquiry is to ask whether the Respondent's prepared to make an admission in this regard, then we can advise that the answer is in the negative."

The Tribunal as a result of the correspondence and the history of the complaint directed that if there were any further objections, motions must be brought by March 24th, 2016.

The Complainant brought a motion on that date wherein he sought relief for:

One: an Order declaring that the Respondent Canada Border Services Agency is prohibited from objecting to the fact that the Complainant has a disability.

Two: an Order declaring that Canada Border Services Agency has in fact accepted that Mr. Hughes has a disability.

Three: that in light of points one/two above Mr. Hughes need only produce evidence regarding his disability in the form of his own testimony as well as the medical information supplied to him by his physicians.

As a result of that there were two issues that were identified being at page 205 of the Complainant's material: Is Respondent prohibited from objecting to the fact of Mr. Hughes' disability? And is it necessary to have physicians (ph) testify to the nature of Mr. Hughes' disability?

The Respondent and Complainant disagree on what has been agreed and what has disagreed in the proceedings.

I think it is important to examine that the authority of this Tribunal is found within the *Canadian Human Rights Act* and I refer the parties at 48.1(1) that: "There is hereby established a tribunal to be known as the Canadian Human Rights Tribunal consisting, subject to subsection (6), of a

maximum of fifteen members, including a Chairperson and a Vice-chairperson, as may be appointed."

Section 48(9) "Rules of Evidence: In conducting an inquiry, the judge is not bound by any legal or technical rules of evidence and may receive, and base a decision on, evidence presented [by] the proceedings that [a] judge considers credible or trustworthy in the circumstances."

Section 50(3)(c): "subject to subsections (4) and (5), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law."

In fact the Respondent has covered in his Reply Brief and submitted as part of his argument the case of *Richard Carpenter* 2015 CHRT number 8. This was a decision of a Tribunal Member Olga Luftig and I refer to parts of that decision paragraphs [33]: "Section 48.1(1) of the *Act* (supra) creates the Tribunal. Therefore, the Tribunal is what is called a "creature of statute". It has only the powers which the *Act* confers on it, either expressly, or by necessary implication as recognized in the case law. The Tribunal is not a judicial authority. Rather, it is a quasi-judicial body, that is to say, an administrative body that functions in [in a manner] the same way as a court."

Paragraph [34]: "There are other significant differences between a court and the Tribunal flowing from the fact that the Tribunal is a statutory creation, conducting a statutory inquiry. Of relevance are the following: The *Act* does not create or make a complaint into a common law cause of action (*Chopra v Canada*, 2007 FCA 268)."

"An inquiry under [this] *Act* is not an action governed by the *Federal Court Rules*, specifically Federal Court Rule 169, nor is it a 'proceeding' under FC Rule 1.1. Put briefly, a complaint is not the same as a lawsuit in a court."

"Subsection 50(3)(c) provides that in a Tribunal hearing, the member or panel can 'receive and accept' any evidence and [any] other information that the member or panel sees fit, and highlighted "whether or not" … it " … would be admissible in a court of law, subject only to privilege and information from a conciliator."

[35]: "Therefore, the rules of evidence which apply to a Tribunal hearing provide much greater leeway for admissibility than do the rules of evidence applicable in a court."

Paragraph [36]: "Parliament's intention in making the Tribunal a quasi-judicial administrative body constituted by the *Act* was to provide the

public with less formal, more flexible procedures for hearing human rights complaints than those of the courts (see section 48.9(1) of the *Act*.)"

Paragraph [37]: "Therefore, one must both exercise caution and make appropriate adjustments when comparing and trying to import terminology and [processes] from civil courts to administrative human rights tribunals."

The Complainant in these proceedings states in his Complainant's Motion Brief at paragraph 17: "There is no doubt that a threshold for providing" — excuse me — "proving a disability is not high. *Dumont* this Tribunal accepted that the complaint has been discriminated against on the basis of perceived disability based on the testimony of the Complainant and the fact that medical certificates have been provided to their employer prior to termination. The circumstances of the present case are exactly the same and there's no reason to depart from the Tribunal's previous decision and its authority."

The Complainant referred to *Dumont v Transport Jeannot Gagnon Inc*. 2002 CanLII 5662, paragraphs 45 to 47 which was at tab four.

I had also made reference to a case of *Mellon v Canada (Human Resources Development)* 2006 CHRT 3.

This Tribunal is mindful of the authorities and position taken by the Complainant and also in the circumstances the position of Mr. Stark stating that the — at page four of his Brief, paragraph 11 (ph): "It is trite law that the onus resides with a complainant to establish a prima facie case of discrimination. In adverse effect discrimination cases the proof lies with the Complainant. He who alleges must prove. A *prima facie* case is in the Human Rights context one which covers the allegations made and which if they are believed is complete and sufficient to justify a verdict in the Complainant's favour in the absence of answer from the Respondent employer."

Furthermore at paragraph 12 the Respondent's counsel indicates that the relief seeking a declaratory relief is an extraordinary remedy.

In the present circumstances the Tribunal will not make a declaratory slot (ph) and the Complainant must meet the onus of proving a prima facie case.

The position of the Respondent ought not to have caught the Complainant unawares in light of the attraction (ph) made by Mr. Stark in June of 2015 and his reply correspondence of February 2016.

The Tribunal agrees not to make such an Order, but is prepared to find — I'm sorry, but is not prepared to find that the motion by the Complainant is not abuse of process.

> Again I just remind the parties the powers of the Tribunal Section 50 (ph) of 3(c) and rules one of procedure and rules of the Tribunal which gives wide latitude on how they proceed.
>
> In the present circumstances the medical evidence shall be entered into evidence. The parties are free to argue relevance, weight of the said reports and as to what the Tribunal should consider relevant to same.
>
> In the present circumstances the Respondent, if it takes the position that the authors of these reports — some of which are in fact the subject to the control of the Respondent — they may request that those people be brought forward. Such request must be made to this Tribunal by four p.m. on April 5th.

[24] Certainly, the Complainant was aware of the Respondent's position prior to bringing the motion and he certainly knew after the decision of April 4, 2016, that the issue of a disability was in play and to suggest otherwise is untenable.

[25] With respect to the reply arguments, the Tribunal, after hearing arguments, allowed the reply arguments to ensure that the Complainant's position was before the Tribunal.

[26] Many arguments were presented at the hearing regarding alleged irregularities in the staffing processes. In this regard, it is important to note that the Tribunal is not an employment law adjudicator, nor an arbitrator, and does not deal with irregularities in a hiring process unless there was a breach based on a prohibited ground (*Folch c. Lignes aériennes Canadien* 1992 CanLII 7197 (CHRT). The Tribunal has to be cautious of not attempting to be an employment law adjudicator. In the case of *Moffat v. Davey Cartage Co. (1973) Ltd.* 2015 CHRT 5, the Tribunal stated:

> [45] Unless there is evidence that a discriminatory ground was a factor, directly or indirectly, it is not the role of the Tribunal to second-guess the business decisions of company management which, with the benefit of hindsight, may be easy to criticize … The Tribunal will ask itself whether the explanation proffered in support of the decision was reasonable in that context, but only so far as is necessary to determine whether the explanation given in support of the decision was not simply a pretext for discriminatory considerations.

[27] In this context, the Tribunal needs to look at the evidence it was provided with to determine if the CBSA discriminated against the complainant on the basis of his age,

his disability, or both, during one, or many, of the eleven competitions. To do so, it will start with an overview of each competition the Complainant applied to.

IV. THE FACTS

[28] At the hearing, the Complainant testified that in April 2001, he had a “critical stress incident”, which triggered his mental health issues. This occurred while working at the CCRA. The evidence of the Complainant was that he became aware that his supervisor at the CCRA had written two recommendations for him, a positive recommendation for his applications with Customs, and a second assessment recommendation, which made a negative reference against hiring him within CCRA. This event led the Complainant to take a sick leave of about 15 weeks from July to September 2001. He ultimately returned to work and was placed in a position with different supervisors, but this was the beginning of many more issues with management at the CCRA.

[29] The Complainant was initially employed as a federal public servant with the CCRA in 1995. The Complainant was a customs contact officer at a PM-02 level. This position was multifaceted and required him to interpret and apply legislation and deal with individuals who were in arrears. The Complainant would try to negotiate voluntary payments and, if unsuccessful, would then commence legal actions such as garnishee applications. The Complainant worked for the CCRA for six years.

[30] It was while working for the CCRA that he started applying for customs inspector positions, which were still under the responsibility of the CCRA at the time. His first application was made in 2001. From 2002 to 2004, he was successful in obtaining three seasonal terms with CBSA. The Complainant, however, was unsuccessful in obtaining indeterminate employment, despite having received positive reviews during his term positions.

[31] In total, the Complainant entered 11 competitions to work as a CBI or a BSO, mostly in the Victoria area, had multiple interviews and was placed into a number of pre-qualified pools. It was from these pre-qualified pools, which are time limited, that

candidates were being chosen by managers for indeterminate positions. However, the Complainant was not chosen. There were also other occasions where the Complainant was not eligible, or was screened out at or before the interview process.

[32] The CBSA hiring practices were convoluted and seemed to have exceptions to the standard rules. Selection boards, which consisted of two to three individuals, were usually tasked to hire candidates based upon selected competencies.

[33] The Respondent submitted at the hearing that hiring practices were consistent and generally followed the following steps:

a) there is a poster asking for applications;

b) after the close of the competition, there is a review of the applications;

c) there is an assessment of each application;

d) there is a screening for further assessment, which would usually consist of an interview or a re-examination;

e) candidates are scored on various competencies;

f) reference checks are conducted;

g) hiring managers establish an eligibility list or a pre-qualification pool (PQP) with the names of the qualified candidates;

h) from the PQP, the hiring manager can hire candidates on a best fit basis.

[34] The hiring processes were not all that straightforward as the competitions could often be geographically limited to designated ports of entry. The evidence shows that a candidate for a position at one port of entry would usually not be a candidate for a position at another port of entry. However, these were not the only rules. Some candidates could be seconded out of a previous competition. Furthermore, there were many exceptions to the standard practice of using pools. Managers had flexibility as they could: a) draw on specific employees from an existing pool; b) assign an existing

employee to fill the role in an acting capacity; c) reassign an existing employee or utilize student recruitment or d) hire an employee on a short term contract.

[35] The main exception appears to be the use of a process known as “named referral” in which a specific person was put forward for hire without a competition. These were only used rarely and usually for a specific location.

[36] With respect to student hires, Superintendent Pringle stated that from the mid 90’s to 2003, students were routinely hired. The Respondent stopped using this practice around 2004 for a number of reasons, for example, because it was more effective to hire from a competition. Thus, through competitions, a number of candidates were screened on specific competencies and if successful, placed in a hiring pool. Ideally, candidates were selected as vacancies occurred and the practice was to take candidates from the older pools first, provided they had not expired.

[37] I will now examine the eleven competitions in which the Complainant participated in order to determine if he was discriminated against in one or more of them.

A. The competitions

(i) 2000-7015

[38] The CCRA in late 2000 advertised to hire indeterminate, acting and term positions in the locations of Victoria, Sydney and Bednall Hollow. Applicants were restricted to residents of Metropolitan Victoria up to and including Duncan. The Complainant was successful and was placed in a qualified pool in March of 2001. The Complainant testified that he was required to bring to the interview process a driver’s license and a birth certificate. He alleged that the driver’s license was used as a proof of age, which is an indicium of age discrimination.

[39] The Complainant testified that the 7015 pool, which he was screened into, was only good for two years. However, the pool was extended for one year and he was appointed to a term position in April 2002 for the summer. The position of CBI required him to work at both primary and secondary screening sites. The primary is the first

contact for entrance into the country and the secondary is a more detailed examination. The Complainant also completed an officers training course.

[40] In October 2003, the Complainant received a positive assessment from his supervisor for the period of 2003-04-28 to 2003-09-28. The only comment on the briefing form by the Complainant was “I had a perfect attendance record”.

(ii) 2001-7009

[41] There was a competition in March 2002 for intermediate, acting or term positions and it was open to persons who had previous experience as customs inspectors.

[42] The Complainant was ineligible to compete, as he did not have the experience to apply at the time. This in itself is not an issue. It is not an allegation of discrimination but the Complainant takes issue with the position of the shifting hiring practices of the Respondent. In his evidence, the Complainant acknowledged that in the 2001-7009 competition, of the five individuals who received permanent positions, two were within one year of his age, one was three years younger and one was ten years older.

(iii) 2002-7012

[43] In or about January of 2003, another competition was launched to hire in a limited area. The Complainant had pre-qualified for this pool and was interviewed by Katherine Pringle, Robert Farrell and Mark Northcott. Ms. Pringle was the Chair and she and Mr. Northcott conducted the interview. The Complainant met the criteria and was placed in a pool and was ultimately hired.

(iv) 2003-1002

[44] This was a competition that commenced in June 2003 for permanent, term and acting positions at the Metro Vancouver District Airport, and it was open to experienced customs inspectors. Applicants who had already been interviewed for a customs inspector position in January of 2002 were ineligible to apply. The core competencies

for this position were communication, professionalism, team player and adaptability, initiative and service. The successful candidates would have to complete training in the use of force in Rigaud, Quebec. Rigaud, Quebec is a training centre for CBSA inspectors.

[45] The evidence disclosed that the Complainant was screened in for the first interview. He had his first interview with a board of two people, Holly Freeround (Stoner) and Ron Tarnawski, on April 21st, 2004.

[46] The Complainant was successful in his first interview and was called for the second interview. The second interview was conducted by a board of three people: Ron Tarnawski, Bart Northcott and Karen Morin. At no time before or during either interview did the Complainant request an accommodation, mention he had a disability, or disclose that he had medical issues.

[47] During the course of the first interview, the Complainant asked Ms. Stoner to get him a glass of water and in her absence, he questioned the Chair as to the appropriateness of the questions being asked as according to Mr. Hughes they diverted from the norm and Ms. Stoner was making him nervous. Both Ms. Stoner and Mr. Northcott testified that they had no information that the Complainant had any sort of disability. Despite this curious behaviour, Mr. Hughes was called for the second interview, but failed this one, for according to Mr. Northcott the Complainant's answers dealing with difficult situations, one of the criteria, was unsatisfactory and the Complainant did not demonstrate a lot of self-confidence.

[48] Subsequent to the second interview, when the Complainant was screened out of the process, there was a meeting between Ms. Rashid, Mr. Tarnawski, and Colin Reid, where it was suggested to have a post board meeting with the Complainant, which is not part of the normal evaluation process. There was also a telephone conversation between Ms. Rashid and Ms. Kavelaars, a personnel consultant, as to the best way to proceed. There were differences as to what the motive behind this phone call was and what was actually said.

[49] On August 25th, the Complainant was invited to a feed-back session with Mr. Tarnawski and Ms. Stoner. It did not go well. It appears that the Complainant did not understand the purpose of the meeting in as much as he believed there would be a reconsideration of his application. The meeting was confrontational, with the Complainant having prepared forms for Mr. Tarnawski and Ms. Stoner to sign admitting to errors in the process. Both sides were critical of the other, with the Complainant alleging that the meeting was just for show and was organized to disguise a discriminatory practice.

[50] The evidence of Ms. Stoner was that the Complainant became agitated and left the room, slamming the door as he left. The Complainant did not accept this version of the events but admitted saying at the end of the meeting that he would “see you in court”.

[51] Three days later, on August 28, 2004, the Complainant met with Ms. Kavelaars to advise her of his concerns with the process, as he wanted to have a resolution. At the end of the day, however, there was no resolution. The Complainant was still employed with CBSA.

[52] During this period, the Complainant also attended an informational session in Victoria, where Chief Superintendent Fairweather spoke to CBSA employees. The Complainant alleges that Mr. Fairweather made comments to the effect that “if you want a career in customs and are under 35, come to Vancouver.” This is one of the Complainant’s allegations supporting age discrimination.

[53] The Complainant ultimately filed a complaint with the Public Service Commission (PSC) alleging bias by the boards against him. The investigation did not support bias but it did disclose discrepancies between the screening processes and the posted competencies.

[54] The PSC required the Respondent (at this time CBSA) to take preventative action. The process was redone but there were no changes to the results of the competition. The Complainant filed an application to the Federal Court of Canada, which was dismissed.

(v) 2003-7003

[55] On or about October 11, 2003, CCRA advertised a competition for term, indeterminate, and anticipatory hiring for PM-02 Customs Inspector positions in Victoria, Sidney, and Bedwell Harbour. The closing date for this competition was October 30, 2003, and it was geographically restricted to persons residing or employed in greater Victoria including Colwood, Langford, and Sidney. The posting asked that applicants advise of any accommodation they require in order to participate in the assessment phase of the process. Candidates appointed permanently would be required to complete core and mode specific training in Rigaud, as well as use of force training that would require “significant physical exertion”. The Complainant was screened in and was interviewed by Kathryn Pringle and Trevor Baird on December 16, 2003. He never asked for any accommodation nor did he mention he had a disability.

[56] The Complainant was successful in the assessment process and was placed in a prequalified pool in March 2004.

[57] In May 2004, the Complainant was on sick leave/unpaid leave from CCRA. CBSA wanted to offer him a secondment within CBSA for the summer, but due to administrative issues and because he was on leave, the CCRA would not allow him to be seconded to CBSA. Instead, CBSA selected him from the pre-qualified pool (Competition 3961) and the Complainant worked for CBSA during the summer of 2004.

[58] In the context of this competition, the Respondent had wanted to take a lot of the successful applicants to Rigaud, Quebec for further training. The Complainant also wished to be selected to go. Ultimately, four candidates from the pool were selected to go, all of whom were in their 20’s. The Complainant contends that they stopped doing placements when they came to his name.

[59] At the end of his summer contract, the Complainant returned to work with CCRA, and he decided to file a complaint with the PSC to investigate alleged irregularities in competition #2003-7003. The PSC found no flaws in the placements.

[60] During the hearing before our Tribunal, Ms. Pringle testified about this process and the employment of the Complainant during the summer of 2004. Ms. Pringle confirmed that she did a performance review of the Complainant in 2004, where she wrote a very positive report using phrases such as “projects professional image, conducts himself in a polite manner when dealing with the public, is able to make appropriate decisions based on the priorities of the agency.”

[61] Furthermore, Ms. Pringle acknowledged in that performance review that “it had been a pleasure working with him” and she agreed to act as a reference for him with respect to his reliability.

[62] In his testimony, the Complainant also indicated that Ms. Pringle did not know about any medical conditions from which he may have suffered at the time. He also confirmed that he had worked with Ms. Pringle in the past and that he had received compliments from her.

(vi) Stewart, British-Columbia

[63] There is a small port in British Columbia, Stewart, which was very hard to staff. In 2004, a position became available for staffing and it was initially filled by using a named referral to appoint Stanley Stinson. He was a qualified candidate in the Victoria pool, a pool the Complainant was also part of. It is the position of the Respondent that this referral came about in unique circumstances and that it was in fact not an indeterminate appointment.

[64] The Stewart appointment became available again for the winter period of 2004, and the Respondent put out a call letter to staff this position in September 2004. The Complainant was interested in a permanent position and would have been ready to move to Stewart to obtain it. When CBSA offered him a position in Stewart, they told him it would only be temporary and so he refused. Finally, CBSA decided to offer it to Mr. Van Helvoirt, who was in the 2003-1002 pool and gave him an indeterminate position. The Complainant thinks it is really unfair because if CBSA had offered him an indeterminate position first, he would have accepted.

[65] Moreover, the Complainant alleges that Mr. Van Helvoirt was screened into the 2003-1002 pool late and was screened in while being evaluated for two competencies on the same example.

[66] The Complainant takes the position that this was improper and if he had been screened into the Vancouver competition, he would have been able to take this position.

(vii) 2005-1001

[67] This was a competition for permanent, temporary, seasonal, part time and full time PM-03 positions at the Border Services Offices, at various locations in British Columbia and the Yukon. The Complainant was invited for an initial interview in March 2005 in Vancouver. The Complainant did not advise the panel that he needed an accommodation. At the time, the Complainant had just completed his third term with the Respondent. The panel consisted of Steven Cronin and Catherine Black. Evidence disclosed that the Complainant had had no prior contact with Mr. Cronin or Ms. Black. Evidence disclosed that in a conversation between Mr. Cronin and Mr. Northcott, that Mr. Northcott had advised Mr. Cronin that the Complainant had failed his prior competition.

[68] The Complainant was not successful in the interview and was not passed on for further assessment. In particular, he was unsuccessful in the Effective Interactive Communication Competency, scoring only 55 points, where a passing mark was 70.

(viii) 2005-1005

[69] In spring of 2005 there was a posting and the Complainant applied once more. He was automatically screened out on the basis of not having been successful in the earlier 2005-1001 competition.

(ix) 2005-2006 Public Service Commission Hearings

[70] Whilst this is not part of the hiring process, some of the Complainant's claims have proceeded to a hearing before the Public Service Commission (PSC) respecting complaints in the process in competitions 2003-1002 and 2003-7003. This began in October 2005 and continued up to February and August 2006. There was considerable evidence as to the Complainant's behaviour at those hearings, which are germane to the 2005 and 2006 competitions, and which will be discussed in more depth.

[71] The evidence disclosed before our Tribunal shows that the hearings were apparently very confrontational. Ms. Lennax, who appeared on behalf of the Respondent, testified that the Complainant was angry, disruptive, disrespectful and confrontational. She went on to say that at one juncture the Complainant had jumped up from the table, yelling and using profanity, and had stormed out of the room. On the other hand, the Complainant is of the opinion that Ms. Lennax was treating him with disdain, and was laughing at his evidence. The Complainant has admitted that he was very angry, and that he was under considerable stress during the hearings. One of the Complainant's witnesses, Levan Turner, confirmed that he viewed Ms. Lennax as laughing when the Complainant was giving evidence, to the point where the investigator required her to cease.

[72] There is no question that during the course of the hearings, Ms. Lennax took copious notes of what went on. In her testimony before this Tribunal, Ms. Lennax said that she did feel threatened by the Complainant. As previously stated, the Complainant and Mr. Turner disagreed with Ms. Lennax and contradicted her evidence. Mr. Turner felt that her attitude was demeaning towards the Complainant and that she was laughing at him. Ms. Lennax denies having laughed at the Complainant.

[73] Ms. Lennax testified that prior to the PSC hearings, a) she knew nothing of the Complainant's working time with CCRA; b) she did not know that he had any disability and c) she did not have the CCRA's records. In fact, Ms. Lennax testified that she had no knowledge of his disability prior to the 2006 competition. During the course of the PSC hearing the Complainant requested an adjournment due to "anxiety and depression", which was opposed but was granted by the adjudicator.

[74] Following the hearing, Ms. Lennax instituted security precautions which included advising the staff by email that the Complainant was not permitted in the building, posting his folder on the web site, and hiring a Commissionaire to ensure he did not try to enter the offices in Victoria.

(x) 2006-066

[75] The Complainant applied for a new competition for 50 BSO officers (Border Services Officers), which were for permanent, temporary, seasonal, part time and full time PM-03 positions in various locations in British Columbia and the Yukon. However, the Complainant was screened out of the competition as evidence came out at a later date that there was a sticky note on his application that stated “candidate was excluded from this process due to inappropriate behaviour in the recent court cases with the selection board”.

[76] The evidence did not disclose who wrote the note and Ms. Lennax testified that it was not her handwriting. She stated that it was either Mr. Northcott or Mr. Tarnawski, but Mr. Northcott denied that it was his note. The evidence showed that the employer did hire candidates in their 20’s who were not as experienced as the Complainant, with his six years of enforcement experience at the CCRA. The evidence also disclosed, however, that there was a long list of candidates for the position who were over 30 years of age or older than the Complainant and were qualified by the selection board and passed along to the training phase.

(xi) 2006-001

[77] CBSA ran another competition for positions in the Pacific region. On March 27, 2006, the Complainant applied online and was screened in for an interview. On November 7, 2006, he was invited to an interview, where the board members were Mr. Farrell and Sandra Petropoulos, an individual who had never had any contact with the Complainant before.

[78] On October 26, 2006, approximately two weeks before his scheduled interview, Mr. Farrell received an email from Ms. Lennax.

[79] The email from Ms. Lennax was unsolicited, and attached a letter from Holly Stoner regarding the Complainant's conduct in the 2003-1002 competition.

[80] Ms. Lennax's e-mail, dated October 26, 2006, stated as follows:

> I first met Mr. Hughes on October 12, 2006 when a hearing was convened to investigate allegations Mr. Hughes presented to the Public Service Commission. We proceeded with the hearing on October 12th, during which time Mr. Hughes was disrespectful and unprofessional in my opinion. Mr. Hughes was disruptive in the proceedings, using profanity and walking out of the hearing room on a couple of occasions. It was clear that the Chair was caught off guard when Mr. Hughes did this, as Mr. Rys looked confused when Mr. Hughes would abruptly leave the hearing room. Normally, the chair is responsible for scheduling breaks at times convenient to all parties.
>
> At one point in the hearing, Mr. Hughes said in a loud voice, extending his arm and pointing his finger at me "She's laughing at me", in fact, I had chuckled regarding a number of pens I had beside me and when my colleague Safana Ladak who was representing the department lifted the side of the binder she was using. The pens rolled down the table, as a result I chuckled about the pens rolling down and it had nothing whatsoever to do with Mr. Hughes.
>
> …
>
> On February 14th, the hearing commenced. We continued the hearing with me representing the Department as Safana was off on maternity leave. I took over the handling of the process and again Mr. Hughes was disrespectful and unprofessional. Again, Mr. Hughes was disruptive when he would jump up, say, "this is bullshit, I need a break" and leave the room. This was disruptive and unprofessional. It was clear at times the Chair, Adrian Rys was caught off guard by Mr. Hughes outbursts.

[81] Notwithstanding the above e-mail, the Chair, Mr. Farrell, decided to proceed with the interview of the Complainant. It should be noted that in his application, the Complainant did not advise the board of any disability, nor did he ask for accommodation. However, the Complainant did testify that he had spoken to a CBSA clerical staff member and had requested: 1) that he not have to go to a particular office location; 2) that he be advised of the names of the selection board members; and 3)

that he be given accommodation due to his disability. Unfortunately, the CBSA staff member did not pass along the last request to the selection board nor was this individual called to the hearing before the Tribunal. It is common ground that the Complainant did not provide any documentation to the selection board regarding any mental health issues.

[82] The Complainant testified that at the outset of the interview, he expressly advised the board that he was a person with a disability and requested an accommodation. This was the first time he was indicating that he had a mental health issue. He requested an accommodation in the assessment phase, since his depression was affecting his speech and his confidence. The Complainant asked the selection board to forego a formal interview and use his performance reviews from 2002, 2003 and 2004 to establish his qualifications for the formal interview. The Complainant indicated that he had submitted two documents: i) a psychological assessment from Dr. Boissevain from 2004 and ii) a doctor's note from Dr. Miller dated September 22, 2006 referring him for counselling.

[83] The evidence of the Complainant was that he was depressed, had difficulty speaking, lacked confidence and was having a critical stress incident. The interview was adjourned.

[84] The evidence disclosed that both the Complainant and the board thought the other was being confrontational and the Complainant felt he did not receive a fair interview.

[85] The following day, the Complainant submitted a formal request for an accommodation.

[86] Mr. Farrell consulted with Ms. Lennax, his Human Resources support person. The board refused to allow the Complainant to rely on previous assessments as a substitute for the interview. Ultimately, the Complainant provided to the board his 2004 assessment from Dr. Boissevain and a doctor's note from Dr. Miller dated September 22, 2006, referring him to counselling.

[87] On November 8, 2006, the Complainant sent a lengthy email to Mr. Farrell which states in part: “I am suffering from depression, high stress, anxiety and justified paranoia.”

[88] On November 9, 2006, Mr. Farrell forwarded the email to Ms. Lennax, who drafted a reply to Mr. Farrell that states:

> Hi Robert,
>
> I would respond to Mr. Hughes relating to the interview. It would not be appropriate to speak to his complaints and certainly not whatever issues he may be having with CRA.
>
> A response could be something like this:
>
> Mr. Hughes:
>
> I am in receipt of your email dated November 8, 2006.
>
> You mention that you spoke to James Austin of our office regarding accommodation. Mr. Austin’s recollection of your request is that you asked him for two issues to be addressed.
>
> The first issue was your request to know who was on the selection board. As you are aware, CBSA at times has a number of board members assessing candidates. Your concern was that the board members would be individuals that would have ‘a Conflict of Interest, be a person I was suing or one of the 28 BSO employees that could lose their job’. The department is responsible for identifying Board Members, we select board members based on their skills and competency as well as their familiarity with the position being staffed or familiarity with the staffing process. It is not up to the candidates to determine who the selection board members will be.
>
> The second issue you brought to Mr. Austin’s attention was that you did not want to meet in room 107. As you are aware, we did accommodate this request and did not have the meeting in room 107 as you requested.
>
> It is unfortunate you feel you ‘can never get a fair assessment from CBSA’, however, I can assure you that we conduct our assessment process with the utmost professionalism and sensitivity to candidates.
>
> You further go on to state that ‘Why would CBSA accommodate my request to not meet in room 107 due to a disability but think I would not need accommodation in the actual interview.’ As you are aware, it is up to the candidate to bring forward any disability that may affect their

performance during an assessment process. We need to be informed of the disability and what actions could be taken to accommodate that disability, within reasons. At no time did you discuss with Mr. Austin nor the selection board prior to our meeting what your disability was and what accommodation you would require. As a result, no other accommodations were sought on your behalf. Until we are aware of the disability and possible accommodations of that disability, we cannot be expected to accommodate individuals if we are unaware of the disability or that in fact there is a disability.

I also want to be clear that there was no ‘blaming’ of you regarding your disability, just a frank discussion that the onus is on you to disclose your disability for which you require accommodation. As this did not take place prior to the interview, the only accommodation afforded to you was changing the room for the meeting from room 107.

You further go on to state that ‘I felt you did not have the required training to deal with assessing a candidate with a disability. Some of your comments were troubling. You mentioned that if I could not perform properly in an interview how could you expect me to perform on the job. That is completely inappropriate and discriminatory. I request an apology over this comment. It is again unfortunate that you interpreted our discussion in that manner. At no time did I make the correlation that if you could not perform in the interview that you could not perform the job. I advised you that in order to determine your suitability for the position being staffed we would proceed with the interview to determine your suitability for this position. I certainly regret your misinterpretation of the discussion but will not apologize for that misinterpretation.

As you are aware, I have experience as a selection board member and management felt that my skills as a board member were sufficient in every detail to effectively perform that task. I am aware of issues of disability and the requirement for accommodation within reason. Again, if we are unaware of the disability, it is impossible to accommodate an individual.

The tools the selection board chose to use in this process are the BSOT, which you have successfully completed, a formal interview as well as reference checks. The selection board is more than willing to accommodate any individual with a disability to allow that individual to compete on a level playing field. We will accommodate individuals who have a disability, however, we will not exempt individuals from partaking in the assessment process. While you have Performance Appraisals that speak to certain aspects, we are not using Performance Appraisals in this assessment process. It would be unfair to use appraisals for you, it would set a difference standard and could provide you with an advantage over others. While I understand that interviews are stressful, they are stressful for most individuals, even those without disabilities. To exempt you from

> the entire process and use only your appraisals does not provide for consistency in assessment. Also, this is an external process and there are many individuals that have not worked for the federal government and would not have the opportunity to presenting their appraisals. For these reasons, we are not considering appraisals in this selection process. While you did provide a copy of an Appeal Decision, these are not precedent setting and each accommodation must be looked at on its own merit. We would not want to arbitrarily make decisions that could have a negative impact on any individual in our selection processes.
>
> At no time did I 'downplay' your past experiences, in fact, that is what was taken into consideration when you were screened into this assessment process. Also, during the reference check stage, we will also be looking at your previous experiences and conduct while an employee.
>
> Your issues with CCRA and CRA are not relevant to this assessment process. As the Chair of this selection process, I can assure you that we will conduct ourselves with the utmost of professionalism and sensitivity when dealing with all candidates.

[89] There continued to be communication issues concerning the medical evidence required between the Complainant, Mr. Farrell and Ms. Lennax, (who is not a person involved with the interview process) who advised that there had been no notes taken on November 7, 2006. On November 20, 2006, the Complainant provided a medical note from one of his physicians, which included a recommendation that he would require further time in the interview process and time to answer each question.

[90] On February 2, 2007 Mr. Farrell wrote to Ms. Lennax:

> The nature of the job is that you conduct interviews and need to be able to make the appropriate justifiable decision based on the information presented in a timely manner e.g. thirty seconds on a primary inspection line. The interviews can become very stressful at times because a lot of the interviewees are not cooperative and do give some push back. The inability to be able to react quickly and effectively in these types of situations could allow the interview to escalate to violence.
>
> Based on these requirements, I do not believe that Chris is capable at this time of performing the requirements of the job.

[91] Ms. Lennax responded to Mr. Farrell as follows:

> Hi Robert, after speaking with Daniela, we think it would be appropriate to provide Chris with extra time to answer the questions. There is no need to

> allow him 15 minute breaks between questions. He should not be allowed to leave the room during breaks to ensure the integrity of the process.
>
> Maybe what you might consider doing is to provide him with the question, give him some time to think of his response and then allow him to deliver his response. Hopefully with this accommodation he will be able to meet our recruitment needs.
>
> I don't disagree that the duties of the job require certain skills and abilities but by allowing him the best opportunity to showcase his skills is the best course we can take given the situation.…

[92] Mr. Farrell accepted the advice of Ms. Lennax and the interview proceeded on March 2, 2007. The suggested accommodations offered were to let the Complainant take as long as he needed to allow him to ask for clarification of the question if required, and to take a break after each question.

[93] At the end of the process, the Complainant scored 50 points for enforcement orientation, and 40 points for self-confidence. Passing is a minimum of 70 points per category. Mr. Farrell testified that the gauging of professionalism commences when the applicant enters the room until the end of the interview. Mr. Farrell also testified that during the course of the interview the Complainant referred to his legal proceedings and that the interview did not go well. The Complainant thought Mr. Farrell was being overly officious.

V. DECISION

A. Age discrimination

[94] The Complainant, in his oral testimony and his statement of particulars, alleges that the Respondent discriminated as a general policy against those candidates over 35 years of age, while promoting younger candidates.

[95] The Complainant, through an Access to Information request, obtained all of the birthdates of the candidates in the Victoria and Vancouver competitions. As a result, the Complainant did an analysis and came to certain conclusions. He argued that in 2001, hiring in Victoria had an average age of 35, in 2002 it was 33, in 2003 it was 30, and in

2004 it was 27. Charts containing the Complainant's analysis were admitted as an exhibit to these proceedings.

[96] The Complainant also submits that he ought to have been given an indeterminate position by CBSA, based on his experience and his previous performance reviews.

[97] The Respondent argues that the Complainant's statistics are unreliable, and states at page 37 of its written submissions:

> 114. Even so, the Complainant produced in the course of the hearings a set of documents that purports to demonstrate that the Respondent discriminated against him based on his age. Those statistics are unreliable, as made clear by the following concessions made by the Complainant in his testimony:
>
> a) The statistics don't look at CBSA hiring as a whole, but instead only relate to the specific competitions that the Complainant was involved in — he concedes he has 'no broader statistics about the age of candidates who apply for positions either as customs inspectors before 2004/5 or border services officers afterwards.
>
> b) The Complainant did not include in his spreadsheet people who were qualified through the first phase of hiring, but who subsequently failed or declined training at Rigaud, clouding that evidence with respect to which candidates were being actually qualified by the selection boards (even if they failed at later stages in the hiring process.

[98] There was no evidence called by expert witnesses either by way of a statistician or an actuary. The analyses were all done by the parties and the Tribunal certainly cannot make any comment on the statistical reliability of the samples.

[99] The Respondent filed as evidence (CBOD Vol 5, Tab N1) documents setting forth all of the people hired to Customs Inspectors and Border Services Officers positions from 2001 to 2009. In the Respondent's written submissions, this chart was recreated as Appendix A and colour coded for individuals who were older than 30, those individuals who were older than the Complainant, and those who were the same age as the Complainant. This Appendix is very helpful to the Tribunal to the extent that it demonstrates, with clarity, evidence tendered at hearing. However, the evidence was

compiled on what was tendered as evidence and the Tribunal has discretionary powers as to what they will consider. This was certainly the case in the latitude the Complainant was given wherein he was allowed to proceed to reply evidence and reply arguments.

[100] According to the Complainant, another argument or indicium of discrimination lies in the fact that the candidates who were chosen to attend the training in Rigaud were required to go at a low stipend, which would discourage older people.

[101] The Complainant also pointed out that at the interview processes, candidates were required to bring a driver's license or some other document which would display a proof of age. According to the Complainant, this shows that there was a bias based on age.

[102] The Respondent's witnesses, Mr. Farrell, Ms. Black and Ms. Pringle, denied that age was a factor and affirmed that their focus of analysis was only about whether or not the person was qualified. Ms. Pringle specifically addressed this by saying words to the effect that candidates who were older had a depth and breadth of knowledge and could bring more to the job.

[103] The Complainant also based his assertion on a seminar he attended in Victoria, where Superintendent Fairweather made a presentation. The Complainant alleges that Mr. Fairweather made a comment that "if you are under 35 there is a career for you with CBSA".

[104] Mr. Fairweather stated in direct examination the following:

> (The Respondent's counsel put the following question to Mr. Fairweather)
>
> I just want to indicate to you that there has been some testimony in this proceeding from Mr. Hughes that when you attended the group in Victoria you used the words --- words to the effect that:
>
> If you are under the age of 35 years of age and want to pursue a career in Customs, come to Vancouver.
>
> Did you in fact say that?

[105] Mr. Fairweather responded as follows:

> I wouldn't. I did not say that. I would not have said that.
>
> It just isn't part of, you know, what I believe. It wasn't what I believed then. It wouldn't have formed part of the talk. And I don't believe it today and it isn't something that I would have ever said.

[106] There was an acknowledgement that Mr. Fairweather's comments might have been misinterpreted by the Complainant, but generally the evidence supports the conclusion that Mr. Fairweather never made such comments about age.

[107] The issue, tests and requirements of the Complainant establishing a *prima facie* case were discussed earlier in this decision and the Tribunal reviewed the law of what a *prima facie* case was (see Ontario Human Rights Commission *O'Malley v Simpsons-Sears,* (1985) 2 SCR 536). The test for a *prima facie* case is a three stage test as set forth in *Stanger v Canada Post* (supra) and are: the complainant has one or many characteristics protected from discrimination under the *Act*; the complainant has experienced an adverse impact; and *the protected characteristic or characteristics were a factor in the adverse impact*.

[108] In the present complaint, the Complainant alleges that he was discriminated on age, a protected characteristic under the *Act*. The Complainant alleges candidates under 35 were given preferential hiring. It appears that this belief was born out of the comments the Complainant heard in the fall of 2004 whilst attending an information session where Superintendant Fairweather allegedly said words to the effect "If you are under the age of 35 years of age and want to pursue a career in Customs, come to Vancouver." Superintendent Fairweather, in his testimony, strongly denied making that statement and further stated that he disagreed with those comments. This position was echoed by Superintendents Black and Pringle, stating that their focus was whether or not the candidate was qualified or not. In fact Superintendent Pringle specifically commented that older candidates bring "depth and knowledge" to the job.

[109] The Complainant stated, as an example of age discrimination, the requirement to produce a valid driver's license which would disclose a candidate's age. I do not find the requirement to produce a driver's license to be a breach of the *Act* in the present circumstances.

[110] Interestingly, the Complainant has argued that the stipends paid to candidates at the training facility in Quebec were inadequate for older candidates and that an older candidate could not survive on the per diem they were allowed, whereas younger candidates who had not established themselves in life or did not have dependents could get by on what was being offered. I do not accept this argument.

[111] The Complainant went on to describe in details the hiring process, the interview process, the screening process and the concept of pre-qualified pools. He alleges that in some instances he went into pre-qualified pools and he did not receive an appointment from that pool as it had lapsed. In this circumstance, the Complainant is of the view that this was another way of screening him out due to his age. However, the evidence showed that the selection boards consisted of different individuals, that the complainant has been screened in pools on many occasions, and that due to timing or to where the Complainant ranked on the pools list, he was not offered an indeterminate position by CBSA.

[112] This Tribunal has reviewed all the processes the Complainant has cited and whilst the Complainant has justified complaints which he took to the Public Service Alliance (PSA), there were none that went to age discrimination. The PSA did find problems in some hiring processes but they did not reinstate or change the appointments. The Complainant has even tried to apply for judicial review of one of the PSA's decisions, but the Federal Court dismissed his application. Moreover, the statistics provided by the Complainant about age discrimination within the hiring processes at CBSA were not comprehensive enough to support his position. The use of statistics with the support or the analysis of an expert, be it an accountant, an actuary or a statistician, would have added some weight to the Complainant's flawed analysis. In reviewing the evidence, the Tribunal is not satisfied that the Complainant has met his burden.

[113] Based on the evidence presented, the Tribunal finds the Complainant failed to prove the case of age discrimination and therefore dismisses the claim.

B. Medical Disability

[114] The Complainant has the burden of proof to establish a *prima facie* case of discrimination and the first element of his burden is to demonstrate that he had a characteristic protected from discrimination under the *Act*. Here, the Complainant has to establish that he had a disability during the relevant period. The Complainant has filed multiple doctors' notes and reports, which I describe below. However, I have noticed that most of these notes related to his employment within the CCRA (now CRA), where he had multiple problems with management.

[115] As explained earlier, the Complainant testified that his mental health issues started as a result of a critical incident which happened on April 11, 2001, when he was employed at the CCRA. He testified and acknowledged that before this incident, he had no form of stress or anxiety.

[116] A few days after this incident, the Complainant consulted Dr. John Miller, his family physician. On April 19, 2001, Dr. Miller wrote two notes. The first note stated: "Off work for medical reasons. April 20th start, estimate 2–3 weeks."

[117] The second note reads as follows: "Refer psychologist". This note led the Complainant to consult Dr. Philip Prendergast, who authored a report on November 13, 2001 which stated the following:

> Re: Chris Hughes
>
> Fitness to Work Evaluation
>
> As requested in your letter of September 19, 2001, Mr. Hughes has been assessed for fitness to work. The process included an interview of the employee, discussions with his managers, and a review of all available documentation. Based on the information available to me at this time, it is my opinion that Mr. Hughes meets all of the medical requirements of his position of Collections Contract Officer, as detailed in the Job Analysis provided.
>
> Mr. Hughes has been off work for several periods of time since he first began working under the supervision of Richard Soderquist in May of 2000 and then while working under the supervision of Jobina Mcleod from May of 2001. Most of these absences from work have been considered sick leave. I believe that Mr. Hughes has indeed been ill enough that he should not have been at work for these periods of sick leave.

> The cause of Mr. Hughes' periods of sick leave has been the strained interpersonal relations that exist between him and the two supervisors mentioned above. He still has a number of complaints about his treatment by these supervisors, and I believe that he should not return to work with either Richard or Jobina as his supervisor, since he would become ill again in such a work environment. It is possible that Mr. Hughes could eventually return to work under either Richard or Jobina if a mutually agreeable settlement of his grievances could be obtained.
>
> While I did review the nature of Mr. Hughes' episodes of perceived mistreatment with both Mr. Hughes and his two supervisors, it was not obvious to me that either party was entirely wrong in their actions. I did not assess each situation in detail, since settling disputes of this nature is not within my realm of expertise. I can say however, that there continues to remain significant disagreement between the two parties on a number of issues. Appropriate mediation is the best way to resolve these issues. If you would like, I could make myself available for any mediation procedures that you might arrange for this purpose. However, I believe the medical input to such activity would be quite limited. For now, Mr. Hughes should return to work with a different supervisor, preferably doing work in which he has previously demonstrated competence.

[118] Despite this report, the Complainant continued to work for the CCRA under different supervisors, but also took multiple sick leaves in the following years. He stated during his testimony that the years 2002 and 2003 were good years for him, but that his distress came back at the end of 2003. On December 10th and 16th, 2003, he was seen by Dr. Michael Boissevain, Clinical and Rehabilitation Psychologist, a practitioner to whom he was referred by Dr. Miller. Dr. Boissevain reviewed the Complainant's history as well as Dr. Miller's chart notes, and prepared a Psychological Assessment Report, dated January 12, 2004, which states in part:

> 4.0 Summary and Conclusions
>
> Based on the definition of CIS (Critical Incident Stress) provided to me, it is apparent Mr. Hughes was experiencing this syndrome during the period in question. Among the symptoms listed in the CIS brochure, Mr. Hughes soon reportedly experienced the following: increased heart rate, frustration, anxiety, anger, irritability, agitation, depression, a sense of isolation, poor concentration, emotional outbursts, changed activity level, changed eating habits, and restlessness. In my opinion, his reaction at the time is clinically consistent with, and can be attributed to the inherent stress of the situation as he described it to me. Further, it is clear that his recovery from his critical incident stress was compromised by his transfer

> to Ms. McLeod's team, where he was reportedly exposed to continued harassment in the form of being 'micromanaged' by the team leader. From a clinical perspective, this likely exacerbated or prolonged his symptomatology. As discussed above, this problem was recognized by Dr. Miller in his 6 and 13 September chart entries.
>
> Based on Mr. Hughes' self-report, it appears that there are no other factors that could account for the change in his emotional and behavioural adjustment aside from the critical incident in question. Further, Mr. Hughes denied any prior history of significant emotional disturbance, and stated that he had not previously accessed either psychological or medical treatment for emotional difficulties.
>
> Currently, it appears that Mr. Hughes remains vulnerable to experiencing some of the above-noted symptoms, albeit a milder level than during the spring and summer of 2001. For this reason, I would recommend that he consider accessing psychological treatment on an as-needed basis.

[119] On January 15, 2004, Dr. Miller again wrote two notes, the first one reading: "Mr. Hughes should be off work January 19-30 for medical reasons" and the second note reading: "I recommend that for health reasons, Mr. Hughes no longer work in the Victoria Tax Office and be given alternative work."

[120] The Complainant again saw Dr. Prendergast, who prepared a letter dated April 13, 2004, to Ms. June Lensen, Assistant Director, Human Resources, CRA, which stated:

> … As you know, Mr. Hughes is pursuing administrative and legal action against former supervisors and a number of other individuals in the Vancouver Island Tax Services Office. He is doing this because he feels that he has been treated unfairly with respect to opportunities for promotion in his job. Management has responded to these actions with sanctions and other administrative measures directed against Mr. Hughes. These actions of management have caused more upset for Mr. Hughes. Apart from the repercussions for his actions, Mr. Hughes has not been pleased with the results of the investigation into his complaints. He has initiated further complaints. The situation for Mr. Hughes at the Vancouver Island Tax Services Office has become untenable, as well it has become very uncomfortable, I am sure, for the other employees embroiled in Mr. Hughes' situation at work.
>
> When Mr. Hughes is at work, he develops symptoms of stress-related illness. His doctor has advised him not to work for medical reasons. This is

> appropriate because he does become unwell when he is at work. Fortunately he recovers quite readily when he is away from the office.
>
> It is difficult to provide medical recommendations for Mr. Hughes. From one perspective, he is quite well at this time and is capable of meeting the medical requirements of his job as detailed in the Work Description and Job Analysis I have on file. From another perspective, he becomes significantly distressed and quite unwell when in the office, since he returns to an environment which he believes has provided him with so much injustice. I must agree with his doctor in saying that he should not return to work in the Vancouver Island Tax Services office.
>
> It is fortunate that Mr. Hughes will be going back to Customs for employment over the summer, beginning in early May. He should do fine whilst there. It is best that he not return to the Vancouver Island Tax Services Office at the conclusion of his assignment unless there has been some resolution in his situation. I would support him being accommodated in a suitable job in another workplace, but I cannot say that this is a medical requirement at this time. If the situation changes significantly, I would be happy to reassess him.
>
> I hope you find this letter helpful. If I can be of further assistance please let me know.

[121] Dr. Prendergast saw the Complainant again and prepared another report dated January 27, 2005, which states in part as follows:

> Chris went on sick leave after seeing his doctor. I do not feel that he was incapable of working for medical reasons at that time. He was unhappy, frustrated and feeling stressed, but he was not unwell. Anyone who was unhappy in his/her job would feel similarly. His aspirations lay in another division, but I do not feel that it was necessary to move him there for medical reasons.
>
> Mr. Hughes is fit for work. I still feel it is important for him to have minimal interaction with the individuals against whom he has taken administrative action. Certainly these individuals include Jobina Mcleod and Richard Soderquist. He may also need to have minimal interaction with Ann Welman, Gord Leach and Gary Boyer, but I am unsure of the nature of the relationship between Chris and these individuals. I felt that if Chris was working in Client Services Division, minimal interaction with the above individuals would be achieved, but Chris says that this is not the case. I will leave it up to management to decide how best to accommodate this limitation.
>
> I understand that this is a very difficult situation for Mr. Hughes and management. The medical situation is really quite straightforward

> however. Whenever I have assessed Mr. Hughes, I have declared him fit for work. He has been on sick leave numerous times because of symptoms related to stress, but he has never been significantly ill. I am concerned about what might occur should he continue to work in an environment where poor interpersonal relations exist (my concern extends to both Mr. Hughes and the other parties) and that is the reason behind the limitations I have recommended. I have conferred with Mr. Hughes' family doctor and have his support on this. (emphasis added)

[122] The complainant also filed a medical note from Dr. Miller dated February 12, 2005, which states as follows: "Mr. Hughes is unable to return to work in position offered due to medical reasons" and another one from May 27, 2005: "Client should have no direct contact with Ann Welman for medical reasons."

[123] Both notes refer to the Complainant being off work for medical reasons but there is no diagnosis. In fact, the secondary note does not say that the Complainant could not return to work; it simply says that he should not have contact with Ann Welman. On June 24, 2005, Dr. Miller wrote: "Refer psychiatrist re: anxiety and depression." On August 5, 2005, Dr. Miller wrote: "Chris remains unable to work for medical reasons. He should be able to return to work on September 2, 2005. I recommend he not return to work in the Client Service Division for health reasons."

[124] Again, the rationale for his absence from work is a medical reason but it only relates to his position within Client Services and the only indication is that he should not return to that work environment.

[125] On July 5, 2005, the Complainant started seeing a counsellor for "employment related stress situations". The counsellor, Bernice Carter, MA, BSN, RN, RCC, wrote in a report dated September 7, 2005:

> To whom it may concern:
>
> Re: Mr. Chris Hughes
>
> I have been seeing Mr. Chris Hughes in a professional capacity since July 5, '05 for employment related stress issues. Mr. Hughes experiences his present work environment as increasingly negative and hostile, and this has escalated to a point that it has become a serious health concern for him. As a result, he has had to take considerable time from work in the

> effort to preserve his well-being and recover from the impact of his every escalating employment experience in this environment.
>
> Mr. Hughes has expressed to me that he wishes to return to work as soon as he is able. However, several outstanding job actions, etc., as well as unresolved interpersonal conflicts with superiors, continue to exist. I believe that this work situation cannot be repaired sufficiently in order to aide my client and protect him from further health reducing stress. Therefore, it is my opinion and recommendation that Mr. Hughes not be returned to Client Service Division.

[126] Again, on October 19, 2005, Dr. Miller wrote: "Mr. Hughes was off work October 13, 2005 for medical reasons. Due to stress, anxiety and depression, I recommend job modification for the foreseeable future." This note did address a diagnosis but indicated that the Complainant could still work.

[127] There is a lapse of approximately one year until the last medical report prepared by Dr. Miller filed before the Tribunal, which is dated November 7, 2006, and which says: *"*Chris has a medical condition that creates problems with interviews. Ideally an alternative assessment that doesn't require an interview would be helpful." This is the first medical recommendation which is addressed to CBSA, whilst all the other documentation related to and was addressed to the CCRA or the CRA.

[128] It is an old adage that "he who asserts must prove". The issue of proving a *prima facie* case of discrimination comes down to the fact that the Complainant, on a balance of probabilities, must establish that he was discriminated against on the ground of his disability, defined in s. 25 of the *Act* as "any previous or existing mental or physical disability…". In this context, it is my task to determine if the complainant suffered from a disability in the relevant period, in light of the evidence filed.

[129] The *Act* does not greatly assist in determining what a disability is. Often, mental health issues are not self-evident and there are those who suffer that are often unwilling to share this information with others. Also, it is accepted that a person's status of suffering from a mental disability may be temporary or permanent.

[130] The Respondent argues that the Complainant did not have a disability because stress and depression are often treated as normal ailments. The Respondent cites

Riche v. Treasury Board (Department of National Defence) 2013 PSLRB 35 ("*Riche*"), where the Public Service Labour Relations Board reasoned that:

> 130. The difficulty is that the grievor's argument confuses an ailment with a disability. Depression and stress are commonly experienced by many people in the course of their working lives. Neither is by that fact, disabling. The same can be said of sleep apnea. The fact that one experiences such conditions does not establish a *prima facie* case of disablement or, all the more so, a *prima facie* case of discrimination based on a disability. Needed in this case was evidence that the conditions were so bad that they disabled or at least limited the grievor's ability to comply with the reporting conditions. But the grievor offered no such evidence other than the conditions themselves.

[131] The Respondent also referred to *Halfacree v. Canada (Attorney General),* 2014 FC 360; aff'd 2015 FCA 98, wherein the Court wrote the following with respect to the issue of stress as a disability:

> 37. As argued by the respondent, decisions from labour arbitrators and human rights tribunals have consistently held that while stress may be disabling, it is not in and of itself a disability requiring accommodation. In order to obtain the protection of human rights legislation, an employee needs to provide a diagnosis with specificity and substance. Furthermore, a brief doctor's note may be held to have no probative value where the doctor does not testify. (*Gibson v Treasury Board (Department of Health)*, 2008 PSLRB 68 at para. 31)

[132] These principles are critical to the analysis of the Complainant's complaints. The Complainant in his reply argument asserts that the proof of a disability is not a high one as stated in the case of *Dumont v. Transport Jeannot Gagnon Inc*. 2002 CanLII 5662 (CHRT). In this case, our Tribunal accepted the Complainant's testimony and the Respondent's submissions, and rightly pointed out that the discrimination against a Complainant can be based on a perceived disability. The Complainant further argues that a *prima facie* case is based on the Complainant's evidence, which need not include "medical evidence or medical certificates". The case of *Desormeaux v. Ottawa-Carleton Regional Transit Commission (City of Ottawa),* 2005 CAF 311 (*Desormeaux*) , stands for the proposition that a tribunal can find a *prima facie* case of disability on the evidence of a Complainant and the Complainant's family doctor without the need of evidence being called by a specialist (*Desormeaux*, para 11 to 15).

[133] At the hearing, no doctor was called to testify. In the case at hand, one would have anticipated that at least Dr. Miller would have been called as a witness and in the alternative, that he would have been asked to prepare a tangible report dealing with a diagnosis and how the Complainant presented himself. The evidence of Dr. Miller is scanty, always on a prescription pad and but for the October 19th note where he states that the Complainant suffered from stress, anxiety and depression, there was no mention of a possible disability. Moreover, this note did not suggest that the Complainant could not work, but rather recommended a job modification.

[134] The Complainant argues that he can establish a *prima facie* case based on the family doctor's notes. In the present case, except for a short note from Dr. Miller dated October 19, 2005, there was no diagnosis of a medical condition. The only information provided was that the Complainant was off work and suffering from stress and depression and required work modifications. It is true, however, that a specialist need not be called if the diagnosis is sufficient.

[135] In the reports submitted to the CRA, it was never mentioned that the Complainant was unfit for work. For example, Dr. Prendergast, who had found the Complainant fit to work in all of his reports, stated on September 21, 2004: "[he] is currently well and capable of fulfilling the requirements of his job". Furthermore, Dr. Prendergast stated words to the effect that the Complainant did not suffer from a medical condition which would prevent him from returning to work. In his report of January 27, 2005, he stated that the medical evidence was quite straight forward, and concluded that the Complainant had had stress factors but had never been significantly ill.

[136] Dr. Miller suggested that the Complainant see a psychiatrist, and Dr. Boissevain suggested that the Complainant see a psychologist. However, the Complainant did neither of these things. It is also noteworthy that there is no evidence that the Complainant, at any time, took any medication for stress or anxiety. Additionally, the Complainant testified that 2002 and 2003 were good years and, therefore, his mental health issues seem to be limited to 2001 and 2004 moving forward.

[137] The Tribunal has been advised by the Complainant and his counsel that he had had more medical concerns. The Complainant testified that he had received EI Disability Insurance benefits. That may be the case, but the Tribunal has not received any evidence to establish the medical basis in respect of which these benefits were paid. In particular, the Complainant's testimony did not reveal why he was receiving EI Disability benefits.

[138] Moreover, it is noteworthy that all of the reports given dealt with the Complainant's relations with CCRA and CRA, but not with CBSA. Indeed, it is important to stress the fact that the Complainant did not inform CBSA about his medical condition until the 2006-1001 competition. Before that competition, the Complainant had never asked the Respondent for any accommodation, nor had he advised the Respondent of any disability.

[139] The evidence does not disclose that CCRA shared the Complainant's medical condition with the Respondent. Moreover, no evidence was presented to show that the Complainant would have experienced the same kind of problems with the Respondent as he had experienced with CCRA. The evidence rather shows that a big part of the Complainant's health issues were directly related to the toxic relationship he had with coworkers and managers at CCRA.

[140] With respect to the competitions and the different panels, the Complainant did not present any evidence to demonstrate that the Respondent should have had suspicions about his disability. His behaviour before the panels did not display a disability nor did his work assessments from his supervisors in his terms of employment with the Respondent. He also never told the Respondent about his disability, except during the last competition in 2006.

[141] It is important to mention that a hiring process provides a much more limited opportunity to indirectly learn of an employee's need for accommodation, as compared to the daily interactions between an employee and his/her supervisor.

[142] That being said, the 2006-001 competition requires special consideration, since it was the first competition where the Complainant asked for an accommodation, but also

because I find the conduct of the Respondent troubling. Indeed, while she was not directly involved in this competition, Ms. Lennax sent Mr. Farrell an unsolicited email and attached a letter from Ms. Stoner concerning the Complainant. The email from Ms. Lennax concerned the Complainant's appearance before the PSC in 2006, and Ms. Stoner's letter was with respect to his interview with the selection board in the 2003-1002 competition.

[143] The contents of the email and the letter were set out above, but the Tribunal finds that their goal was to discredit the Complainant. Mr. Farrell, notwithstanding that information, chose to screen in the Complainant and to invite him to an interview. It is agreed that in the Complainant's application for the 2006-1001 competition, there was no mention of a disability or any request for an accommodation. The interview was scheduled for November 7, 2006 and prior to that date, the Complainant made three requests: 1) he did not want to have his interview take place in a specific office; 2) he wanted to obtain the names of those on the selection board; and 3) he wanted to be given an accommodation due to his disability. Unfortunately, the CBSA employee who received this request did not pass it along to the interview panel.

[144] It is agreed that the Complainant did not provide the selection board with any documentation to support his claims that he had mental health issues. At the beginning of his interview, the Complainant advised the board that he needed an accommodation and that he had mental health issues, mainly depression, which affected his ability to speak. He also said that he suffered from paranoia and that he lacked self-confidence. The Complainant had been concerned about his performance at the interview and suggested that, instead of conducting a formal interview, the board rely upon his performance assessments for the period up to 2004. These symptoms were never mentioned before any of the previous selection boards. As previously stated, the November 7, 2006 interview did not go well and I find that both sides were confrontational. Once the Complainant made his request, the interview was adjourned and the board asked for medical reports in order to be able to make a decision on the request. In the following months, the Complainant and the Respondent exchanged multiple e-mails about the possibility of accommodating the Complainant. It was not until

February 1, 2007 that the Complainant provided CBSA with a doctor's note that clarified that he would "…need extra time in the interview process due to problems with concentration and logic."

[145] Ultimately, Mr. Farrell was of the opinion that he had enough information to proceed with the interview, and at one juncture he wrote to Ms. Lennax that he was prepared to proceed with the interview. However, shortly thereafter he had a change of heart and he intended to screen the Complainant out of the process. Ms. Lennax urged him to proceed with the interview to allow the Complainant to showcase himself. The interview finally took place on March 7th, 2007.

[146] In reviewing the medical evidence, it does show that the Complainant suffered from some form of stress or depression. However, no position from a psychiatrist, psychologist or counsellor found the Complainant medically unfit to work. All of the stressors related to the Complainant's work with CCRA and CRA; none pertained to CBSA. Prior to the 2006 competition, the Complainant had never advised of a disability nor asked for an accommodation, and in fact, he was hired for three term positions and was screened into other pre-qualified pools. This is hardly evidence that the Respondent had a perception that the Complainant suffered from a mental health disability, or had mental health issues. The Complainant never gave any evidence of any condition other than anxiety and stress, and he failed to take any active steps to seek psychiatric assistance.

[147] The quality of Dr. Miller's notes, which were on prescription pads, was woefully inadequate. There should have been evidence with respect to chart notes, and if Dr. Miller was not being called as a witness, there should have been a comprehensive report prepared. None of the reports or evidence had a diagnosis of a mental health illness, and while his behaviour at times was certainly not particularly good, there was no evidence that the Complainant was suffering from a medical disability.

[148] The Respondent also cited the case of *Canada (Attorney General) v. Gatien,* 2016 FCA 3, where the Court upheld the distinction between disabilities and ailments and stated at paragraph 47:

> 47. In this regard, contrary to what the Federal Court judge found, there was evidence before the Adjudicator from which he could have reasonably concluded that the employer was unaware of Ms. Gatien's mental health condition when it imposed discipline. The mere fact that she dissolved into tears or said she was stressed falls well short of proof of her suffering from a recognized psychiatric illness. Likewise, the brief note from her physician, which merely referred to recent stressors to support a short period of sick leave falls well short of communicating to the employer that Ms. Gatien was suffering from or was likely to suffer from post-traumatic stress disorder.

[149] This Tribunal in *Mellon v Human Resources Developments Canada*, 2006 CHRT 3, took a different view at paragraph 88:

> 88. The *Act* does not contain a list of acceptable and unacceptable mental disabilities. It is not just the most serious or most severe mental disabilities that are entitled to the protection of the *Act*. Additionally, it is not solely those that constitute a permanent impairment that must be considered. Where appropriate even mental disabilities described as minor with no permanent manifestation could be entitled to protection under the *Act*. However, sufficient evidence still needs to be presented to support the existence of the disability.

[150] The *Mellon* case affirmed that a "minor disability with no permanent manifestation could be entitled to protection under the *Act*". The case however qualifies it by stating "However, sufficient evidence still needs to be presented to support the existence of the disability". In the present case, until the end there was no definite disability that was diagnosed or any medical evidence presented with any specificity. The primary physician, Dr. Miller, produced notes but no report and was not called as a witness. The present case, if one accepted the rationale from *Mellon*, has failed to provide sufficient evidence of a disability.

[151] In this context, I find that the Complainant did not show on a balance of probabilities that he suffered from mental health issues from 2001 to 2005, nor did he show that CBSA could have known about any of his issues with the CCRA at the time. However, I do find that during the 2006-001 competition, the Complainant established that he had a disability and that he requested an accommodation. I will thus only consider this specific competition for the two other parts of the *prima facie* discrimination test.

[152] I first have to determine if the Complainant suffered an adverse impact during the 2006-001 competition. Here, I believe that no lengthy analysis is needed since I find that the Complainant suffered from an adverse impact, as described under s.7 *CHRA*, when he failed the competition and was not put in a pre-qualified pool. Section 7 *CHRA* is clear: " It is a discriminatory practice, directly or indirectly, to refuse to employ any individual on a prohibited ground of discrimination."

[153] Second, I have to determine if *the Complainant's disability was a factor in the fact that he did not succeed in competition 2006-001.*

[154] As previously stated, by the time the Complainant entered the competition 2006-001, his behaviour had deteriorated. He told the panel chaired by Mr. Farrell that he needed an accommodation and he provided some medical evidence to the panel to support that position. This was the first time the Complainant advised a panel of any issues and sought an accommodation. The hearing panel rightfully adjourned the hearing at the request of the Complainant in order to determine what accommodation would be appropriate. There was then a series of correspondence between the Complainant and Ms. Lennax and Ms. Lennax and Mr. Farrell. There was also a letter from Ms. Stoner which was prepared with respect to his behaviour at the 2003-1002 hearing. At one juncture, Mr. Farrell almost screened out the Complainant, but at the urgence of Ms. Lennax, he changed his mind and screened the Complainant into the competition.

[155] I find that the behavior of the Respondent's employees in this entire process is surrounded by a "subtle scent of discrimination". The fact that the panel received an e-mail and a letter from Ms. Lennax and Ms. Stoner to discredit the Complainant was unacceptable. These e-mails and this letter without a doubt contaminated the panel and the way they viewed how the Complainant could be fit for the job. In this context, I conclude that the Complainant's disability, or perceived disability, was a factor in the decision of the panel to fail Mr. Hughes. I also conclude that for this specific competition, Mr. Hughes has met his burden of proof of establishing a case of *prima facie* discrimination.

[156] I now have to determine if the Respondent was able to refute the allegations of *prima facie* discrimination, or established, on the balance of probabilities, a defence based on a *bona fide* occupational requirement.

[157] The Respondent argued that since the panel had been advised that the Complainant had issues with concentration, speaking, logic and logical thinking, the accommodation was to allow the Complainant extra time to answer questions. The panel however refused to review the Complainant's past reviews instead of the interview. Despite the accommodations provided, the Complainant failed the interview process. The Respondent argues that it provided the Complainant with an accommodation but the Tribunal finds that the Respondent did not do enough to accommodate the Complainant. The pejorative e-mail of Ms. Lennax and the letter from Ms. Stoner tainted the mind of Mr. Farrell with respect to the Complainant. The Respondent ought to have considered establishing a new panel where the perception of mental illness would not have been so prevalent. The Respondent argues that the issue of the Complainant's cognitive abilities and retention are vital to CBS offices. However, the Respondent did not rely on s.15 of the *Act*. Therefore, I cannot find that CBSA has established a defence.

[158] In summary, I conclude that the Complainant has established he has a disability or a perceived disability, that he did suffer an adverse impact due to his disability during the Competition 2006-1001 and that his disability and/or perceived disability was a factor in the adverse impact. He has thus met the test for a *prima facie* case. The Respondent has not been able to refute the allegations of prima facie discrimination, or establish, on the balance of probabilities, a defence based on a *bona fide* occupational requirement.

C. Perceived medical disability or medical disability

[159] In all of the circumstances up until the 2006-001 competition, the Tribunal finds that there was no discrimination on a medical disability or a perceived medical disability contrary to the provisions of the *Act*. This is so because the Tribunal found that the

Complainant did not prove, on the balance of probabilities, that he suffered from a disability, or perceived disability, until the 2006-1001 competition. Therefore, all of the allegations up to the 2006-1001 competition are dismissed.

D. 2006-001 Competition

[160] Clearly, in the 2006-001 competition when the Complainant appeared before the selection board, his condition had deteriorated. He had asked for an accommodation prior to the hearing, and ultimately provided further medical notes to support his request.

[161] The Tribunal is satisfied that in the 2006-001 competition, that the Complainant has proven on a balance of probabilities that he had a medical disability and/or a perceived medical disability, and based on his medical/perceived disability, he was discriminated against in the hiring process. The complaint is substantiated in part.

VI. DIRECTION BY THE TRIBUNAL

[162] The Tribunal hereby directs the Registry to canvass the parties for common dates on which to convene a Remedial Hearing. This Remedial Hearing will only be for a remedy on the last competition 2006-001.

Signed by

George E. Ulyatt
Tribunal Member

Ottawa, Ontario
May 29, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1726/8111 and T1769/12411

Style of Cause: Chris Hughes v. Canada Border Service Agency

Decision of the Tribunal Dated: May 29, 2019

Date and Place of Hearing: June 23-26, 2015; April 4-8, 2016; May 16-20, 2016; June 20-24, 2016; October 31, 2016; November 1-4, 21-23, 2016; March 7, 2017; April 24-25, 2017, and February 26, 2018

Victoria, BC

Appearances:

David Yazbeck, for the Complainant

No one appearing for the Canadian Human Rights Commission

Graham Stark, for the Respondent