

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

**Citation: 2023 CHRT 33
Date: August 16, 2023
File No(s): HR-DP-2811-22**

Between:

ISHRAT NIPA

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

TRANSPORT CANADA

Respondent

Decision

Member: Edward P. Lustig

Table of Contents

I.	OVERVIEW.....	1
II.	BACKGROUND	2
III.	LEGAL FRAMEWORK	13
IV.	ANALYSIS	16
V.	DECISION AND ORDER.....	20

I. OVERVIEW

[1] The Complainant Ishrat Nipa is a Canadian citizen who came to Canada from Bangladesh. She alleges that the Respondent discriminated against her on the basis of her race and/or her national or ethnic origin by changing a passing mark she had achieved in a formal merit based oral interview to a failing mark after a subsequent informal non merit based oral interview, thereby eliminating her from an employment selection process, contrary to section 7 of the *Canadian Human Rights Act* (“CHRA”).

[2] On January 9, 2020, Ms. Nipa accepted an invitation from the Respondent for a formal merit based oral interview for the position of ATIP (Access to Information and Privacy) Junior Officer Level PM-01 (the “job”) in Selection Process#19-EA-HRS-96729 Transport Canada (the “selection process”).

[3] She was originally passed for inclusion into a pool of qualified applicants for the job following her successful formal merit based oral interview that was conducted on January 20, 2020 by two experienced managers. She also submitted her references required in the selection process as well as all forms and information requested by the Respondent.

[4] In the formal merit based oral interview Ms. Nipa was given a passing mark in all of the merit criteria assessed. The two managers who interviewed her gave her a passing mark of 3 out of 5 for the merit criteria of “ability to communicate effectively orally”, although one of the interviewers noted difficulty in understanding her and that she did not speak clearly.

[5] Subsequently, on February 20, 2020 Ms. Nipa attended an informal non merit based oral interview she had been invited to by the Respondent with two different managers who said they had difficulty understanding what Ms. Nipa was saying and expressed concerns to their Director about her ability to comprehend and communicate orally.

[6] Following the informal non merit based oral interview, the Director met with the informal interview managers and the formal interview managers. It was agreed, upon receiving advice from a Human Resources advisor who was consulted by the Director, that Ms. Nipa’s passing mark in the formal merit based oral interview for the merit criteria of

“ability to effectively communicate orally” would be changed from a pass to a fail, resulting in her failing the formal merit based oral interview and being eliminated from the selection process.

[7] The Respondent denies that it discriminated against Ms. Nipa and contends that the changing of her mark and her elimination from the selection process was due to concerns that the informal interview managers had about her oral communication skills when they interviewed her that were similar to concerns raised about her performance in this essential merit criteria by the formal interview managers when they interviewed her. As a result they concluded, on the advice of the HR advisor, that they could not qualify her based on merit as required by section 30 of the *Public Service Employment Act* (PSEA).

[8] In considering the evidence adduced at the hearing, the Tribunal has determined that while the decision to change her mark and eliminate Ms. Nipa from the selection process was unusual and hurtful to her and may have been procedurally irregular and flawed, there is no reasonable inference that can be drawn from the evidence that the decision was based on Ms. Nipa’s race and or national or ethnic origin. Therefore, the Tribunal finds that the decision was not discriminatory under the CHRA. As a result, Ms. Nipa’s complaint is dismissed.

II. BACKGROUND

[9] The main facts in this case are not in issue. Rather, the parties disagree on the reason why Ms. Nipa’s mark was changed in one of the essential merit criteria she was initially assessed on from a pass to a fail, resulting in her elimination from the selection process. Hence, the only issue to be determined in this case is whether the Respondent discriminated against Ms. Nipa, on the basis of her race and or national or ethnic origin, in changing her mark and eliminating her from the selection process, contrary to section 7 of the CHRA.

[10] In response to her online application that was determined to meet the initial screening criteria, Ms. Nipa accepted an invitation from the Respondent on January 9, 2020 for a formal merit based oral interview in the selection process for the job to take place on

Monday, January 20, 2020 at 9 am at 330 Sparks Street in Ottawa. The Respondent had announced the selection process to create a pool of qualified candidates to recruit Junior ATIP officers in the Respondent's ATIP Office.

[11] The job was an entry level administrative job involving the receipt and processing of ATIP requests from the Respondent, including interacting verbally with applicants and staff.

[12] The invitation from the Respondent stated that the interview was designed to assess the following 6 merit criteria:

- #1. Ability to plan and organize
- #2. Effective Interpersonal Relationships
- #3. Analytical Thinking
- #4. Dependability
- #5. Team Work
- #6 Ability to communicate effectively orally.

[13] In addition, the invitation from the Respondent stated that "If you are successful in the interview phase, Reference Checks will then be completed" and requested that the references should be provided "at this time". The invitation also requested that photo identification and proof of education be provided at the interview. The invitation didn't specify the need to produce forms in regard to security clearance for potential future appointments from the pool of candidates. Ms. Nipa submitted all of the reference checks, photo identification, proof of education and security clearance forms requested by the Respondent on time.

[14] There was no mention in the invitation from the Respondent or the information to candidates for the formal merit based oral interview about there being a subsequent informal non merit based oral interview that would take place in the selection process or assessment process. There was information that selection from the pool of qualified candidates would be based on the results of the entire assessment process.

[15] The Respondent also provided candidates with instructions about the formal merit based oral interview that prior to the interview candidates would have 30 minutes of preparation time to review all interview questions and that the interview would be 60 minutes in length. It was noted that only the answers provided orally to the jury members during the

interview would be assessed and all notes written during preparation, although given back to jury members, would not be considered at any moment of the assessment exercise.

[16] For each merit criteria except #6 there was a hypothetical scenario or situation related to the specific merit criteria with questions about how to deal with each scenario or situation. In the case of merit criteria # 6 there were no scenarios or situations or questions, rather the assessment of this merit criteria was to be based on how effectively the candidate communicated orally in responding to the questions about the other 5 merit criteria scenarios and situations throughout the interview.

[17] The Interview Rating Guide noted for all of the merit criteria assessed that “A Pass Mark on all individual essential merit criteria must be obtained in order to pass the overall interview.” The scoring was marked out of 5 for each merit criteria.

[18] Ms. Nipa attended at the formal merit based oral interview on January 20, 2020 and prepared notes in reviewing the interview questions during the preparation period before the interview started.

[19] Ms. Betricia Abou-Hamad, who appeared as a witness at the hearing and was very forthright and credible, together with Ms. Angie Belsher were the interviewers for the formal merit based oral interview. Both of them gave Ms. Nipa exactly the same pass marks for each of the 6 merit criteria at the January 20, 2020 interview as follows: For merit criteria #1 a pass a mark of 3; for merit criteria #2 a pass mark of 3; for merit criteria #3 a pass mark of 4; for merit criteria #4 a pass mark of 3; for merit criteria #5 a pass mark of 4; and for merit criteria #6 (Ability to communicate effectively orally) a pass mark of 3. As a result Ms. Nipa passed the formal merit based oral interview at this stage according to both interviewers scoring.

[20] On the scoring form at the formal merit based oral interview Ms. Abou-Hamad, who was very experienced in the selection process and had done many interviews, wrote the following comments about Ms. Nipa’s responses with respect to each of the individual merit criteria assessed: For merit criteria #1 “Ideas were all over the place but did hit points”; For merit criteria #2 “Ideas were all over the place but did mention the key points”; For merit criteria #3 “Provided better order of events/steps to follow”; For merit criteria #4 “Mentioned

steps taken. Lost in her chain of thoughts”; For merit criteria #5 there was no comment; For merit criteria #6 there was no comment but the mark was changed from 3 (Pass) to 2 (Fail) after the informal non merit based interview on February 20, 2020 that Ms. Abou-Hamad did not attend. She testified that her pass mark in merit criteria #6 was given because she was able to dissect what Ms. Nipa had said and she could understand her.

[21] On the scoring form at the formal merit based oral interview Ms. Belsher wrote the following comments about Ms. Nipa’s responses with respect to each individual merit criteria assessed: For merit criteria #1 “ideas were all over the place but did touch key point”; For merit criteria #2 “touched key points but thoughts were all over”; For merit criteria #3 “Answer was better chronological order of steps to take”; For merit criteria #4 “steps taken are lost in her chain of thought and quality she attribute to herself”; For merit criteria #5 “good answer”; For merit criteria #6 “Candidate was hard to understand. She did not speak clearly” and the mark was changed from 3 (Pass) to 2 (Fail) after the informal non merit based interview on February 20, 2020 that Ms. Belsher did not attend.

[22] The comment by Ms. Belsher about merit criteria #6 was the only comment made by either interviewer about merit criteria #6. Ms. Belsher did not attend the hearing but Ms. Abou-Hadad said that Ms. Belsher’s written comment on the scoring form about merit criteria #6 was added when she changed her scoring form for this merit criteria from 3 (a pass) to 2 (a fail) on February 20, 2020.

[23] For merit criteria #6 the guide for assessing this criteria provided that to score “3 pts: Fair” (a Pass) “Candidate possesses good communication skill: Very few language, grammar or vocabulary issues; Defines messages, important points and issues well, but not as clearly and concisely as possible; Defines complex issues , but with some gaps; Uses some communication tools; A few issues in distinguishing between essential and non-essential information; Adjusts style for various audiences; Addresses diverse views to build consensus”.

[24] For merit criteria #6 the guide for assessing this criteria provided that to score “2 pts: Poor” (a Fail) “Candidate possesses weak communication skills; A number of languages, grammar or vocabulary issues; Only adequately defines messages, important points and

issues; Struggles to define complex issues; Uses only a few communication tools; Struggles to distinguish between essential and non-essential information; Struggles to adjust styles for various audiences, but does attempt to do so; Struggles to address diverse views, but does attempt to do so”.

[25] Notes of Ms. Nipa’s responses at her formal merit based oral interview were made extensively by both of the interviewers on the scoring form together with the scores and the interviewers comments as set out above.

[26] Both interviewers attested on the scoring forms to seeing Ms. Nipa’s proof of education including a diploma as a paralegal from Algonquin College and Masters of Law from University of Chittagong, Bangladesh, 1999 and Bangladesh Bar council, 2002.

[27] At the hearing, because of the passage of time, Ms. Abou-Hamad testified that she could not remember any specific examples relating to any of her negative comments on the scoring form about Ms. Nipa’s formal merit based oral interview or any of the comments she made in her testimony about Ms. Nipa being “hard to understand and not speaking clearly” or that her ideas were “all over the place and not in sequence”.

[28] Ms. Abou-Hamad did not see any inconsistency in this case in later changing Ms. Nipa’s mark for merit criteria #6 from a pass to a fail, as her score was very close in this merit criteria between a pass (3) and a fail (2). She was confident in changing the mark in merit criteria #6 even though she did not attend the subsequent non merit based oral interview or receive any specific examples about Ms. Nipa’s alleged communication deficiencies in that interview and even though the marks in each of the other 5 merit criteria that depended on oral communication skills were not changed.

[29] Ms. Abou-Hamad said she was comfortable with the decision to change the mark even though neither she or Ms. Belsher ever approached their Director, Ms. Brigitte Parent about concerns they had with the formal merit based oral interview. Instead, it was only after Ms. Parent arranged to meet with them following the subsequent informal non merit based oral interview of Ms. Nipa by other interviewers that they expressed their concerns to their Director. She admitted that the reason the informal interview occurred was because

there were too many qualified candidates for the available jobs and that if the informal interview had not taken place the mark would not have been changed.

[30] Ms. Abou-Hamas testified about the very diverse workforce in the ATIP office and in the Department and that she had taken courses in diversity and unconscious discrimination. She came from an ethnic background herself and did not think that there was any unconscious discrimination in the decision to change Ms. Nipa's mark in this case.

[31] On February 18, 2020 Ms. Nipa was invited to an informal non merit based oral interview on February 20,2020. Not all of the candidates for the job who passed the oral merit based interview were invited to an informal non merit based oral interview.

[32] According to the Respondent, the purpose of this interview was to find the "best fit" for placement of the candidate into the job from the successful pool of candidates from the merit based interview that turned out to be larger than the vacancies for the job. This interview was not intended to be about assessing candidates merit for the job, as that had already taken place in the formal merit based oral interview. "Best fit" was described by the Respondent to the Commission in its investigation of the complaint, in subjective terms, as the person "who would best fit with the team in terms of energy and how they can meet the department's specific needs...the energy of the person and the personality that would blend into the team the easiest and fit with the dynamics of the team".

[33] Ms. Nipa's informal non merit based oral interview on February 20 2020 was carried out by Ms. Marie-Josée Ouellette and Ms. Josée Laurin, neither of whom knew who Ms. Nipa was before the interview took place or were aware of her race or ethnicity. Ms. Ouellette was senior to Ms. Lauren who was a witness at the hearing and was a last minute fill in for the informal interview with no previous experience in this type of interview.

[34] Ms. Laurin who was also a forthright and credible witness testified that she was mainly an observer and little involved at the informal non merit oral interview and could only remember asking a couple of questions of Ms. Nipa. One of her questions was whether Ms. Nipa was bilingual because she felt she was having difficulty understanding Ms. Nipa and her train of thoughts and felt Ms. Nipa had difficulty in conveying her thoughts in English in

response to questions. Ms. Nipa was not bilingual in Canada's official languages and spoke English as a second language.

[35] The other question that Ms. Laurin asked Ms. Nipa at the interview was when she would be available if a job was offered to her. Ms. Laurin indicated that Ms. Nipa initially had trouble answering this question clearly and responded to it by saying that she had two part time jobs but ultimately was able to answer the question advising that she would need one week notice to her employers. A partially redacted note of this exchange was tendered into evidence but it was the only note that was made by the interviewers of the approximately one half hour long interview.

[36] Further, Ms. Laurin testified at the hearing that given the lengthy time since the interview she had no other recollection of a specific example of her claim that Ms. Nipa was difficult to understand and to follow her train of thoughts in her responses to questions at the interview. Ms. Laurin and Ms. Abou-Hamud were the only witnesses who had met or spoke to Ms. Nipa.

[37] Ms. Laurin testified that the informal interview was intended to find the right fit operationally for employment out of the pool of candidates that had passed the formal merit based oral interview. She confirmed that the informal interviews were only held with some of the candidates but not all of the candidates who had passed but would not have been held with any of the candidates if it were not for the fact that there were more candidates who passed than there were job opportunities available.

[38] Ms. Laurin testified that she was not involved in the decision to change Ms. Nipa's merit based mark or in any discussion about doing that and only reported to Ms. Parent the facts of the interview as she observed them. She did not find out that Ms. Nipa's mark had been changed and that she had been eliminated from the selection process until some time later after the complaint was filed in this case and an investigation took place by the Canadian Human Rights Commission.

[39] Immediately following the non merit based oral informal interview of Ms. Nipa on February 20, 2020, Madames Ouellette and Laurin reported their concerns about Ms. Nipa's ability to communicate effectively at the interview to Ms. Parent, an experienced Manager

who was a forthright and credible witness at the hearing. Ms. Parent had the delegated authority to make final hiring decisions as she was responsible for running the selection process.

[40] As well, Ms. Genevieve St. Louis, who was an administrative assistant and who did not interview Ms. Nipa but walked her over to both interviews, told Ms. Parent that she had difficulty understanding and communicating with Ms. Nipa.

[41] The same day as the informal interview took place, Ms. Parent had a discussion with all 4 of the managers who had interviewed Ms. Nipa formally and informally, including Madames Abou-Hamad and Belsher who had passed her at the formal merit based oral interview despite noting some concerns about her responses at that interview. According to Ms. Parent they told her that while they had some difficulty understanding Ms. Nipa they had understood her well enough to pass her at the formal merit based interview.

[42] At the hearing, Ms. Parent said she accepted Madames Ouellette and Laurin's advice about not being able to understand or follow Ms. Nipa at the informal interview. Ms. Parent said that she believed that they came to that conclusion because some of Ms. Nipa's answers didn't respond to the questions asked at the informal interview but was unable to give any examples of this.

[43] Ms. Parent testified that as she had never encountered this type of situation before she sought direction from her HR consultant, Mr. Patrick Toupin who she consulted on the same day as the informal interview. Mr. Toupin was a witness at the hearing and was credible and forthright and knowledgeable about rules and laws in the employment area. Mr. Toupin advised Ms. Parent that section 30 of the PSEA obliged her not to hire Ms. Nipa if she felt that Ms. Nipa did not satisfy the merit criteria, even though she had passed all of the merit criteria when the merit based interview was held. Mr. Toupin advised Ms. Parent that she should consider the non merit based interview in making her decision if that showed the candidate did not meet the merit criteria on the whole of the information before her.

[44] As a result of these discussions and consultations it was agreed that Madames Abou-Hamad and Belsher would change Ms. Nipa's mark for "ability to communicate effectively orally" from Fair/Pass (ie 3) to Poor/Fail (ie 2). The result of this change was that the Ms.

Nipa was deemed not to have met one of the essential merit criteria and was eliminated from the selection process. She was informed of this by an email dated February 24, 2020 which specifically cited Ms. Nipa's failure to pass the effective oral communication merit criteria as the reason for her elimination from the process. None of her other merit criteria marks were changed from pass to fail.

[45] There were 12 successful candidates who entered the pool for jobs in the selection process, 8 of whom were hired out of the pool for jobs. Of the 12 successful candidates who entered the pool, 6 self-identified as visible minorities, 4 of whom were hired out of the pool for jobs.

[46] Ms. Nipa was the only candidate in this selection process who initially passed all merit criteria in the formal merit based oral interview but whose mark was later changed from a pass to a fail after the informal non merit based oral interview. Ms. Nipa scored the lowest marks of the successful candidates in the formal merit based oral interview and was the only one who passed with a mark of 3 on merit criteria #6 as all of the others scored higher on that merit criteria.

[47] None of the witnesses, including Ms. Parent, who was the hiring Manager and Mr. Toupin who was the HR expert, both of whom had over 25 years of experience with procurement process, had ever participated in or known about a selection process where a candidate's pass mark for an essential merit criteria achieved at a formal merit based oral interview was later changed to a fail mark following an informal non merit based oral interview resulting in the elimination of the candidate from the selection process.

[48] None of the Respondent's employees involved with this matter told Ms. Nipa at either interview about their concerns respecting her ability to communicate effectively orally, though she later became aware of these concerns when she was advised of her elimination from the selection process. As a result she was surprised and upset with her elimination from the selection process.

[49] According to Ms. Parent and the other Respondent witnesses, the ATIP office specifically and the Respondent generally had a very diverse work force with many races and ethnic and national origins represented. There was training and courses provided for

the employees in diversity in the work place and in unconscious bias and discrimination. There was statistical evidence produced by the Respondent to show that visible minorities presence in their workforce exceeded their workforce availability. In particular, candidates with the same ethnic origin as Ms. Nipa were more likely to succeed in job competitions than the average candidate and South Asian people were hired by the Respondent at a greater rate than their workplace availability.

[50] Ms. Nipa represented herself in a forthright and credible manner at the hearing and was the only witness who gave evidence on her behalf. I was able to follow and understand Ms. Nipa in her presentations, testimony and in her cross examination of Respondent witnesses and in her oral submissions at the hearing. She seemed to me to be adequately focused and organized at all times at the hearing. The hearing was held in English which is Ms. Nipa's second language. At times I had to orient myself a little to her accent and manner of speaking to understand her and had to ask her to repeat herself to get responsive answers to certain questions, but overall I was able to understand and follow her.

[51] In reading the notes Ms. Nipa made in preparation for the formal interview and in reading the detailed notes prepared by Madames Abou-Hassad and Belsher of her responses at that interview, in response to the questions in each of the merit criteria scenarios, I was unable to find examples of her being "all over the place" or "lost in her chain of thoughts" or "hard to understand" at the interview. That said, obviously I didn't hear her at either of the interviews and there was no audio record of the interviews. As noted there were no notes made of the informal non merit based oral interview.

[52] Ms. Nipa's evidence at the hearing was that she felt that the two managers, Madames Ouellette and Laurin, who interviewed her in the non merit based oral interview, unlawfully, unethically and intentionally influenced the other managers to change the mark that she had received for the effective oral communication from a pass to a fail based on discriminatory considerations, namely her race and or national or ethnic origin.

[53] Ms. Nipa claimed in her evidence that Madames Ouellette and Laurin were biased against her and that the informal interview was set up to eliminate her from the selection process with a fabricated story by the interviewers that they were not able to understand or

follow her during the interview. She testified that they made no notes of her answers to their questions during their lengthy interview of her, except for one very short note that indicated she was not bilingual and that she needed one week notice from her 2 part time jobs to take the job if she was hired.

[54] Ms. Nipa disputed the suggestion that Ms. St. Louis, who was not an interviewer, would have been unable to understand her as she was able to follow all of the instructions from Ms. St. Louis for attending and participating in the interviews.

[55] To Ms. Nipa, it was inconsistent and contrary to the selection process that was supposed to be based on merit, to be eliminated from the process on February 24, 2020 for failing the effective oral communication merit based criteria following the informal non merit based oral interview, despite having initially passed each of the essential merit based criteria, including the effective oral communication merit criteria at the January 20, 2020 formal merit based oral interview. To her, the changing of her mark under these circumstances demonstrated discrimination against Ms. Nipa because of her race and ethnicity.

[56] Further, in Ms. Nipa's opinion, it was inconsistent and did not make sense to her that none of her other essential merit criteria passing marks were changed from pass to fail despite the fact that passing all of the other merit based criteria depended in each case on her having effective oral communication skills that were to be assessed in relation to her responses in each of the other essential merit criteria.

[57] In Ms. Nipa's view, it was unethical and discriminatory that her elimination from the selection process was based on subjective non merit based "best fit" considerations at an informal non merit based oral interview after she had passed all merit based criteria at the formal merit based oral interview and had submitted all the information required to demonstrate her qualifications. According to her no specific evidence was produced by the Respondent to support their general criticisms of her communication skills at either interview.

[58] Also, Ms. Nipa felt that it was inconsistent that copious notes could be made of her responses to the questions in the formal merit based oral interview if she was not able to be

understood by the interviewers who wrote the notes and initially passed her in all of the merit criteria including effective oral communication skills.

[59] According to Ms. Nipa, as a result of the discrimination by the Respondent in changing her mark and eliminating her from the selection process based on her race and ethnicity, she suffered hurt feelings and a loss of her self worth and dignity.

[60] Ms. Nipa said she has been a Canadian citizen for over 15 years and had never before been told that she could not be understood. She has both university and community college degrees and diplomas in English as well as excellent work references. She feels that she was unlawfully prevented from realizing an opportunity that she was qualified for as well as other potential opportunities in the future for which she wants to be compensated and placed in a Level PM-01 job. She has currently qualified for pools for some other jobs with the government.

[61] The 4 witnesses for the Respondent at the hearing all denied any discriminatory behaviour or racial or ethnic biases against Ms. Nipa. There was no evidence of any overt or intentional racist comments or conduct by the Respondent's employees against Ms. Nipa. The evidence included statistical evidence of a diverse workplace trained in discrimination without any indication of hiring biases against south Asian people or of their underrepresentation in the workforce. The witnesses said that they changed her mark and eliminated her from the selection process because of concerns that they had with respect to her ability to communicate effectively orally at the interviews and the advice they received from Mr. Toupin.

III. LEGAL FRAMEWORK

[62] Section 7 of the CHRA provides, in part, that it is a discriminatory practice, directly or indirectly to refuse to employ any individual or in the course of employment to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Race and national or ethnic origin are among the prohibited grounds of discrimination included in section 3 of the CHRA.

[63] Section 30 of the PSEA provides, in part, that appointments to the public service shall be based on merit which requires that the person designated to appoint must be satisfied that the essential qualifications for the job are met by the person to be appointed.

[64] A complainant alleging infringement of the CHRA bears the onus of proving a *prima facie* case of discrimination. The applicable standard of proof is the civil standard of the balance of probabilities. To discharge the onus a complainant must establish a “connection” to a prohibited ground under the CHRA. (see *Quebec (Commission des droits de la personne et droits de la Jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39 at para 65 (*Bombardier*).

[65] 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.” (see *Ontario Human Rights Commission and O’Malley v. Simpsons-Sears*, [1985] 2 SCR 536 at para 28.)

[66] In order to prove a *prima facie* case of discrimination, the test that the complainant must generally satisfy is that: i) the complainant has one or more characteristics protected from discrimination under the CHRA, such as race, national or ethnic origin; ii) the complainant was subjected to adverse treatment or disadvantage; and iii) one or more of the complainant’s protected characteristic(s) was a factor, but not necessarily the only factor in the adverse treatment or disadvantage. (see *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (CanLII) at para 69 citing *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360 at para 33 and *Bombardier*, at paras 60-63.)

[67] In determining whether a complainant with protected characteristics has satisfied the second two parts of the test in a case under section 7 of the CHRA involving a complaint of discrimination in a selection board’s decision, a Tribunal is not required to assess the complainant’s qualifications and experience in absolute terms, not even in relation to other candidates. The Tribunal is not sitting as a selection board in such a case, nor is it exercising appellate jurisdiction in respect of the selection board’s decision, Rather, the Tribunal is required to assess the decision-making process of the selection board in order to determine whether the complainant was adversely impacted by the decision and whether the

complainant's protected characteristics or a combination thereof played a role in the selection board's decision-making process. (see *Turner v. Canada Border Services Agency*, 2018 CHRT 1, at para. 40).

[68] The Tribunal is not mandated to decide on the effectiveness, the correctness or the accuracy of the respondent's selection process, but rather to determine whether this process was tainted with discrimination. The presence of irregularities in the hiring process, even where it is shown that the hiring process was "seriously flawed", is not evidence of discrimination. The Tribunal does not have the power to monitor and supervise the operation and staffing process under the PSEA. The Tribunal's role is not to determine whether irregularities in the hiring process exist rather the Tribunal's role is to determine whether these irregularities were motivated by a prohibited ground of discrimination. (see *Salem v. Canadian National Railway*, 2008 CHRT 13 at para. 72; *Dokis v. Dokis Indian Band*, 1995 CanLII 10394 (CHRT); *Kibale v. Transport Canada*, 1985 CanLII 90 (CHRT)).

[69] A complainant is not required to prove that the respondent intended to discriminate in order to establish a *prima facie* case as some discrimination involves multiple factors and is unconscious. Indeed, it is often said that discrimination is not a practice that would ordinarily be displayed openly or even practiced intentionally. As a result, the Tribunal must examine all of the circumstances, invariably often involving circumstantial evidence, that both support and undermine the allegation of discrimination, to determine if there exists what the Tribunal has called the "subtle scent of discrimination". (see *Bombardier* at paras. 40-41; *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT); *Peel Law Association v. Pieters*, 2013 ONCA 396 at paras. 72 and 8; *British Columbia (Public Service Employees Relations Commission) v. BCGSEU*, [1999] 3 SCR at para. 29).

[70] Discrimination need only one factor in the respondent's decision not to hire for a complainant to be successful under the CHRA. The Tribunal is tasked with discerning whether discrimination was a factor in failure to hire. To do so the Tribunal must consider all of the evidence, make findings of fact and determine whether the inference that may be drawn from the facts supports a finding of discrimination on the balance of probabilities. However, there has to be a nexus between the conduct under scrutiny and a prohibited ground of discrimination. The nexus can be inferred through circumstantial evidence, but

the inference of discrimination must be more probable than other possible inferences. In making the inference, the fact at issue must be proved by other facts. Each piece of evidence need not alone lead to the conclusion. The pieces of evidence, each by themselves insufficient, are combined to provide a basis for the inference that the fact at issue exists. The finding of discrimination by the Tribunal can be based upon circumstantial evidence as well as direct, anecdotal and statistical evidence. (see *Khiamal v. Canada*, 2009 FC 495 at paras. 80-84).

[71] If a complainant establishes a *prima facie* case, the onus shifts to the respondent to show by way of a reasonable explanation that either discrimination did not occur or the conduct was not discriminatory. Any such explanation must be credible, and not a mere pretext or mask for discrimination. (see *Bombardier* at para. 37.)

IV. ANALYSIS

[72] Whether or not it was discriminatory, the decision by the Respondent to change Ms. Nipa's pass mark and eliminate her from the selection process was highly unusual and possibly irregular and flawed from a process point of view. None of the Respondent's very experienced witnesses had ever known of or been involved with changing a mark and eliminating a candidate from a job selection process.

[73] As well, the decision was clearly hurtful for Ms. Nipa and had an adverse impact on her. Ms. Nipa, who is from Bangladesh, was not made aware of her elimination until after the second interview and was understandably surprised and upset by the result as acknowledged by the Respondent. It was a blow to her self worth and dignity.

[74] In light of the merit requirements of section 30 of the PSEA that was used by the Respondent to support its position, the decision to change Ms. Nipa's mark and eliminate her from the selection process as a result of an informal non merit based oral interview that was supposed to be about the subjective "best fit" assessment for the job rather than merit based, also appears to be somewhat contradictory. The informal interview was not provided for in the process information made available to the candidates and was only held for some of the candidates because there were too many successful candidates in the pool from the

merit based interview. Had the informal non merit based oral interview not been held, Ms. Nipa's mark would not have been changed and she would not have been eliminated from the selection process.

[75] It also seems surprising and unfortunate, given the unusual circumstances, that with one exception, no clear and specific examples to support the general negative comments made by the interviewers about their difficulty in following Ms. Nipa's responses could be remembered at the hearing or were documented by the interviewers in either of the interviews, including the first interview where copious notes were made of her responses. The interviewers must have been able to follow what Ms. Nipa was saying well enough to make their notes.

[76] The one exception was the very brief note made by Ms. Laurin of Ms. Nipa's response to the question about her availability to start the job if selected. It is unclear from that note what was actually asked and answered and how it supports the negative comments about her oral communication skills.

[77] As well, it seems odd that the decision to change her mark and fail Ms. Nipa for poor oral communication skills in an entry level job selection process was made despite very positive references about her work in Canada that were accepted by the Respondent as well as her university degrees and Canadian community college diploma in legal studies that were also accepted by the Respondent.

[78] It also seems curious that the passing marks for all of the other 5 essential merit criteria that were assessed on an objective basis and depended on Ms. Nipa's effective oral communication skills to achieve a pass mark were not changed when merit criteria #6 was changed from a pass to a fail following the non merit based oral interview.

[79] Finally, in retrospect, in view of the very unusual circumstances in this case, one has to wonder whether it would have been more desirable for the Respondent to first reach out to Ms. Nipa for third oral interview by either Ms. Parent or a different panel of interviewers to recheck her oral communication skills before making the change to her mark and eliminating her from the selection process.

[80] All of that being said, as the cases cited above indicate, it is not the Tribunal's role to determine the adequacy or the merits of a respondent's hiring procedures and choice of candidates, even in unusual and possibly flawed selection processes. However, in such circumstances, where subjective criteria are being used in a hiring decision, it is necessary to more carefully scrutinize a hiring decision to determine whether the decision was tinged with discrimination on any of the alleged grounds of discrimination.

[81] Despite the unusual circumstances in this case and the possible irregularities that took place as referred to above, in weighing all of the evidence in this case, I find that there is no direct or indirect evidence establishing, on the balance of probabilities, that the Respondent intended to discriminate against Ms. Nipa or consciously did so. There is no evidence that displays any overt acts of discrimination on the part of the Respondent's employees against Ms. Nipa.

[82] Further, I accept the Respondent's witnesses testimony that they did not think that they were discriminating against Ms. Nipa when they changed her mark and eliminated her from the selection process. I believe that they genuinely felt that she did not possess the effective oral communication skills that were required for her to be hired on a merit basis to do the job according to section 30 of the PSEA and that they did not intend to discriminate against her.

[83] Even though the assessment of merit criteria #6 was subjective, the reason for the Respondent's decision was not, in my opinion, a pretext to discriminate against Ms. Nipa. I accept the Respondent's evidence that the difference between a pass (3) mark and a fail (2) mark was very close. Given that Ms. Nipa had the lowest mark in this essential merit criteria and that all 4 of the interviewers had generally the same view of her weak oral communication skills, the decision seems to me to have been reasonable.

[84] I also accept the Respondent's evidence about the broad diversity in its workforce and the training employees received about discrimination, including unconscious discrimination. This supports my view that this was not a workplace where discrimination in hiring normally took place and therefore it was unlikely that the Respondent's employees intended to discriminate against Ms. Nipa in this case. One of the interviewer witnesses self

identified as an ethnic visible minority. The uncontradicted evidence was that the Respondent did not disfavour the hiring of south Asians. Half of the successful candidates in the selection process were visible minorities who had passed the formal interview and one third of those were hired into the jobs by the Respondent.

[85] Notwithstanding my finding that there was no intent to discriminate against Ms. Nipa, given the unusual circumstances in this case as referred to above, it is incumbent upon me to review the evidence to try to determine whether there may have been unconscious or unintentional bias in the decision to change Ms. Nipa's pass mark to a fail mark and eliminate her from the selection process. In other words, whether the employees who participated in the decision unconsciously held negative stereotypical biases about Ms. Nipa based on her race or ethnicity that may have been a factor in their decision.

[86] Needless to say, it is an extremely difficult and uncertain task to try to determine whether there may have been unconscious bias by the Respondent's employees in this case who claimed not to be biased against Ms. Nipa, but who wouldn't have been able to recognize their own biases if they were held unconsciously. The unusual and even irregular conduct of the Respondent's employees in this case may have been wrong and unfair but does not alone amount to there having been unconscious bias and discrimination in the decision to eliminate Ms. Nipa from the selection process.

[87] At best, in the absence of intentional acts of discrimination, I can only examine the conduct under scrutiny to determine whether, more probably than not, an inference can be drawn of a nexus between the conduct under scrutiny and a prohibited ground of discrimination alleged by Ms. Nipa, based upon negative stereotypical biases unconsciously held by the decision makers in this case.

[88] I am not able to draw such an inference in this case based upon my review of the evidence. There was no evidence presented about any negative stereotypical biases generally prevalent in society against persons of Ms. Nipa's race and or ethnicity or national origin .

[89] On the other hand, as previously noted, there was statistical evidence presented about ample diversity in the Respondent's workplace and workforce including in the ATIP

office where the events of this case took place. The evidence showed that the Respondent's percentage of visible minority employees exceeded their workforce availability and that candidates with the same ethnic origin as Ms. Nipa were more likely to succeed in job competitions than the average candidate. 4 of the 8 successful candidates in this competition self-identified as visible minorities.

[90] All of the interviewers had expressed concerns about Ms. Nipa's oral communication skills and even though she originally received a pass mark it was on the borderline of a fail mark and the lowest mark achieved by any of the candidates.

[91] The decision was a spontaneous reaction to what the interviewers perceived to be Ms. Nipa's poor oral communication skills that they were told must be taken into consideration in the hiring process by virtue of section 30 of the PSEA, irrespective of Ms. Nipa's race and or her ethnic or national origin.

V. DECISION AND ORDER

[92] For the foregoing reasons I find that Ms. Nipa's complaint has not been substantiated and is dismissed.

Signed by

Edward P. Lustig
Tribunal Member

Ottawa, Ontario
August 16, 2023

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: HR-DP-2811-22

Style of Cause: Ishrat Nipa v. Transport Canada

Decision of the Tribunal Dated: August 16, 2023

Date and Place of Hearing: June 5, 2023, and June 6, 2023

Ottawa, Ontario (videoconference)

Appearances:

Ishrat Nipa, for herself

Kevin Palframan, for the Respondent