CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

SURESH KHIAMAL

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

GREYHOUND CANADA TRANSPORTATION CORPORATION

Respondent

REASONS FOR DECISION

MEMBER: Kerry-Lynne D. Findlay, Q.C. 2007 CHRT 34
2007/08/09

VI. DECISION 30

I. INTRODUCTION

[1] On August 15, 2003, Suresh Khiamal (the "Complainant") filed a complaint under Sections 7, 10, and 14 of the *Canadian Human Rights Act* ("CHRA") against Greyhound Canada Transportation Corporation (the "Respondent"). The Complainant alleges that the Respondent has engaged in discriminatory practices on the grounds of race, national or ethnic origin, colour, age and disability in a matter related to employment.

[2] Both the Complainant and the Respondent were represented by legal counsel. The Canadian Human Rights Commission ("the Commission") was not present.

II. BACKGROUND FACTS

[3] The Complainant, born December 4, 1948, is 58 years old. He is a Canadian citizen of East Indian origin. He immigrated to Canada in 1979 from South Africa. He worked as a licensed mechanic in South Africa from 1970 to 1979, and commenced work with the Respondent on February 20, 1980 as a second class mechanic. Within a few months, the Complainant obtained his license in Canada and was promoted to first class mechanic. Throughout the hearing, his position was referred to as one of a heavy duty mechanic.

[4] The facts giving rise to the complaint took place at the Respondent's Edmonton, Alberta Garage ("the Edmonton Garage"). There are two areas at the Edmonton Garage where heavy duty mechanics perform their employment duties. The first is the Service area, where Greyhound buses are serviced in terms of being inspected for roadworthiness, washed, gassed up, and generally maintained. The second is the Hoist area, where buses are mechanically overhauled and literally put up on a hoist for more substantive mechanical repairs such as brake repair, wheel alignment and the like. Heavy duty mechanic work in the Hoist area is more physically demanding.

[5] There have been many management changes in personnel and style in the time the Complainant has worked for the Respondent. At times, there has been more than one Foreman, and at times there have been none. The role of Supervisor, and the employees who have performed as supervisor, have also changed over time.

[6] Throughout his employment with the Respondent from 1980 forward, the Complainant was appointed to the Lead Hand position often, and for long continuous periods. His pay stubs show that when he performed Lead Hand duties, he was paid an extra $1.00 per hour. Although he worked in both the Service area and the Hoist area, he has primarily worked in the Service area particularly in recent years.

[7] The Lead Hand's duties are similar to the Foreman's in that the Lead Hand supervises other mechanics to ensure that the work that needs to get done is completed, allocates resources and assigns mechanics to certain duties, corresponds with the dispatcher, uses the MCMS computer maintenance system, and handles the responsibility for the buses being ready for and keeping to their schedules. The primary distinguishing differences

between the two positions is that a Lead Hand does not discipline, nor does payroll, nor deals with supervisors in a greater managerial sense. Leadership skills are essential.

[8] The Edmonton Garage is a unionized environment. The Complainant is a member of the Amalgamated Transit Union ("the Union"), and held the position of shop steward for many years. During his term of employment, the Complainant filed many grievances, some of his own and several for other workers, and was thereby familiar with the grievance process. A collective agreement, as amended from time to time, has been in place throughout the subject period.

[9] At the time of the filing of this complaint, the Complainant was the most senior mechanic at the Edmonton Garage. Seniority is a factor in holiday time choices, and may be a factor in whether a person is given training and courses by the Respondent or through the Union, and is a factor but not determinative in obtaining a promotion from heavy duty mechanic to a foreman position.

[10] When a mechanic is promoted to the position of Foreman, he loses his Union membership, and is not allowed to touch mechanic's tools except in the case of a real emergency. Under the collective agreement in place at the time of the complaint, a Foreman could return to his mechanic's duties with his seniority intact if he was laid off from that position, but not if he was terminated by the Respondent.

III. OVERVIEW OF THE COMPLAINANT'S ALLEGATIONS

[11] The complainant's allegations can be organized as follows:

a) Allegation #1 deals with the complainant's application for the position of Night Shift Maintenance Foreman, and the respondent's decision not to hire him for this position. The complainant alleges that the respondent's decision was tainted by discrimination on the ground of disability, age, race, colour, or national or ethnic origin.

b) Allegation #2 deals with a series of incidents, or aspects of his workplace experience, that in the Complainant's view constitute harassment on the ground of race.

c) Allegation #3 focuses on one of the above incidents (i.e. the respondent's refusal to approve training and courses for the complainant), and asserts that this refusal constituted adverse differentiation and the denial of employment opportunities, based on race.

IV. THE LAW

A. Prohibited Grounds of Discrimination

[12] Section 3 of the *CHRA* designates race, national or ethnic origin, colour, age and disability as prohibited grounds of discrimination.

B. The Complainant's Burden and the Respondent's Burden

[13] The Complainant has the initial burden of establishing a *prima facie* case of discrimination. A *prima facie* case is one which covers the allegations made and which, if the allegations are believed, is complete and sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent. *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 ("*O'Malley"*)

[14] The Federal Court of Appeal has established in *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, that the Tribunal must not take into account the Respondent's answer in determining whether a *prima facie* case has been made out.

[15] In the event that the complainant establishes a *prima facie* case of discrimination, it is incumbent upon the respondent to provide a reasonable explanation for the otherwise discriminatory practice that is not a mere pretext for discrimination. (*Lincoln* at para 23).

C. Section 7

[16] Under s. 7, it is a discriminatory practice, directly or indirectly, to refuse to employ any individual (s. 7(*a*)), or in the course of employment, to differentiate adversely in relation to an employee (s. 7(*b*)), on the basis of a prohibited ground of discrimination.

[17] According to the Ontario Board of Inquiry's decision in *Shakes v. Rex Pak Ltd.* (1982) 3 C.H.R.R. D/1001, where it is alleged that the respondent's refusal to employ the complainant was discriminatory, a *prima facie* case of discrimination can be made out by presenting evidence that:

a) the Complainant was qualified for the particular employment;
b) the Complainant was not hired; and
c) someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

[18] That said, the *Shakes* approach is not a rule of law, but merely an illustration of the principle established in *O'Malley*. *Shakes* should not be applied in a rigid or arbitrary fashion in every hiring case. (*Lincoln*, para. 18; *C.H.R.C. v. Canada (A.G.)* 2005 FCA 154, paras. 25-26).

D. Section 14

[19] Under s. 14 of the *CHRA*, it is a discriminatory practice, in matters related to employment, to harass an individual on a prohibited ground of discrimination.

[20] Where an allegation of harassment is made under s. 14, the complainant must demonstrate that the impugned conduct:

a) related to a prohibited ground of discrimination;
b) was unwelcome; and
c) was persistent or serious enough to create a negative work environment.

(See *Morin v. A.G. Canada*, 2005 CHRT 41, para. 246)

E. Section 10

[21] Section 10 of the *CHRA* is engaged where an employer pursues a practice that tends to deprive an individual of an employment opportunity on a prohibited ground of discrimination.

F. Evidentiary Assessment

[22] Discriminatory considerations need not be the sole reason for the actions at issue in order for the complaint to be substantiated. It is sufficient that the discrimination be one of the factors in the employer's decision (*Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12 at para. 7 (F.C.A.)).

[23] An inference of discrimination may be drawn from circumstantial evidence, provided that the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses. (See *Chopra v. Canada (Health and Welfare)* (2001) 40 C.H.R.R. D/396 (CHRT) at para. 286.)

[24] Finally, in *Kasongo v. Farm Credit Canada*, 2005 CHRT 24, at paragraphs 29 and 30, the Tribunal underscored the need for an objective approach; adjudicators should be cautious in relying on perceptions of the parties that may be distorted because of personality characteristics, such as a high degree of sensitivity or defensiveness.

V. ANALYSIS OF THE COMPLAINANT'S ALLEGATIONS

A. ALLEGATION NO. 1 - THE NIGHT SHIFT MAINTENANCE FOREMAN JOB POSTING OF JULY 2002

[25] The complainant alleged that:

a) his disability;

b) his age; and
c) his race, colour or national or ethnic origin

played a role in the respondent's refusal to employ him for the above-noted position.

[26] To facilitate the analysis, each of the above grounds will be examined in turn, in order to determine whether the complainant has made out a *prima facie* case.

[27] Where a *prima facie* case has been established, consideration will be given to the respondent's explanation.

(a) Refusal to Employ Based on Disability - The *Prima Facie* Case

[28] The Complainant testified that he has diabetes. His evidence is that he has neuropathy in his feet. However, no medical evidence was led at the hearing as to the severity of his diabetes and its impact on his health, nor the timing of his first diagnosis and consequent medical treatment.

[29] The Complainant testified that he believes Steven Watson and everyone at his workplace knows he has diabetes because they would have seen him taking insulin. However, he gave no specific evidence of when or where the two supervisors who interviewed him for the Foreman position (Chuck Seeley and Steven Watson) did, in fact, see him taking insulin prior to or at the time of the July 2002 job posting and interview process. He suggested they might have seen him in the lunch room or in the men's washroom. However, the evidence indicated that Mr. Seeley was in a wheel chair and rarely took his lunch in the lunch room, or used the same washroom.

[30] The Complainant further testified that he did not raise the issue of his diabetes during the interview process for the Foreman's position, nor in either of the brief conversations he had with Steven Watson about the job on the work floor. In other words, the Complainant did not self-identify as having a disability at the time period relevant to this complaint, nor did he ask the Respondent to accommodate him in this regard.

[31] The Complainant's evidence on this point was evasive, weak, and non-specific. Based on the foregoing, I conclude that he has failed to establish on a *prima facie* basis that his disability played a role in the respondent's decision not to hire him for the Night Shift Maintenance Foreman position in July 2002.

(b) Refusal to Employ Based on Age-The *Prima Facie* Case

[32] At the hearing, the Complainant testified that he was born on December 4, 1948, and therefore was 53 years of age at the time of the July 2002 posting. Mr. Kenneth Mullan (the successful candidate) testified that he was born on January 19, 1959, and therefore was 43 years of age at the time of the July 2002 posting. Mr. Mullan's birth certificate was filed in the proceedings and corroborated his testimony as to his age.

[33] In the Complainant's letter of application, he did not mention his age or birth date, nor did he self-identify at the interview process or at any time relevant to this complaint as wanting to be accommodated for this reason.

[34] There was no evidence led that age was a relevant factor to the position of Maintenance Foreman at the Edmonton Garage. At age 53, the Complainant was still many years away from the normal age of retirement. There was no attempt by the Complainant to bring his age to the attention of the Respondent at the time of the job interview or other times relevant to this complaint. There was no evidence that age was a subject of discussion in either the Complainant's or Mr. Mullan's job interviews, nor that the age difference between the two men was apparent at the time.

[35] I find that the Complainant has not made out a *prima facie* case that his age played a role in the respondent's decision not to hire him.

(c.1) Refusal to Employ Based on Race, Colour, National or Ethnic Origin - The *Prima Facie* Case

[36] The Complainant testified that this was the first time that he had applied for a promotion to Foreman since arriving at the Edmonton Garage in 1980. He testified that this was because he did not feel that the Respondent was ready for a "coloured foreman as yet", and that he was physically fit, could do the heavy duty mechanic's job easily, and he earned more money than a foreman because he worked overtime.

[37] When asked what had changed to prompt him to apply in 2002, the Complainant responded, "my health, my age", and said that he was unaware of any employment equity initiatives at the Edmonton Garage. He also testified that he would take the position today if it was offered to him, and that at the time of the hearing there was an open position for one foreman.

[38] The Complainant testified that when he applied for the position, he first asked Steven Watson questions about the wage, the benefits package, "and everything else" but that Mr. Watson did not know anything about it. He decided to apply anyway, as he felt that it would be much lighter work for him due to him getting older and his health not being up to par.

[39] A copy of the written application submitted by the Complainant was introduced into evidence, and the contents read out and confirmed by the Complainant in part as:

"Equipped with 22 years of experience as a mechanic/lead hand I am applying for the position of maintenance foreman."

[40] In fact, at the time, the Complainant had 32 years of experience because he had 10 years' experience in South Africa prior to being hired by the Respondent.

[41] The written application also stated:

"I have reviewed the qualifications needed for the position and have the qualifications for all items listed on the job posting. If any further information is needed, I will furnish it upon your request."

[42] The Complainant did not submit any further resume or proof of qualifications, nor was he asked by the interviewing supervisors, Chuck Seeley or Steven Watson, to do so.

[43] When asked about the lack of information he provided, the Complainant testified that the supervisors knew everything about him because he had been at the Edmonton Garage for 22 years, and that Mr. Watson knew all about his certifications.

[44] In my view, it would be surprising if Mr. Watson had full recall of the certifications the Complainant had shown him in 1989, thirteen years prior to the interview. Having said that, I find that Mr. Watson would have been fully conversant with the Complainant's job performance over many years as a heavy duty mechanic in both the Service and Hoist Areas, his relationship with co-workers and his ability as a Lead Hand.

[45] The Complainant also testified that his interview only took about three minutes, and that although Mr. Seeley had lined paper and pen in front of him (the supervisors and the Complainant were across the desk from each other), he took no interview notes in his presence.

[46] The Complainant called Mr. Mullan as a witness. In Mr. Mullan's testimony he stated that his interview was also not lengthy, less than half an hour. He recalled being asked about how he would conduct himself as a manager, but that it was an informal

interview because he knew the supervisors having been working there for 5 years at the time. He vaguely recalled Chuck Seeley taking notes during the interview, but little was asked of him about his work experience. Like the Complainant, he testified that he felt that the interviewing supervisors knew him well enough that his expertise was not in question and was not the subject of discussion.

[47] The Complainant is of East Indian ethnicity. Mr. Mullan is white.

[48] As was mentioned above, under the *Shakes* approach, a *prima facie* case may be made out by demonstrating that the Complainant was qualified for the particular employment; that the Complainant was not hired; and that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

[49] In that the Complainant was not hired in this case, and in that Mr. Kenneth Mullan, the successful candidate, lacks the distinguishing feature which is the gravamen of this complaint, the issue is whether the Complainant was qualified for the Foreman's position, and whether Mr. Mullan was no better qualified than the Complainant.

[50] Mr. Mullan testified that he was a union shop steward at the time of the application for the position, but had no Lead Hand experience in the employ of the Respondent. He testified that he commenced work for the Respondent in 1997, and worked there as a Class A1 mechanic only until his promotion to Foreman in August 2002.

[51] His experience as a licensed mechanic spanned only 5 years at the time of the posting as compared with the Complainant's thirty-two years. As a foreman, all were agreed that a person no longer does any mechanic duties. However, I accept evidence given by the Complainant that knowledge of mechanic duties is essential to doing the Foreman's job well as you are dealing with mechanics, drivers and dispatch all the time who need supervision, guidance, and assistance.

[52] Cooperation with co-workers and management was also, by all accounts, an important part of the Foreman's job. Numerous witnesses said that the Complainant worked well with his co-workers. He in fact was very friendly with some, and maintained appropriate business relations with others. With management, the only reported tensions were with his supervisor, Steven Watson. Gary Peach, who is now retired, but at the relevant time was the Dispatcher located in downtown Edmonton, dealt with the Complainant on the telephone on a daily basis as Lead Hand. He was very complimentary of the Complainant's cooperation, knowledge and helpfulness on an ongoing daily basis over years of interaction.

[53] Nizar Dalla (an area maintenance manager out of Calgary), Richard Baker (at one time a Foreman at the Edmonton Garage), Steven Pejkovic, Gary Peach, and Jace Loewen all testified that the Complainant was highly skilled and conscientious at his job, interacted well with co-workers, and had leadership qualities. On the other hand, Richard Baker, Gary Peach, and Steven Pejkovic testified that Mr. Mullan was not as knowledgeable as the Complainant, nor as cooperative, nor as competent.

[54] Mr. Mullan had commenced work for the Respondent in 1997, and therefore had 17 years less seniority at the Edmonton Garage than did the Complainant. Mr. Mullan did have previous relevant work experience. At the time of the job competition, Mr. Mullan had been the Union Shop Steward for approximately 1½ years. The Complainant had also served as Union Shop Steward for several years previously.

[55] Based on the above, I find that there is sufficient evidence that the Complainant was qualified for the position of Foreman, and that Mr. Mullan was less qualified or no better qualified than the Complainant.

Improper Use of Discipline Record

[56] The Complainant also adduced evidence that, despite his equal or superior qualifications, his candidacy for the job was hampered by improper consideration of his past disciplinary record. In this regard, he testified about a conflict in the workplace that he feels was improperly considered by the respondent in determining whether he had the necessary interpersonal skills to be Foreman.

[57] On March 11, 1992, (ten years prior to the disputed Foreman job competition) an argument took place at the workplace between the Complainant and his supervisor Steven Watson. According to the complainant, there were words between the two of them, but there was no physical contact. At the time of the argument, the complainant had been using an exacto knife to scrape an inspection sticker off a bus window.

[58] Mr. Watson filed a formal workplace complaint against the Complainant arising out of the argument. The Complainant testified that, in the workplace complaint, Mr. Watson falsely accused the Complainant of threatening him, by poking Mr. Watson with his finger during the argument and having knives in his possession that Mr. Watson found intimidating.

[59] There was evidence that the incident was held against the Complainant ten years later during the Foreman hiring process, and that it was viewed as an example of the Complainant not getting along with his superiors in management. The evidence suggested that it was a factor in the respondent's decision not to hire the complainant, even though it should have been ignored because it had occurred so far in the past. It would seem to be the complainant's assertion that because of his race, the respondent dug deeply into his employment history to find a reason not to hire him. In this way, he could be passed over for the job despite his superior qualifications.

Conclusion

[60] I conclude, based on all of the above, that the Complainant has established a *prima facie* case of discrimination on the ground of race with respect to the 2002 Foreman job competition.

(c.2) Refusal to Employ Based on Race, Colour, National or Ethnic Origin - The Respondent's Explanation

[61] The Respondent has presented a number of explanations for why Mr. Kenneth Mullan was offered the position of Foreman in the July 2002 competition:

(1) Mr. Mullan was, despite the complainant's evidence, the best candidate for the job;

(2) Hiring Mr. Mullan for the Foreman position allowed the Respondent to accommodate his physical disability;

(3) The decision to hire Mr. Mullan was made by individuals in the Calgary office who presumably had no personal knowledge of the candidates;

(4) To the extent that the Complainant was treated unfairly in the job application process, this was due to personal animosity between the Complainant and Steve Watson, that had nothing to do with discrimination.

[62] The Respondent also presented explanatory evidence in regard to the Complainant's allegation that the 1992 workplace conflict was used against him in the hiring process.

[63] All of these explanations shall be considered in turn.

Mr. Mullan was, despite the complainant's evidence, the best candidate for the job;

[64] In comparing the work experience of Mr. Mullan to that of the Complainant, the Respondent notes that the latter only submitted a short letter of application, with no detail given as to qualifications or experience, and stating that he had only 12 years of experience with the Respondent as a Lead Hand. Again, however, the evidence tendered at the hearing did not support this statement, as the Complainant had been appointed Lead Hand throughout the 22 years he worked there, and I have found that his experience as a Lead Hand in the employ of the Respondent exceeded 12 years.

[65] The respondent sought to challenge the Complainant's suggestion that he was not accorded a fair interview. A piece of paper purporting to be questions asked of the Complainant during the interview process was introduced into evidence, and identified by Mr. Chuck Seeley as having been handwritten by him during the interview of the Complainant. It was similar in terms of the questions asked to other documents introduced purporting to be the interview notes of other interviews conducted of other candidates for the subject job posting and other Foreman job postings. Complainant's counsel challenged the authorship of the document, and challenged when the document was created.

[66] Ultimately, given the evidence as to both the Complainant's interview and Mr. Mullan's interview, I do not see anything turning on this point. I find that the piece of paper purporting to be a record of the Complainant's interview, was in fact authored by Chuck Seeley. It is possible that the notes were taken during the interview; however it is just as possible that they were written up afterward. Thus the paper does not serve as conclusive evidence of equal treatment during the interview process.

[67] The Respondent also tried to challenge the Complainant's qualifications relative to Mr. Mullan by impugning his computer skills. Several witnesses testified that about one year previous, the Respondent had introduced a new computer system called MCMS for maintenance purposes at the Edmonton Garage. All the mechanics had to learn to use it to complete orders, pull up their time, complete electronic time cards on it, and access some maintenance assistance manuals. It was necessary to use this system as both a Lead Hand and as a Foreman. Mr. Mullan testified that this was discussed during his interview, that the supervisors indicated that they felt he knew the system as well as anyone else working with the new program, and that if he had any difficulties they could help him.

[68] In Mr. Watson's testimony, he says he questioned the Complainant's competency with the MCMS system at the time, and felt he was slower and less capable with MCMS than some others. The Complainant had testified, however, that he was fully capable on the system as he used it daily as a Lead Hand. I accept the evidence of the Complainant on this issue, that he had sufficient competency on the MCMS system for the job of Foreman and his abilities at least equalled those of Mr. Mullan.

[69] Mr. Watson also testified as to Mr. Mullan's work experience. He acknowledged that Mr. Mullan was a Class A1 mechanic at the Edmonton Garage, and never a Lead Hand. He further testified that Mr. Mullan had been a heavy duty apprentice mechanic for his immediately previous employer, a general helper apprentice mechanic before that, and a service person at Edmonton Transit before that. In brief, the respondent was unable to demonstrate that Mr. Mullan was more qualified than the complainant, so this explanation must be rejected.

Hiring Mr. Mullan for the Foreman position allowed the Respondent to accommodate his physical disability

[70] The respondent also put forward the explanation that under the *Employment Equity Act*, it had an obligation to accommodate disabled workers. Placing Mr. Mullan, who suffered from arthritis, in the less physically demanding job of Foreman served to accommodate his disability.

[71] At the time of the job posting, Ken Mullan was absent from work on disability due to his arthritic condition. His arthritis was evident, as he had been off work several times for several months at a time. The Respondent was obviously aware of this. However, in Mr. Mullan's testimony at the hearing, he was adamant that his arthritic condition did not prevent him from doing full heavy duty mechanic duties, and specifically said that he did not self-identify as disabled, nor ask to be accommodated for the Foreman job posting. He testified that he really wanted the job, and that he emphasized his enthusiasm in the interview, because he wanted to advance himself.

[72] Mr. Mullan further testified that when he was terminated from the Respondent's employ after having been a foreman for about one and one-half years, he wanted to return to his heavy duty mechanic position. He stated that at that time, he felt fully capable of performing as a heavy duty mechanic, but he was not given the chance to go back `on the floor'. He has since changed his occupation on doctor's advice, but at the relevant time period, this was his mind set and his capability as he judged it.

[73] Mr. Mullan's evidence on these points was not controverted by either of the interviewing supervisors, Steven Watson or Chuck Seeley. No one from the Respondent's Calgary office gave evidence.

[74] As a result, I find this alternate explanation of the Respondent's-that it hired Mr. Mullan as Foreman in an effort to accommodate his disability-to be pretextual.

The decision to hire Mr. Mullan was made by individuals in the Calgary office who presumably had no personal knowledge of the candidates

[75] The respondent also tried to portray its actions in a non-discriminatory light by asserting that the ultimate decision to hire Mr. Mullan over the Complainant was made by the Calgary office, and not by anyone at the Edmonton Garage. However, I find that the actual decision was really made by Steven Watson with Chuck Seeley's concurrence. The Respondent chose to only have Steven Watson testify as its representative, and no one from the Calgary office appeared to give evidence. It is clear from Mr. Seeley's and Mr. Watson's evidence taken together that they had made up their minds to offer the position to Mr. Mullan before calling the Calgary office, and that they presented their interview findings in such a way as to effectively direct that Mr. Mullan be hired.

[76] It is my view that this is not a satisfactory or reasonable explanation.

T**o the extent that the Complainant was treated unfairly in the job application process, this was due to personal animosity between the Complainant and Steve Watson, that had nothing to do with discrimination.**

[77] The Respondent states that there is a history of conflict between Supervisor Steven Watson and the Complainant. It characterizes this as the Complainant having complained to other employees about Mr. Watson and his abilities as a manager, causing problems between the two men. The Respondent stresses that the conflict between Mr. Watson and the Complainant is not based on a prohibited ground, but rather is based on personal differences.

[78] The evidence of both Mr. Watson and the Complainant is that, at one time, they were close personal friends outside of work as well as at the workplace. Although Mr. Watson commenced at the Edmonton Garage in 1973, and the Complainant commenced in 1980, Mr. Watson worked his way up through the ranks. The Complainant arrived at the Edmonton Garage as a fully licensed mechanic. Mr. Watson was apprenticed to the Complainant and worked under him. The Complainant took his own time to assist Mr. Watson to gain his mechanic's certification. They worked on cars together at a friend's farm after work often, and went out to eat together. Their personal relationship soured, however, after Mr. Watson became the Complainant's superior.

[79] Given their previous close personal relationship, the preponderance of evidence suggests that the tensions that arose between them were non-discriminatory in nature.

[80] I find that the personal conflict between the Complainant and Steven Watson improperly influenced Mr. Watson's handling of the hiring process for Night Foreman in the Summer of 2002. Mr. Watson's and Mr. Seeley's interview of the Complainant was very brief. Mr. Watson asked the questions, and he did not explore the Complainant's qualifications adequately, nor ask him for further information that the Complainant offered to give. Mr. Watson exaggerated the qualifications of Mr. Mullan when he presented the interview outcomes to the Calgary decision-makers, with Mr. Seeley going along.

[81] Similarly, I find that Mr. Watson sought to undermine the Complainant's candidacy by using the 1992 workplace conflict against him. There was evidence from Steven Watson that any employee had the right to look at his own personnel records in Mr. Watson's office upon request. Upon a review of his personnel records, any employee has the right to destroy or cause to be destroyed any disciplinary or similar records after a five year time period. Accordingly, while it is true the workplace conflict occurred, it occurred ten years prior to the Complainant's application for promotion to Foreman; it was therefore remote in time and irrelevant to the job competition. Despite the foregoing, there was evidence it was an incident that Steven Watson continued to hold against the Complainant personally. In the context of their soured friendship, this is more than likely.

[82] The evidence supports the conclusion that Mr. Watson did not want to be dealing with the Complainant on a more frequent basis as supervisor to Foreman, due to the personal conflicts between the two men in the past and the consequent suspicion and animosity between them. The Complainant, for his part, felt victimized by supervisor Steven Watson's animus toward him, which would appear on the evidence to be justified.

[83] 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. Failing that, there may be other workplace, union, and civil remedies open to the Complainant, but the standard needed to establish a human rights complaint will not have been met.

[84] Liability under the *CHRA* is not engaged where the complainant's negative workplace experiences are due solely to a personality conflict with a supervisor. (See *Hill v. Air Canada* (2003), 45 C.H.R.R. D/456 (C.H.R.T.), paras. 132, 164-165, 169 and the cases cited therein.)

[85] In this case, I find that the *prima facie* discrimination in the hiring process is satisfactorily explained by the personal animosity existing between the Complainant and

Mr. Watson. This animosity is based on the interactions and respective career paths of the two men, and has nothing to do with the complainant's race, colour, or national or ethnic origin-or for that matter his age or disability. The inference of personal animus based on workplace history is more probable than any possible inference of discrimination on a prohibited ground.

[86] Since the respondent has provided a reasonable explanation, Allegation No. 1 is dismissed.

B. ALLEGATION NO. 2 - HISTORIC AND ONGOING HARASSMENT BY CO-WORKERS AND MANAGERS

[87] The Complainant has presented evidence of eight incidents or aspects of his workplace experience which he alleges form a pattern of harassment based on race, within the meaning of s. 14 of the *CHRA*. These eight incidents or aspects will be examined in turn.

(i) Workplace harassment by then foreman, Bruce Morrison, commencing 1984

[88] The Complainant gave evidence regarding workplace harassment by then foreman, Bruce Morrison, against him commencing in or about 1984 and continuing over several years. The Complainant made a formal human rights complaint against the Respondent in 1990 also based on age, race and disability, which was investigated and ultimately dismissed by the Canadian Human Rights Commission in 1994. The Complainant testified that Mr. Morrison was responsible for demoting him from Lead Hand, that he made racially based remarks behind his back, and denied him courses that "white mechanics got".

[89] It is the Complainant's position that although his 1990 *CHRA* complaint was dismissed, it should still be looked upon in this hearing as evidence of discrimination dating back nineteen years previous to the filing of the present complaint. On this issue, I agree with the Respondent that this matter is too remote in time from the present matter to be properly adduced as a factor in the present inquiry. Therefore I cannot give it consideration as a single act of harassment, nor as part of a pattern of harassment.

(ii) False accusations of making threats against Mr. Watson on March 11, 1992

[90] As was mentioned earlier, on March 11, 1992, an argument took place at the workplace between the Complainant and Steven Watson. According to Mr. Watson, during this exchange the Complainant threatened him by angrily poking him with two fingers, while holding an exacto knife in the same hand. Steven Watson ultimately filed a formal complaint against the Complainant, which he said he agonized over somewhat as they had been good friends at one time. He states that he was influenced in his decision by others superior to him, who convinced him that he had to take these formal steps to promote respect in the workplace for him and his position. The formal complaint at the time stated that the Complainant had "small knives in his possession" that Mr. Watson found intimidating. However, during the hearing Mr. Watson confirmed that the Complainant had an exacto knife in his hand that he had been using for work, not "small knives".

[91] With respect to this incident, two documents in particular were introduced. One document introduced by the Respondent was put forward as containing corporate records (referred to as Form 6s) indicating that the Complainant was disciplined for this incident, and reciting the incident as Mr. Watson had outlined it, except for the reference to the "small knives" in the Complainant's possession. The Form 6s are a commonly used form

at the Edmonton Garage that are employed for a variety of reasons. On the form it shows to whom copies of the Form are to be sent. When it comes to disciplinary matters, the person being disciplined would normally receive a copy. The Form 6s introduced indicate that the Complainant would have received a copy.

[92] However, in the Complainant's testimony, he stated that he was not disciplined nor did he ever receive the Form 6 reprimand introduced into evidence. The Form 6 evidence was put to the Complainant during cross-examination, and Complainant's counsel objected to their introduction. She submitted that the Respondent was under an obligation to disclose all of the Complainant's employment records, and had not previously disclosed these particular documents.

[93] I allowed the documents to be put to the Complainant on the basis that Form 6 documents relating to a 1992 incident might not necessarily have been considered relevant prior to the hearing. In that the complainant gave statements under oath, that the documents tended to refute, I allowed Respondent's counsel to introduce them as credibility was an issue in the hearing. At the cross-examination stage, they were introduced as exhibits for identification only, as there was no evidence that the Complainant had seen them previously and he testified therefore that he could not identify them.

[94] Subsequently, the documents were introduced as corporate records, kept in the normal course of business, through Steven Watson.

[95] Another document relating to this incident was introduced by the Complainant, that was identified as a copy of a contemporaneous written complaint outlining the event's particulars and authored by his supervisor, Steven Watson, that had been ripped up and retrieved by the Complainant and others from the trash. The Complainant had kept the document in the intervening years.

[96] Steven Pejkovic testified for the Complainant about the March 11, 1992 incident. He said that he has never observed the Complainant to be physically aggressive toward anybody at the garage over the years. However, he also testified that he was not present at the time of the March 11, 1992 incident, and that he could not confirm the incident. The Respondent did not call any witnesses as to the incident (other than Mr. Watson).

[97] I prefer the evidence of Steven Watson. He was quite emotional when remembering that he agonized over whether to report the matter which would bring disciplinary action upon the Complainant, because of the closeness of their friendship in earlier years. He admitted that the "small knives" notation, which appeared in the initial documentation, was wrong, and had a clear memory of the details. This contrasted with the Complainant's blanket denial. I find that this incident did take place as outlined by Steven Watson, and that the Complainant did receive a reprimand.

[98] However, I do not accept the Complainant's position that he was falsely accused and that this is an example of ongoing managerial harassment of him on a discriminatory basis. The evidence reveals that this incident had no connection with the Complainant's race, and originated rather from a personal animosity that had arisen between the Complainant and Steven Watson, which they both denied on the stand, but which was evident in their respective testimonies. Therefore, I cannot attach significance to this incident in my harassment analysis.

(iii) Complainant's 2000 holiday scheduling

[99] The Complainant alleges that his year 2000 summer holiday application was tampered with. Holidays are governed at the Edmonton Garage by the Collective Agreement. The Complainant testified under cross-examination that he did not file a grievance with respect to this incident. He testified that there have been no other holiday `incidents' since that time. He did state that there were other holiday incidents that preceded this one, but gave no details or timelines, and there was no corollary evidence given on the point. Therefore, the only matter for me to consider is the 2000 one.

[100] In April 2000 the Complainant applied for holidays from June 17th to June 30th, 2000. By virtue of his seniority, he should have been assigned his first choice. He had already bought airline tickets and made plans to vacation in the United States. There is no dispute that the application was tampered with. A copy of the handwritten bid was introduced as evidence, which clearly showed the year 2000 had been crossed out and 2001 handwritten in over it. No evidence was adduced as to who might have been responsible for this tampering. The Complainant testified that he did not do it, and I accept his evidence on this point. He would not have put his desired vacation plans in jeopardy, and risk someone else being assigned his preferred holiday time.

[101] The Complainant did state that at the relevant time, he handed his application to the then second supervisor at the Edmonton Garage, Chuck Seeley. He also testified that Steven Watson phoned him to point out that he had bid for the wrong year. Although he did not file a grievance through his Union, the Complainant did go to Keith Hutchings, then on the Union Executive, and a Senior Labour Relations Manager. Upon their intervention, the Complainant was given the holidays he requested, but it appears he would not have without their intervention. The time had already been given to the second in seniority, and that assignment had to be changed.

[102] The Complainant says that this is an example of workplace harassment of him by management. Given that the Complainant gave his bid to his supervisor, Chuck Seeley, and that the evidence before me was that the only other person who had the bid was supervisor Steven Watson, I find that his holiday bid was tampered with by someone in management.

[103] Moreover, management did not act appropriately to rectify the situation once they were made aware that the Complainant had not altered his bid. The Respondent did give the Complainant the holidays that he was entitled to ultimately, but only after he sought out intervention at a higher level within the company. His direct supervisors denied him his entitlement despite what quickly became a very evident error on the face of his holiday bid. Someone deliberately changed his bid, and his immediate superiors, being Steven Watson and Chuck Seeley, did not react appropriately when made aware of the conflict. This should not have required union intervention to correct.

[104] However, in order to constitute harassment within the meaning of s. 14, the incident needs to be based on a prohibited ground of discrimination. Nothing in the evidence suggests that the tampering with the complainant's holiday application, or management's response thereto, was based in whole or in part on the complainant's race.

(iv) Steve Watson's threat on July 23, 2002 to fire the Complainant if he won the Foreman Position

[105] At the time of his enquiries about the job competition for Night Shift Maintenance Foreman, the Complainant states that he was told by supervisor Steven Watson that he would fire him if he got the position, because he would no longer be in the Union. Mr.

Watson denies saying this. However, the Complainant's witness, Euclide Plamondon, a serviceman in the Edmonton Garage, testified that Mr. Watson said this in his presence to the Complainant. Mr. Plamondon's memory of the statement was, "If you take the job, I will fire you. You won't be in the union anymore." I accept Mr. Plamondon's evidence on this point. He had a clear memory of the circumstances of the statement, his reaction, and the reaction of the Complainant.

[106] A great deal of time was spent at the hearing on the question of whether, in fact, the Complainant could be fired or terminated if he had been hired as Foreman. Whether he could in fact be fired or not once he was no longer in the Union, is irrelevant to the complaint which is based on what was said to him. I accept the evidence of the Complainant and Mr. Plamondon that the threat was made by Steven Watson, and was done openly on the work floor in front of Mr. Plamondon.

[107] However, the Complainant's further testimony on this point was curious. Mr. Plamondon testified that he did not feel that Steven Watson was joking when he made the comments; he felt Mr. Watson was serious. However, the Complainant testified that he did not believe that Mr. Watson was "that serious", and that he thought Mr. Watson "was joking". If the Complainant received this comment as a joke, it calls into question whether he truly perceived the comment as being "unwelcome". He applied for the job in any event.

[108] That being said, even if the Complainant viewed Mr. Watson's threat as an unwelcome communication that served to poison the work environment, it has not been demonstrated that the threat was connected to the Complainant's race, or that it was based on any other prohibited ground of discrimination. Therefore the threat incident cannot be viewed as an instance of harassment.

(v) Ken Pauli October 4, 2005 incident

[109] The Complainant testified that on October 4, 2005, another mechanic, Ken Pauli, harassed him at work by calling him names including "stupid" and "lazy" and "everything else". He was Lead Hand, it was a statutory holiday, and Mr. Watson was away that week. Nizar Dalla, a manager from Calgary, was on duty later that day. The Complainant testified that he "felt that Mr. Watson took the week's holidays and condoned Ken Pauli to harass me." Explaining further, he testified that he believed that "[Mr. Watson] got Ken Pauli to harass me." His reasoning was that he had never had problems with Ken Pauli previously.

[110] The Complainant was advised by Marcia Reynolds in the Respondent's Human Resources Department to file a complaint in writing about the incident, which he did. Subsequently, he was aware that Ms. Reynolds did carry out an investigation and that he received a letter from Ms. Reynolds stating that Mr. Pauli admitted harassing him and acting against the Respondent's relationship policy that is widely posted at the Edmonton Garage and other of the Respondent's work sites. Race was not investigated, just harassment. He testified that he felt race was an issue, but he did not state that at the time of his workplace complaint. He also felt that Mr. Pauli's conduct was really a retaliation from Mr. Watson for his having filed a human rights complaint. (However, he did not make a formal allegation at the hearing, or beforehand, of retaliation under s. 14.1 of the *Act*.)

[111] The Complainant testified that this was "the only incident I had with anybody on the floor in the garage" and that this was "a singular incident". In his testimony, Mr.

Watson denied any prior knowledge of Mr. Pauli's conduct, and confirmed that he was away on holiday at the time of the incident. There was no evidence of Mr. Watson's involvement with this incident, either by encouraging it or condoning it. The investigation of the Complainant's workplace complaint against Ken Pauli did not involve Mr. Watson. At best, the Complainant's belief was pure conjecture that Mr. Watson was involved in putting Mr. Pauli up to harassing him when Mr. Watson would be away on holidays.

[112] Moreover, the only evidence the Complainant presented suggesting that race was a factor in Mr. Pauli's behaviour was the Complainant's stated belief that race was an issue, even though he did not state this at the time of his workplace complaint.

[113] In view of the above, I find that the Complainant has not demonstrated that this incident can be considered an instance of harassment within the meaning of s. 14.

(vi) Denial of training and courses

[114] The Complainant testified that on numerous occasions he requested specialized courses but did not get them. The issue of courses and training can be grieved through the Collective Agreement but the Complainant did not do this, although he testified that he did talk to a Union Executive member, Nelson Holst, about the issue.

[115] The Complainant alleges that he has been denied the opportunity to take courses or receive training that has been offered to other workers, and that this denial over time has both hindered his career advancement and directly interfered with his ability to perform certain specialized functions at work. Together with general allegations of discrimination in allocation of courses, the Complainant says he was denied the opportunity in 2001 to obtain his Class 2 licence (an upgrade from Class 3), and that when he took a newly required Air Conditioning course in 2003 and failed it, he suspects that Supervisor Steven Watson influenced the instructor to give him a failing grade.

[116] There was little evidence from the Complainant that he did not have adequate training over his years of employment. However, there was evidence that he was not given longer courses that he requested or that he felt he needed to do his work with current competence. In particular, in or about 2001, there was a new requirement that mechanics needed an upgrade from a Class 3 to a Class 2 license in order to carry a passenger when testing buses. The need to carry passengers would arise when a mechanic would carry an apprentice or another mechanic with him or her when testing the bus for vibrations or the like. It was not disputed that several mechanics achieved their Class 2 license, but when the Complainant asked Steven Watson to take the course, he was told that they had sufficient numbers with the new classification. He never did get this training, and to date cannot now test buses unless he gets somebody with a Class 2 license to go with him. As the most senior mechanic at the garage, often with Lead Hand duties, this is a real restriction on his ability to do duties he could do previously. Many mechanics who work under the Complainant as Lead Hand, have these Class 2 Licenses now.

[117] The Complainant also testified that when he was working more in the Hoist area, he was working on engines but not given any courses on engines. He also mentioned a 2003 electronics course offered to learn about a computerized analyzer to analyze what is wrong with the bus engine. He stated that whether you work in the Service area or the Hoist area, or any part of the workplace, you still need to use that analyzer. He was denied this opportunity.

[118] Another example given by the Complainant was an Air Conditioning (AC) course that the Complainant asked to take from about 1999 forward, and was finally offered in 2003 only after he told a union executive board member that it was being denied to him. He had considerable experience working with AC units on the buses. He considers the course very relevant and essential to his career. According to current Alberta government regulations, you can only work on AC units if you pass this course and hold the appropriate HRAI certificate.

[119] It was a one week course, with a final open-book examination, and the Complainant failed the course. The course was taught by one Peter Jasmin, who was independent of the Respondent. The Complainant saw Steven Watson talking with Peter Jasmin, and although he could not hear what they were saying, he believed they were talking about him. The Complainant blames interference by Steven Watson for his failing the course. He did not grieve the matter through the Union, nor complain to the Respondent, because he was embarrassed. The result is that although he has worked on AC units since 1970, he can no longer do so.

[120] The Complainant did not give any evidence as to whether he has asked to take the course again, or re-write the examination. The inference from his evidence is that he did neither.

[121] I do not accept the assertion made by the Complainant that Steven Watson interfered with the AC course and influenced the instructor to give the Complainant a failing grade. Therefore, I find that the Complainant has not made out a *prima facie* case of harassment with respect to this matter.

(vii) Denial of overtime

[122] The Complainant testified that he had been denied overtime opportunities. The evidence led in his direct testimony was that he told Steven Watson some time ago that he wanted to retire soon, and build up his pension before doing so by working some overtime. He testified that Mr. Watson's response was "No. There is no overtime." He further testified that other white mechanics could work overtime. He elaborated by saying that he worked quite a bit of overtime previous to Mr. Watson becoming foreman.

[123] When asked to be specific about the denials, he testified that if he had asked for overtime two years ago, Mr. Watson would have refused to grant it to him, but that this had changed about one year to a year and one-half ago. He stated that there is a shortage of mechanics so this is not an ongoing issue now.

[124] Despite the fact that several people were called as witnesses for the Complainant who did work for the Respondent in the relevant time period, and continue to work for the Respondent, none of them testified as to their own overtime experience nor as to overtime generally available at the Edmonton Garage. The only evidence led was by the Complainant and Steven Watson.

[125] Although the Complainant may have at times been denied overtime when he asked for it, his evidence was unclear on the dates and time periods involved. The complainant did not present enough evidence demonstrating even on a *prima facie* basis that his race played a role in any decisions made to deny him overtime.

(viii) Historical and ongoing workplace harassment

[126] The Complainant led little evidence on this point outside the ambit of the specific events and allegations already highlighted. He stated that the "whole thing is racial discrimination because my race, my age, and disability". His evidence essentially was

that "there is discrimination everywhere", and that "wherever you go in the blue-collar trade, it is the same thing". He stated that "it is the same kind of behaviour, the same mentality, the same culture, the same." This appears to be the defensive filter through which the Complainant views any workplace, including the Edmonton Garage where he has worked for 26 years.

[127] When asked about the ongoing nature of his complaint, the Complainant testified that "there is name calling behind the back. It is never in front of me..." He said he knows this because "people tell me about [it]". However, the Complainant's testimony on this aspect lacked any specificity, and he did not give evidence as to who told him this, or when, or provide any details as to either the nature of the talk, or what he was told about it.

[128] I find that the Complainant has not made out a *prima facie* case on this general alleged manifestation of harassment. The evidence is not complete or sufficient.

[129] Nor do I find that all eight incidents or aspects considered together constitute harassment within the meaning of s. 14 of the *CHRA*. As was mentioned above, to constitute harassment there must be a connection between the pattern of unwelcome conduct and a prohibited ground. No such connection has been established in regard to any of the eight incidents or aspects. Nothing in the evidence suggests that such a connection can be inferred in regard to the group of eight as a whole, or in regard to a sub-group thereof.

[130] Allegation No. 2 must be dismissed.

C. ALLEGATION NO. 3 - DENIAL OF TRAINING AND COURSES

[131] I have already dismissed the Complainant's allegation that Steven Watson harassed him by influencing an instructor to fail him in the AC course. However, more generally, the complainant has also asserted that the Respondent's conduct in regard to the denial of training and courses constitutes a discriminatory practice under both ss. 7(*b*) and 10(*a*) of the *CHRA*.

[132] This allegation is supported by the fact that the Complainant was denied the Class 2 license course, as well as the Electronic Analyzer course, and that for several years he was denied the opportunity to take the AC course. All these courses are essential to the Complainant being able to keep up his competency levels and to potential career advancement. In fact, the lack of courses has compromised the Complainant's ability to do his work at the Edmonton Garage despite his seniority and experience. All of the courses at issue were offered to other mechanics in the Edmonton Garage, often those who continued to work under the Complainant's direction.

[133] In view of the foregoing, I find there is *prima facie* evidence that the Respondent differentiated against the complainant adversely in the approval of courses and training. Similarly, there is *prima facie* evidence that the Respondent in the person of Steven Watson did pursue a practice affecting courses and training that deprived the Complainant of employment opportunities.

[134] However, in order to satisfy the *prima facie* burden, the evidence must be "complete and sufficient" to justify a decision in the Complainant's favour. In the current matter, there is no evidence linking the adverse differentiation or denial of employment opportunities to a prohibited ground of discrimination. Instead, the evidence indicates that the personal conflict between the Complainant and Steven Watson improperly influenced Mr. Watson's decisions relating to the courses and training that were made

available to the Complainant. As I have said before, on the evidence, I find that this personal conflict had nothing to do with the Complainant's race, age or disability.

[135] In view of the above, Allegation No. 3 must be dismissed.

VI. DECISION

[136] For all the foregoing reasons, the complaint is dismissed. No costs are awarded to the respondent as this is not provided for in the *CHRA*.

"*Signed by*"

Kerry-Lynne D. Findlay, Q.C.

OTTAWA, Ontario
August 9, 2007

PARTIES OF RECORD

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APPEARANCES:	
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No one appearing	For the Canadian Human Rights Commission
Michael Ford	For the Respondent