Federal Court  Cour fédérale

Date: 20151123

Docket: T-1725-14

Citation: 2015 FC 1302

Ottawa, Ontario, November 23, 2015

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CHRIS HUGHES,
CANADIAN HUMAN RIGHTS COMISSION

Respondents

JUDGMENT AND REASONS

[1] The Attorney General of Canada seeks judicial review of a decision by the Canadian Human Rights Tribunal, whereby it upheld Mr. Chris Hughes' complaint that Transport Canada had discriminated against him on the grounds of his mental disability, contrary to paragraph 7*(a)* of the *Canadian Human Rights Act*, RSC 1985, c H-6 [Act]. The Tribunal found Mr. Hughes' history of stress and depression was a factor in Transport Canada's decision to screen out his application from the marine security analyst competition, albeit indirectly or unintentionally.

[2] The applicant essentially argues that the Tribunal erred: (i) by rigidly applying the *Shakes* test, thereby failing to consider whether there was a connection between Mr. Hughes' disability and his treatment; (ii) in finding that the selection board had knowledge of Mr. Hughes' disability; and in the alternative, (iii) in unreasonably finding the evidence before it met the *Shakes* test, and rejecting the explanation provided by Transport Canada.

[3] For the reasons discussed below, I am of the view that the application should be granted on the basis that it was unreasonable for the Tribunal to conclude, based on the record before it, that Mr. Hughes had established a *prima facie* case of discrimination.

I. Background

[4] Mr. Hughes is a former federal government employee. He served as a collection contact officer/compliance officer, as a customs inspector, and finally as a business window agent, all PM-01 positions for various, discontinuous periods of time.

[5] While employed by the Canada Customs and Revenue Agency [CCRA] (predecessor of the Canada Revenue Agency [CRA] and the Canada Border Services Agency [CBSA]), he was forced to take two sick leaves as a result of work-related stress and depression. Mr. Hughes asserts that the stress was caused by an illegal act allegedly committed by the CCRA, which he had prevented in 2000. He says that consequently, he was retaliated against and refused several promotions. In early 2005, Mr. Hughes filed human rights complaints against the CRA and the CBSA with respect to the alleged illegal act of the then-CCRA, and also regarding alleged discrimination based on his age.

[6] In addition, Mr. Hughes filed a civil suit against the CRA and the CBSA, and in December 2005, he reached an out-of-court settlement with the two agencies; he was awarded $51,000.00 in compensation.

[7] Meanwhile, Mr. Hughes applied for the position of marine security analyst (PM-04 position) and subsequently applied for three other positions at Transport Canada. The first position is pertinent for the present application. The selection board for that position was composed of Mr. John Lavers, Ms. Sonya Wood and Mr. Ron Perkio.

[8] Mr. Hughes passed the written exam and participated in an interview with the selection board.

[9] After the interview, Mr. Lavers contacted Mr. Hughes to obtain references. On February 4, 2006, Mr. Hughes sent an email with references, adding that if there were concerns, he could provide clarification and/or additional documentation to confirm his work performance.

[10] A few days later, Mr. Hughes wrote to Mr. Lavers advising that he was having some problems with his old supervisor, Mr. Trevor Baird, who was refusing to validate an event Mr. Hughes had referred to in his interview. Mr. Hughes explained that Mr. Baird's evasiveness was a result of the out-of-court settlement, and that other references may be evasive for the same reason. The same day, Mr. Lavers asked Ms. Wood for her thoughts on the problems encountered with Mr. Hughes' references and she responded by an email to Mr. Lavers and Mr. Perkio, dated February 7, 2006, that it was not "an uncommon situation". She added:

> When/if a candidate's Reference Contact declines to provide a Reference check, there are other options/tools which the Selection Board can (& should) utilize to assess Personal Suitability…e.g. Board can ask the candidate to provide copies of any Letters of Reference or Performance Evaluations….in the e-mails below Chris has included what seems to be 'quotes' from Performance Evaluations Reports & prior Reference checks, from his previous employment.

[11] Therefore, at Mr. Lavers' request, Mr. Hughes mailed a package of documents referred to in the Tribunal's decision as Exhibit R-4 [Supplemental documentation] which included performance evaluations and past references. From these documents, Mr. Lavers identified Ms. Kathryn Pringle and Mr. Bill DiGuistini as potential references for Mr. Hughes.

[12] On February 27, 2006, a teleconference took place in the afternoon among the members of the selection board to discuss the consensus ratings for all of the candidates' personal suitability. The Supplemental documentation was reviewed by the selection board and Ms. Wood indicated in her notes taken during the teleconference that these documents were deemed by the board to not have sufficient context or information or relevance.

[13] The same day, Mr. Lavers contacted Mr. Hughes at 4:45 pm asking if he could shed some light on why no one on the list he provided was willing to provide a reference. Mr. Hughes asked if he could call back later, which he did at 5:30 pm. It was during that telephone conversation that Mr. Hughes disclosed his previous medical conditions.

[14] The next day, Mr. Lavers contacted Ms. Pringle and Mr. DiGuistini for references. Only Mr. DiGuistini agreed to act as a reference; specific questions were asked and answered but Mr. DiGuistini was unable to confirm whether or not Mr. Hughes was "detail-oriented".

[15] As a result, Mr. Hughes' rating guide, signed by Mr. Lavers and dated March 2, 2006, indicated a failing mark of 12/20 on the "detail-oriented" criterion, under the required 14/20.

[16] Mr. Hughes had also applied for three TI-06 positions that were all rejected. This aspect of his complaint for discrimination based on his disability was dismissed by the Tribunal, which found that he had not established *prima facie* cases of discrimination with respect to those three competitions. Mr. Hughes did not seek judicial review of these findings, nor did he contest the Tribunal's finding that section 14.1 of the Act, prohibiting retaliation against individuals who have previously filed discrimination complaints, was not engaged.

II. Impugned Decision

[17] The Tribunal upheld Mr. Hughes' complaint that Transport Canada discriminated against him in the course of the competition for the position of marine security analyst, contrary to section 7 of the Act.

Prima Facie Case

[18] The Tribunal relied on *Ontario (Human Rights Commission) v Simpsons-Sears*, [1985] 2 SCR 536 at 558 [*O'Malley*] for the proposition that the threshold required to establish a case of discrimination is quite low:

> [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.

[19] The Tribunal also stated that the response by the employer must be credible, and that in the absence of justification, relief is owed to the complainant (*Ontario* (*Human Rights Commission) v Etobicoke*, [1982] 1 SCR 202 [*Etobicoke*]). Further, the complainant need not show that discrimination was intentional (*Bhinder v CN*, [1985] 2 SCR 561). Once *a prima facie* case is established, the burden of proof shifts on to the employer to prove on a balance of probabilities that the behaviour was non-discriminatory or justified.

[20] The Tribunal selected the legal test for a *prima facie* case of discrimination as that of *Shakes v Rex Pak Ltd* (1981), 3 CHRR D/1001 (Ont Bd of Inquiry) [*Shakes*], as it was enunciated in *Premakumar v Air Canada* (2002), 42 CHRR D/63 (CHRT) [*Premakumar*]:

> [75] In the employment context, a *prima facie* case has been described as requiring proof of the following elements:
>
> a) that the complainant was qualified for the particular employment;
>
> b) that the complainant was not hired; and

> c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (ie: race, colour etc.) subsequently obtained the position [*Shakes*].
>
> [76] This multi-part test has been modified to address situations where the complainant is not hired and the respondent continues to look for suitable candidates. In such cases, the establishment of a *prima facie* case requires proof:
>
> > a) that the complainant belongs to one of the groups which are subject to discrimination under the Act, e.g. religious, handicapped or racial groups;
> >
> > b) that the complainant applied and was qualified for a job that the employer wished to fill;
> >
> > c) that, although qualified, the complainant was rejected; and
> >
> > d) that, thereafter, the employer continued to seek applicants with the complainant's qualifications. (*Israeli v. Canadian Human Rights Commission and Public Service Commission*, (1983), 4 C.H.R.R. D/1616, at page 1618 [*Israeli*].)

[21] The Tribunal also retained a few concepts from the jurisprudence: (i) that the task was to consider all the circumstances to determine if there was a "subtle scent of discrimination" as discrimination is not a practice always overtly displayed (*Basi v Canadian National Railway Co (No 1)* (1998), 9 CHRR D/5029 at para 38414 (CHRT) [*Basi*]; (ii) that discriminatory considerations need not be the sole reason for the actions in issue (*Holden v Canadian National Railway* (1990), 14 CHRR D/12 at D/15); (iii) that circumstantial evidence may be submitted if "an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses" (*Basi* at 11).

[22] The Tribunal chose to focus its analysis on the question as to whether Mr. Hughes was qualified for the marine security analyst position and the issue of the "detail-oriented" criterion, for which Mr. Hughes did not receive a passing grade from the selection board.

[23] As regards the selection board's knowledge of his disabilities and history of conflicts with previous employer, the Tribunal found:

> - Mr. Hughes disclosed to Mr. Lavers his previous disabilities in relation to his various employers, the CRA and CBSAl;
> - All board members were subsequently aware of Mr. Hughes' problems;
> - Mr. Hughes also disclosed the difficulties encountered in obtaining references in support of his application;
> - Despite the fact that some of the references previously agreed to act as references, they all systematically refused to support his application, though none of them overtly admitted this.

[24] The Tribunal concluded that it was doubtful Mr. Hughes could not have obtained a passing grade and that the lack of positive feedback in his case should have undoubtingly been offset by the amount of positive documentation showing, on a balance of probabilities, that he met the "detail-oriented" criterion. The Tribunal noted that the selection board was significantly influenced by the lack of references and neutral comments of Mr. DiGuistini about Mr. Hughes and that the Supplemental documentation should have been considered to his benefit in respect of his abilities regarding the "detail-oriented" criterion.

[25] The Tribunal had difficulty understanding Mr. Lavers' preference to communicate with persons directly rather than to refer to the Supplemental documentation in light of emails

between him and Ms. Wood. In fact, the Tribunal rejected Ms. Wood's testimony that the documents provided were insufficient and incomplete. A more liberal approach should have been taken because of the abundance of the documentation and the particular circumstances of Mr. Hughes.

[26] The Tribunal then considered the other candidates who applied for the same position and found they received positive comments qualifying them for the "detail-oriented" criterion. However, a careful review of their application indicates that the answers they provided at their interview were no better than those of Mr. Hughes. The Tribunal had difficulty understanding why Mr. Hughes' application was not accepted in view of a comparative analysis to the applications of other candidates.

[27] Mr. Lavers explained that the references provided by a candidate were instrumental in confirming a candidate's interview and to adequately score the "detail-oriented" criterion. As such, Mr. Lavers said he considered the only reference available and that Mr. DiGuistini was the basis for the final score of Mr. Hughes on that criterion, which was 12/20.

[28] The Tribunal stated (at para 239 of its decision):

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

[29] Finally, the Tribunal noted additional circumstantial evidence it found troubling: certain "VG" or "very good" comments were erased from Mr. Hughes's application without explanation from the selection board.

Transport Canada's Explanation

[30] Based on the answers provided by the testimonies of Ms. Wood and Mr. Lavers, the Tribunal concluded that the selection board offered no credible response with respect to its decision to screen out Mr. Hughes' application:

- Ms. Wood brushed aside all the documents provided by Mr Hughes in R-4 with his various comments demonstrating aspects of the detail-oriented criterion; she indicated that some passages were interesting or assumed that he met the detail-oriented criterion (at paras 248 and 249 of the decision);
- Mr. Lavers was not receptive to the documentation in R-4 and at the time of the analysis of Mr. Hughes' file he did not conduct a comprehensive and careful analysis (at para 251 of the decision);

[31] As such, the responses provided were not sufficient and were a mere pretext. Given that a *prima facie* case had been established by Mr. Hughes and given a lack of justification by Transport Canada, Mr. Hughes was entitled to relief (*Etobicoke*, above at paras 202-208).

III. Issues and Standard of Review

[32] This application raises the following issues:

(1) Did the Tribunal err in fact by finding the selection board had knowledge of Mr. Hughes' disability?

(2) Did the Tribunal err in finding there was a *prima facie* case of discrimination?

(3) If answered in the affirmative, did the Tribunal err in finding Transport Canada had not discharged its burden of demonstrating discrimination was justified or did not occur?

[33] I agree with the parties that the standard of review applicable to the issues raised in this case is that of reasonableness (see *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2005 FCA 154 at para 33 [*Morris*]); *Khiamal v Canada (Human Rights Commission)*, 2009 FC 495 at para 52 [*Khiamal*]).

IV. Analysis

Knowledge of Mr. Hughes' disability by the selection board

[34] The applicant submits that the Tribunal made key factual errors with respect to the Board's knowledge of Mr. Hughes' disability. On that point, the Tribunal stated:

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

[35] According to the applicant, this is an erroneous finding. Based on the record, Mr. Hughes provided references on February 4, 2006 and made no mention of disability. On February 6, 2006, he mentioned to Mr. Lavers he had an out-of-court settlement with CRA but did not disclose having had a disability at the time. Only once most steps in the staffing process were complete - by February 27, 2006 - was the disability disclosed. Therefore, the Tribunal could not reasonably infer that knowledge of the out-of-court settlement constituted knowledge of Mr. Hughes' disability. In fact, the evidence shows that Mr. Hughes did disclose his complaints against the CRA and CBSA in relation to the issue of CCRA's allegedly illegal act and age discrimination, but neither these relate to his disability. As regards the other members of the selection board, on direct examination Ms. Wood said she did not find out about the disability until the human rights complaint was filed. On cross-examination, when asked about whether she knew the reasons why the selection board could not get references, she said she did not recall exactly when she became privy to that information. Further, the record shows no evidence that Mr. Lavers ever told Mr. Perkio of the disability.

[36] The applicant also submits that while the board was troubled by the Supplemental documentation and the handling of Mr. DiGustini's reference, there is no express statement about how the assessment of this information was connected to Mr. Hughes' disability. The applicant maintains that the only reasonable conclusion based on the evidence is that Ms. Wood reviewed the Supplemental documentation and the board had a teleconference to discuss them before Mr. Hughes revealed his disability. In this regard, the applicant states:

> The evidence shows the Board reached a consensus on the Supplemental Materials and that the meeting to perform this assessment was to take place in the afternoon of February 27, 2006. Finally, the evidence shows that Mr. Lavers first became

> aware of Mr. Hughes disability during a conversation that started at 5:30 pm the evening of February 27, 2006.

[37] As regards the "VG" comments erased, the applicant argues that the record shows it is not at all uncommon for such alterations to occur.

[38] The respondents submit that there is ample evidence that Mr. Lavers knew of Mr. Hughes' disability for a long enough time to affect the outcome of the competition. Mr. Lavers knew of Mr. Hughes' disability by February 27, 2006 at the latest. Mr. Lavers contacted Mr. DiGuistini for a reference on February 28, 2006, and waited until March 2, 2006 to note the reason Mr. Hughes failed the "detail-oriented" factor. As for Ms. Wood, she learned of Mr. Hughes' disability before he received the failing score on March 2, 2006. While she testified that she was unable to remember when she learned of the disability, she also testified she was in frequent contact with Mr. Lavers and they would have discussed his disability after Mr. Lavers' phone call with Mr. Hughes on February 27, 2006. The brief notes of her review of the Supplemental documentation are undated and she claimed not to remember when they were written. Mr. Hughes submits that given the circumstances it was not unreasonable for the Tribunal to infer that Ms. Wood did discuss the disability before the failing score was finalized on April 2, 2006. As for the "VG" comment next to the "detail-oriented" factor, it was erased before it was disclosed to Mr. Hughes. As regards the "common practice" mentioned by the applicant, the evidence shows there were no similar alterations made to the other candidates' rating guides.

[39] I note that the Tribunal's reasons - particularly the portion dealing with a review of the evidence considered - do not explicitly mention that Mr. Hughes disclosed his disability, but rather focus on his effort to explain that the refusals to provide references were due to the December 2005 out-of-court settlement with the CBSA and the CRA.

[40] However, it is quite clear from the evidence that on February 27, 2006, at the end of the day, Mr. Hughes did indicate to Mr. Lavers that he had been on stress leave and that he had suffered from depression. This then begs the question as to if and when the subject was discussed between Mr. Lavers and the other members of the selection board.

[41] In my view, it was reasonable for the Tribunal to have found that the record reveals that Mr. Lavers more likely than not told the selection board about Mr. Hughes' medical conditions, sometime between February 27 and March 2, 2006.

[42] The record is unclear as to whether a final decision was rendered at the teleconference held between the selection board members during the afternoon of February 27, in light of: (i) the telephone discussions between Mr. Lavers and Mr. Hughes at 4:45 pm and 5:30 pm on February 27, 2006; (ii) the reference checks which took place on February 28, 2006; (iii) Ms. Wood's testimony that she could not recollect whether another meeting took place between them; and (iv) the fact the rating guide was only signed on March 2, 2006. During his examination-in-chief, Mr. Lavers explains that the rating guide of each candidate is put together over time (Certified Tribunal Record at 1827-1831). He adds that he put a note in Mr. Hughes'

rating guide on March 2, 2006 that said: "Reference check provided insufficient cooperation while affecting the global score for this factor".

[43] I therefore find that while the reasons of the Tribunal could have been more precise on its review of the evidence, the record supports the Tribunal's factual finding that, at the ultimate moment of deciding whether to screen the respondent out, Mr. Lavers did have knowledge of Mr. Hughes' mental disability.

Prima facie case of discrimination

[44] The question is now whether there was a factual connection established between the selection board's knowledge of Mr. Hughes' disability and the decision to screen him out.

[45] In the applicant's view, the Tribunal failed to carefully determine, on an analytical basis, whether there was a connection between the adverse treatment alleged and the complainant's membership in a protected group, when it rigidly relied on the *Shakes* test without considering the broader circumstances or context as the case law and situation requires. Relying on *Morris*, above at paras 25-30, the applicant maintains that each case should be considered to determine if the application of the test, in whole or in part, is appropriate. The conduct itself and the context in which it occurred must be analysed and scrutinized. The applicant points to paragraphs 280 and 288 of the Tribunal's decision as an indicator that the Tribunal concluded Mr. Hughes made a *prima facie* case merely by being qualified for the position; there was no discussion or finding that his depression played a role in the decision not to employ him.

[46] In the alternative, the applicant submits that there was not sufficient evidence to satisfy all the factors of the *Shakes* test. Particularly, there is no evidence that the successful candidates in the process do not possess the same distinguishing feature as Mr. Hughes. The applicant adds that it was unreasonable for the Tribunal to conclude that the references for other applicants are comparable or inferior to that provided by Mr. DiGuistini when considering the "detail-oriented" aptitude.

[47] Mr. Hughes argues that evidence of defects in the selection process is highly relevant and that it was open for the tribunal to draw an inference of discrimination based on irregularities in the employer's selection process (see *Kasongo Sadi v Canada (Human Rights Commission)*, 2006 FC 1067 at paras 20-21, 24-25; *Canada (Attorney General) v Brooks*, 2006 FC 1244 at paras 4, 19, 21, 25-27, 30-32; *Khiamal*, above). In the case at bar, the Tribunal did just that. Mr. Lavers used a neutral reference to give Mr. Hughes a failing score and refused to consider additional information instead of verbal references. The documents established that he met the detail-oriented factor despite Ms. Wood's attempt to discredit their relevance. The successful candidates were no better qualified and the selection board was aware of Mr. Hughes' disability. In addition, there was circumstantial evidence leading to the same conclusion.

[48] As regards the *Shakes* test, Mr. Hughes submits that other factors were considered in the analysis. He agrees that the test ought not to be applied in a rigid or mechanical manner: i) the Tribunal referenced the *Israeli* modification of the test that is used when an employer continues to seek applicants after rejecting the complainant for the position; ii) there is no strict

requirement that each of the successful candidates be a person with a disability; the *O'Malley* test, which is the ultimate test, contains no such requirement.

[49] At the outset, it is useful to reiterate that there is neither a particular type of evidence nor a particular application of the *Shakes* test which must be used in order to successfully establish a *prima facie* case. In *Morris*, above at para 28, the Federal Court of Appeal endorsed the view that "[d]iscrimination takes new and subtle forms." The Federal Court of Appeal also stated that "deciding what kind of evidence is necessary in any given context to establish a prima facie case is more within the province of the specialist Tribunal"(at para 29). At first instance, the Federal Court had found that the law required comparative evidence in order to establish a *prima facie* case of discrimination. The Federal Court of Appeal held that the Federal Court erred in that respect, and endorsed the view that the definition of a *prima facie* case must recognize the infinite fact patterns possible in the circumstances of employment discrimination. *Morris* specifies how a *prima facie* case is to be established [emphasis added]:

> [25] The definition of a *prima facie* case in the adjudication of human rights complaints was considered in *Lincoln v. Bay Ferries Ltd.*, which was decided after the decision under appeal in the present case was rendered. Writing for the Court, Stone J.A. said (at para. 18):
>
> The decisions in *Etobicoke, supra*, and *O'Malley, supra*, provide the basic guidance for what is required of a complainant to establish a prima facie case of discrimination under the Canadian Human Rights Act. ... The tribunals' decisions in *Shakes, supra*, and *Israeli, supra*, are but illustrations of the application of that guidance. ... As was recently pointed out by the tribunal in *Premakumar v. Air Canada*, [2002] C.H.R.D. No. 3, at paragraph 77:
>
> While both the *Shakes* and the *Israeli* tests serve as useful guides, neither test should be automatically applied in a rigid or arbitrary fashion in every hiring case: rather the circumstances of each case

> should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether Mr. Premakumar has satisfied the *O'Malley* test, that is: if believed, is the evidence before me complete and sufficient to justify a verdict in Mr. Premakumar's favour, in the absence of an answer from the respondent?
>
> [26] In my opinion, *Lincoln* is dispositive: *O'Malley* provides the legal test of a *prima facie* case of discrimination under the *Canadian Human Rights Act*. *Shakes* and *Israel*i merely illustrate what evidence, if believed and not satisfactorily explained by the respondent, will suffice for the complainant to succeed in some employment contexts.

[50] In the case at bar, the Tribunal detailed the evidence from which it concluded Mr. Hughes established a *prima facie* case of discrimination. At that stage, however, the Tribunal should not have accounted for the explanations provided for by Mr. Lavers and Ms. Wood (*Lincoln v Bay Ferries Ltd*, 2004 FCA 204 at para 22). This would have been more appropriate once the burden shifted; this overlap in the analysis is questionable. With that said, I believe the Tribunal committed a reviewable error when it concluded as follows (at para 239 of the decision):

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

[51] As discussed in the course of considering the previous issue, the Supplemental documentation was reviewed by the selection board prior to their knowledge of Mr. Hughes' disability. It is therefore hard to establish, on a *prima facie* basis, how Mr. Hughes' disability could have been a factor influencing their review of those materials. At that stage of the analysis of the evidence, the Tribunal could not reproach the manner in which Ms. Wood and Mr. Lavers treated the materials in the absence of their knowledge of the mental disability. The reasons show

that the Tribunal accorded great weight to this evidence in determining whether a *prima facie* case was established. In my view, it was unreasonable for the Tribunal to reproach the selection board for failing to re-assess the materials on March 2, 2006 or on February 28, 2006, for example, if it had already considered them of no relevance at the teleconference.

[52] In any event, I have reviewed the Supplemental documentation and the neutral comments provided to Mr. Lavers on the phone by Mr. DiGuistini, and have difficulty seeing how they could have changed the outcome of the assessment of the "detail-oriented" criterion.

[53] There is an abundance of documentation but it is by no means easy to read through. The information contained therein is not self-evident and it was fully within the selection board's discretion to have determined it to be irrelevant and to have not reconsidered it after the selection board acquired knowledge of Mr. Hughes' disability. The Tribunal erred by expecting the selection board to revise its process for Mr. Hughes in view of the DiGuistini reference. For all the candidates, the references were expected to confirm the information obtained during the interviews and it is logical that the absence of a reference confirming that Mr. Hughes was in fact "detail-oriented" would have had a negative impact on the selection process.

[54] Furthermore, the evidence does not show that there was a change in the board member's attitude toward Mr. Hughes' application, after Mr. Lavers was made aware of Mr. Hughes' disability. On the contrary, Mr. Lavers emphasised the importance of obtaining references from the beginning of the process and he persisted after his February 27 conversation with Mr. Hughes. He was certainly consistent in that regard.

[55] Therefore, I am of the opinion that the Tribunal's finding that there was a *prima facie* case of discrimination against Mr. Hughes does not fall within the range of possible outcomes defensible in regards of the facts and law.

V. Conclusion

[56] In light of the foregoing, I will quash the impugned decision and remit the matter back for re-determination by a different member of the Tribunal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted;
2. The decision of the Canadian Human Rights Tribunal, dated July 9, 2014, is set aside;
3. The file is remitted to a different member of the Canadian Human Rights Tribunal for a new determination;
4. Costs are granted in favour of the applicant, against respondent Chris Hughes only, in the amount of $1,500.00.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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