Federal Court  Cour fédérale

Date: 20210212

Dockets: T-1035-19
T-1065-19

Citation: 2021 FC 147

Toronto, Ontario, February 12, 2021

PRESENT: Mr. Justice Diner

Docket: T-1035-19

BETWEEN:

CHRIS HUGHES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1065-19

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

CHRIS HUGHES and
CANADIAN HUMAN RIGHTS
COMMISSION

Respondents

JUDGMENT AND REASONS

[1] The Canadian Human Rights Tribunal ("Tribunal") dismissed Mr. Hughes' complaint of age-based discrimination in his ten attempts to secure permanent employment with the Canada Customs and Revenue Agency ("CCRA") and the Canada Border Services Agency ("CBSA") between 2000 and 2006. The Tribunal also dismissed Mr. Hughes' complaint of disability-based discrimination in relation to nine of those ten attempts to obtain permanent employment. However, the Tribunal found disability-based discrimination for the tenth opportunity. Now, both parties seek judicial review of the parts of the Tribunal decision that are adverse to them: Mr. Hughes challenges his unsuccessful outcomes of age and disability based discrimination in Court file T-1035-19, while in T-1065-19, the Attorney General of Canada ("Canada") challenges the single finding of disability-based discrimination.

[2] This Court has consolidated the two Applications, given that they both arise out of one Tribunal proceeding, which spanned 29 hearing days. After considering the arguments, I find the Tribunal's decision withstands judicial review for reasons that will be explained after a brief review of the background.

I. BACKGROUND

[3] The same factual circumstances underlie both applications. Mr. Hughes began working for CCRA in 1995, where he served for six years as a Customs Contact Officer in the Vancouver area. From 2002 to 2004, he then held three seasonal positions as a Customs Inspector – two

with CCRA for approximately five months each, and a third with CBSA after its creation, for approximately four months.

[4] CBSA assumed border services and immigration enforcement functions from the now-defunct CCRA on December 12, 2003, pursuant to Order in Council PC 2003-2064 dated December 29, 2003. Upon its creation, CBSA became subject to the *Public Service Employment Act*, RSC 1985, c P-33 [*PSEA*].

[5] Prior to CBSA's creation, selection processes at CCRA assessed candidates on various requisite abilities, and ranked them on "eligibility lists" according to their respective scores. Hiring Managers would make offers of employment to candidates sequentially, based on the eligibility list rankings. CBSA, under the *PSEA*, abandoned the eligibility list approach to selection processes, instead adopting "pre-qualified pools", whereby all qualified candidates would be placed in "pools" without reference to scoring. Hiring Managers would then appoint candidates from the pools based on organizational need. With this shift came a focus on candidates' demonstrated competencies, as opposed to their personal suitability or "fit".

[6] It is worth noting, however, that selection processes were not the only tool available to staff positions. Hiring Managers, in consultation with Human Resources, could: temporarily or permanently assign existing employees to fill vacancies; use student recruitment; hire employees on short-term contracts; and, less commonly, hire a specific person via a "named referral" without competition. Some of these alternate selection processes became relevant, both to Mr. Hughes' employment, as well as to his complaints.

[7] Between 2000 and 2006, Mr. Hughes applied to ten selection processes for Customs Inspector or Border Services Officer positions. These processes were: i) 2000-7015, (ii) 2001-7009, (iii) 2002-7012, (iv) 2003-1002, (v) 2003-7003, (vi) the Stewart, BC (appointment) Process, (vii) 2005-1001, (viii) 2005-1005, (ix) 2006-066, and (x) 2006-001. While successful in being placed into several pre-qualified pools, Mr. Hughes never obtained his ultimate goal of "indeterminate" employment, meaning a permanent position in the federal public service. Mr. Hughes filed two complaints with the Canadian Human Rights Commission ("Commission") contesting these ten processes, the last of which was successful.

A. *The First Nine Processes*

[8] First, Mr. Hughes was successful in Process 2000-7015. He was placed in a pool, from which CCRA appointed him to a term position as a Customs Border Inspector for the summer of 2002. During this process, Mr. Hughes was required to bring his driver's licence and a birth certificate to an interview.

[9] Second, Mr. Hughes was screened out of Process 2001-7009, being ruled ineligible to compete, as he lacked the requisite experience to apply at the time. Of the five individuals appointed to indeterminate positions, two were within a year of Mr. Hughes' age, one was three years younger, and one was ten years older.

[10] Third, Mr. Hughes qualified for Process 2002-7012, was successful in the interview, and was ultimately hired to a term position.

[11] Process 2003-1002, the fourth, proved more eventful. Mr. Hughes was screened in and attended an April 21, 2004 first interview with Ms. Holly Stoner and Mr. Ron Tarnawski, the

board Chair. During this interview, Mr. Hughes asked Ms. Stoner to get him a glass of water. Upon her leaving the room, Mr. Hughes questioned Mr. Tarnawski as to the appropriateness of Ms. Stoner's questions, informing the Chair that she was making him nervous. Despite this sequence, the board called Mr. Hughes to a second interview, which he failed. Thereafter, upon consulting Human Resources, the board members agreed to hold a feedback meeting with Mr. Hughes, which became confrontational.

[12] As these events unfolded, Mr. Hughes also attended an information session for CBSA employees. There, he alleges that Superintendent Fairweather made a comment to the audience to the effect that "if you want a career in customs and are under 35, come to Vancouver". As a result, Mr. Hughes made a complaint to the Public Service Commission ("PSC") alleging bias against him in various selection processes, as he was older than 35. While this first PSC Inquiry ("PSC Inquiry 1") revealed discrepancies between the screening process and the posted competencies, it revealed no bias. Pursuant to PSC's order, CBSA underwent the process anew, and Mr. Hughes was again unsuccessful. He brought an application to this Court, which was dismissed.

[13] Fifth, Mr. Hughes applied to Process 2003-7003 in October 2003, and was successfully placed into a pool of candidates. As with the previous processes, he did not request an accommodation nor mention any disability. It was CCRA's intention with this process to send multiple successful candidates to Rigaud, Quebec for training. While Mr. Hughes wished to go to Rigaud, four candidates in their twenties were selected. Mr. Hughes, who was not selected, filed a complaint with PSC to investigate alleged irregularities in this process ("PSC Inquiry 2"). PSC found no issue.

[14] In May 2004, Mr. Hughes was on sick/unpaid leave from CCRA. During that time, CBSA wanted to offer him a secondment within the organisation for the summer, but CCRA did not allow the move for various administrative reasons. CBSA nevertheless appointed Mr. Hughes for the same term position via a different pool.

[15] Sixth came a call-letter seeking interested candidates to staff a position in Stewart, British Columbia for the winter of 2004. As noted in the list above, the Stewart position was technically an “appointment” rather than a “selection” process, but it has been grouped with the other nine selection processes for the sake of simplicity. While Mr. Hughes indicated his willingness to move to Stewart for an indeterminate opportunity, CBSA only offered him a determinate one. He rejected it. Thereafter, CBSA appointed another candidate to the position on an indeterminate basis. Mr. Hughes was never offered the indeterminate position.

[16] Mr. Hughes applied to a seventh selection process in Process 2005-1001. He was screened in, but failed his interview. Specifically, he achieved an inadequate score on the Effective Interactive Communication Competency. Again, he did not request an accommodation nor mention his disability.

[17] Outside of the selection processes, PSC held hearings for PSC Inquiries 1 and 2, described above, between October 2005 and August 2006. These hearings were tense and confrontational, with Mr. Hughes leaving the room abruptly on multiple occasions. Ms. Lennax, a Human Resources Advisor for CBSA, acted as the employer’s representative. This was the first time Ms. Lennax and Mr. Hughes would cross paths.

[18] During the course of the first PSC hearing, Mr. Hughes requested an adjournment due to "anxiety and depression", which the adjudicator granted. After the hearing, Ms. Lennax instituted various security measures against Mr. Hughes, which included sending an e-mail featuring a picture of Mr. Hughes to CBSA employees to inform them that he was not allowed in the office building where Ms. Lennax worked, and posting a security guard at the office to prevent Mr. Hughes from entering the premises.

[19] In 2005 and 2006, Mr. Hughes unsuccessfully applied to two more selection processes, the eighth and ninth listed above (2005-1005 and 2006-066). In the latter, Process 2006-066, a sticky note attached to his application indicated that the "candidate was excluded from the processes due to inappropriate behaviour in the recent court cases with the selection board". The author of the sticky note remains unknown. The evidence before the Tribunal was mixed. It showed that CBSA hired multiple younger, less qualified candidates than Mr. Hughes. However, it also showed that there was a long list of candidates older than him who qualified and were submitted to the training phase.

B. *The Tenth Process: Process 2006-001*

[20] The tribunal found the tenth and final process 2006-001 to be the only one tainted by discrimination. Mr. Hughes applied to 2006-001 on March 26, 2006. As with the preceding processes, he did not request an accommodation or mention his disability in his application. He was invited to an interview on November 7, 2006, with the selection Board comprised of Superintendent Farrell (the board Chair) and Ms. Petropolous of CBSA (together, the "Board").

[21] Two weeks before the interview, and upon learning of Mr. Hughes' application, Ms. Lennax sent an e-mail to Superintendent Farrell about Mr. Hughes' conduct during the PSC Inquiry hearings. She wrote that in her opinion, Mr. Hughes had been disrespectful, unprofessional, profane, and disruptive during the hearings. Along with her e-mail, she attached a letter from Ms. Stoner regarding Mr. Hughes' conduct during the Process 2003-1002 interview and feedback session.

[22] Prior to his interview for 2006-001, Mr. Hughes reached out to a CBSA clerical staff member, leaving a message for the Board that 1) he not have to go to a particular office location, 2) that he be advised of the names of the Board members, and 3) that he be given an accommodation for his disability. Unfortunately, the Board never received the message.

[23] At the start of his 2006-001 interview, Mr. Hughes advised the Board that he was a person with a mental health disability. He requested an accommodation because his depression and anxiety, which stemmed from a stress incident years prior, affected his confidence and speech. He asked that the Board forego the standard interview, and instead undergo a paper assessment of his performance reviews from the three most recent years (2002-2004). The Board adjourned the interview.

[24] The next day, Mr. Hughes submitted a formal accommodation request. He ultimately also submitted two medical documents: (i) a January 12, 2004 Psychological Assessment Report prepared by Dr. Michael Boissevain, a Clinical and Rehabilitation Psychologist, and (ii) a September 22, 2006 note from his family physician, Dr. Miller, referring him for counselling. After consulting Ms. Lennax, Superintendent Farrell refused to change the method of evaluation.

[25] On November 8, 2006, Mr. Hughes sent an e-mail to Superintendent Farrell stating he suffered from "depression, high stress, anxiety and justified paranoia". Superintendent Farrell forwarded the e-mail to Ms. Lennax the next day, who prepared a draft response. Superintendent Farrell then sent the Board's response, informing Mr. Hughes that CBSA was willing to accommodate persons with disabilities, but that the employer required more information about the disability in order to do so.

[26] In light of the response, Mr. Hughes provided the Board with a further medical note from Dr. Miller in November 2006. The note indicated Mr. Hughes "has a medical condition that creates problems with interviews. Ideally an alternative assessment that doesn't require an interview would be helpful." Dr. Miller did not specify Mr. Hughes' medical condition.

[27] Mr. Hughes submitted a further note from Dr. Miller on February 1, 2007, indicating he had problems with concentration and logic, and that he would need additional time to answer interview questions. The next day, Superintendent Farrell expressed his desire not to proceed with the interview in an e-mail to Ms. Lennax, which reads as follows:

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

[28] Ms. Lennax responded with a recommendation that the Board proceed with the interview, and recommended accommodating measures, including allotting more time to think over

questions and deliver a response. The Board heeded Ms. Lennax's advice, and the interview proceeded on March 2, 2007. The Board allowed Mr. Hughes to take as long as he needed to consider the questions and to ask clarification questions as necessary, and to take a break after each question. Mr. Hughes failed the interview, obtaining unsatisfactory scores on the "enforcement orientation" and "self-confidence" competencies.

C. *The Complaints to the Human Rights Commission*

[29] Mr. Hughes filed two complaints with the Commission relating to the ten selection processes. His January 19, 2005 complaint ("Complaint 1") was directed at both CCRA and CBSA for alleged age-based discrimination in the course of the selection processes up to 2005, contrary to sections 7 and 10 of the *Canadian Human Rights Act*, RSC 1985, c H-6 [*CHRA*]. His July 8, 2008 complaint ("Complaint 2"), alleged CCRA and CBSA discriminated against his age, disability, and perceived disability in all ten selection processes.

II. DECISION UNDER REVIEW

[30] The Tribunal heard Complaints 1 and 2 jointly over 29 hearing days between June 23, 2015, and February 26, 2018, rendering its decision on May 29, 2019 ("Decision"). In that Decision, it found that Mr. Hughes failed to meet his burden of proving the claim of age-based discrimination, and dismissed the claim entirely. The Tribunal found the evidence insufficient to show that age had been a factor in the staffing decisions.

[31] With respect to the claim of discrimination based on actual or perceived disability, the Tribunal found that Mr. Hughes failed to demonstrate, on a balance of probabilities, that CBSA perceived or knew that he suffered from a disability for any of the processes up until the tenth,

2006-001. The Tribunal also found that Mr. Hughes failed to show that CBSA could have known of his issues with CCRA. Accordingly, the Tribunal dismissed the claims arising from events prior to 2006-001. However, the Tribunal found that Mr. Hughes demonstrated that he suffered from an actual or perceived mental health disability which was a factor in his being screened out of that tenth process, establishing *prima facie* discrimination. Finding CBSA did not refute the allegations nor defend them based on a *bona fide* occupational requirement, the Tribunal concluded that disability-based discrimination took place in CBSA Process 2006-001.

III. PROCEDURAL HISTORY BEFORE THE FEDERAL COURT

[32] The hearings for both files T-1035-19 and T-1065-19 were set to take place before the Federal Court during the morning and afternoon, respectively, of January 15, 2021. Mr. Hughes, self-represented in T-1035-19, informed the Court shortly before the hearing that his counsel would no longer be representing him in T-1065-19. Mr. Yazbeck, his counsel confirmed this with the Registry. Mr. Hughes, however, provided no formal notice regarding the change, as required pursuant to Rules 124-126 of the *Federal Courts Rules*, SOR/98-106 [*Rules*]. Nor did he provide a corresponding Form 124C to act in person. Mr. Hughes advised the Court at the outset of the hearing that he had been unwell. The Court agreed to proceed on the basis that Mr. Hughes would provide the form after the hearing.

[33] The hearing commenced as planned with the first matter, T-1035-19. However, shortly after Mr. Hughes began to deliver his submissions, it was twice interrupted, which Mr. Hughes' attributed to his computer issues. The Court ultimately recessed in an attempt to resolve the issues with Mr. Hughes.

[34] When Court resumed, Mr. Hughes advised that he continued to feel unwell and was not in a position to continue to make his submissions. After some discussion about how best to proceed, the parties agreed to rely on their written arguments and exchange any remaining submissions in writing. Mr. Hughes explained that it would take him a week to recuperate before he could submit anything. The Court accordingly agreed to build in that time to receive submissions and provided a Direction setting out the remaining timelines.

[35] Mr. Hughes also undertook to submit the requisite Form under Rule 124. However, when the Court received nothing further regarding the removal of Mr. Hughes' solicitor from file T-1065-19, a teleconference was convened for January 19, 2021. Mr, Hughes advised during the teleconference that a request had been filed to obtain legal representation anew in T-1065-19. That request was approved, and Mr. Yazbeck was reinstated, resolving the Rule 124 issue. The Court rescheduled T-1065-19 for January 28, 2021.

IV. POSITIONS OF THE PARTIES

A. *The First Application (T-1035-19)*

[36] Mr. Hughes, representing himself in this first application, challenges the Tribunal's Decision both on substantive and procedural grounds.

[37] Substantively, Mr. Hughes submits that the Tribunal erred in dismissing his claim of age-based discrimination in relation to the various selection processes that took place between 2001 and 2006. To that end, he also submits the Tribunal erred in finding CBSA's practice of requiring candidates to present identification featuring candidates' age (*e.g.*, a driver's licence),

as well as the use of student bridging and the Federal Student Work Experience Program ("FSWEP") to fill vacancies did not violate section 10 of the *CHRA*.

[38] Mr. Hughes further claims the Tribunal erred by failing to make credibility findings regarding key witnesses, including himself, Mr. Northcott, Ms. Stoner, Ms. Lennax, and Superintendent Fairweather. To that effect, he alleged CBSA destroyed key files relating to candidates' dates of birth and two processes in 2006, and that the Tribunal ignored this issue.

[39] Mr. Hughes also contends that the Tribunal overlooked key evidence, including "positive performance reviews and training for the border guard position".

[40] Procedurally, Mr. Hughes contends that the Tribunal allowed CBSA three years to complete disclosure, when such disclosure ought to have been completed within three weeks. He also argues the Tribunal ought to have issued a confidentiality order over his medical documents. Furthermore, Mr. Hughes argues that the doctrines of issue estoppel and *res judicata* should have precluded the Tribunal from considering whether he had a disability from 2001 to 2006. He claims that CBSA did not raise the issue in its Statement of Particulars, contravening the Tribunal's *Rules of Procedure* and *CHRA* subsection 48.9(1), and thereby permitting a "trial by ambush".

[41] Canada responds that it was reasonable for the Tribunal to dismiss the claim of age discrimination entirely and to find that Mr. Hughes had failed to establish he had a disability prior to 2006-001. Accordingly, Canada says it was reasonable to dismiss the claims of disability-based discrimination prior to 2006-001. Finally, Canada argues the doctrines of *res judicata* and issue estoppel do not apply, in part because they were not raised before the

Tribunal. It rejects Mr. Hughes' related claim of "trial by ambush", and states that the allegation it did not address the issue of disability before the Tribunal is wholly inaccurate.

B. *The Second Application (T-1065-19)*

[42] In the second of the two consolidated applications, Canada argues that the Tribunal unreasonably decided that Mr. Hughes demonstrated a disability at the time of 2006-001, and that CBSA discriminated against him. Canada argues it was inconsistent for the Tribunal to find, on one hand, that Mr. Hughes did not prove he suffered from a disability prior to 2006-001, but on the other, to find that he did prove such a disability existed for the tenth process based on substantially the same evidentiary record. The fact that Mr. Hughes requested an accommodation during an interview, along with medical notes submitted to the Board, was insufficient to demonstrate a disability on a balance of probabilities, as neither established a specific medical diagnosis.

[43] Canada also contends that the Tribunal erred in finding CBSA failed to accommodate Mr. Hughes adequately following his request for accommodation because CBSA implemented the precise measures requested by Mr. Hughes and recommended by his family physician. Canada also submits the Tribunal erred in finding CBSA's conduct with respect to Mr. Hughes "troubling", and that a letter sent by Ms. Lennax to the Board was intended to discredit Mr. Hughes.

[44] Finally, Canada claims the Tribunal erroneously found Mr. Hughes suffered an adverse impact because of his alleged disability without providing any analysis on whether such a disability was a factor in his lack of success in 2006-001. To this end, Canada submits the

Tribunal ignored evidence relating to Mr. Hughes' accommodated interview on March 7, 2007, as well his dealings with the Board.

[45] Mr. Hughes responds in this second application that the Tribunal came to a reasonable conclusion when it determined CBSA discriminated against him in 2006-001. He states that Canada raises no questions of law, and by attacking only the Tribunal's findings of fact, Canada invites the Court to reweigh the evidence. He argues that his actual and perceived disability tainted the process, and that Ms. Lennax, who knew him from a previous selection process and hearings before PSC, proceeded to discredit him before the Board, resulting in an adverse impact. The Tribunal, according to Mr. Hughes, thus found a *prima facie* case of discrimination, and reasonably found that CBSA did not sufficiently refute the allegations nor justify them with a *bona fide* occupational requirement.

V. ISSUES AND STANDARD OF REVIEW

[46] Both parties submit that reasonableness is the applicable standard of review with respect to the substantive aspects of a human rights decision. I agree, noting that the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] did not alter the applicability of the reasonableness standard to the substance of a decision in the human rights context: *Bangloy v Canada (Attorney General)*, 2021 FC 60 at paras 26-27; *O'Grady v Bell Canada*, 2020 FC 535 at para 30 [*O'Grady*]).

[47] On a reasonableness review, the Court must examine the Tribunal's Decision to determine whether its outcome demonstrates an internally coherent and rational chain of analysis, justified in relation to the legal and factual constraints before the decision maker. In

other words, was the decision, as a whole, reasonable in light of its outcome and rationale under the governing statutory scheme (*Vavilov*, at paras 83-5, 96-98, 102, 108).

[48] The Decision must be "intelligible, transparent and justified" (*Vavilov*, at para 15). Justification and transparency mean that reasons will have to "meaningfully account for the central issues and concerns raised by the parties", or be – in a word – "responsive" (*Vavilov*, at para 127). The decision must also have "adequate justification" vis-à-vis the perspective of the individual concerned where there is a significant personal impact, as *Vavilov* goes on to state at paragraph 133:

> The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

[49] Still, the Court must exercise judicial restraint and show deference to specialized decision-makers (*Vavilov*, at paras 13, 75, 93). Absent exceptional circumstances, the decision maker's factual findings shall not be disturbed, nor will the evidence be reweighed (*Vavilov*, at paras 125-126).

[50] Finally, *Vavilov* did not change the correctness standard of review applicable to procedural fairness issues: *Girouard v Canada (Attorney General)*, 2020 FCA 129 at para 38; *O'Grady*, at para 30. A court conducting this review determines for itself whether the administrative process satisfied the level of fairness required in all of the circumstances: *Hood v Canada (Attorney General)*, 2019 FCA 302 at para 25; *Mission Institution v Khela*, 2014 SCC 24 at para 79.

VI. ANALYSIS

[51] There is no question that age and disability are prohibited grounds under section 3 of the *CHRA*. Mr. Hughes alleges that CBSA discriminated against him on these prohibited grounds, contrary to sections 7 and 10 of the *CHRA*. *CHRA*'s section 7 makes it a discriminatory practice, based on one or more prohibited grounds, to directly or indirectly (a) refuse to employ or continue to employ any individual, or (b) in the course of employment, differentiate adversely in relation to an employee. *CHRA*'s section 10 makes it a discriminatory practice for an employer to engage in a policy, practice, or agreement affecting recruitment or any other aspect of employment that deprives certain individuals of employment opportunities based on a prohibited ground.

[52] Mr. Hughes alleges the Tribunal engaged in the wrong analysis to determine whether his claims of discrimination were borne out. He claims the Tribunal relied on cases more suited to cases of harassment and the duty to accommodate, as opposed to claims of discrimination. Mr. Hughes submits, relying on *Turner v Canada (Attorney General)*, 2017 FCA 2 [*Turner FCA*], that the Tribunal ought to have followed *Shakes v Rex Pak Ltd* (1981), 3 CHRR D/1001, 1981 CarswellOnt 3407 (WL Can) (Ont HR Bd) [*Shakes*], *Israeli and Canadian Human Rights Commission and Public Service Commission* (1983), 4 CHRR D/1616, 1983 WL374879 (CHRT) [*Israeli*], *Premakumar v Air Canada* (2002), 42 CHRR D/63 (CHRT) [*Premakumar*], and *Ont Human Rights Comm v Simpsons-Sears*, [1985] 2 SCR 536, [1985] SCJ No 74 [*O'Malley*].

[53] I cannot agree with Mr. Hughes that the Tribunal followed the wrong test. Rather, it reasonably relied on and applied *O'Malley* to the factual circumstances to determine that there

was no discrimination – or subtle scent of it – in the first nine processes (although it found evidence of discrimination in the tenth, based on distinguishing facts described below).

[54] Furthermore, as is clear in *Shakes*, *Israeli*, and *Premakumar*, factual circumstances can differ greatly and allegations of discrimination must be evaluated in light of the specific facts that arise in each case. The first two of these cases predated *O'Malley*, an early Supreme Court of Canada decision on employment discrimination, which is still good law. *Premakumar* applied *O'Malley*, having also considered both *Shakes* and *Israeli* (*Premakumar*, at para 77).

[55] Indeed, the Federal Court of Appeal ("FCA") has characterized *Israeli* and *Shakes* as illustrations of the *O'Malley* test requiring a complainant to show a *prima facie* case of discrimination (*Lincoln v Bay Ferries Ltd*, 2004 FCA 204 at para 18; see also *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2005 FCA 154 at para 26). As the Tribunal recently pointed out in *Kelsh v Canadian Pacific Railway*, 2019 CHRT 51 at para 68, the FCA in this jurisprudence "made it abundantly clear that *Shakes* is not to be automatically applied in a rigid or arbitrary fashion in every hiring case".

[56] Ultimately, *Vavilov* instructs that administrative decision makers have latitude in distinguishing a precedent (at para 129; see also *Services d'administration PCR ltée v Reyes*, 2020 FC 659 at para 20 [*Reyes*], and *Altus Group Ltd v Calgary (City)*, 2015 ABCA 86 at para 16). Accordingly, when an applicant alleges the administrative decision maker applied the wrong legal test, as is the case with Mr. Hughes, this Court must "examine to what extent that precedent makes a conflicting decision unreasonable and whether the administrative decision-maker gave reasonable grounds to disregard it" (*Reyes*, at para 20).

[57] Here, the Tribunal chose, instead of *Shakes*, to follow the *O'Malley* line of cases (which includes *Moore v British Columbia (Education)*, 2012 SCC 61 [*Moore*] and *Stewart v Elk Valley Coal Corp*, 2017 SCC 30 [*Elk Valley*]). In this regard, the member quoted *Stanger v Canada Post Corporation*, 2017 CHRT 8 at para 12, as follows:

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

[58] In *Turner FCA*, on the other hand, the FCA noted that:

> [21] The Tribunal chose to follow the test set out in… *Shakes* to determine if a *prima facie* case of discrimination in hiring has been made out:
>
> > (1) the complainant was qualified for the particular employment;
> >
> > (2) the complainant was not hired; and
> >
> > (3) someone obtained the position who was not better qualified than the complainant, but lacked the attribute on which the complainant based their human rights complaint."
>
> [Emphasis added.]

The FCA thus clearly noted in *Turner FCA* that the Tribunal "chose" to follow *Shakes*.

[59] The Tribunal here, on the other hand, soundly chose to apply the predominant case law as established in O'Malley, Moore, and Elk Valley, which has been followed in many other cases.

A. *Was the Tribunal's finding of no age-based discrimination reasonable?*

[60] The Tribunal wrote that, for a complaint to succeed, a protected characteristic need only have been one of the factors in the actions in issue. While a "subtle scent of discrimination" would be sufficient to meet this burden, the Tribunal noted that the complainant would not need to prove the respondent's intention to discriminate. These statements are also consistent with the law: *O'Malley*, at 15-16; *Moore*, at para 33; *Bombardier*, at para 40; see also *Elk Valley* at paras 23-25 and *Lafrenière v Via Rail Canada Inc*, 2019 CHRT 16 [*Lafrenière*] at paras 65-67, 72.

[61] Mr. Hughes alleges CCRA/CBSA discriminated, as a general policy, against candidates over the age of 35 while promoting younger candidates. In evidence before the Tribunal, he submitted a compilation of statistics he himself prepared after obtaining information on the age of candidates in various staffing processes via an access to information request. These statistics purported to demonstrate a hiring pattern within the organizations that favoured younger candidates.

[62] The Tribunal questioned the reliability of the sample statistics provided by Mr. Hughes, in addition to their lack of comprehensiveness to establish discrimination within CBSA's hiring processes. Canada noted that his statistics did not consider CBSA staffing as a whole, beyond the selection processes in question. The statistics also did not include candidates who were successful in the first stages of hiring, but were subsequently unsuccessful or who declined positions offered. The Tribunal chose not to comment on their reliability, concluding that the "use of statistics with the support or the analysis of an expert, be it an accountant, an actuary or a statistician, would have added some weight to the Complainant's flawed analysis. In reviewing

the evidence, the Tribunal is not satisfied that the Complainant has met his burden" (Decision, at para 112).

[63] Mr. Hughes also alleges that CBSA's requirement that candidates bring to the interviews identification indicating their age is a discriminatory practice. The Tribunal considered testimony from witnesses, Superintendents Farrell, Black and Pringle (who were involved in the various selection processes), denying that age was a factor in their staffing decisions and that, instead, their focus was strictly each candidate's qualification for the position. The Tribunal also pointed to Superintendent Pringle's testimony that older candidates tended to have a greater depth and breadth of knowledge and could bring more to the job.

[64] Mr. Hughes also bases his claim on the alleged "under 35" comment he claims to have heard from Superintendent Fairweather at a 2004 CBSA information session. Superintendent Fairweather denied making this statement. He testified before the Tribunal, in response to the allegation, that "I did not say that. I would not have said that". The Superintendent went on to state that "It wasn't what I believed then. It wouldn't have formed part of the talk. And I don't believe it today and it isn't something that I would have ever said". Superintendent Fairweather acknowledged that Mr. Hughes may have misinterpreted what he had said at the 2004 session.

[65] The Tribunal, which was able to evaluate the testimony witnesses firsthand, concluded that "generally the evidence supports the conclusion that Mr. Fairweather never made such comments about age".

[66] Finally, Mr. Hughes alleged that the use of student hiring (primarily via the FSWEP) was a way to avoid hiring older candidates. Based on the record, the use of student recruitment was a

valid option available to hiring managers. Superintendent Pringle testified that engaging students was quite routine from the mid 1990s to 2003, but that it dwindled after 2004 because CBSA found it more effective to hire from selection processes. Mr. Hughes provided no evidence CBSA used student hiring as a way to exclude older individuals from employment.

[67] The Tribunal ultimately found that Mr. Hughes failed to show a *prima facie* case of discrimination on the basis of age. It found CBSA's evidence more compelling, including Superintendent Fairweather's testimony above, along with that of Superintendents Farrell, Pringle, and Black, that age was never a factor in their staffing decisions and that older candidates could bring more to the job.

[68] The Tribunal also rejected Mr. Hughes' claim that CBSA allowed certain pools to lapse as an alternative way to screen him out based on age, primarily because he had qualified in multiple pools, and that appointments were often the result of timing and candidates' performance in the various assessments.

[69] In addition, the Tribunal rejected Mr. Hughes' argument regarding the Rigaud placements that candidates were offered low stipends so as to discourage older candidates from applying (because they could not live on such a stipend) for lack of evidence.

[70] The claims of aged-based discrimination were all based on specific, fact-based allegations made by Mr. Hughes. The Tribunal responded to each with specificity: its comprehensive reasons were certainly responsive to the arguments Mr. Hughes advanced. I find nothing unreasonable in the Tribunal's conclusions regarding his failure to demonstrate *prima facie* age-based discrimination. He is effectively asking this Court to reweigh the evidence he

presented to the Tribunal. That is not the Court's role on judicial review (*Vavilov*, at para 125; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55).

[71] Given the instructions from the Supreme Court of Canada, as well as those from the FCA in this area of the law – including Mr. Hughes' appeal of an earlier decision in *Hughes v Canada (Attorney General)*, 2016 FCA 271 at para 8 – this Court's role on a reasonableness review is crystal clear: to ensure the evidence sufficiently supports the Tribunal's key conclusions. The Tribunal's primary role is to assess and evaluate the evidence, and it did just that in this case.

[72] Absent exceptional circumstances, the reviewing court will not interfere with the decision maker's factual findings: *Vavilov*, at para 125. No exceptional circumstances exist here. The Tribunal's decision and reasoning with respect to the claim of age discrimination is coherent and transparent. The Tribunal evaluated the evidence, made credibility findings with respect to the witnesses, and justified its reasons based on those findings. The Tribunal found CBSA's evidence more compelling and I see no reviewable error in its factual findings. Thus, this Court has no basis on which to interfere with the Tribunal's conclusions regarding age-based discrimination with respect to any of the ten processes in which Mr. Hughes claimed they were a factor.

B. *Was the finding of disability-based discrimination prior to Process 2006-001 reasonable?*

[73] Before examining the Tribunal's Decision regarding disability-based discrimination, I will address Mr. Hughes' procedural arguments that the existence of his disability should not have been in question.

(1) Procedural arguments – *res judicata* and issue estoppel

[74] Mr. Hughes' argument is twofold. First, he argues the Tribunal should have accepted the existence of his disability pursuant to the doctrine of *res judicata*, because he alleges previous decisions from the Tribunal, this Court, and the FCA confirmed he had a disability during the relevant time. Second, he argues that both the doctrine of issue estoppel and the *Canadian Human Rights Tribunal Rules of Procedure* (03-05-04) should have precluded CBSA from raising the issue at the hearing, since it was not mentioned in CBSA's Statement of Particulars. He claims these errors led to a "trial by ambush".

[75] I am unpersuaded by these arguments. Mr. Hughes was represented by Counsel before the Tribunal – the same Counsel representing him in file T-1065-19. Yet, he did not raise the *res judicata* and issue estoppel arguments before the Tribunal. A court has discretion not to consider an issue raised for the first time on judicial review where doing so would be inappropriate: exercising that discretion in favour of an applicant is generally not warranted where the issue could have been, but was not, raised before the decision maker (*Canada RNA Biochemical Inc v Canada (Health)*, 2020 FC 668 at para 92, citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22-26).

[76] It further is worth noting that in his reply submissions to the Tribunal, Mr. Hughes argued that CBSA never challenged his disability. The Tribunal found this was "simply not true", and proceeded to list a variety of circumstances demonstrating that CBSA had expressed its position regarding Mr. Hughes' disability, and that the latter was aware of that position (Decision, at paras 22-24). At paragraph 23 of its Decision, the Tribunal reproduced an earlier decision rendered by Member Ulyatt refusing a March 24, 2016 motion brought by Mr. Hughes, which

sought an order (i) prohibiting CBSA from objecting to the fact of his disability, (ii) declaring that CBSA accepts his disability, and (iii) having to provide evidence regarding his disability through only his own testimony and his physicians' medical information.

[77] Clearly, Member Ulyatt's rejection of all three grounds of relief sought in this motion implicitly rejected any notion that the disability alleged in Mr. Hughes' complaints had been previously decided. It is true that Mr. Hughes has raised, in other cases and based on numerous other complaints, allegations of discrimination in various forums including in public sector grievances and PSC proceedings, the Public Service Labour Relations Board (PSLRB), the Tribunal, this Court, and the FCA. However, these complaints have involved various government departments and agencies.

[78] The findings and outcomes of those arbitrators, boards, tribunals, and courts, not unlike Member Ulyatt's in this case, have been mixed. This is part and parcel of the fact that they involve different job competitions or employment situations. All decisions must flow from the allegations and the evidence raised in each particular circumstance.

[79] That discrimination may have been found in a past work-related situation with a specific employer, its managers, or selection process, does not mean that the finding decides the issue going forward for other competitions in other contexts and with other employers. As Justice de Montigny has observed in an earlier such case involving a discrimination claim against the former Department of Human Resources and Skills Development Canada (HRSDC) in *Canada (Attorney General) v Hughes*, 2014 FC 278 at para 68:

> Lastly, it cannot be said that the Tribunal's reasons were inadequate because it ignored the evidence of the PSLRB complaints and the PSLRB decision, and of two key witnesses. As

> stated earlier, the complaints submitted by Mr Hughes pursuant to the PSLRA do not relate to discrimination due to disability, and as such these complaints and the PSLRB decision do not constitute relevant evidence to be considered in deciding the discrimination issue before the CHRT.

[80] In sum, given that Mr. Hughes raises new arguments before this Court with respect to a grouping of ten selection processes not challenged before the Tribunal, he cannot now attach disparate findings made in other, disparate proceedings. As the Supreme Court stated in *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 39 with respect to issue estoppel in administrative proceedings:

> Broadly speaking, the factors identified in the jurisprudence illustrate that unfairness may arise in two main ways which overlap and are not mutually exclusive. First, the unfairness of applying issue estoppel may arise from the unfairness of the prior proceedings. Second, even where the prior proceedings were conducted fairly and properly having regard to their purposes, it may nonetheless be unfair to use the results of that process to preclude the subsequent claim.

(2) Did Mr. Hughes prove a disability on a balance of probabilities prior to 2006-001?

[81] Section 25 of the *CHRA* defines a disability as "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug". The Tribunal correctly noted that despite this definition, the *CHRA* provides little guidance as to what constitutes a mental disability (Decision, at para 129).

[82] From a legal sense, a disability consists of a physical or mental impairment, which results in a functional limitation or is associated with a perception of impairment: *Desormeaux v Ottawa-Carleton Regional Transit Commission*, 2005 FCA 311 at para 15. It is important to note that defining mental disabilities is slightly more complex, because two people might not perceive

their symptoms in the same way, and one who suffers from a mental illness might be unaware of their condition: *Dupuis v Canada (Attorney General),* 2010 FC 511 at para 26 [*Dupuis*]. Accordingly, the *CHRA* prohibits discrimination based on an actual disability or on the perception or impression of a disability (*Dupuis*, at para 25).

[83] That said, not all ailments are disabilities. Canada notes a distinction between a disability requiring protection under the *CHRA* on the one hand, and "normal ailments" on the other. Stress and some forms of depression constitute normal ailments, and do not reach the level of disabilities attracting protection under the *CHRA*. Canada relies on a number of decisions from courts and tribunals that have made this distinction, including *Halfacree v Canada (Attorney General)*, 2014 FC 360 at para 37 [*Halfacree*], aff'd 2015 FCA 98, *Canada (Attorney General) v Gatien*, 2016 FCA 3 at paras 47-48, *Riche v Treasury Board (Department of National Defence)*, 2013 PSLRB 35 at para 130, *Gibson v Treasury Board (Department of Health)*, 2008 PSLRB 68, *Jones v Deputy Minister of Fisheries and Oceans*, 2013 PSST 32, *Mandryk v Anmore No 3*, 2013 BCHRT 108, and *Bodnar et al v Treasury Board (Correctional Service of Canada)*, 2016 PLSLREB 71 at paras 106-108, rev'd on other grounds, 2017 FCA 171.

[84] I agree that, ordinarily, stress and depression are not disabilities attracting protection under the *CHRA* unless the complainant is able to prove some diagnosis with specificity and substance: *Halfacree*, at paras 37, 40. A tribunal may afford little to no probative value to a doctor's notes, if that doctor does not testify at the hearing: *Halfacree*, at para 38. However, a complainant can also demonstrate that the wrongdoer discriminated on the basis of a perceived disability (*Dupuis*, at para 25; *Lafrenière*, at para 114).

[85] Here, Mr. Hughes' family physician, Dr. Miller, did not testify before the Tribunal. The Tribunal remarked that only one of Dr. Miller's notes up to 2006, described as "scanty", diagnosed Mr. Hughes with a medical condition. Rather, the notes referred to stress and recommended work accommodations for medical reasons (mainly regarding where and with whom Mr. Hughes should work). As for the exception, the Tribunal pointed to Dr. Miller's note dated October 19, 2005, which read, "Mr. Hughes was off work October 13, 2005 for medical reasons. Due to stress, anxiety and depression, I recommend job modification for the foreseeable future".

[86] The Tribunal remarked that none of Dr. Miller's notes, nor the notes from other medical professionals, indicated that Mr. Hughes was unfit for work. Indeed, both the letter and the report from Dr. Prendergast, an Occupational Health Physician, respectively dated April 13, 2004, and January 27, 2005, mention that while Mr. Hughes experienced some stress-related symptoms, he was not unfit for work, nor was he incapable of meeting the requirements of the job. As the Tribunal wrote, the 2004 Prendergast letter indicated that Mr. Hughes did not suffer from a medical condition that would prevent him from returning to work, and the 2005 letter indicated that Mr. Hughes had "stress factors but had never been significantly ill".

[87] Mr. Hughes did not present evidence of a diagnosis to CBSA during the relevant time period of the first nine selection processes, calling into question whether these symptoms were related and whether he had met his burden to show that he had a disability. The Tribunal found he had not, which, absent exceptional circumstances, is a decision to which this Court owes deference. In addition, Mr. Hughes chose not to call Dr. Miller as a witness, leaving the Tribunal to infer what little it could from the physician's short and undetailed medical notes.

[88] The Tribunal also acknowledged that Mr. Hughes testified that the years 2002 and 2003 were “good years” in terms of his symptoms. The Tribunal found his mental health issues were limited to 2001 and 2004 onward. The Tribunal also pointed out that Dr. Miller, in his June 24, 2005 note, wrote that Mr. Hughes should see a psychiatrist, and Dr. Boissevain recommended he see a psychologist. The Tribunal wrote that Mr. Hughes did neither of these things, nor did he, at any time, take medication for stress or anxiety.

[89] Mr. Hughes also claims the Tribunal erred with respect to its findings on the first nine processes by failing to make credibility findings with respect to certain witnesses, notably himself, Mr. Northcott, Ms. Stoner, Ms. Lennax, and Superintendent Fairweather.

[90] I cannot agree. Rather, the Tribunal commented at length on the testimony and evidence before it emanating from Mr. Hughes, Superintendent Fairweather, and Ms. Lennax. It also commented about Mr. Northcott and Ms. Stoner (albeit to a lesser extent than the others, as they were more peripheral to the claims in question). It weighed the key evidence before it, including the evidence regarding all these individuals, and made a decision in light of that assessment. The Tribunal did not ignore or fail to assess the evidence of these witnesses, but rather came to conclusions with which Mr. Hughes disagrees.

[91] As for Mr. Hughes’ submission that he was “ambushed” before the Tribunal, I disagree: the process was fair. Mr. Hughes had ample time to prepare and put forward his case from the time that he lodged his complaints, and to deal with all manner of issues – both procedural and otherwise.

[92] Mr. Hughes also argues that CBSA destroyed various documents/files that would have been incriminating, which he states the Board failed to rule on. Canada noted in a responding letter to the Court of January 27, 2021:

> In paragraph 74 of his memorandum of fact and law, Mr. Hughes states that the respondent destroyed staffing files of other candidates in two selection processes in 2006. In these selection processes, Mr. Hughes was screened-out of the processes because of his very recent behaviour at Public Service Commission hearings and related concerns about his professionalism and personal suitability. As such, Mr. Hughes' candidacy in those selection processes did not proceed further and, in particular, he was not assessed as against the broader selection criteria. The records relating to these selection processes were retained for the requisite period of time but ultimately destroyed pursuant to the applicable retention policy. By the time, Mr. Hughes raised specific allegations in relation to one of these competitions (2006-BSF-EA-VIA-006) in paragraph 29 of his statement of particulars dated September 14, 2012, the application packages of other candidates had been destroyed. These issues were before the Tribunal and no further relief was sought.

[93] Mr. Hughes neither provided anything further in reply to this submission, nor do I find anything in the record to substantiate his argument regarding document destruction.

[94] In short, I see no reviewable misapprehension of the evidence by the Tribunal regarding *prima facie* evidence of a disability for the first nine selection processes, and certainly no exceptional circumstances to the deference owed, which would warrant this Court reweighing the evidence and disturbing the Tribunal's findings. I thus find the Tribunal's conclusion reasonable, based on insufficiency of evidence to prove a disability on a balance of probabilities.

(3) Was there evidence an alleged disability had any impact?

[95] Even if the Tribunal had found that Mr. Hughes proved his mental disability at the relevant time on a balance of probabilities – which, again, it did not – there was no evidence

before the Tribunal that CBSA knew of it, much less considered it when making staffing decisions in the first nine staffing processes. As the Tribunal noted, the bulk of the medical reports presented dealt with Mr. Hughes' relations with CCRA, not with CBSA. There was no evidence that Mr. Hughes communicated his disability to any of the various staffing board members involved in the first nine staffing processes, nor that he requested an accommodation prior to the tenth selection process (Process 2006-001). The Tribunal found:

> [139] The evidence does not disclose that CCRA shared the Complainant's medical condition with the Respondent. Moreover, no evidence was presented to show that the Complainant would have experienced the same kind of problems with the Respondent as he had experienced with CCRA. The evidence rather shows that a big part of the Complainant's health issues were directly related to the toxic relationship he had with coworkers and managers at CCRA.
>
> [140] With respect to the competitions and the different panels, the Complainant did not present any evidence to demonstrate that the Respondent should have had suspicions about his disability. His behaviour before the panels did not display a disability nor did his work assessments from his supervisors in his terms of employment with the Respondent. He also never told the Respondent about his disability, except during the last competition in 2006.
>
> [141] It is important to mention that a hiring process provides a much more limited opportunity to indirectly learn of an employee's need for accommodation, as compared to the daily interactions between 'an employee and his/her supervisor.

[96] It was entirely reasonable, absent any evidence to indicate CCRA communicated information about Mr. Hughes' medical issues to the various hiring managers at CBSA, that the first nine selection boards simply did not know about Mr. Hughes' problems. Without more, there was no reason for the Tribunal to impute knowledge on CBSA managers of issues they never dealt with. CCRA and CBSA were different employers as of December 2003.

[97] The fact, as Mr. Hughes' asserts that they are both part of the Government of Canada apparatus, does not mean that their information is shared across departments, or that the Government has one human resources department that centrally gathers information about all public servants. Indeed, Mr. Hughes could point to no evidence to that effect, other than simply stating that Mr. Boyer, who worked at Human Resources at CCRA, and then at CBSA, carried the knowledge about him from the predecessor Agency, CCRA, to its successor, CBSA. Whatever information he may have had, it was nevertheless not demonstrated that such information had been used to adversely treat Mr. Hughes in the various staffing processes before 2006-001.

[98] Furthermore, as the Tribunal noted at paragraph 26 of the Decision, it is not an employment law adjudicator, nor an arbitrator. The Tribunal cited *Moffat v Davey Cartage Co (1973) Ltd*, 2015 CHRT 5 at para 45 to explain its role in the employment context. That passage reads:

> 45 Unless there is evidence that a discriminatory ground was a factor, directly or indirectly, it is not the role of the Tribunal to second-guess the business decisions of company management which, with the benefit of hindsight, may be easy to criticize. The role of the Tribunal is to examine all of the considerations leading up to the impugned decision. In so doing, the Tribunal will ask itself whether the explanation proffered in support of the decision was reasonable in that context, but only so far as is necessary to determine whether the explanation given in support of the decision was not simply a pretext for discriminatory considerations (See Morin v. Canada (Attorney General), 2005 CHRT 41 (Can. Human Rights Trib.), at para. 219; Durrer v. Canadian Imperial Bank of Commerce, 2007 CHRT 6 (Can. Human Rights Trib.), at para. 63, aff'd on other grounds in 2008 FCA 384 (F.C.A.)).

[99] When it examined the selection processes in question, the extent of the Tribunal's role was to determine whether Mr. Hughes had a protected characteristic, and if so, whether that

characteristic played a role in the decision making process, causing an adverse impact. The Tribunal noted this at paragraph 27 of the Decision (see also *Turner FCA*, at para 60, as well as *Turner v Canada Border Services Agency*, 2018 CHRT 1 at paras 39-40).

[100] Finally, regarding the reasonableness of the findings with respect to Mr. Hughes' application in T-1035-19, he raises the "sticky note" placed on his application in the course of Process 2006-006. The sticky note stated that the "[c]andidate was excluded from this process due to inappropriate behaviour in the recent court cases with the selection board".

[101] The evidence did not disclose who wrote the note, nor to which court cases it referred. Both Ms. Lennax and Mr. Northcott testified that they knew nothing of the note's origins. The Tribunal did not comment further on the matter. Based on the record, I find that was reasonable. The note, by itself, was insufficient to show that the employer discriminated against Mr. Hughes, and there was no additional information to support any other inference.

[102] The Tribunal found no credible evidence that Mr. Hughes' alleged disability or perceived disability was a factor in any of the staffing decisions up to Process 2006-001. Therefore, Mr. Hughes failed to establish the three requirements of *prima facie* discrimination set out at paragraph 56 above. The Tribunal's reasoning was coherent, and its conclusion was reasonable in light of the evidence and the law.

(4) Did the Tribunal afford Mr. Hughes sufficient procedural fairness in the hearing?

[103] The bulk of Mr. Hughes' procedural fairness concerns relate to the fact that the Tribunal heard arguments from CBSA on the issue of his disability. I have already found it reasonable for the Tribunal to have concluded that Mr. Hughes was aware that the issue of disability was a live

one. Mr. Hughes was able to put forward evidence with respect to his condition, and he knew the case to meet. The Tribunal, over a proceeding that included 29 hearing days, various motions, and a four year period, provided every opportunity for input.

[104] Similarly, the fact that CBSA took time to complete disclosure did not result in unfairness to the process. Mr. Hughes was not prejudiced, and indeed, requested a great deal of information about ten processes. It is not surprising, given the breadth of his documentary requests, that Canada took time in seeking out and collecting the information that was still available to it from these processes that had taken place several years prior.

[105] Finally, Mr. Hughes raises a concern about confidentiality, which he claims should have been ordered over his medical documents. Again, Mr. Hughes pointed to no specific allegation of impropriety or error in this regard by Member Ulyatt.

[106] In short, I find no breaches of procedural fairness in the errors that Mr. Hughes alleges were made by the Tribunal.

C. *Was the discrimination finding in Process 2006-001 reasonable (T-1065-19)?*

[107] Canada submits the Tribunal erred in finding CBSA discriminated against Mr. Hughes based on disability or perceived disability in relation to the tenth selection process. Canada claims the conclusion is grounded solely on Mr. Hughes' request for accommodation during his interview and following its adjournment. Canada argues that the request and medical evidence presented were insufficient to prove a disability under the *Elk Valley* test. Accordingly, Canada asserts that the Tribunal's conclusion is unsupported by the evidence and constitutes an erroneous finding of fact.

[108] Moreover, Canada submits it was unreasonable for the Tribunal to find that CBSA failed its duty to accommodate Mr. Hughes, because the accommodations that CBSA put in place for the interview accorded with his doctor's request and any other information available at the time. It notes that the evidence was equally deficient to find discrimination for the tenth competition as it was for the nine previous ones where the evidence pointed to no *prima facie* case of discrimination. Mr. Hughes counters that the Tribunal's analysis at paragraphs 154-158 was not only reasonable, but it was in fact correct.

[109] Responding to Canada's argument that there was a similar lack of evidence in this process as for the others, the Tribunal noted (a) a deterioration of Mr. Hughes' condition, (b) a clear request for accommodation from Mr. Hughes' doctor, (c) correspondence from Mss. Lennax and Stoner to the Board, (d) the reaction from Board Chair Superintendent Farrell, (e) a resulting "subtle scent of discrimination", having tainted the Chair's mind, establishing *prima facie* discrimination, and (f) a lack of *bona fide* occupational requirements or any other section 15 *CHRA* defences raised.

[110] I cannot agree with Canada's argument that there were no material differences in the dearth of evidence of Mr. Hughes' disability in the previous nine competitions, as compared with Process 2006-001, nor can I agree that the Tribunal's conclusion was unreasonable. With respect to the previous processes, the Tribunal found no evidence of medical notes or accompanying accommodation requests, tainting of boards, or other evidence of *prima facie* discrimination. Indeed, Mr. Hughes contends that by granting his accommodation request in Process 2006-001, the Board implicitly acknowledged that Mr. Hughes had a disability that required

accommodation. That deduction can be made from the steps that CBSA took in 2006-001, which did not take place in any of the other nine competitions.

[111] Moreover, the Tribunal found CBSA discriminated based on a disability or a perceived disability (Decision, at para 159). This was repeated in paragraph 161 of the Decision, in which the Tribunal stated it was satisfied that Mr. Hughes "has proven on a balance of probabilities that he had a medical disability and/or a perceived medical disability, and based on his medical/perceived disability, he was discriminated against in the hiring process".

[112] Thus, while Mr. Hughes bore the burden of proving his claim with specificity and substance, he did not have to prove a specific medical diagnosis, but could instead show that CBSA treated him adversely based on a perception or impression of a disability (*Dupuis*, at para 25). In my view, it was reasonable for the Tribunal to find that Mr. Hughes met that burden. As was recently held in *Lafrenière*, "[m]ental health disabilities, though not always major, permanent, or ongoing, are also entitled to protection from discrimination" (at para 93).

[113] First, Mr. Hughes put CBSA on notice when he told the Board he needed an accommodation for a disability, noting anxiety and depression affecting his confidence and speech, all of which stemmed from a Critical Stress Incident years prior. Under re-examination before the Tribunal, Superintendent Farrell testified that he took Mr. Hughes' claim of a disability at face value and never questioned whether Mr. Hughes actually had a disability at that time.

[114] Second, the tone of the adjourned interview appeared somewhat confrontational. The Board's handwritten notes show some disagreement between Mr. Hughes and the Board

regarding his claim of a disability, the medical documentation required, and whether the request was properly made. The notes also show how the Board's two members perceived Mr. Hughes at that time. The first set of notes indicates that Mr. Hughes was "confrontational, unwilling/unable to start interview", "convinced (paranoia) that [he] would not get a fair interview" and that he "became more agitated as [time] went on". The other Board member's notes state that he was "confrontational, right at [the] beginning, [and he] became increasingly agitated".

[115] Third, it is apparent the comments from the interview notes mirrored some of the concerns expressed in Ms. Lennax's e-mail and Ms. Stoner's letter submitted to Board Chair, Superintendent Farrell, which the Tribunal found had tainted the Board. This is particularly noteworthy given that Ms. Lennax was aware that at the time of the PSC hearings Mr. Hughes suffered from anxiety and depression, and that he requested an adjournment because of those symptoms.

[116] Regardless of whether she made the link between his symptoms and his behaviour, the Tribunal found that Ms. Lennax's intention was to discredit Mr. Hughes as a viable candidate in Process 2006-001. While it is true that Superintendent Farrell testified that the information in those documents did not have an impact on the Board's assessment of Mr. Hughes, the Tribunal found that they had nevertheless "tainted the process". That factual finding, particularly after seeing and listening to all relevant witnesses over the course of the lengthy hearing, was squarely within the Tribunal's wheelhouse as the trier of fact.

[117] Fourth, Superintendent Farrell, during the period between the two interviews, wrote an e-mail to Ms. Lennax on February 2, 2007, expressing his view that Mr. Hughes was incapable of "performing the requirements of the job". Superintendent Farrell expressed this view two

months after Mr. Hughes provided Dr. Miller's November 20, 2006 note, requesting an alternative assessment due to a medical condition. It also came a day after Superintendent Farrell received a follow-up note from Dr. Miller indicating Mr. Hughes' difficulty with concentration and logic, requesting that he have more time to answer interview questions. Strikingly, the Chair came to that conclusion before the Board had determined how it would accommodate Mr. Hughes, and before the rescheduled interview.

[118] Fifth, in cross-examination before the Tribunal, Superintendent Farrell was asked whether Dr. Miller's note was the basis for his view on Mr. Hughes' qualification, to which he responded that he based his conclusion on "the information there and based on what the job require[d]". He also testified that he recognized Dr. Miller did not know about certain aspects of the job, namely the types of interviews one would need to conduct, and that the medical note referred only to the interview in Process 2006-001, not interviews conducted in the course of employment as a Border Services Officer. Pressed further, Superintendent Farrell admitted that there was no evidence beyond Dr. Miller's note supporting his reservations about Mr. Hughes' ability to perform well on the job, notwithstanding that he had previously interviewed Mr. Hughes for a similar position two years prior without issue.

[119] In sum, I agree with Mr. Hughes that the Board took his disability at face value – that is, it perceived Mr. Hughes had a disability because it accommodated him. The Board also appeared to have pre-judged that Mr. Hughes was not qualified for the job based on a medical note indicating more time would be required to answer questions in light of his symptoms. During that time, Superintendent Farrell consulted with Ms. Lennax regarding accommodations, the same person who knew of Mr. Hughes' symptoms previously and who had intended to discredit

his application with an unsolicited e-mail. The Tribunal raised all of these points in its Decision (see paras 151-155). It was thus reasonable to infer that the determinations were made in the lead-up to the interview, without having yet assessed Mr. Hughes under the selection criteria, and were based on a perception of the disability, rather than having been made on the basis of a diagnosis of any particular type of mental disability.

[120] Additionally, the Tribunal found that Mr. Hughes suffered an adverse impact in that he was unsuccessful in the accommodated interview, and ultimately screened out of Process 2006-001. This meant he was no longer eligible for appointment from that process. I agree that this reasonably constitutes proof of an adverse impact (see *Canada (Attorney General) v Bodnar*, 2017 FCA 171 at para 26). I also agree with the Tribunal that Mr. Hughes' disability was a contributing factor to that adverse impact – the third factor of the *O'Malley*/*Moore* test of *prima facie* discrimination set out above.

[121] Canada, however, argues that the Tribunal erred in finding *prima facie* discrimination because it failed to expressly assess whether Mr. Hughes' actual or perceived disability was a reason he failed his interview and was removed from Process 2006-001. It submits that there was in fact no adverse impact, because Mr. Hughes' performance at the accommodated interview simply failed to meet standard required to obtain a passing mark.

[122] In my view, this argument does not attack the finding that there was an adverse impact – which, again, there was – but rather attacks the inference that the adverse impact was linked to the perception of Mr. Hughes' disability.

[123] Either way, I do not find this line of argument to be persuasive in the particular factual and legal constraints underpinning Process 2006-001. The crux of the Tribunal's findings with respect to 2006-001 centered on an undue influence of the Board regarding Mr. Hughes specifically. It found that Ms. Lennax (via the unsolicited e-mail) had tried to discredit Mr. Hughes as a suitable candidate, knowing full well that he suffered from various psychological and physical symptoms.

[124] Ms. Lennax's characterizations of Mr. Hughes' behaviour resemble those ultimately found by the Board in Process 2006-001 – that he was easily agitated, unprofessional, and confrontational. Moreover, the Chair himself wrote to Ms. Lennax to explain how he felt Mr. Hughes would be unable to perform the job because of the various symptoms elicited by his anxiety and depression. He did so after he had accepted Mr. Hughes' disability at face value, precisely because of the symptoms flowing therefrom, and before he conducted the accommodated interview. It is therefore clear that the Tribunal felt the Board had pre-judged Mr. Hughes before his interview. The end result, for the Tribunal, could not be segregated from the Board's pre-judgement.

[125] In sum, the Tribunal's conclusion that Process 2006-001 was "surrounded by a subtle scent of discrimination" is coherent and logical. It was reasonable, in light of the facts and the law, for the Tribunal to find *prima facie* discrimination during Process 2006-001 on a balance of probabilities.

[126] Next, then, is whether the Tribunal reasonably found that the employer failed to refute the claim of *prima facie* discrimination. Canada, in its application, submits that it never raised the issue of a *bona fide* occupational requirement before the Tribunal and, accordingly, this issue

was not relevant to the case. Rather, Canada argues the Tribunal failed to perform a meaningful analysis of the accommodation measures CBSA put in place – an error of law, and that the evidence did not support the conclusion that the measures were inadequate.

[127] Again, I disagree. The Tribunal determined that CBSA's accommodation measures were inadequate. Although the Board offered Mr. Hughes more time to answer questions, the Tribunal found Superintendent Farrell's mind had been tainted with respect to Mr. Hughes, and that a new board should have been established where the perception of mental illness would not have been so prevalent.

[128] As Mr. Hughes submits, this statement was not made in the context of an undue hardship analysis, but rather with respect to the adverse impact analysis. Mr. Hughes argues that regardless of the accommodation measure that was put in place, the only appropriate way to effectively accommodate him in the circumstances would have been to establish a new board. As such an option did not appear to have been considered by the Board, the Tribunal's conclusion was reasonable in these circumstances.

[129] Canada claims the accommodation measures CBSA implemented reflected what had been requested and what was disclosed in the various medical notes. However, that view does not square with the evidence for three reasons.

[130] First, Dr. Miller's November 20, 2006 note states "[Mr. Hughes] has a medical condition that creates problems with interviews. Ideally, an alternative assessment that doesn't require an interview would be helpful". There is no evidence that an alternate type of assessment was considered or provided by the Board.

[131] Second, Mr. Hughes requested that the Board perform a paper assessment of his past performance appraisals as opposed to an interview, because he maintained that his condition affected his confidence and speech during in-person interviews. Superintendent Farrell seems to have concluded, after consulting Ms. Lennax, that such an alternative would not be consistent among candidates, and might even give Mr. Hughes an advantage over other candidates. Again, there is no evidence that the Board provided any material consideration of alternate accommodation possibilities, although Superintendent Farrell noted the importance of interviews for the job, given the high-pressure environment faced by Border Services Officers when interviewing those seeking entry to the country.

[132] Third, the final note from Dr. Miller of February 1, 2007, indicating Mr. Hughes had problems with concentration and logic requiring extra time in the interview process, was submitted after back-and-forth discussion between the Board, Mr. Hughes, and Ms. Lennax. It may be that this was the only medical note Superintendent Farrell accepted because it did not recommend an alternative form of assessment, which he was hesitant to undertake. Whether accurate or not, the point remains that Superintendent Farrell did not appear amenable to accommodating Mr. Hughes in light of his particular circumstances, and had pre-conceived notions of Mr. Hughes' abilities.

[133] Viewed as a whole, the Tribunal felt that Superintendent Farrell's assessment of Mr. Hughes was unduly tainted. Thus, according to the Tribunal, CBSA could not justify its actions nor refute the finding of *prima facie* discrimination for Process 2006-001. I find that in all the circumstances, the Tribunal's reasoning and conclusions with respect to the tenth selection

process were both logical and coherent, and thus reasonable. As a result, I will dismiss Canada's application for judicial review in T-1065-19.

VII. COSTS

[134] Counsel agreed at the hearing that costs for T-1065-19 would proceed in the cause, in a lump sum of $3,500. This proposal is, in all the circumstances, fair. In matter T-1035-19, which proceeded primarily in writing, Mr. Hughes, representing himself, proposed costs of $1,000 to the successful party. Mr. Stark agreed on behalf of Canada. Once again, that agreement will be respected by the Court.

VIII. CONCLUSION

[135] For the reasons set out above, both applications for judicial review are dismissed. The Tribunal's Decision, for all ten processes at issue, was both reasonable and fair. As for costs, first for Court file T-1035-19 in which Mr. Hughes was self-represented, he shall pay legal costs to Canada in a lump sum of $1,000. For the second matter, T-1065-19, which had counsel on both sides, costs will be awarded to Mr. Hughes in the amount of $3,500.

JUDGMENT in T-1035-19 and T-1065-19

THIS COURT'S JUDGMENT is that the Applications for judicial review in T-1035-19 and T-1065-19 are both dismissed, with costs paid by and to Mr. Hughes in the amounts of $1,000 and $3,500, respectively.

"Alan S. Diner"
Judge

APPENDIX

Canadian Human Rights Act, RSC 1985, c H-6 (excerpts)

Employment

7 It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

…

Discriminatory policy or practice

10 It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

…

Emploi

7 Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :

a) de refuser d'employer ou de continuer d'employer un individu;

b) de le défavoriser en cours d'emploi.

[…]

Lignes de conduite discriminatoires

10 Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite et s'il est susceptible d'annihiler les chances d'emploi ou d'avancement d'un individu ou d'une catégorie d'individus, le fait, pour l'employeur, l'association patronale ou l'organisation syndicale :

a) de fixer ou d'appliquer des lignes de conduite;

b) de conclure des ententes touchant le recrutement, les mises en rapport, l'engagement, les promotions, la formation, l'apprentissage, les mutations ou tout autre aspect d'un emploi présent ou éventuel.

[…]

Exceptions

15 (1) It is not a discriminatory practice if

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

(b) employment of an individual is refused or terminated because that individual has not reached the minimum age, or has reached the maximum age, that applies to that employment by law or under regulations, which may be made by the Governor in Council for the purposes of this paragraph;

(c) [Repealed, 2011, c. 24, s. 166]

(d) the terms and conditions of any pension fund or plan established by an employer, employee organization or employer organization provide for the compulsory vesting or locking-in of pension contributions at a fixed or determinable age in accordance with sections 17 and 18 of the *Pension Benefits Standards Act, 1985*;

(d.1) the terms of any pooled registered pension plan provide for variable payments or the transfer of funds only at a fixed age

Exceptions

15 (1) Ne constituent pas des actes discriminatoires :

a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

b) le fait de refuser ou de cesser d'employer un individu qui n'a pas atteint l'âge minimal ou qui a atteint l'âge maximal prévu, dans l'un ou l'autre cas, pour l'emploi en question par la loi ou les règlements que peut prendre le gouverneur en conseil pour l'application du présent alinéa;

c) [Abrogé, 2011, ch. 24, art. 166]

d) le fait que les conditions et modalités d'une caisse ou d'un régime de retraite constitués par l'employeur, l'organisation patronale ou l'organisation syndicale prévoient la dévolution ou le blocage obligatoires des cotisations à des âges déterminés ou déterminables conformément aux articles 17 et 18 de la *Loi de 1985 sur les normes de prestation de pension*;

d.1) le fait que les modalités d'un régime de pension agréé collectif prévoient le versement de paiements variables ou le transfert de

under sections 48 or 55, respectively, of the *Pooled Registered Pension Plans Act*;

fonds à des âges déterminés conformément aux articles 48 et 55 respectivement de la *Loi sur les régimes de pension agréés collectifs*;

(e) an individual is discriminated against on a prohibited ground of discrimination in a manner that is prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be reasonable;

e) le fait qu'un individu soit l'objet d'une distinction fondée sur un motif illicite, si celle-ci est reconnue comme raisonnable par une ordonnance de la Commission canadienne des droits de la personne rendue en vertu du paragraphe 27(2);

(f) an employer, employee organization or employer organization grants a female employee special leave or benefits in connection with pregnancy or child-birth or grants employees special leave or benefits to assist them in the care of their children; or

f) le fait pour un employeur, une organisation patronale ou une organisation syndicale d'accorder à une employée un congé ou des avantages spéciaux liés à sa grossesse ou à son accouchement, ou d'accorder à ses employés un congé ou des avantages spéciaux leur permettant de prendre soin de leurs enfants;

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.

g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.

Accommodation of needs

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based

Besoins des individus

(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou

on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

…

[…]

Definitions

25 In this Act,

disability means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug; (*déficience*)

Définitions

25 Les définitions qui suivent s'appliquent à la présente loi.

déficience Déficience physique ou mentale, qu'elle soit présente ou passée, y compris le défigurement ainsi que la dépendance, présente ou passée, envers l'alcool ou la drogue. (*disability*)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1035-19 AND T-1065-19
DOCKET:	T-1035-19
STYLE OF CAUSE:	CHRIS HUGHES v ATTORNEY GENERAL OF CANADA
AND DOCKET:	T-1065-19
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v CHRIS HUGHES AND CANADIAN HUMAN RIGHTS TRIBUNAL
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN VANCOUVER, BRITISH COLUMBIA, TORONTO, ONTARIO, AND OTTAWA, ONTARIO
DATES OF HEARING:	JANUARY 11, 2021 JANUARY 28, 2021
JUDGMENT AND REASONS:	DINER J.
DATED:	FEBRUARY 12, 2021

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