No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF PRINCE EDWARD ISLAND)

BETWEEN:

NOEL AYANGMA

APPLICANT

and

PRINCE EDWARD HUMAN RIGHTS COMMISSION

RESPONDENT

ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENT

APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Section 40 of the Supreme Court of Canada Act, R.S.C. 1985, c. S-26)

NOEL AYANGMA, Applicant
75 Cortland Street
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TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

AND TO: KAREN A. CAMPBELL, QC – JESSICA M. GILLIS
Queen Street, Charlottetown PE C1A 7N8
For the Respondent, the English Language School Board

AND TO: JONATHAN B. GREENAN
PO Box 2000, 53 Water Street
Charlottetown PE C1A 7N8,
Respondent, PEI Human Rights Commission

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(ON APPEAL FROM THE PRINCE EDWARD COURT OF APPEAL)

BETWEEN:

NOEL AYANGMA

AND

THE PRINCE EDWARD HUMAN RIGHTS COMMISSION

RESPONDENT

THE ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENT

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the Applicant, Noel Ayangma hereby applies to the Supreme Court of Canada pursuant to section 40(1) of the ***Supreme Court Act***, R.S.C. 1985, c. S-26, as amended, for leave to appeal from the decision/order of the Prince Edward Island Court of Appeal dated July 25, 2019 and August 28, 2019 respectively (case number S1-CA 1413), which decision dismissed the Applicant's appeal from the decision of the Applications judge (case number S1-GS-27578) dated December 21, 2018, which decision, upheld the decision of the Chairperson dated August 11, 2017, which in return, upheld the decision of the Executive Director dated April 11, 2017.

AND FURTHER TAKE NOTICE that the said Application for Leave to Appeal shall be made on the following three main grounds:

GROUND ONE: DENIAL OF PROCEDURAL FAIRNESS/NATURAL JUSTICE

(a) The Selection board has erred in law and denied the Applicant procedural fairness, citing privacy concerns, when it refused to disclose to the Applicant, as the aggrieved person and the person with the burden of establishing a *prima facie* case of discrimination, all arguably relevant application materials of the candidates who were screened-in, which it gathered as part of the selection process put in place to select a Director of Human Resources, so as to enable him establish a *prima facie* case of discrimination, showing either that he had been denied an opportunity to compete for the position of Human Resources Director, alongside all those candidates screened- in and interviewed; or show that the selection criteria advertised by the Respondent were not evenly applied to all candidates, and/or that those screened in including successful candidate, may not have met all the advertised criteria, including the criteria it alleged the Applicant did not meet;

(b) The Executive director has also erred in law in failing to direct the Selection Board to disclose to the Applicant all application materials requested including the resumes of the other two screened-in candidates, also citing privacy concerns, and so did the Chairperson, the Applications judge and the Court of Appeal when the upheld the decision of the Executive director.

GROUND TWO: SETTING AN EXTREMELY HIGHER AND UNREASONABLE STANDARD:

(c) The Executive director has also erred in law and set an extremely high standard which was on its face beyond any reasonable expectation or reach, when she required that the Applicant establish a *prima facie case* of discrimination based on a denial of an opportunity to compete alongside other candidates screened-in, for the position of Director of Human Resources, without the benefit of their application materials of all candidates screened-in for the position, including their resumes;

(d) The Executive director has also erred in law and set a higher expectation which was on its face beyond any reasonable reach, when she expected the Applicant to show that he was either equally or more qualified than the other candidates screened-in or show that the selection criteria were not evenly applied to all candidates and/or that some of the candidates screened-in may not have met all the minimum advertised selection criteria including the criteria the selection board had alleged the Applicant did not possess;

GROUND THREE: MAKING OF PATENTLY UNREASONABLE DECISIONS:

(e) All the decision-makers involved in this case (the Chairperson, the Applications judge and the Court made a patently unreasonable decision, in concluding, that the Applicant failed to establish a prima facie case at the investigative stage, without the benefit of all the resumes of those candidates screened in and interviewed for the position of Director of Human Resources, and upholding the Executive director's decision that all those screened in and interviewed, all met the minimum qualifications advertised and were therefore more qualified on a paper exercise, than the Applicant, including the criteria the Executive director concluded the Applicant was lacking

DATED at the City of Charlottetown in the Province of Prince Edward Island this 8th day of September, 2019.

NOEL AYANGMA

TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

AND TO: KAREN A. CAMPBELL, QC
JESSICA M. GILLIS
Queen Street, Charlottetown PE C1A 7N8
Tel: (902) 628-1033 Fax: (902) 566-2639
Solicitors for the Respondents for the Respondent, the English Language School Board

AND TO: JONATHAN B. GREENAN
PO Box 2000, 53 Water Street
Charlottetown PE C1A 7N8,
Tel: (902) 368-1480 Fax: (902) 368-4236
Solicitor for the Respondent, PEI Human Rights Commission

NOTICE TO THE RESPONDENT

A respondent may serve and file a memorandum in reply to this application for leave within 30 clear days after service of the within application. If no reply is filed in that time, the Registrar will submit this application for leave to the Court for consideration pursuant to section 43 of the *Supreme Court Act.*

Dated this 8th day of September 2019

NOEL AYANGMA, Applicant
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Tel:(902) 628-7934
noelayngma@yahoo.ca

TO: THE REGISTRAR OF THE SUPREME COURT OF CANADA

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Solicitor for the Respondent, PEI Human Rights Commission

FORM 25B CERTIFICATE

I, NOEL AYANGMA hereby certify that:

1. This file sealed in the courts below

   NO

2. There is a ban on the publication of evidence or the names or identity of a party or a witness.

   NO

3. There is confidential information on the file that should not be accessible to the public by virtue of specific legislation.

   NO

SIGNED BY

NOEL AYANGMA

September 8th, 2019
DATE

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HRC file Number: 1929-13

In the Matter of the *Human Rights Act*, R.S.P.E.I. 1988, Cap. H-12, as amended.

Between:

NOËL AYANGMA

COMPLAINANT

And:

ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENT

EXECUTIVE DIRECTOR DECISION

NOTICE OF DISMISSAL
Pursuant to Section 22 *Human Rights Act*

10 APRIL 2017

To: Noël Ayangma

And To: Karen Campbell
Solicitor for the English Language School Board

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Nature of Complaint

On 18 October, 2013, Noël Ayangma ("Mr. Ayangma") filed a complaint in the area of employment on the grounds of Colour, Race and Ethnic or National Origin and because he had made previous complaints under the PEI *Human Rights Act ("Act")*. The Respondent, is the English Language School Board ("ELSB").

Mr. Ayangma alleges that he was denied the opportunity to compete for a job with the ELSB. He alleges that based on the job description posted in the advertisement, he had the requisite qualifications and he should, therefore, have been screened in for an interview. He was not, and he alleges the reason he was not was because of his Colour, Race and Ethnic or National Origin and/ or because he had made previous complaints under the *Act*. Mr. Ayangma submits that the individuals who were selected for interviews were no better qualified than he was and that the successful candidate did not meet the basic educational requirement and thus should never have been granted an interview, let alone the job.

Mr. Ayangma submits that:

> the selection criteria identified by the respondent and included in the ad were not evenly applied to all applicants and that he was denied the opportunity to be interviewed for this position and eventually the position of Director of Human Resources, even though he was equally if not, better qualified than those who were screened in and given an interview, including the successful candidate.
>
> *(Further Reply to the Respondent's Additional Response, received October 17, 2014, Para. 3)*

He also submits that because he was more qualified than the successful applicant he was not only denied the opportunity to compete he was, ultimately, denied the position.

The ELSB, defends the allegations of discrimination in two ways. Firstly, they submit that Mr. Ayangma signed a Memorandum of Settlement and Release in 2012 which they submit was a full and final release, not only of past allegations of discrimination but of future claims of

discrimination as well. They submit that the effect of that Release is that the Complainant is prevented from making any further claims of discrimination against the ELSB.

Secondly, they submit that there is no merit to the complaint in that the Complainant has presented no evidence to support that discriminatory factors were used to screen the Complainant out of the hiring process. The ELSB denies the characterization of the historical incidents set out in the complaint and submits they do not amount to evidence of discrimination in relation to this job application process. They submit that the Selection Board applied the selection criteria evenly to all applicants.

In relation to the release, Mr. Ayangma submits that the Release does not apply to discriminatory acts which occur after the signing of the Memorandum of Settlement and Release.

Preliminary Matter – Effect of the Release signed 6 February 2012

In paragraphs 82-84 of his complaint, Mr. Ayangma acknowledges that on 6 February 2012 he signed a Memorandum of Settlement and a Full and Final Release. He acknowledges that this precludes the Commission from dealing with complaints arising prior to the execution of the agreement. As to allegations which post-date the Release he submits:

> ... he did not and could not have contractually agreed to put himself beyond the protection of the Human Rights Act in the future and/or relinquished his future rights protected pursuant to s. 6 of the **Human Rights Act**.
>
> *(Complaint filed October 18, 2013, Para. 84)*

The ELSB submits that he can and did contract out of his right to sue for any violations of his Human Rights even those occurring after the execution of the agreement ("future violations"). They rely on the wording of the Full and Final Release executed by Mr. Ayangma relating to, *inter alia*, the ELSB which includes the following provisions:

> Noel Ayangma ...
>
> (c) Agrees not to make any claim or take any proceeding of any nature in the future against the Releasees, individually or collectively, including but not limited to a claim alleging a debt owed, breach of contract, a duty of any kind whatsoever owed or breached, how so ever arising (be it statutory, contractual or common law), **human rights violation**,

> collective agreement or other grievances, negligence, misrepresentation, libel, slander, defamation, *Charter* violation(s), claims for damages or a claim for any other remedy which is alleged to have been caused in any manner whatsoever by the Releasees, individually or collectively, which exists now, or may hereafter arise or be discovered to exist, which in any way relates to or arises out of any **past, present or future dealings** or claims of any nature or kind between the Releasees, individually or collectively, and the Releasor (hereinafter referred to as "Future Claims"). **(Emphasis Added)**
>
> *Full and Final Release executed 6 February 2012 by Mr. Ayangma, Para. (c)*

Whether the existence, validity and applicability of a Release will be dealt with as a preliminary matter will depend on the nature and facts of the case. It may be appropriate to deal with the validity of the release before looking at the merits of the case where a release, if valid, clearly covers the subject matter of the complaint. In other cases, it may be clear that the case is not within the jurisdiction of the Commission or lacks merit on its face in which case it may be appropriate to deal with the case on its merits rather than assessing the validity or applicability of the Release.

I have reviewed all of the materials, including cases and submissions, from the parties regarding the Release and its applicability to "future" allegations of discrimination. The parties submitted significant case law relating to whether a person can contract out of their Human Rights or can contract out of their right to file a complaint when their rights have been violated.

If this matter were to be decided on the issue of the validity of the release as it relates to claims that arise after the time of the signing of the Release, I would forward this matter to a Panel to hear evidence and further submissions about the intentions of the parties and the effectiveness of the Release given the public policy consideration. I do not find, however, that is it necessary to do so.

Although the Respondent raised the Release as a preliminary matter, I have reviewed all of the materials regarding the merits of the complaint and conducted an investigation on the merits. I have concluded that I am able to exercise my discretion under section 22 of the *Act* based on an assessment of the merits of the case. For the reasons outlined below, I have determined that there is no reasonable basis, in the evidence, to justify sending the matter to a Panel based on the

merits of the case and, therefore, it is not necessary for a Panel to be convened to hear evidence on the Release.

Background and Details of the Complaint

In September 2013, the ELSB advertised for applications to fill the positon of Director of Human Resources. On 9 September 2013, Mr. Ayangma applied for the positon. The competition closed on 13 September 2013.

The Minimum Qualifications set out in the Job Posting were:

Education and Training:

- Must have a university degree, preferably at the Masters level, in a related area with considerable training in human resources.
- CHRP designation would be an asset.

Skills and Experience:

- Extensive and successful experience in a senior human resource management role in a complex unionized environment in areas such as labour relations, recruitment and retention, policy development, HR planning, classification etc.
- Managerial experience is required.
- Proven conflict management and mediation skills.
- Demonstrated superior interpersonal, collaborative and team building skills
- Excellent oral, written and presentation skills are essential
- Ability to use word processing, spreadsheets, HR information systems, presentations software, e-mail.

The Selection Board consisted of Cythia Fleet, ELSB Superintendent of Education; Ron McLeod, Lawyer and Human Resources Consultant; and Rebecca Gill, Bilingual Staffing Consultant, PEI Public Service Commission. The Selection Board reviewed the applicants using an Applicant Screening Tool to determine who would be invited for an interview. The Applicant Screening Tool had the following five sections: Education (include Major and Minor), Relevant Training, Relevant Experience, Other Requirements or Assets, and School Community.

As part of the investigation of this matter, I reviewed the resumes of each of the applicants for this position and the completed Applicant Screening Tool. I met with one of the individuals on

the Selection Board. In doing so, I looked for evidence as to whether the selection criteria were evenly applied to all candidates.

The Applicant Screening Tool listed each of the applicant's by name. Comments were written in the columns until it was determined the person did not qualify and, for the most part, the remaining columns did not have entries.

There were ten applicants for the position. Seven were screened out prior to the interview stage. One was screened out for not having the required education. The other six applicants were screened out for not having the required experience. Of those six, some candidates did have Human Resource experience and some had familiarity or experience with unionized negotiations. Mr. Ayangma was one of those six. Applicants #3, #4, and #5 were screened in for interviews. Applicant #5 withdrew before the interview process. Applicants #3 and #4 were interviewed and W.N. (Applicant #4) was hired for the position.

Education Requirement

The Education Requirement was: "Must have a university degree, preferably at the Masters level, in a related area with considerable training in Human Resources. CHRP designation would be an asset." CHRP stands for Certified Human Resources Professional.

Ron MacLeod, a member of the Selection Board, clarifed what was meant by "related area." He indicated they were looking for education which was related to the position of being an Administrator, in an education setting. He indicated that there are a number of university degrees which would satisfy this requirement. He also indicated that the qualification would be satisfied if the person had any university degree and, separate and apart from that degree, they had "considerable training in human resources."

Nine of the ten applicants passed through this screening. The one who had no university degree was screened out. Of those screened in, a number had MBA degrees (one was completing the MBA program), one had a law degree, one had a BAS (Business Administration Studies), and one had a BA (Bachelor of Arts).

Mr. Ayangma argues that W.N. and Applicant #3 should have been screened out of the selection process for failing to have the requisite education qualification. He submits that the fact that they were not, is an indication the criteria were not applied equally.

W.N. had a Masters of Education, in Education Administration. Mr. MacLeod stated that a Masters of Education Administration is a degree about administering school systems which the Selection Board identified as being related to this position. The successful candidate's role would be Education Administration. W.N. does not have a CHRP designation but did indicate attending ongoing seminars and institutes in the Human Resources area.

Applicant #3 had a BA in psychology and a CHRP designation. The Selection Board determined this met the criteria of a university degree, and considerable training in Human Resources ("HR"). Even though the HR training was not related to the university degree, the qualification was satisfied by the studies necessary for a CHRP designation.

Mr. Ayangma's educational qualifications were not in issue (they include an MBA and PhD in Business Administration). He passed through this level of screening.

Relevant Experience

The second level of screening was Relevant Experience. Two of the minimum qualifications in this area were stated to be:

> Extensive and successful experience in a senior human resource management role in a complex unionized environment in areas such as labour relations, recruitment and retention, policy development, HR planning, classification etc.
>
> Managerial Experience is required.

There were other minimum qualifications but there does not appear to be any issues relating to these and they will not be discussed. The Relevant Experience category is where most applicants were screened out.

Mr. MacLeod clarified that a complex unionized environment is one where there is a large number of unionized employees involving multiple unions. He provided two examples in PEI

including Health and Education. The Health sector has a very large number of employees, many working shift work, with four different bargaining units. The Education sector also has a very large staff and five different bargaining units which negotiate three different Collective Agreements. Mr. MacLeod indicated that from his experience, School Boards in other provinces have similar structures, although usually just three units (not five) negotiating three Agreements.

Mr. MacLeod indicated that the Selection Board was looking for candidates that not only had union related experience, but that held senior management roles in complex union environments. He indicated that while some applicants did have experience advising senior management or participated in union negotiations, they either did not have senior management experience or did not have management roles in complex union environments.

In reviewing the Applicant Screening Tool and the resumes of the Applicants, the following summarizes the basis on which six applicants were screened out at this stage:

> Applicant # 2 – indicated familiarity with the negotiation process with government and was screened out as having no extensive HR experience.
>
> Applicant #6 – was a business owner and was screened out as having no qualifying experience (no evidence of union experience).
>
> Applicant #7 – had multiple years of experience as a lawyer in the Human Resources field and was screened out as having no extensive managerial experience.
>
> Applicant #8 – had experience with Human Resource Management and union negotiations and was screened out as having no extensive HR Management experience.
>
> Applicant #9 – was a senior Director of Human Resources and was screened out as not having labour relations experience in a unionized environment.
>
> Mr. Ayangma was also screened out at this stage. The notation on the Applicant Screening Tool was that he had no significant Human Resources experience in a complex unionized environment.

Teaching HR management courses does equate to being an HR manager;

Providing strategic advice to senior managers does not mean you are a senior manager. Applicant #7 had significant experience giving advice to senior managers but was also screened out for not having management experience.

He would not consider Regional Project Managers to be a senior human resource management role and there was nothing in the resume to indicate that this was a unionized environment, let alone a complex one.

Although Mr. Ayangma's resume indicates he has Human Resource experience, including that in a union setting, the ELSB submits that his resume and cover letter do not refer to senior management roles, nor do they identify management experience in "complex" unionized environment. As with the other applicants who had some union or management experience, Mr. Ayangma was screened out at this stage and not offered an interview.

Applicants Screened in for an Interview

W.N.'s application indicates he worked for five years as Director of Labour Relations for the Newfoundland and Labrador School Boards Association. Among other things, his cover letter states that his position involved being the Chief negotiator in contract negotiations with Unions representing school employees. He was previously the Executive Director of the Nova Scotia Teachers Union for six years and the Newfoundland and Labrador Teachers Union for four years.

Mr. MacLeod advised that both he and Ms. Fleet were familiar with the structure of the Newfoundland and Labrador School Boards Association and their negotiating structures. The School Boards Association co-ordinates all the Labour Relations for all of the school boards in the province and the Director would be involved in Collective Agreement negotiations for 25 to 30 thousand employees with a number of different bargaining units.

In addition to the Director position, Mr. MacLeod indicated that in each of W.N.'s positions as Executive Director of Teachers Unions he would have had management responsibility for approximately 25-30 staff. W.N.'s cover letter outlines that he has:

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Mr. Ayangma's Application

Mr. Ayangma submits that he should not have been screened out at this stage and that his application indicates he meets these qualifications. His cover letter and resume state that he is an:

> "experienced human resources individual who can function independently and has considerable training, experience and skills in human resources/financial management, managing projects and/or programs and labour relations issues in unionized environments..."

He also indicates he was a "grievance and Appeal Representative for the National Component of the Public Service Alliance of Canada for 2 years."

In his submissions to the Commission, Mr. Ayangma indicated the following as examples of where he demonstrates he was a senior manager in a complex unionized environment:

> He worked in a unionized environment as Labour and Grievance Adjudication Representative;
>
> He worked in a senior HR management role by teaching various human resource management courses;
>
> He provided strategic advice to senior managers, thereby he should be considered as a senior manager;
>
> He was a Regional Program Manager/Project Manager for a large project. His cover letter indicates this was a $40M project.

Ron MacLeod indicated the Selection Board did not identify these as meeting the qualification of having extensive and successful experience in a senior human resource management role in a complex unionized environment. He addressed the submissions noted above in the following way:

> Being an adjudication representative is not a senior HR management role. Both applicants #2 and #8 had experience in a union environment but not at the management level and were screened out;

> ...two decades of intense involvement and experience with respect to collective bargaining, collective agreement administration, recruitment and hiring, evaluation, employment relations, pensions and employee benefits and the broad spectrum of labour relations and human resource management.

According to Mr. MacLeod, the Director of Labour Relations position in Newfoundland and Labrador is a senior management position, in a complex unionized environment. The comparable position in PEI would be the supervisor to the Director of Human Resources, the position for which they were hiring. In effect, he indicated W.N. was likely overqualified for the position.

Candidate #3 – This candidate's application indicates having ten years experience as an HR Manger in various positions in the Health Sector. The resume and cover letter outline that this candidate does have extensive experience as a Senior Human Resource Manager in a complex unionized environment.

Candidate #5, who was screened in but withdrew before the interview process, provided a cover letter and resume outlining 12 years experience in senior management positions in environments with multiple unions, part of that time being in the Health Sector.

The ELSB submits that the screening criteria were applied evenly to all applicants. Mr. MacLeod further stated that the Selection Board never discussed Mr. Ayangma's Colour, Race and Ethnic or National Origin and/ or that he had made previous complaints under the *Act*. Mr. MacLeod acknowledged that he knew Mr. Ayangma and he knew of his circumstances but stated they did not influence his decision and his knowledge was not discussed with the others. He was unable to indicate what the other members of the Selection Board knew about Mr. Ayangma's circumstances.

Disclosure of Resumes

Mr. Ayangma requested that the ELSB disclose to him the applications of the individuals who were screened in for interviews so he could assess and, if appropriate, challenge whether they met the qualifications. The ELSB refused to provide copies to him, although they did provide a copy of the successful candidate's application and a vetted copy of the Applicant Screening

Tool. Mr. Ayangma submits that there should be an adverse inference drawn against the ELSB as a result of their failure to release those documents.

The ELSB submits that the privacy of the individual applicants who applied in confidence for the position would be violated by providing copies to him. They submit that even if names were vetted, the information in the applications would allow for identification.

The ELSB provided me with access to all of the applications received as well as access to the un-vetted Applicant Screening Tool so I could conduct a review of the screening process to determine if there was any evidence in those documents to support Mr. Ayangma's allegations that discriminatory factors were considered to screen him out, and /or that the selection criteria were not applied evenly among the applicants. Those are appropriate roles for the Executive Director, acting as investigator, on a complaint such as this. In order to maintain the privacy of the applicants I have provided some information about the applicants without putting such detail as would lead to their identification.

Since the ELSB did provide me, as investigator, with those documents there is no need to address Mr. Ayangma's submissions about making an adverse inference from their refusal to release the documents.

Role of the Executive Director

The duties of the Executive Director are set out in section 22(3) and (4) of the *Act:*

> 22(3) The Executive Director shall investigate and attempt to effect settlement of the complaint.
>
> 22(4) Notwithstanding subsection (3), the Executive Director may, at any time,
> (a) dismiss a complaint if the Executive Director considers that the complaint is without merit;
> (b) discontinue further action on the complaint if, in the opinion of the Executive Director, the Complainant has refused to accept a proposed settlement that is fair and reasonable;
> (c) discontinue further action on the complaint if it could be dealt with more appropriately by an alternate method of resolution

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> under any other Act, or if grievance or other review procedures have not been exhausted; or
> (d) report to the Chairperson of the Commission that the parties are unable to settle the complaint.

During this stage of the process:

> The investigator has the responsibility to acquire information from both the complainant and the subject of the complaint. The investigator is also obliged to explore the possibility of settlement of the complaint with both parties.
>
> *Ayangma v French School Board,* 2002 PESCAD 5, Para. 38

In *P.E.I. Music and Amusement Operators Assn. Inc. v. Prince Edward Island* the Court considered the Executive Director's role stating:

> 28 ... [T]he process to be followed by the Executive Director is a common sense assessment of the case before her/him, akin to what happens in a preliminary inquiry in Provincial Court, or in a Summary Judgment motion in Supreme Court. The Executive Director does not make findings of fact, but rather makes an assessment of the case which is part expert based on his/her experience, qualifications and role, and part common sense. ...
>
> 29 While the Executive Director does not make findings of fact, he or she is permitted and indeed is required, to assess the sufficiency of a complaint so as to winnow out claims which do not have a sound basis.
>
> *PEI Music and Amusement et al.v. Gov't of PEI,* 2014 PESC 20, Paras. 28-29 (upheld on appeal in 2015 PECA 8)

Where there is no settlement, it is the role of the Executive Director to determine if the matter should proceed to a Panel. If a *prima facie* case of discrimination has been established by the Complainant, the matter should proceed to a Panel. If the Complainant has not established a *prima facie* case, the matter should be dismissed.

In reviewing the evidence gathered at the investigative stage, the Court provides the following direction:

> [37] At the investigative stage under the *Human Rights Act* a complainant need only make out a *prima facie* case of discrimination to establish the complaint has merit. The next question is, what evidence will constitute a *prima facie* case or put another way, what test should the investigator, or the Chairperson on a review, apply to the evidence

> gathered in the course of an investigation to determine whether to dismiss a complaint for lack of merit?
>
> ...
>
> [39] ... It is not the role of the investigator to weigh the evidence but simply to test its sufficiency and determine if a panel should conduct an inquiry.
>
> [40] There will always be some evidence of discrimination even if it comes only from the Complainant. Similarly, there will always be some conflict in the evidence gathered by the investigator because the subject of the complaint will most frequently have a version of the situation different from that of the Complainant. Therefore, a test that would not permit any weighing of the evidence in these circumstances would be meaningless and impractical. Having due regard to the spirit of the Act and to permit the Executive Director to properly discharge his function as an investigator in deciding to dismiss a complaint for lack of merit, he must be permitted to look at all the evidence and make some common sense assessment.
>
> [41] ... [T]he investigator is to decide whether there is a reasonable basis in the evidence gathered by the investigator which would justify sending the proceeding to the next stage which, failing settlement, is the inquiry by a panel appointed by the Chairperson.
>
> *Ayangma v French School Board* (2002), PESCAD 5, Paras. 37-41

Subsection 1(1)(d) of the *Act* prohibits:

> discrimination in relation to age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, disability, political belief, race, religion, sex, sexual orientation, or source of income of any individual or class of individuals.

Section 15 of the *Act* provides:

> No person shall evict, discharge, suspend, expel or otherwise discriminate against any person because he has made a complaint or given evidence or assisted in any way in respect of the initiation, inquiry or prosecution of a complaint or other proceeding under this Act.

Section 6(a) of the *Act* provides:

> 6. (1) No person shall refuse to employ or to continue to employ any individual (a) on a discriminatory basis, including discrimination in any term or condition of employment.

Discrimination is described in the decision of *Andrews* v *Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.) which was accepted in *Ayangma v The French School Board*

> ... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.
>
> *Ayangma v The French School Board*, 2002 PESCAD 5, Para. 34

In *Moore v. British Columbia (Education)*, the Supreme Court of Canada set out the following three-part test to determine the existence of a *prima facie* case of discrimination:

> ... to demonstrate prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.
>
> *Moore v. British Columbia (Education)* 2012 SCC 61, Para. 33

In *Shakes v Rex Pak Ltd,* the Ontario Human Rights Tribunal heard evidence that a black woman applied for a job and was not hired. The same day, a white woman was hired to do the same job. The Tribunal found that the evidence presented by the Complainant was sufficient to establish a *prima facie* case. The Tribunal set out three pieces of evidence that the Complainant had to satisfy:

> In an employment complaint, the Commission usually establishes a *prima facie* case by proving (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 (i.e., race, colour, etc.) subsequently obtained the position.
>
> *Shakes v Rex Pak Ltd,* 1981 CarswellOnt 3407 (Ontario Board of Inquiry), Para. 11

In the *Shakes* case, the Tribunal found the Ontario Commission, acting on behalf of the Complainant, met the *prima facie* case and shifted the burden to the Respondent who offered evidence in reply. Ultimately the finding of the Tribunal was that there was no discrimination.

The test set out in the *Shakes* case is a useful one in dealing with employment cases and it has been accepted in PEI. In *Ayangma v Eastern School Board* [2005] P.E.I.H.R.B.I.D No 1; 2005 CanLII 60064, a Human Rights Panel used this test to find that there was *prima facie* evidence that Mr. Ayangma had been discriminated against when he was not hired, **nor given the opportunity to interview**, for a number of teaching positions. At the Panel, the burden shifted to the Respondent who did not discharge their burden and a finding of discrimination was made.

The decision of the Panel was before the Supreme Court by way of a Judicial Review and the use of the *Shakes* test in employment cases was confirmed.

> [21] In reaching its decision, the Panel correctly set out the three elements necessary for a *prima facie* case of discrimination in employment as articulated in the case of ***Shakes v. Rex Pak Ltd.*** (1981), 3 CHRR D/1001.
>
> *Eastern School Board v Montigny and Ayangma* 2007 PESCTD 18, Para. 21

Although this matter resulted in additional appeal hearings, the issues on appeal were related to damages and costs, not the test itself.

In some cases, there may be direct evidence of discrimination, in which case, it may not be necessary to apply the *Shakes* test. This was the case in *Widdis v Desjardin Group* where the Ontario Human Rights Tribunal stated:

> [47] The applicant referred to *Abouchar v. Metropolitan* Toronto School Board, [1998] OHRBID No. 6, in which the Board of Inquiry states at paras. 10:
>
> However, the tests in Shakes and Israeli are not a complete statement of the applicable law. Depending on the factual circumstances, proof that the complainant was an equivalent or better candidate will not always be essential to the legal burden of proof in a case of employment discrimination. A finding of discrimination will be made out if the Commission can prove on the balance of probabilities that the complainant was treated unequally in the competitions, and that one reason for the unequal treatment was his membership in a group

> identified by prohibited ground under the Human Rights Code [R.S.O. 1990, c. H.19]. It will be a question of fact in each case as to whether a prohibited ground of discrimination was a factor in the unequal treatment, and further, whether the discriminatory factor contributed to the decision not to hire the complainant. Even a completely unqualified applicant can be discriminated against in a hiring process on the basis of a prohibited ground, but in those circumstances, the discrimination would not likely be a proximate cause for the applicant's lack of success in the competition.
>
> *Widdis v Desjardins Group/ Desjardins General Insurance* 2013 HRTO 1367, Para. 47

In the *Widdis* case there was direct evidence that the pre-interview screener had a conversation about the Complainant's inability to work on Saturday due to religious reasons. The Tribunal found this to be sufficient *prima facie* evidence to switch the burden to the Respondent to provide evidence that the reason she was not offered an interview was NOT because of her religion. The *Widdis* case does not change the validity of the *Shakes* test, it simply highlights that there may be cases where evidence of discrimination can be seen from words or actions of the parties.

Where there is no direct evidence, which there often is not, then the *Shakes* test allows for an analysis of the hiring process. Further direction in assessing the selection criteria is found in *Ayangma v The Eastern School Board* (2004):

> [41] If specific selection criteria were identified and if on their face the selection criteria were evenly applied, then there would be no basis for suggesting that the selection criteria were used to discriminate on one of the prohibited grounds. However, an uneven application of the selection criteria does provide evidence suggestive of such discrimination. In those circumstances, a further inquiry – by way of the appointment of a panel of inquiry – is necessary. To set the bar higher would be unreasonable. As many cases have noted, clear evidence of discrimination on a prohibited ground is difficult to obtain. Circumstantial evidence is often all that is available. Depending upon the circumstances, such evidence may be sufficient to establish discrimination on a prohibited ground.
>
> ...
>
> [44] Also, the evidence put forward in the instant case could be considered to be conflicting evidence which requires an assessment of

> credibility and reliability. The Board's position is that it applied certain selection criteria to all candidates equally. The appellant alleges that these criteria were not applied to all candidates equally. **There is some evidence to support this argument of the appellant. Others appear to have been hired in spite of their failing to meet the identified criteria.** Perhaps further inquiry will resolve this apparent conflict, but on its face it is a conflict that would require some weighing of the evidence before ruling out the suggestion that this is evidence of discrimination. **(Emphasis Added)**
>
> *Ayangma v. The Eastern School Board* 2004 PESCAD 23, Paras. 41 and 44

As can be seen from this 2004 case, the *Shakes* test applies at the investigative stage to determine if there is sufficient evidence to send the matter to Panel. Whether the adverse impact was not being hired for the position or not being given an interview, the *Shakes* test is an appropriate analysis to produce a common sense assessment of the evidence.

It is not sufficient, however, for the Complainant to simply allege the criteria were not applied evenly. There must be "some evidence to support this argument". That evidence may be found through the statements of witnesses or through a review, by the investigator, of the applications and selection criteria.

Prima Facie at the Investigation Stage

There is a difference in the assessment of what meets a *prima facie* case at the investigative stage and what meets a *prima facie* case at a Panel. At the investigative stage, the threshold is less onerous and is not subject to the same weighing of evidence as is necessary at a Panel. The investigator is required to conduct a common sense assessment of the evidence to determine whether there is a reasonable basis to send the matter to a Panel. (*Ayangma v French School Board*, 2005 PESCAD 18)

Analysis

In preparing this decision, I have given careful consideration to all information provided by the parties, both in their written submissions and during interviews conducted as part of the

investigation. I have made a common sense analysis of the facts with which I have been provided. I have not made determinations of credibility.

Mr. Ayangma is a person of colour and he has made *previous complaints* under the *Act.* He applied for and was not hired nor given an opportunity to be interviewed for the advertised position with the ELSB. He has, therefore, satisfied steps 1 and 2 of the *Moore* analysis.

Step 3 requires Mr. Ayangma to establish *prima facie* evidence that his Colour, Race and Ethnic or National Origin and/ or the fact that he has made previous complaints under the *Act* were factors in his not being interviewed or hired for the position.

Mr. Ayangma submits that because he was not offered an interview, he was not given the opportunity to compete for the position and that this sets a lower threshold of what needs to be established at this stage of the process than if he had been interviewed and not hired. *Moore* and *Shakes* apply to this situation. For the matter to be sent to a Panel, there must be some evidence based on a common sense analysis to establish on a *prima facie* basis that he was excluded from an interview for reasons related to his personal characteristics as set out in his complaint or that his resume and cover letter were not assessed based on the same criteria as the other applicants.

Is there evidence that he was excluded from an interview for reasons related to his personal characteristics?

Mr. Ayangma submits that he was the only black applicant for this position. Since Mr. Ayangma does not know who the other applicants were, he has no evidence to offer in support of that. Mr. MacLeod confirmed that neither of the two applicants who were interviewed are black. He confirmed that he knew some of the other applicants personally and knows they are not black but he indicated he had no knowledge of the Colour, Race and Ethnic or National Origin of the other applicants whom he did not personally know. It was not information that was sought and the members of the Selection Board did not discuss the Colour, Race and Ethnic or National Origin of Mr. Ayangma (whom Mr. MacLeod did know) or the other applicants. Mr. MacLeod indicated that these were not considerations of the Selection Board. There is no indication on the applicant's resumes as to their Colour, Race and Ethnic or National Origin. Mr. Ayangma was

not the only applicant screened out and the evidence does establish that there were white applicants who were screened out on the same criteria as Mr. Ayangma.

Mr. Ayangma has made a number of complaints against the ELSB and its predecessors (Eastern School Board, Eastern School District). He submits that failure to consider him for this job in 2013 was another incident of discrimination by an organization which had systemically discriminated against him in the past. To establish that point, in paragraphs 5-81 of his complaint he outlined numerous incidents of alleged discrimination involving these parties dating back to 1998. Mr. Ayangma submits it is necessary to understand this history to assess his current complaint.

All of the past incidents alleged by Mr. Ayangma have been disposed of. Some of these allegations resulted in hearings and findings of discrimination by a Human Rights Panel, some were resolved by a Memorandum of Settlement which did not include an acknowledgement of discrimination by the ELSB. They are not, in and of themselves, evidence that this particular Selection Board discriminated against Mr. Ayangma. The position being hired for in this case was that of a senior manager whereas the positions outlined in the previous cases were primarily for teachers. There were some management positions, although not at the same senior level as in this competition. While, in some cases, it may be relevant to consider information which predates the complaint to confirm or negate particular hiring practices there must still be some evidence that the selection process in the position which is the subject matter of this complaint was discriminatory.

Mr. Ayangma submits that he was not given the same opportunity to compete as other applicants who were either not black or had not previously made complaints under the *Act*. Mr. Ayangma was able to apply and submit his cover letter and resume as were other candidates. Mr. MacLeod provided evidence that the issues of Colour, Race and Ethnic and National Origin and the fact he had made previous complaints under the *Act* were not considered by the Selection Board. There is nothing on the face of the evidence that directly supports a conclusion that the protected characteristics of Mr. Ayangma were factors in the screening process. He did not provide any evidence to establish that the application process or the Applicant Screening Tool were designed

to identify those characteristics or that the Selection Board made any comments to suggest direct evidence of discrimination.

This is not a situation where I have to weigh evidence or assess credibility on this point. The only direct evidence is that these characteristics were not issues and there is nothing in the documentation to suggest otherwise. This is not a situation such as in *Widdis* where one witness reported something was said and the other denied it. Mr. Ayangma's assertion that these were factors is just that, an assertion, it is not evidence supported by the facts.

Is there any evidence that Mr. Ayangma's application was not assessed based on the same criteria as the others applicants?

Having found no *prima facie* direct evidence of discrimination, I must make a common sense assessment as to whether "on their face, the selection criteria were evenly applied". *Ayangma v The Eastern School Board* 2004 PESCAD 23

The screening of applicants is not an exact science. The Selection Board uses its knowledge and looks for key indicators in the resume and cover letter that the person meets the qualifications. They may miss something if it is not clearly set out in the document. Mr. MacLeod indicated that when they reviewed Mr. Ayangma's resume there was nothing that stood out to them to indicate he had extensive and successful experience in a senior human resource management role, in a complex unionized environment. He stated that was the reason they did not choose to interview him for the position. Whether they were right or wrong, or whether they could have come to a different conclusion and asked for an interview to dig deeper is not the issue. The issue is, did they apply the selection criteria to his cover letter and resume in a fashion equal to other applicants?

Mr. Ayangma's submission is that the Selection Board did not apply the criteria evenly and he has presented arguments about how he was qualified and W.N. was not. He submits that his submissions on this point take the matter out of the discretion of the investigator and must be put before a Panel. As noted above, in *Ayangma v French School Board* (2002), PESCAD 5 (par 37-41) there will always be some evidence on either side, it is up to the investigator to make a common sense analysis of the material as a whole. In *Ayangma v The Eastern School Board*

2004 PESCTD 23 the situation was similar to this one. The Court was assessing whether the Executive Director and the Chair exercised their discretion to dismiss a case where Mr. Ayangma was not given an opportunity to interview for various positions. In that case, the Court found that during the investigation phase there was some evidence to support the argument of the Complainant. This case demonstrates that it is appropriate for the investigator to look beyond the assertions of the Complainant. There must be some evidence which arises in the investigation of the complaint to support the assertion. His submissions that the Selection Board did not apply the criteria evenly are his opinion based on his assessment of his own qualifications and those of W.N. He may have differing opinions as to what experiences meet the qualifications but that is his opinion, it is not evidence.

In terms of an opportunity to compete, Mr. Ayangma was given the same opportunity to submit a resume and cover letter as the other applicants. A review of the resumes and the screening tool establish that all of the letters and resumes were reviewed and the same screening process was applied to each. A comparison of the basis on which the applicants were screened in or out does not demonstrate evidence of unequal application of the selection criteria. There is no evidence to establish that the selection criteria were applied inconsistently.

Mr. Ayangma suggests that a Panel should be held to hear evidence about who was the best candidate for the position and that the Panel may need to obtain university transcripts of the applicants. The question is not did the Selection Board make the best choice of applicants. The question is based on the information they had before them, which was a cover letter and resume from each of the candidates, did they apply the selection criteria evenly?

Having considered his submissions and based on a common sense analysis, including a review of all of the applications and the Applicant Screening Tool, I do not find that there is *prima facie* evidence to support Mr. Ayangma's submission that there was of an uneven application of the criteria. This is not based on a finding of credibility of one party over the other it is a common sense analysis of the evidence as is laid out earlier in this Decision.

Applying the three step process in the *Shakes* case the questions are: Was Mr. Ayangma qualified for the position, did he not get hired (or interviewed) and was the person who did get hired (or interviewed) no more qualified than he was?

Was Mr. Ayangma qualified for the position of Director of Human Resources for the ELSB? The opinion of the Selection Board was that he did not have the extensive and successful experience in a senior human resource management role in a complex unionized environment. Although Mr. Ayangma is of a different opinion, it does appear that the Selection Board reviewed his resume and cover letter. The entries on the Applicant Screening Tool confirm he passed through the educational level of the screening but the notation on the Tool is that he did not pass the relevant experience portion. Others with Human Resource, Management and Union experience were also screened out at this stage. There is no evidence that the screening tool was not applied evenly and in the opinion of the Selection Board he was not qualified.

Even if he was qualified for the position, given that he did not get the position (or the interview) the third step in *Shakes* would ask: is there evidence that W.N. was no better qualified than him? Mr. Ayangma had a higher level of education than W.N. but the evidence establishes that W.N. had more relevant experience. His resume showed that he had worked for the past five years as the Director of Labour Relations for the Newfoundland and Labrador School Boards Association, which the members of the Selection Board were aware was directly comparable to the position being offered, except that it would be a step above the one in PEI. Even if Mr. Ayangma were successful in arguing that he was qualified for the position, he has not established *prima facie* evidence that W.N. was "no better qualified" than he was. In terms of the two others that were screened in, again both had significant experience as senior managers in complex unionized environments.

When considering the *Shakes* test, the analysis of how the screening criteria were applied and the lack of any direct evidence, Mr. Ayangma has not presented *prima facie* evidence which would satisfy the third step in the *Moore* case that his protected characteristics were a factor in the decision not to interview him.

Summary

The Complainant has failed to establish a *prima facie* case that his Colour, Race and Ethnic or National Origin, or the fact that he has made previous complaints under the *Act* were factors in his being denied an interview in the hiring process for the Director of Human Resources. He has failed to establish that the selection criteria were applied differently to him than to others who applied. He has failed to show that someone no better qualified for the position than he was hired.

There is no reasonable basis, in the evidence gathered, to justify sending the matter to a Panel. This complaint is, therefore, dismissed pursuant to section 22(4)(a) of the *Act* as I consider that the complaint is without merit.

Review

If the Complainant is not satisfied with this Decision, he may request to have this Decision reviewed by the Chairperson of the Commission. Section 25(1) of the *Act* states that a Request for Review must be in writing and must be made within 30 days of the receipt of the Decision.

A Request for Review must contain reasons why the Complainant believes the Decision should be reviewed. The Request for Review should also include any further information that the Complainant believes may be important or relevant to the complaint.

Should the Chairperson of the Commission decide, pursuant to Section 25(3)(a)(i) of the *Act*, that the Complaint should not have been dismissed, the Chairperson shall appoint a Human Rights Panel to deal with the complaint. Pursuant to Section 28.1 of the *Act*, when the Chairperson has made a decision to appoint a Panel to hear a complaint, the Complainant will have carriage of his own complaint at the hearing.

Dated this 10th day of April 2017, at Charlottetown, Prince Edward Island.

Brenda J Picard Q.C.
Executive Director

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HRC File No. 1929-13

IN THE MATTER OF THE
Human Rights Act R.S.P.E.I 1988, Cap. H-12

BETWEEN

Noël Ayangma

COMPLAINANT

AND

English Language School Board

RESPONDENT

CHAIR REVIEW DECISION
Section 25 *Human Rights Act*
August 11, 2017

To: Noël Ayangma
Complainant

And to: Karen Campbell, Q.C.
Solicitor on behalf of the Respondent

Introduction:

On April 27, 2017, Noël Ayangma, ("Mr. Ayangma"), ("the Complainant") requested a review of the Executive Director's decision to dismiss his complaint against the English Language School Board, ("E.L.S.B."), ("the Respondent").

My authority to review this Decision is derived from Section 25(3) of the Prince Edward Island *Human Rights Act,* R.S.P.E.I. 1988 ("the *Act").* During the course of this review, I have read all file materials and although I do not make reference to all of these, they have been considered in this decision. My role is to review the Executive Director's decision and the record and decide whether the complaint should have been dismissed. My decision is as follows.

Background:

Noel Ayangma has been a resident of Charlottetown, Prince Edward Island, for over 25 years. He holds a B.Ed. (Linguistics), MBA (Business Administration), PhD (Business Administration), and M.Ed. (Leadership and Learning). Mr. Ayangma is licensed to teach on Prince Edward Island at the Certificate VI level and has held a number of teaching positions in the province over the years.

At the time of the Complaint, the English Language School Board was a public school board responsible for the operation of all English public schools in Prince Edward Island. It has since been rebranded as the Public Schools Branch, a body corporate responsible for administering the English school system throughout the province.

On February 6, 2012, Mr. Ayangma signed a Full and Final Release ("the Release") with the Eastern School Board, the Eastern School District, the French School Board, and the Government of Prince Edward Island as well as certain individuals and organizations named in a Memorandum of Settlement. In exchange for the sum of $370,000, Mr. Ayangma agreed to release those organizations and individuals from any claims that existed at the time of the agreement or that might arise in the future.

On October 18, 2013, Mr. Ayangma filed a complaint against the E.L.S.B. alleging discrimination in the area of employment on the grounds of: 1) Colour, Race and Ethnic or National Origin, and 2) Having Laid a Complaint under the PEI *Human Rights Act* in the past.

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Effect of the Release (Preliminary Matter):

The effect of the Release on this current complaint has been raised as a preliminary matter and needs to be addressed as part of this review.

The Release was signed by the Complainant and was *full* and *final*. It was undertaken voluntarily with a clear understanding of its meaning as indicated by the signed agreement. There was no evidence offered to suggest any duress in signing the agreement.

The Respondent argues that the Release covers future actions as well as those outstanding at the time of signing the agreement. In the Respondent's submission of August 5, 2014, they state:

> *Mr. Ayangma in paragraph (c) of the Release, agreed specifically to release any future human rights claims that could arise in relation to present, past, or future dealings* (p. 2).

The Complainant argues that the Release cannot contract out of any human rights protections in respect of violations that might occur in the future. Doing so would constitute a trespass of the true spirit of human rights law. In his submission dated August 18, 2014, Mr. Ayangma cites *Insurance Corporation of British Columbia v. Heerspink* [1982] 2 SCR 145. That case states:

> *... as [the Human Rights Code] is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.*

I agree with the Complainant's position on his right to file complaints on future incidents of perceived discrimination. I am also compelled by the very clear wording and intent of the release of February 6, 2012. Giving both factors consideration, I have determined that my review will focus solely on the evidence surrounding Mr. Ayangma's application for the position of Director of Human Resources with the E.L.S.B., which is the essence of this complaint.

The Complaint:

As mentioned above, the original Complaint involves the application of the Complainant for the position of Director of Human Resources with the E.L.S.B. On September 9, 2013, the Complainant submitted his letter of application and resume for this position

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but was screened out and not granted an interview. The Complainant felt that he was qualified for the position and should have been granted an interview. At paragraph 87 of the Complaint he states:

> *The Complainant alleges that though qualified, his application was neither acknowledged nor was he called for an interview.*

Further, Mr. Ayangma believes he was discriminated against by the E.L.S.B. in not being granted an interview for the position. At paragraph 90 he writes:

> *The Complaint further alleges that he had been illegally and systematically denied the opportunity to compete for the position of Director of Human Resources, despite being qualified, for discriminatory for discriminatory* [sic] *reasons and has therefore been denied his quasi-constitutional right to be employed and to continue to be employed in the future in the province in which he has been residing for the past 26 years.*

As noted on the complaint form, the Complainant believes himself to be discriminated against because of his colour, race, ethnic or national origin and because he has laid complaints in the past. Mr. Ayangma is a black man who grew up in a country other than Canada and, as the record reveals, he has previously laid a number of complaints against the English Language School Board, the French School Board, the former Eastern School District and others.

Response from Respondent:

The E.L.S.B. first responded on the merits of the complaint on August 29, 2014. The submission outlined the composition and function of the "Selection Board" put in place to fill the position of Director of Human Resources. It explained how an Applicant Screening Tool was employed to determine who would be interviewed for the position. Per the Respondent's submission, Mr. Ayangma's application was screened out because:

> *...he lacked the required "Minimum Qualification" in the area of "Skills and Experience" of "Extensive and successful experience in a senior human resource management role in a complex unionized environment..."*

The Respondent's submission makes reference to *O'Malley v. Simpsons-Sears,* [1985] 2 S.C.R. 536 at p. 558 and *Shakes v. Rex Pax Ltd.* (1981), 3 C.H.R.R. D/1001 in that a Complainant must establish a *prima facie* case of discrimination for a complaint to move

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forward. Specifically, *Shakes* states that the following criteria must be met to establish a *prima facie* case in employment-related claims:

> *1) The Complainant was qualified for the particular employment;*
>
> *2) The Complainant was not hired; and*
>
> *3) Someone obtained the position who was no better qualified than the complainant, but lacked the attribute on which the complainant based the Human Rights Complaint.*

A second response to the merits of the complaint was submitted to the Human Rights Commission on October 6, 2014. The E.L.S.B. called for a common sense assessment of the evidence. They submitted:

> *The ELSB is not suggesting that the Executive Director ought to weigh the evidence presented by the parties; but rather, a common sense assessment of the evidence gathered during the investigative stage is required to determine whether Mr. Ayangma has established a prima facie case of discrimination.*

Their argument was that the Complainant had not clearly established a *prima facie* case of discrimination relying on *O'Malley v. Simpsons-Sears*, [1985] 2 SCR 536 and *Shakes v. Rex Pak Ltd.* (1981), 3 C.H. R. R. D/1001 to argue their position. They submit:

> *(1) The Applicant bears the onus of presenting evidence which is "complete and sufficient to justify a verdict in favor of the Applicant in the absence of an answer from the Respondent"- O'Malley v. Simpsons-Sears*
>
> *(2) PEI jurisprudence provides that the factors set out in the Shakes test are appropriate in determining whether a prima facie case of discrimination is made out. In the instant case, Mr. Ayangma must have established that his qualifications are at least equal to those of the successful candidate*

The Respondent submits that the Complainant failed to meet this test in that he had not submitted evidence to demonstrate "experience in a senior human resource management role in a complex unionized environment". The Respondent argued that the successful candidate was better qualified for the position due to his more extensive experience in senior management, thus failing the *Shakes* test. They conclude that a *prima facie* case of discrimination had not been made.

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Further Submissions from Complainant:

Two further formal submissions from the Complainant were received by the Human Rights Commission on this complaint.

In the first submission of September 15, 2014, the Complainant requested a complete disclosure of all the application materials for those who were screened in and granted an interview.

> *The Complainant submits that because his case is about a denial of an opportunity to complete* [sic], *the Respondent must disclose the materials of all those who were screened in and given an interview and not only those of the successful candidate as suggested by the Respondent to permit a proper comparison and a complete reply.*

At paragraph 9 of this submission, Mr. Ayangma maintained that the Executive Director's role at this stage of the investigation is as follows:

> *It therefore follows that at this stage of the inquiry, it was not necessary to determine whether he was qualified or not or whether someone else was better qualified, that was the function of the Panel following a hearing on the merit of the Complaint.*

In the second submission of October 17, 2014, the Complainant makes a second call for the release of materials pertaining to the applications.

At paragraph 7 of this submission the Complainant writes:

> *The Complainant suggests that the first step at this stage of the investigation before the Executive Director is to scrutinize the respondent's response or explanation to as to why it screened out the Complainant (the only black candidate who applied for the position) and allowed three white candidates no better qualified to proceed to the next stage of the selection.*

At paragraph 9 Mr. Ayangma submits:

> *...the respondent must disclose the application material of all those who were screened in and interviewed...*

He calls for this disclosure so that a full comparison can be made between the applications. He alleges (para. 10) that:

> *...the criteria identified by the respondent and included in the job advertisement were not evenly applied to all candidates and that the screening out of his application was evidence suggestive of discriminatory* [sic].

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At paragraph 13 he argues that:

> *In only disclosing the application material of the successful candidate and not those of the two remaining candidates who were screened in, the respondent is clearly avoiding to deal with the real issue-which the real issue as to why it decided to screened out the Complainant-the allegations of discrimination.*

The Complainant further submits at paragraph 42 that the successful candidate did not meet all the minimum qualifications for this competition. He writes:

> *The Complainant submits that it is clear from a common sense review of the ad against the resumes of both the Complainant and the successful candidate, that the successful candidate, did not even contrary to the respondent's suggestion, meet all the advertised minimum qualifications for the position and nor was it better qualified on paper than the Complainant.*

Final Submission from Respondent:

The final submission from the E.L.S.B. was dated January 16, 2015. In it the Respondent argues that the *Shakes* test is the appropriate test with regard to this complaint. They state:

> *Mr. Ayangma's complaint simply alleges that the successful candidate was no better qualified and did not share his personal characteristics; therefore, the Shakes test applies in these circumstances.* (p.4)

They provide a review of the qualifications of candidates who were screened out of the competition as per the Screening Tool used. They submit that two of the other screened-out candidates had *arguably* equal or better qualifications than did the Complainant. The position of the E.L.S.B remained that Mr. Ayangma ...

> *...lacked senior human resources management experience in a unionized environment.* (p.5)

The Respondent concludes their submission by stating that Mr. Ayangma had failed to establish a *prima facie* case of discrimination in that:

1) *Mr. Ayangma was not qualified for the position of Director of Human Resources;*

2) *The applicants who were granted interviews were qualified; and*

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3) *At least two of the applicants who were screened out of the competition were arguably more qualified than Mr. Ayangma.*(p.5)

Citing *O'Malley* and *Shakes* the Respondent E.L.S.B. concluded that the complaint should be dismissed..

Final Submission from Complainant:

The Complainant filed a response to the E.L.S.B. submission of January 16, 2015, with the Human Rights Commission on January 23, 2015. This was the final formal submission on this matter prior to the Executive Director's *Decision to Dismiss* dated April 10, 2017.

In this final submission, the Complainant maintains his position that the appropriate test at this level of inquiry is:

> ...the ***"sufficiency of the evidence to warrant an inquiry before a panel"*** *and not the determination of whether the case has been made out on the balance of probabilities.* (para. 10)

Mr. Ayangma then reviewed the various requirements taken into consideration in the Screening Tool and applied them to various applications for the position. The following are some of the conclusions that he draws from this exercise:

- The successful candidate did not meet the Education Requirement set by the Employer:

> *It is also clear from the Record that the successful candidate's educational background and training is strictly in education and <u>not related to an area with considerable training in human resources</u>. While the successful candidate possessed a Bachelor of Arts and a Master's degree in Educational Administration, not* [sic] *none of these degrees are related to any human resource management fields, they do not certainly demonstrate or suggest any <u>considerable training in human resources</u>.* (para. 19)

- Regarding extensive experience in senior management he writes the following in regards to candidates 3 & 4:

> *...there is also no evidence based on these candidates' application material that they even fully met the second criteria* [sic] *or that his skills and experience regarding this criteria* [sic] *were better than those of the Complainant.* (para 30)

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- The Complainant also raises a question as to whether the successful candidate met the experience requirement for the position. He concludes that:

> *It is clear from the successful candidate's application material that while he held a senior management position in his capacity as Director of Labour Relations with NLSBA, this position though a Union position, was neither itself a in [sic] senior management role nor within a complex unionized environment. There is therefore absolutely no evidence on a common sense assessment of the successful candidate application material that he met any of the parts of the second requirement- having "the Experience in a senior management role in a complex unionized environment".* (para 31)

Mr. Ayangma concludes:

> *...there is some evidence to suggest that the Complainant was better qualified than the successful candidate on paper. The Complainant submits that this evidence is sufficient to establish a prima facie case of discrimination at this stage of the inquiry and therefore requires further inquiry by the Panel.* (para 42)

Decision to Dismiss:

The Executive Director dismissed the complaint due to lack of merit in a decision rendered on April 10, 2017. In her decision, she first addressed the preliminary matter of the Release. The Executive Director determined that:

> *The parties submitted significant case law relating to whether a person can contract out of their Human Rights or can contract out of their right to file a complaint when their rights have been violated.*
>
> *If this matter were to be decided on the issue of the release as it relates to claims that arise after the signing of the Release, I would forward this matter to a panel to hear evidence and further submissions about the intentions of the parties and the effectiveness of the Release given the public policy consideration. I do not find, however, that is it necessary to do so.* (p. 3)

Setting the Release issue aside, the Executive Director continues with an examination of the merits of the complaint. In doing so, she found that:

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> *...there is no reasonable basis, in the evidence, to justify sending the matter to a Panel based on the merits of the case and, therefore, it is not necessary for a Panel to hear evidence on the Release.* (pp. 3,4)

The Executive Director examined the screening process for the candidates and provided an analysis of which were dropped and why. Meeting the "education requirement" and "relevant experience" criteria were necessary to be granted an interview for the position. She found that Mr. Ayangma's application (along with five others) was dropped because:

> *Mr. Ayangma was also screened out at this stage. The notation on the Applicant Screening Tool was that he had no significant Human Resources experience in a complex unionized environment.* (p. 7)

The Executive Director continues with an extensive review of the law relating to the determination of *prima facie* discrimination. She references *P.E.I. Music and Amusement Operators Assn. Inc.* as well as *Ayangma v French School Board (2002),* PESCAD 5, paras. 37-41 to argue that she is warranted some "common sense assessment" of the evidence in making her decision.

She further references *Moore v. British Columbia (Education)* SCC 61, Para.33, *Shakes v Rex Pak Ltd.* CarswellOnt 3407 (Ontario Board of Inquiry), Para. 11, *Eastern School Board v Montigny and Ayangma* 2007 PESCTD 18, Para. 21, *Widdis v Desjardins Group/Desjardins General Insurance* 2013 HRTO 1367, Para. 47, *Ayangma v Eastern School Board* 2004 PESCAD 23, (Paras. 41, 44). In her discussion (at page 17) of what constitutes a *prima facie* case of discrimination at this stage she concludes:

> *There is a difference in the assessment of what meets a prima facie case at the investigative stage and what meets a prima facie case at a Panel. At the investigative stage, the threshold is less onerous and is not subject to the same weighing of evidence as is necessary at a Panel. The investigator is required to conduct a common sense assessment of the evidence to determine whether there is a reasonable basis to send the matter to a Panel. (Ayangma v French School Board,* 2005 PESCAD 18)

After conducting a common sense review of the evidence, the Executive Director concluded that the Complainant had not established a *prima facie* case of discrimination. Her conclusion took into consideration the protected characteristics of the Complainant and whether his application was assessed based on the same criteria as the others. On the matter of protected characteristics, she concludes:

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> *There is nothing on the face of the evidence that directly supports a conclusion that the protected characteristics of Mr. Ayangma were factors in the screening process.* (p. 19)

On the question of fair application of the screening process, she concludes:

> *Having considered his submissions and based on a common sense analysis, including a review of all of the applications and the Applicant Screening Tool, I do not find that there is prima facie evidence to support Mr. Ayangma's submission that there was of an uneven application of the criteria. This is not based on a finding of credibility of one party over the other it is a common sense analysis of the evidence as is laid out earlier in the Decision.* (p. 21)

She further finds that, in consideration of the *Shakes* test, the Complainant also failed to show that the successful candidate was "no better qualified" than he was.

> *He has failed to show that someone no better qualified for the position than he was hired.* (p. 23)

The Executive Director dismissed the Complaint due to lack of merit.

Request for Review:

The Prince Edward Island Human Rights Commission received Mr. Ayangma's Request for Review of the Executive Director's Decision to Dismiss on April 27, 2017. At page 7 of this submission, the Complainant outlined three key questions that he felt the Chairperson should consider in his review of the evidence:

> *11.1 Did the Selection Committee err in law in failing to correctly interpret the selection criteria for the position of Director of Human Resources and/or failing to evenly apply them to all applicants? If the answer is yes, then did the Executive director err in law in dismissing the complaint on the basis of those misinterpretations.*
>
> *11.2 Did the Executive Director err in law in attempting to resolve the inherent/apparent conflicts in the interpretations of the selection criteria and in blindly accepting the interpretation's* [sic] *provided by a member of the Selection Board over those provided by the Complainant and whether in doing so she usurped the function of the Panel?*
>
> *11.3 Did the Executive director conduct arising from the unjustified and inordinate delay of 42-43 months in completing the investigation report and the refusal to draw a negative inference on the Employer's refusal to*

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disclose additional relevant materials (resumes of the individuals interviewed) and her failure to disclose additional information (evidence) gathered through her discussions with a Selection Board member, Mr. Ron MacLeod, together with her failure to provide the Complainant the opportunity to respond to that evidence, amount to both a denial of natural justice and procedural fairness, and whether these serious breaches are sufficient to set aside the decision of the Executive director and send this matter to the Panel?

After an in-depth review of the lengthy Request for Review, the allegations the Complainant makes may be summarized as follows:

1) The Executive Director erred in concluding there was no *prima facie* case for discrimination made;
2) The Executive Director misinterpreted the selection criteria or incorrectly determined the selection criteria were applied evenly (Question 1, page 10);
3) The Executive Director blindly accepted the findings of the Selection Board (Question 2, page 53);
4) The delay in completing the investigation report amounted to a denial of natural justice and procedural fairness, (Question 3, page 59); and
5) The Executive Director's failure to disclose information from Ron MacLeod and failure to disclose resumes showed bias.

The Complainant describes the issues for this review to consider as follows:

It therefore follows that the only key issues arising from the Executive director's decision which is subject matter of this review by the Chairperson would be whether the selection criteria was evenly applied by Selection Board in staffing the position of Director, Human Resources, if no whether the Executive director erred in law dismissing the Complainant's complaint at the screening stage of the selection process. (para. 9)

This was restated later in the submission in the following manner:

...the main issue which was before her and is now before the Chairperson is whether the Selection Board was right in denying the Complainant the opportunity to be interviewed or the opportunity to fully compete for the position of Director of Human Resources. (Para. 120)

Included in the Complainant's submission was a comparative analysis of Mr. Ayangma's qualifications along with those of candidates #3, #4, #5 who were granted interviews for the position. The Complainant draws the conclusion that the selection criteria were not applied fairly and that he should have been granted an interview. He states:

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> *It is clear from reading the **Selection Board's Applicant Screening Tool put in Evidence Exhibit "G"** that the Selection Board members either did not know what they were doing or simply failed and/or refused to evenly apply the selection criteria so to favor their pre-determined candidate Mr. Wayne Noseworthy who was familiar with one of the Selection Board member Ms. Cynthia Fleet.* (para. 60)

Further to the alleged issue of the application of the selection criteria, the Complainant raises the matter of the delay by the Executive Director in reaching a decision on the merits of the complaint. He cites numerous cases where delays have impacted the outcomes of hearings. One such case cited was ***NLK Consultants Inc. v. British Columbia*** (Human Rights Commission), 1999 CanLII 6340 (BC SC) at para. 57:

> *(a) the actual length of delay was unreasonable compared to other cases;*
> *(b) there has been both inferred and actual prejudice caused by the unreasonable delay, actual prejudice by memories fading with time, etc. and inferred prejudice by the size of the unreasonable delay; and*
> ***(c) The unreasonable delay coupled with the actual or inferred prejudice taints the fairness of the proceeding and constitute a denial of natural justice.***

The Complainant concludes his Request for Review with the following summary statement at para. 241:

> *The Complainant therefore submits that the appropriate course of action in situations such as the one at bar as detailed above, would require the setting aside of the decision of the Executive and the sending of this case to the Panel as prayed on several grounds including but not limited to flawed and lack of thoroughness in investigation, prejudice caused by both the inordinate and unjustified delay, denial of procedural fairness and natural justice arising from both the delay and the refusal to disclose or failures to direct the disclosure of relevant materials or evidence to the Complainant.*

Response to Request for Review:

The E.L.S.B. submitted their Response to the Request for Review on May 26, 2017. In this submission, they address five grounds presented by the Complainant in his Request for Review.

The first ground is whether the Executive Director erred in concluding that there was no *prima facie* case of discrimination. The Respondent submits that *Moore* and *Shakes*

were the correct tests to use in the Executive Director's analysis of the complaint. On this, the Respondent concludes (at page 4):

> *(1) The Complainant did not show he was qualified-the evidence (his resume and cover letter) did not demonstrate that he had experience in a senior human resource management role in a complex unionized environment.*
> *(2) The Complainant did establish that he was not hired (or interviewed)- this is the only part of the Shakes test that was satisfied.*
> *(3) The Complainant did not establish that someone no better qualified but lacking the distinguishing feature subsequently obtained the position (or interview) –the evidence failed to establish that another candidate was hired or promoted who does not share the same personal characteristic and is no better qualified. The application of the successful candidate, Mr. Noseworthy, was provided for the purpose of comparison. Mr. Noseworthy was better qualified than the Complainant for the position based on the job requirements.*

As in *Moore* (supra), the Respondent concludes that the Complainant has failed to establish a *prima facie* case for discrimination because:

> *There is no evidence that supports a conclusion that the protected characteristics of the Complainant were factors in the screening process.* (p. 4)

The second ground deals with the allegation that the Executive Director misinterpreted the selection criteria or that the selection criteria were applied unevenly. The Respondent submits that the Screening Tool was initiated as a fair and equal assessment of the candidate designed to avoid any discrimination in the hiring process. They state (at pages 6-7):

> *The very purpose of a screening tool is to create a fair, consistent and transparent hiring process.* (p. 6)
>
> *The Screening Tool demonstrates that the Selection Board considered the same education and training requirements for each applicant.* (p. 6)
>
> *There is no evidence to which the Complainant points to show that the selection criteria were applied unevenly.* (p.7)

The third ground for the Review was the allegation that the Executive Director "blindly accepted" the findings of the Selection Board. The Respondent disputes this allegation stating:

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> *The Executive Director did not simply accept the results of the Screening Tool. She undertook her own analysis of the hiring competition, and considered whether the education, training and experience of the applicants met the selection criteria (Decision, pp.5-10).Here, it is important to note that the Executive Director, in carrying out a thorough investigation, sought input from Ron MacLeod, a member of the Selection Board, to clarify the objectives of the Selection Board and what they were looking for in each requirement.*
>
> *In addition, the Executive Director also requested that the ELSB disclose the resumes of all applicants and the un-vetted Screening Tool to her, so she could determine for herself whether the qualifications summarized by the ELSB in the vetted Screening Tool matched the contents of the applications. The Decision clearly shows that the Executive Director undertook her own detailed evidentiary review and analysis to make an informed assessment of whether the hiring process was completed in a discriminatory manner.* (p. 8)

The fourth ground identified was in regard to the allegation that the delay in completing the Decision amounted to a denial of *natural justice* and *procedural fairness*. The Respondent argues against the applicability of authorities presented by the Complainant in this particular matter. Particular reference is made to *NLK Consultants Inc. v British Columbia (Human Rights Commission)* (supra) as well as *Blencoe v. British Columbia (Human Rights Commission)* 1998 CarswellBC 1009. They conclude:

> *In the case at hand, the Executive Director conducted a thorough investigation of the Complaint. In total, six separate submissions were filed (three from each party including the Complainant), which referred the Executive Director to numerous authorities on the issues of both the applicability of the Release and the merits of the Complaint. Further, the Complaint was held in abeyance for nine months (October 2013-June 2014) pending the outcome of a judicial review application in Ayangma v. La Commission Scolaire, which similarly dealt with the application of the Release executed between the parties. The Executive Director also took the time to ask the ELSB to provide with her access to a Selection Board member, and to review the resumes and cover letters of all applicants in the process.*
>
> *It took time for the Executive Director to properly investigate, consider, and reach a "common sense assessment" having regard to all the evidence gathered and the authorities presented. It is also recognized that the Commission handles a significant case load each year and unlike some of the cases cited in the Request for Review, there is no unreasonable delay in this case that would warrant a stay of proceedings.*(pp. 9 &10)

The final ground was the allegation that the Executive Director's failure to disclose information gathered through discussions with Ron MacLeod and the refusal to draw negative inferences from the disclosure of resumes of all individuals interviewed showed bias. The Respondent E.L.S.B. disputes this allegation stating:

> *As stated by the Executive Director at p. 12 of her Decision, during the investigative stage of the process, "the investigator has the responsibility to acquire information to acquire information from both the complainant and the subject of the complaint." (Ayangma v. French School Board,* 2002 PESCAD 5, para. 38) ...
>
> *The ELSB submitted that due to the privacy concerns of those who applied for this position in confidence, it was unnecessary to produce all resumes at this stage of the process. However, since ELSB provided the Executive Director with the un-vetted documents to review, there is absolutely no reason to draw an adverse inference.* (p. 10)

The Response concludes with the following summary statement:

> *In order to successfully establish a prima facie case of discrimination, the Complainant had to demonstrate a number of facts under the Moore and Shakes test, including that he was qualified for the position for which he applied (since there was no evidence of discrimination). The Executive Director concluded the Complainant failed to meet the Relevant Experience criteria, and therefore, was not qualified. The Executive Director also determined there was no evidence that the criteria were unevenly applied, and therefore, there was no basis upon which an inference could be drawn that a protected characteristic was a factor in the selection process.* (p. 11)

Determination:

My authority to review the Executive Director's Decision to Dismiss is derived from Sections 25(3) and 25(4) of the P.E.I. *Human Rights Act* wherein it states:

> (3) *The Chairman of the Commission shall*
>
> *(a) Review Director's decision and decide whether*
> *(i) The complaint should have been dismissed; or*
> *(ii) Settlement was fair and reasonable as the case may be; and*

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(b) Forthwith serve notice of the Chairperson's decision upon the complainant and on the person against whom the complaint was made.

(4) A decision of the Chairperson under subsection (25) (3) is final and binding upon parties (1977) (2nd), c.65, s.3.

After reviewing the file materials, it is evident that the crux of this complaint centers on the Complainant's belief that he was discriminated against when he was not granted an interview for the position of Director of Human Resources. He repeatedly makes this allegation in his numerous submissions. Discrimination is described in the decision of *Andrews v. Law Society of British Columbia,* (1989) 56 D.L.R. (4th) 1 (S.C.C.) and accepted in *Ayangma v. The French School Board,* (2002) PESCAD 5 (para. 34) as follows:

> *Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits opportunities available to other members of society.*

The Complainant believes that he was discriminated against when he was not granted an interview for the position and someone *no better qualified and lacking his distinguishing characteristics* was granted an interview and indeed was successful in being awarded the position.

In order to send this matter to a Panel, a *prima facie* case of discrimination must first be established by the Complainant. In *O'Malley v. Simpsons-Sears (1985), 2 S.C.R. 536* the Supreme Court described a *prima facie* case as follows:

> *...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favor in the absence of an answer from the respondent.*

This definition was further enhanced in *Moore v. British Columbia (Education) 2012 S.C.C. 61* (para. 33) wherein a three-part test was defined as a means to determine *prima facie* discrimination:

> *...to determine prima facie discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse effect.*

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It is accepted that the Complainant does have characteristics that are protected under the *Act*. He is a black man who was born in a country other than Canada. He is also an individual who has filed numerous complaints in the past. I can conclude from this that the first requirement to establish *prima facie* discrimination has been met.

Further, Mr. Ayangma did experience an adverse impact in not being granted an interview for the position in question. In not being granted an interview, the prospect of acquiring the position was eliminated. This no doubt was a disappointment to the Complainant at the time and precipitated a perception on his part that he had suffered discrimination. Therefore, I conclude the second requirement of the *Moore* test has been met as well.

I find the third and final part of the *Moore* test more difficult to assess. Were any of the protected characteristics that the Complainant possessed a factor (or factors) in the decision not to grant Mr. Ayangma an interview?

In making this determination I am allowed to make a "common sense assessment" of the evidence as has been suggested by both the Complainant and the Respondent.

> *There will always be some evidence of discrimination even if it comes only from the complainant. Similarly, there will always be some conflict in the evidence gathered by the investigator because the subject of the complaint will most frequently have a version of the situation different from that of the complainant. Therefore, a test that would permit any weighing of the evidence in these circumstances would be meaningless and impractical. Having due regard to the spirit of the* ***Act and*** *to permit the Executive Director to properly discharge his* [her]*function as an investigator in deciding to dismiss a complaint for lack of merit, he*[she] *must be permitted to look at the evidence and make some common sense assessment. Ayangma v. The French School Board, 2002, PESCAD 5* (para. 40)

My role on a Section 25 review is no different from that of the Executive Director.

My common sense assessment compels me to conclude that the Complainant failed to satisfy the third requirement of the *Moore* test. In other words, Mr. Ayangma has not shown that any of the protected characteristics he possesses factored in the decision to not grant him an interview.

Even more than *Moore*, I believe that *Shakes* (supra) is applicable here. *Shakes* sets out the commonly-used test for discrimination in employment cases at the hiring stage. That test is:

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> *In an employment complaint, the Commission usually established a prima facie case by proving (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 ... subsequently obtained the position. If these elements are proved, there is an evidentiary onus on the respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation for what occurred.*

Contrary to the Complainant's argument, the successful candidate in the competition was better qualified in terms of his experience in senior human resources management. I find this is evident from the resumes that were submitted by the Complainant and the successful candidate. It is obvious to me that the successful candidate's application demonstrated a lengthier and more varied experience in human resources management at senior levels. This was the qualification upon which the Complainant was screened out of the competition and, as a result, was not granted an interview.

To suggest that Mr. Ayangma was eliminated from the competition at this stage because of his distinguishing characteristics is unreasonable. One candidate was screened out because he did not have the minimum education requirement. The Complainant was not screened out at this stage. Five candidates were screened out because they lacked extensive experience in senior human resource management. The Complainant was screened out at this stage for the same reason. Since all were treated in the same manner (being screened out as a result of the application of the Screening Tool), my common sense assessment is that the candidates were treated equally and fairly.

It is clear to me that there is not enough evidence to meet the third requirement of the *Moore* test and I am unable to conclude that the Complainant was discriminated against because of his distinguishing characteristics. In considering the factors of the *Shakes* test, it is clear to me that the successful candidate's application demonstrated better qualifications for the position than Mr. Ayangma's. In other words, a *prima facie* case has not been made and this is fatal to the complaint.

Although it is not necessary to do so, as I have already determined that a *prima facie* for discrimination has not been established, I will address other issues that the Complainant raised in his Request for Review. These include: the question of delay, the Respondent's failure to disclose information from the selection process, and the Executive Director's "blind acceptance" of the findings of the Selection Board.

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The Complainant submitted that about 42 months lapsed between the filing of his complaint on October 18, 2013, and the Executive Director's Decision to Dismiss the complaint on April 10, 2017. The file materials show that he considered this to be an unreasonable amount of time amounting to a "denial of procedural unfairness and a violation of the principles of natural justice".

I recognize that much time lapsed before a decision was reached; however, I also recognize that many submissions were received on this matter even as late as November 22, 2016. Further, the complaint was held in abeyance from December 19, 2013, until June 23, 2014, pending a Supreme Court decision on a related matter. The investigation of the complaint, just by the sheer volume of the submissions, was weighty. When you combine this with the need to access information from other venues regarding the selection process, the task becomes quite time-consuming. Finally, when you couple these realities with the demands posed by other ongoing human rights files and the need to complete thorough investigations, the time required to complete this case was understandable. I find nothing unfair or unnatural in the progression of this complaint.

With regard to the Complainant's allegation that the Executive Director "blindly accepted" the findings of the Selection Committee, this is not supported by the file materials. I believe that the Executive Director conducted a thorough review of the file. She accessed and assessed the applications of the other candidates, including their resumes, in respect of which the Respondent claimed privacy concerns. The Executive Director became better informed about the selection criteria of the Screening Tool by interviewing one of the members of Selection Team for E.L.S.B. From all of this, I am compelled to conclude that the Executive Director conducted a fair and thorough investigation.

Connected to the previous allegation is the Complainant's accusation that information was withheld from him by failing to disclose the application materials of all the candidates as well as details of her meeting with Selection Board member, Mr. Ron MacLeod. As noted above, under privacy protection rules, the E.L.S.B. would not allow that information to be released; however, the Respondent did allow the Executive Director to examine it at their office.

Further, the meeting with Mr. MacLeod was conducted as part of the investigation process and after final formal submissions were received. I do not find anything inappropriate or contrary to the *Act* in these matters.

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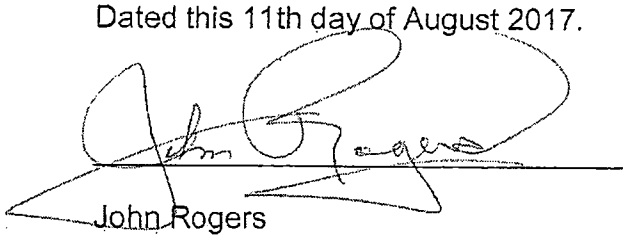
Decision:

Upon review of this file and the numerous submissions that have been made, and pursuant to section 25(3)(a)(1) of the Prince Edward Island *Human Rights Act*, I concur with the Executive Director's decision to dismiss this complaint against the English Language School Board. The Prince Edward Island Human Rights Commission will take no further action on this matter.

Dated this 11th day of August 2017.



John Rogers
Chair, PEI Human Rights Commission

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SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: *Ayangma v. PEI HRC and ELSB*, 2018 PESC 52

Date:12212018
Docket:S1-GS-27578
Registry: Charlottetown

Between: Noel Ayangma

Applicant

And: Prince Edward Island Human Rights Commission and English Language School Board

Respondents

Before: The Honourable James W. Gormley

Appearances:
Noel Ayangma, on his own behalf
Jonathan Greenan, representing the P.E.I. Human Rights Commission
Mary Lynn Kane, Q.C., representing the English Language School Board

Place and Date of Hearing — June 26, 2018
Charlottetown, Prince Edward Island

Place and Date of Judgment — December 21, 2018
Charlottetown, Prince Edward Island

STATUTES REFERRED TO: *Human Rights Act*, RSPEI 1988, C-H.12 ss. 6, 22, 23, 25

CASES CITED: *Ayangma v. La Commission Scolaire et al.*, 2014 PESC 18 ***Dunsmuir v. New Brunswick***, [2008] 1SCR 190; ***Prince Edward Island (Minister of Family and Human Services) v. Prince Edward Island (Human Rights Commission)***, 2018 PECA 3; ***Moore v. British Columbia (Ministry of Education)***, [2012] 3SCR 360; ***Shakes v. Rex Pak Ltd. (1981)***, 3CHRR D/1001; ***Ayangma v. Prince Edward Island (Human Rights Commission)***, 2004 PESCAD; ***Ayangma v. French School Board***, 2002 PESCAD 5; ***PEI Music and Amusement et al. v. Gov't of PEI***, 2014 PESC 20; ***Stewart v. Elk Valley Coal Corp.***, 2017 SCC 30 [2017] 1 SCR 591; ***New Brunswick (Department of Social Development) v. New Brunswick (Human Rights Commission)***, 2010 NBCA 40; ***Ayangma v. Prince Edward Island (Human Rights Commission)***, 2014 PECA 15; ***Cairns v. Prince Edward Island (Human Rights Commission)***, 2017 PECA 16

Application for judicial review of decisions of both executive director and chairperson of Human Rights Commission.

Gormley, J.:

Background

[1] On October 18, 2013, Noel Ayangma, the applicant (hereinafter "Ayangma") filed a complaint with the Prince Edward Island Human Rights Commission (hereinafter "HRC") alleging discrimination based on "his race, colour, ethnic and national origin contrary to section 6 of the PEI Human Rights Act" and having laid a complaint or given evidence/assistance under the ***Human Rights Act***, RSPEI 1988 (hereinafter the ***"Act"***). The allegations of discrimination related to Ayangma's application for the position of Director of Human Resources with the English Language School Board (hereinafter "ELSB").

[2] As delay has been raised as an issue in this matter, I include the procedural history of the complaint.

[3] Initially, the Executive Director of the Commission (hereinafter "ED") made a decision to hold the complaint in abeyance pending a decision in a separate judicial review matter (***Ayangma v. La Commission Scolaire et al.***, 2014 PESC 18). This was communicated by way of correspondence of December 19, 2013. After a decision was rendered by the court on June 23, 2014, the ELSB submitted its initial response

on August 5, 2014. These initial submissions dealt with the preliminary issue of whether or not a full and final release signed by Ayangma with the ELSB precluded him from bringing this complaint.

[4] Subsequently, Ayangma submitted his reply on August 18, 2014 on the preliminary issue. On August 29, 2014 the ELSB provided its second set of submissions focussing on the merits of the complaint. On August 15, 2014 Ayangma submitted his reply on the merits of the complaint. On October 6, 2014 a reply was submitted by ELSB. On October 17, 2014 Ayangma submitted a further reply to the additional response of ELSB. On January 16, 2015, ELSB submitted its comments on Ayangma's further reply and as part of this specific submission the ELSB attached the Applicant Screening Tool used in the Director of Human Resources competition which delineated the assessment of educational and experience qualifications for the ten applicants for the position. Ayangma replied further on January 23, 2015.

[5] As a result of having received the documentation from the two parties, the ED then proceeded to investigate Ayangma's complaint. There was a delay from January 23, 2015 until August of 2016 at which time the ED commenced the review of the submissions made by the parties. As part of the ED's investigation, she met with Ayangma on October 26, 2016 and received additional submissions from Ayangma on November 22, 2016 in the form of a comparative analysis he had prepared assessing the respective merits of the three candidates who were screened in for interviews against his credentials.

[6] On March 3, 2017, the ED attended at the office of the ELSB's legal counsel to review all ten applications received in the job competition as well as "un-vetted" copies of the Applicant Screening Tool.

[7] On February 27, 2017, Ayangma filed an Amended Notice of Application seeking to remove the ED's statutory authority to investigate his complaint and to exercise any of her other powers under the ***Act***. The main ground for the application was Ayangma's position that the delay was inordinate and unreasonable as of that date. On April 5, 2017, the ED interviewed one of the three members of the selection board for the job competition.

[8] The ED then issued a decision on April 10, 2017 (hereinafter the "ED Decision"), in that decision she found that Ayangma had not established a *prima facie* case of discrimination on the basis of colour, race, ethnic or national origin, or the fact that he had made previous complaints under the ***Act***. As well she found that there was no basis in the evidence gathered to justify sending the matter before a panel of inquiry.

[9] Subsequently on April 27, 2017 Ayangma requested a review of the ED Decision pursuant to s. 25(1) of the *Act*. As a result, both Ayangma and the ELSB made further submissions in relation to Ayangma's request for review. The Chairperson conducted a review of the ED Decision. The Chairperson agreed with the ED Decision to dismiss and issued written reasons pursuant to s. 25(3)(a)(i) of the *Act* on August 1, 2017 (hereinafter the "Chair Decision").

[10] As a result, Ayangma brought his application for judicial review on August 25, 2017.

The Issues

[11] The following are the three major issues as identified by the parties:
Issue 1) In dismissing Ayangma's complaint, did the ED and the Chairperson identify and apply the correct legal tests regarding the finding of a *"prima facie"* case of discrimination at the investigative stage of complaints made under the *Act*?

Issue 2) Was Ayangma denied natural justice or procedural fairness by:

(a) the ELSB's failure to disclose the resumes and job application materials received from the candidates who received interviews for the Director of Human Resources position;

(b) the Commission's failure to order the disclosure of relevant materials including the resumes of candidates;

(c) the failure to afford Ayangma an opportunity to respond and/or address the latest submissions made by a member of the selection committee to the ED in the course of her investigation; or

(d) the Commission's delay in conducting the investigation and issuing its decision.

Issue 3) - Did the ED and the Chairperson err in their interpretation of the minimum education, training and experience requirements set out in the job posting?

Issue 1) - Did the ED and the Chairperson apply the correct legal test to determine that a *prima facie* case of discrimination was reached?

Standard of review

[12] It is always instructive to situate oneself within the seminal decision of ***Dunsmuir v. New Brunswick***, [2008] 1SCR 190, when attempting to determine the

appropriate standard of review of each specific aspect of an administrative decision. The Supreme Court contrasts the correctness with the reasonableness standards in the following two paragraphs:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law....
>
> [50] As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[13] As ***Dunsmuir*** makes clear, the deferential reasonableness standard is concerned mostly with justification, transparency and intelligibility of the decision-making process. Whereas in a correctness milieu, the court should decide whether it agrees with the determination of the decision-maker and is free to substitute its own view and provide what it sees as the correct answer.

[14] I have the benefit of other decisions rendered by the Prince Edward Island Court of Appeal specifically the decision of ***Prince Edward Island (Minister of Family and Human Services) v. Prince Edward Island (Human Rights Commission)***, 2018 PECA 3 (hereinafter "***King***") which provided clarification with respect to the special place that human rights panels have in the "firmament of administrative law standard of review analysis":

> 37 In ***2013 Canada Health Infoway***, the judge on judicial review followed the Supreme Court of Canada directions in ***Canada (Canadian Human Rights Commission) v. Canada (Attorney General)***, 2011 SCC 53 (CanLII) ("***Mowat***"). Mowat advises us that human rights panels have a special place

in the firmament of administrative law standard of review analysis. Due to their nature, which on the one hand furnishes them with a depth of knowledge and familiarity with their area of expertise, and on the other hand requires them to deal with general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, a measured and careful approach is involved. Human rights tribunals are generally entitled to deference in respect of the legal interpretation of their home statute and laws or legal rules closely connected with them; however, general questions of law as mentioned are reviewable on the standard of correctness. This passage from Mowat sets out the reason for the distinction and the proper approach to selecting the applicable standard of review:

> [22] ... The nature of the "home statute" administered by a human rights tribunal makes the task of resolving this tension a particularly delicate one. A key part of any human rights legislation in Canada consists of principles and rules designed to combat discrimination. But, these statutes also include a large number of provisions, addressing issues like questions of proof and procedure or the remedial authority of human rights tribunals or commissions.
>
> [23] There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the Dunsmuir standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise. Proper distinctions ought to be drawn, especially in respect of the issue that remains before our Court.

[38] The decision in ***2013 Canada Health Infoway*** was upheld by this court in ***Ayangma v. HRC and Canada Health Infoway***, 2014 PECA 13, at para.27.

[39] In ***Mowat*** the issue at hand was whether the human rights tribunal could award costs, and the Supreme Court found that deference should be accorded on that kind of home statute question. In the present case, I agree with the reviewing judge that reasonableness is the standard of review applicable to the exercise that she performed, which was mostly a fact-based review of the Panel decision. However, the Panel decision also addressed larger questions that engage important questions of law of general importance to the legal system and are beyond the particular expertise of the Panel – including discrimination prohibited; discrimination defined; disabilities defined; comparator analysis; elements of a *prima facie* case of discrimination; legal content of reasonable explanation. Regarding those kinds of questions of law, Mowat points to the applicable standard of review being correctness. Those kind of questions were in play in this

judicial review. In the first ground the issue was whether the Panel made an error in determining that a *prima facie* case of discrimination was established. The second ground (which is not an issue in this appeal) involved the content of the duty of procedural fairness owed by a Human Rights Panel to a party regarding the right to be heard.

[40] For clarification, I will mention that I believe the foregoing standard of review analysis is consistent with the recent decision of this court in ***Cairns v. PEI HRC and Eastern School District***, 2017 PECA 16. The Cairns appeal dealt with a judicial review of decisions of an Executive Director and Chairperson, not a Panel; and more importantly it was a fact-based judicial review. In that appeal decision, we observed (at paras.24-27) that reviewing courts generally approach the decisions of tribunals under human rights statutes with considerable deference, as the Commission is an institution of long standing in this province with expertise in matters involving human rights law. In the ***Cairns*** appeal, Mitchell J.A. expressed the view that the reviewing judge was correct in finding that the appropriate standard of review was reasonableness and not correctness. Being fact based, the ***Cairns*** proceedings did not engage the important and basic questions of law regarding which Mowat would reserve for the standard of correctness.

[15] Therefore, the Court of Appeal has made clear how a measured and careful approach is used when making a determination with respect to the standard of review analysis in regard to human rights administrative action.

[16] The Court's reference in paragraph 39 of the decision is specifically germane to this case as both the Chairperson and the ED were addressing important questions of law of general importance to the legal system and are therefor arguably beyond the particular expertise of the panel. Specifically as our Court of Appeal has mentioned such matters as: discrimination prohibited; discrimination defined; and elements of a *prima facie* case of discrimination.

[17] I accept the position argued by ELSB that in regards to the first issue, there are in fact two standards of review which are as follows:

(a) On the question of whether the ED and the Chairperson correctly identified the applicable legal tests is a question of law, reviewable on a standard of correctness; and

(b) the ED and Chairperson's application of the relevant legal principles to the evidence arising from the complaint is a question of mixed law and fact reviewable on a standard of reasonableness. I also find that a contextual approach considering the role that the ED and Chairperson are performing are consistent with such an

analysis.

[18] Ayangma contends that both the ED and the Chairperson erred when relying upon the tests as delineated in ***Moore v. British Columbia (Ministry of Education)***, 2012 SCC 61 [***Moore***] and ***Shakes v. Rex Pak Ltd.*** (1981), 3CHRR D/1001 (***Shakes***) rather than applying tests as established in ***Ayangma v. Prince Edward Island (Human Rights Commission)***, 2004 PESCAD [***Ayangma 2004***] and ***Ayangma v. French School Board***, 2002 PESCAD 5 [***Ayangma 2002***].

[19] Contrary to the position taken by Ayangma, I find that the ED had a clear understanding of her role and the appropriate Prince Edward Island precedents. This is illustrated in the following portion of her decision:

> **Role of the Executive Director**
>
> The duties of the Executive Director are set out in section 22(3) and (4) of the *Act*:
>
> > 22(3) The Executive Director shall investigate and attempt to effect settlement of the complaint.
> >
> > 22(4) Notwithstanding subsection (3), the Executive Director may, at any time,
> >
> > (a) dismiss a complaint if the Executive Director considers that the complaint is without merit;
> >
> > (b) discontinue further action on the complaint if, in the opinion of the Executive Director, the Complainant has refused to accept a proposed settlement that is fair and reasonable;
> >
> > (c) discontinue further action on the complaint if it could be dealt with more appropriately by an alternate method of resolution under any other Act, or if grievance or other review procedures have not been exhausted; or
> >
> > (d) report to the Chairperson of the Commission that the parties are unable to settle the complaint.
>
> During this stage of the process:
>
> > The investigator has the responsibility to acquire information from both the complainant and the subject of the complaint. The investigator is also obliged to explore the possibility of settlement of the complaint with both parties.

Ayangma v. French School Board, 2002 PESCAD 5, Para. 38

In *P.E.I. Music and Amusement Operators Assn. Inc. v. Prince Edward Island* the Court considered the Executive Director's role stating:

> 28...[t]he process to be followed by the Executive Director is a common sense assessment of the case before her/him, akin to what happens in a preliminary inquiry in Provincial Court, or in a Summary Judgment motion in Supreme Court. The Executive Director does not make findings of fact, but rather makes an assessment of the case which is part expert based on his, her experience, qualifications and role, and part common sense....
>
> 29 While the Executive Director does not make findings of fact, he or she is permitted and indeed is required, to assess the sufficiency of a complaint so as to winnow out claims which do not have a sound basis.
>
> *PEI Music and Amusement et al. v. Gov't of PEI*, 2014 PESC 20, Paras. 28-29 (upheld on appeal in 2015 PECA 8)

Where there is no settlement, it is the role of the Executive Director to determine if the matter should proceed to a Panel. If a *prima facie* case of discrimination has been established by the Complainant, the matter should proceed to a Panel. If the Complainant has not established a *prima facie* case, the matter should be dismissed.

In reviewing the evidence gathered at the investigative stage, the Court provides the following direction:

> [37] At the investigative stage under the *Human Rights Act* a complainant need only make out a *prima facie* case of discrimination to establish the complaint has merit. The next question is, what evidence will constitute a *prima facie* case or put another way, what test should the investigator, or the Chairperson on a review, apply to the evidence gathered in the course of an investigation to determine whether to dismiss a complaint for lack of merit?
>
> ...
>
> [39] ...It is not the role of the investigator to weigh the evidence but simply to test its sufficiency and determine if a panel should conduct an inquiry.
>
> [40] There will always be some evidence of discrimination even if it comes only from the complainant. Similarly, there will always be some conflict in the evidence gathered by the investigator because the subject of the complaint will most frequently have a version of

> the situation different from that of the Complainant. Therefore, a test that would not permit any weighing of the evidence in these circumstances would be meaningless and impractical. Having due regard to the spirit of the Act and to permit the Executive Director to properly discharge his function as an investigator in deciding to dismiss a complaint for lack of merit, he must be permitted to look at all the evidence and make some common sense assessment.
>
> [41]... [T]he investigator is to decide whether there is a reasonable basis in the evidence gathered by the investigator which would justify sending the proceeding to the next stage which, failing settlement, is the inquiry by a panel appointed by the Chairperson.
>
> *Ayangma v. French School Board* (2002), PESCAD 5, Paras. 37 - 41

[20] The record is clear that the ED correctly identified the appropriate *juris prudence* in Prince Edward Island by referring and applying both the ***Ayangma 2002*** decision and the ***P.E.I. Music and Amusement and Amusement et al. v. Gov't of PEI,*** 2014 PESC 20 decision.

The test for *Prima Facie*

[21] As referenced, Ayangma disputes the precedential value of the decision of ***Moore*** which states as follows:

> [33] As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[22] As one can see, ***Moore*** establishes three requirements for a complainant to prove in order to show a *prima facie* case of discrimination:

1) that the complainant has a protected characteristic;

2) that the complainant has experienced an adverse impact; and

3) that the protected characteristic was a factor in the adverse impact.

[23] ***Moore*** has been confirmed recently by the Supreme Court of Canada in ***Stewart v. Elk Valley Coal Corp.***, 2017 SCC 30 [2017] 1 SCR 591 (***Elk Valley***). As

well, it has also been followed in the Prince Edward Island Court of Appeal in ***King***, supra wherein the court stated as follows:

> [49] The Panel conducted a discrimination analysis as mandated by the Supreme Court of Canada in *Moore*, and found that the complainant had established a *prima facie* case. This involved the Panel making findings of fact: (1) that Laura suffered from a personal characteristic protected from discrimination by the Act, namely a mental disability; (2) that Laura experienced an adverse impact by being denied access to the DSP, a service and benefit available to the appropriate comparator group; and (3) that Laura's mental disability was the sole reason she was denied.

[24] Therefore it is clear that the ED and Chairperson were correct in their application of the ***Moore*** analysis as it has been recently reaffirmed by the Supreme Court of Canada and by the Prince Edward Island Court of Appeal. In particular, the reliance by the ED on a "common sense assessment of the case before her" has been favourably considered by both courts.

[25] In the following paragraph of the ED Decision, she applies the ***Moore*** analysis explicitly:

> Mr. Ayangma is a person of colour and he has made *previous complaints* under the *Act*. He applied for and was not hired nor given an opportunity to be interviewed for the advertised position with the ELSB. He has, therefore, satisfied steps 1 and 2 of the *Moore* analysis.

[26] The ED then goes on to step 3 of the ***Moore*** analysis and states as follows:

> Step 3 requires Mr. Ayangma to establish *prima facie* evidence that his Colour, Race and Ethnic or National Origin and/or the fact that he has made previous complaints under the *Act* were factors in his not being interviewed or hired for the position.

[27] The ED reviews the position of Ayangma in regards to the third step. Over the next several paragraphs of analysis, the ED sought a nexus to determine if there was any direct evidence pointing to a conclusion that Ayangma was excluded from an interview for reasons related to his personal characteristics. Specifically she stated as follows:

> ...There is nothing on the face of the evidence that directly supports a conclusion that the protected characteristics of Mr. Ayangma were factors in the screening process. He did not provide any evidence to establish that the application process or the Applicant Screening Tool were designed to identify those characteristics or that the Selection Board made any comments to suggest direct evidence of discrimination.

[28] The ED was also careful to point out:

> This is not a situation where I have to weigh evidence or assess credibility on this point. The only direct evidence is that these characteristics were not issues and there is nothing in the documentation to suggest otherwise. This is not a situation such as in *Widdis* where one witness reported something was said and the other denied it. Mr. Ayangma's assertion that these were factors is just that, an assertion, it is not evidence supported by the facts. [my emphasis]

[29] I agree with the characterization by the ED that the mere assertions of Ayangma in this situation do not amount to any direct evidence.

[30] Having come to the conclusion that there was no direct evidence, the ED moved on to determine if there was any uneven application of selection criteria, and comparisons of candidate qualifications, which are both examples of the types of circumstantial evidence suggestive of discrimination. Again this was sound analysis as performed by the ED and in accordance with ***Ayangma 2004*** and the ***Shakes,*** supra decision. Unequal application of selection criteria may be evidence of *prima facie* discrimination.

[31] Even though the ED could find no direct evidence that Ayangma was excluded from the interview on the basis of his personal characteristics, as ***Ayangma 2004*** makes clear, it is incumbent upon the ED to make a "common sense assessment" as to whether or not "on their face the selection criteria were evenly applied".

[32] After reviewing the minimum qualifications as set out in the job posting, the ED made it clear that she reviewed the following evidence:

> As part of the investigation of this matter, I reviewed the resumes of each of the applicants for this position and the completed Applicant Screening Tool. I met with one of the individuals on the Selection Board. In doing so, I looked for evidence as to whether the selection criteria were evenly applied to all candidates.
>
> The Applicant Screening Tool listed each of the applicant's by name. Comments were written in the columns until it was determined the person did not qualify and, for the most part, the remaining columns did not have entries.
>
> There were ten applicants for the positions. Seven were screened out prior to the interview stage. One was screened out for not having the required education. The other six applicants were screened out for not having the required experience. Of those six, some candidates did have Human Resource experience and some had familiarity or experience with unionized negotiations. Mr. Ayangma was one of those six. Applicants #3,

> #4, and #5 were screened in for interviews. Applicant #5 withdrew before the interview process. Applicants #3 and #4 were interviewed and W.N. (Applicant #4) was hired for the position.

[33] Later in her decision, the ED stated as follows:

> ... His submissions that the Selection Board did not apply the criteria evenly are his opinion based on his assessment of his own qualifications and those of W.N. He may have differing opinions as to what experiences meet the qualifications but that is his opinion, it is not evidence. [my emphasis]

[34] Again, the ED considered the evidence and ignored the assertions and opinions of the applicant and "reasonably rejected the applicant's argument that the selection criteria were applied unevenly".

Comparison of qualifications as evidence of *prima facie* discrimination. The *Shakes* Test.

[35] Having found no direct evidence of *prima facie* discrimination nor evidence that the selection criteria were applied unevenly, the ED then considered the test as enunciated under ***Shakes*** which asks that the complainant demonstrate that: 1) he was qualified; 2) he was not hired or interviewed; and 3) someone no better qualified but lacking the distinguishing feature, subsequently obtained the position, or in this case, the interview. It should be noted that the ED confirmed in her decision that the ***Shakes*** test has been incorporated and accepted in the Supreme Court of P.E.I. wherein she stated:

> The decision of the Panel was before the Supreme Court by way of a Judicial Review and the use of the *Shakes* test in employment cases was confirmed.
>
> > [21] In reaching its decision, the Panel correctly set out the three elements necessary for a *prima facie* case of discrimination in employment as articulated in the case of ***Shakes v. Rex Pak Ltd.*** (1981), 3CHRR D/1001.
> >
> > *Eastern School Board v. Montigny and Ayangma* 2007 PESCTD 18, Para. 21

[36] As the ED made clear, as is often the case in these types of situations following ***Shakes*** allows for an analysis of the hiring process.

[37] I find that the ED was correct in relying on the ***Shakes*** test to determine

whether there was any evidence that the complainant had been adversely effected in the hiring process based on a protected ground. In the application of the test, the ED stated as follows:

> Applying the three step process in the *Shakes* case the questions are: Was Mr. Ayangma qualified for the position, did he not get hired (or interviewed) and was the person who did get hired (or interviewed) no more qualified than he was?
>
> Was Mr. Ayangma qualified for the position of Director of Human Resources for the ELSB? The opinion of the Selection Board was that he did not have the extensive and successful experience in a senior human resource management role in a complex unionized environment. Although Mr. Ayangma is of a different opinion, it does appear that the Selection Board reviewed his resume and cover letter. The entries on the Applicant Screening Tool confirm he passed through the educational level of the screening but the notation on the Tool is that he did not pass the relevant experience portion. Others with Human Resource, Management and Union experience were also screened out at this stage. There is no evidence that the screening tool was not applied evenly and in the opinion of the Selection Board he was not qualified.
>
> Even if he was qualified for the position, given that he did not get the position (or the interview) the third step in *Shakes* would ask: is there evidence that W.N. was no better qualified than him? Mr. Ayangma had a higher level of education than W.N. but the evidence establishes that W.N. had more relevant experience. His resume showed that he had worked for the past five years as the Director of Labour Relations for the Newfoundland and Labrador School Boards Association, which the members of the Selection Board were aware was directly comparable to the position being offered, except that it would be a step above the one in PEI. Even if Mr. Ayangma were successful in arguing that he was qualified for the position, he has not established *prima facie* evidence that W.N. was "no better qualified" than he was. ...

[38] I find that the ED appropriately applied the ***Shakes*** test in her decision and that she reasonably determined that Ayangma had not established ***prima facie*** evidence that W.N. was "no better qualified than he was". Therefore the third criteria of the Shakes test had not been met and as a result, the ED reasonably applied the appropriate legal test to the facts.

Issue 2) Did the ED and Chairperson fail to provide procedural fairness with respect to:

(i) the employer's failure to disclose the resumes and application materials for candidates screened into the competition for the Director of Human Resources; and

(ii) the commissions failure to order the disclosure of relevant materials including the resumes of candidates.

[39] In regards to the appropriate standard of review to be applied to the questions relating to procedural fairness I refer to the decision of ***New Brunswick (Department of Social Development) v. New Brunswick (Human Rights Commission)***, 2010 NBCA 40 wherein the Court of Appeal stated as follows:

> [32] Deference does not extend to allegations of breaches of the fairness duty because these decision-makers cannot claim a relative expertise over matters which do not bear upon the merits of the claim. As easy as it is to state that the duty of procedural fairness applies to pre-hearing procedures and the content of the duty varies with the circumstances, the review standard of correctness simply means that it is the reviewing court which has the last say as to whether the applicant was accorded procedural fairness in the circumstances: *Dunsmuir*, at para. 129 per Binnie J, concurring; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, [2002] S.C.J. No. 9 (QL), 2002 SCC 11 (CanLII), at paras. 74-75; *Fundy Linen Service Inc. v. New Brunswick (Workplace Health, Safety and Compensation Commission) (2009)*, 2009 NBCA 13 (CanLII), 341 N.B.R. (2d) 286, [2009] N.B.J. No.41 (QL), 2009 NBCA 13 (CanLII), at para. 12 and cases cited therein.

[40] I agree with the position of the Court of Appeal of New Brunswick in regards to the appropriate standard of review to apply and will apply a standard of correctness as it is the reviewing court which has the last say as to any alleged breaches of procedural fairness.

[41] With respect to the employer's failure to disclose the resumes and application materials and the Commission's failure to order the disclosure of relevant materials including the resumes of candidates, it is important to remember that at this stage of the proceeding the ED was conducting an investigation of a complaint. Similarly the Chairperson's review of the dismissal of the complaint does not entitle the complainant to a hearing at that stage of the proceeding either. In other words, neither the ED nor the Chairperson was involved in a formal hearing nor was the complainant entitled to one at this stage of the proceedings. In addition the ELSB indicated that they redacted personal information in the Applicant Screening Tool as the result of privacy concerns of those who had applied for this position in confidence. It should also be noted that the ELSB subsequently provided the ED with all of the un-vetted documents to review. Therefore the ED was able to make her own assessment having all of the relevant information available to her.

[42] It should also be taken into consideration that this complaint was not a situation where Ayangma was the subject of a disciplinary hearing or any type of

reduction of existing privileges or rights. This complaint was made in regards to the possibility of an employment position, in particular the possibility of obtaining an interview for a particular employment position. This is very different from the situation where, for instance, an individual may have lost a license or specific privileges that were already in existence as a result of an administrative hearing. In this situation, the complainant is entitled, pursuant to the legalisation, to a complaint to be investigated by the ED, but one of the legislatively contemplated outcomes is that the complaint may very well be dismissed at first instance. As well the complainant is of course entitled to request the Chairperson to conduct a review of the ED's decision, but again no hearing is mandated at that stage of the proceeding. This results in diminished procedural protections pursuant to the process when the rights and privileges of the complainant are considered in context.

[43] I also note the decision of ***Ayangma v. Prince Edward Island (Human Rights Commission)***, 2014 PECA 15 at paras. 19 and 20 which states as follows:

> [19] The decision of the reviewing judge upholding the Executive Director's decision not to order production of all materials requested by Ayangma does not amount to a denial of procedural fairness. Pursuant to the HRA, the Executive Director had the discretion to demand the production of documents that he felt may be relevant to the subject matter of the investigation. The Executive Director is not obligated to demand the production of every document identified by a complainant.
>
> [20] The Human Rights Commission required PSAC to produce over 800 pages of materials in respect of the three competitions for which Ayangma was screened in. In reviewing the decision, the judge was able to satisfy himself that the Executive Director and the Chairperson arrived at their respective conclusions in a reasonable and fair manner. The decision of the judge on judicial review that the decisions of the Executive Director in that regard were reasonable clearly withstand appellate scrutiny.

[44] I agree with the Court of Appeal that the ED is under no obligation to demand the production of every document identified by a complainant. Nor is the ED under a duty to breach the privacy of uninvolved third parties who have done nothing more than to apply for employment in order to investigate pursuant to the ***Act***. In this case, as the record makes clear the information was provided to the ED in due course and she did rely upon the unredacted information to come to her decision. Ayangma is not entitled to complete unfettered disclosure. This is not a criminal proceeding and Ayangma is not accused of anything, nor is it even a hearing wherein Ayangma's existing rights or privileges are at stake. Therefore, I find that the decision of the ED not to order the production of unredacted documents to Ayangma does not amount to a denial of procedural fairness. There is no breach and therefore no remedy.

2) (iii) Was the failure to afford the applicant an opportunity to respond and/or address the latest submissions made by a member of the Selection Committee a breach?

[45] As part of the ED's investigation and prior to preparing her decision she interviewed one of the members of the Selection Board. Ayangma argues that this was a denial of procedural fairness. In particular the member of the Selection Board provided information to the ED relating to the selection criteria used in the competition and explained the decisions made using the Selection Tool.

[46] Ayangma argued that the additional information received from Mr. MacLeod, a member of the Selection Board was tantamount to "new argument" from the ELSB.

[47] I do not agree with the characterization made by Ayangma. The information provided by Mr. MacLeod was relevant evidence and not argument.

[48] The complainant would have a much stronger argument had the ED been offered an opportunity to review one of the selection panel and refused to do so. In other words, the decision by the ED to take the extra time and conduct an in-person interview of an additional witness in order to ensure the foundational strength of her decision is indicative of procedural fairness, not a denial. Therefore I do not find that the decision not to allow Ayangma to respond to the information provided by Mr. MacLeod to the ED amounts to any breach of procedural fairness.

[49] It was also pointed out that Ayangma had the opportunity to make any additional submissions he felt were lacking prior to the ED's decision when the matter was reviewed by the Chairperson pursuant to s. 25(3) of the *Act*.

Delay

[50] I have previously reviewed the history of this proceeding and in particular the submissions which were filed and the specific procedural steps which added to the length of time it took this matter to get to the decision stage of the ED and consequently the Chairperson. In summary, it is to be remembered that no less than six separate submissions were filed, three from each party, which referred to numerous authorities on preliminary issues and the merits of the complaint. There was a period of time where the complaint was held in abeyance for nine months pending the outcome of a judicial review application in a related matter. I have the benefit of the decision of ***Cairns v. Prince Edward Island (Human Rights Commission)***, 2017 PECA 16 which dealt with the issue of a four year delay in reaching a decision by the very same administrative board. In particular the court stated as follows:

47 In ***Blenco v. British Columbia (Human Rights Commission)***, 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307, Bastarache J. wrote, at paras.121-122:

> To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (***Brown and Evans***, ***supra***, at p. 9-68). There is no abuse of process by delay per se. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was "inordinate".
>
> The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

48 In ***New Brunswick Human Rights Commission v. Province of New Brunswick (Department of Social Development)***, 2010 NBCA 40 (CanLII), Robertson J.A. for the court was dealing with a situation of an almost six year delay. He wrote at para.56-57:

> 56 ... I pause here to note that everyone has assumed a six year delay is "inordinate". However, inordinate does not equate with unusual. An examination of the human rights jurisprudence reveals that it is not unusual to find the lapse of several years from the date a complaint is filed and the day it moves forward for adjudication.
>
> ...
>
> 57 ... In the administrative law context, mere delay will not warrant a stay of proceedings for abuse of process, as that would be tantamount to imposing a judicially created limitation period. There must be proof of "significant prejudice" which results from an unacceptable delay. The delay must be such that a party's ability to make full answer and defence to the complaint has been compromised (e.g., witnesses have died or are unavailable or evidence has been lost). The Supreme Court has framed the applicable test in terms of whether proof of prejudice has been demonstrated to be of sufficient magnitude to impact on the fairness of the hearing. ...

> 49 Cairns' position that delay alone is sufficient to support a finding that he has been prejudiced is not supported by the law. He has shown no prejudice let alone significant prejudice.
>
> 50 While it is unfortunate that the file lay dormant for approximately two years (2007 to 2009), this delay did not cause prejudice to Cairns. He fully availed himself of the opportunity to present his case and his material to the Commission, and his case was thoroughly considered.

[51] I find that based on the submissions provided by Ayangma and the ELSB, I agree with the reasoning of Justice Mitchell in ***Cairns***, and in this situation, I, as well can find no prejudice, let alone significant prejudice based on the submissions made by Ayangma. Significant prejudice is a high bar, it requires specific evidence in order to meet the requirements of the test as set out in ***Cairns***, I do not think the court should impose any form of judicially created limitation period in regards to the HRC. I see no proof of evidence having been lost to the process. Therefore I do not detect any procedural unfairness in regards to this issue.

Did the ED and Chairperson err in their interpretation of the minimum education, training and experience requirements set out in the job posting?

[52] For purposes of analysis of this aspect of the judicial review, I agree with the characterization made by the ELSB that this question is a question of mixed law and fact and is reviewable on a standard of reasonableness. In support of the reasonableness standard it is important to remember that both the ED and the Chairperson of the HRC have been granted the legislative power to investigate complaints of discrimination and also to seek to attempt to bring settlement to the complaints where it is reasonably possible. In fact, the decision-making process in interpreting the minimum education, training and experience are more fact than law and from the perspective of a ***Dunsmuir*** analysis, it is clear that in regards to this issue reasonableness is the appropriate standard of review to apply.

[53] I find that the ED did complete an appropriate and thorough review of the evidence in relation to each candidates' qualifications for the Director of Human Resources position. Specifically, it is clear that the ED contextualized her analysis by identifying the minimum qualifications for education, skills and experience as set out in the job posting. She then identified the members of the Selection Board and indicated that an Applicant Screening Tool for the purposes of determining who would be interviewed among the ten candidates was being used by the Selection Board. She also reviewed the resumes of the ten candidates for the position and contextualized the ten candidates in the Applicant Screening Tool. She also took the

extra step of interviewing a member of the Selection Board. She also had the benefit of un-vetted originals of the Tool and resumes and applications prior to making her decision and indicated that she was specifically looking for evidence to support the applicant's allegations that discriminatory factors were applied to screen him out. In particular she stated that:

> The ELSB provided me with access to all of the applications received as well as access to the un-vetted Applicant Screening Tool so I could conduct a review of the screening process to determine if there was any evidence in those documents to support Mr. Ayangma's allegations that discriminatory factors were considered to screen him out, and/or that the selection criteria were not applied evenly among the applicants. Those are appropriate roles for the Executive Director, acting as an investigator, on a complaint such as this. In order to maintain the privacy of the applicants I have provided some information about the applicants without putting such detail as would lead to their identification.

[54] The ED also considered the relevant experience category of the screening process. In particular she focussed on the requirement for "extensive and successful experience in a human resource management role in a complex unionized environment in areas such as labour relations, recruitment and retention, policy development, HR complaining, classification, etc.".

[55] Coupled with the information she received from Mr. MacLeod of the Selection Board she was able to clarify what constitutes a "complex unionized environment" and the requirement of having "experience in the senior human resource management role".

[56] The ED took the time to note that six of the remaining nine candidates were screened out at this stage. She was careful to review the Applicant Screening Tool and the resumes of each of the candidates and provided a summary as to the basis for each respective screening out.

[57] The ED considered Ayangma's submissions that he should not have been screened out at that stage. She considered his cover letter and resume and his submissions to the Commission and obtained the opinion of the member of the Selection Board on those submissions as well as on Ayangma's credentials and the credentials of the successful candidate. She also considered the application of the successful candidate and the other two applicants selected for interviews.

[58] The ED came to the conclusion that there needs to be some evidence that the selection process utilized in filling this particular position was discriminatory for Ayangma to be successful.

[59] As has been already been discussed, she found no direct evidence of discrimination relating to the applicant's protected characteristics in this hiring process. She referred to ***Ayangma 2004*** and made note of her requirement to "make a common sense assessment as to whether on their face the selection criteria were evenly applied".

[60] The ED stated as follows:

> In terms of an opportunity to compete, Mr. Ayangma was given the same opportunity to submit a resume and cover letter as the other applicants. A review of the resumes and the screening tool established that all of the letters and resumes were reviewed and the same screening process was applied to each. A comparison of the basis on which the applicants were screened in or out does not demonstrate evidence of unequal application of the selection criteria. There is no evidence to establish that the selection criteria were applied inconsistently.

[61] I find that the process as delineated by the ED was a reasonable process and her findings were reasonable based upon a common sense assessment of the evidence and therefore I am not inclined to disturb her findings in regards to this matter. I also find that the Chairperson correctly understood his role on the s. 25 review and would specifically refer to the following section of the Chairperson's decision:

> Contrary to the Complainant's argument, the successful candidate in the competition was better qualified in terms of his experience in senior human resources management. I find this is evident from the resumes that were submitted by the Complainant and the successful candidate. It is obvious to me that the successful candidate's application demonstrated a lengthier and more varied experience in human resources management at senior levels. This was the qualification upon which the Complainant was screened out of the competition and, as a result, was not granted an interview.

[62] Having reviewed the Chairperson's findings, I find that it too was based upon a reasonable common sense assessment of the evidence and I am not inclined to seek to replace any of the findings made by the Chairperson or the ED.

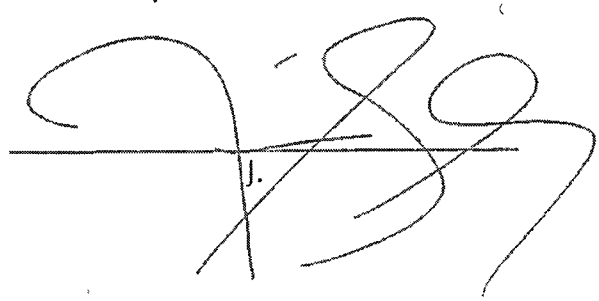
Conclusion

[63] Having considered the submissions of the ELSB, the Commission and Ayangma, and for all of the reasons set out above, I dismiss this application for judicial review of the decisions of the ED and the Chairperson.

Costs

[64] As the ELSB has been successful in this matter, I award partial indemnity costs to the ELSB. I will make no award of costs to the Prince Edward Island HRC. If the parties cannot agree on costs within 30 days, I will accept brief written submissions on the respective parties' positions on costs and will provide a decision on costs forthwith.

Dated: December 21, 2018



Court File No.: S1-GS-27578

SUPREME COURT OF PRINCE EDWARD ISLAND
(General Section)

BEFORE THE HONOURABLE JUSTICE GORMLEY DATE: JANUARY 9th, 2019

BETWEEN:

NOEL AYANGMA

APPLICANT

AND:

PRINCE EDWARD ISLAND HUMAN RIGHTS COMMISSION
THE ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENTS

ORDER

WHEREAS the Applicant filed an Amended Amended Notice of Application on August 25, 2017, seeking judicial review of the decisions of the Executive Director of the Prince Edward Island Human Rights Commission dated April 10, 2017, and the decision of the Chairperson of the Prince Edward Island Human Rights Commission dated August 11, 2017 (the "Decisions of the Human Rights Commission");

AND WHEREAS the Application for judicial review was heard on June 26, 2018;

AND UPON reading the application record and written submissions of the parties;

AND UPON hearing the submissions of Mary Lynn Kane, Q.C., on behalf of the Respondent English Language School Board and Jonathan Greenan on behalf of the Respondent Prince Edward Island Human Rights Commission, and the submissions of the Applicant, Mr. Ayangma;

THIS COURT ORDERS that the Applicant's Application for judicial review of the Decisions of the Human Rights Commission be dismissed;

THIS COURT FURTHER ORDERS that the Respondent English Language School Board is entitled to partial indemnity costs as agreed upon by the parties. If the parties are unable to agree on costs within 30 days of the written decision, they shall make written submissions on costs following which a decision on costs shall be rendered by this court.

(SGD.) JAMES W. GORMLEY
J.

J.

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Court File No.: S1-GS-27578

Ayangma v. PEI HRC and ELSB

SUPREME COURT OF PRINCE EDWARD ISLAND

PROCEEDINGS COMMENCED AT
CHARLOTTETOWN

ORDER

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Jessica Gillis
COX & PALMER
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File No.: 20017750-00045

PROVINCE OF PRINCE EDWARD ISLAND
PRINCE EDWARD ISLAND COURT OF APPEAL

Citation: ***Ayangma v. HRC & ELSB***, 2019 PECA 20

Date: 20190725
Docket: S1-CA-1413
Registry: Charlottetown

BETWEEN:

NOËL AYANGMA

APPELLANT

AND:

THE PEI HUMAN RIGHTS COMMISSION and THE ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENTS

Before: Chief Justice David H. Jenkins
Justice Michele M. Murphy
Justice John K. Mitchell

Appearances:
Noël Ayangma, the Appellant on his own behalf

Jonathan B. Greenan, counsel for the Respondent P.E.I. Human Rights Commission

Karen A. Campbell, Q.C., and Jessica M. Gillis, counsel for the Respondent English Language School Board

Place and Date of Hearing — Charlottetown, Prince Edward Island, June 24, 2019

Place and Date of Judgment — Charlottetown, Prince Edward Island, July 25, 2019

Written Reasons by:
Justice John K. Mitchell

Concurred in by:
Chief Justice David H. Jenkins
Justice Michele M. Murphy

who reviewed the needs for the position and determined the minimum education and experience requirements for the job. The job posting included the following description:

> Education and training:
>
> - Must have a university degree, preferably at the master's level, in a related area with considerable training in human resources
> - CHRP designation would be an asset
>
> Skills and experience:
>
> - Extensive and successful experience in a senior human resource management role in a complex unionized environment in areas such as labour relations, recruitment and retention, policy development, HR planning, classification, etc.
> - Managerial experience is required
> - Proven conflict management and mediation skills
> - Demonstrated superior interpersonal collaborative and team building skills
> - Excellent oral, written presentation skills are essential
> - Ability to use word processing, spread sheets, HR information systems, presentations software, email.

[3] Ten applications were received including Ayangma's. The selection board met twice to review the applications. They used an *"Applicant Screening Tool"* to assist in the screening process. Seven applicants were screened out, one for failing the minimum education requirements and six because they lacked the necessary skills and experience. Ayangma was one of the six screened out for lack of the necessary skills and experience.

[4] Applicants three, four and five were screened in; however, one applicant withdrew from the competition. Applicant four, W.N., a white male was the successful applicant.

[5] On October 16, 2013 Ayangma filed a 93-paragraph complaint complete with attachments A through Z-9 with the HRC alleging that the ELSB discriminated against him on the grounds of colour, race, ethnic or national origin, as well as on the ground of having previously filed complaints under the ***Human Rights Act***, R.S.P.E.I. 1988,

Standard of review

[13] The role of the court of appeal on an appeal from a judicial review is to determine whether the applications judge identified the appropriate standard of review and applied it correctly. In doing so, the court of appeal steps into the shoes of the reviewing judge such that its focus is, in effect, on the panel decision (***Agraira v. Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 36, at paras.45 and 46; ***Cairns v. Prince Edward Island Human Rights Commission and Eastern School District***, 2017 PECA 16, at para.23).

[14] ***Dunsmuir v. New Brunswick***, 2008 SCC 9, continues to be the starting point when considering the issue of standard of review. The standard of review of course depends on the question to be answered. ***Dunsmuir*** advises that where the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a particular tribunal, there is no need to go further (***Dunsmuir***, para.62). This court has determined on a number of occasions that decisions of the HRC, including those of the executive director and the chairperson, are entitled to deference (***Cairns v. Prince Edward Island Human Rights Commission and Eastern School District***, 2017 PECA 16, at para.23-25; ***Ayangma v. Canada Health Infoway***, 2014 PECA 13). Their decisions on questions of law within their home statute and on questions of fact and mixed fact and law are to be reviewed on a standard of reasonableness.

[15] On the other hand, on the question of whether or not the HRC misidentified or choose the wrong test, the standard of review must be correctness (***King v. Government of P.E.I.***, 2018 PECA 3, para.39). Should a decision maker choose the wrong test, the result will inevitably be unreasonable as the result would not be an acceptable outcome defensible in respect of the facts and law (***Dunsmuir***, para.47).

[16] The second issue is a question of procedural fairness. Procedural fairness is not amenable to a correctness or a reasonableness standard. A party must be accorded procedure fairness. It is either there or it is not. On that basis, it is akin to the standard of correctness in the sense that if the tribunal dealt with a party unfairly the tribunal decision will not be upheld (***Miltonvale Park v. IRAC and O'Halloran***, 2017 PECA 23, at paras.83-85).

Issue #1: Did the executive director/chair of the HRC misapply or misidentify the test to be applied to determine a *prima facie* case?

- *Positions of the parties*

[17] ELSB's position is that the decision maker chose the correct test and applied it

exhausted; or, as in the case at bar, where the executive director considers that the complaint is without merit.

[24] A complainant whose complaint has been dismissed at the investigative stage has the right to request a review of the executive director's decision by the chairperson (s.25(1)). When exercising her duties as an investigator under s.22 the executive director is performing an administrative function (***Ayangma 2002***, at para.20). She must determine whether there is a reasonable basis in the evidence for proceeding to the next stage which is the adjudicative stage.

[25] The panel at the adjudicative stage must weigh the evidence, assess credibility, and make a determination of whether or not the complainant has a successful complaint.

[26] The role of executive director as investigator is much more limited than the role of the adjudicative panel. She must gather information from both the complainant and the subject of the complaint to decide whether there is a reasonable basis in the evidence gathered which would justify sending the complaint to a full adjudicative panel. In doing so, the executive director must remain within an administrative function and not slip into an adjudicative role. There is a fine line between weighing evidence as an adjudicator to make a determination as to whether or not a complaint has been established and that of testing the sufficiency of the evidence to determine if a panel should be appointed.

[27] That problem was recognized by McQuaid J.A. in ***Ayangma 2002*** at para.40 where he wrote:

> There will always be some evidence of discrimination even if it only comes from a complainant. Similarly, there will always be some conflict in the evidence gathered by the investigator because the subject of the complaint will most frequently have a version of the situation different from that of the complainant. Therefore, the test that would not permit any weighing of the evidence in these circumstances would be meaningless and impracticable. Having due regard to the spirit of the act and to permit the executive director to properly discharge his function as an investigator in deciding to dismiss a complaint for lack of merit, he must be permitted to look at all the evidence and make some common sense assessment.

[28] In my view both the executive director and the chairperson chose the correct test and applied it properly. The executive director began with an extensive review of the evidence. She acknowledged that she had the responsibility to acquire information from both Ayangma and the ELSB.

[29] She charged herself with the correct law and specifically cited ***P.E.I. Music and***

[33] Next the executive director examined whether there was any evidence that his application was not accepted based on the same criteria as other applications. Here she came to the same conclusion; that is, that there was no evidence to support the claim. She applied her common sense assessment of the evidence to the test set out by the Supreme Court of Canada in ***Moore v. British Columbia, supra.*** That case set the following three-part test to determine the existence of a *prima facie* case of discrimination:

> To demonstrate *prima facie* discrimination complainants are required to show they have a characteristic protected from discrimination under the code; that they have experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.

[34] The executive director, and the chairperson reviewing the executive director's decision, found that Ayangma met the first two requirements set out in ***Moore*** but on a common sense review of the evidence he did not meet the third. The executive director then applied the ***Shakes v. Rex Pak*** test and came to the same conclusion. The ***Shakes*** test states *"in an employment complaint, the Commission usually establishes a prima facie case by proving (a) the complainant was qualified for the particular employment; (b) 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 (i.e. race, colour etc.) subsequently obtained the position."* Once again the executive director and the chairperson found Ayangma did not meet the third requirement.

[35] Ayangma's contention that the executive director and the chairperson should only consider his evidence and not consider any evidence from the ELSB does not hold up to the direction given to the HRC in ***Ayangma 2002*** where this court said at para.40:

> Having due regard to the spirit of the Act and to permit the executive director to properly discharge his function as an investigator in deciding to dismiss a complainant for lack of merit he must be permitted to look at all the evidence and make some common sense assessment. [Emphasis added.]

[36] The fatal flaw in Ayangma's reasoning in this case is that he fails to see the distinction between facts/evidence on the one hand and argument and opinion on the other. The executive director was quite specific that she was not engaging in a weighing of evidence. If she weighed the evidence she would have run afoul of the law in ***Ayangma 2002*** and applied the wrong test. She was quite careful to ensure that in rendering her decision, she was not choosing between different versions of the facts.

[42] Ayangma relies on several cases such as ***Christopher v. City of Toronto***, 2016 H.R.T.O. 285, and ***Forsch v. Canadian Food Inspection Agency***, 2004 F.C. 513, for the legal proposition that the test for disclosure is *"arguable relevance"*. He argues that he is *"clearly entitled to complete unfettered disclosure of all arguably relevant materials that went before the selection committee"* (Ayangma factum, para.97).

[43] He further argues that *"it is not important whether the Executive Director had gained access to the resumes of other candidates screened in by the respondent as it was for the appellant and NOT the Executive Director to establish a prima facie case of discrimination ..."*. (Emphasis in original, para.91, Ayangma factum)

[44] He argues that his complaint is that he was denied an opportunity to compete, therefore the full applications of all three candidates who were screened in are relevant and necessary for him in making out a *prima facie* case of discrimination.

[45] The ELSB says that as a public body it is constrained by the ***Freedom of Information Protection Privacy Act***, R.S.P.E.I. 1988, Cap. F-15.01 (***FIOPPA***), and therefore cannot release private information. It points, as well, to the fact that at least one applicant's covering letter made it clear that his application was forwarded *"in confidence."* Releasing resumes with names redacted would still allow identification of the applicants who may easily be identified by other information in their resumes.

[46] The HRC takes no position on whether there is any obligation to disclose as between Ayangma and the ELSB. It points out that the powers of the executive director in conducting an investigation are both defined and limited by the ***HRA*** . She has the power to compel production *"for examination"* of records and documents but that all information obtained this way *"shall be kept in confidence, except as required for the purposes"* of the ***Act*** (s.23(1)).

[47] There is no requirement in the ***HRA*** for the executive director to demand production of every document requested by a complainant. The HRC states that the only documents that Ayangma requested but did not receive were those related to applicants three and five, the two unsuccessful candidates who were screened in. However, the ELSB granted the executive director unfettered access to review all documents related to all applicants.

[48] The ***Act*** provides for a review by the chair of the HRC of the investigative decision made by the executive director. The chair of the HRC in conducting a review has no power to compel documents nor authority to disclose documents. Should a matter proceed to a hearing however, a HRP has authority to compel production of relevant documents from any person.

complaint is filed with the HRC. The complaint is investigated and broadly speaking, if it has merit and cannot be settled, an HRP is appointed to deal with the complaint. The HRP is the adjudicative body. The executive director, as investigator, plays an administrative role (***Ayangma 2002***, at para.20). Nevertheless the investigation must be impartial and thorough (***Cairns***, paras.37-40). That means, amongst other things, that the executive director must seek evidence from all relevant sources, including the complainant and the respondent (***Ayangma 2002***, at para.40). She is to control the nature and extent of the investigation and, being impartial, she is not to be unduly influenced by either party.

[54] In her investigation she may compel *"production for examination of records and documents"* (s.23(1)) and she may copy those records and documents but must keep them *"in confidence except as required for the purposes"* of the ***HRA***.

[55] There is no doubt that the content of the duty of fairness at the investigative stage is not the same as it is at the adjudicative stage. It is much higher at the adjudicative stage.

[56] In ***Ng v. Canada (Attorney General)***, 2000 F.C. 1298 (FC), a case upon which Ayangma relies, the Federal Court found that the decision maker violated the rules of procedural fairness by accepting the Board's response to Ng's request for a review and then failing to disclose it to Ng so she could respond to them. This, the Federal Court held, constituted a breach of procedural fairness.

[57] In ***Tanaka v. Certified General Accountants Association (NWT)***, 1996 CanLII 3653 (NWTSC), the court found there was a breach of duty of fairness where the Association investigated a complaint and referred the matter to an inquiry without providing notice to the complainant and without providing an opportunity to the complainant to respond to the complaint. In ***Williams v. First Air***, 1990 CanLII 8909 (FC), Williams' human rights complaint was dismissed at the investigative stage. The Federal Court held the fact that she had the opportunity to respond to the investigative report before the human rights decision was made to dismiss her complaint was sufficient procedural fairness at the investigative stage.

[58] ***Slattery v. Canada (Human Rights Commission)***, [1994] 2 F.C. 574, was another case where the complaint was dismissed at the investigatory stage. The Federal Court found that procedural fairness requires that the parties be informed of the substance of the evidence obtained by the investigator, that the parties have an opportunity to respond to the evidence and make representations in relation to the evidence, and that the investigation be neutral and thorough.

[59] In this case the executive director kept both parties informed as the

thereto, and that the investigation is neutral and thorough (see also ***Cairns, supra***, paras.37-40).

[64] In this case I cannot see where the tribunal has failed to provide procedural fairness. Ayangma was kept informed throughout of the substance and nature of the matter before the executive director. He was given ample opportunity to put his case forward and he took full advantage of that. The executive director must be independent and do a thorough investigation and it would appear from her decision that she did so. The investigator does not have to dance to the tune called by either the complainant or the respondent. Doing so would breach the executive director's duty of impartiality. The executive director in this case has a degree of expertise in human rights matters and fully understood the issues involved in the case.

Conclusion

[65] I would dismiss the appeal with costs on a partial indemnity basis in favour of the English Language School Board. There will be no costs either for or against the Human Rights Commission. Should the parties be unable to agree on costs by the third day of September, 2019, the English Language School Board may submit its bill of costs to this court by September 9th, and Ayangma shall file his response by September 16th.

Justice John K. Mitchell

I AGREE:
Chief Justice David H. Jenkins

I AGREE:
Justice Michele M. Murphy

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PROVINCE OF PRINCE EDWARD ISLAND
PRINCE EDWARD ISLAND COURT OF APPEAL

Citation: ***Ayangma v. HRC & ELSB***, 2019 PECA 20err

Date: 20190729
Docket: S1-CA-1413
Registry: Charlottetown

BETWEEN:

NOËL AYANGMA

APPELLANT

AND:

THE PEI HUMAN RIGHTS COMMISSION and THE ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENTS

Before: Chief Justice David H. Jenkins
Justice Michele M. Murphy
Justice John K. Mitchell

Appearances:
Noël Ayangma, the Appellant on his own behalf

Jonathan B. Greenan, counsel for the Respondent P.E.I. Human Rights Commission

Karen A. Campbell, Q.C., and Jessica M. Gillis, counsel for the Respondent English Language School Board

Place and Date of Hearing — Charlottetown, Prince Edward Island, June 24, 2019

Place and Date of Judgment — Charlottetown, Prince Edward Island, July 25, 2019

ERRATUM

Erratum:

[1] In para.57 of the decision filed July 25, 2019 the first sentence should have read:

> [57] In ***Tanaka v. Certified General Accountants Association (NWT)***, 1996 CanLII 3653 (NWTSC), the court found there was a breach of duty of fairness where the Association investigated a complaint and referred the matter to an inquiry without providing notice to the member and without providing an opportunity to the member to respond to the complaint. ....

[2] The rest of para.57 remains unchanged.

Chief Justice David H. Jenkins

Justice Michele M. Murphy

Justice John K. Mitchell

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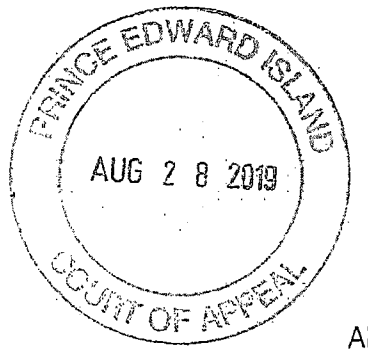
Court File No. S1-CA-1413

PRINCE EDWARD ISLAND COURT OF APPEAL

BEFORE: Chief Justice David H. Jenkins
The Hon. Michele M. Murphy
The Hon. John K. Mitchell



BETWEEN:

NOËL AYANGMA

APPELLANT

AND

THE PEI HUMAN RIGHTS COMMISSION

RESPONDENT

AND

THE ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENT

ORDER

WHEREAS the Appellant filed a Notice of Appeal on January 14, 2019, appealing an Order of Justice James W. Gormley, dated January 9, 2019, which dismissed the Appellant's Application for Judicial Review of a decision of the Chairperson of the Prince Edward Island Human Rights Commission;

AND WHEREAS the Appeal was heard on June 24, 2019;

AND UPON reading the submissions of the parties;

AND UPON hearing the submissions of counsel on behalf of the Respondent English Language School Board, the submissions of counsel on behalf of the Respondent Prince Edward Island Human Rights Commission, and the submissions of the Appellant;

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THIS COURT ORDERS that the Appellant's appeal of the Order of Justice James W. Gormley shall be and is hereby dismissed;

THIS COURT FURTHER ORDERS that the Respondent English Language School Board is entitled to partial indemnity costs as agreed upon by the parties. If the parties are unable to agree on costs, they shall make written submissions on costs in accordance with the directions in this Court's written decision dated July 25, 2019, following which a decision on costs shall be rendered by this Court.

ISSUED at the City of Charlottetown, Queens County, Prince Edward Island, this 28th day of August, 2019.

Deputy Registrar

PRINCE EDWARD ISLAND
COURT OF APPEAL

Proceedings commenced at
Charlottetown, PE

ORDER

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