

HUMAN RIGHTS TRIBUNALS OF ALBERTA

**Citation: Cowling v. Her Majesty the Queen in Right of Alberta as represented by
Alberta Employment and Immigration, 2012 AHRC 12**

BETWEEN

Joan Cowling

Complainant

-and-

**Her Majesty the Queen in Right of Alberta as represented by
Alberta Employment and Immigration
(now the Department of Human Services)**

Respondent

DECISION

Tribunal Chair: Shirley Heafey, B.A., LL.B.

Decision Date: December 13, 2012

File Number: N2008/05/0051

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Introduction

[1] The complainant, Ms. Joan Cowling, filed a complaint dated May 1, 2008 against the respondent, Her Majesty the Queen in Right of Alberta as represented by Alberta Employment and Immigration (now the Department of Human Services) (Alberta) on the grounds of age contrary to s. 7(1) (a) and (b) (employment) and s. 8 (applications and advertisements) of the *Human Rights and Citizenship Act* (now the *Alberta Human Rights Act*) (the Act)¹:

7(1) No employer shall

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

(b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

...

8(1) No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any written or oral inquiry of an applicant

(a) that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person, or

(b) that requires an applicant to furnish any information concerning race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation.

...

¹ *Alberta Human Rights Act*, R.S.A. 2000, c.A-25.5

[2] Ms. Cowling alleges she was denied continuing employment and discriminated against in the area of employment because of her age, in her position as a labour relations officer 3 (LRO 3) at the then Alberta Department of Employment and Immigration (now the Department of Human Services).

[3] An Agreed Statement of Facts dated February 23, 2012 was provided to the Tribunal by the parties prior to the start of the hearing on April 23, 2012 and is attached as Appendix A.

[4] Alberta made a preliminary application on a limitation issue claiming that the complainant was out of time to make her complaint but the Tribunal held that the complaint was in time and a decision was issued dated April 13, 2012.

Agreed Facts taken directly from Appendix A

[5] In 1999, Alberta held a competition to fill an LRO 3 position in the Mediation Services Branch of the department (now the Department of Human Services). Ms. Cowling, at 59 years of age, applied for the job and was the successful candidate. A copy of the job description outlining the required skills and experience for the job is contained at Tab-C1 of Exhibit 1 in the complainant's book of exhibits. It is entitled "Government of Alberta, Opted Out and Excluded – Job Description."

[6] Ms. Cowling was employed as a labour relations officer at the same salary rate as an LRO 3 (also occasionally referred to in the evidence as HR 3) position under contract for eight consecutive years. The employment agreements consisted of four sequential contracts for the duration of eight years with a start date and a termination date for each of the four contracts. The contracts specified that either party could terminate the agreement prior to the termination date noted in each contract.

[7] The first contract for which Ms. Cowling was hired started May 5, 1999 and ended May 4, 2001, a period of two years. The second contract started May 5, 2001 and ended May 4, 2004, a period of three years. The third contract started May 5, 2004 to May 4, 2006, a period of two years and the final contract started May 5, 2006 and ended May 4, 2007, a period of one year.

[8] The first two contracts were each renewed approximately six weeks after the actual termination date on the contracts. However, Ms. Cowling continued to perform her duties as required until the official renewal of the contract. Consequently, there was no interruption in her salary, nor in the services provided by Ms. Cowling in spite of the time gap between the renewal and the eventual signing of the contracts.

[9] About one year prior to the renewal of the fourth employment contract between Ms. Cowling and Alberta, on April 11, 2006, Alberta notified Ms. Cowling that her contract would not be renewed past the May 4, 2007 termination date because Alberta planned to restructure the Mediation Services Branch and downgrade the level and responsibilities of the job to an HR 2 level, one level lower than Ms. Cowling's job and at

a lower rate of pay. Ms. Cowling's supervisor, Mr. Dan Kennedy, stated that he intended to restructure and turn her job into a permanent "developmental" job. Consequently, Ms. Cowling's final day of employment under her contract with Alberta was to be May 4, 2007.

[10] Alberta then held a competition for the permanent lower level LRO 2 job. Ms. Cowling applied for the job, was interviewed and, on or about March 29, 2007, was notified that she was unsuccessful in obtaining the job. None of the other 110 applicants who applied for the job were successful.

[11] Ms. Cowling subsequently filed a discrimination complaint with the Alberta Human Rights and Citizenship Commission (now the Alberta Human Rights Commission) on the ground of age.

Issues

[12]

a) Was there a contravention of s. 7 of the Act in that Ms. Cowling was discriminated against in the area of employment, or denied employment on the basis of age?

b) Was there a contravention of s. 8 of the Act in that Ms. Cowling was discriminated against in the area of applications and advertisements with respect to employment, on the basis of age?

c) If discrimination contrary to the Act is proven, what is the appropriate remedy?

Evidence

[13] At the hearing, the complainant, Ms. Joan Cowling, gave evidence on her behalf.

[14] The respondent called six witnesses. Mr. Dan Kennedy and Mr. Don Mitchell had both been Ms. Cowling's direct supervisors. Ms. Gloria Thompson, Ms. Linda Harris, and Ms. Linda Camminatore, all Alberta employees, were human resource professionals. Mr. Brian Hill worked for the City of Edmonton and was an occasional client of the Mediation Branch. These six witnesses each described their professional qualifications and their knowledge and/or involvement of the dispute between Ms. Cowling and Alberta.

Ms. Joan Cowling

[15] Ms. Cowling testified regarding her educational background as well as her professional skills and experience related to labor relations. (Transcript pages 17, 18, 19).

[16] Ms. Cowling has a Bachelor of Commerce degree from the University of Alberta (U of A) obtained in 1961, and a Master's of Industrial Relations from Queen's University in Kingston in 1994, which included mediation and conflict resolution courses.

[17] She also has a Certified Human Resources professional designation, was a member of the Human Resources Institute at the U of A, and possessed a Certificate in Adult and Continuing Education from the U of A. Ms. Cowling was also registered with the Alberta Arbitration and Mediation Society and was enrolled in a conflict resolution program and had completed five courses towards the certification in that program.

[18] In terms of practical experience in labour relations, Ms. Cowling testified that she had been on the Edmonton Public School Board for 12 years and served as both chair and vice chair. During her tenure with the Board, she obtained significant experience in highly charged labour relations situations, including experience in dealing with strikes. As part of the Board and in the aftermath of the strikes, Ms. Cowling successfully implemented "relationship building" supports and programs between the unions and the Board, as well as liaison committees with union and support staff groups.

[19] Ms. Cowling testified that Ms. Shelley Ewart-Johnson was the director of the Mediation Services Branch when Ms. Cowling, at 59 years old, was initially hired on a two-year contract from May 1999 to May 2001. It happened that Mr. Kennedy was on the interview panel that recommended Ms. Cowling for the LRO 3 position in 1999. Later, in 2002, Mr. Kennedy was appointed director of the branch and became Ms. Cowling's supervisor.

[20] Ms. Cowling gave testimony describing the functions of and the service provided by the Mediation Services Branch and her role in the branch. Ms. Cowling further confirmed that she performed all the duties as outlined in her job description (Exhibit 1, Tab C-1) as a LRO 3 from 1999 to 2001 namely, that she participated in carrying out the efficient administration of the mediation process.

[21] Specifically, Ms. Cowling assessed the nature of the dispute between the parties, identified the mediators available and subsequently made a recommendation to the director. She also managed the selection of mediators to the departmental roster. Ms. Cowling was also involved in developing a matrix for the skills, ability and knowledge that mediators were required to have, and she designed the system that resulted in mediators being selected. Ms. Cowling was also involved in creating an orientation program for mediators, and developing an audit instrument and conducting audits with clients who used the services of mediators. Auditing was a significant part of her job.

[22] Ms. Cowling also worked as a team member of Mediation Services with representatives from labour and management to establish and maintain a highly qualified roster of mediators, and collaborated in the selection and legislated appointment of mediators to specific disputes such as inquiry boards. Ms. Cowling also participated in establishing a roster of arbitrators. Ms. Cowling was also involved in providing updates and ministerial briefing notes, identifying workplace trends and issues

and innovations. Further duties are outlined in Exhibit 1, Tab C-1 and in the Transcript pages 24 to 41.

[23] Ms. Cowling testified about the negotiations that took place at the start of the renewal of each contract she signed during the eight years she worked in Mediation Services. She explained that the 2001 and 2004 contract extensions were not signed and completed until about a month past the expiry date. Ms. Cowling continued to do her job and receive her salary during this lapse period. (Transcript pages 40, 41)

[24] Ms. Cowling explained her difficult personal circumstances, as follows, at the time of the 2004 contract negotiations with Mediation Services:
(Transcript pages 41, 42)

(A) ... my husband had been diagnosed with a very rare condition called Lambert-Eaton myasthenic syndrome. He had been ill for a couple of years, and it wasn't until the fall of 2003 that that diagnosis was made, and it was an indicator of a lung cancer, which he had, and then towards the end of the year of 2003, I believe it was November, he was advised that it had spread to his brain, so he was undergoing extensive - - the chemotherapy and radiation therapy treatments for that.

(Q)And what arising out of those circumstances what concerns did you have related to your employment?

(A)I do recall November 2003 Mr. Kennedy being quite concerned about the fact that I was having to attend to my husband's appointments, and I was very unsure as to what kind of provisions there might be, if any, in the public service or my capacity to access those, and - -

(Q)And what kind of provisions would you be looking for?

(A)I was aware that the federal government was developing some policy or, in fact, may have developed policy about compassionate leave, and so in the course of these negotiations I had asked if the provincial government was considering anything with respect to that and was told that they absolutely were not considering that, and I also asked if I could find out what kinds of days I might have. I had - - in the previous three-year term had not used any sick leave days, so there was something like 54 sick leave days that I had acquired, and I was wanting to know if I could perhaps roll those into the new contract or somehow have access to those, or if there was anything else that I - - that might be available to me. I was the sole bread winner in our family. My husband had not been able to work for about three years at that point.

(Q)So when you were going into negotiation you had the concern about how do I get time off with pay to deal with my husband's illness?

(A) Yes, that was essentially what I was - -

(Q)That was the major concern?

(A)I was concerned about finding that information out.

[25] Ms. Cowling testified about an incident that happened in November 2003, at a time of great stress in her life due to her husband's illness. She received a call at work from her husband to tell her that his doctor had just informed him that his cancer had spread to his brain. Mr. Kennedy was not in the office at the time and Ms. Cowling hurriedly went to see Mr. Bill Fisher in human resources to try to obtain information about handling her employment dilemma. At this point, there was a three-day period where Mr. Kennedy and Ms. Cowling did not see each other subsequent to Ms. Cowling's consultation with Mr. Fisher in human resources. On his return to the office and learning of Ms. Cowling's enquiries with Mr. Fisher, Mr. Kennedy was "quite angry" that Ms. Cowling had contacted human resources directly and that she had not asked his permission. Ms. Cowling explained to Mr. Kennedy that she was under a lot of stress that day because of the news of the increased seriousness of her husband's illness and she went directly to human resources to get some information about what kind of paid leave that might be available to her so she could have time off to take her husband to his cancer treatments. (Transcript pages 43, 44)

[26] Shortly after receiving the news of the seriousness of her husband's illness, Ms. Cowling entered into negotiations for an extension to her employment contract. Ms. Cowling asked Mr. Kennedy for a three-year contract. Mr. Kennedy responded that he did not know if that would happen and informed Ms. Cowling that he needed to involve people from human resources before responding. A meeting took place between Ms. Cowling and four departmental officials which included Mr. Kennedy, Mr. Mitchell as well as Ms. Thompson and Mr. Fisher from human resources. The issues that were of concern to Ms. Cowling were the length of her contract, the notice period in her contract and information and advice regarding potential compassionate leave assistance. These points were discussed at this meeting with some tension. Ms. Cowling asked for the typical three-year government contract and some time needed for leave to look after her husband's cancer treatments. (Transcript page 45)

[27] Ms. Cowling stated there were subsequent formal and informal meetings with Mr. Kennedy and Ms. Thompson of human resources, regarding Ms. Cowling's contract extension. Ms. Thompson seemed unable to provide Ms. Cowling with any helpful information regarding any possibility for Ms. Cowling to access some form of compassionate leave within the provincial or federal frameworks. At the end, Ms. Cowling accepted a two-year contract to do the same job she was initially hired to do, at the same rate of pay, with the same two-month notice period. However, she lost all of the unused sick leave from previous years. In a memo, she expressed her disappointment in the loss of her almost four years of unused sick leave but confirmed her wish to continue working in Mediation Services to help meet the goals of the branch. (Exhibit 1, E-2).

[28] At the point of this 2004 contract negotiation, Ms. Cowling was 64 years old and, in her testimony, stated she had no intention of retiring. Ms. Cowling indicated that the question of retirement was never raised by Mr. Kennedy in meetings with Ms. Cowling, nor in his plans to reorganize Mediation Services.

[29] Ms. Cowling began to have concerns about how the 2004 contract negotiations had gone, given that the contract had been shortened from the typical three-year government contract to a two-year contract, in spite of the fact the workload in the branch was increasing. Ms. Cowling again noted that there were some uncomfortable moments between Ms. Cowling, Mr. Kennedy and Ms. Thompson during the 2004 contract negotiations. Ms. Cowling became worried the cut back in the length of her contract might be due to her personal circumstances and that her husband's illness and her age were having an impact on her employment in Mediation Services.

[30] During the 2006 discussions for the final one-year offer to extend her contract, Ms. Cowling was asked to meet with Mr. Kennedy and Ms. Thompson. The discussion that took place is captured in the form of notes provided to Ms. Cowling following the meeting. Mr. Kennedy explained that Mediation Services intended to redefine her job into a permanent position and he characterized it as a position that would ensure that Mediation Services would provide services "over the long term," that the position would be a "growth position," that it would be downgraded to a lower level and that Ms. Cowling would certainly "have the opportunity to apply." (Exhibit 1, Tab E-1). Ms. Cowling testified that she felt pressured to sign the contract extension before she felt comfortable accepting the terms of the contract.

[31] Ms. Cowling was unfamiliar with the term "growth position," and asked what it meant. Mr. Kennedy explained that the position was to be broader in scope, a "developmental position." Ms. Cowling was understandably interested in the newly defined permanent job, the LRO 2 position, because of her training and abilities as well as her experience in the branch. In addition, the job would necessarily include pension provisions, and a variety of other benefits such as medical and leave benefits which were not included in Ms. Cowling's contract position.

[32] In further examination by her counsel, Ms. Cowling confirmed that she had been carrying out all the duties itemized in the LRO 2 position but at a higher level of responsibility as a LRO 3, and that she had been assessed as "fully meeting expectations" in the job for almost eight years at that time.

[33] Ms. Cowling again confirmed that during her Master's degree studies in Industrial Relations at Queen's University, she had studied conflict management, conflict resolution and mediation. Further, as Chair of the Edmonton Public School Board, Ms. Cowling had been involved in collective bargaining situations and had mediation experience as a client as well.

[34] Ms. Cowling confirmed her ongoing interest in mediation during her performance assessments with Mr. Kennedy. She had requested and been approved to register for the Alberta Arbitration and Mediation Society certificate program and had completed one-third of the required courses when her employment in Mediation Services ended. Mediation training was in Ms. Cowling's learning plan set by Mediation Services throughout all the years she was employed there when courses were available.

[35] At one point, Ms. Cowling asked Mr. Kennedy for permission to attend a federal program to train mediators and Mr. Kennedy said “no,” I could not attend because mediation was not my responsibility, and so I was not allowed to participate in that.”

[36] Ms. Cowling responded to questions about a couple of Mediation Services documents, the first being, “Professional Staffing Options in Mediation Services” and the second being, “Mediation Services - Human Resources Plan,” both prepared by Mr. Mitchell. She stated she had only become aware of the plans outlined in those documents while preparing for the Tribunal hearing.

[37] Ms. Cowling described her relationship with Mr. Kennedy as “... a solid working relationship. He was - - he helped me initially in terms of learning the ropes of Mediation Services and I respected his skills and abilities in that regard.” However, she highlighted her concern about Mr. Kennedy’s lack of communication to keep her informed of branch activities, and absence of feedback in her performance assessments including what she could do to enhance her performance to further enable her to meet the goals of the branch. (Transcript page 143)

[38] Ms. Cowling testified that Mr. Mitchell’s arrival in the branch led to considerable erosion of Ms. Cowling’s job responsibilities as shown in her job description and according to the criteria in which her performance was assessed. Without any explanation from Mr. Kennedy, Ms. Cowling was excluded in many areas of her responsibilities at work, from meetings that she had previously been involved in, from decision making she had previously done and denied some training opportunities that appeared to be directly related to the requirements of her job according to Mr. Kennedy’s job performance assessment of Ms. Cowling’s position. Mr. Kennedy apparently did not communicate with Ms. Cowling about the changes that were taking place before or after Mr. Mitchell’s arrival nor what his intentions were vis a vis her responsibilities.

[39] Ms. Cowling again explained the difficult year she went through in 2004. Her husband died of his illness at the end of 2004. Ms. Cowling herself was diagnosed with melanoma and several close relatives died during this period. This necessitated periodic absences from work and caused elevated stress in her life. Ms. Cowling stated that Mr. Kennedy expressed his concern to her, both for her absences and her personal situation. Mr. Kennedy’s comments worried Ms. Cowling. Ms. Cowling explained that she felt more and more isolated in her work place as she was being left out of a lot of her areas of responsibility without any explanations despite her request for feedback.

[40] Ms. Cowling, who was assessed for eight years as “fully meeting expectations,” stated that she made efforts to find out from Mr. Kennedy what her status was and what she could do to be more helpful in the branch. No constructive information was forthcoming. Mr. Kennedy responded he did not know what she could do to enhance her performance. No explanations were forthcoming to her from Mr. Kennedy to inform her of any changes in her job description yet Mr. Mitchell’s arrival in the branch did effect a big change in her duties.(Transcript page 36)

[41] In further examination of Ms. Cowling regarding her March 2007 panel interview for the LRO 2 permanent position in Mediation Services, Ms. Cowling expressed how she felt after asking a question, at the end of her interview, regarding what would be the key result expected from the candidate in the LRO 2 position in the first six months. The following is her response: (Transcript page 87)

I had never felt so uncomfortable in an interview as I felt after asking this reasonable in my thinking question. I guess what went through my head was, they are not going to give me this job. They made it clear. In the agenda item the year before they said long term. Clearly I'm not long term. I guess maybe people define that differently, but the growth position aspect I was very curious about because I sought out, I tried to get opportunities to develop and was refused that, so I - - they also made reference to new, and so I just felt that I was not a candidate for this position that they were going to recognize that I would be appropriate to fill it, and so I was very discouraged, and I felt very uncomfortable because I almost sensed their anger about me asking, asking this question."

[42] Following the LRO 2 job interview, Ms. Cowling continued to do her job until the remainder of her contract which terminated on May 4, 2007. Ms. Cowling sought feedback about her failed LRO 2 interview from Ms. Harris, the chair of the interview panel and the human resource consultant, regarding the panel's determination that Ms. Cowling was unsuitable for the position. Ms. Cowling expressed the following regarding her confusion about the panel's determination that she was unsuitable for the LRO 2 position:

I find it rather curious with respect to the suitability piece, because when I contracted the first term, when I was successful in that application I - - I was suitable, obviously, and I worked for eight years for the branch, and my performance reviews were all "fully competent", and I met all the expectations, and the only piece that's different, in my view, is my age.

[43] At the end of Ms. Cowling's employment at the Mediation Services Branch, a reception was held by the branch in her honour. As well, Mr. Kennedy provided Ms. Cowling with a very complimentary letter of reference elaborating on her competence, efficiency, skills, experience, productivity and ability to work independently and as a team member for the eight years she held the LRO 3 position. (Exhibit 1, Tab J-5)

[44] Shortly after the unsuccessful LRO 2 competition and after Mr. Cowling left the branch, Mr. Kennedy and Mr. Mitchell re-defined the LRO 3 position again, this time as labour relations advisor, a management position. In the staffing request made by Mr. Kennedy for this manager position, Ms. Cowling's name is included as the previous incumbent. The job description appears materially the same as the job Ms. Cowling did for eight years. (Exhibit 1, Tab H-5)

[45] Mr. Wilbert Flinterman was the successful candidate for this management position of labour relations advisor. The advertisement for the position was posted publicly on two occasions but with different closing dates on each. Ms. Cowling became aware of the opening for the position but, because of the confusion caused by the mistakes posted publicly regarding the closing date, she believed she was out of time and did not apply for the position. It appears, but for this confusion, Ms. Cowling could have applied for the job.

[46] Mr. Flinterman occupied the position of labour relations advisor for only a short period of time in Mediation Services before he went on a one-year sabbatical. He then returned to the branch for another short period of time and left the branch for a new position. The position remains vacant as of April 2012.

[47] Both Mr. Kennedy and Mr. Mitchell testified that Ms. Cowling did a good job in carrying out all the duties of the LRO 3 position. Ms. Cowling testified that each year Alberta gave bonuses to employees for meeting their position expectations and in the years Ms. Cowling worked in Mediation Services, she received a letter from a high level departmental official congratulating her for her contribution in helping the branch meet its objectives. Further she received monetary bonuses for her contribution.

Mr. John 'Dan' Kennedy

[48] Mr. Kennedy testified regarding his educational background as well as his professional skills and experience in labour relations (Transcript pages 225 to 226 and 233). Mr. Kennedy is currently the assistant deputy minister (ADM) for the Alberta Department of Human Services in the area of workplace standards policy, a position he has held for approximately three years. He has responsibility for Occupational Health and Safety, Employment Standards, Labour Relations, Professions and Occupations and Mediation Services. Mr. Kennedy indicated that he had a background in mediation in that he worked in private industry previously and negotiated contracts on behalf of the Chemical and Atomic Workers. He also attended labour college in 1974 to get some labour training. Mr. Kennedy indicated that he had conducted mediations for approximately 29 years. Prior to his ADM position he was the director of Mediation Services.

[49] Mr. Kennedy gave further evidence regarding the evolution of the Mediation Services Branch and his dealings with Ms. Cowling during the seven years he was her direct supervisor.

[50] In response to questions from Alberta's counsel, Mr. Kennedy explained the history of the Mediation Services Branch and how it evolved from staff members initially doing mediation to the point where mediation was outsourced. A roster of certified mediators was established and, depending on their experience, they were assigned to mediate specific files. The mediators were managed by the branch personnel which included Mr. Kennedy, Ms. Cowling and later, Mr. Don Mitchell.

[51] Mr. Kennedy testified that he was on the interview panel that hired Ms. Cowling on the initial two-year contract for the LRO 3 position in the Mediation Services Branch.

[52] Mr. Kennedy confirmed that Ms. Cowling did a very good job in preparing a variety of reports that the branch required and that she did an equally good job in doing audits of the mediators who conducted mediation on files that were outsourced. Mr. Kennedy indicated that he felt Ms. Cowling's weakness was that during some meetings, she might challenge what was being proffered and ask questions after which she would sometimes follow-up with a memo to him clarifying what she understood had been decided at the meeting. Mr. Kennedy also added that one of the roster mediators, Mr. Champion, did not wish to deal with Ms. Cowling and asked to deal with Mr. Kennedy directly because he felt he was being "questioned on the work that he was doing."

[53] Mr. Kennedy testified that in 2001, following her initial two-year contract, Ms. Cowling's contract was extended for a period of three years. It was also about this time that Mr. Mitchell joined the Mediation Services Branch as assistant director at a senior manager 2 level. Mr. Kennedy had previously also been moved up to senior manager 2 and named director.

[54] Mr. Kennedy acknowledged that Mr. Mitchell's arrival in the branch had an impact on Ms. Cowling's work because Mr. Mitchell was doing some of the work Ms. Cowling had been doing. Mr. Kennedy acknowledged that, given he was director of the branch, he made decisions about who would be provided with opportunities to attend seminars, training sessions and opportunities to grow in their positions.

[55] Mr. Kennedy stated that neither Mr. Mitchell nor Ms. Cowling had conducted mediations prior to 2004 and that this was a concern for him. He felt that there should be someone in the branch who could conduct mediation in the event a mediator was "not available to continue with a file."

[56] Mr. Kennedy spoke of issues that came up during Ms. Cowling's 2004 contract negotiations. Ms. Cowling wanted a three-year extension to her contract and flexibility regarding sick leave. This latter issue is dealt with later in greater detail in Ms. Thompson's testimony. Mr. Kennedy wanted a shorter term contract for Ms. Cowling and he explained that this was because "we were looking at going forward" "developing mediation skills that we needed within Mediation." (Transcript pages 243, 244)

[57] In response to Alberta counsel's question about whether or not he would have chosen Ms. Cowling as somebody who could be developed as a mediator in the future, Mr. Kennedy said "No, I did not." (Transcript page 244)

[58] Mr. Kennedy testified about his plans to restructure the Mediation Services Branch which involved terminating the contract position, Ms. Cowling's position, in order to "build capacity within the unit to ensure that over the next 5, 10, 15 years we had the capacity to continue." (Transcript page 252)

[59] Mr. Kennedy spoke of the necessity to hire a new person in the branch, someone with “developmental potential.” Mr. Kennedy also gave evidence about Alberta’s continuing discussions regarding the need for “capacity, leadership, continuity, and succession planning.” (Transcript page 254) Discussions along those lines were held only between Mr. Kennedy and Mr. Mitchell.

[60] Mr. Kennedy was asked about a staffing options paper (Exhibit F-1) prepared by Mr. Mitchell at Mr. Kennedy’s direction. This options paper talks about the average age of the people in the Mediation Services Branch as being 56 years old. Mr. Kennedy responded that he was not concerned about staff age but rather about when people were going to leave. Mr. Kennedy was also asked about the use of the term “junior level” in this same staffing options paper. He explained that it meant “somebody that may not have the same skills as an HR 3 but has the potential to develop up into a leadership role, a mediator role.” When asked if age was a factor in the “junior level” description of the lower level LRO 2 job, Mr. Kennedy said it was not. (Transcript page 255)

[61] Mr. Kennedy further testified that Ms. Cowling had not demonstrated an ability in the mediation area and that he “didn’t see her going in as - - accepted as a neutral mediator because he felt she was “confrontational rather than problem solving and trying to find the middle ground with the parties.” (Transcript page 257)

[62] Mr. Kennedy later responded to a question by Alberta’s counsel saying that he had not made a decision whether or not Ms. Cowling would obtain a permanent position. (Transcript page 258)

[63] Again, Mr. Kennedy stated that, in spite of the language used in the options paper such as “growth position,” and concerns about continuity “over the next 5, 8, 10 years,” age was not a factor in these plans. Concerns about the possibility of having 80 per cent of branch employees retire within the next five years was discussed as well as the necessity to plan “to ensure long-term continuity of specialized mediation and arbitration services.” (Transcript page 261) Mr. Kennedy reiterated that age was not a consideration in the restructure plans.

[64] Mr. Kennedy confirmed that Ms. Cowling’s job performance in the final year of her contract with Mediation Services was the same as in previous years in that she met all the expectations of her job description. However, Mr. Kennedy stated that he continued to view Ms. Cowling as having no potential as a mediator.

[65] Mr. Kennedy explained his understanding of the process involved in the vetting of applications for the LRO 2 competition. He said that only those applicants who demonstrated they met the required qualifications were interviewed. Ms. Cowling was among those interviewed. He did not recall “specifically” if there had been any discussion about whether Ms. Cowling should be among those interviewed. He stated he was to be a member of the interview panel but was called away at the last minute.

Mr. Mitchell replaced him on the panel, which consisted of Ms. Harris, the human resource consultant and Mr. Hill, a stakeholder representative.

[66] When questioned about his recollection of any dealings he may have had with Mr. Hill prior to the LRO 2 competition, Mr. Kennedy could not recall if he had. Mr. Kennedy testified that he did not speak to anyone on the interview panel about Ms. Cowling's prospects in advance of the interviews. Mr. Kennedy testified that he had already developed plans with Mr. Mitchell to replace Ms. Cowling partly because of his "long term" goals for the branch and they had both decided that Ms. Cowling would not be seriously considered for the LRO 2 position because they felt she had no potential as a mediator.

[67] Mr. Kennedy stated that no candidate was certified for the LRO 2 competition, including Ms. Cowling. This result led him to pursue a higher level position, a management position. The result of the competition for the management position was the hiring of Mr. Flinterman whose resume indicated he had worked as a labour relations officer and a human resource consultant. Mr. Kennedy further stated that Mr. Flinterman demonstrated he had done mediations in highly charged circumstances whereas Ms. Cowling had not conducted mediations in those circumstances.

[68] Mr. Kennedy responded to questions about Ms. Cowling's allegations that her job duties were eroded after Mr. Mitchell's arrival in the branch and that she was excluded from meetings and discussions. His explanation was that Mr. Mitchell's presence in the branch did change things because there were now two managers and that there would inevitably be some exclusion of Ms. Cowling from meetings.

[69] When asked if he had ever spoken to or explained to Ms. Cowling about the change in her duties and her exclusion from meetings, Mr. Kennedy said he had not.

[70] In cross-examination by Ms. Cowling's counsel, Mr. Kennedy related his work experience right out of high school working for a plant making plastic in Edmonton doing quality control and testing products in a lab at the plant. He eventually became involved in the Chemical Atomic Workers Union at this plant and was president of the local union. This led to his involvement in two collective bargaining agreements as well as involvement in mediation in one of the agreements.

[71] Mr. Kennedy elaborated on his attendance at labour school for eight weeks in 1974 where the curriculum covered everything from public speaking to American history and sociology. There was no mediation or collective bargaining training involved in this course.

[72] Mr. Kennedy explained further the career moves he made, which included a government position as a manager of Employment Standards, another as assistant prosecution officer in Employment Standards and later as mediation officer. Mr. Kennedy explained that he had his first mediation within the first month of being appointed. He agreed that he was thrown into this situation without having any formal mediation training.

[73] Noting that Mr. Kennedy was on the interview panel that hired Ms. Cowling for the LRO 3 position in 1999, Ms. Cowling's counsel questioned him about his knowledge and awareness of Ms. Cowling's educational and professional qualifications, that being a Master's in Industrial Relations from Queen's University, Board member and then later, chair of the Edmonton Public School Board which involved her on committees negotiating collective agreements as well as negotiations during a period when there were two strikes at the School Board. Mr. Kennedy acknowledged that he would have been aware of these facts when Ms. Cowling was certified by the interview panel.

[74] When provided with the advertisement for the LRO 3 position for which Ms. Cowling was hired, Mr. Kennedy acknowledged that there was no mention that mediation training was required. Mr. Kennedy also confirmed that it was common, in the mediation area, to have contract positions. Mr. Kennedy was also a contract employee for a short period of time but did become a permanent employee sometime about 2001.

[75] Mr. Kennedy stated that he rarely conducted mediation on files. Rather, he would step into a negotiation file on an emergency basis if a mediator became unavailable for a variety of reasons and he would attempt to complete the file.

[76] Mr. Kennedy testified that Ms. Cowling was involved in recommending the appointment of mediators, selecting mediators for the roster, updating branch policies that applied to mediators, providing research and information to mediators and conducting audits to ensure that the service was of high quality and up to branch standards.

[77] Mr. Kennedy stated that qualified arbitrators were chosen in a random manner through an automated system, a computer program that would put forth a number of names to be offered to the organizations requiring an arbitrator. It was Ms. Cowling's job to review new applications from arbitrators and run a background check on their qualifications. Mr. Kennedy also stated that Ms. Cowling was involved in the work around the appointment of special tribunals, public emergency tribunals, voluntary interest boards, compulsory interest boards and dispute inquiries.

[78] In response to further questions from Ms. Cowling's counsel regarding Ms. Cowling's job description and the duties she performed during her eight years as LRO 3, Mr. Kennedy confirmed that Ms. Cowling did perform the duties as shown in the job description in a "fully competent" manner for all those years. (Complainant Ex. #1) Mr. Kennedy also stated that a new manner of assessing employee performance through the use of a numbering system was instituted in 2002 whereby the employee's business results and personal behavior were assessed by assigning a score to individual sections. Mr. Kennedy confirmed that this part of the performance assessment was not shared with Ms. Cowling. (Exhibit 1, Tabs D-3, D-4, D-5) Ms. Cowling's score was again fully competent in this unshared performance assessment. Nothing about her potential to improve in any area was noted on her assessment nor shared with Ms. Cowling.

[79] Mr. Kennedy testified that he signed a letter of reference for Ms. Cowling and that he was in agreement with its contents. (Complainant Ex. J-5; Transcript page 306)

[80] Complainant's counsel asked Mr. Kennedy if he had ever given Ms. Cowling an opportunity to correct what he had earlier described, firstly, as Ms. Cowling's 'confrontational style for asking questions' and, secondly, the fact that one mediator did not want to deal with Ms. Cowling because of her questioning. Mr. Kennedy acknowledged that Ms. Cowling did ask him how she could improve her performance in the branch. However, Mr. Kennedy confirmed that he did not provide Ms. Cowling with feedback that would allow her to make any required correction in her behaviour. (Transcript page 307)

[81] Mr. Kennedy stated that he was aware of the difficult circumstances that Ms. Cowling was experiencing in late 2003 and during the 2004 contract negotiations. He knew Ms. Cowling's husband was seriously ill and that she was taking time off to care for him.

[82] In response to a further question from Ms. Cowling's counsel, Mr. Kennedy agreed that, unlike permanent government employees, it was expected that contract employees like Ms. Cowling would "seek to obtain the best deal they can in terms of their employment contract." Mr. Kennedy also agreed that there was nothing wrong with Ms. Cowling asking for increased benefits in her contract of employment at negotiation time. He added the proviso that there were guidelines provided by the departmental human resource policies that dictated what could or could not be done regarding requests for benefits by a contractor. (Transcript page 310)

[83] Ms. Cowling's counsel questioned Mr. Kennedy about the LRO 2 competition he had run to replace the LRO 3 position filled by Ms. Cowling. Mr. Kennedy acknowledged that the LRO 2 position was at a lower salary than the LRO 3 position that Ms. Cowling had filled for eight years. Mr. Kennedy agreed that he informed Ms. Cowling that she would have the opportunity to apply for the LRO 2 position. Mr. Kennedy did agree that the competition was an open one; therefore, there were no restrictions as far as Ms. Cowling's ability to apply for the LRO 2 position. Mediation was not a requirement in the job description for the LRO 2 position.

[84] Ms. Cowling's counsel asked Mr. Kennedy the following questions regarding the views Mr. Kennedy expressed to Ms. Cowling in a meeting with her on April 11, 2006. In this meeting, Mr. Kennedy informed Ms. Cowling that there would be no further extensions to her contract past May 2007, that there was to be a new position developed at the LRO 2 level to replace her LRO 3 position and that she could apply for that new position when it opened up in a few months. (Transcript pages 316 to 318)

(Q) But at that time, I take it, you also had formulated in your own mind that - - or you had come to the conclusion in your own mind that she would not be suitable for this position?

(A) I think with - - it would have been difficult for her to be accepted as a mediator.

(Q) Did you communicate that to Joan in this meeting?

(A) I don't recall that.

(Q) Do you recall ever having a discussion with her about what your opinion was or what your thoughts were in relation to her wanting to be a mediator?

(A) Joan did sit in on a mediation or mediations. I don't recall the follow-up whether there was follow-up with the mediator that was assigned or not. It would have been the mediator that would have provided some feedback if there was some.

(Q) That's not quite what I had in mind, Dan. You were her manager. You were the one who supervised her employment right?

(A) Mm-hmm. That's correct.

(Q) And you were the one who provided her with performance reviews, Correct

(A) That is correct..

(Q) And you are telling an eight year employee or a seven-year employee that time in April of 2006 that you are going to terminate her contract, correct?

(A) We didn't terminate the contract.

(Q) Well, let's put it another way. You weren't going to extend it past one year?

(A) We weren't going to offer another contract, yes, that's correct.

(Q) So she has been there for seven years getting performance reviews telling her - - that she is meeting all of the requirements of her job, she is performing competently?

(A) That's correct.

(Q) And then you tell her that there is going to be a new position that's going to be paid less than what she is currently getting, and she can apply for it?

(A) That's correct

(Q) And what you don't tell her is that you don't think she will be suitable for it?

(A) That's correct.

[85] Ms. Cowling's counsel asked Mr. Kennedy about his conversation with Ms. Cowling when he met to inform her that her contract would not be renewed past May 2007. Mr. Kennedy said he spoke to Ms. Cowling of his long-term plans for Mediation Services Branch. When asked to explain what he meant by "long-term," Mr. Kennedy

responded that “long-term” in his planning for the Mediation Services Branch meant “.....Five to ten, five to eight, ...” years.

[86] Mr. Kennedy was also questioned regarding the Mediation Services - Human Resources Plan (Ex. 1, Tab F-2) and his testimony is as follows:
(Transcript pages 319 to 321)

(Q) Your testimony was that the human resources plan, you think, was probably prepared by Don Mitchell but you would have had some hand in it?

(A) Would have had discussions with Don, yes.

(Q) So my friend had asked you before whether or not you had any discussions with any of the interview panel for the HR2 position about the position, but you would have had extensive discussions with Don Mitchell about what you were looking for, correct?

(A) When we developed the job description and that, yes.

(Q) Yes. And this wasn't a document that was shared with Joan Cowling before these proceedings?

(A) It was an internal document.

(Q) And it's clear in the document itself that you are proposing to recruit – it's in the first paragraph – you are proposing to recruit a permanent employee at the HR2 level to replace the contract position, right?

(A) That's correct.

(Q) And that contract position was Joan's position?

(A) That is correct.

(Q) And the purpose was to ensure that government continues to have some capacity leadership, continuity and succession planning in the area of labour relations. That was your purpose?

(A) That's correct.

(Q) Succession planning, as I understand it, usually refers to the replacement of retiring employees with new employees. Is that your understanding?

(A) I guess it's one way.

(Q) You are trying to figure out how in the course of the goals that you had set and the goals that Mr. Mitchell had set how you are going to replace at least two professional bodies, and the third one you were dealing with differently?

(A) I think to be - - in fairness, we were looking at the whole branch and the needs of the branch.

(Q) In the strategy section of this document, in the first bullet under "Strategy" you have a point that says, "Develop a longer-term training and development strategy for the new position". Do you see where I'm referring to?

(A) Yes, I do.

(Q) So your plan was to hire a person who was inexperienced and train them to become a mediator? Was that your thinking?

(A) No. Ideally if we could have hired somebody that had the mediation or some mediation skills would have been ideal.

(Q) But under your proposal to the higher-ups in government you are saying that you are going to develop a longer term training and development strategy for the position.

(A) That's correct.

(Q) And I take it at that time, Dan, we know you are still employed by government, so going back to 2006, your notion of longer term at that time was at least five or six years.

(A) That's correct.

[87] Ms. Cowling's counsel further cross-examined Mr. Kennedy on the Mediation Services - Human Resources Plan, specifically:

- a) how Mr. Kennedy arrived at the average age of the five employees in Mediation Services;
- b) the process he initiated to convert Ms. Cowling's LRO 3 position to an HR 2 or LRO 2 position without giving up the LRO 3 level budget;
- c) the comparison in the job requirements between Ms. Cowling's LRO 3 position and the new HR 2 position;
- d) why so much emphasis was being placed on the requirement for mediation skills in Mr. Kennedy's plans for Mediation Services whereas in submissions to the department, specifically Exhibit 1, Tab F-3, "informal mediation and dispute resolution are not key elements of this position." (Exhibit 1, Tab F-3) This exhibit was labeled Change Analysis Report and was prepared by the human resource consultant, Ms. Harris. This report was done based on input and direction from Mr. Kennedy and Mr. Mitchell. One of the specifications was that "Informal mediation and dispute resolution are not key elements of this position." Nowhere was mediation stated as a requirement in the LRO 2 job description or in Mr. Kennedy's submissions to the department.

[88] Finally, Mr. Kennedy confirmed that he had never asked or discussed with Ms. Cowling her intentions to keep working. He recalled that she had once told him that she liked her job and wanted to keep working in the branch. Mr. Kennedy also stated that Ms. Cowling asked a lot of questions that he felt were done in a confrontational style. He testified that this style was not desirable for a mediator and he did not agree with the suggestion that in dealing with some parties in a dispute, there can be a high degree of confrontation and sometimes this style could possibly be helpful.

Mr. Don Mitchell

[89] Mr. Mitchell was the assistant director of the Mediations Services Branch for approximately ten years. Prior to that, he was a facilitator with the Workplace Relations and Facilitation in the same department. He was a senior manager there in early 2001 for a little over a year working in a facilitator role with labour relations “managing, facilitating issues and relationship kinds of questions,” “training and interest based bargaining” and doing action requests for the minister in response to client letters on issues such as the effects of strikes. Prior to that role, Mr. Mitchell was an employee of the City of Edmonton seconded to the unions. Mr. Mitchell organized their meetings, did communications and ran campaigns and other initiatives and was responsible for maintaining good relationships with senior city management.

[90] Mr. Mitchell possesses a Bachelor of Fine Arts from the University of Alberta, and after graduation took some political science, history, and anthropology courses while working for the City. None of these courses involved mediation or dispute resolution issues or training.

[91] In terms of professional mediation training, Mr. Mitchell has taken a week-long national mediator training that was presented by the Canadian Association of Administrators of Labour Legislation and some dispute resolution or conflict management training through the Alberta Arbitration and Mediation Society.

[92] Mr. Mitchell currently holds the same classification he had prior to his move to mediation services, senior manager 2. He was given the title of assistant director at Mediation Services.

[93] Alberta’s counsel questioned Mr. Mitchell further regarding his new duties as the assistant director of Mediation Services Branch and colleague of Ms. Cowling. (Transcript pages 368 to 370):

(Q) Sir, what were your duties as assistant director when you first began with Mediation Services Branch?

(A) I - - when I first began, I really didn't know a great deal about the business, but the director at the time, Dan Kennedy, asked me to take over the arbitration appointment process, and I think he had been doing that up until that time. I also began to review the mediation files in circulation. Every time something happened on a mediation file, it was placed - - whatever that was, whether it was a meeting or a memorandum

of agreement being reached, a note would be placed on the file, and it was circulated among the staff, so I was asked to familiarize myself with the files. And I don't think it was very long at all before I began to prepare briefing notes.

(Q)What would you prepare briefing notes in relation to?

(A)Disputes and mediation, strike votes taken, strike notice served, progress of the dispute.

(Q)So there was an initial learning period when you first started, then you began doing more things like preparing briefing notes?

(A)Yes.

(Q)And did you do other things as well as time passed on?

(A)As time passed, I eventually took over the preparing the weekly report that I think Dan had been doing pretty much exclusively before that time. The weekly report is essentially just a report on disputes and mediation that we provided to the assistant deputy minister every week.

(Q)So was there any overlap between your duties and Ms. Cowling's duties?

(A)Yeah. Certainly both of us did - - prepared briefing notes and backgrounders on disputes and other issues. I think that was probably the main overlap. That's a significant part of our job, reviewing the files and, I guess, making observations about files, making recommendations to the director regarding appointments, mediation appointments if it was a new application that came in. And the three of us, Joan Cowling, Dan Kennedy, and I, would I think fairly regularly sort of meet in his office and talk about those things. Also, in time I really started to take over, I guess, from Dan, I suppose, the kind of performance management matters. As a senior manager, I think that was kind of more or less expected that I would have some role in that, so - - and that was - - that was not a kind of a decision making role, it was really more about facilitating the process, people preparing their personal performance agreements, and end of the year reviews. Dan and I would discuss the results, and the results were always Dan's results at the end of the day. He was the decision maker on those.

[94] In his testimony, Mr. Mitchell acknowledged that there was, in fact, considerable overlap between his duties and those of Ms. Cowling's duties and this is based on the job description that Ms. Cowling was originally contracted to perform and which she had been performing for almost three years. He stated that, in his view, his working relationship with Ms. Cowling was very good. Further, Mr. Mitchell assessed Ms. Cowling's work performance as satisfactory, although she did not report to him.

[95] Mr. Mitchell testified that, after some discussion with Mr. Kennedy, the latter asked him to prepare a document (Exhibit 1, Tab F-1) outlining the options available keeping in mind Mr. Kennedy's reorganizational plans for the Mediation Services Branch. Alberta's counsel questioned Mr. Mitchell on the content of this document and the testimony is as follows: (Transcript pages 381 to 384).

(Q) I want to go through some of the terms in this document. And you - - just to make sure I'm clear here, you were the one who wrote this document?

(A) I did.

(Q) And you would have been the one responsible for the terminology in the document?

(A) Yes.

(Q) Under Option 1, the introductory paragraph there, it speaks of "Do not renew the contract and hire a new professional employee in 2006." What did you mean, sir, by "new professional"?

(A) Well, to hire a permanent employee rather than have a contract position. So by "new professional employee" it's really talking about a newly class position.

(Q) Did you have any employee in mind with that phrase "new professional employee"?

(A) I'm not sure I understand what you mean.

(Q) Well, I guess we know that Ms. Cowling was an existing professional employee. And using the term "new professional employee", was it your intent that that would exclude Ms. Cowling?

(A) Exclude Ms. Cowling? I don't think that was the intent.

(Q) It's the position that would be new then?

(A) Yes.

(Q) Not necessarily the employee?

(A) Right.

(Q) And then going down on first bullet there, you see the term "developmental potential"?

(A) Yes.

(Q) What did you mean by that term, sir?

(A) Well, in the context of, you know, how we were thinking about the future of the branch, we were looking at really our long-term needs. And by developmental potential, we saw the need to bring in an employee who could or had the potential to advance to more senior role or roles in the branch, to potentially do mediation work and so on.

(Q)In your mind, was there any correlation between developmental potential and age?

(A)No.

(Q)And using the words “developmental potential”, did you have any particular age group in mind?

(A)No, I was thinking much more about kind of the level or the professional level in the organization.

(Q)And then on the second bullet under “con”. There is a reference to “The decision to not renew the contract could be perceived as arbitrary and unfair by some and will affect the overall morale of the branch.” What did you mean by that, sir?

(A)Well I guess what I meant by that was that, you know, we were aware that there was, you know, sensitivity around the contract negotiation process, especially the previous contract which had left - - I'd say left its mark on the branch in terms of making it a less pleasant place to work there, that there seemed to be lingering tension around that. Also, we - - Ms. Cowling's husband had - - had been critically ill, and you know, I think we didn't want to be hurting someone when they were vulnerable or for that to be perceived as the case as well.

(Q)Sir, with respect to all of the options that went on the option paper, were any of the options crafted with any particular age group in mind?

(A)No.

[96] Alberta's counsel questioned Mr. Mitchell about the content of another document he had prepared for Mr. Kennedy in October 2006 entitled “Mediation Services – Human Resources Plan.” (Exhibit 1, Tab 2)

[97] The Human Resources Plan spoke of “leadership continuity,” “succession planning,” “development strategy,” successful recruitment,” “strong prospects for long term development,” and the “average age of staff is approximately 56 years old.” “Given the current demographics of the branch, a realistic succession plan includes bringing in a new professional employee at a Junior Level with significant opportunities to develop in the future.” [Exhibit , Tab 2]

[98] According to this same Human Resources Plan, the strategy was to have the “new HR2 employee start up to four months before the end of the contract employee's (reference to Ms. Cowling) service. The transition period will provide effective orientation and the opportunity for development of role specific competencies to take place.” (Exhibit 1, Tab F-2)

[99] Mr. Mitchell testified that the Mediation Services Branch was small with five members; three professional and two administrative employees, that the median age of staff was “approximately 56 years old,” and that the branch would likely “experience an

80% turnover by 2010/2011.” (Transcript page 387) Mr. Mitchell stated that he arrived at the median age of branch employees by guessing at ages and further stated that he did not know Ms. Cowling’s age.

[100] Mr. Mitchell testified that the new HR 2/LRO 2 position was to be a “junior” “developmental” position, that the terminology had nothing to do with age, that the position would require the candidate to develop mediation skills so that this candidate could step in and mediate when required and that, in his view, Ms. Cowling had limited potential to develop the necessary skills. Mr. Mitchell testified that he arrived at that conclusion because Ms. Cowling appeared tense and nervous during her contract negotiations and at some staff meetings. Mr. Mitchell did concede that he had never observed Ms. Cowling in a mediation situation. (Transcript page 389)

[101] Mr. Mitchell testified that he was one of three members on the interview panel for the LRO 2/HR 2 job competition, which included the human resource consultant, Linda Harris, and stakeholder representative, Brian Hill. Mr. Mitchell testified that he had no recollection of having any discussion with the panel members about Ms. Cowling prior to the interview except to enquire if Ms. Cowling had applied for the new position, which Ms. Harris did confirm. Following candidate interviews, panel members discussed their assessment of each interviewee.

[102] Mr. Mitchell stated that during Ms Cowling’s interview with the panel, he felt “confronted” because Ms. Cowling asked the panel to clarify the difference in responsibilities between the new LRO 2 position and the position she had occupied for eight years. Mr. Mitchell felt that that question reflected negatively on her suitability for the new position and concluded that Ms. Cowling was not certifiable for the position, nor were any of the other applicants. Mr. Mitchell added that Ms. Cowling’s age was not relevant to his decision to eliminate Ms. Cowling as a candidate for the position.

[103] Because of the ensuing failure to staff the LRO 2 position, Mr. Mitchell testified that a new job description was developed which would be managerial in scope. A new manager was ultimately hired as a result of this new management competition. The successful candidate in this competition had been on the roster of mediators for the Mediation Services Branch.

[104] Under cross-examination by complainant’s counsel, Mr. Mitchell confirmed that Ms. Cowling had been fully competent in meeting all the requirements of the LRO 3 position she had held for eight years, and agreed that if there had been an issue with Ms. Cowling’s personal performance, that is, in her “ability to establish and build upon neutrality, accountability, credibility and strategic relations when working with clients, that that would have been raised in her performance reviews.” (Transcript page 420)

[105] Again under cross-examination, Mr. Mitchell acknowledged that he and Dan Kennedy determined that Ms. Cowling would not be a good mediator because she appeared “tense, nervous and somewhat agitated in dealing with tense situations.” Mr. Mitchell further acknowledged that during the period Ms. Cowling appeared “tense,

nervous and somewhat agitated,” her husband was seriously ill, she was 64 years old and being told her employment would end in a year during contract negotiations. Mr. Mitchell agreed that Ms. Cowling’s personal situation would have had an impact on her demeanour. (Transcript page 421)

[106] Mr. Mitchell did agree, under further cross-examination, that he knew approximately how old Ms. Cowling was, and that he had never observed Ms. Cowling doing mediation work while he was in the branch because the opportunity to actually do mediation was not provided to Ms. Cowling.

[107] Mr. Mitchell agreed that he and Dan Kennedy had done Ms. Cowling’s performance assessments and deemed her fully competent in all respects, based on the LRO 3 position she occupied for eight years and this necessarily included personal suitability. In spite of this past consistent assessment, Mr. Mitchell stated that, as a candidate for the lower level LRO 2 position, he disqualified her on the “soft factor of personal suitability” due in part to the fact she asked a question during her interview, notably for clarification on the differences between her LRO 3 position and the LRO 2 position for which she was now competing. Mr. Mitchell stated that he felt the timing of Ms. Cowling’s question was not appropriate but he had no recollection or notes to explain this determination. (Transcript pages 435 to 436)

[108] Mr. Mitchell confirmed that he drafted a letter of reference for Dan Kennedy’s signature wherein he described Ms. Cowling in the following terms:

She was able to work well both independently and collaboratively on group projects, and she reacted positively to the often tight time lines and high-pressure environment inherent in our business.

(Exhibit 1, Tab J-5)

[109] Under cross-examination, Mr. Mitchell confirmed that he stood by this evaluation of Ms. Cowling in the letter of reference. (Transcript page 459)

Ms. Gloria Thompson

[110] Ms. Thompson was a witness for the respondent, Alberta, and served as a human resource advisor during some of the period that Ms. Cowling was employed by Alberta in the Mediation Services Branch. Ms. Thompson was not an employee in the Mediation Services Branch but served as Alberta’s human resource professional. Ms. Thompson made it clear she was not directly involved but “... was aware of some things” (Transcript page 473) in the core dispute between Alberta and Ms. Cowling.

[111] Ms. Thompson testified about her educational background, qualifications and extensive experience as a human resource professional. She acquired diplomas in her field and held the positions of strategic advisor from 2000 to 2004 and then operations manager from 2004 to 2007 during the time Ms. Cowling was in the Mediation Services Branch.

[112] Ms. Thompson stated that her dealings with Ms. Cowling were limited to Ms. Cowling's enquiries about obtaining compassionate leave or "special leave," as Alberta referred to it, during the period when Ms. Cowling's husband was terminally ill and needed care. Alberta provided only ten days of "special leave" in these situations and Ms. Thompson testified that Ms. Cowling was granted the ten days of "special leave" that Alberta allowed. During this time, Ms. Thompson was aware that Ms. Cowling was dealing with her father-in-law's death as well as her husband's terminal illness. The ten days of "special leave" available to Alberta employees was not sufficient for Ms. Cowling to allow her to look after her husband. Consequently, Ms. Cowling enquired repeatedly of Ms. Thompson for any information about compassionate leave that would allow her to care for her husband. She sought information from Ms. Thompson about a program she had heard of that the federal government had in place for employees who needed extended leave for compassionate reasons.

[113] Ms. Thompson was unable to inform Ms. Cowling about any steps she could take to obtain benefits. Ms. Cowling inquired if she could have some of her numerous years of unused sick leave rolled over to allow her to look after her husband without penalty. Ms. Thompson informed Ms. Cowling that, given she was a contract employee, rollover of sick leave was not permitted by Alberta. Ms. Thompson testified that she had to explain repeatedly to Ms. Cowling that Alberta could not rollover her sick leave and that Ms. Cowling had some difficulty accepting this decision.

[114] Ms. Thompson informed Ms. Cowling that only as a federal government employee could she access the federal benefits for compassionate leave. Ms. Thompson actually provided Ms. Cowling with incorrect information on this point. Under cross-examination, Ms. Thompson testified that she was unaware about the federal program that Ms. Cowling was enquiring about for employees, whereby, under certain conditions, employees could participate in a compassionate leave program under a federal employment insurance initiative. On further cross-examination by complainant's counsel, (Transcript pages 502 to 507), it is clear that, after numerous attempts by Ms. Cowling to obtain information from Ms. Thompson about compassionate leave, Ms. Thompson, as a human resource expert, misunderstood Ms. Cowling's request and failed to provide her with the correct information.

[115] For Ms. Cowling's third contract that was to terminate in May 2006, Ms. Thompson testified that she tried to have Ms. Cowling sign the contract as soon as possible suggesting that Ms. Cowling might not be paid in a timely way if she did not sign the contract.

[116] Ms. Thompson further testified that in 2006, Mr. Kennedy asked for her advice, as a human resource professional, regarding steps to take if he decided to restructure his branch. At this point he had made a decision that he would only extend Ms. Cowling's contract by one year. Ms. Thompson confirmed that, as an advisor, the decision for the one-year contract was not her decision but rather Mr. Kennedy's decision as the director of the branch.

[117] During contract negotiations for Ms. Cowling's 2004 to 2006 contract with the Mediation Services Branch, Ms. Thompson testified that her discussion with Mr. Kennedy at the time led her to believe that because he had a small branch, five people, he was likely thinking of the diversity that was needed in the branch and the direction in which he wanted to go. In response to a question from counsel for Alberta, Ms. Thompson added that Mr. Kennedy's decision to limit Ms. Cowling's contract to one year at this time led her to believe Mr. Kennedy wanted to "look in another direction" and that "he might be looking at a restructure."

[118] Ms. Thompson also testified about the bonus that Ms. Cowling received each year she was employed by the Mediation Services Branch. In response to a question from Alberta's counsel, Ms. Thompson referred to receipt of a bonus by Ms. Cowling as "standard procedure." However she also added that employees who do not meet the requirements of their position would not receive a bonus and these are employees who have "performance issues."

[119] Finally, Ms. Thompson explained that her role was simply that of an advisor to Mr. Kennedy and Mr. Mitchell. She was not directly involved in any substantial decisions regarding Mr. Kennedy's plans to restructure the branch or terminate Ms. Cowling's employment.

Ms. Linda Harris

[120] Ms. Harris was a witness for Alberta and served as a human resource consultant during the last few months that Ms. Cowling was employed by Alberta in the Mediation Services Branch. Ms. Harris testified about her academic and professional qualifications as well as her work as a human resource consultant which, among other related areas, encompassed recruitment and staffing for over twenty years. Ms. Harris testified at length about her role as a human resource consultant to the Mediation Services Branch. She explained her role in the interview process for the LRO 2 position that Ms. Cowling applied for prior to the end of Ms. Cowling's contract in May 2007. Ms. Harris' testimony appears at pages 516 to 699 of the Transcript.

[121] Ms. Harris was examined by counsel for Alberta. In response to being asked if she had "any role in determining Ms. Cowling's job responsibilities, course approvals and contract negotiations," Ms. Harris responded, "My - - not in determining. My role would have been reviewing a position description that was put forward by the worksite for classification review and decision." Ms. Harris responded "no" confirming that she had nothing to do with course approvals for Ms. Cowling nor did she have anything to do with Ms. Cowling's contract negotiations. (Transcript page 520)

[122] Alberta's counsel asked Ms. Harris, "So as the consultant in charge of restructuring and classification, were you brought in as a result of the decision to restructure in the division at this time?" Ms. Harris' response was, "- - because I wouldn't say that I was in charge of - - the consultant in charge of restructuring and classification. I was the consultant providing the human resource operational services

to the division, so that was recruitment, classification, labour relations kinds of issues. But I wouldn't be in charge of, I would say providing those services."

[123] Ms. Harris provided further clarification of her role when asked about her involvement with the branch: "I was there to provide any services that the branch needed; but certainly in this case, one of the services that they needed was classification review of a position that they were putting forward as a result of restructuring." When further asked about her recollection of how she became aware of Mr. Kennedy's plans to restructure, Ms. Harris did not recall and testified based on what would or could have happened in these circumstances. (Transcript page 521)

[124] Ms. Harris was asked if she recalled why the decision was made to change Ms. Cowling's position from a contract position to a permanent position. Again, she confirmed that she was not part of that discussion and that any discussion on that issue would have happened prior to her arrival in human resources. All she could recall was her understanding that the branch was looking to stabilize their staffing.

[125] Ms. Harris further testified that her understanding at the time was that contract positions were typically used more for shorter term types of positions or project positions where they did not know how long the work was going to be required. (Transcript page 525) She speculated that Mr. Kennedy's intentions, regarding his decision to turn the contract position into a permanent position, were to "build capacity for people who could develop strength in labour dispute processes and certainly develop a strong understanding of those processes, as well as providing information and support to the labour relations community, be that internal or external clients and stakeholders, and someone that could provide support within the branch." Ms. Harris was asked if age had any relevance regarding the skills that the branch was looking for and she replied "no." (Transcript page 528)

[126] Ms. Harris explained how Alberta staffs positions within the public service. She explained that positions are normally staffed through competitions and these competitions can vary from limited competitions open to Alberta public service staff only or they can be open to anyone in the public who wishes to apply. Ms. Harris referred to an uncommon manner of staffing which Alberta characterizes as "exemptions from competition guidelines" and this means the staff member would simply be given the job without competition. She explained that the first situation where this would happen is "where there is specialized knowledge or skills with an internal applicant that really couldn't be bettered through competition." (Transcript page 531) "Another rationale would be urgency, and urgency would typically be a situation where there isn't time to run a competition; that taking that time to run a competition would potentially interrupt critical business. And the third condition is effective utilization of staff, and that would be a case where perhaps you had some workforce adjustment activity where salaried employees have been given notice or abolishment, and you need to find placement for those salaried employees." (Transcript page 531)

[127] Ms. Harris explained her role in analyzing the changes put forward from the LRO 3 position to the new LRO 2 job description that Mediation Services asked her to examine and what this analysis entailed. Ms. Harris noted that she noticed there was “a shift in the level of knowledge that would be required of someone filling” the LRO 2 position “versus the” LRO 3 position occupied by Ms. Cowling. She felt that the level of knowledge “was changing from someone who is really an expert in labour relations and those third party dispute resolution services to someone who has a good understanding of it.” (Transcript page 537). Ms. Harris further stated that she felt the job description Mediation Services asked her to review and classify was more one of informing or providing information whereas the job occupied by Ms. Cowling was more in a role of influencing and persuading others. The scope of creativity in the lower level LRO 2 position was much lower than that required in the LRO 3 position occupied by Ms. Cowling. The position Ms. Cowling held as an LRO 3 was one of “accountability with respect to decision-making” whereas LRO 2 position was to fulfill more of a support function.” (Transcript page 539).

[128] Ms. Harris was asked if age was a factor in her analysis of the LRO 2 position that she was asked to classify. She stated that, “age wouldn’t have any bearing on the classification of a Position.” Ms. Harris explained that job descriptions are developed by the worksite and based on what the worksite says is needed. She further explained that government jobs are subject to a competitive process and even if a candidate meets the requirements of the job, there is no guarantee that the candidate will get the job. (Transcript pages 540, 541)

[129] Alberta’s counsel referenced wording in the Mediation Services Plan, specifically:

80 percent of branch employees will be in a position to retire within the next five years. It is necessary to fill the position to ensure a long-term continuity of specialized mediation and arbitration services as mandated by legislation. Without continuity, the stability of labour relations in Alberta could be compromised. (Transcript page 542)

[130] Ms. Harris was then asked to explain how she interpreted the wording to justify the change from Ms. Cowling’s LRO 3 position to an LRO 2 position. Ms. Harris indicated that Mediation Services “could have been doing some succession planning and that as a result of that succession planning, they felt they needed to bolster or strengthen their continuity planning. It looked to me like they had done some demographic work. That’s where their statement of ‘80 percent would be in a position to retire within the next five years,’ and so they were just trying to position themselves to make sure that services could continue if that in fact came to be.” A further question by Alberta’s counsel asking whether or not age is a factor in recruitment, Ms. Harris responded, “Age doesn’t factor into recruitment. We don’t ask age of applicants.” (Transcript page 544)

[131] Ms. Harris testified that she was involved in the interview process for the LRO 2 position as she was chair of the three-member panel that interviewed candidates for the

position. Ms. Cowling did apply for this position and she was interviewed. When questioned about her contact pre-interview with Mr. Kennedy and Mr. Mitchell, Ms. Harris did not recall but stated that she would typically have had contact with Ms. Cowling's supervisors, Dan Kennedy and Don Mitchell during the classification process, and the drafting of the advertisement in the newspaper for the LRO 2 position but was unsure about whether there were any discussions with Mr. Kennedy and Mr. Mitchell about Ms. Cowling. (Transcript page 549) When asked if she remembered having a discussion with Mr. Kennedy or Mr. Mitchell immediately prior to interviewing Ms. Cowling for the LRO 2 position, Ms. Harris stated she did not recall.

[132] Ms. Harris testified that an interview panel for job competitions is typically made up of the hiring manager from the worksite, that is, the individual who has responsibility to make hiring decisions and to whom the individual who you're hiring would report. Ms. Harris added that there are also two other people on the panel, one who would be a colleague-level individual or stakeholder and then there is a human resource consultant. (Transcript pages 554, 555)

[133] Ms. Harris was asked if she knew or had met Ms. Cowling prior to the LRO 2 competition and she could not recall. When asked further if she had spoken to Dan Kennedy and Don Mitchell about Ms. Cowling she stated that she was aware that they had a contract employee whose contract was coming to an end and that Mr. Kennedy or Mr. Mitchell had let her know that they anticipated that Ms. Cowling would be interested in applying for the position. Ms. Harris added that either Mr. Kennedy or Mr. Mitchell explained to her that they wanted the competition to be held while Ms. Cowling's contract was still in force so that she could apply and if she won the competition, there would not be a gap in her employment.

[134] Ms. Harris emphasized that the worksite has a more detailed knowledge of the qualifications required for a job so the manager would typically meet with her after her initial pool of candidates had been chosen. Ultimately, the manager makes the decision about potential candidates who could qualify and who will be interviewed. Ms. Cowling was screened into the candidate pool because "She presented qualifications and skills and educational background that were being asked for in the ad." (Transcript page 561)

[135] The interview panel for the LRO 2 position consisted of Ms. Harris as the human resource consultant, Mr. Mitchell as the worksite manager and Mr. Hill, as a stakeholder representative, a client who had dealt with Mediation Services.

[136] Ms. Harris provided a great amount of detail about all the steps pertaining to the general government interview process. This general background provided information about Alberta government interviews of job candidates but was not referenced specifically with respect to Ms. Cowling and this competition. While interview and hiring practices, generally, within an organization may be relied upon and relevant in certain circumstances, given the number of witnesses involved directly in Ms. Cowling's work circumstances and the LRO 2 and 3 positions, and the direct testimony provided with respect to same, I find the general information provided by Ms. Harris to be of limited

value in the circumstances of this case and need not be detailed for the purposes of this decision.

[137] Ms. Harris testified that at the end of the interview process, none of the candidates were certified, including Ms. Cowling. Ms. Harris stated that passing the interview was a requirement of obtaining the job. Ms. Harris stated that Ms. Cowling “demonstrated that she had a strong skill set and experience that was called for in the role.” However, she also stated that there were concerns about Ms. Cowling’s “... fit with the role” and she explained that part of that “fit” requirement was that the candidate needed to be “a good match for the position in terms of the other people that they’ll work with, in terms of general suitability for the nature of the role, the type of the role.” (Transcript page 569) Ms. Harris expanded on an instance during Ms. Cowling’s interview which consisted of Ms. Cowling asking the panel for clarification on the role of the LRO 2 position she was applying for compared to her role in the LRO 3 position that she held. This question apparently really disturbed Ms. Harris. She felt the timing and the question was inappropriate. Mr. Mitchell did, however, respond to Ms. Cowling’s question and attempted to provide some information regarding the change in focus between the two jobs.

[138] Ms. Harris was questioned about the assessment guide whereby the three-member panel each had a copy of the guide and assessed each area of competence for each candidate. Ms. Harris did make a note of the fact Ms. Cowling asked a question about the variance in the two positions during her interview with the panel. However, the note was not made on the actual assessment form but rather on a “sticky note” and stuck at the back of the assessment guide. Ms. Harris acknowledged that the comment on the “sticky note” should have been entered on the assessment guide and could not recall why she had chosen that route. (Exhibit 9, 10 and Transcript p.572)

[139] Ms. Harris testified that the three panel members each had an assessment guide on which to make comments and thereby rate each candidate interviewed. However, she explained that her assessment guide was kept and used as the official assessment for each candidate, including Ms. Cowling’s assessment. The assessment guides of the other two panel members were shredded at the end of the interview and were unavailable for review. The final assessment for Ms. Cowling, based on Ms. Harris’ document, was that although Ms. Cowling had all the skills and experience required, she was deemed not a good “fit” for the Mediation Services Branch.

Mr. Brian Hill

[140] Mr. Hill was a witness for Alberta and served on the panel that interviewed candidates, among whom was Ms. Cowling, for the LRO2 position in 2007. Mr. Hill was a stakeholder representative who made use of mediators on the mediation services’ roster. Mr. Hill was deemed to have a stake in who would be hired for the LRO 2 position as he would be potentially dealing with this person in future.

[141] Mr. Hill was examined by Alberta’s counsel and he provided evidence regarding his professional skills and experience as well as his knowledge and acquaintance with

Ms. Cowling. Mr. Hill stated that he was a 1973 graduate of the Northern Alberta Institute of Technology where he studied business administration and later took some labour relations courses at the Banff Centre. He worked as a senior negotiator with the City of Edmonton, as a human resource professional and is currently director of employee relations for the Edmonton Police Service.

[142] Mr. Hill first met Ms. Cowling while he was senior negotiator with the City of Edmonton. He did not recall who called him from Mediation Services but he was asked to assist with an audit that was being carried out by the branch. At that time, he met with Ms. Cowling, as a stakeholder, for approximately an hour to explore employers' perspectives of the service provided by Mediation Services.

[143] Mr. Hill, who had known Mr. Kennedy as a colleague for a long period, was asked by him to participate in an interview panel for an "LRO position" at Mediation Services. In response to whether he was given any instruction about Ms. Cowling prior to his participation in the interview panel, Mr. Hill did not recall. He did recall being advised about how the interview would be carried out.

[144] Mr. Hill stated that he recalled he was told there was a scoring system awarded for different areas in the interview process. He further stated that Don Mitchell was on the panel, that he had not met Mr. Mitchell prior to that day, nor did he know Linda Harris, the human resource member of the interview panel.

[145] In response to a question from Alberta's counsel as to how Ms. Cowling had done in the interview, Mr. Hill said "My recollection is she did quite well." (Transcript page 709)

[146] Mr. Hill was questioned about the complainant Exhibit G-3, which was the assessment guide used during Ms. Cowling's interview for the LRO 2 position. Mr. Hill appeared to agree with most of the assessment scores on the assessment guide. He expressed reservations about whether or not Ms. Cowling had fully understood a question about her contribution to a team while working on her own. Mr. Hill did not recall how he had graded Ms. Cowling on that item because his assessment guide was not available.

[147] Mr. Hill did recall writing notes on the assessment guide during the candidate interviews but to the best of his recollection, his notes were turned over to Ms. Harris. Mr. Hill stated that his recollection was that Ms. Harris' assessment guide was a reflection of the overall opinion of the panel regarding Ms. Cowling. Mr. Hill did express reservations about the overall score attributed to some of Ms. Cowling's responses and suggested that his score would have been higher in some instances. Due to the time lapse and the absence of his interview notes, his recollection was faint in parts. (Transcript page 717)

[148] In cross-examination by Ms. Cowling's counsel, Mr. Hill was asked if he was aware of the job Ms. Cowling held as an LRO 3 for nearly eight years in Mediation

Services. Mr. Hill responded that he knew little except for what Don Mitchell had told him at the time of the interview for the LRO 2 position. He added that he was confused as to the difference between the LRO 3 position held by Ms. Cowling and the LRO 2 position for which she was interviewing. Consequently, when Ms. Cowling asked that very question, he states that he was listening to the response provided by Don Mitchell “because I kind of wanted to know the answer myself.”(Transcript page 728)

[149] Mr. Hill explained that he only became aware that Ms. Cowling had been performing a higher level position than the LRO 2 position during the course of her interview by the panel. Mr. Hill felt that Ms. Cowling’s question during the interview was a fair question to ask given that she had been doing the job at a higher level and was now applying for virtually the same job at a lower level. Mr. Hill agreed that if a candidate is not entirely clear about aspects of a job, that it is fair to ask questions about it to have a better understanding of the requirements.

[150] Mr. Hill agreed that personal suitability is subjective and that Mr. Mitchell and Ms. Harris would have a better idea of Ms. Cowling’s suitability because they knew her. Mr. Hill also agreed that, in his many years of interviewing candidates, judging people’s competencies in the interview process is not a guaranteed method of assessment. (Transcript page 732)

[151] When asked about the one time he met and was interviewed by Ms. Cowling during a Mediation Services audit meeting, Mr. Hill stated, “... I recall it as a very nice conversation at the start, just, you know, topics of mutual - - general interest, and then more specifically we got into the audit itself.” (Transcript page 731)

[152] Mr. Hill confirmed that he received a verbal explanation about the LRO 2 position from either Don Mitchell or Linda Harris but that he did not recall seeing a hard copy of the job description.

Ms. Linda Camminatore

[153] In examination by Alberta’s counsel, Ms. Camminatore explained that her role in the department of Alberta Human Services was that of an employee relations manager and that she worked on human resource programs. Ms. Camminatore further explained that she had also worked as a human resource consultant doing staffing, classification, general employee relations and employment competitions.

[154] Ms. Camminatore stated that, at the request of Alberta’s counsel, she researched the availability of Government of Alberta job postings between 2007 to 2012 in the data bases, in particular those postings for which Ms. Cowling might be qualified. Ms. Camminatore gave evidence to the effect that, following a review of Ms. Cowling’s resume, she concluded that there were a number of postings on the competition list that indicated Ms. Cowling had the minimum qualifications to qualify for these particular jobs. Ms. Camminatore’s evidence was in reference to Exhibit 5, 11, 12, 13 and explained in (Transcript pages 735 to 742).

[155] Ms. Cowling's counsel challenged the authenticity of the list of job postings because Ms. Camminatore testified that she obtained the information on the postings from two departmental people who provided them to her. (Transcript pages 742, 743) Alberta's counsel pointed out that the rules of evidence in administrative proceedings are different than in other proceedings and the documents were entered as exhibits with the proviso that they would be accorded the weight in keeping with the source. Alberta's counsel responded with another list of job postings in further correspondence received by the Tribunal on April 16, 2012.

[156] In cross-examination by Ms. Cowling's counsel, Ms. Camminatore confirmed that she was aware of the nature of the proceedings in which she was testifying, the circumstances of Ms. Cowling's LRO 3 position and the fact Ms. Cowling had been determined not qualified for the lower level LRO 2 position.

[157] Ms. Cowling's counsel questioned Ms. Camminatore about two competitions aside from the LRO 2 position for which Ms. Cowling was deemed unqualified. Ms. Camminatore stated she was aware of one of the other Alberta government positions applied for by Ms. Cowling and for which Ms. Cowling never received a response, in spite of the fact Ms. Cowling had the minimum requirements of education and experience. (Transcript page 743)

[158] Ms. Camminatore agreed that if the only criteria for a successful job application in the government was that the applicant had the minimum requirements, an applicant would be qualified for many jobs in the government.

[159] Ms. Camminatore stated there were about 5,200 employees in the Department of Human Services but she had no idea of the number of employees who are over 65 years of age.

[160] Ms. Camminatore was questioned about a specific Alberta policy that was developed following studies conducted to deal with mature workers in the work force. Ms. Camminatore stated she had not reviewed the policy and was not familiar with it. Ms. Cowling's counsel then read the following excerpt from the departmental policy and Ms. Camminatore agreed that the excerpt was a fair assessment of the difficulties faced by mature workers:

The Department concludes although mature workers have lower unemployment rates than younger aged cohorts, end to have longer durations of unemployment once they do become unemployed. Re-entry can be difficult with workers needing to adjust to the challenges of job search and potential employer misperceptions about mature workers.
(Exhibit 8 "Engaging the Mature Worker." and Transcript page 748, 749)

[161] Ms. Cowling's counsel questioned Ms. Camminatore further about a senior manager position Ms. Cowling had applied for in the department and for which Ms. Cowling was rejected. When asked if it would follow that if Ms. Cowling was rejected on

the LRO 2 position that she would be rejected on a higher level position for which she supposedly met the minimum requirements, Ms. Camminatore's explanation was that each competition has its own set of qualifications and criteria. (Transcript page 751)

[162] Ms. Camminatore confirmed that she was aware that Ms. Cowling had provided her resume to the chair of the Labour Relations Board, Mr. Mark Asbell, in the hope of obtaining employment with the Board. There were a number of questions and issues that Ms. Camminatore was unaware of or simply could not recall.

[163] Ms. Camminatore responded to a final question from Ms. Cowling's counsel stating that the fact that an applicant met the minimum requirements of a position did not mean the applicant would get the job or even be interviewed. (Transcript page 756)

Analysis

Legal Tests for Discrimination

[164] The test for discrimination has been affirmed recently in the case of *Moore v. British Columbia (Education)*.² The complainant must show *prima facie* discrimination; once that threshold has been met the burden then shifts to the respondent to justify the impugned action or provide a credible explanation on all the evidence, to address the allegation of discrimination. The "persuasive burden throughout the case is the balance of probabilities."³

[165] In the context of Ms. Cowling's human rights complaint, the analysis for *prima facie* discrimination is as follows:

- a) The complainant must possess a characteristic protected from discrimination by the Act.
- b) The complainant must show adverse action or impact against her in the area of employment.
- c) Lastly, the complainant must show that the protected characteristic, in this case age, was a factor in the adverse action or impact.

[166] As consistently recognized in the jurisprudence, discrimination is rarely practiced openly. Accordingly, it is appropriate to draw reasonable inferences based on circumstantial evidence.⁴

Prima Facie Discrimination

[167] It is clear that Ms. Cowling was at all relevant times an older woman past the historical age of retirement. It is also clear that there was a refusal to continue to employ

² *Moore v. British Columbia (Education)*, 2012 SCC 619 at para. 33.

³ *O'Malley v. Simpson-Sears* (1985), 7 C.H.R.R. D/3102 S.C.C.

⁴ *Workeneh v. 922591 Alberta Ltd.*, 2009 ABQB.

and a refusal to employ Ms. Cowling as of May 2007. Membership in a protected group and adverse action or impact in the area of employment has been demonstrated. The first two branches of the *prima facie* test are met.

[168] With respect to the third branch of the test for *prima facie* discrimination, I find that it is reasonable to infer that age was a factor in the denial of Ms. Cowling's continued employment in May 2007, given the circumstances surrounding the restructuring of the branch, the non renewal of the contract after eight years of fully competent assessments where Ms. Cowling was apparently a good "fit" in Mediation Services and had very relevant academic credentials for the job, and the subsequent failure to offer Ms. Cowling the LRO 2 position.

[169] The complainant had exemplary qualifications and skills. Ms. Cowling had "fully competent" performance assessments for eight years, and she received bonuses for meeting all objectives. Ms. Cowling made it clear she loved the work she was doing in Mediation Services and the evidence indicates that no complaint about her duties was ever levied at her by her supervisors. She was regularly looking for opportunities to improve her work performance, expand her expertise, and had specifically pursued courses to enhance her knowledge about mediation.

[170] During the 2006 discussion regarding the final one year offer to extend her contract, Ms. Cowling testified that Mr. Kennedy told her that Mediation Services intended to redefine Ms. Cowling's job into a permanent position that would ensure services "over the long term" and that the position would be a "growth position" and later explained it would be a "developmental" position. Mr. Kennedy did not indicate to Ms. Cowling at that time that hands-on mediation was a requirement for this new position. The departmental documents for this LRO 2 position indicated that informal mediation and dispute resolution were not key requirements for the position. (Exhibit 1, Tabs F-4, F-6, F-7) Ms. Cowling's LRO 3 qualifications clearly met the requirements of the LRO 2 position.

[171] Ms. Cowling also testified that after Mr. Mitchell arrived in the branch, there was considerable erosion of her job responsibilities. Given this erosion of responsibilities, Ms. Cowling made efforts to find out what her status was and how she could be more helpful in the branch. No information was forthcoming in terms of what, if any improvements in her job performance was required. Ms. Cowling still received performance reviews as fully competent, and at the end of her employment, received a strong reference letter, drafted by Mr. Mitchell for the signature of her supervisor, Mr. Kennedy.

[172] Ms. Cowling was 59 years old when she was first hired by Alberta and 67 years old when she was denied ongoing employment in May 2007. As indicated above, she received strong performance assessments during all eight years of her employment with the respondent. Ms. Cowling was advised that her position was not being continued because the respondent was redefining her position with one what could apparently ensure services "over the long term" and that the position would be a "growth" or

“developmental” position. Ms. Cowling was not advised at any time that she did not have qualifications or suitability for this position or that the position required mediation training, and no such requirement was noted in the job advertisement or departmental documents. In the absence of any contrary information as to why Ms. Cowling was not successful in the position, all of the above evidence supports a reasonable inference that Ms. Cowling’s age was a factor in her inability to secure this long-term “developmental” or “growth” position. *Prima facie* discrimination has been established.

[173] The burden now shifts to the respondent to provide a reasonable or credible explanation on all the evidence, for the alleged discriminatory conduct.

Burden Shifts to the Respondent

[174] The respondent has indicated two reasons, other than age, as to why Ms. Cowling was denied continued employment with Alberta. First, Mr. Kennedy and Mr. Mitchell believed that Ms. Cowling was not a good “fit” for the LRO 2 position because the job required hands-on mediation skills and in their opinion, Ms. Cowling did not have the skills or potential to be a mediator. Secondly, Alberta argued that Mediation Services can legitimately replace a position at will according to organizational needs and this does not indicate discrimination.

[175] Mr. Kennedy and Mr. Mitchell testified that Ms. Cowling was not a good “fit” for the position as she did not have the skills or potential to be a mediator. First, there is no convincing evidence that mediation skills were a clear requirement for the position. The documentation, specifically the Change Analysis Report prepared by Ms. Harris, which was based on input and direction from Mr. Kennedy and Mr. Mitchell, indicates that “Informal mediation and dispute resolution” were not key elements of this position. Mediation was also not required in the advertised job description for the position.

[176] Further, although Mr. Kennedy consistently highlighted the necessity for Ms. Cowling to be able to mediate, the evidence showed that, actual mediation skills were not in demand in the branch. In the years Mr. Kennedy headed the branch, he was called upon only once to step in to complete a mediation. It was also clear that the branch’s mandate was to manage the roster of mediators and arbitrators which were both outsourced, rather than actually conduct the mediations. Consistent with the documentation placed before the department in terms of creating this new position allegedly to do mediation, the evidence does not support new or expanded functions for the branch which would require an individual in the LRO 2 position to actually conduct mediations

[177] Alternatively, even if one accepts that mediation skills were required for this position, the evidence supports that Mr. Kennedy and Mr. Mitchell did not fairly assess Ms. Cowling’s mediation skills. Neither of them had seen her mediate or provided her with an opportunity to further develop her hands on mediation skills. While supervisors certainly have discretion as to what opportunities they allow their employees, decisions cannot be made either in whole or in part on the basis of protected grounds such as age

(without justification). While Mr. Mitchell, who in my respectful view had significantly inferior qualifications to Ms. Cowling in the area of dispute resolution, was provided opportunities by Mr. Kennedy to expand his mediation training, Ms. Cowling was inexplicably denied many of these opportunities, such as regularly sitting in on mediations for learning and furthering her mediation training. Neither was she provided guidance that could have helped her to overcome any perceived weaknesses identified by her supervisors.

[178] I acknowledge that Ms. Cowling, earlier in her tenure with the respondent, was allowed to pursue further training in mediation. However, during the latter part of her tenure, the evidence supports that even though mediation training was set out in Ms. Cowling's learning plan, Ms. Cowling was held back by Mr. Kennedy from opportunities to increase her practical experience and knowledge in mediation.

[179] Alberta also submits that Ms. Cowling was not a good "fit" in that Ms. Cowling had a somewhat confrontational nature unsuited to a mediator. The evidence of Mr. Kennedy and Mr. Mitchell in support of this submission was that Ms. Cowling was tense and appeared agitated in her 2004 contract negotiations, she apparently asked a lot of questions at meetings followed up by memos, as well as posing an allegedly inappropriate question during the LRO 2 interview, regarding the comparison of the position she was interviewing for vis a vis her current position.

[180] During Ms. Cowling's contract negotiations in 2004, at the age of 64, she was under a great deal of stress. Her husband was terminally ill, a number of close family members died and Ms. Cowling herself was diagnosed with melanoma. Ms. Cowling continued to work but incurred some absences. She had taken little or no sick leave during the years prior to her husband's illness. Mr. Kennedy and Mr. Mitchell point to Ms. Cowling's demeanour during contract negotiations held during this period of time when they knew that Ms. Cowling was experiencing tragic personal circumstances, as evidence of Ms. Cowling's personal unsuitability to be a mediator. Mr. Kennedy also acknowledged, in cross-examination that when negotiating a contract, as opposed to simply continuing as a permanent employee, the contract employee must negotiate and attempt to get the best deal. I do not find the evidence of Ms. Cowling's demeanour during these contract negotiations, given her personal circumstances and her desire to negotiate a good contract, to be of such a confrontational nature that would support a credible justification that Ms. Cowling was not a good "fit" for the LR 2 position.

[181] Mr. Kennedy further indicated that Ms. Cowling asked a lot of questions at meetings and then followed up with a memo to clarify what she had understood during the meeting. In my view, this type of clarification and thoroughness, given Ms. Cowling's role as a senior officer and the nature of Ms. Cowling's work as an auditor in the branch, is understandable and cannot reasonably be viewed as difficult or evidence of a confrontational nature. Additionally, given that the evidence indicates that Mr. Kennedy's communications with Ms. Cowling were not always forthcoming or direct, it seems reasonable for Ms. Cowling to follow up and clarify with Mr. Kennedy regarding issues of concern.

[182] Alberta points to Ms. Cowling's allegedly inappropriate question in the LRO 2 interview as support for the position that Ms. Cowling was confrontational and therefore unsuitable as a mediator. During the LRO 2 job interview Ms. Cowling asked what would be the key expected result coming from a successful candidate, and received a very negative reaction. Despite Ms. Harris emphasizing that the asking of this question was inappropriate and of sufficient import to disqualify Ms. Cowling on the basis of personal unsuitability, Ms. Harris records the question, not in the formal assessment records, but on a "sticky note." Mr. Mitchell's notes on this point are destroyed but he remembers generally the question and indicates he thought it was inappropriate.

[183] However, Mr. Hill, witness for Alberta and one of the interview panel members, characterizes the question as reasonable as he himself could not distinguish between the LRO 2 position for which they were interviewing and the LRO 3 position which Ms. Cowling held. Mr. Hill also testified that he would have scored Ms. Cowling higher than the other two supervisors and notes Ms. Cowling's high level of professionalism displayed in the interview. I am in agreement with Mr. Hill that the question posed by Ms. Cowling is reasonable and appropriate given the circumstances and is not supportive of a confrontational nature that would justify the respondent's failure to disqualify Ms. Cowling from the competition and continued employment with Alberta.

[184] After Ms. Cowling's unsuccessful interview she understandably sought further information from Ms. Harris. Again, unsuccessful candidates for jobs often perform this kind of follow up. It was reasonable for Ms. Cowling to follow up with Ms. Harris given that the results of the interview imply that Ms. Cowling was not suitable for a position which seemed to be the same position she had essentially held for the last eight years, fully meeting performance expectations.

[185] There was one roster mediator who complained to Mr. Kennedy that Ms. Cowling was questioning him when they interacted during her audits. This mediator was a former manager in the Mediation Services Branch and apparently asked that he not have to deal with Ms. Cowling because she questioned him about his work. Part of Ms. Cowling's duties was to conduct audits about the efficiency of mediators; consequently, in my view it is reasonable that Ms. Cowling would be asking mediators challenging questions in order to gauge their efficiency and prepare an audit report. I also note that Mr. Kennedy never raised this complaint with Ms. Cowling, supporting the view that Mr. Kennedy did not believe the complaint to have sufficient importance in terms of Ms. Cowling's performance that she needed to consider any corrections in her conduct. This "one off" complaint, in my view, does not provide sufficient evidence that Ms. Cowling would not be a good fit as a mediator.

[186] Mr. Kennedy was on the interview panel that certified Ms. Cowling in the position of LRO 3 in 1999. For eight years, her contracts were renewed. She regularly received bonuses for being assessed as "fully meeting expectations." Ms. Cowling repeatedly asked how she could enhance her performance yet Mr. Kennedy had nothing to offer and could not provide her with any recommendations in that regard. From this evidence and the evidence supporting that Ms. Cowling's qualifications in the LRO 3 position met

the qualifications of the LRO 2 position, one can reasonably conclude that Ms. Cowling did very good work, was an efficient member of the branch and was indeed a good “fit” in the position and with colleagues in the branch.

[187] I find that the documentation and the witness evidence does not support that hands on mediation was a formal or key requirement for the LO 2 position. Alternatively, even accepting that mediation was a requirement for the job, the respondent did not fairly assess and discounted Ms. Cowling’s credentials in this regard, and did not support her requests to pursue mediation training. The position that Ms. Cowling was confrontational and therefore would not have made a good mediator is not reasonably supported by the evidence. In sum, the justification that Ms. Cowling was denied continued employment because she was not a good “fit” and did not have the skills of a mediator, is not a credible justification for the respondent’s failure to continue Ms. Cowling’s employment.

[188] The other reason Alberta puts forward as the reason Ms. Cowling did not get the job is that the organization legitimately needed to replace Ms. Cowling’s position with a “growth” or “developmental position,” and age was not a factor in this replacement.

[189] Plans were developed by Mr. Kennedy and Mr. Mitchell to restructure the Mediation Services branch so that it could function “over the long term.” Mr. Kennedy wanted to have a “growth position,” a “developmental position” to replace Ms. Cowling’s contract position. The position was to be a permanent position and a level lower than Ms. Cowling’s job. In his testimony, Mr. Kennedy’s definition of “over the long term” was anywhere from 5, 10, 15 years. The documentary evidence revealed that Mr. Kennedy and Mr. Mitchell developed plans that clearly appeared to exclude the possibility of Ms. Cowling continuing to work in the branch not only because of the descriptive terms used as noted above throughout the documentation but also because of the sequence of steps taken in the proposed plans which suggested that employee age was part of the reasoning in the decision to restructure the branch. (Exhibit 1, Tab F-1, F-2]

[190] Mr. Kennedy asked Mr. Mitchell to prepare a discussion paper (Mediation Services-Human Resources Plan) which discussed the average age of the people in the branch as being 56 years old and which emphasized that there would likely be an 80 per cent turnover in the five-member staff in the near future.

[191] The LRO 2 position’s description very closely matched the responsibilities Ms. Cowling had in her LRO 3 position. I note that Ms. Harris gave evidence that Ms. Cowling was screened into the LRO 2 candidate pool because “She presented qualifications and skills and educational background that were being asked for in the ad.” I also note the witness evidence of Mr. Hill that it was unclear to him if there was any difference in the position Ms. Cowling held and the LRO 2 position for which she was applying. I note in comparing the LRO 3 and LRO 2 job descriptions that the main difference appears to be that the LRO 3 job description uses the word “participates” indicating a certain level of responsibility while the LRO 2 position uses the word “supports.” However, the duties in both job descriptions are virtually the same.

[192] Alberta argued that Ms. Cowling was considered a viable candidate during the interview process. However, the information consistently supports that Mr. Kennedy and Mr. Mitchell went through the motions of including Ms. Cowling in the candidate pool for the LRO 2 competition but with no intention of hiring her no matter the outcome. (Transcript pages 316 to 318) The information further supports that Alberta included Ms. Cowling in the interview process because Mr. Kennedy and Mr. Mitchell were concerned it would look bad and have a negative impact on morale in the branch if Ms. Cowling was left out of the process.

[193] I acknowledge the testimony of Ms. Harris that either Mr. Kennedy or Mr. Mitchell explained to Ms. Harris that they wanted the competition to be held while Ms. Cowling's contract was still in force so that she could apply and if she won the competition, there would not be a gap in her employment. However, this information conflicts with Mr. Kennedy's and Mr. Mitchell's own testimony that really they viewed Ms. Cowling unsuitable for the job prior to any interviews being held.

[194] Mr. Kennedy had evaluated Ms. Cowling as meeting expectations on all criteria for the past eight years. The LRO 2 position did not require any further qualifications that Ms. Cowling did not possess. I also note that while Ms. Cowling's LRO 3 position was initially converted to a LRO 2 position this was done without giving up the LRO 3 level budget which resulted in an "underfilled position."

[195] I further note that when the LRO 2 position was not filled, Mediation Services very quickly began trying to develop another job description and this time titled the position as managerial. The title of this job description was labour relations advisor, materially the identical position Ms. Cowling held. Indeed on documentation pertaining to this managerial position, Ms. Cowling was listed as the incumbent in the job request.

[196] Notwithstanding then that while the organization was, according to the respondent's witnesses, looking for a candidate with different qualifications from Ms. Cowling, I find that the LRO 2 position did not require any further qualifications than the LRO 3 position. Further, after the conclusion of the LRO 2 competition, the respondent advertised for the labour relations advisor position, in fact, the near identical position Ms. Cowling held.

[197] Indeed the series of events demonstrated that the "long term" needs of the branch apparently could be met by someone who was in the LRO 3 position and who had the qualifications of Ms. Cowling. This series of events supports the view that the Respondent was looking for someone other than Ms. Cowling, someone distinguished by a younger age, who could ostensibly continue working for the branch for several years to come.

[198] The documentation prepared by Mr. Mitchell under the direction of Mr. Kennedy further supports the position that Ms. Cowling was not seriously considered for the LRO 2 position. Her advanced age was not consistent with the Respondent's view of a "new professional employee" being placed in the position but rather, a younger professional

who could meet the longer term servicing of the branch and who could “grow” into the position. (Exhibit 1, Tabs F-1, F-2)

[199] I accept that succession and transitional planning is a legitimate and necessary process in any organization. However, succession planning in these circumstances does not provide a credible explanation for Ms. Cowling’s denial of continuing employment. Indeed, the documentation and the information provided by the witnesses point to a restructuring which targeted a particular individual’s continued employment, by creating a position with requirements (ability to stay in the position 5 to 10 years) which would likely eliminate from contention an older employee, notwithstanding the strong qualifications of that employee. (Exhibit 1, Tabs F-1, F-2)

Credibility and Relevance of Witness Testimony

[200] Ms. Cowling alone testified on her behalf. Her memory was clear and vivid during all of her testimony. She was articulate and came across as balanced and reasonable. Ms. Cowling was unshaken in cross-examination. The clarity of her memory and her powers of observation as they related to the evidence presented by Alberta were solid. Of course, Ms. Cowling is the one who lived through the events about which she testified. All of the incidents in the last few years of her employment in Mediation Services were very personal and stamped with ambiguity, disappointment and extreme tragedy

[201] Ms. Cowling’s testimony was internally consistent as well as consistent with the documentary evidence. Her evidence as to what she was told by Mr. Kennedy and Mr. Mitchell is consistent with their evidence on this point. Her evidence with respect to the interview for the LRO 2 position is also consistent with the evidence of the interview panel and the documentation tendered at the hearing. Her testimony also fits into what the balance of the evidence dictates is the most probable series of events as a whole. Her evidence was credible and her demeanour was assured yet she was prepared to reasonably concede some potential questions whenever Alberta’s counsel proposed scenarios that may have differed from her observations.

[202] Ms. Cowling’s credibility was further amplified by the fact she happens to be an avid note taker as shown in her evidence, consequently the contemporaneous notes she took during a number of the meetings she had with supervisors were helpful in refreshing her memory. While I recognize that this evidence is not independent, the notes taken at the time were consistent with her evidence, and consistent with the documentary evidence.

[203] The witnesses who testified on behalf of Alberta, provided tentative and somewhat disparate evidence throughout most of the hearing. Given the distance in time since this matter started and developed, this tentativeness and disparity can be explained to some extent by memory gaps and, in the case of the human resource witnesses, the limited or lack of direct involvement with the incidents set out in Ms. Cowling’s complaint.

[204] However, I do have some concern with the evidence from some of Alberta's witnesses in that the evidence of these witnesses is not consistent with the written documentation at the time. As indicated earlier, I do not find the reasons put forward by the respondent as to why Ms. Cowling was not seriously considered for the LRO 2 job as consistent with the requirements of the position as set out in the documentation. Indeed, as previously noted, the documentation outlining the job description did not even indicate mediation experience as a requirement. Ms. Cowling's written job performances as fully meeting expectations including personal suitability factors, also contrasted with Mr. Kennedy's and Mr. Mitchell's oral testimony that she would not be a good "fit," given the similarities in the two positions. I am unable to accept the contention of Alberta's witnesses that age discrimination did not play a part in the refusal to hire Ms. Cowling.

[205] While generally informative of provincial government human resources policies and the LRO 2 and LRO 3 position and the similarity of qualifications required for both, Ms. Harris was cautious in her testimony as she explained her limited role regarding her involvement in the dispute between Alberta and Ms. Cowling. Her recollection of events was speculative and vague and understandably, given the years since the events occurred. Ms. Harris indicated that she operated as a consultant providing a service to the departmental branches during the events between Alberta and Ms. Cowling. Ms. Harris was careful to frequently note that she served the needs of the branches in the department but was not involved in decision making regarding the changes requested by the Mediation Services Branch. Most of her testimony involved information about Alberta's policies and guidelines and her support for these policies and guidelines as required of her role as a human resource professional in the department. While Ms. Harris was involved in the interview panel and was in my view, incongruously upset by Ms. Cowling's question regarding the key factors in suitability for the position, Ms. Harris made it clear that she was not directly involved in determining Ms. Cowling's fate but rather merely provided a service and upheld departmental policies.

[206] I also note that the remainder of the witnesses for the respondent, notably Ms. Thompson and Ms. Camminatore were more involved with policy, staffing, recruiting and other human resource issues, consequently, they were not in a position to provide first hand support for Alberta's position that there was no age discrimination involved in the expulsion of Ms. Cowling from Mediation Services. Ms. Camminatore spoke only to the issue of possible mitigation, should discrimination be found.

The Complainant has established Discrimination on the Balance of Probabilities

[207] In my view, Ms. Cowling's evidence and the evidence of Alberta's witnesses as well as the plans and documentation prepared for this restructure, all strongly support a finding of age discrimination.

[208] I find that the LRO 2 position was really the same job but was going to be underfilled and offered to someone who in order to meet the longer term service requirement demanded by Mr. Kennedy, would have to be younger than Ms. Cowling. I

find that Ms. Cowling was not seriously considered for the position right from the very beginning. Again, while I acknowledge that organizations are free to restructure they cannot, without legal justification, deny continued employment either in whole or in part on the basis of age. In this case, a restructuring occurred wherein Ms. Cowling, a woman past the historical age of retirement, was denied continued employment either in whole or in part due to her age. Ms. Cowling met the qualifications and clearly could “grow and develop” with respect to any mediation requirements but was not allowed to continue in her position because of her age, as the Respondent wanted someone who, in a younger age bracket, could ostensibly attend at the job for a longer period of time.

[209] Alberta’s counsel referred to a 2004 Alberta Court of Appeal case, *U.N.A., Local 33 v. Capital Health Authority (U.N.A.)*.⁵ In this case, an arbitration board determined that the decision by the respondent, Capital Health Authority, was reasonable in that it refused to train the appellant, Ms. Brake, after having determined that she was unsuitable to perform the work she was applying to do. It is important to note that in *U.N.A.* that there was clear requirements for the work in which Ms. Brake was applying to do, requirements which Ms. Brake did not possess. It is also clear in the *U.N.A.* case that Ms. Brake was fairly assessed as being unsuitable regarding the work she was applying to do.

[210] In Ms. Cowling’s situation, the evidence did not support that hands on mediation was a required component of the job. Further, the evidence supports that Ms. Cowling, with her strong job performance to date and qualifications and experience, was suitable to be trained as a mediator but was unfairly denied that opportunity. Lastly, another distinction in the *U.N.A.* case is that the appellant was observed, interviewed and assessed by two individuals who were highly experienced and qualified to determine the appellant’s suitability. With respect, the individuals who assessed Ms. Cowling’s abilities and suitability as a mediator in the LRO 2 position had limited expertise especially in assessing Ms. Cowling’s mediation abilities (which Alberta submitted was an essential requirement for the position). Ms. Harris was a Human Resource consultant with no expertise in mediation. In his testimony, Mr. Mitchell admitted he had never even done mediation. Mr. Hill’s evidence revealed that he was not convinced that Ms. Cowling was unsuitable for the job but appeared to go along with the views of the other two panel members.

[211] Throughout her years of employment in Mediation Services, the evidence demonstrated that Ms. Cowling made considerable efforts to show her willingness to meet and exceed the requirements of the work she was doing. She was energetic in trying to elevate her skills as a mediator by taking courses, remaining current and retaining her professional designations. There is no evidence that Ms. Cowling could not have met any hands on mediation needs of the branch or be a part of longer term or developmental planning. If transition or succession planning is to occur within an

⁵ *U.N.A., Local 33 v. Capital Health Authority*, 2004 ABCA 401, 2004 Carswell Alta 1707, at paras. 7, 41, lv. to appeal to SCC den. [2005] S.C.C.A. No. 73.

organization, Alberta's human rights legislation dictates that, without clear justification, this kind of planning cannot discount or undervalue the growth potential of faithful, qualified and performing employees who happen to be in an older age bracket.

[212] The failure to renew Ms. Cowling's contract, the creation of the LRO 2 position which very closely resembled the requirements of Ms. Cowling's LRO 3 position and which was characterized as meeting the needs over the "long term" (meaning in Mr. Kennedy's evidence 5, 10 or 15 years), the failure to consider Ms. Cowling as a legitimate candidate right at the beginning of the process for this position without sufficient justification, the documentation which describes a "new professional" as opposed to a new position, the redefinition and renaming of the LRO 3 position as labour relations advisor with Ms. Cowling listed as an incumbent, all combined with the denial of employment in May 2007 to Ms. Cowling at Ms. Cowling's advanced age, support a finding of a contravention of s. 7 of the Act on the grounds of age.

[213] The complainant has established *prima facie* discrimination on the basis of age and a credible explanation has not been provided by the respondent. I find that the complainant has, on the balance of probabilities, established a contravention of the Act on the ground of age in the area of employment pursuant to s. 7.

[214] In terms of the alleged contravention of section 8 of the Act, discrimination in the area of applications and advertisements in employment, the documentation used in the interview process did not directly or indirectly specify a limitation, specification or preference indicating discrimination on the basis of age. While the language used by Mr. Kennedy and Mr. Mitchell both in their testimony and in the documentation emphasizing "growth" and "development" and services in the "long term" can, in certain circumstances and context, act to discriminate against older employees, this language was not used in any form of application for employment as required under s. 8. As such, there is no contravention of the Act pursuant to s. 8.

Remedy

[215] The Act provides

32(1) A human rights tribunal:

(b) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

- (i) to cease the contravention complained of;*
- (ii) to refrain in the future from committing the same or any similar contravention;*

- (iii) *to make available to the person dealt with contrary to this Act the rights, opportunities or privileges that person was denied contrary to this Act;*
- (iv) *to compensate the person dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act;*
- (v) *to take any other action the tribunal considers proper to place the person dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act.*

(2) A human rights tribunal may make any order as to costs that it considers appropriate

Mitigation

[216] Ms. Cowling testified regarding her efforts to find employment after the end of her employment as an LRO 3 in Mediation Services and after her failed attempt to remain in the branch as an LRO 2 employee. Ms. Cowling was 67 years old at that time. As a professional, she had a network of former colleagues and friends who she contacted to let them know that she was looking for employment. Apart from the LRO 2 competition, she applied for a number of positions in government but did not receive any replies. There was one position that she appeared to be considered for but it appeared that once her age was determined through a variety of methods, the offer to meet was rescinded. She attended alumni functions and professional functions to circulate her resume and enhance her potential for employment but nothing materialized. (Exhibit 1, Tab. L-1) Ms. Cowling also resuscitated a consulting company and attempted to retain contracts; however, this was ultimately unsuccessful.

[217] Alberta provided lists of Human Resources Institute of Alberta job postings as well as a list of Government of Alberta open postings during the time Ms. Cowling was searching for employment. Alberta argued that Ms. Cowling should have applied for these positions and may have been successful in obtaining these positions if she had applied for all of them. The evidence on this point, however, provided by Ms. Camminatore with respect to whether Ms. Cowling would have been successful in these positions, was speculative. Clearly, having minimum requirements for a government job does not guarantee a successful application and, in her testimony, Ms. Camminatore agreed with that conclusion.

[218] The Government of Alberta undertook a research study entitled “Engaging the Mature Worker” that concluded that “although mature workers have lower unemployment rates than younger cohorts, they tend to have longer durations of unemployment once they do become unemployed. Re-entry can be difficult with

workers needing to adjust to the challenges of job search and potential employer misperceptions about mature workers.” (Exhibit 8)

[219] Ms. Cowling demonstrated throughout her evidence that she wanted to be employed and was willing to take a lower level and lower paying job in order to remain in the work force and to contribute according to her skills and qualifications. She made it clear that neither she nor her deceased husband had acquired pensions during their years of employment and that she needed and loved her work.

[220] I am satisfied that Ms. Cowling attempted to appropriately mitigate her losses by seeking employment. Ms. Cowling’s experiences did not show lack of effort or diligence in attempting to reenter the workforce. Rather her experiences emphasize the challenges faced by mature workers such as Ms. Cowling.

Reinstatement As Remedy

[221] Reinstatement has been requested by Ms. Cowling. The respondent has commented in its Further Submissions and Authorities dated June 11, 2012 that “Reinstatement is not a realistic option at this point.” The reasoning offered by the respondent is that the Complainant requested reinstatement to a permanent manager 2 position and that this “would amount to a promotion of two levels and the conversion of Ms. Cowling’s contract status into a permanent position.” In fact, the complainant has made a reasonable request that she be reinstated to a position similar to that which she held for eight years in Alberta Employment and Immigration or elsewhere in the Government of Alberta as a labour relations officer or a comparable position at a comparable salary level. (Complainant’s Submissions and Authorities, dated March 23, 2012)

[222] The traditional inclination would be that reinstatement is not a workable solution. However, the particular facts of this case support that reinstatement is appropriate and the best way, consistent with human rights principles, to satisfactorily place Ms. Cowling in the position she would have been in but for the discrimination.

[223] First, despite the fact that Ms. Cowling was hurt by the actions of Alberta, she does not seem to harbor any ill will to the extent that it would affect her being employed once again for Alberta. Similarly, Alberta’s witnesses do not seem to harbor any animosity towards Ms. Cowling by virtue of the litigation. The trust essential in employment relationships does not appear to be irrevocably damaged by this litigation.

[224] Secondly, the evidence indicated that there is currently an opening in the Mediation Services Branch. Ms. Cowling’s LRO 3 position was reengineered by the Mediation Services Branch into a management position designated as labour relations advisor after her employment ended in May 2007. The evidence indicates that this position is currently open.

[225] Thirdly, even if there was ill will towards Ms. Cowling in the Mediation Services Branch, the government has a large and varied workforce and there is opportunity for Ms. Cowling to be placed in a setting outside the Mediation Services Branch.

[226] Fourthly, there were no work performance issues with Ms. Cowling. Ms. Cowling received very strong performance assessments.

[227] Lastly, Ms. Cowling continues to be unemployed at the time of the hearing. Every indication is that Ms. Cowling is an excellent candidate to continue to be engaged in the Alberta government workforce. Ms. Cowling is clearly willing, able and very capable of working still today.

[228] I am further supported in my decision that reinstatement is appropriate given the information tendered at the hearing regarding the Alberta government's initiative "Engaging the Mature Worker." This research initiative encourages mature workers to continue to contribute to the province's workforce as part of Alberta's ten-year strategy in "Building and Educating Tomorrow's Workforce." (Exhibits 7 and 8)

[229] The following are excerpts from the Alberta Government's Action Plan regarding retention of mature workers:

In 2006, the Government of Alberta acknowledged the need to increase the labour force participation of mature workers in its comprehensive labour force strategy, 'Building and Educating Tomorrow's Workforce' (BETW). Between October 2007 and February 2008 an online public consultation on Alberta's aging workforce gathered input from Albertans on their priorities, issues and experience with an aging workforce. Following this, government has developed an action plan to support increased labour force participation of mature workers. The action plan is based on the following assumptions:

With the aging population, increasing mature worker labour force participation may be important for improving productivity and encouraging economic growth. Mature workers have identifiable work-related needs, such as the need for increased flexibility, which are not being fully addressed. Market forces and employer practices will have a positive influence on increasing the workforce participation of mature workers; however, policy changes may be necessary to remove some barriers and to sustain strong labour market participation. (Exhibit 8, page 2)

Developing supports for hiring and retaining mature workers and promoting investment in our human resources will take the cooperation of all partners; in particular employers, industry leaders, training providers, government and individual workers. As partners work together, a new map of the working world is being created – one in which employers recognize that mature workers are among their most valuable assets, and

mature workers continue to demonstrate their value, potential and ability to contribute. (Exhibit 8, page 3)

[230] Clearly, notwithstanding the action of Ms. Cowling's supervisors, the Alberta Government wishes to retain mature workers and not squeeze them out to be replaced by young workers who require mentoring as well as transfer of corporate memory. The existence of this innovative and progressive approach by the Alberta Government is consistent with an order of reinstatement and Ms. Cowling's return back into Alberta's workplace.

[231] I did consider that Ms. Cowling's employment was through contract which is more tenuous than permanent employment and will address this through the lost wages award. However, it remains that if the respondent had not sought to replace Ms. Cowling with a younger employee who was in a position to continue services for the branch "long term," Ms. Cowling would very likely have continued in her position at the LRO 3 wage rate pursuant to a renewed contract.

Lost Wages

[232] In terms of lost wages, as noted in the recent case of *Walsh v Mobil Oil Canada*⁶:

[76] While the tribunal has a broad discretion to make an order for compensation for "any or all" wages lost, this discretion must be practiced on a principled basis: Chopra at para. 37.

[101] In fact, Chopra recognizes that the fact that foreseeability may not be an appropriate device for limiting loss does not mean that liability for loss is unlimited, commenting at para. 37 that "(t)here must be a causal link between the discriminatory practice and the loss claimed".

[233] There is no question in my mind that there is a strong causal link between the discriminatory practice and the loss claimed by the complainant. However, in exercising my discretion I recognize that while Ms. Cowling's employment contract was renewed consistently for a long period of time, her employment was by way of contract and not permanent employment. Accordingly, while Ms. Cowling has been out of work from May 5, 2007 and continues to be out of work as of the date of the hearing in April 2012, a period of five years, and normally would be entitled to lost wages for that time period, I have discounted the award by 30 per cent to recognize the more tenuous nature of a contract position.

General Damages for Injury to Dignity, Self Respect and Pain and Suffering

[234] In her testimony Ms. Cowling explained the grief, loss of dignity and self esteem she experienced following her release from Mediation Services, her difficult search for

⁶ *Walsh v Mobil Oil Canada (Exxmobil Canada Ltd.)*, 2012 ABQB 527

employment and the discrimination attached to her circumstances because of her age. In her testimony, Ms. Cowling made it clear that the impact of being unemployed and refused employment in the Alberta branch she had successfully worked in for eight years was humiliating and devastating for her.

[235] In *Arunachalam v. Best Buy Canada Ltd.*,⁷ the Ontario Human Rights Tribunal spoke about the importance of acknowledging injuries which are not related to financial losses but that are, nonetheless important to recognize because of the immeasurable harm that is cast on a complainant emotionally and psychologically.

[236] In the decision, *Jonathan Simpson v. Oil City Hospitality Group Inc., 1260055 Alberta Limited operating as Oil City Roadhouse*,⁸ Tribunal member McFetridge stated, with regard to potential general damages awarded in cases of injury to dignity, that the “consequences of the respondent’s violation of the Act should be recognized though a significant award of general damages.”

[237] I also subscribe to Tribunal member McFetridge’s determination that injury to dignity and all that encompasses, should be compensated in a manner that will provide “real redress to the complainant and encourage respect for the principles set out in the legislation.”

[238] Considering all that Ms. Cowling was subjected to by her employer during the final years of her employment in Alberta’s Mediation Services, an award of \$15,000.00 is appropriate for the significant injury to Ms. Cowling’s dignity and self esteem.

Order

[239] I ORDER:

1. The respondent to reinstate the complainant, on a one year contract, either, at the Complainant’s choice, to her previous position in Mediation Services, or to a comparable contract position in the Government of Alberta as a labour relations officer 3 or a comparable position at a comparable salary level, at the earliest opportunity. After the expiration of the one-year contract, Alberta can determine the need for Ms. Cowling’s services; however Ms. Cowling’s age cannot be a factor in future decisions not to renew her contract.
2. Salary compensation representing wages for five years from May 5, 2007, but discounted at a rate of 30 per cent. The amount of salary

⁷ *Arunachalam v. Best Buy Canada Ltd.* 2010 HRTO 1880

⁸ *Jonathan Simpson v. Oil City Hospitality Group Inc., 1260055 Alberta Limited operating as Oil City Roadhouse*, 2012 AHRC 8, para.,67

compensation is to be calculated at the rate of the advertised LRO 3 position, subject to normal statutory deductions.

3. General damages in the amount of \$15,000.00.
4. Interest on both sets of damages from May 5, 2007 for a period of five years pursuant to the *Judgment Interest Act*.⁹
5. I also award costs on a party/party basis pursuant to Schedule C, Column 2 of the *Alberta Rules of Court*.

[240] I have confidence that counsel can come to an agreement in terms of the actual dollar figure for remedy, interest and costs but I retain jurisdiction to address these issues, as well as any issues arising out of the reinstatement order, if agreement cannot be reached within 180 days of this decision.

[241] I thank counsel for their able submissions, their cooperation and their exemplary conduct throughout the proceedings.

December 13, 2012

Shirley Heafey, B.A., LL.B.
Tribunal Chair

⁹ *Judgment Interest Act* Revised Statutes of Alberta 2000 Chapter J-1

Appearances

Ms. Gwen Gray, Q.C., Legal Counsel
for the Complainant Joan Cowling

Mr. Sean McDonough, Legal Counsel
for the Respondent Alberta Employment and Immigration

Ms. Sarah Dolgoy, Legal Counsel
for the Respondent Alberta Employment and Immigration