



so. This Board of Inquiry is satisfied that it has the jurisdiction to proceed in such a fashion on the basis of the consent of the parties and its jurisdiction to govern its own procedure.

2. Mr. Howe, the Complainant in this matter, was not represented by counsel. However, he was afforded an opportunity to ask questions and otherwise participate in the hearing as an independent party. His submissions were further supported by that of the Newfoundland and Labrador Human Rights Commission, represented by Ms. Strong.
3. This Inquiry concerns two separate incidents of alleged discrimination. In January 2013, Mr. Howe applied for temporary employment with Talon Energy Services Incorporated ("Talon"). In February 2013, Mr. Howe applied for a position with KBAC Constructors ("KBAC"). In each case, he was directed by the potential employer to undergo drug and alcohol and medical testing which was to be conducted by the Respondent, SureHire. In each case, Mr. Howe was denied employment as a result of the reports generated by SureHire following the medical testing. Mr. Howe alleges that he was the victim of discrimination by SureHire and that this discrimination resulted in the loss of potential employment and injury to his dignity.
4. On May 9, 2013, Mr. Howe filed a complaint with Newfoundland and Labrador Human Rights Commission alleging that SureHire, KBAC and Talon had discriminated against him on the basis of perceived disability, contrary to Section 14 of the *Human Rights Act, 2010*. The potential employers, Talon and KBAC, were originally respondents in the complaint filed by Mr. Howe. However, they did not participate in this hearing. The Board of Inquiry was advised that a settlement had been reached among those parties prior to the hearing.

## Summary of the Evidence

### **Mr. Leo Howe**

5. Mr. Howe is an industrious person proficient in a variety of trades. He is a hard worker who takes pride in his ability to work. He testified that he has been working since the age of 16. He detailed for the Board of Inquiry his prolific work history dating back to the 1970s. Mr. Howe has been gainfully employed as a carpenter, insulator and in other trades for his entire adult life.
  
6. Mr. Howe testified that he was born with a club foot, having corrective surgery for same when he was four years old. He demonstrated for the Board of Inquiry how, as a result, he has a significant decrease in range of motion in his right ankle. Despite this disability, however, Mr. Howe had never had any difficulty performing his duties on the job. Prior to January 2013 he had ever been denied employment.
  
7. In January 2013 he applied for a job with Talon as a carpenter at a worksite in Bull Arm, NL. As part of the pre-employment screening process required by Talon, Mr. Howe was directed to attend for medical testing to be conducted by SureHire. He attended SureHire in St. John's on January 15, 2013 for his pre-employment medical testing. During a pre-test screening, Mr. Howe's blood pressure was found to be too high to conduct the testing based on SureHire's policy. As such, he was directed to his family physician to obtain clearance to complete the testing. Mr. Howe's family physician returned a note to SureHire confirming that Mr. Howe was clear to undergo SureHire testing despite the blood pressure readings. Mr. Howe returned to SureHire on January 17, 2013 at which time he completed a document detailing his medical history and underwent a musculoskeletal analysis followed by strength and mobility testing. Mr. Howe completed all the required testing and indicated he was not advised of the result of the testing.

8. In February 2013, Mr. Howe was referred by his union for a job with KBAC Construction at their worksite in Long Harbour, NL. As with the hiring process he underwent with Talon, he was required to have a fit-for-work assessment performed by ShireHire. The report KBAC received from SureHire indicated that Mr. Howe's performance on the testing was at a "Level 4", meaning that an internal review would be necessary to clear Mr. Howe for work. Mr. Howe submitted a letter from his physician purportedly clearing him for work. However, the call for work was cancelled before the internal review could be completed.
9. Mr. Howe testified that he had not heard back from Talon for some time after the medical testing. He called Talon and was advised that he would not be hired. He states that he was told that the medical report suggested that he could not walk on slippery floors, climb ladders, squat or go into confined spaces. He was advised he was not fit for work. He testified that he was "surprised" and "very distraught" when advised of this. Mr. Howe was not hired for this position.

### **Ashley Hiscock**

10. Ms. Hiscock was employed by SureHire between 2011 and 2015. She is a Certified Athletic Therapist who worked as a Medical Assessor for SureHire. In essence, her job was to take and review a "donor's" medical history (SureHire refers to the prospective employees they assess as "donors") and to determine whether a donor could safely undergo SureHire's fitness to work testing.
11. Ms. Hiscock saw Mr. Howe during the January 2013 visit to the SureHire office. She testified that she completed the necessary screening tests to ensure Mr. Howe was safe to complete the medical testing. This screening included a blood pressure and oxygen saturation test, grip strength test, medical history review and musculoskeletal

examination. After conducting this review, Mr. Howe was immediately seen by Mr. Ryan Douglas<sup>1</sup>.

12. Ms. Hiscock saw Mr. Howe again on February 7, 2013 when he attended for his medical assessment for the KBAC position. The tests required by the employer on this date were slightly different in that they did not involve strength and mobility testing. At this time, Ms. Hiscock conducted the same musculoskeletal analysis she had previously conducted on Mr. Howe for the Talon position and, contrary to her view that the musculoskeletal analysis was within normal limits with respect to the Talon position, found that on this occasion his musculoskeletal exam was “abnormal”. Ms. Hiscock explained this apparent difference in reporting by stating that she reported an abnormal medical in February 2013 because no further testing had been scheduled. She testified that had she just been doing a “screening test” with further testing to follow, as she did for the Talon position, she likely would have cleared Mr. Howe for testing. Her report indicates that Mr. Howe received an abnormal medical due to a permanent disability of his right foot. She reported her objective findings that this caused issues with his range of motion, balance and ability to crouch or squat.
13. Ms. Hiscock testified that she was not testing Mr. Howe on either occasion for his fitness to perform the specific work indicated by the employer. She advised that her role was merely to report her objective findings to the medical review team located in the Province of Alberta. The final report on a donor’s performance was done by that team. Ms. Hiscock testified that she did not know the specific job requirements of either of the positions Mr. Howe had applied for and also could not comment on the scale for reporting used by SureHire to report a donor’s performance on the testing to the prospective employer.

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<sup>1</sup> On all exhibits filed, Mr. Douglas’ name is listed as Ryan Herritt. Mr. Douglas testified that he was formerly known as Ryan Herritt and has had a legal name change since the time he signed these documents.

14. Ms. Hiscock had no part in selecting what tests a donor would undergo or setting any particular standard for performance on any of the tests. A donor's appointment was simply listed on her schedule along with a code which instructed her which tests to perform that day. The bookings were made by SureHire's head office in Alberta, who provided the instructions as to what type of testing was being requested.

### **Ryan Douglas**

15. Mr. Douglas is currently the National Network Co-ordinator for SureHire. In January 2013, he worked for SureHire in St. John's, NL doing the lifting components of pre-employment testing along with drug and alcohol testing. He is a personal trainer, fitness instructor and nutrition specialist by trade. Mr. Douglas' only involvement with Mr. Howe was with respect to the strength and mobility testing completed on January 17, 2013. Mr. Douglas testified that his role was to conduct various strength and mobility tests on a donor in accordance with the specifications set out by SureHire. The Board of Inquiry had an opportunity to review the documents Mr. Douglas was required to fill out in the course of his examinations. The instructions contained in the document with respect to each test were very detailed and even included a script which was to be read to each donor prior to a specific portion of the test. Mr. Douglas was required to monitor the donor's heart rate and oxygen saturation during the testing period and recovery period, record the readings and report whether the donor had completed the test or was required to stop before the test was completed. The various strength and mobility tests conducted on Mr. Howe included a floor to waist lift, waist to waist lift, one hand lift, overhead lift, long carry, sustained kneel, sustained crouch and sustained truck flexion test.
16. Mr. Douglas testified that Mr. Howe successfully completed each component of the testing without having to be stopped. He states that this, however, is not the end of his duties. In addition to informing the medical review team as to whether a donor was able to complete the test, he is also instructed to provide as much information as possible

about the donor's performance in the testing. The decision as to whether a person "passes" their SureHire medical test is not Mr. Douglas'. That decision is made by the medical review team upon review of all the documents and information submitted.

17. Mr. Douglas' evidence was that while Mr. Howe had *completed* each of the tests he was asked to perform, his performance in the sustained crouch and his overall cardiovascular performance were quite poor. He detailed these concerns in the "critical strength and mobility comments and information" section of the form he was asked to complete for SureHire. He testified that while he wrote in the comment section "in my opinion, this person is not fit to be on a job site, accident waiting to happen", he was never asked to provide an opinion. It was not his job to make that determination. He testified that it is not his role to determine whether a person passes or fails their medical test. His only role is to indicate to SureHire whether or not a donor had made it through to the end of testing without a stoppage and to provide details as to the donor's performance during the test.
18. On cross examination, Mr. Douglas testified that he had nothing to do with ranking people on the various levels of fitness which would be reported by SureHire to the employer. His role was merely to perform the tests which were specified in the work order which accompanied the donor's appointment. The tests were designed by SureHire. However, it was left to the employer to select which type of testing they wished to have their employees undergo. SureHire was not in the business of setting physical fitness standards for specific jobs or work sites. SureHire's role was to measure the performance of the donor against the standard of the particular test.

### **Jill Andrews**

19. Ms. Andrews has been employed by Talon Energy Services Inc. in various positions for approximately twelve years. She is currently the manager of Corporate Services. In January 2013 she was the Operations Manager who, among other things, was responsible for hiring and laying off employees on various projects. She explained that the process

for hiring workers was that she would put out a call to the Union to provide a certain number of workers in various trades. The Union would respond with referrals. She would then set up an appointment for each prospective employee with SureHire to have medical testing completed. She testified that the site access requirements as regards physical fitness were not set by Talon but were dictated by the owner of the site. Talon was using SureHire for pre-employment testing because it was dictated to do so by KKC, a company with whom they were sub-contracted to do work on the site. She testified that to her knowledge, Talon never used SureHire before this particular project.

20. Ms. Andrews testified that when setting up appointments, she would send a request to SureHire online and provide the prospective employee's address and the site on which the work was being done. She explained that by providing the identity of the work site, SureHire would know what type of testing needed to be done. She was clear in her evidence that the request for testing was based on the job site requirements and that Talon didn't determine the requirements as regards physical fitness to obtain work on a particular job site. All she had to do was to provide proof to SureHire that Talon was contracted to perform work on a particular site and that SureHire would have been familiar with the specific site access requirements of that site.
21. Ms. Andrews testified that after SureHire had performed medical testing on Mr. Howe, she received a report (a copy of which is contained in Consent #1 at Tab 5) indicating the following:

"Leo How successfully completed the following test(s):

Fit for Duty

Level 3 – 50 LB Physical"

22. Ms. Andrews testified that SureHire ranked the performance of prospective employees on a scale of 1 to 5 following the medical test. A document purported to be the "Fitness to Work Assessment Scale" used by SureHire was entered into evidence as Consent 1, Tab

3. However, none of the witnesses who testified could identify the document as being such. In any event, Ms. Andrews testified that she was aware that there were five levels of performance which were regularly reported by SureHire, Level 1 being the best performance and Level 5 being the worst. She testified that prospective employees receiving a Level 1 grade would be hired provided all other aspects of their application were in order. Prospective employees receiving a Level 2 grade would require further approval from the site owner. If a prospective employee receives a Level 3, 4 or 5 designation, the prospective employee would be advised that they didn't pass their medical to the standards required by the site owner and were therefore denied employment.
23. Ms. Andrews testified that Talon never did any of its own medical testing and always contracted out that work. She testified that Talon doesn't set out the standards required for employment as regards medical or physical fitness. Further, she indicated that Talon relied upon SureHire to make the determination as to whether a prospective employee met those standards which were set out by the site owner. She did not provide any evidence as to whether Talon would conduct any further additional testing of a person's physical fitness for work if a Level 3, 4 or 5 were reported by SureHire. On cross examination she confirmed that SureHire did not set the medical or physical fitness standards for employment.

**Dominique Martin**

24. Ms. Martin has been employed by Kewitt since 2009. In 2013 she was employed by Kewitt, but assigned to work as a Labour Relations Co-ordinator on a KBAC project. This was the project for which Mr. Howe applied for employment in February 2013. In her role as Labour Relations Co-Ordinator, Ms. Martin was responsible for, among other things, recruiting and onboarding workers for KBAC. She testified that with respect to her dealings with SureHire, her role was simply to arrange for the prospective employee to attend for drug and alcohol testing and medical testing. She would provide SureHire with

a list of the names of people who would require testing, their trade and location. She did not have any knowledge of the specific testing which SureHire would undertake and relied upon SureHire to do whatever the appropriate testing was for the specific job at the specific work site. The site access requirement standards were set by the site owner. She assumes there is some form of agreement between the site owner and SureHire, but she cannot confirm that such an agreement exists.

25. She testified that SureHire would report a ranking between Level 1 and Level 5 with respect to each prospective employee's performance on the medical testing. If the employee received a Level 1 grade, the prospective employee would be hired, provided the remainder of the employment requirements were met. If a prospective employee received a Grade of 2, 3, 4 or 5, KBAC would conduct an internal review in which it would attempt to see whether the prospective employee could nevertheless be provided with clearance upon the provision of additional information or medical opinion.
26. Ms. Martin testified that SureHire's report relating to Mr. Howe graded him as a "Level 4". In accordance with its policy for internal review, Ms. Martin received from Mr. Howe a letter from his physician reportedly clearing him for work despite the grade he received on the SureHire test. However, she testified that shortly after receiving this clearance letter, the call for work was cancelled, so Mr. Howe was no longer required for work. As a result, KBAC did not proceed with an internal review of Mr. Howe's physical fitness at that time.

**Law: Motions for Non-Suit**

27. On July 26<sup>th</sup>, 2017, after the Complainant and the Commission had closed their cases, the Respondent made a motion for non-suit. After some discussion and review of various cases provided by the Respondent, I indicated that I would, as requested by the Respondent and consented to by the Complainant and the Commission, hear the motion

without requiring the Respondent to elect first as to whether they would be calling evidence and without precluding the Respondent from giving evidence if their motion failed.

28. It is important to note that on a motion for non-suit, the quality of the evidence is not to be weighed. If there is some evidence that a reasonable trier of fact could believe and accept to establish the complaint alleged, then a *prima facie* case has been made out and the motion should be dismissed. The approach to motions for non-suit in the context of Human Rights complaints alleging discrimination was discussed in *Gerin and Eaton v. I.M.P. Group Limited Malone, Boucher and Radcliffe*, (1994) 24 C.H.R.R. D/449 (N.S. Bd. Inq.) at paragraphs 12-13:

I start my explanation for this view by noting that both counsel and authorities agree that the test on a motion for non-suit is whether the complainants have made out a *prima facie* case. However, the rub comes in understanding what this test, a *prima facie* case, means and how it is applied in the context of a Human Rights Board of Inquiry.

29. Beatrice Vizkelety in *Proving Discrimination in Canada* (Toronto: Carswell, 1987) discusses this issue at pp. 109-110. She notes that the expression *prima facie* evidence can mean one of two things:

[I]n the first sense, *prima facie* evidence means that a party's case has been taken out of the realm of conjecture and that his "evidence in support of an issue is sufficiently weighty to entitle a reasonable man to decide the issue in his favour, although, as a matter of common sense, he is not obliged to do so"; in the second sense, *prima facie* evidence represents the next degree of cogency "where a party's evidence in support of an issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence.

30. Vizkelety then suggests that it is the first sense noted above which is appropriate on a motion for non-suit in a discrimination case:

A *prima facie* case in the first sense is the degree of cogency that is usually required to avoid having the action dismissed at the close of the complainant's case pursuant to a non-suit motion by the respondent, in other words, it is the degree of evidence necessary to get to the fact finder in the first place.

31. The proper approach to motions for non-suit was also discussed in the text *Administrative Law in Canada* (Toronto: Butterworths 1992) at pp. 42-43. In referring to the standard of proof to be applied at this stage, the author writes:

This is a lower standard than the balance of probabilities applied when finally deciding whether the burden of proof has been met. Reviewing the evidence in a light most favourable to the party who presented it, if there is some evidence, however weak, in support of the case, a *prima facie* case has been made out. Credibility of witnesses and weight of evidence is not considered at this stage.

32. In its motion for non-suit, the Respondent states that the Complainant and Commission have failed to establish a *prima facie* case with respect to two issues it is required to prove: (1) that SureHire was the complainant's employer, or acting on behalf of the employer; and (2) that SureHire discriminated against Mr. Howe.
33. Section 14(1) of the *Human Rights Act, 2010*, S.N.L. 2010 c. H-13.1, as amended, is the governing legislation with respect to the first issue. It reads as follows:

S. 14(1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment on the basis of a prohibited ground of discrimination, or because of a conviction for an offence that is unrelated to the employment of the person.

34. SureHire was not acting as Mr. Howe's employer or prospective employer. The Respondent, however, contends that neither is there any evidence that SureHire as "acting on behalf of" either Talon or KBAC when it performed the pre-employment testing on Mr. Howe. In its argument, the Respondent referred the Board of Inquiry to the

interpretation of this phrase from Section 14(1) of the *Act* in the decision of *Prior v. Newfoundland (Department of Health)*, (1996) 25 C.H.R.R. D/268 (N.L. Bd. Inq.) where at paragraphs 85 and 86 the Board of Inquiry stated:

The adjudicator is satisfied that the language of Section 9 of the Code contemplates an agency relationship wherein an employer delegates some of his powers regarding terms and conditions of employment to the agent, who exercises them on his behalf. ...

The respondents submit that control over the agent is a requisite element in the agency relationship ... the adjudicator finds that, as a minimum, “a person acting on behalf of an employer” must be part of the “controlling mind” of the employer, such that their intentions and actions can be said to be those of the employer. In the case at bar, there is no evidence that the respondents are acting by virtue of any authority conferred by the patient-employer.

35. The Commission, on the other hand, argues that the Board ought to take a broad, purposive and remedial approach to the interpretation of this portion of legislation. It further points out, and I agree, that I am not bound by the decision in *Prior*. It argues that it is open for the Board of Inquiry to find that SureHire was acting “on behalf of” Talon and/or KBAC despite the absence of an agency relationship or any evidence to suggest that it was part of the “controlling mind” of either employer or exercising any authority over Mr. Howe in regard to his potential employment.
36. The evidence before the Board of Inquiry is that SureHire was performing a service for the employer. That is, SureHire provided the medical expertise to conduct pre-employment screening of potential employees. Neither the Commission nor the Complainant presented any evidence indicating that SureHire had been given authority to make any decisions with respect to the standard a particular employee was required to meet in order to be hired. Nor is there any evidence that SureHire had the authority to decide whether a prospective employee would or would not be hired based on their performance in the medical testing.

37. The evidence before the Board of Inquiry is that SureHire offered employers a variety of options in terms of specific types of tests it could ask SureHire to perform on its prospective employees. These tests were developed by SureHire. However, there is no evidence that the tests were designed by SureHire specifically as screening tools for the particular jobs Mr. Howe applied for. The tests were not “pass/fail”. Rather, a prospective employee’s performance on the testing overall was reported back to the employer on a scale of 1 to 5. It was left to the employer to decide what to do with these results. The evidence before the Board of Inquiry is that Talon would immediately proceed to hiring those individuals who scored a Level 1 and would seek clearance from the owner of the job site for those individuals who scored a Level 2. Those individuals scoring 3, 4 or 5 on the test would be advised that they were not cleared medically to work on the job site. There is no evidence to suggest that this decision was SureHire’s. KBAC took a different approach in applying the results of the testing reported by SureHire. KBAC would immediately proceed to hiring those individuals who scored Level 1 and would conduct their own internal fitness assessment/review for those individuals who scored Levels 2, 3, 4 or 5. As with Talon, the Board of Inquiry was not presented with any evidence indicating that SureHire had been conferred with any authority by KBAC to make any decisions in regard to Mr. Howe’s prospective employment.
38. While I agree with the Commission that the categories of relationships which might be classified as a party acting “on behalf of an employer” are not necessarily closed, the language of this section cannot be interpreted to extend so far as to capture a party who merely performs a service for an employer which causes it to come into contact with a potential employee but does not otherwise have the authority to make decisions affecting the employee as regards their employment. Simply because an independent party takes an action, performs an assessment or generates a report at the request of an employer, it does not *ipso facto* mean that the party has acted “on behalf of” the employer for the purposes of S. 14(1) of the Act. The inquiry as to whether a party has acted “on behalf

of” an employer within the meaning of that section extends beyond the question of whether they were asked by an employer to perform a service which might affect a person’s employment. The central issue is the authority, if any, vested in that party and the nature of its relationship with the employer.

39. It might be said that SureHire’s decision to score Mr. Howe as a Level 3 and Level 4 did have an impact upon his prospective employment. However, the only evidence before the Board is that SureHire was merely performing a service for the employers in reporting its findings in respect of Mr. Howe’s performance on the physical testing. The effect this had on his employment was only as a result of standards set by Talon and KBAC and what those parties opted to do within the information supplied by SureHire. In coming to this determination, I am not weighing the evidence. There is simply no evidence before the Board of Inquiry to suggest that Talon or KBAC had SureHire act on its behalf within the meaning of the act.
40. The Respondent’s motion for non-suit is therefore granted and the complaint is dismissed.

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Robby D. Ash