

**Case Number: 41000-30-H11-0746**

**IN THE MATTER OF:**                    *The Human Rights Act, R.S.N.S. 1989, c.214*

and

**IN THE MATTER OF:**                    A complaint of breach of Section 5(1)(d) and (h) of  
the Nova Scotia *Human Rights Act*

**BETWEEN:**

**JAMES HOLLAND**

**Complainant**

- and -

**TRI-COUNTY REGIONAL SCHOOL BOARD and the  
CANADIAN UNION OF PUBLIC EMPLOYEES (Local 964)**

**Respondents**

- and -

**THE NOVA SCOTIA HUMAN RIGHTS COMMISSION**

**DECISION OF THE BOARD OF INQUIRY**

**UPON** this matter coming before a Board of Inquiry Hearing held on Friday, November 21, 2013 at Shelburne, Nova Scotia;

**AND UPON** hearing submissions and evidence presented on behalf of the Nova Scotia Human Rights Commission by Lisa Teryl (hereinafter "NSHRC"), James Holland on his own behalf as Complainant (hereinafter "Mr. Holland"), John MacPherson Q.C. on behalf of the Respondent Tri-County Regional School Board (hereinafter "Tri-County") and Susan Coen on behalf of the Canadian Union of Public Employees (hereinafter "CUPE");

The following is hereby decided under the authority of Section 34 of the Nova Scotia Human Rights Act (hereinafter "Human Rights Act"), as Board of Inquiry Chair in this proceeding:

## *Issues*

This Board of Inquiry was mandated to enquire into an allegation of discrimination under Section 5(1)(d) and (h) of the *Human Rights Act* on the grounds of discrimination in relation to the Complainant, Mr. Holland's employment on the basis of age. The main issue being whether such discriminatory conduct was an exception pursuant to Section 6 of the *Human Rights Act*, stated as follows:

### *Exceptions*

...

*(g) to prevent, on account of age, the operation of a bona fide Pension Plan or the terms or conditions of a bona fide group or employee insurance plan;*

*(h) repealed 2007, c. 11, s. 1.*

The following is hereby determined:

[1] On November 6, 2011, the Complainant, Mr. Holland filed a written complaint with the NSHRC alleging discrimination with respect to his employment on the basis of age as prohibited under Section 5(1), (d), and (h) of the *Human Rights Act*.

[2] Mr. Holland was hired by Tri-County on October 1st, 1985 as a permanent school bus driver.

[3] Bus drivers for Tri-County are represented by CUPE as their certified bargaining agent. Upon engaging in collective bargaining, Tri-County and CUPE entered into a Collective Agreement effective April 1, 2007 to March 31, 2012 (hereinafter "Collective Agreement").

[4] In accordance with the Collective Agreement, Tri-County sponsors the Tri-County Regional School Board CUPE Staff Pension Plan (hereinafter "Pension Plan") for eligible CUPE employees. Section 6.01 of the Pension Plan states that, "A member shall retire on their Normal Retirement Date except as otherwise provided in this Section." Normal Retirement Date is defined in the Pension Plan text at Section 2.23, as, "Normal Retirement Date means the first day of the month coincident with or next following the month in which the Member's 65th birthday occurs." Mr. Holland was a bargaining unit member of CUPE and a member of the CUPE Staff Pension Plan.

[5] Mr. Holland was born on January 8, 1946 and turned age 65 on January 8, 2011. Mr. Holland's normal retirement date was determined by the Employer pursuant to the definition contained in the Pension Plan to be February 1, 2011.

[6] Mr. Holland initiated a letter dated October 4, 2010 requesting approval from Tri-County to continue working until the end of the school year 2010/2011 in accordance with Article 36.1 of the Collective Agreement. Additionally contained in the letter of October 4, 2010, Mr. Holland requested additional approval to have his period of employment extended past June 30<sup>th</sup>, 2011 in accordance with Section 6.03 titled "Postponed Retirement" of the Pension Plan.

[7] The last paragraph of the letter quoted as follows, "I would also like it to be noted that if given the opportunity I would like to continue to work for the next couple of years." By letter dated November 1, 2010, Tri-County approved his request to extend his employment past the age of 65 with Mr. Holland's official retirement date being determined to be June 30, 2011. Mr. Holland was not given approval by Tri-County to extend his employment past June 30, 2011.

[8] Tri-County indicated that they had limited discretion, if no discretion, to have Mr. Holland work past his retirement date pursuant to Section 6.01 of the Pension Plan indicating, "A Member shall retire on his Normal Retirement Date except as otherwise provided in this Section."

[9] Tri-County relied on their understanding of the terms of the Collective Agreement at Section 36(1) indicating, "All Employees shall retire at the end of the month in which their sixty-fifth (65th) birthday falls, or with the approval of the Employer, by the end of the school year following their sixty-fifth (65th) birthday." Tri-County did not use their discretion pursuant to Section 6.01 and 6.03 under the Pension Plan, which allowed for the postponement of retirement on a year-to-year basis up to and until the age of 71.

[10] The facts are undisputed that the main reason for Mr. Holland's retirement was the fact that he reached the age of 65 years and the provisions under the Pension Plan interpreted by the Employer in combination with the Collective Agreement indicated that all Employees must retire at the end of the month in which they turn 65 or, with the approval of the Employer, at the end of the school year following their 65<sup>th</sup> birthday.

[11] A *prima facie* case of discrimination against Mr. Holland in the course of his employment as it relates to his age, pursuant to Section 5(1)(d)(h) of the *Human Rights Act* has been established.

[12] The main issue for determination is whether the discriminatory conduct fits into the exceptions as suggested under the *Human Rights Act* at Section 6(g) "to prevent, on account of age, the operation of a *bona fide* Pension Plan or the terms or conditions of a *bona fide* group or employee insurance plan;"

#### *Exception Analysis*

[13] The determination as to whether such discrimination fits into the exceptions as envisioned in Section 6(g) of the *Human Rights Act* was amended by, "*An Act Respecting the Elimination of Mandatory Retirement*, SNS 2007, Chapter. 11 (hereinafter "*Act Respecting the Elimination of Mandatory Retirement*"), basically striking out the retirement provision contained in Section 6(g) and repealing Section 6(h) in its entirety. The *Act Respecting the Elimination of Mandatory Retirement* came into force and effect on July 1<sup>st</sup>, 2009. Therefore, the *Act Respecting the Elimination of Mandatory Retirement* was in full force and effect at all material times relevant to the facts and time period of Mr. Holland's complaint.

[14] The leading case related to this issue of mandatory retirement is outlined in *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.*, 2008 SCC 45 (hereinafter "*Potash*"), a Supreme Court of Canada decision which considered the operation of a *bona fide* Pension Plan as one of the permissible exceptions to age discrimination under the Human Rights legislation coming out of New Brunswick.

[15] There is no question that *Potash* is the leading authority in Canada related to the issue of a *bona fide* Pension Plan and the impact of a *bona fide* Pension Plan as it relates to age discrimination under Human Rights legislation. Certainly, any determination regarding mandatory retirement must consider the *Potash* decision as the leading authority on this issue. The Tri-County CUPE Staff Pension Plan being in force and effect as of April 1, 2007 until March 31, 2012 was at all material times relevant to the facts and cause of action in this proceeding.

[16] In *Potash*, Justice Abella, writing for the majority of the Supreme Court of Canada at:

*Para 33: Section 3(6) (a), notably, states that the age discrimination provisions do not apply to the terms or conditions of any "bona fide pension plan". The placement of the words "bona fide", it seems to me, is significant. What this immunizes from claims of age discrimination is a legitimate pension plan, including its terms and conditions, like mandatory retirement. It is the plan itself that is evaluated, not the actuarial details or mechanics of the terms and conditions of the plan. The piecemeal examination of particular terms is, it seems to me, exactly what the legislature intended to avoid by explicitly separating pension plan assessments from occupational qualifications or requirements. This is not to say that the bona fides of a plan cannot be assessed in relation to terms which, by their nature, raise questions about the plan's legitimacy. But the inquiry is into the overall bona fides of the plan, not of its constituent components.*

Therefore, once the threshold for *bona fide* is established as set out in *Potash*, the question for determination when there is a conflict between the terms and conditions of the Pension Plan and any associated document, is the legitimacy of the overall Pension Plan and its application thereof. I find that the *Potash* decision leaves open, once the threshold of *bona fide* is established as a whole, a further analysis of the overall legitimacy of the Pension Plan in the application thereof.

[17] An Act Respecting the Elimination of Mandatory Retirement amended the *Human Rights Act*, as follows:

1. Section 6 of Chapter 214 of the Revised Statutes, 1989, the *Human Rights Act*, as enacted by Chapter 12 of the Acts of 1991, is amended by
  - (a) adding immediately after subclause (f)(i) the following subclause:
    - (ia) based upon a *bona fide* occupational requirement;
  - (b) striking out "retirement or" in the second line of clause (g); and
  - (c) striking out clause (h).

[18] The effect of the legislation was to further narrow and limit the exceptions as contained in the *Human Rights Act* legislation at clause 6(g) now stated "as to prevent on account of age the operation of a *bona fide* Pension Plan or the terms and conditions of a *bona fide* group or employee insurance plan." Additionally, elimination of clause 6(h) "to preclude all except a *bona fide* plan, scheme or practice of mandatory retirement;"

[19] Upon review of the *Potash* decision, it is clear that such sets the standard, test and framework to be applied when considering whether a Pension Plan is *bona fide*. I find that the main issue in this case is not whether the Pension Plan is *bona fide*, but rather the main analysis for consideration should be on the legitimacy and application of the terms and conditions of the Pension Plan as a whole and whether there was discriminatory conduct pursuant to Section 5 of the *Human Rights Act*.

[20] The overall effect of the limitation of the *Act Respecting the Elimination of Mandatory Retirement* was to narrow the exceptions to established *prima facie* cases of discriminatory conduct pursuant to Section 5 of the *Human Rights Act*. The clear intent of the legislation was to narrow the exceptions and/or eliminate the ability of a party to be discriminated against pursuant to Section 5 on the basis of age in the course of employment. The main consideration in the Province of Nova Scotia, effective with the coming into force and effect of this legislation, established the Pension Plan itself as the predominant consideration, not any associated retirement scheme/policy.

[21] In this case there is no express provision incorporating the Collective Agreement into the Pension Plan in the Pension Plan itself. However, there is an express provision in the Collective Agreement incorporating the terms and conditions of the Pension Plan into the Collective Agreement.

[22] The Pension Plan is in dissonance with the Collective Agreement. The terms and conditions of the Pension Plan should not be ambiguous and should be reflective of a clear understanding of its application and any incorporation of terms and conditions as contained in an associated document should be expressly incorporated by provision in the Pension Plan document itself. Otherwise, in the event that a Pension Plan does not have certainty of terms in application, the legitimacy of the overall Pension Plan is compromised. In the event of a conflict in terms, the terms and conditions contained in the Pension Plan document shall prevail, pursuant to the clear intent and limiting effect of the Provincial legislation.

[23] Although, the Pension Plan is *bona fide* pursuant to the initial *Potash* analysis, the

application of the Pension Plan was in a manner that discriminated against Mr. Holland's rights protected under Section 5(1) (d) (h) of the *Human Rights Act*, "No person shall in respect of employment discriminate against an individual or class of individual on account of age." The meaning of discrimination was set out in Section 4 of the *Human Rights Act*,

*For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of the subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society. 1991, c.1, 2.1*

[24] In light of the legislation respecting the *Act Respecting the Elimination of Mandatory Retirement* in force and effect at the time this complaint was initiated, the application of the *Act Respecting the Elimination of Mandatory Retirement* should have been a consideration at the time of Mr. Holland's termination of employment. Therefore, after a *prima facie* case of discrimination is made out, the Employer has an obligation to apply their own Pension Plan in a clear, unambiguous and non-discriminatory manner. There being certainty in terms and due regard given to the application of any legislation and law impacting on such issue. Both Tri-County and CUPE argued that there was no such limiting effect and the legislation had no impact on the application of the Pension Plan to the case in point. I do not accept this argument, as to accept such argument would make the legislation and purpose redundant and useless.

[25] Effectively, even though a Pension Plan may be determined to be *bona fide* pursuant to the initial *Potash* analysis, there is a narrowing of the exception to such discriminatory conduct in the application of the terms and conditions of the Pension Plan itself. Therefore, even though a pension plan, can be found to be *bona fide* according to the initial *Potash* analysis, *Potash* leaves open a potential analysis of the method and manner in which an overall Pension Plan applies and its legitimacy in application. It may potentially be found not to be *bona fide* on the basis of legitimacy in application of the overall Pension Plan itself.

[26] The Collective Agreement indicates at Section 36(1), "the employee must retire by the end of the school year following the employees 65<sup>th</sup> birthday." The provisions contained in the Pension Plan at Section 6.01 indicate, "A Member shall retire on his Normal Retirement Date except as otherwise provided in this Section."

...

Section 6.03 indicates, as follows:

*A Member may postpone retirement on a year-to-year basis provided the Member receives the written agreement of the Employer. In no event may such retirement, for purposes of the Plan, be postponed beyond the end of the calendar year in which the Member reaches age 71. In the event of postponed retirement, the Member shall continue to make contributions and to earn pension benefits in the regular manner until the date of the Member's actual retirement under the Plan. Upon actual retirement, the amount of pension will be the benefit payable at age 65 which the Member had earned up to the date of actual retirement in accordance with Section 8.*

[27] In evidence, Carl Crouse on behalf of CUPE, indicated that it is in the Employer's discretion to allow an employee to work past the normal age of retirement and the provisions in the Collective Agreement indicate the party must retire by their 65<sup>th</sup> birthday or the end of the school year. It is possible for the Employer to communicate with CUPE to effect an agreement to enable an extension to take place and such is possible by agreement between CUPE and Tri-County. Effectively, the facts support that Tri-County has discretion pursuant to the Pension Plan terms expressly enabling the Employer to extend employment past the normal retirement date in consultation and agreement with CUPE. Additionally, the use of such discretion is envisioned up to the age of 71 years, pursuant to Section 6.03 of the Pension Plan.

[28] Gerry Purdy, Director of Human Resources, gave evidence on behalf of Tri-County indicating that he was aware that such discretion to extend retirement on behalf of the Employer was possible pursuant to Section 6.03 of the terms of the Pension Plan. Mr. Carl Crouse, National Representative on behalf of CUPE gave evidence that Tri-County could effect communication with CUPE and potential agreement in the event that Tri-County engaged their discretion pursuant with Section 6.03 of the Pension Plan enabling employment past the Normal Retirement Date, potentially to age 71. Mr. Purdy's evidence indicated that at the time of Mr. Holland's retirement, such discretion had never been engaged.

[29] The evidence indicates that Tri-County made a determination regarding not extending Mr. Holland's employment due to their understanding of the two (2) previous sections of the Pension Plan read in association with the terms and conditions contained in the Collective Agreement. Tri-County applied the limiting terms contained in the Collective Agreement and did not use their discretion to extend Mr. Holland's employment pursuant to Section 6.03 of the Pension Plan. The terms of the Collective Agreement was Tri-County's main consideration when determining not to use their discretion to extend Mr. Holland's employment. Therefore, this interpretation of the Pension Plan and Collective Agreement was an error in the application of the terms and conditions contained in the Pension Plan and lack of clear direction in the Pension Plan

itself as to the application of the use of such discretion in the hands of the Employer envisioned at Section 6.01 and 6.03 of the Pension Plan. Additionally, the limitations on extending employment past the normal retirement date as outlined in the Collective Agreement had a limiting effect not mirrored in the Pension Plan itself. Therefore, the terms and conditions of the Pension Plan and the Collective Agreement were in conflict, the terms and conditions of the Pension Plan should prevail pursuant to the current limitations suggested at Section 6(g) of the *Human Rights Act*.

[30] An Employer has an obligation to apply the terms and conditions of their own Pension Plan in a non-discriminatory fashion and have certainty of terms. It is Tri-County's error in the interpretation of their Pension Plan and application of the terms outlining their discretion potentially engaging until an Employee is 71 years of age. Tri-County believed that their discretion was limited by the provisions in the Collective Agreement, therefore they understood the terms of the Collective Agreement prevailed to limit such discretion.

[31] Clearly, the amending legislation was intended as a limitation to the exceptions to mandatory retirement and as an interpretive tool in determining whether a Pension Plan, though determined to be *bona fide* pursuant to the *Potash* analysis, can prove to be not *bona fide* in terms of the application of the terms and conditions of the Pension Plan as a whole. The fact that the Collective Agreement terms did not enable extension of employment past the last day of the school year in which an Employee's normal retirement date occurred was not mirrored in the Pension Plan which enabled such extension at Section 6.03, potentially extending retirement to age 71, creates uncertainty in terms compromising the overall legitimacy of the Pension Plan in application. The conflict in terms between the Pension Plan and the Collective Agreement, creating ambiguity and misinterpretation of application resulted in compromising the overall Pension Plan's legitimacy. In light of considerations in *Potash* and the *Act Respecting the Elimination of Mandatory Retirement* amending the *Human Rights Act*, application of the *Potash* analysis opened up a further analysis in the legitimacy of the overall Pension Plan. Additionally, in the event of conflict in terms, the consideration narrowed to the terms and conditions of the Pension Plan as the primary consideration. I find that in the event of conflict in terms and conditions between the Pension Plan and the Collective Agreement or any other associated incorporated document, the Pension Plan must prevail.

[32] It is determined that although the Pension Plan may be found to be *bona fide* excluding analysis of the component parts, such can be found not to be *bona fide* due to lack of legitimacy in the application of the terms and conditions of the Pension Plan as a whole. A Pension Plan must be applied in a non-discriminatory and consistent manner, with certainty of terms in order to survive as a discriminatory legitimate exception. All documents seeking to be incorporated into the Pension Plan must have express provision to incorporate such in the Pension Plan. The terms and conditions of such associated document being reflective and a mirror of the terms and conditions as contained in the Pension Plan itself. Whereupon, in the event of conflict in terms, the terms of the Pension Plan shall predominate. It was in the discretion of the Employer to extend



employment past age 65 and past the last day of the school year in the year the Employee turns 65 and there being an obligation on the Employer to apply their discretion as enabled in the Pension Plan at Section 6.03 in a non-discriminatory fashion pursuant to the terms and conditions of their Pension Plan, with the ability to apply such legitimately.

[33] I have considered the *Potash* decision as the leading authority relevant to the issue at hand, other Nova Scotia Human Rights Investigations/Considerations of the Commission, legislation and caselaw provided by counsel. My decision follows the *Potash* decision establishing the Pension Plan to be *bona fide* and further interpreting *Potash* and extending such analysis of the legitimacy of the Pension Plan in application. As Board of Inquiry Chair, although *stare decisis* is a consideration, I have a broader application of the law to apply to effect the principles of natural justice applied to effect a personal remedy and move the law in the direction of non-tolerance of discriminatory conduct pursuant to the Human Rights Act, such being clearly in the public interest. It is clear that the public interest is moving toward eliminating/narrowing exceptions to Mandatory Retirement as witnessed by the *Act Respecting the Elimination of Mandatory Retirement*. I am not bound by Human Rights Investigative proceedings that did not proceed to Board of Inquiry, such being a consideration only.

[34] *Potash*, considered the Pension Plan exception to the age discrimination provisions. Justice Abella, concluded for the majority at paragraph 33, "... This is not to say that the *bona fides* of a plan cannot be assessed in relation to terms which, by their nature, raise questions about the plan's legitimacy." The conflict in terms between the Pension Plan and Collective Agreement, with the Pension Plan terms predominating pursuant to the narrowed exception as contained in 6(g) of the *Human Rights Act*, effective with the *Act Respecting the Elimination of Mandatory Retirement* creates a question of the overall Pension Plan's legitimacy in application for the reasons previously mentioned. Effectively, the *Potash* decision suggests that although a Pension Plan may be considered initially *bona fide*, the terms and conditions therein, when in conflict may raise issues of the Pension Plan's overall legitimacy in application. I would distinguish the *Potash* decision on the basis of the conflict in terms, being ambiguous and enabling discretion in the Pension Plan, while restricting discretion in the Collective Agreement.

[35] Upon consideration of *Talbot v. Cape Breton (Regional Municipality) 2009 NSHRC 1 (CanLII)* (hereinafter "*Talbot*"), I distinguish *Talbot* based on the grounds that there was no issue raised regarding dissonance in terms regarding the Collective Agreement and Pension Plan. In addition, at the time of the *Talbot* decision, the *Act Respecting the Elimination of Mandatory Retirement*, was not in force or effect.

[36] The *Human Rights Act* and *Act Respecting the Elimination of Mandatory Retirement*, are under Provincial jurisdiction and have such right to limit or restrict discriminatory conduct and to protect Human Rights within the realm of their own Provincial legislation. Upon the coming into force and effect of the *Act Respecting the Elimination of Mandatory Retirement* in July 2009, such Provincial intent in the application of the *Human Rights Act* was clear on the face of this new legislation limiting

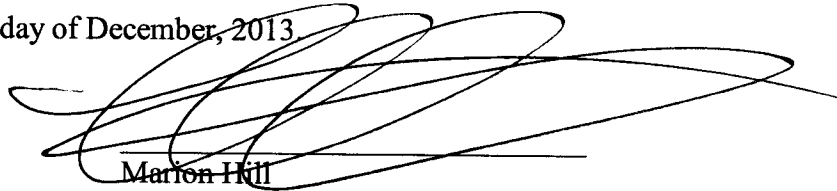
exceptions. The purpose being clear and unambiguous indicating the main point of reference as it applies to any discriminatory conduct related to mandatory retirement being restricted to the considerations and application of the Pension Plan alone. I find that though determined to be *bona fides*, the overall Pension Plan lacks legitimacy in its ability to apply the terms and conditions contained therein to give the Employer a clear and consistent direction sufficient for the Employer to meet the threshold exception pursuant to Section 6(g) of the *Human Rights Act*. Therefore, I make the determination that, discrimination under Section 5(1)(d) and (h) of the *Human Rights Act* on the grounds of discrimination in relation to the Complainant, Mr. Holland's employment on the basis of age is established, without exception.

### **Remedy**

[37] A decision on remedy is reserved pending the Complainant, Mr. Holland, the NSHRC and Tri-County providing written submissions/argument regarding remedy and such submissions to be provided within 30 consecutive days of the date of this herein decision. Additionally, Ms. Teryl, on behalf of the NSHRC, will be providing Mr. Holland's income information and disclosure relevant to the consideration regarding remedy. Disclosure is limited to the evidence of Mr. Holland's income during the year 2010/2011/2012 to date and Tri-County reserves the right to have the matter brought forward for a hearing of 1/2 day in the event the Respondent, Tri-County, requests an opportunity for examination/cross examination of Mr. Holland, limited to the issue of clarification of Mr. Holland's income disclosure evidence alone as may be provided after the date of this hearing. Mr. MacPherson, on behalf of the Respondent is to provide written notice within 10 business days of receipt of the issuance of the Decision as to whether such request for a 1/2 day hearing as aforementioned is required. Unless otherwise provided herein, no further disclosure or evidence will be permitted in this proceeding.

[38] In terms of remedy, I find that CUPE shall have no liability related to any remedy suggested and are further dismissed as a party in this proceeding, such basis for finding no liability on behalf of CUPE rests with the fact that Mr. Holland did not request or initiate the formal grievance procedure available to him through CUPE at the time of such discriminatory conduct, such being open to him at that time. Mr. Holland did not engage CUPE in a grievance procedure according to his option, he therefore foregoes any request for compensation from CUPE in this proceeding. All remedial liability rests solely in the hands of Tri-County. No further submissions are required from CUPE and no costs are awarded as between Mr. Holland, the Complainant and CUPE.

**Dated** at Kentville, Nova Scotia, this 11th day of December, 2013.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Marion Hill  
Barrister and Solicitor  
Board of Inquiry Chair

**MARION S. HILL**  
A Barrister of the Supreme  
Court of Nova Scotia