

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

and

IN THE MATTER OF: **A complaint by Mark Thomas pursuant to Section 5 of
the Human Rights Act**

BETWEEN:

MARK THOMAS

COMPLAINANT

and

HALIFAX REGIONAL WATER COMMISSION

RESPONDENT

and

NOVA SCOTIA HUMAN RIGHTS COMMISSION

DECISION OF BOARD OF INQUIRY

Chair: **Dennis James, Q. C.**

Preliminary Motion: **May 24, 2016 and July 18, 2016**

Location: **Halifax, Nova Scotia**

Counsel: **Dr. Wanda Thomas Bernard, Representing Mark Thomas,
Complainant
John MacPherson, Q.C., Counsel for Halifax Regional Water
Commission
Kendrick Douglas, Counsel for Nova Scotia Human Rights
Commission**

This matter arises from a complaint by Mark Thomas dated December 21, 2009 alleging that the Halifax Regional Water Commission (“HRWC”) discriminated against him in his employment because of his physical disability and/or his race and/or colour. The hearing of this matter was scheduled October 3 to 7th but HRWC brought a series of preliminary motions:

1. Should the Complaint be dismissed due to delay and abuse of process?
2. Should the Complaint be dismissed because it was not filed within the time limits mandated by Section 29(2) of the *Human Rights Act*?
3. Should those portions of the Complaint that are alleged to have occurred more than 12 months prior to December 21, 2009, be struck?
4. Should the Complainant be permitted to rely on the evidence of Mr. Royce Hellesoe who “...has a similar, but **unrelated** complaint with the Human Rights Commission”?

Originally, April 15, 2016 was set to deal with the preliminary motion but that was adjourned to May 24 upon request of the Complainant. The hearing of the preliminary motions proceeded on May 24 but following comments by Dr. Thomas Bernard who is representing the Complainant, there appeared to be a possibility that Mr. Thomas and/or Dr. Thomas Bernard may have had notes that could inform the issues raised by the complaint and relevant to the preliminary motions. A further adjournment was granted to permit the Complainant to search for records. By letter dated June 16, 2016, Dr. Thomas Bernard advised:

Unfortunately, Mr. Thomas has not been able to locate notes that have actual dates recorded. Additionally, as per my consultation with Mr. Douglas, my calendar entries and notes re meetings and contact with Mr. Thomas about his experiences and the complaint process, are not sufficient to be considered documentary evidence. Therefore there is no additional evidence to be submitted at this time.

The hearing resumed on July 18, 2016 at which time the parties addressed the issue of whether the complaint was filed in the time frame set out in Section 29 (2). It was agreed that should the Board dismiss the preliminary motion by HRWC on the limitation period then the other three issues would then be addressed.

This written decision follows from an oral decision that I rendered on July 18, 2016 dismissing the complaint of Mark Thomas on the basis that it was outside the 12 month limitation period as set out in Section 29 (2) of the *Human Rights Act* RSNS 1989 c. 214, as amended ("*Act*"). While I provided some reasons for my decision on July 18, I indicated to the parties that I would follow up with a written decision. As I found the complaint to be out of time the remaining three issues raised by way of preliminary motion were not advanced further.

Time Limitation for filing a Complaint

The period for filing a complaint under the *Act* is set out in Section 29 (2):

Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.

Under Section 29 (3) the Director has the discretion to extend the time period for an additional twelve months but in this case there was no extension requested.

The Nova Scotia Court of Appeal had occasion to consider Section 29 (2) in *Izaak Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)* [2014] NSCA 18. The Court overturned a decision of the Board which determined that the limitation period of 12 months excluded anytime taken by the Commission in conducting an internal review of the complaint. In interpreting Section 29 (2), Justice Bryson states at Paragraph 24:

So we begin with the words the Legislature has used. To repeat, these are:

29(2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.

Those words seem clear. One hardly needs a dictionary to interpret 'within', which clearly assumes a beginning and end inside of which the time should run. Resort to standard texts bears this out. For example, *The Concise Oxford Dictionary*, 8th ed. uses such words as 'inside'; 'enclosed' or 'contained by'; 'not beyond or exceeding' to describe 'within'. More pertinently, *Stroud's Judicial Dictionary*, 5th ed., vol. 5, p. 2876 cites examples of judicial interpretation of 'within' as 'inside which certain

events may happen'; 'within four months' means any date within that period: 'within three years' means not later than three years. But the Board found that 'within twelve months' did not mean within consecutive months. Rather, it meant within 12 months excluding any period during which the Commission was conducting an internal review. So the limitation period could be 15 months, 20 months or whatever period by which the internal review delayed the tolling of the months. The Board provided no linguistic or 'ordinary meaning' defence of this eccentric interpretation.

Further at Paragraph 36 he says:

The Board's interpretation of s. 29(2) of the *Act* is not reasonable. The limitation period clearly tolls from the events described in s. 29(2). The language is not ambiguous and is undisturbed by the policy considerations on which the Board relied. To précis an earlier quotation from *McLean*:

[38] ... Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance; ...

Complaint of Mark Thomas

The complaint form signed by Mr. Thomas alleges that during his employment with HRWC he was subject to repeated and numerous racially derogatory comments from staff and supervisors. In addition he says that as a result of a back injury in 2006 he was restricted in what he could do. Mr. Thomas alleges that he sought accommodation from HRWC but was denied such accommodation and as a result he says that he had to take a leave from his position on October 31, 2008. He alleges that until he was approved for LTD benefits on February 19, 2009 he continued to approach HRWC and his union to discuss accommodation but was not successful. The complaint does not detail any communication after October 31, 2008.

During the initial date assignment conference on January 12, 2016 counsel for HRWC requested and the Board directed that Mr. Thomas provide dates around incidents that are generally described in Paragraph 2 of the complaint alleging racial and derogatory language in front of supervisors. Dr. Thomas Bernard provided additional details by a

letter dated February 24, 2016 which says May 16, 2008 was the first instance he recorded such offending statements. She also identified the supervisors that Mr. Thomas says were present when such comments were made.

Factual Findings

There is no disagreement that the last day of Mr. Thomas' attendance in the workplace was October 31, 2008. There was no suggestion in the complaint form or any additional information that there were any racist or derogatory comments made to Mr. Thomas after he left the work place on October 31. According to the complaint form then the only residual issue after October 31, 2008 related to the request for accommodation.

In support of the motion on the limitation period, HRWC filed an affidavit of Rochelle Bellemare, Manager of Human Resources. Ms. Bellemare's affidavit provides a chronology related to the complaint by Mr. Thomas including correspondence from the Human Rights Commission to HRWC dated January 29, 2009. Clearly Mr. Thomas had contacted the Human Rights Commission before January 29, 2009.

There is no suggestion in the complaint form or evidentiary record that Mr. Thomas suffered any consequences as a result of his leave which was recommended by his physician. The record is clear he remained an employee of HRWC without any negative consequence for his leave.

For the purposes of the issue of whether the complaint was filed in time the relevant portion of Ms. Bellemare's affidavit describes a meeting of February 18, 2009 between Mr. Thomas, Ms. Bellemare and Mr. Thomas' Union Representative, Dave Dort. The purpose of the meeting was to discuss Mr. Thomas' request for accommodation and he brought an Attending Physician's Report from Dr. Minodin dated October 31, 2008. It appears from handwritten notes that were taken by Ms. Bellemare at that meeting she requested more current medical information from Mr. Thomas in order that she could address the request for accommodation. Coincidentally it was the next day, February 19, 2009, that Mr. Thomas was accepted for LTD benefits and he has not been back to the HRWC work place since.

Ms. Bellemare was not cross-examined on her affidavit or her notes. Nor was there any additional information provided by Mr. Thomas or the Human Rights Commission in addition to the complaint form and the letters referred to above.

Based on the evidence available to the Board, I make the following findings:

1. Mr. Thomas' last day of work for HRWC was October 31, 2008;
2. That Mr. Thomas' requested leave of absence for medical reasons on October 31, 2008 was respected and there is no allegation or evidence that he suffered consequences from HRWC as a result of the leave.

3. That any alleged racist or derogatory comments directed at him in the HRWC workplace occurred on or before October 31, 2008.
4. That the only contact between Mr. Thomas and HRWC after he left on October 31, 2008 was the meeting of February 18 between Mr. Thomas, Ms. Bellemare and Mr. Dort.

There is a suggestion in the complaint form signed by Mr. Thomas of communication between him and HRWC or his Union between October 31, 2008 and February 18, 2009 but there was no evidence to detail that assertion. Obviously if the contact was with the Union, that is different from contact with HRWC.

I find that there is nothing in the record of the February 18, 2009 meeting that would suggest discriminatory behaviour by the HRWC. Mr. Douglas on behalf of the Human Rights Commission agreed that the record of February 18, 2009 meeting did not reveal discriminatory conduct. Nor did Mr. Douglas suggest there was any conduct after October 31, 2008 that would evidence an act of discrimination.

In absence of any evidence from the Complainant or the Human Rights Commission I find that there is no evidentiary basis to suggest discriminatory conduct by HRWC after October 31, 2008. The implication of this finding is that if there was discriminatory conduct as alleged it had to have occurred before October 31, 2008, which means Mr. Thomas' complaint had to be filed by October 31, 2009.

Given these findings I find that the complaint filed by Mr. Thomas was not filed in the time limit prescribed by Section 29 (2) and must be dismissed.

Accountability by the Human Rights Commission

The Board acknowledges that it has no jurisdiction to Order the Human Rights Commission to do so but there are many questions that arise from this complaint that suggest the Commission should review its handling of Mr. Thomas' complaint and account to him that it was properly handled. The Board is not in a position to make findings but offers these questions as they occurred from a review of the complaint file to the extent that it has been available to the Board. It poses these questions in the context of the disturbing timeline from Mr. Thomas' first approach to the Human Rights Commission no later than January 29, 2009 and the fact that this Board was advised of its appointment by letter dated December 15, 2015, received in early January 2016. That is a long time for Mr. Thomas and HRWC to wait to learn that the complaint was out of time. With this in mind, the following questions are left for consideration:

1. What was the reason for the delayed in filing the complaint form between January 29, 2009 and December 21, 2009?

2. What analysis was carried out by the investigator to determine whether the complaint was filed in time?
3. Did the investigator determine that the complaint related to alleged racial or derogatory comments was filed within time? Or just the complaint related to the alleged failure to accommodate? Or did the investigator distinguish between the two?
4. What efforts were made to determine what, if any, alleged conduct occurred after October 31, 2008 to sustain a complaint?
5. Did the investigator advise Mr. Thomas of his right to request of the Director an extension of time for filing his complaint?
6. Why was there such a long delay before the Commission sought to refer the matter to a Board of Inquiry?
7. What information did the investigator provide Mr. Thomas about the need to secure records that may assist in the complaint?

In asking these questions the Board is aware that it is not the Commission's role to resolve dispute of facts but to decide whether a matter should be referred to a Board of Inquiry. However it is indisputable that the Commission has a critical role in determining whether a complaint is filed in accordance with Section 29 (2). There are two important reasons why this is not an issue that should be left to a Board of Inquiry, if at all possible. First, the investigator must be satisfied that the Commission has jurisdiction to deal with the complaint. If the investigator cannot determine alleged conduct that would meet the limitation period, the Commission would have no jurisdiction. If a complaint was dismissed on that basis, a complainant would have access to judicial review if they disagreed. Second, an early determination will provide the complainant with the opportunity to apply to the Director pursuant to Section 29 (3) if there are compelling reasons to justify such an extension.

A third reason that is illustrated clearly in this case is that both the complainant and the respondent have endured unexplained, oppressive delay only to confront a determination that should have been made very early on. While not reaching any conclusions the management of this file, both in terms of the limitation period and the subsequent referral to a Board of Inquiry, raises the spectre of the complainant and the respondent suffering a serious injustice.

Mr. Douglas began his remarks on July 18 by apologizing to Mr. Thomas and HRWC for the delay caused by the Commission. The Board commends him for doing so and encourages the Commission to follow suit by considering the issues raised and report to Mr. Thomas.

Dated this 2 day of August, 2016.

Dennis James, Q.C.
Chair
Board of Inquiry