Nova Scotia Human Rights Board of Inquiry

BETWEEN:

Tammy Quilty-MacAskill

Complainant

-and-

The Nova Scotia Human Rights Commission

Commission

-and-

Community Justice Society

Respondent

DECISION

Nova Scotia Human Rights Board of Inquiry:	Kathryn A. Raymond
Place of Hearing:	Dartmouth, Nova Scotia
Dates of Hearing:	April 8th, 9th, 10th & 15th, 2013
Appearances:	Ann Smith, Counsel for the Complainant Bradley Proctor, Counsel for the Respondent Lisa Teryl, Counsel for the Commission
Date of Decision:	June 13, 2013

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Introduction

1. This is a Board of Inquiry appointed pursuant to the *Nova Scotia Human Rights Act* R.S.N.S., 1989, c. 214, as amended, (the "*Act*") to inquire into a complaint of discrimination by Tammy Quilty-MacAskill, the Complainant, against the Community Justice Society, the Respondent. The complaint concerns an allegation by the Complainant that she was discriminated against on the basis of sex (pregnancy), which is a protected characteristic in the context of her employment with the Community Justice Society, contrary to section 5(1)(d)(m) of the *Act*.

Overview of the Law

2. The parties are in agreement respecting the applicable law in this case:

3. The initial onus is upon the Complainant to establish a *prima facie* case of discrimination, in the absence of any evidence offered by the Respondent. To meet this onus she has to establish that: a) she was pregnant; b) the Respondent's actions had an adverse effect upon her; and c) it is reasonable to infer a connection between the pregnancy and the adverse treatment.

4. If the Complainant meets this legal test, the onus shifts to the Respondent to demonstrate on a balance of probabilities that the adverse effect occurred due to non-discriminatory reasons. In this respect, the subjective intention of the Respondent is irrelevant.

5. It is not necessary for pregnancy to be the sole factor, as long as it is a factor.

6. As employers rarely announce that a dismissal is due to pregnancy, many cases fall to be determined on the basis of circumstantial evidence. In supporting or negating an inference that pregnancy was a factor in this case, any temporal connection between the announcement of the Complainant's pregnancy and the occurrence of the alleged adverse impact should be taken into account.

Overview of the Parties' Positions

7. The Complainant worked as a caseworker in a restorative justice program delivered by the Respondent to youth and victims of crime within the criminal justice system. The

Complainant was employed by the Respondent for consecutive one year term contracts beginning in April, 2009. The Complainant's second term contract was due to expire on April 6, 2011.

8. She became pregnant and informed the Executive Director of the Respondent, Yvonne Atwell, of her pregnancy in February of 2011. On March 1, 2011, the Complainant asked Ms. Atwell about the possibility of further employment, which included requests that either her contract be extended for a further one year term or that she be able to roll into or apply for a position that she anticipated would become available. Ms. Atwell is alleged to have refused to continue to employ the Complainant for the stated reason that the Complainant would not be there because she was pregnant and would be on pregnancy leave. Ms. Atwell is alleged to have complained that it would be too much work to have to re-post the position when the Complainant went on maternity leave. The Complainant believes that she was discriminated against on the basis of her pregnancy.

9. During that same meeting the Complainant was offered a five month contract that would expire just before her due date. The Complainant submitted that the five month extension was evidence of discrimination because Ms. Atwell was prepared to have the Complainant continue to work for the Respondent but only if her employment contract expired before the commencement of her maternity leave.

10. Shortly after the meeting on March 1, 2011, a vacancy for a one year contract position was posted in the workplace. The Complainant and her immediate supervisor, Jake MacIsaac, met with Ms. Atwell on March 9, 2011. The Complainant alleges that Ms. Atwell repeated her refusal to continue her employment other than through the five month extension because the Complainant would be on maternity leave. She alleges that Ms. Atwell told her that she could apply for the one year position that was posted but that she would not get it. The Complainant subsequently resigned her employment.

11. The Complainant submits that pregnancy is a factor in the Respondent's decisions respecting her continued employment. Complainant's counsel submits that if pregnancy is a factor in this case, even if it is not the only factor, this Board must conclude that the Respondent discriminated against the Complainant. Counsel used the analogy that a single drop of arsenic in a clear bowl of water taints the entire bowl of water.

12. The Complainant submits that there is a temporal connection between the announcement of her pregnancy in February and the adverse impact upon her in March, the adverse impact being the refusal of the Respondent to consider her for a further one year contract or for the position that became available.

13. The Respondent submits that there is no temporal connection in this case. The Complainant's current employment contract became effective April 10, 2010 and was due to expire by its terms in April, 2011. It submits that the expiry of the contract was set to occur from the outset, long before the pregnancy occurred. The Respondent also denies a temporal connection on the facts if the relevant time period extends from when the pregnancy was announced in February, 2011 to the expiry of the contract in April, 2011. The Respondent submits that there was no nexus between the employee's pregnancy leave and the end of her contract.

14. The Respondent contends that there was no adverse treatment, such as a decision to terminate an employee, as the contract was about to expire and the decision that the contract would expire had been made before the pregnancy.

15. The Respondent alleges that the Complainant had serious performance issues and a history of discipline. It says that her contract was not renewed for reasons related solely to her performance and that pregnancy was not a factor in its decision-making.

16. The Respondent submits that the five month contract extension was the result of the Complainant asking for that arrangement. It suggests that the extension is not inconsistent with its position that the Complainant was a problematic employee and that the Executive Director allowed the extension until the Complainant's due date for reasons that were unrelated to the fact of her pregnancy.

17. In response, the Complainant acknowledges that she had a few performance-related incidents during her employment. However, she submits that she had a very good work record for most of the year before the expiry of her contract and was a satisfactory employee overall. The Complainant submits that, even if she had performance issues, her pregnancy was still a factor in the decisions the Respondent made about her employment status.

18. The Nova Scotia Human Rights Commission's position mirrors that of the Complainant. Accordingly, these reasons will focus on the evidence of the witnesses.

Is a *prima facie* case of discrimination made out by the Complainant?

19. That the Complainant was pregnant and that the pregnancy was known to the employer is an undisputed fact.

20. Based on the Complainant's evidence alone, there is sufficient evidence of adverse treatment or an adverse impact based on the actions of the Respondent for purposes of meeting the test required to establish a *prima facie* case. The adverse impact here is the refusal of the Respondent to extend her contract for another year, or to allow her to roll into a one year term position that was posted, or to have her application for that position considered without reservation based on her pregnancy. The overarching point of the Complainant is that she was denied access to opportunities that were available to other employees on the basis that she was pregnant.

21. Given the Complainant's evidence alone about what was said during the meetings with Ms. Atwell in March, it is reasonable to infer that there was a connection between the pregnancy of the Complainant, her upcoming maternity leave and the alleged adverse treatment she received from the Respondent.

22. Accordingly, the onus shifts to the Respondent to demonstrate that pregnancy was not a factor in the Respondent's actions, which must be demonstrated on a preponderance of probabilities.

Key Evidentiary Points

23. In determining whether pregnancy was a factor in this case, this Board must make assessments of credibility and factual findings respecting what was said at the meetings of March 1 and 9, 2011. The Complainant asked this Board to focus on what was said at those meetings. If the Complainant's testimony is accepted, the Executive Director effectively announced that pregnancy was the only factor in the Respondent's decisions concerning the Complainant, as the sole reason she gave was the Complainant's maternity leave and that it would be too much work to re-post the position. Jake MacIsaac, the Complainant's supervisor, was offered as a corroborating witness

regarding what was said at the March 9, 2011 meeting. Accordingly, the credibility of his evidence is also a focal point in these reasons.

24. The Respondent submits that Ms. Atwell informed the Complainant that she "would not be there" in response to questions about continued employment, as her contract was going to expire and not be renewed as a result of performance issues. Ms. Atwell denies stating that it would be difficult to have to re-post the position. The credibility of her evidence is, likewise, a significant issue.

25. Also, as the Respondent alleges that performance issues in both the first and second year of her employment are the sole reason for its decision not to continue the Complainant's employment, a significant amount of evidence was offered to the Board respecting the Complainant's performance. If the Respondent's version of its justifications for not continuing the Complainant's employment is believed, those reasons amount to a non-discriminatory explanation for their refusal to continue employing the Complainant.

26. As conflicting versions of events exist, this Board's findings as to what occurred are very much dependent on an assessment of the credibility of the Complainant, Mr. MacIsaac, and Ms. Atwell. The Board's task is to determine which of the witnesses' versions of events is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize is reasonable in that place and in those conditions." See *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C.C.A.). This can include assessing the following factors: "the witnesses' motives, their powers of observation, their relationship to the parties, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses' evidence." See *Hadzic v. Pizza Hut Canada* (1999), 37 C.H.R.R. D/252 (B.C.H.R.T.).

27. In the event this Board concludes that nothing discriminatory was said at these meetings, it still has to be satisfied, given the factual background, that pregnancy was not a hidden factor. This includes assessing whether the performance issues alleged by the Respondent were a pretext. The employer's actions are to be considered from the perspective of whether it discriminated regardless of the subjective intention of the Respondent. This requires an analysis of not only the denial of specific continued

employment relationships with the Complainant but also the permission given to the Complainant to remain as an employee in a five month contract until her due date.

The First Term Contract

28. The Complainant joined the Respondent on April 6, 2009 for a one year term. She testified that she gave up employment at Homebridge, an organization that also supports youth, to do so. Her evidence was consistent with the perception of a witness who believes that they have left their former employer on good terms. The Complainant specifically mentioned obtaining a very positive reference from her former supervisor at Homebridge, Trish O'Brien.

29. The Respondent challenged the Complainant's credibility on the basis that she had not left Homebridge on good terms. When she was asked about the timing of when she had problems at work with the Respondent, she did not identify that a problem had developed immediately upon her hiring. The Complainant had sent a controversial email on April 3, 2009 to Linda Wilson, the Executive Director of Homebridge. Ms. Wilson forwarded this email to Ms. Atwell. Ms. Atwell testified that the issue in this email was sufficiently serious that Homebridge wanted to have no further dealings with the Complainant in the context of shared clients between the two organizations.

30. In the Board's view, the Complainant may reasonably have not perceived this issue as being directly related to her performance while employed by the Respondent. However, of relevance to credibility is the implication by the Complainant that she left her former employer on good terms and her denial that the email she wrote to Homebridge was a complaint. On this latter point, she suggested that the specific recipient of the email, Ms. Wilson, was something of a mentor to her and testified that the email had been written in that context.

31. The Complainant's email to Ms. Wilson was written after the Complainant's former supervisor and reference, Ms. O'Brien, refused to allow the Complainant to remain as a casual employee of Homebridge, in addition to working for the Respondent. The content of the Complainant's email alludes to perceived issues by Ms. O'Brien with the Complainant's performance and acceptance of authority with which the Complainant

disagreed. The Complainant asked Ms. Wilson to meet with the employees supervised by Ms. O'Brien. She wrote:

> *...although I know not everyone will open up and be honest in fear of the backlash from Trish I know that some will...*
>
> *Again please don't take any of this letters [sic] contents as revenge but only as honesty, I have felt this way about Trish since I first began at Cogswell over a year ago... If there is no change those amazing WCWs that remian [sic] may leave and that would be a great disservice to the youth resideing [sic] there.*

32. This Board has not considered whether the contents of the email are true. That Ms. Wilson forwarded the email to Ms. Atwell to express concern about the Complainant is inconsistent with the email being interpreted by Ms. Wilson as a communication in the nature of "running an issue by" a mentor. The content of the email does not solicit the advice of a mentor. While it is not reproduced here in its entirety, its content is consistent with being a complaint in the ordinary sense of that word. The Complainant's characterization of this document as being intended to illicit mentoring advice from Ms. Wilson is not credible.

33. The Complainant was one of four new employees hired by the Respondent, all on one year term contracts, three of which were hired as restorative justice case workers. She was trained for several weeks by Jake MacIsaac, the caseworker manager or supervisor.

34. Mr. MacIsaac's primary responsibility was to supervise the caseworkers. While Mr. MacIsaac was sometimes called a manager, he had no authority to hire, fire or discipline on his own. These decisions were made by Ms. Atwell.

35. The new caseworkers were on probation during their one year term contract positions. Mr. MacIsaac testified that it can take six months before a new caseworker has their feet under them. A probationary review is held at the six month mark. Ms. Atwell explained that all new caseworkers are hired on a one year term contract which is used as a probationary period.

36. There is no one specific type of qualification to become a restorative justice caseworker. Employees come to the organization from different relevant educational backgrounds with different skill sets. This is why extensive training is offered to new hires and why caseworkers are hired initially on term contracts with the expectation of a long probationary period.

37. The role of the restorative justice caseworker is to assist youth and other participants through a very specific type of process. A key pre-condition to participation in the program is that the youth must be prepared to accept responsibility for their actions.

38. The Respondent provides each employee with a policy manual that contains the policies and protocols of the restorative justice process. The evidence was that these policies and procedures are not intended to simply preserve the integrity of a process but rather are designed to ensure the psychological safety and, in some respects, the physical safety of the participants. Youth, victims of crime, support persons, and the larger community can be harmed by participating in the restorative justice program if the process is not followed.

39. The Board accepts that being a caseworker requires a significant degree of good judgement. This includes the ability to apply the concepts of restorative justice within a defined process while dealing with troubled youth and other participants from various backgrounds in what is often an emotional setting.

40. The Complainant encountered difficulties in her new role in June 2009. The Complainant attended a medical appointment related to a pregnancy test with a youth client. The Complainant did not seek the permission of her supervisor to attend the appointment.

41. At a later point, the youth client and her 18 year old partner were driving in a car. The Complainant spoke to the youth's partner on the phone. She informed him of the results of the client's pregnancy test. The partner began to berate the Complainant over the phone. The Complainant testified that she did not react as she normally would and lost her self control. She called the youth's partner an "idiot" and hung up on him. There was no suggestion by the Complainant that she lacked the knowledge or skill as to how she

should handle the situation. She described her conduct in calling the youth "an idiot" as being completely out of character.

42. Ms. Atwell testified that sharing the results of the pregnancy test with the partner was an unsafe action as the youth client could be put at risk, depending on how that news was received. She testified that caseworkers often encounter verbal abuse in the course of their duties and are trained to handle such situations. She testified, as well, that caseworkers are required to maintain an objective relationship with clients. They are required to avoid interacting with youth clients in a manner that may lead the client to become emotionally attached to them. Attending a medical appointment with a young person, particularly if the issue was possible pregnancy, could create a close relationship with the young person which would undermine the objectivity required in the relationship.

43. Ms. Atwell testified that the incident was of concern due to potential liability to the organization. Taking a client to an appointment would be outside the normal duties of a caseworker, and could create issues with parents and other support persons. With few exceptions, the policies and protocols of the restorative justice process require that youth under the age of 18 must have a support person with them at all restorative justice steps.

44. The incident gave rise to a disciplinary warning notice that was written by Mr. MacIsaac, reviewed by Ms. Atwell and provided to the Complainant, dated July 29, 2009. Mr. MacIsaac also met with the Complainant to discuss this matter.

45. The Complainant subsequently wrote a memo dated August 4, 2009 to Mr. MacIsaac. She described the memo as a clarification. She wanted to ensure that she had been heard correctly. However, it seems to have been written as a rebuttal to some of reasons for the warning notice. For example, in relation to the disclosure of the medical test to a person other than the youth client, she wrote:

> *Although I felt it was not inappropriate to disclose the result at the time; I now see where this could have caused an issue given a different circumstance.*

46. The parties placed emphasis on the issue of whether the Complainant actually took responsibility for this incident. This was relevant to whether she was a good employee or not, one who would learn from her mistakes. Ms. Atwell testified to her belief that the Complainant truly did not accept responsibility and that this was a significant factor in her assessment of the Complainant's overall performance.

47. During her testimony about this incident, the Complainant emphasized her own credibility inferentially on the basis that she reported herself to the employer. For example, she highlighted that Mr. MacIsaac was surprised and happy that she reported herself. This positive inference is tempered somewhat by the Complainant's testimony that she knew there was some chance that Mr. MacIsaac would receive a call over the incident. Her evidence that she accepted responsibility was also somewhat tempered during her cross-examination, when she expressed both having learned from the incident and that she and Mr. MacIsaac had different views on the matter. The Board notes that the Complainant was not particularly empathetic in her testimony to the youth involved in terms of the potential harmful effect of her actions.

48. Under cross-examination on the subject of the release of information related to the pregnancy test, the Complainant testified that the youth client was in the car with her partner and passed the phone to him. The Complainant testified that the client said in the background to "just tell him". This circumstance would theoretically provide her with consent to release the information. No mention of this was made in the memo the Complainant wrote to Mr. MacIsaac at the time. In writing that document to clarify what happened, if there was some extenuating circumstance that would justify what happened, presumably the Complainant would have mentioned it. She acknowledged in her testimony that the June incident was very serious and that she knew it could have an effect on her advancement.

49. From her demeanor during her testimony, the Complainant clearly believes both that she accepted responsibility for this incident and that she was justified in releasing information to the youth's partner. She did not appear to self-identify any evident contradiction in this context. When tested under cross-examination as to the extent she agreed that she had done something wrong, she identified a new reason to justify her disclosure of the results of the pregnancy test, namely that the youth told her to share the information at

the time. Her failure to resist the inclination to do so and the resulting inconsistency belies the sincerity of her acceptance of responsibility in hindsight.

50. Mr. MacIsaac responded to the Complainant's clarification memo by letter dated August 4, 2009. He wrote that he received the Complainant's response positively, stating:

> *The explanations seek to clarify and give context without making excuses or minimizing. There is also a clear acceptance of responsibility and acknowledgement to the valuable learning opportunities the incident has provided.*
>
> *He also wrote that the Respondent "will make any future considerations regarding your employment (probationary, contract renewal, or other available positions) based on the totality of your performance and qualifications, and not solely this incident."*

51. This letter was reviewed and approved by Ms. Atwell at the time. Notwithstanding her approval of the letter, it was her opinion that Mr. MacIsaac characterized issues as learning opportunities a little too readily. This became an increasing source of friction between them over time.

52. On October 21, 2009, Mr. MacIsaac completed an employee appraisal process with the Complainant. The Complainant received ratings between average and excellent. The average ratings related to work quality, quantity, knowledge of job and judgement. Key areas requiring improvement were described as impulsivity, her failure to recognize her lack of casework experience and to seek advice from her supervisor and Mr. MacIsaac's concern that she did not always recognize the limits of the restorative justice process.

53. Under the heading of "Warnings, If Any, to be Given to Employee", Mr. MacIsaac wrote:

> *Tammy is very sensitive. She should continue to work on separating her personal feelings from the work. As discussed with her previously, she should also be aware that the nature of the casework position is to support ALL parties towards Session. Tammy should constantly be aware of her past employment experiences, which lead her toward being overly*

partial to the Young person, especially when the complexity of a file is revealed.

54. Mr. MacIsaac explained in his testimony that he had discussions before the appraisal with the Complainant about these issues. However, he concluded that she had demonstrated the necessary skills to have her probationary period extend for the remainder of the 12 month contract.

55. In November 2009, a full time caseworker position was posted. Three of the new one year term caseworkers, who had been hired at the same time, applied for the position, namely, Lisa Davis, Shelley MacNeil, and the Complainant. They were interviewed and received assessment scores respectively of 52, 51 and 48. Lisa Davis was awarded the position as she was considered to be the most qualified of the applicants. Ms. Davis had no history of discipline on her file.

56. As it was anticipated that another position would become available in the near future, the Respondent and the Union agreed that the next subsequent vacancy did not have to be posted.

57. The Complainant had no further incidents of discipline during the remaining portion of her one year contract.

The Second Term Contract

58. The Complainant's contract was due to expire on April 6, 2010. As the expiry date approached and passed, the Complainant was told by Mr. MacIsaac to continue to report to work. However, he testified that he was excluded from decision-making concerning whether her contract would be extended.

59. The Complainant was eventually provided with a second written contract for a one year term, retroactively effective for the period April 6, 2010 to April 6, 2011. The contract was executed on June 1, 2010. When asked why the Complainant was given a second contract given the discipline on her record during the first year, Ms. Atwell testified that the Respondent was an organization that believed in giving people a second chance.

60. The contract stated:

> *It is understood that the contract period is designed to determine your suitability for Full Time employment. Accordingly, your employment may be terminated at any time and for any reason during the contract period, subject to the Nova Scotia Labour Standards Code, if applicable.*

61. Complainant's counsel pointed out that this contract permitted the Complainant to be terminated quite easily during that second term contract. She suggested that if the Complainant's performance was, in fact, substandard, the employer could have easily terminated the Complainant prior to its expiry. The Board agrees that the contract provided for minimal obligations from the employer's perspective in the event of termination of employment.

62. After receiving this second term contract, one of the permanent case workers, Mariella Felentes, went on leave and the Complainant took over some of her files.

63. Within this same time frame, the Complainant learned that she was pregnant. Regrettably, however, in early June 2010, the Complainant had a miscarriage. She was off work for a few days and returned, but subsequently had to take a bereavement leave. She requested a bereavement leave from Judy Feltus, the office manager, which was granted. She testified that this experience had a profound effect on her.

64. The Complainant testified that in July, 2010, she began to report to Gola Taraschi as Mr. MacIsaac was off work for a few months from July to September 2010, after sustaining injuries in a car accident. She identified that further issues were raised with her performance in October 2010 by Mr. MacIsaac when he returned, related to events that had happened in August, 2010.

65. However, the evidence is that on July 9, 2010, two fellow caseworkers complained about the Complainant. Staff and clients were participating in a meeting that was part of a ShopLift program provided by the Respondent. During the meeting, a client of the Complainant disclosed information about the extent of her shop lifting to the group. This was new knowledge to the Complainant. It is not in dispute that the Complainant spoke out in the group setting, stating something to the effect, "We will chat about this later".

66. Given the Complainant's description of events in an email she wrote to Mr. MacIsaac of July 12, 2010, the Complainant knew that her co-workers had a concern immediately. She noted that one of the caseworkers touched her arm when she made the comment. The Complainant must have interpreted this gesture as being an expression of concern about what she had just said because she responded to the effect that she was "just joking", a comment she repeated directly to the client immediately.

67. According to Ms. Atwell, before he left on leave, Mr. MacIsaac gave her the impression that he would hold a restorative justice session with the three staff and follow up with any required supervisory action. However, he met with each caseworker separately and let the matter drop. He did not seem to be particularly concerned about the actual issue between the caseworkers. Mr. MacIsaac's evidence was that he was more concerned that the two caseworkers came to him instead of going directly to the Complainant. He did not appear to consider that the Complainant realized that her co-workers were immediately concerned. His concern also related to the ability of the caseworkers to work together post-incident. Despite this concern, Mr. MacIsaac did not hold a restorative justice session with the three co-workers.

68. His reaction is in marked contrast to the reaction of Ms. Atwell when she became involved at a later point. Ms Atwell testified that joking is not permitted in this context.

69. Effectively, the original issue was left unresolved by Mr. MacIsaac and was not clarified sufficiently for the Complainant. She maintained during the hearing that this was not a matter involving her judgment because she understood her relationship with the client the best. The Complainant's opinion does not take into account that this was a group setting, not a private session with her client, and that her comment ran counter to the role of the caseworkers participating in that group discussion and to the desirability of youth speaking openly.

70. As indicated previously, Mr. MacIsaac, unfortunately, had a serious motor vehicle accident in July and was out of the office on medical leave until September.

71. Previous to this, Ms. Atwell's concerns about Mr. MacIsaac's performance as a supervisor had become more pronounced. By July 2010, she described their relationship as having become tense. There had been an arbitration involving the

Respondent. Mr. MacIsaac was to be a witness but had not adequately documented what happened. The lack of documentation impacted the Respondent's ability to defend the grievance. Mr. MacIsaac testified that Ms. Atwell was very angry with him over that. They had on-going discussions about the need to document incidents involving staff.

72. Ms. Atwell testified that she also had concerns about Mr. MacIsaac's management style. To her, he saw everything as a "teachable moment" when some issues needed to be treated as something more than that. She formed the opinion that he was too close to the staff he supervised and not aligned with management in accordance with the expectations of his job description.

73. When Mr. MacIsaac was off work on medical leave, the Respondent retained Gola Taraschi to act as Acting Caseworker Supervisor in his absence. She conducted an audit of casework files.

74. The Board noted that when the Complainant referenced Ms. Taraschi later in her evidence, she described her as an advisor to the agency and specifically made the point to the Board that she was not a caseworker. The inference was that Ms. Taraschi did not know what she was doing. It came out later in the evidence that Ms. Taraschi developed the policies and protocols of the restorative justice program and, therefore, offered the Respondent significant expertise in her role. In effect, Ms. Taraschi "wrote the book".

75. Ms. Taraschi followed up on the concern related to the ShopLift session that had not been addressed by Mr. MacIsaac. This led to Ms. Atwell writing a "Second Warning Notice" to the Complainant by letter dated July 30, 2010 respecting her inappropriate comment to the youth. Ms. Atwell wrote, "...unless matters can be corrected, I shall have no alternative but to undertake further action."

76. There was some dispute in the evidence about whether this was a further disciplinary event, as contrasted to a cautioning. Nothing specifically turns on this point. This case concerns whether discrimination occurred, as compared to a case where an employer is attempting to establish just cause for termination.

77. Ms. Atwell testified that over the summer months, Ms. Taraschi discovered other issues in relation to the performance of staff supervised by Mr. MacIsaac which reflected on his performance as a supervisor. This included concerns about a file handled by the

Complainant during August and September of 2010. As well, as a result of issues disclosed by the audit of files of other staff that had not been addressed by Mr. MacIsaac, a number of staff received warning letters on their files. Mr. MacIsaac met with significant criticism of his performance when he returned to work in September. Ms. Atwell described the issues as "glaring mistakes" and testified that her relationship with Mr. MacIsaac became even more strained.

78. Having been directed to follow up on certain matters upon his return, Mr. MacIsaac identified a number of issues related to the Complainant's management of a particular file in August and September. The performance deficiencies were significant. There was no adherence to the restorative justice process in a number of key respects. Ms. Atwell described the deficiencies as horrific.

79. On August 9, 2010, a youth arrived at an intake meeting without an adult support person. As indicated, the protocol requires that a support person over the age of majority attend intake with the young person. The Complainant proceeded with the intake.

80. As well, acceptance of responsibility by the youth for the offence is a prerequisite to participation in the program. The young person had not taken responsibility at intake, yet the Complainant proceeded with the process.

81. On August 16, 2010, the Complainant offered to be the young person's support person at the upcoming restorative justice session in the absence of adult support and in the absence of the client's acceptance of responsibility.

82. The young person subsequently offered to have her sister act as her support person. Pre-service with the support person is considered to be an important prerequisite to a restorative justice session. At the time the session was scheduled to proceed, there was no pre-service done with the sister to ensure she was prepared to participate appropriately.

83. The Complainant scheduled the restorative justice session, which required the attendance of a police officer, on a day she knew the officer was not scheduled to work. Scheduling police officers to attend restorative justice sessions on their days off increased the costs of policing by incurring overtime. Accordingly, an agreement had been reached with the police that officers were to be scheduled to attend sessions on

days they were scheduled to work. There was a process in place to ensure this occurred. Mr. MacIsaac questioned whether the Complainant was aware of the process for booking officers.

84. The Complainant was disciplined about her poor management of this file. For the most part, Mr. MacIsaac agreed with Ms. Atwell that the Complainant should be disciplined. Appropriate discipline was determined to be a suspension without pay for two days, a two month period of suspension with close supervision and a reflection assignment, which was essentially a training/learning opportunity. The caveat respecting Mr. MacIsaac's agreement regarding the appropriateness of discipline is a reference to his evidence that, given that issues had been raised by Ms. Atwell concerning his lack of supervisory follow up, "he was not of a mind" to disagree with her.

85. On October 12, 2010, the Complainant wrote a response to the letter informing her that she was being disciplined and copied her response to the Executive Director. Mr. MacIsaac interpreted her response as a rebuttal of his decision in regards to her discipline. He advised the Complainant in an email of October 12, 2010 that she could petition the Executive Director if she wished to appeal the disciplinary decision.

86. The Complainant did not follow up. The Complainant testified that, in her mind, she had already petitioned the Executive Director by copying her communication to Mr. MacIsaac to the Executive Director. However, having been invited to appeal by Mr. MacIsaac, she did nothing further.

87. The positions of the parties differ as to the degree to which the Complainant accepted responsibility for her actions. The Complainant asserted during her evidence that she took responsibility, noting that in Mr. MacIsaac's letter of October 7, 2010, he had acknowledged that she took responsibility "at an early stage". However, she also testified that she was surprised to be disciplined two months after the events, and stated that she did not know that what she did was wrong.

88. The Complainant testified that she questioned the severity of the disciplinary action because it did not make sense to her. She felt "bombarded" by the investigation and implied that a restorative process should have been used. She felt she needed to have some input into what happened, as she had no say in it. It was "all put on her". The

Board notes that her testimony is inconsistent with an acceptance of responsibility after the fact.

89. Her written response disputed whether progressive discipline had been followed and proper considerations taken into account. While she acknowledged being interviewed, she felt the decision to impose discipline had already been made on the basis that notes were taken during the interview and because she was informed that a formal investigation into her "poor casework" was taking place.

90. In her written rebuttal, the Complainant asserted that this was the first time her casework had ever come into question. She acknowledged that she had prior written warnings but pointed out that they were for being "too supportive" and not for poor casework. She asserted in her rebuttal that she had never had any "poor casework" issues brought to her attention in the past.

91. In the Board's view, the issues in June, 2009 involved her judgment in interactions with clients and other participants and her adherence to the protocols that make up the restorative justice process. The underlying commonality between the incidents is poor practice in a context where procedure is highly important. In any event, both "poor practice" and "poor casework performance" is referenced in Mr. MacIsaac's letter of October 7, 2010. The reference to casework in the letter of discipline of October 7, 2010 seems to have been intended to be a general reference to her responsibilities as a caseworker. As well, in her performance appraisal, the Complainant had been advised to "be aware of and respect the limitations of the NSRJ mandate", which was described as "essential to success in casework". In the circumstances, the Complainant appeared to be somewhat selective about what Mr. MacIsaac conveyed to her.

92. The Complainant distanced herself from her written rebuttal during her testimony on a particular point. In that document she had acknowledged that she had more than one prior written warning. However, the Complainant testified that she intended to refer to just the one incident where she was "too supportive". The Complainant testified that she did not recall any other disciplinary warnings. She then added that there was one situation that did not come to mind at the time she wrote her response. That was the incident involving the ShopLift meeting. She explained her perception that this was not

disciplinary on the basis that Mr. MacIsaac had told her that the incident was not a disciplinary matter.

93. The Complainant's testimony does not take into account the events that occurred after Mr. MacIsaac left on leave, specifically, the letter she received, described as a second warning, from Ms. Atwell. The Board does not find her testimony in which she disavowed having received more than one written warning convincing in light of these facts.

94. The Complainant's rebuttal of October 12, 2010 is persuasive evidence that the Complainant did not take responsibility for her actions, although she believes she did. At the outset of her letter she wrote, "I would like to state right away that I accept the consequences outlined in the letter but only because I have no alternative to choose from." The Complainant also wrote: "...this was my first offence of this nature (if this is even such an offence), this is not a culminating incident, if indeed my work on this file was 'poor' I take responsibility and am open to learning...."

95. The Complainant alleged in her rebuttal that there were mitigating circumstances that may have led to a misjudgement on her part which were disclosed to Mr. MacIsaac and Ms. Atwell at an earlier time. She testified that by "mitigating circumstances' she meant her miscarriage in June.

96. In his letter of October 7, 2010, Mr. MacIsaac explained the rationale or balancing of factors that had been considered by management in determining what would be appropriate discipline. He did not only take into account the evidence of poor practice but also considered the fact that her casework did not usually contain such obvious flaws. He wrote, "Bearing this in mind, it gives credibility to your assertion that recent personal issues have distracted you from delivering quality casework on this file." He clearly did take her mitigating circumstances into account. However, he specifically clarified that neither he nor Ms. Atwell were aware of her personal struggles.

97. The Complainant testified that this statement in Mr. MacIsaac's letter was "a lie". She asserted that there was no way an employer would give her grief days and not know why.

98. The evidence of Mr. MacIsaac was that he thought that people in the office knew that the Complainant had a miscarriage in June because it was a small office. However, when

he wrote this letter in October, he did not know how it was affecting her work. He said this was the first time the Complainant made this connection for him.

99. The evidence of Ms. Atwell was that she did not know the reason the Complainant had taken bereavement leave. Ms. Atwell stated that if an employee needs bereavement leave, they just take it and it is not questioned.

100. The Board accepts the evidence of Mr. MacIsaac and Ms. Atwell on this point. The Board finds that the Complainant "read into" the situation, inputting knowledge of the specific reason that she took bereavement leave to both Ms. Atwell and Mr. MacIsaac.

101. The Complainant clearly did not recognize that she had acted contrary to the policies and protocols of the restorative justice program before it was brought to her attention by Mr. MacIsaac. She continued to insist, after it was discussed and explained to her in writing, that her own judgment as to what was in the best interests of the youth should be, in effect, substituted for the policies and protocols of the restorative justice program.

102. She made a point of contradicting Mr. MacIsaac's assertion in writing on October 7, 2010 that neither he nor the Executive Director was aware of her personal struggles. She did so by including a statement in her rebuttal of October 12, 2010 that her mitigating circumstances were disclosed to her supervisor and the Executive Director at an earlier time.

103. Mr. MacIsaac gave evidence about having butted heads with the Complainant prior to this incident. It appeared from his evidence that he was quite comfortable having caseworkers speak their minds and challenging him. However, he circled the word "but" in the Complainant's rebuttal of October 12, 2010, as that word appeared several times in the document. He felt it meant "justified". He testified that he had a problem with the Complainant using the word "but". To him, the letter was an indictment of the Complainant against herself if the words following the words "but" were discounted. He made a written notation to that effect on the document. He testified that he had tried to counsel the Complainant about the use of the word "but" and how that undermines accountability by explaining the problem away. However, that the Complainant did not adjust her behaviour.

104. Notwithstanding his testimony, in the disciplinary letter of October 7, 2010, Mr. MacIsaac made a point of noting that the Complainant took responsibility at an early stage, also writing:

> *...(You) fully cooperated, answering all questions asked of you during our meeting. In your defence you initially submitted that operational changes have occurred in recent weeks and what would have been considered an honest mistake a few weeks ago, is now treated as an egregious error.*

105. In the Board's view, Mr. MacIsaac was a little quick to conclude that the Complainant was taking responsibility. The Complainant was cooperative and frank in the spirit of defending herself. This is not the same thing as accepting responsibility. His premature conclusion is belied by her rebuttal of October 12, 2010 in which she wrote that she accepted the consequences but only because she had no choice.

106. The Respondent submitted that Mr. MacIsaac's assessments and reactions in his supervision of the Complainant should be considered in light of his own performance related difficulties in the workplace. Reference has been made previously to Ms. Atwell's testimony that their relationship became even more strained. On his return to work in September, 2010, Mr. MacIsaac had been presented with a letter regarding his own performance, which he described as "pseudo-disciplinary".

107. Of the ten staff he supervised, a number had letters in their files similar to the one sent to the Complainant. These were written by Ms. Atwell. He was informed that his staff had disciplinary issues because he had disciplinary issues and that he was not doing his job. Mr. MacIsaac testified that the staff who received these letters had never received a warning before in their lives, by their own words, and to him there "appeared to be a fire sale on these letters". He testified that he was just as shocked as the staff were that they received them.

108. Mr. MacIsaac questioned Ms. Atwell's competency respecting case work. Under cross-examination, he testified that the Executive Director had never done the job of a case worker and had no personal knowledge. He said that she relied upon the consultant, Ms. Taraschi. He testified that "it starts to be meaningless", in the context of Ms. Atwell's

criticisms, nothing that in the same year he won an award for his service within the criminal justice system.

109. On September 30, 2010, he received a new job description. The most significant component of the change related to a direction from Ms. Atwell that Mr. MacIsaac was not to attend court any longer on behalf of the Respondent. He testified that he "purged most of it" because it was "hogwash".

110. He acknowledged that he was told that the concern was that he was spending too much time in court and that this time at court impaired his ability to properly supervise the case workers. He testified that he was not sure what that meant.

111. Mr. MacIsaac saw attendance at court as being a necessary and important part of his role. When asked whether the decrease in profile the agency played in court decreased his job satisfaction, he characterized his objection as a concern that the agency would no longer have a voice at the table and suggested that this could lead to fewer referrals. The plan was to have a case worker attend court instead. He noted that the case worker would not be a decision-maker and that this would create undue delay. This was disputed by Ms. Atwell.

112. Under cross-examination, he testified that there had been a youth court stakeholder's meeting, at which Ms. Atwell met with various stakeholders. He said that she felt attacked and ambushed, as attendees decried the decision of the Respondent to pull a decision-maker out of court. Mr. MacIsaac reported that one participant asked Ms. Atwell, "Why are you sending us your B team and keeping your A Team home?" He concluded that the change to his job description was a power move, as Ms. Atwell said to him, "I run the agency, not you."

113. Mr. MacIsaac admitted that these events increased the tension in the workplace. He decided that he would leave Respondent's employ. He testified as to the reasons for this decision.

114. These reasons included his determination that there was only one spot for him to consider if he had stayed with the Respondent and that was the position of Executive Director. He had thought that Ms. Atwell would retire. However, it became fairly clear to him that Ms. Atwell was not moving on. Mr. MacIsaac added that, at some point, Ms.

Atwell will retire and that he intended to put his name in for her position. Counsel for the Complainant suggested that this comment was made as a joke by Mr. MacIsaac. Given the witness's demeanour, this statement did not appear to the Board to be intended as a joke.

115. Mr. MacIsaac posed a hypothetical question respecting whether he could compete with the Respondent for its restorative justice work. The Respondent delivers the restorative justice program through a contract with the Nova Scotia Department of Justice. He noted that it would be interesting to see how "they" followed the rules of tender. He stated his belief that at present the contract just carries forward.

116. Mr. MacIsaac described the agency as a "very terrible" place to work. He brought up a workplace review conducted by Dunphy & Associates that was highly critical of the workplace. On cross-examination, he clarified that this occurred in 2005, around the same time as the Respondent became unionized. The evidence is that this was prior to Ms. Atwell's employment with the Respondent. Mr. MacIsaac testified that even post-unionization, the workplace was "extremely disputatious" and that the environment was not one of respect.

117. To make matters worse, there were further disputes between Mr. MacIsaac and Ms. Atwell occurring in the background. Mr. MacIsaac was told he was too lenient with the staff he supervised. He was sent a letter of warning (the exact timing of which was unclear on the evidence) after rumours surfaced that that he was having an intimate relationship with one of his staff. The letter referred to the expectation that he retain appropriate distance between himself and the staff he supervised.

118. Mr. MacIsaac testified that he and Ms. Atwell met about this issue. She realized that the allegation of an intimate relationship was not true and apologized. However, Ms. Atwell decided that the letter, as written, should stand because he was too close to his staff. He requested a letter of apology to which Ms. Atwell would not agree. The issue led to a restorative justice circle facilitated by the Board Chair of the Respondent. Mr. MacIsaac testified that the issue became about his management. He did not have recourse to take it further, as he was not a unionized person.

119. Mr. MacIsaac fundamentally rejected Ms. Atwell's assessment of his own performance and her assessment of the performance of the employees he supervised. It is apparent from his testimony that he strongly disagreed with her conclusion that certain issues required disciplinary action and a disciplinary message to employees. His testimony was consistent with a supervisor who is taking sides very obviously with his staff.

120. His testimony also highlights a fair degree of lack of respect for Ms. Atwell's competency. Whether Mr. MacIsaac was correct or not about Ms. Atwell's competency is not the issue in this case. However, the evidence concerning his attitude and conduct towards Ms. Atwell is relevant context to the assessment of his perception and recollection of events. Mr. MacIsaac seemed intent on discrediting Ms. Atwell in his evidence. The Board finds that he is clearly not a neutral witness.

121. On October 21, 2010, the Complainant began her two month period of probation. It concluded on December 21, 2010. She was required to be closely supervised by Mr. MacIsaac and had to meet with Mr. MacIsaac to consult with him on each file before any sessions were scheduled. In addition, Mr. MacIsaac conducted spot checks. There were also 2 monthly supervision meetings during the probation.

122. Mr. MacIsaac wrote a letter dated December 21, 2010 at the end of the probation to the Complainant. He made a number of very positive comments about the Complainant in that letter. The letter of December 21, 2010 also contained this statement:

> *From our conversations, I know that moving forward restoratively from this point is as important to you as it is to CJS management. While documentation remains on your file, it should not dissuade you from applying for other positions within the agency nor does it perpetually hang over your head.*

123. Because of the content of the letter, the Complainant submitted that it was reasonable for her to believe that she could receive additional employment from the Respondent following the expiry of her contract. She submits that reassurances offered to her in that letter contradict the Respondent's claim that it did not wish to continue to employ the Complainant once her contract expired because of performance issues.

124. Mr. MacIsaac testified that this is language he put in the letter. Ms. Atwell reviewed and approved the letter before it was sent to the Complainant. Ms. Atwell did not tell Mr. MacIsaac to change this statement. Ms. Atwell did not say that she disagreed with the content of the letter. Ms. Atwell testified that she did not request changes because she had no information to the contrary and had to rely on Mr. MacIsaac as the supervisor.

125. Mr. MacIsaac's comments in the letter of December 21, 2010 included the positive statement: "In my opinion, you have accepted responsibility and completed all that was asked of you, as such, this matter is concluded." He noted that, "Any feedback given one month was immediately acted upon and did not reappear the next time". Her casework during this time was described as being of a "high calibre". Mr. MacIsaac worked quite closely with the Complainant during this probationary period.

126. There is no evidence of anything other than compliance by the Complainant with the terms of her probation. What strikes the Board as less supportable on its face is Mr. MacIsaac's statement in his letter of December 21, 2010 that, in his opinion, the Complainant had accepted responsibility. There was no evidence of any further discussion or rehashing of the events that gave rise to the discipline subsequent to Mr. MacIsaac advising the Complainant she could appeal in his email of October 12, 2010. The Complainant's evidence was that, "in her mind it was done" and she had her suspension. The Complainant clearly did not accept responsibility at the hearing. She offered no evidence during her testimony to suggest that she had changed her opinion of her rebuttal.

127. The Board concludes that Mr. MacIsaac was trying to portray the Complainant in a favourable light in his letter of December 21 2010. In contrast, in October he noted that her rebuttal was an "indictment against if letter written without 'but'". On the evidence, there was no reason for him to conclude, after she so strongly challenged the discipline, that she had accepted responsibility for the incidents that led to the discipline. What she did was comply with the probation and do a very good job during her probationary period.

128. By the time this letter was written in December of 2010, Mr. MacIsaac had decided he wanted to leave the employ of the Respondent. By this time he very much disagreed with the way Ms. Atwell was managing the workplace. It was clear from his demeanour

during his evidence at certain points that he was quite upset by the criticism of his performance. For these reasons, the letter Mr. MacIsaac wrote is not as reliable evidence of a change in attitude by the Complainant as it would be, on its face, purely based on its content.

129. On December 20, 2010, Shelly MacNeil was given a full time unionized position on the basis of her score. Ms. MacNeil had no record of discipline.

130. This left the Complainant as the only caseworker still employed with the Respondent from the original group of newly hired caseworkers who did not have a full time unionized position, a fact that clearly troubled her. The Complainant testified that she was told by a Union Representative that caseworkers had rolled into full time unionized positions in the past.

131. By the end of December 2010, the Complainant had approximately three and a half months left in her contract. Mr. MacIsaac testified that he had a number of discussions with the Complainant about her contract. During weekly supervision meetings, the Complainant would bring up the issue of her prior discipline frequently. She wanted to know whether her disciplinary record would lie over her head and asked Mr. MacIsaac whether he had talked to Ms. Atwell about this. There was no suggestion in Mr. MacIsaac's evidence that he ever spoke to Ms. Atwell about this particular issue on the Complainant's behalf or otherwise.

132. The Complainant testified that she knew that her contract would be up in a few months and wanted a renewal. Ms. Felentes had told her that she might not come back to work at the end of her leave, which was scheduled to end March 1, 2011. The Complainant had ongoing discussions with Mr. MacIsaac about this and in her mind hoped that she would roll into or otherwise apply for Ms. Felentes's position.

133. The Board heard evidence of friction between the Complainant and Ms. Atwell in other contexts. Mr. MacIsaac and Ms. Atwell confirmed that the Complainant and Ms. Atwell "butted heads" frequently.

134. The Complainant complained at staff meetings about the fact that the Respondent offered programs specifically directed to assisting African-Nova Scotian youth. She implicitly denied that these youth are an under-represented group. Ms. Atwell is an

African-Canadian with strongly held beliefs in this regard. Given her personal history, she no doubt found that difficult to hear.

135. Ms. Atwell was also offended by the Complainant during an event hosted by the Respondent which featured the spoken word artist, Elle Jones. The artist's performance included references to African-Nova Scotian youth being treated differently by police. The Complainant voiced the opinion in front of others that it was unprofessional for the Respondent to host such an event with police officers present.

136. Under cross-examination, Mr. MacIsaac indicated that in mid-January he had interviews for a position he ultimately obtained with Dalhousie, his current employer. Subsequently, in February, he received two warning letters from Ms. Atwell respecting his performance.

137. At some point before January 2, 2011, another manager complained about Mr. MacIsaac. A restorative justice session was scheduled to proceed; however, the facility was not available. Mr. MacIsaac advised that the session could be held at Tim Hortons. Mr. MacIsaac had done this before and did not see anything wrong with it. He received a written warning from Ms. Atwell dated February 3, 2011 which stated that "sessions in public places is strictly prohibited". He disagreed with Ms. Atwell that this warranted a warning.

138. Ms. Atwell wrote another warning letter to Mr. MacIsaac, dated February 28, 2011. It arose from a complaint about Mr. MacIsaac's conduct from a mother of a youth involved in the program. The mother's complaint had been forwarded to the Restorative Justice Manager within the Department of Justice and the Ombudsman of Nova Scotia.

139. The gist of the complaint was that Mr. MacIsaac had conveyed to the mother that he recommended that no further action be taken against her son in the early stages of the process. This created expectations that the matter would be dealt with without additional consequences for her son. This is said to run counter to the restorative justice process, which is to address consequences with the involvement of all relevant participants. The mother also alleged, among other things, that she thought she was going to a session with only herself, her son, the principal of the school and the facilitators present. The session was attended by other youth clients and their supports.

140. Although the key points were not in dispute, Mr. MacIsaac was dismissive of the letter of February 28, 2011 from Ms. Atwell, describing it as "just written allegations or complaints". He testified that the letters was not anything he took much time to process because he did not have to.

141. Sometime in early February, 2011 the Complainant told Mr. MacIsaac that she was pregnant. He advised her to keep the fact of her pregnancy to herself. Mr. MacIsaac described having a bit of a "back and forth" with the Complainant, who took issue with his warning. She was happy that she was pregnant and felt it was her right to be able to tell people she was happy and that no one should be able to tell her to keep it to herself.

142. Mr. MacIsaac testified that he had no idea why he told the Complainant to keep the fact of her pregnancy to herself. No one had said that this was going to be an issue. He did not have any specific information to make him say this and noted specifically that nothing had been said by Ms. Atwell. He believed at the time that there was a shortage of staff due to vacancies and that case workers were doing extra work. However, he testified "who can describe it..., you know where the egg shells are".

143. The Respondent submitted that Mr. MacIsaac planted the seed of potential discrimination in the Complainant's mind in making these statements.

144. Mr. MacIsaac testified that at a subsequent staff meeting, which he believed occurred in early February, the Complainant announced that she was pregnant. He said that he remembered looking at his feet the whole time. He thought it was a bad idea that she told everyone, but everyone was happy for the Complainant.

145. The Board finds that there is no reasonable basis for Mr. MacIsaac to have reacted in this manner. The evidence, both of other employees who were witnesses, and Mr. MacIsaac himself, was that Ms. Atwell was generous in giving employees leave from work to attend to health or family-related issues. Mr. MacIsaac made a point of mentioning this in his exit interview. He had not personally experienced discrimination in this workplace. The Complainant herself did not suggest that she had concerns that her pregnancy would be a problem.

146. The Complainant testified that Ms. Atwell's reaction to the pregnancy was positive. The Complainant had no interactions subsequently with Ms. Atwell respecting her pregnancy

in the day to day operations of the Respondent. Mr. MacIsaac acknowledged under cross-examination that he had no discussions with Ms. Atwell concerning the pregnancy following the announcement.

147. Mr. MacIsaac testified that by the end of February, he and Ms. Atwell had not had any discussion about what would happen with the Complainant's contract. He had the sense that her contract would be extended in April because they were short-staffed. He referenced that Mariella Felentes had been off work. He was not sure whether she would be coming back; he had "no real sense of this". He felt that administratively it would have been a nightmare to lose the Complainant in April because the Society did not have a full complement of case workers. However, he did not know what was going to happen; nor did he have any decision-making power in this regard.

148. He testified that the Complainant asked frequently whether, if Ms. Felentes did not return, she could apply for her job. He told her he could not say why not.

149. Mr. MacIsaac testified that at regular management meetings, which were attended by Ms. Atwell, he made it clear that that they were understaffed in his area. Notably, he testified that while that information was presented at these meetings, solutions were not. This is consistent with Mr. MacIsaac not knowing what was going to happen.

150. Ms. Atwell testified that she deliberately did not tell Mr. MacIsaac about what was going on in relation to staffing decisions. By that point in time she had serious reservations about his loyalty to upper management. She did not believe he would hold information in confidence. She thought he would use the information to cause chaos among the staff.

151. Mr. MacIsaac testified that he and the Complainant talked about the fact that Ms. Atwell did not discuss with Mr. MacIsaac whether she had made a decision about the Complainant's contract.

152. The Complainant testified that her expectations were that she would continue working. She was hoping to roll into Ms. Felentes's position or apply for it if she was not rolled into the position. She had not been told that any decision had been made to not renew her contract. She testified that the non-renewal of her contract was not even hinted at.

153. She testified that she had no prior discussion with Ms. Atwell regarding the future of her employment at all prior to March 1, 2011. This testimony contradicts the evidence of Ms. Atwell, who testified that the Complainant started approaching her in this regard in late 2010. Ms. Atwell wrote a letter to the Commission on February 13, 2012 indicating that the Complainant had made it known to her on repeated occasions that she was intent on remaining in the Respondent's employ beyond the expiry of her contract during her second term. She wrote that the topic was brought up with such frequency that it "approached the level of unreasonableness".

154. Notably, the Complainant had no further disciplinary incidents related to performance issues from September, 2010 until the end of the term of her employment contract on April 6, 2011.

The Meetings in March, 2011

155. The Complainant testified that she decided to meet with Ms. Atwell on March 1, 2011 to discuss her contract and the one coming up. Her testimony is that Ms. Atwell asked the Complainant what her plans were. The Complainant said that she planned on continuing to work; she planned on applying for Ms. Felentes's position if she did not roll into it; she would have her baby; and she conveyed that she would take some time but was not taking a one year maternity leave. Under cross-examination she testified that she told Ms. Atwell that she intended to take a 3 or 4 month maternity leave, although she admitted that she did not tell anyone else that, including Mr. MacIsaac, because she did not think it was relevant.

156. The Complainant stated that there was much humming and hawing, following which Ms. Atwell responded, "That's probably not going to work". The Complainant asked why. The response was, "why would I hire you for a year long position if you're not going to be here." The Complainant responded that she would be on maternity leave. She testified that Ms. Atwell questioned why she would give the Complainant a year long position she would have to fill in 5 months.

157. The Complainant testified that confusion set in; she "was not understanding" Ms. Atwell. She used the word "dumbfounded" to describe how she felt. She described becoming upset. She stated that Ms. Atwell added that she did not know if the Board would

approve of her giving the Complainant a one year contract if she would not be here, commenting, "How does that make sense?"

158. The Complainant testified that the conversation continued back and forth in this manner. It was apparent to the Board that the conversation became an argument.

159. The Complainant testified that Ms. Atwell then asked her what her due date was and asked her if she wanted to work another five months, to her due date. Ms. Atwell identified that the Respondent was short-staffed. The Complainant agreed to remain on that basis.

160. The Complainant challenged Ms. Atwell about having a five month extension but not a new contract. She said that Ms. Atwell raised her voice at this. She stated that it was more work for her to have to replace the Complainant halfway through the contract. Ms. Atwell emailed the Complainant afterwards stating that her contract was extended to August 1, 2011.

161. The Complainant testified that Ms. Atwell made no mention of performance issues during the March 1, 2011 meeting.

162. Ms. Atwell testified that sometime before March 1, 2011, she had spoken with Ms. Felentes, the employee out on an extended leave. Ms. Felentes had asked for a further leave of absence of one year, which she granted. The exact time that Ms. Atwell learned this is not clear on the evidence. Ms. Atwell testified that she did not need to replace Ms. Felentes at time she found out that Ms. Felentes would not be returning on March 1, 2011. She had to look at workloads and think about whether they needed to fill that role. There was evidence to the effect that workloads had begun to decrease in late 2010 and into 2011. There was also evidence that the Respondent was short staffed. Ms. Atwell testified that on March 1, 2011, she had not made a full decision about whether she would post the position.

163. Ms. Atwell testified that when the Complainant met with her on March 1, 2011 and asked her for a job, she responded that there is no job, because there was no job. She stated that the Complainant became irate and accused her of doing this because she was pregnant. Ms. Atwell testified that she responded, "That's ridiculous". The Complainant accused Ms. Atwell of doing this because she would be taking a maternity leave. Ms.

Atwell responded, "You're done, you're finished, you're leaving," by which she meant your contract is coming to an end.

164. Ms. Atwell testified that the Complainant asked if she could stay on after her contract ended. She did not want to stay at home doing nothing until her baby was born. Ms. Atwell testified that she replied affirmatively so that the Complainant could finish work on her files. She denies offering the Complainant this extension. She denied saying that she would not hire the Complainant for Ms. Felentes's position. In her mind, she was clear in her communication and this is how the matter was left.

165. Ms. Atwell denied finding it difficult to fill a position temporarily vacated by a maternity leave, indicating that she had done this before. At a different point in her testimony, the Complainant also testified that it was not difficult to cover people on leaves as staff covered for each other all the time. The evidence was that staff had covered Ms. Felentes's leave by dividing up her work and that when another caseworker had been fired, the additional work was allocated among the caseworkers.

166. Ms. Atwell testified that she granted a five month extension of the contract as a cushion to ease the pain of the Complainant not getting another contract. She was cognizant of how upset the Complainant was.

167. Under cross-examination, Ms. Atwell admitted that she did not state at the March 1, 2011 meeting that the Complainant's contract was not being renewed. She agreed that she did not mention the Complainant's performance during this meeting. She said that she was trying to temper the conversation as the Complainant became emotional.

168. Ms. Atwell testified that she had made a decision to let the Complainant's contract expire without further renewal based on job performance sometime after the Complainant was suspended and placed on probation. She stated that the final straw was the suspension and that she could not put the agency at risk by retaining the Complainant. She did not believe that the Complainant understood the restorative justice process and concluded that the Complainant was not a good fit for the agency. She did not believe that the Complainant truly accepted responsibility when she made mistakes. Ms. Atwell testified that it was never present in her mind to keep her on. She denied that the pregnancy had anything to do with her decision-making.

169. She also testified that she believed that the Complainant should not have expected to be retained following the expiry of her contract given that she had been suspended and placed on probation during her second year contract.

170. The Board considered not only the testimony of the Complainant and Ms. Atwell as to what was said at the March 1, 2011 but also considered written statements by these witnesses that were made closer in time to the relevant events.

171. Ms. Atwell was cross-examined extensively on a letter she wrote dated February 13, 2012, in preparation for her attendance at a Resolution Conference hosted by the Nova Scotia Human Rights Commission. In paragraph 28 of that document, the letter states: "CJS states that at the meeting on March 1, 2011, the Executive Director offered to extend Ms. Quilty-MacAskill's term until August 1, 2011 as CJS was short staffed, but that it did not intend to offer her a full-time position based on her performance issues." (Emphasis added)

172. Ms. Atwell testified that she agreed to the extension but she did not offer it, contrary to what is written in paragraph 28 of her letter. She testified that she tracked the wording of the written complaint which stated: "Ms. Atwell offered to allow me to stay with the agency until August 1, 2011, to help out, as they were currently short staffed."

173. Counsel for the Complainant stressed that this was a significant inconsistency in the testimony of Ms. Atwell, noting that Ms. Atwell had every opportunity to write in the response that she did not offer the position; rather the Complainant brought it up. Counsel submitted that it is not necessarily relevant who brought it up; rather the point goes to credibility.

174. As well, Counsel for the Complainant highlighted that Ms. Atwell testified that there was a shortage of work in the context of earlier testimony and then later stated under cross-examination that on March 1, 2011 she told the Complainant that they were short staffed. Ms. Atwell testified that the Respondent was not particularly short staffed. Her explanation for saying the Respondent was short staffed in the context of discussing the five month extension was that she did not want to add to the Complainant's pain.

175. The Complainant was also not exact in her written description of her complaint to the Human Rights Commission, which was prepared by the Complainant on March 24,

2011. Her description of the March 1, 2011 conversation with Ms. Atwell did not include a reference to her expressing an intention to only take 3 or 4 months as maternity leave. The only reference to the possible length of the maternity leave suggests the Complainant intended to take a longer maternity leave. The Complainant mentioned Ms. Atwell having to cover the last few months of what was a year-long contract. The reference to last few months of the contract is not consistent with the Complainant working in this contract position for 5 months, leaving for 3 or 4 months, and then returning to finish the one year term for the remaining 3 to 4 months.

176. In her written statement on the Intake Form to the Human Rights Commission, the Complainant wrote that, "I also expressed that I did not feel it was right or fair to allow me to stay as a "favour" to help out until my maternity leave but not give me the full year contract". The reference to "allowing" her to stay as a "favour to help out until her maternity leave" is more consistent with the Complainant asking if she could stay and is consistent with Ms. Atwell's testimony that she was prepared to give her something (by way of the five month extension) to respond to how upset the Complainant was.

177. After the March 1, 2011 meeting, Mr. MacIsaac gave his notice that he was leaving the employ of the Respondent. The event of giving notice of his resignation created even more constraint between Mr. MacIsaac and Ms. Atwell. Mr. MacIsaac wanted validation from Ms. Atwell that he had done a good job. He wanted Ms. Atwell to ask whether there was anything the Respondent could do to make him stay, even though he knew that this was not likely given the letters he had received from Ms. Atwell about his performance. Instead she said something to the effect that, "we can't all stay forever" and asked him how much notice he could give the Respondent. He testified that he felt very hurt by Ms. Atwell's comment after putting so much work into the Society.

178. The Complainant testified that a few days after March 1, 2011, she went to Mr. MacIsaac to discuss the conversation she had with Ms. Atwell. She also testified that a job was posted internally and externally for a caseworker to replace Ms. Felentes. The evidence of Ms. Atwell is that this position was posted on March 8, 2011.

179. The Complainant testified that when she told Mr. MacIsaac what happened during her meeting on March 1, 2011 with Ms. Atwell, Mr. MacIsaac leaned back in his chair and

looked shocked, commenting, "She can't say that". She said he offered to clarify, approached Ms. Atwell and set up a meeting for March 9, 2011.

180. The Complainant testified that Mr. MacIsaac reported back to her after approaching Ms. Atwell. He told her that Ms. Atwell did not bring up performance issues and denied having made the discriminatory statements.

181. That Mr. MacIsaac would bring up the fact that Ms. Atwell had or had not made reference to performance issues is significant. This is consistent with the Complainant and Mr. MacIsaac being cognizant of the fact that performance issues might be driving Ms. Atwell's decision-making. This does not rule out the possibility that pregnancy was a factor in her decision-making. However, this evidence runs counter to the Complainant's belief that performance issues did not explain the Respondent's reaction to her request for continued employment.

182. For his part, Mr. MacIsaac testified that the Complainant came to see him in tears, explaining that she had decided to talk to Ms. Atwell about a job and that she was told she was not going to get it because she was pregnant. Mr. MacIsaac testified that even though he had warned the Complainant about disclosing her pregnancy, he was genuinely surprised to hear this.

183. He decided it would be helpful if the Complainant and Ms. Atwell sat down with someone independent, such as himself, and expressed confidence in his own ability to resolve matters. His perception of himself as "independent" struck the Board as being inconsistent with the circumstances and with the strained relationship between Mr. MacIsaac and Ms. Atwell at this point in time.

184. Mr. MacIsaac testified that when he went to Ms. Atwell's office to broker the meeting, he relayed that the Complainant had heard Ms. Atwell say that she was not getting the job because of her pregnancy. He testified that Ms. Atwell replied, "That's ridiculous". She agreed to the meeting.

185. The meeting was held that same day. From the evidence, it is apparent that the meeting quickly devolved into a back and forth series of assertions, with Ms. Atwell stating that the Complainant was not going to be here and the Complainant repeating that it was not fair and that she would be on maternity leave and that she was good enough to get a

five month extension but not good enough for a job. The Complainant testified that she started crying. She told Ms. Atwell that she felt it was discrimination. Ms. Atwell became upset and told her not to be self-righteous. The Complainant left the meeting. She says that Ms. Atwell slammed her office door.

186. The Complainant testified that nothing was said by Ms. Atwell about her performance, only that she was leaving, and that it was too much work to fill a short-term position.

187. The Complainant's evidence about what was said in exact terms is not entirely clear. This is consistent with the Complainant being quite upset at the time and there being considerable "back and forth" between the two. It is also consistent with her connecting her pregnancy with her "leaving" or being "gone" from her employment.

188. Ms. Atwell describes the conversation as the Complainant asserting that Ms. Atwell was doing this to her because she was pregnant and because she was going on maternity leave. Ms. Atwell says that she replied "this is ridiculous" twice. She says the Complainant kept pushing. Ms. Atwell felt that the Complainant wanted Ms. Atwell to say what she wanted to hear.

189. Ms. Atwell admitted telling the Complainant that she could apply for the position, but that she was not going to get it. She testified that they were both agitated and that she was upset about being pushed by the Complainant. She thought that on March 1, 2011 she had been clear that the Complainant was done, that she was finished being employed by the Respondent. The conversation had then proceeded to the Complainant's request to stay on until August 1, 2011, which Ms. Atwell granted. Ms. Atwell says that she could not figure out why they were going on again about the subject. She thought that she was clear. She denies saying that her decision had anything to do with the Complainant's pregnancy, maternity leave or any difficulty filling a vacancy created by her maternity leave.

190. It is clear that the two primary participants in this meeting were upset, likely talking over each other, and not listening particularly well to the other person. They were truly "butting heads", to borrow Mr. MacIsaac's description.

191. Mr. MacIsaac's evidence concerning the content of the March 9, 2011 meeting is that Ms. Atwell replied, "That's ridiculous. As a black woman why would I discriminate?

You're not getting the job." He testified that the Complainant responded, "I won't be here because I'm going on mat leave".

192. From Mr. MacIsaac's description, there was considerable back and forth between the two ladies. The Complainant commented that she was good enough for Ms. Atwell to extend until she left on maternity leave but not good enough to get the job. He testified that Ms. Atwell responded that she was not going to post a job and then have to repost it in five months. The Complainant responded that she would not be there because she was pregnant. He says the Complainant stood up and stated that she had one more question, which was whether she was allowed to apply for the posted vacancy. He says Ms. Atwell responded that she could apply, but why would she because she was not going to get it. The meeting ended.

193. The critical point of evidence here is Mr. MacIsaac's confirmation of the Complainant's testimony that Ms. Atwell complained about having to repost the job. His evidence also supports Ms. Atwell's assertion that as a black woman she found the conversation ridiculous. The Board notes that there is some degree of potential inconsistency in these two alleged statements.

The Aftermath

194. On the same day of her second meeting with Ms. Atwell, the Complainant determined that she could make a complaint to the Nova Scotia Human Rights Commission. On March 10, 2011, she saw her physician and reported stress, which led to her physician recommending that she take a medical leave from work. The Complainant decided to resign her employment and gave notice on March 24, 2011 stating she was doing so as there was no permanent position or year-long contract available to her. She filed her Intake Form with the Human Rights Commission on March 24, 2011. Her last day of work was April 8, 2011.

195. In her description of her complaint to the Human Rights Commission, specifically on the Intake Form dated March 24 2011, the Complainant wrote, "I asked Jake to come to the meeting with me for support and to be a witness in case she was to repeat her same reasons for not giving me the official year contract". In providing contacts to the

Commission, she wrote that Jake MacIsaac was "witness to comments and willing to comment on them".

196. Mr. MacIsaac completed an exit interview and form on March 18, 2011. He was asked whether, to the best of his knowledge, any employees were discriminated against. He answered, "With employees not in my experience...." He explained the absence of any comment from him on the basis that the events involving the Complainant and the Respondent had not finished unfolding at the time he completed the exit interview on March 18, 2011. He suggested that it would have been premature for him to comment.

197. The Board does not accept this explanation. Decisions had been made about to what extent the Complainant would be continuing her employment. An email had been sent confirming the five month contract extension. There was no suggestion that there was anything left to be decided or that Ms. Atwell was planning to consider her decision further. The Board notes that Mr. MacIsaac expressed opinion regarding other contentious issues he believed in, within the workplace, during his exit interview.

198. If Mr. MacIsaac truly thought that the story had not ended on March 18, 2011, there was all the more reason for him to express his concerns while there was time to correct the problem. Identifying such a serious concern in the workplace would have been a logical step for a supervisor to take.

199. Further, the extent of on-going discussion and moral support offered by Mr. MacIsaac in the latter months of his employment to the Complainant is notable. He had received feedback from the Respondent that he was too supportive of staff. The Board believes that it is more likely than not that Mr. MacIsaac knew that the Complainant was considering filing a human rights complaint. This inference is drawn based on the nature of their on-going discussions, the fact that the Complainant came to him to complain about discrimination by Ms. Atwell and because the Complainant had identified Mr. MacIsaac as her support person and witness for purposes of the March 9, 2011 meeting. In the circumstances, the omission in the exit interview form appears to have been a conscious choice.

200. On April 7, 2011, the Complainant completed an exit interview at the request of Ms. Atwell. She was asked about discrimination during her time there. She did not respond.

She testified that she tried to avoid conversation with Ms. Atwell. Her process with the Commission had already begun and she did not want to ruin that. On the exit interview form, she stated her reason for leaving without alleging discrimination. She testified that the reason she gave was just a way to give a reason so that she would not hurt her human rights complaint.

201. The fact that the Complainant was not prepared to specifically raise the allegation of discrimination during her exit interview is not in itself highly determinative evidence concerning her credibility. However, the evidence of the Complainant and Mr. MacIsaac, taken in its entirety, had an element of confidence in presentation that Ms. Atwell had been caught by them doing something wrong. The Complainant specifically identified in her written complaint that she brought Mr. MacIsaac to the March 9, 2011, meeting in case Ms. Atwell repeated her statements. This is consistent with the Board's impression of their demeanour.

202. The Complainant received sick leave employment insurance benefits until the birth of her child on July 16, 2001. She then remained on maternity leave benefits until approximately June 2012. During this time she continued university studies part-time. She recently began to look for employment.

203. On October 26, 2011, Ms. Felentes advised the Respondent that she would not be returning at the end of her leave. This is relevant to the Complainant's position that the effect of the discrimination was to deny her opportunities to be considered for future employment.

Decision & Analysis

A. Is the expiry of a term contract and a refusal to renew it discrimination?

204. The Respondent submits that this Board should conclude that there were no obligations upon the Respondent to do anything other than allow the Complainant's employment contract to expire. The Board agrees that a written contract of employment that is set to expire by its terms prior to the advent of pregnancy is not evidence, in and of itself, of discrimination. It is not possible for the selection of the expiry date by the employer to have been influenced by a pregnancy unknown to the employer at the time. Subject to the caveats that follow, employees on definite term contracts who become pregnant

during the term of the contract do not have a legal basis to expect to have their contract renewed or extended simply because of their pregnancy. Pregnancy cannot be used as a reason to deny a person a job; nor can it create entitlement to acquire a job.

205. However, these circumstances must be absent evidence that the decision to allow the expiry to occur acquired a discriminatory intention. An employer cannot hide behind an expiry of a contract to achieve a discriminatory objective. It is that acquisition of discriminatory intent that is captured by counsel for the Complainant when she submits that the expiry of the contract was a pretext relied upon by the employer, as it did not wish to have to accommodate the birth of the Complainant's child.

206. Further, employees on definite term contracts who become pregnant during the term of the contract may have a reasonable expectation or legal basis to have their contract extended or renewed irrespective of their pregnancy. Where such a reasonable expectation, non-renewal and pregnancy overlap, this creates a temporal connection that may well be taken into account in supporting an inference that pregnancy was a factor in decisions made by the employer about continued employment.

B. Was the performance history of the Complainant a pretext raised by the Respondent to avoid continuing the employment of the Complainant?

207. Ms. Atwell testified that she made a decision to not retain the Complainant beyond the expiry of her contract in the fall of 2010 after the Complainant was suspended and placed on probation. The Complainant alleges that the decision to not retain her was made sometime after the announcement of the Complainant's pregnancy in early to mid-February. The Board prefers Ms. Atwell's evidence on this point over that of the Complaint for a number of reasons.

208. Incidents in the first year of her employment would reasonably have caused concern respecting the Complainant's judgement. The Complainant called a youth's 18 year old partner an idiot, failed to recognise the privacy issues related to disclosure of personal health information, namely a youth's pregnancy, and failed to recognize the safety issues inherent in making this disclosure concerning her pregnancy.

209. In the context of the nature of the Complainant's work, which requires a high degree of respect for boundaries and confidentiality, this strikes the Board as raising reasonable

concerns for the Respondent respecting the Complainant's suitability. This was sufficiently troubling to lead a reasonable employer to desire a longer period of performance assessment.

210. Complainant's Counsel referred to the 6 month probationary review conducted by Mr. MacIsaac. The suggestion was that the Complainant had successfully completed her probationary period. However, on the evidence the Board finds that the full first year of employment was a period of consideration of suitability for the position.

211. In any event, the Board concludes that nothing turns on whether the first year contract was a full one year probationary period because there was no obligation on the Respondent to extend a further contract to the Complainant at the end of the first year contract.

212. The Board considered the submissions of Complainant's counsel respecting the lack of further disciplinary events during the first year contract. This is a significant factor to be considered. However, the Board accepts the evidence of the Respondent that there was a specific decision made to give the Complainant a further chance with a second year contract.

213. The Board finds that, in any event, the fact that there was no further disciplinary action during the first year contract became overshadowed by subsequent events during the second one year contract. This includes the Complainant being suspended and placed on probation.

214. Counsel for the Complainant submitted that the fact the Complainant effectively rolled into her second year contract in April, 2010 created a reasonable expectation by the Complainant that her contract would once again be continued or renewed in March of 2011. The Board does not accept this submission for several reasons.

215. The Complainant was told by Mr. MacIsaac to continue coming to work in the spring of 2010. However, this is not strong evidence that the contract would be allowed to roll over in the spring of 2011. The evidence is clear that Mr. MacIsaac was not involved in decision-making on such issues. He was not informed of management's thoughts and decisions in advance of the communication of those decisions to to the Complainant. The Complainant was aware that Mr. MacIsaac did not know what would happen.

216. Counsel drew the Board's attention to the late arrival in June, 2010 of the Complainant's second written contract when the first year contract had already expired in April, 2010. She submitted that a third year contract would have likewise been formally extended after the expiry of the second year contract but for the Complainant's pregnancy.

217. This Board has considered the reason offered by the Respondent for the late arrival of the contract in June 2010 and finds it believable. That reason is simply administrative tardiness. It enters the realm of speculation to conclude that tardiness in one year would become a pattern or be repeated the subsequent year.

218. Assuming it was entirely reasonable for the Complainant to have an expectation that her contract would roll over in April 2011 on these facts, the reasonableness of that expectation is countered by the Complainant's intervening suspension and probation. A reasonable person would be concerned about whether they would be kept on when they are employed under a second one year term contract and have had a suspension and probationary period imposed mid-stream.

219. Counsel for the Complainant very ably stressed the significance of the fact that the Complainant had no further incidents in the workplace that led to discipline after August and September of 2010, until the expiry of her contract in April 2011. The Board was asked to infer that the lack of further discipline after the actual occurrences in August and September of 2010 meant that performance was a pre-text for not giving the Complainant another full one year contract. On these facts, the Board cannot draw that inference.

220. The Complainant was on probation until December 21, 2010. The consequence of the disciplinary incidents, therefore, remained a matter of active management until December 21, 2010, three and a half months before the expiry of her contract. Her performance issues would have been relatively fresh in memory.

221. While there was no further discipline, the Board accepts the evidence of Ms. Atwell that she had decided not to retain the Complainant after the suspension and probation in the fall as this is most consistent with the Board's assessment of credibility and the factual circumstances. Ms. Atwell testified that she did not think much more about her decision after that.

222. The performance issues in the summer of 2010 were serious. They represented a fundamental failure by the Complainant to follow the restorative justice protocol. This included proceeding with an intake when the youth client had not met the criteria for inclusion in the program, proceeding without the involvement of an adult support person, ignoring the procedure for booking police officers for restorative justice sessions, and failing to prepare the support person once one was found. Given that the same process is to be followed by the caseworker for each case, it was reasonable for the Respondent to question whether the Complainant was consistently committed to the highly defined process of the restorative justice protocol.

223. When she was subsequently disciplined, the Complainant offered the explanation that in August her performance was still being affected by her miscarriage in June. The Board does not find this to be a complete explanation for the fundamental mistakes in the management of this case. There is no evidence that the after effects of the miscarriage had an impact on other files. One might reasonably expect a broader impact on performance. It is more consistent with the evidence that the Complainant tried to help this young female client because she wanted to, despite the protocol. The Complainant had a documented history of being overly supportive to youth clients.

224. The Board notes that there is an important distinction underlying its assessment of the evidence. This is not a case where the Complainant was terminated over these events and the Board is being asked to assess the grounds for discipline. It is not appropriate for the Board to make findings related to the employment law aspects of this case, including the adequacy of the communication respecting expiry of the contract. That is not relevant to the test to be applied in determining whether discrimination occurred under the *Human Rights Act*.

225. Rather, the Board has considered whether the performance issues in August/September 2010 were sufficiently significant and both rationally and reasonably aligned with Ms. Atwell's alleged concerns and stated desire to avoid further employing the Complainant. The Board has considered the totality of the evidence concerning whether the non-discriminatory justification offered by the Respondent is more probable than not. On these facts the Board does not agree that it is reasonable to infer that pregnancy was a factor on the basis that Ms. Atwell did not tell the Complainant that her contract was expiring or that she was not being retained because of her performance.

226. Counsel for the Complainant emphasized that the Complainant had been informed in writing in the letter of December 31, 2010 from Mr. MacIsaac that her probation and suspension would not be held against her. However, there is compelling evidence that the Complainant knew she was at risk of not getting further work, notwithstanding the reassurance offered to her in that letter.

227. This is apparent from her on-going discussions with Mr. MacIsaac in his office and her questions about the likelihood of her being considered for future employment following her probation and suspension.

228. Mr. MacIsaac gave confirmatory evidence that he and the Complainant met in his office and strategized about what might work in terms of future employment opportunities. This is inconsistent with a reasonable expectation that the contract would be extended automatically, without consideration of her disciplinary history.

229. The Complainant would have had every indication from Mr. MacIsaac that he had no actual say or control over the decision about her contract expiring or being renewed, consistent with his testimony. It is inconsistent that these discussions would have continued otherwise. Mr. MacIsaac's evidence was that he raised issues regularly at management meetings about staff workload and the need for more staff but that solutions were not offered. This is consistent with Ms. Atwell deliberately not telling him anything about what was really going on because she thought he would use the information to cause chaos between the staff and management.

230. The Board believes that the Complainant was insecure about whether her contract would be renewed, whether she would be allowed to roll into a full time position, and whether she would be successful if she applied. This is underscored by her repeated attempts to approach Ms. Atwell about further work in the months leading up to March, 2011.

231. The Complainant did not volunteer this information during her direct examination and denied having any such discussions with Ms. Atwell. The Board finds as fact that these approaches were made by the Complainant based on the testimony and documentary evidence of Ms. Atwell. This point goes to credibility.

232. The Complainant's approaches to Ms. Atwell in late 2010 and early 2011 did not lead the Respondent to offer her further work or to actively consider her for other positions. This lack of interest in continuing her employment occurred prior to the Respondent having knowledge of the Complainant's pregnancy. This evidence is inconsistent with pregnancy being a factor in the Respondent's on-going decision to not continue to employ the Complainant.

233. Also, the Complainant admitted expressing concern about her ability to be considered for other positions on the basis that she had been on probation. She did so in a conversation with Shelley MacNeil, after Ms. MacNeil was successful in obtaining a fulltime position. When counsel for the Respondent asked Ms. MacNeil about this discussion, counsel for the Complainant objected on the basis that this alleged conversation had not been put to the Complainant during her cross-examination, contrary to the rule in *Browne v Dunn (1893), 6 R. 67 (H.L.).* The Board took the objection under advisement to permit a review of notes of the evidence. The question was put to the witness, and, accordingly, the evidence on this point is allowed.

234. The Board finds that the Complainant did not believe that her contract would be automatically renewed. Because of these subsequent events, the Board concludes that the fact the Complainant effectively rolled over into her second year contract in the spring of 2010 did not create a reasonable expectation by the Complainant that her contract would once again be continued or renewed or that she would roll into further employment in March of 2011.

235. The Complainant also did not believe in the early months of her pregnancy that she would be discriminated against. Her reaction to Mr. MacIsaac suggesting she not tell people about her pregnancy, with his veiled references to it being used against her, was one of disbelief. She went ahead and announced her pregnancy when she wanted to and expressed no personal reservations about doing so during her evidence. Her allegation of discrimination arose for the first time on March 1, 2011. It coincides with the Complainant's expectation that a one year contract would be available related to Ms. Felentes's continued absence and her approach to her employer that was specifically for the purpose of trying to apply for this position.

236. Before moving to the events of March 1, 2011, the Board wishes to return to a point very ably argued by Counsel for the Complainant. Counsel emphasized that there was no discussion or announcement by Ms. Atwell of the decision to allow the contract to expire prior to March 1, 2011. She submits that this suggests that Ms. Atwell had not yet made any such decision. She submits that Ms. Atwell should have directly told the Complainant that her contract would not be renewed and that this should have happened before or during the March 1, 2011 meeting. She drew attention to the predicament of the Complainant in being potentially left without work when she was five months pregnant.

237. Compelling and consistent evidence was presented to this Board respecting the poor relationship that had developed between Ms. Atwell and the Complainant. The Complainant did not think much of Ms. Atwell's competency in the area of casework or that of Ms. Taraschi. This would have been evident in the workplace as the Complainant and Ms. Atwell butted heads frequently. As well, the Complainant offended Ms. Atwell by complaining that the Respondent was offering programs specifically directed to assisting African-Nova Scotian youth and in publicly voicing objection to the Respondent hosting the spoken word artist, Elle Jones. These interactions would have exacerbated Ms. Atwell's concerns about the Complainant's judgement, her fit within the organization and her concerns that the Complainant did not respect her authority.

238. The Board finds that this poor relationship is the explanation for Ms. Atwell's avoidance of addressing the issue of the expiry of the contract directly with the Complainant by March 1, 2011. There is no evidence this omission was motivated or influenced by or occurred by reason of the Complainant's pregnancy.

239. Ms. Atwell testified to her belief that she was entitled to not say anything further but rather could just let the contract expire. This is a legalistic approach to a human issue. However, it is not evidence of discrimination on these facts. As well, this legalistic approach to communication was to some extent offset by the Complainant's behaviour. The Complainant did not come right out and ask Ms. Atwell whether her contract would expire. The Board concludes that both witnesses engaged in strategic behaviour. Both avoided a direct confrontation over the contract prior to March 1, 2011 and skirted the issue on those occasions when the Complainant approached Ms. Atwell about the possibility of further new contracts. It is apparent that they both found it easier to adopt a

"don't ask, don't tell" approach to the fact that the contract was going to expire. There are human reasons for the failure of communication between these two ladies on this specific point. The Board finds that these reasons have nothing to do with the Complainant being pregnant.

240. Counsel for the Complainant submitted that if the performance issues in the second year had been that serious, the Complainant would and should have been terminated. She referred to the Complainant's contract which permitted termination to occur with minimal obligations upon the employer. She submitted that the failure to terminate the Complainant during the second year lent credence to the inference that the Complainant's pregnancy was a factor in subsequent decisions concerning her continued employment.

241. Invoking the termination of the Complainant's contract before its expiry date would no doubt have led to further contention with the Complainant. The evidence follows a pattern of avoidance of direct confrontation between the Complainant and Ms. Atwell on the issue of the pending cessation of the employment relationship. In the circumstances, the failure to terminate the contract before its expiry date does not support an inference that pregnancy was a factor in the Respondent's decision-making.

242. For these reasons, the Board concludes that there is no compelling evidence that performance was a pretext in relation to the non-renewal of the contract prior to the meetings in March.

C. Did the Respondent discriminate against the Complainant during the meetings in March?

243. The Board prefers the evidence of Ms. Atwell concerning her version of what was said during the March meetings over that of the Complainant and Mr. MacIsaac for several reasons. The most significant reason relates to the Board's assessment of credibility as described in the factual portions of these reasons. In a comparative sense, there were significantly fewer issues of credibility identified in relation to Ms. Atwell's testimony.

244. The Board carefully considered the direct evidence respecting what was and what was not said at those meetings. The Board finds that the specific comments made by Ms. Atwell to the effect that the Complainant would be finished, be gone or be leaving related solely to the fact that the Complainant's contract was going to expire in the near future,

as that interpretation is most consistent with the circumstances at the time. The expiry of the contract pre-dated the event of her due date (by five months) and her likely need for maternity leave. The timing of maternity leave had not been discussed or planned as between the Complainant and the Respondent. The Board believes that the most rational explanation for this is because her contract was going to expire before there would be any expectation of maternity leave and not because of some specific desire to avoid dealing with a pregnancy leave.

245. In issue is whether Ms. Atwell said on March 1st that she would not give the Complainant a one year contract because it was too much work to have to refill the position in five months.

246. Mr. MacIsaac confirms that Ms. Atwell stated at the March 9, 2011 meeting that she was not going to post a job and then have to repost it in five months. He corroborates the Complainant's testimony in this key respect. Otherwise his evidence tends to corroborate Ms. Atwell's account of what happened. He also confirms that there was a fair amount of back and forth occurring between the two ladies.

247. This conversation happened four days after Mr. MacIsaac's feelings had been hurt by Ms. Atwell when he gave notice on March 4, 2011. Mr. MacIsaac's perception of Ms. Atwell at this point in time was quite negative. The Board finds that his evidence on the specific point that Ms. Atwell did not want to have to post the job is not credible in the context of the rest of his evidence. The Board includes in its finding Mr. MacIsaac's evidence about how good Ms. Atwell was about granting leaves of absence to employees, as noted during his exit interview on March 18, 2011. If he thought Ms. Atwell was refusing to accommodate a pregnancy leave because of the difficulty of having to post the position twice, the Board believes he would have specifically complained about that at the time. He was departing for new employment. He was in a relatively safe position to identify this as an issue. He had a history of not holding back readily evident criticism of Ms. Atwell.

248. In summary, taking the evidence as a whole, the Board finds that Ms. Atwell did not make any discriminatory statements during those meetings with the Complainant in March 2011.

D. Was the decision to continue the Complainant's employment for five months discrimination?

249. The Board considered the evidence respecting whether the five month extension was offered by Ms. Atwell or requested by the Complainant. This point is relevant because if a position was offered by Ms. Atwell, that tends to support the Complainant's position that she was good enough to be desired as an employee for five months but not for a one year term contract requiring accommodation of her maternity leave.

250. The Complainant says the five month extension was offered to her at the March 1, 2011 meeting. Ms. Atwell testified that the Complainant asked for this. This testimony contradicted what Ms. Atwell wrote in her response to the Human Rights complaint, in which she used the word "offered". However, it is understandable that if the Complainant raised the idea, Ms. Atwell would, nonetheless, frame the extension as having been offered by the Respondent. An employee can make a request. An employer still needs to decide to offer a position. As a contradiction in the evidence, this example is not particularly compelling. The employer seemed to be somewhat careless in its choice of words and copied the Complainant's words from her complaint form.

251. It is also more probable that the Complainant raised the idea because the Complainant had a pattern of requesting work and went to the meeting with that purpose in mind. Ms. Atwell had made up her mind that the Complainant would be departing at the expiry of her contract on April 6, 2011. It is inconsistent that she would volunteer this idea. The Board finds as fact, therefore, that the Complainant requested that she be allowed to stay until August 1, 2011, based on her due date.

252. Granting a request for further work confers a benefit on the Complainant. It does not impose a burden upon a pregnant employee to give them an opportunity they request. There is also a consensual element in this arrangement that runs counter to the imposition of a burden by an employer.

253. The fact that the extension went to the Complainant's due date is because that is what she asked for. That does not make the extension discriminatory on these facts, despite the temporal overlay between the end of the contract extension and the Complainant's due date. The Board is not prepared to make an assumption that a temporal connection between the end of employment and the beginning of a maternity leave on these facts

establishes discrimination. Such an assumption could have the effect of discouraging employers from offering additional work to pregnant employees to bridge them to their due date. Although the temporal connection is suggestive of discrimination on its face, the Board still must be convinced that this has occurred in the context of an adverse impact. Here, the Complainant described the five month extension as a "favour" in her written complaint to the Commission. There is no adverse impact in relation to granting the request for a five month extension.

254. Counsel for the Complainant made the point that Ms. Atwell had the choice to say no to this request. She had been accused of discrimination in the March meeting, yet somehow the message was given that the Complainant could stay on until her due date.

255. Ms. Atwell testified that the five month contract was acceptable because it had an end date in five months. The Board accepts that the key distinction was that one arrangement kept the Complainant from feeling that she had her foot in the door, so to speak, and one arrangement did not.

256. With respect to the Complainant's comment that she was good enough for Ms. Atwell to extend until she left on maternity leave but not good enough to get the job, the answer on these facts was apparently "yes". The Board finds that this distinction made by the Respondent was entirely based on performance and personality conflict.

E. Did the Respondent's decision to not offer the Complainant the one year vacancy have a discriminatory intention or element?

257. This Board considered whether the Respondent's decision to not offer the Complainant further work, specifically the contract vacancy created when Ms. Atwell posted a position to replace Ms. Felentes, had a discriminatory intention or element.

258. Ms. Atwell testified that she did not need to replace Ms. Felentes when she met with the Complainant on March 1, 2011. It was under consideration and she had not fully made up her mind. She told the Complainant that there was no job because there was no job. She subsequently decided that she needed to fill the vacancy and posted the position on March 8, 2011. Ms. Atwell also testified that she was under no immediate pressure to fill the position.

259. The Board concludes based on all the evidence that Ms. Atwell made a somewhat deliberate choice to not make up her mind fully about posting Ms. Felentes's position. She posted that position on March 8, 2011 after she addressed the Complainant's desire to apply for or roll into the position and after she made arrangements with the Complainant that would have her continue working for five months. Importantly, in her mind, that arrangement still brought the employment relationship to an end. The issue is whether her decisions about posting the position were related to the Complainant's pregnancy.

260. The Complainant testified that she saw the one year vacancy as an opportunity to keep her foot in the door. It permitted her to be able to apply internally for positions or perhaps roll into a future vacancy. The preponderance of evidence is that Ms. Atwell was highly aware that the Complainant wanted to acquire full time indefinite employment or another year contract, all of which would make it more difficult for the Respondent to disengage from the Complainant.

261. The Board concludes that the machinations around filling the vacancy were entirely because of ongoing tension between Ms. Atwell and the Complainant. Ms. Atwell did not want to give her any position that could lead to other opportunities for long term employment. However, the Board does not believe that this was in any way motivated by a desire to avoid accommodating the Complainant's maternity leave.

F. Was the comment that the Complainant could apply for the position but she would not get it evidence of discrimination?

262. When the Complainant expressed an intention to apply for the position, Ms. Atwell responded, "you can apply for it, but you won't get it." There is no dispute on the evidence on this point. This statement was made in the heat of the moment and evidences the power struggle that was going on between the two witnesses. In these circumstances, the statement does not establish that discrimination on the basis of pregnancy was a factor in the statement. It is evidence of just how annoyed Ms. Atwell was to be challenged. It is evidence of the extent to which she had made up her mind that she would not continue the Complainant's employment on the terms the Complainant was seeking.

Conclusion

263. For the reasons cited above, the Board finds it more probable than not that pregnancy was not a factor contributing to the Respondent's decision to refuse the Complainant continued employment, beyond the five month extension it granted to her. The Respondent, therefore, did not discriminate against the Complainant.

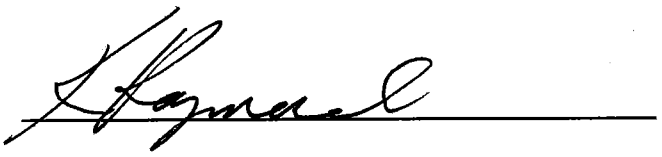
264. The Respondent's refusal to consider the Complainant for employment beyond the five month extension she requested had an adverse effect upon the Complainant. However, the adverse effect occurred due to non-discriminatory reasons. The adverse treatment arose solely due to performance issues and personality conflict between the Complainant and Ms. Atwell. As well, the number of performance-related challenges in the workplace related to Mr. MacIsaac and the perceived alliance between Mr. MacIsaac and the Complainant likely did not assist her cause. However, none of the direct or indirect reasons for what happened relate to the Complainant's pregnancy.

265. Essentially this case is about a difference of opinion and a clash of wills between two strong-minded individuals. The fact that the employee was pregnant at the time is simply a temporal coincidence.

Order

266. The Board finds that the Respondent has not breached section 5(1)(d)(m) of the *Human Rights Act*. The complaint is dismissed.

Dated at Dartmouth, this 13th day of June, 2013.



Kathryn A. Raymond

Nova Scotia Human Rights Board of Inquiry