THE NOVA SCOTIA HUMAN RIGHTS COMMISSION
BOARD OF INQUIRY

BETWEEN:

Tony Smith

-and-

Capital District Health Authority

-and-

Nova Scotia Human Rights Commission

Case Number: 42000-30 H10-1931

Preliminary Decision on Scope of Inquiry

1. Tony Smith signed a complaint under the Nova Scotia *Human Rights Act* on February 21, 2012, alleging discrimination under s.5(1) with respect to employment on the basis of race, colour, and physical disability, as well as a distinct s.11 complaint of retaliation based on him having made a previous complaint under the *Act*.

2. The *Act* requires, by s.29(2) and s.29(3), that complaints be made reasonably promptly after an instance of alleged discriminatory action or conduct. The *Act* provides:

> s.29(2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.
>
> s.29(3) Notwithstanding subsection (2), the Director may, in exceptional circumstances, grant a complainant an additional period of not more than twelve months to make a complaint if to do so would be in the public interest and, having regard to any prejudice to the complainant or the respondent, would be equitable.

3. Mr Smith's complaint indicates that on January 27, 2011, he was informed that his position as an Occupational Therapist Assistant with the Capital District Health Authority was not permanently funded. He says that in January, 2011 he brought concerns about his position not being permanently funded (while others had received "permanent full time placement") to the Manager of Mental Services. He indicated that his own unit manager was also aware of his concerns. As of the date of signing his complaint, Mr Smith says that he had been removed from his position at the clinic "and moved to the Hub." He had been informed that he "was going to be placed in the Hub" on December 9, 2011. He claims that this caused him harm in terms of his placement in a "pilot program" with a consequent loss of employment stability, which in turn he associated with a relapse with depression.

4. The complaint about the asserted change in Mr Smith's employment situation in December 2011 is well within the statutory requirement of s.29(2) of the *Act* that a complaint be made within twelve months of the action or conduct complained of. The more difficult issue confronting the parties here is whether this Inquiry may inquire into the following events also identified in the complaint:

> a) whether his employer on January 27, 2011, reneged on a 2005 promise that he would be designated a permanent full-time occupational therapist assistant; and,
>
> b) whether being placed on an Attendance Management Program in December 2010 was in part based on Mr Smith's race, and perhaps colour (see paragraphs 3 and 4 of the complaint).

5. Mr Smith, in brief, says that his experience of employment discrimination based on colour, race, and physical disability has endured since the time of his initial employment in 1990. He wishes me to adjudicate the identified discrimination issues in relation to that whole 22 year relationship. There was a previous

complaint of discrimination made to the Nova Scotia Human Rights Commission about his employment situation in approximately 1994, which was dismissed. There was subsequent correspondence with the Nova Scotia Human Rights Commission about employment concerns which were not formalized into an actual complaint. When Mr Smith felt it necessary to articulate the complaint that is now before me, he says that Commission staff encouraged him to use 2005 as a reference for the commencement of his complaint even though he felt that his experience of discrimination really extended back earlier than his initial complaint in 1994.

6. Counsel for the Nova Scotia Human Rights Commission, again in brief, says that the focus of this complaint should comprehend Mr Smith's relationship with his employer commencing with a 2005 return to work by Mr Smith, through to the date of his complaint on February 21, 2012. Mr Douglas for the Commission recognized that the 2005 date was identified on the face of the complaint. He suggested that while Mr Smith's experience of discrimination by reason of race, colour and physical disability would be informed by his entire employment history, and that I should hear evidence about that history for purposes of context, I should only adjudicate on alleged discriminatory acts or behaviours occurring in 2005 and after.

7. Counsel for the Capital District Health Authority says – and here I also summarize – that I should apply the statutory limitation in s.29(2) of the *Act* rigorously. To go back to the start of the employment relationship was too far – and frankly would involve allegations involving a former, perhaps unrelated, employer. There had been a previous human rights complaint which was dismissed. Based on of s.29(2), the Health Authority submitted that I could only address behaviours or actions which occurred within the 12 months prior to February 21, 2012. Since there had been no s.29(3) "extension" explicitly granted by the Commission to extend the 12 month limitation, not even the January 2011 issue about the status of

Mr Smith's position, nor the December 2010 Attendance Management Program issue, were legitimately before me. The Health Authority's position in relation to a "continuing discrimination" limitation - "*within twelve months of the last instance of the action or conduct if the action or conduct is ongoing*" - was that any previous instances of action or conduct had to be of the same nature at that of the "*last instance*". For example, if the "last instance" was an assignment of menial work tasks to an employee based on race, then assignments of menial work tasks beyond the 12 months could still be within the scope of my inquiry, but a failure to grant a promotion based on racial grounds to the same employee more than 12 months before would not.

8. My broad empowering authority to inquire into Tony Smith's complaint comes from an appointment made by the Chief Judge of the Provincial Court of Nova Scotia dated June 2, 2014. Under the *Human Rights Act* that appointment obligates me to inquire into that complaint, to consider whether or not there has been a contravention of the *Act*, and if so, to determine a number of supplementary issues identified in s.34(8) of the *Act*:

> s.34(8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor, and where authorized by and to the extent permitted by the regulation, may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances.

9. The *Act* concurrently restricts my authority to inquire into and to adjudicate upon actions or conduct. For distinct instances of alleged discriminatory acts or conduct, these must have occurred within 12 months of the date of the complaint: *Izaak William Killam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014

NSCA 18, at paras.24, 36. The *Izaak Walton Killam* case dealt with a specific event that occurred on a clearly identifiable date.

10. Where the allegation is that there has been an *ongoing* act of discrimination, or ongoing discriminatory behaviour, then it is only necessary that the *last instance* occurred within the 12 months prior to the signing of the complaint to satisfy the limitation period. If there is a "last instance" within 12 months of the complaint, there is no apparent statutory restriction on how far back my authority to inquire could extend. This is particularly important with respect to claims involving systemic discrimination, or complaints related to patterns or habits of behaviour in relation to specific individuals which are perceived as discriminatory.

11. Consideration of what legally constitutes an ongoing act of discrimination often begins with the decision of *Manitoba v. Manitoba Human Rights Commission*, 1983 CarswellMan 164 (C.A.), where Justice Philp stated, at para.19:

> What emerges from all the decisions is that a continuing violation (or a continuing grievance, discrimination, offence or cause of action) is one that arises from a succession (or repetition) of separate violations (or separate acts, omissions, discriminations, offences or actions) of the same character (or of the same kind). That reasoning, in my view, should apply to the notion of the "continuing contravention" under the *Act*. *To be a "continuing contravention", there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts discrimination which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences.* [Emphasis added]

See also: *O'Hara v. British Columbia (Human Rights Commission)*, 2003 BCCA 139, at para.25; *Bolster v. British Columbia (Ministry of Public Safety & Solicitor General)*, 2007 BCCA 65, at paras.154 – 156; *Allen v. Aberta (Human Rights Commission)*, 2005

ABCA 436, at paras.2 – 3; *Newfoundland and Labrador (Human Rights Commission) v. Newfoundland Liquor Corp*., 2004 NLCA 5, at para.75; and *Corbett v. Ainley*, 2007 MBCA 140, at paras.37 – 39, as examples of what constitutes a single act, rather than a continuing act, of discrimination.

12. However, the following comments of Justice Matheson in *Matheson v. Prince Edward Island (Human Rights Commission)*, 2001 CarswellPEI 108 (P.E.I.S.C.,T.D.), at para.28, are perhaps of the most direct relevance in assessing what may constitute a continuing complaint here:

> Nowhere in her correspondence sent to the Chairperson does the complainant describe what discriminatory act, other than the one alleged to have occurred on July 2, 1996, occurred after that date. The references to "repercussions" and "consequences" clearly refer to the complainant of 1996. To bring herself within the time limit of the statute the applicant must have shown some evidence to indicate that there were continuing contraventions of the act as opposed to continuing repercussions from the original breach complained of. However, the reference to "reprisals" has a different meaning from repercussions or consequences. It connotes specific acts of retaliation which may or may not constitute violations of the statute. The allegation of reprisals raised by the complainant in her letter to the Chairperson should have alerted him to the possibility of further contraventions of the *Act* and led him to inquire as to the nature and time of the alleged reprisals. If he had done so he could have determined if there was a reasonable basis for proceeding to the next stage in the process.

Based on this approach to limitation provisions in human rights legislation, "ongoing" discrimination in our *Act* would therefore appear to contemplate behaviour that is recognizable as a series of separate but successive actions involving the complainant, each of which could constitute a violation of the *Act*.

13. The more difficult issue is what it means for the separate violations to be "of the same character". Does this mean that the separate violations must link through

the *reason* for the discrimination, such as age or colour, or that the link should be through the discriminatory *consequences* imposed, such as reduced wages, or lack of access to promotional opportunities, or the kind of work assignments provided?

14. The Nova Scotia *Human Rights Act* defines "discrimination" in s.4 as the process of making a distinction based on a characteristic or perceived characteristic that has the *effect* of imposing burdens, obligations or disadvantages on an individual, or which limits access to opportunities, benefits or advantages available to others. I am not comfortable with an interpretation of either s.4 or s.29(2) which locks a target of discrimination into linking specific kinds of injury or consequences. Personal and systemic discriminatory attitudes toward individuals or groups may express themselves in a variety of ways. For example, historical experience has taught us that systemic biases grounded on genderized thinking have not only caused pay inequities for women, but have also distorted hiring and promotional opportunities for them in employment. The historical lesson of human rights development is that discriminatory biases and behaviours do not get expressed in a single, discrete, and consistent way. Instead, they tend to permeate an entire relationship between the person or institution that is discriminating, and the victim.

15. I appreciate that in many cases of alleged discrimination, as here, there will be mingled grounds of discrimination alleged. This may complicate the assessment of the "character" of any "last instance". However, I am of the view that when the *Act* speaks of ongoing discrimination in s.29(2), the limitation does restrict my ability to inquire into conduct or behaviour that is of a different "character" from that of the "last instance". What this means is that if the claimant proposes that the "last instance" of s.5(1)(d) employment discrimination was based on race, then past instances of proposed *racial* discrimination in employment are properly subject to my inquiry. This so whether or not the claimant alleges that the discrimination

resulted in different kinds of consequences – such as the lack of a promotion, a poisoned work environment, or the inequitable assignment of work tasks.

16. In my view, a fair reading of s.29(2) of the *Act* is that in order to be considered as an ongoing complaint, the limitation requires the same ground of discrimination and the same sphere of activity to establish it as being of the same "character". Thus, a "last instance" of racial discrimination would not necessarily include a three year old *gender* employment discrimination complaint. Nor would a "last instance" of racial s.5(1)(d) employment discrimination necessarily include a three year old racial discrimination complaint in relation to, for example, the purchase or sale of property: s.5(1)(c).

17. This interpretation is preferable to the focus on the type of consequences, suggested by counsel for the Capital District Health Authority. The "consequences" of a single discriminatory decision can persist for years. However, the limitation in our *Act*, and the law since at least 1983, means that consequences cannot ground a discrimination complaint that is more than 12 months old. An "ongoing" complaint should not be defined in terms of effects or consequences either.

18. Here we are dealing with a request by Mr Smith for me to inquire back to 1990, and by the Commission for me to inquire back to 2005. Both of them, with counsel for Capital Health, identified the change in job location and responsibility in December 2011 as within the 12 month limitation contemplated by the *Act* with respect to distinct acts or conduct. This act could, in my view, be characterized either as a job placement decision or as an employment decision in relation to assignment of job responsibilities and obligations. Mr Smith says that employment decision was an expression of discrimination based on race, colour, and physical disability. For limitation purposes, that is our "last instance".

19. Mr Smith and the Commission essentially propose that I should approach the employment decision of December 2011 as a "last instance" of ongoing discriminatory employment-related behaviour. While I appreciate that Mr Smith desires that I go back further, an inferential reading of the formal complaint suggests that the prior identifiable acts of significance date back to 2005. In 2005 Mr Smith and his employer negotiated or agreed to terms for a return to active work after a period of leave. Mr Smith asserts certain understandings about his return to work which apparently proved to be unfounded early in 2011. My inference based on the wording of the complaint is that Mr Smith views this 2011 information as creating a difference or a change in his employment status at that time. This change in status, he asserts, exposed him to the unwanted job placement that occurred in December 2011. Mr Smith does clearly assert that the employer's failure to keep its 2005 return to work promise, and his placement on the Attendance Management Program in December 2010, were both job decisions made by his employer for the same discriminatory reasons as the job placement decision of December 2011. Mr Smith's complaint does not identify any job action prior to 2005 by his employer, or any individual purporting to act on behalf of his employer, which may have contributed to or affected or been linked to the job placement decision of December 2011.

20. I am prepared to hear evidence from the parties about Mr Smith's employment relationship starting with the discussions relating to his return to work from leave in 2005. I appreciate that there may be evidence led by way of background or context as to how the employment relationship began, and what led to Mr Smith's leave of absence. However, I do not believe that I am authorized to adjudicate as to whether any action or behaviour by his employer or superiors prior to 2005 was discriminatory – even systemically. I will hear evidence about Mr

Smith's interactions with his employer and superiors and fellow employees with respect to his return to work in 2005 and after. Indeed, the evidence that Mr Smith and the Commission choose to call will have to establish not only a discriminatory effect or motive in relation to the separate events of his employment relationship in 2005 and since, but also that there is a link between the event in December 2011 and those which occurred prior to February 21, 2011, by reason of the character of the behaviour. I will only adjudicate on that evidence as to rights violations if Mr Smith or the Commission can demonstrate the following:

a) the December 2011 employment decision itself is proven to constitute a violation of the *Act*, **and**

b) the prior acts or conduct of the employer, superiors, or fellow employees are linked in character (by the same statutory ground or grounds of discrimination) to the December 2011 employment decision.

21. I should note here that none of the parties expressed any concern about the availability of witnesses, or prejudice based on the unavailability of witnesses, if my inquiry addressed issues starting with Mr Smith's return to work agreement in 2005. I believe that if there has been discriminatory behaviour, and it has indeed been systemic in nature, that this decision on scope provides ample opportunity for Mr Smith and the Commission to expose the true dimensions of any harm that may have been suffered by him. I also believe that this decision appropriately recognizes the need for the Capital District Health Authority to know the case it has to meet. As I indicated to the parties at the conclusion of the oral focus hearing, I expect that they will mutually discuss any scope issues that remain before the commencement of the hearing scheduled for April 7, 2015. I remain available to hear any application that may be made for particulars, if necessary.

22. In addition to the allegation of discrimination in relation to employment, Mr Smith has alleged ongoing retaliation by his employer contrary to s.11 of the *Act* based on the fact that Mr Smith filed a complaint under the *Act* in 1994. The 1994 complaint was ultimately dismissed. Consistent with my views about the statutory scope allowed to me for inquiry based on s.29(2) of the *Act*, Mr Smith and the Commission will have to prove the following in relation to the s.11 allegation:

a) the December 2011 employment decision itself is proven to have involved a retaliation for him having made his 1994 complaint, **and**

b) prior acts or conduct of the employer, superiors, or fellow employees are linked in character (by the same retaliatory thinking) to the December 2011 employment decision.

23. I appreciate that Mr Smith and the Commission may be concerned that the passage of so much time may significantly dilute the strength of the evidence that can be presented about events in 2011 that echo or demonstrate an ongoing thread to the employer's behaviour reaching back to 1994. However, the employer is legitimately also concerned about its ability to dissect or to fairly expose the reasoning process for employment decisions made over the course of some 20 years. It is my view that this decision in relation to scope respects the requirements of the *Act*, and the obligations of the parties to fairly respond to each other. Again, I expect the parties to discuss these issues, and I remain available to hear any application that may be made for particulars, if necessary.

DATED this 19 th day of January, 2015, at Halifax Regional Municipality, Nova Scotia.

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Donald C. Murray, Q.C.
Board of Inquiry Chair