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

Decision on Motion for Non-Suit

1. I have heard 13 days of evidence in relation to a complaint of discrimination based on race, colour, physical disability, and retaliation put forward by Mr Smith. Not all the days have been full days, and because of some scheduling convenience issues I have already heard some evidence called by the Capital District Health Authority [referred to as Capital Health]. That Capital Health evidence has been taken with the understanding that it would not prejudice its ability to make this motion to have Mr Smith's complaint dismissed without the need for Capital Health to call any evidence at all. All of the evidence that Tony Smith and the Commission have wanted to present is before me, and the motion by Capital Health to dismiss has now been made.

2. This proceeding began with a complaint signed by Mr Smith on February 21, 2012. He specifically referred in that complaint to a job related decision on or about December 9, 2011, which he asserted was the most recent of several successive employment related decisions taken by Capital Health of the same character. He asserts that these employment decisions, in total, constitute a pattern of systemic and institutional racism towards him. On January 19, 2015, I decided that because of the applicable limitation period in s.29(2) of the *Human Rights Act*, my authority to

inquire into behaviour prior to February 21, 2011, depended on Mr Smith and the Commission establishing that the December 2011 employment decision itself could be proven to constitute a violation of the *Human Rights Act*. I went on to state that if in fact the December 2011 employment decision could be proven to be a violation of the *Act*, then the prior acts of the employer linked in character to the December 2011 employment decision could also be the subject of my inquiry. The "character" link would involve either a specific ground of discrimination (race, colour, or disability), or a common element of retaliation.

3. The theory of a motion for non-suit is that in an adversarial process, a defendant should not be forced to lead evidence unless the proponent himself is able to establish a *prima facie* case. If the proponent is unable to even establish a *prima facie* case, a defendant should not be obligated to incur the expense of presenting a defence or answer. There is also a public interest in public resources not being squandered on cases which are either frivolous or hopeless.

4. As counsel have pointed out, the current authorities[1] demonstrate that the dividing line between cases which should be dismissed on a motion for non-suit, and those which should be allowed to proceed, is this: Does the evidence presented by the proponent(s) provide evidentiary support for all of the legal requirements to validate the claim? More specifically for the situation we are in here, is there some evidence, directly or circumstantially (available by reasonable inference), which could, if believed, allow me to validate the discrimination or retaliation claims of Mr Smith in relation to the December 2011 employment decision?

[1] *Fahmy v. Greater Toronto Airports Authority*, 2008 CHRT 12, at paras.12 – 23; *Gerin v. IMP Group Ltd.*, [1994] NSHRBID No.4, particularly at paras.21, 22, 24, and 45.

5. In addressing this motion, again as counsel have pointed out, I am not weighing the value of the evidence led by the proponents, nor am I engaging in conjectures. I am also not deciding whether the evidence is convincing or even trustworthy. As some cases say, the question is whether there is sufficient evidence that a breach of the Act could be found, not whether a breach would or should be found. I don't find the language used in some cases of "giving the benefit of the doubt" to the proponent's evidence particularly helpful. My role here, at its simplest, is to discern whether there is some evidence, directly on point or by reasonable inference, of each element necessary to establish the proponent's claims.

6. Applying that approach to the issue of the December 2011 employment decision, Tony Smith and the Commission led evidence that he was notified that month that his job as an Occupational Therapy Assistant would be moved to another location early the next calendar year. Tony Smith perceived this as a decision by his immediate supervisor that was affected by both her racialized perception of him, and her awareness of his history as a difficult "human rights" complainer.

7. Tony Smith's evidence demonstrated some repeated experience of job placement difficulty, and instability, with Capital Health beginning with his employment at the Choices Program as far back as the 1990s – which actually preceded the assumption by Capital Health of responsibility for that program. There is evidence of a catalogue of placement and job security and job funding issues that infused his employment relationship with Capital Health through 2004 and 2005 and after. Tony Smith's evidence also established that he had made a previous human rights complaint about his employment treatment in the Choices Program in the 1990s.

8. I have heard evidence from Darcy Bechard who learned in 2005 of Tony Smith's employment experience, and human rights issues, while at the Choices program. He learned of them not only from Tony Smith but also from one of Tony Smith's former supervisors at the Choices program. The information was provided by the former supervisor to Mr Bechard in the form of a warning, and proposed a management approach, towards Mr Smith grounded in a consciousness of Mr Smith's previous rights complaint about workplace racism.

9. The employment decision communicated to Tony Smith in December 2011 was communicated to him by his immediate supervisor. Although there is no direct evidence that this supervisor ever had contact with the Choices supervisor, I have evidence that she received some "history" in relation to Tony Smith's employment with Capital Health. Some of that history was communicated by Darcy Bechard, although the evidence is not clear as to how specific or detailed that historical information may have been. My notes of the evidence of Mr Bechard on that issue are generally similar to what was related by counsel during argument. Mr Smith certainly engaged in lengthy and largely one-sided correspondence with this supervisor by email and otherwise during their co-location at the Bedford Sackville Community Health Centre beginning in 2009 about his view of his employment history. I believe it is reasonable to infer that there is some evidence that Mr Smith's immediate supervisor would have been aware in December 2011 of Tony Smith's past and present alertness to potential discriminatory impacts to his job situation.

10. While I appreciate that there is evidence on the record through numerous witnesses, including Mr Smith, that there were operational reasons within Capital Health to contemplate a change in Mr Smith's work situation, the complaint here requires me to focus on the asserted human rights impacts of employment decisions. I also appreciate that in the context of human rights proceedings, there

can be a particular evidentiary difficulty for proponents in establishing both systemic discrimination and retaliation allegations. Here there is, not surprisingly, no direct evidence of a racial component to the December 2011 placement decision. However, a conclusion of systemic discrimination can often only be reached by an inference made from a number of facts which may, on their face, appear unrelated.

11. For the purpose of this motion for non-suit only, I believe that I should ask whether the evidence received to this point provides a reasonable basis on which to consider that the December 2011 employment decision was of a similar character to previous employment decisions by management, and whether it could reasonably be perceived by me to have involved racial considerations prohibited by s.5 of the *Human Rights Act*. I am satisfied of that based on the evidence of contact between the Choices supervisor and Darcy Bechard, followed by some discussion between Mr Bechard and the Mr Smith's 2011 supervisor, about Mr Smith's "history", that there is some evidence that the December 2011 decision about Mr Smith could have been made with those kinds of considerations in mind.

12. The specific "considerations" that I have in mind here are the issues of race and retaliation that were discussed in Mr Bechard's evidence as a result of his meeting with Mr Smith's former supervisor at the Choices program. I am willing to understand colour as a component of race, although I appreciate that colour has been a significant and independent element of Mr Smith's concept of his own identity since childhood. I also understand that some evidence in support of "retaliation" requires an awareness of a previous complaint, and a reason to believe that there was subsequent, differential treatment of the employee which was perceived to have had a adverse impact upon the employee[2].

[2] See *Walsh v, Mobil Oil Canada*, 2008 ABCA 268, at para.69.

13. I do not see any evidence on the record at this point that the December 2011 employment decision could have involved consideration of any physical disability on the part of Mr Smith. I do not see any evidence on which I might reasonably infer that the December 2011 decision could have reasonably involved considerations of physical disability. Mr Smith's own evidence identified the Attendance Management or Attendance Support decision as most directly engaging the issue of physical disability. However, once informed at this hearing by Capital Health records about who else had been placed on the Attendance Support Program at his workplace, he stated in evidence that he realized that this placement had not been a racial thing. That, to me, limits the character of the complaint about physical disability to the 2010 Attendance Support Program decision. That is outside the limitation imposed by the *Act* upon my inquiries. I will not expect an answer from Capital Health in relation to the complaint of discrimination on the basis of physical disability because I have no authority to adjudicate the legitimacy or not of that complaint.

Dated this 1 st day of May, 2015, at Halifax, Nova Scotia.

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Donald C. Murray, Q.C.

Board of Inquiry