

**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**

**Final Decision**

1. Leonard Anthony Smith, preferably known and addressed as "Tony Smith", signed a complaint under the Nova Scotia *Human Rights Act* on February 21, 2012. That complaint alleged discrimination by the Capital District Health Authority (Capital Health) with respect to Tony Smith's employment on the basis of race, colour, and physical disability pursuant to s.5(1) of the *Act*, as well as a distinct s.11 complaint of retaliation based on Mr Smith having made a previous complaint under the *Act*.

***Decision Summary***

2. On December 12, 2011, Tony Smith was employed as an Occupational Therapist Assistant with Capital Health as part of the Bedford/Sackville Mental Health Team. His day to day tasks involved providing services to a mental health client population, as his tasks had been since his placement in that position in September 2005. On December 9, 2011, Mr Smith was formally advised by Kim Fleming, his supervisor, that commencing on April 23, 2012, his job tasks would be performed through the Bedford/Sackville Hub in a new operational structure. This change in the geographical base for Mr Smith's work tasks reflected one of several

changes in how Capital Health had decided to provide mental health services to its client population throughout the metropolitan Halifax area.

3. As Mr Smith testified, this change in location and operational structure for his job tasks caused him some consternation. He had been aware of the structural change going on, and had participated in at least some of the planning for it. However, he ultimately chose not to follow his work to the new location. He took leave, and then retired from Capital Health in June 2012. Mr Smith identified this 2011 employment requirement that he move from the Bedford/Sackville Community Clinic at the Cobequid Centre to “the Hub” (also in Sackville) as a discriminatory employment decision based on his race or colour – either directly discriminatory towards him, or as part of a systemic pattern of discrimination towards him at Capital Health. He also asserted that this employment decision was a retaliation for a previous human rights complaint that he had made when employed with the Choices program of the Department of Community Services (a service program subsequently brought under the umbrella of Capital Health) in 1994.

4. I have not heard any evidence which suggests, let alone proves on a balance of probabilities, that moving Mr Smith’s job functions to the Sackville “Hub” was in any way based on Mr Smith’s race or colour – or was related in any way to the fact that he had made a human rights complaint against his employer in the 1994. I have heard positive evidence from Kim Fleming, and others such as Dorothy Edem, about the change in mental health care delivery operations that were developed over time, and then implemented in 2012. The decision by Capital Health to locate Mr Smith’s job tasks at the Hub was not based on, nor was it affected or influenced by, any previous difficulties that Mr Smith had experienced with his employer. Neither race nor colour, nor retaliation, were factors in the decision to allocate Mr Smith’s job tasks to the Bedford/Sackville Hub.

5. As a consequence of those findings, it is my view that Mr Smith and the Nova Scotia Human Rights Commission have not proven a discriminatory act or behaviour against Mr Smith by Capital Health within the required time frame (after February 21, 2011) that was either unique, or part of a continuing course of behaviour towards him because of his race or colour. Nor has Mr Smith, or the Commission, proven that the assignment of Mr Smith's job responsibilities to the Bedford/Sackville Hub was an act of retaliation for any previous human rights complaint. Mr Smith's complaint dated February 21, 2012, therefore fails at the first necessary step of proof in any discrimination complaint and is dismissed. My reasons for these conclusions follow.

### ***History of Proceedings***

6. As indicated earlier, this proceeding began with a complaint signed by Mr Smith to the Nova Scotia Human Rights Commission on February 21, 2012. I was appointed by the Chief Judge of the Provincial Court to inquire into that complaint on or about June 2, 2014. After some pre-hearing teleconferences, the parties assembled on January 8, 2015, to argue the issue of the scope of my inquiry, for which I provided a decision on January 19, 2015.

7. I began to hear evidence in this matter on April 7, 2015, and continued to do so on April 8, 9, 13, 14, 15, 16, 17, 27, 28, 29, 30; May 1; June 22, and 23, 2015. I heard from 15 witnesses, and received several hundreds if not thousands of pages of documents as exhibits. I heard final submissions over 2 days: June 25 and 26, 2015.

### ***Scope of the Inquiry***

8. At the request of the parties, I provided a decision on January 19, 2015, in relation to the scope of the inquiry that I would conduct into this matter. In short, Mr Smith had hoped that I would adjudicate in relation to human rights employment issues that had concerned him since his original date of hire by the Capital District Health Authority and its predecessors – a period of some 22 years. The Commission took the position that I should adjudicate the issues of human rights that had arisen for Mr Smith between the time of his return to work from leave in 2005, until his ultimate retirement in 2012. Counsel on behalf of the Capital District Health Authority urged that I confine my inquiries to events that had occurred within the 12 months prior to the February 21, 2012, complaint.

9. The following is a summary of what I decided on January 19, 2015. For the specific reasoning supporting that decision, I refer all readers to the actual text of my January 19, 2015 ruling. After considering the provisions of s.29(2), 29(3), and 34(8) of the *Act*, I decided that I was restricted to adjudicating on whether there were distinct instances of discriminatory acts or conduct within 12 months of the date of the complaint – that is, February 21, 2011 or after. I also decided that because Mr Smith was alleging ongoing discriminatory behaviour, I could adjudicate in relation to behaviour prior to February 21, 2011, but only if there was some “last instance” of discrimination proven to have occurred within the 12 months prior to February 21, 2012. As the cases that I referred to in my January 19, 2015, decision make clear, it was not sufficient for Mr Smith to prove that a past act of discriminatory behaviour had a continuing effect or continuing consequences within the 12 months prior to the complaint. The limitation provisions in the *Act* require that I be able to find a distinct discriminatory act or behaviour within 12 months of the filing of his complaint before I can go back in time and adjudicate as to whether there had been previous or ongoing behaviour of the same character.

10. Mr Smith of course also made an allegation of retaliation pursuant to s.11 of the *Act*. The provisions of s.29(2) and 29(3) of the *Act* also apply to claims of retaliation. I am required to find an act of retaliation within 12 months of the filing of his complaint before I can go back in time and adjudicate as to whether there had been previous or ongoing acts of the same character.

11. At the time of addressing this scope issue in January 2015, both Mr Smith and the Commission identified a change with respect to Mr Smith's employment in December 2011 as the last instance of ongoing discriminatory and retaliatory behaviour by Mr Smith's employer. Mr Smith claimed that that employment decision communicated to him on December 9, 2011, breached a return to work agreement that he had made with his employer in 2005. In Mr Smith's view, that 2011 breach of the 2005 promises was also retaliatory for his earlier 1994 Human Rights complaint, and could be linked back through previous acts and behaviours of retaliation to the 1994 complaint.

12. At the conclusion of the evidence called by the Commission, and after I had heard the evidence that Mr Smith desired that I receive, counsel for Capital Health moved to have Mr Smith's complaint dismissed in its entirety. On May 1, 2015, I granted that motion in part. For the specific reasoning supporting my decision, I refer all readers to the actual text of my May 1, 2015, ruling. At that time I decided that Mr Smith's complaint about being placed on an "Attendance Management Program" related to concerns about discrimination on the basis of physical disability, rather than race. The "Attendance Management Program" issue was therefore of a different character than the alleged ongoing racial discrimination, and was something that had occurred in 2010 – outside the *Act's* limitation period based on the February 2012 complaint. I decided that I did not have authority to adjudicate the legitimacy or not of the physical disability complaint, and therefore

did not require that Capital Health respond further in relation to that proposed ground of discrimination.

13. Therefore, the decision that I was left to decide related to whether or not there was an act or behaviour sometime after February 21, 2011, which discriminated against Mr Smith based on race or colour, or which was retaliatory for him having filed a human rights complaint in 1994. If so, I would then have to decide whether the act or behaviour was something unique, or part of a course of ongoing, previous conduct of the same character which affected Mr Smith.

### ***Relevant Statutory Provisions***

14. The Nova Scotia *Human Rights Act*, R.S.N.S.1989, c.214, as amended, provides that:

5(1) No person shall in respect of

....

(d) employment

...

discriminate against an individual or class of individuals on account of

...

(i) race;

(j) colour;....

The *Act* also provides in s.11 that:

No person shall evict, discharge, suspend, expel or otherwise retaliate against any person on account of a complaint or an expressed intention to complain or on account of evidence or assistance given in any way in respect of the initiation, inquiry or prosecution of a complaint or other proceeding under this Act.

***Proof of Discrimination and/or Retaliation***

15. It is recognized that in order to prove discrimination within the meaning of the *Nova Scotia Human Rights Act*, a claimant must show as a first step that consideration of a prohibited characteristic was a factor in a decision about the claimant: *e.g., Pieters v. Peel Law Association*, 2013 ONCA 396, at paras.55 – 59, and 126. Here the complaint asserts that there were 2 prohibited characteristics identified as having been factors in the making of employment decisions about Tony Smith by Capital Health: his race and his colour. If a claimant establishes on a balance of probabilities that a decision was made about his employment in which race or colour was a factor, it would be necessary to then evaluate whether that employment decision discriminated or retaliated against the claimant within the meaning of sections 4 and 11 of the *Act*.

16. The complaint here also contains the assertion that there was retaliation against Mr Smith for having made a previous human rights complaint in 1994. In order to establish retaliation under s.11 of the *Human Rights Act* based on that allegation, it would be necessary for the evidence to show first that there was knowledge of the previous complaint by the decision-maker; second that there was a conscious intention on the part of the decision-maker to make an employment-related decision about the complainant based on that knowledge; and third, that the “retaliatory” decision caused some adverse impact or consequence for the claimant.

17. Bruce Wildsmith, in *Gerin v. I.M.P. Group Ltd.*, 1996 CarswellNS 606 (NS Human Rights Tribunal), at paras.10 – 15 discussed some aspects of the legal content of what it takes to prove a retaliation allegation under the *Nova Scotia Act*. He concluded, at paras.13 - 14:

... Thus, I think that to find retaliation a board of inquiry must determine that the reason for any adverse or prejudicial treatment was to retaliate for someone invoking rights under the *Human Rights Act*. Retaliation must be at least in part the motivation, the reason, the “why” that underlines the action.

In short, I am inclined to think intention and motivation are the gravamen of the offence. Such may be inferred from the circumstances and need not be directly proved; such an inference must be a reasonable one, based on assessing all the evidence in the circumstances. Mere perception by the alleged victim is not in my opinion enough, though if a reasonably based perception, the reasons underlying the perception may lead to the inference that retaliation was intended.

18. I accept Mr Wildsmith’s view that proof of retaliation requires proof in some way of an intention or motivation on the part of the employer to pay someone back, or to respond to someone, for having invoked the complaint provisions of the *Human Rights Act*. His understanding of the concept was actually summarized succinctly by Justice Ritter of the Alberta Court of Appeal in her decision in *Walsh v. Mobil Oil Canada*, 2008 ABCA268, at para.69:

Implicit in the act of retaliation is a degree of consciousness about what was done, and a conscious decision to react by doing something in return.

See also her expanded discussion of this topic at paras.76 – 84, 89 – 94.

19. The critical implication of this interpretation of s.11 is that proof of knowledge is not enough to prove retaliation. Merely because a superior is aware that the complainant has invoked, or has talked about invoking, the provisions of the *Act*, does not convert any subsequent employment-related decision about the employee into a retaliatory decision. There has to be proof, perhaps by inference, that a decision was made about the employee because the employee had invoked the *Act*, and then proof that the identified retaliatory decision caused some adverse impact or consequence for the complainant - in character with the specific kind of consequences mentioned in s.11: eviction, discharge, suspension, and expulsion. See



*Mobil, supra*, at paras.78 and 93. I note that on this point about proof of an adverse impact, the Court of Appeal in *Mobil, supra*, at para.151 (*per* Justice Paperny) was unanimous.

20. If a discriminatory effect or retaliatory action is proven about an employer's behaviour on a balance of probabilities, it would then be appropriate to provide the claimant with an appropriate remedy: *Act*, s.34(8).

### ***What the Evidence Showed***

#### ***Initial Employment***

21. Tony Smith began working as a counselor with the Choices adolescent treatment program in the spring of 1990. Despite the absence of any formal academic counseling qualification, Mr Smith felt that he could be good at this work because of his personal history and a couple of years work as a youth counselor. He was hired, but even during his probationary period experienced discomfort about work assignments and work expectations that were based, he perceived, on his race or colour. To use his word, his employment relationship with his superiors became "awkward". Mr Smith related a number of difficult interactions, often involving a supervisor by the name of Tom Payette, in terms of assignment of work, job competitions, workplace discipline, and medical leave. Mr Smith's union provided some assistance to Mr Smith, but often not sufficient comfort, in dealing with these workplace issues.

22. During his time with Choices, Mr Smith was employed in positions that carried titles or descriptors such as counselor, tracker, day counselor, and day activity co-ordinator. In the midst of this continuing and difficult relationship with his employer and Mr Payette, Mr Smith (in 1994) filed a human rights complaint

about his workplace. Mr Payette was apparently assigned to represent the employer in relation to the investigation of that complaint. In 1997, Mr Smith was informed by the Commission that his human rights complaint would not be pursued further.

23. In 1999 Mr Smith launched a grievance against his employer alleging systemic discrimination. That has created a whole separate tree of litigation involving Capital Health, Mr Smith's union, and the law firm for Mr Smith's union. I am aware of it, and heard evidence about the meandering course of that dispute. Ultimately, the issues engaged by that litigation have no real significance for the issues that I have to decide under the *Human Rights Act*.

24. Mr Smith described how he first developed recognizable symptoms of depression in at least 1992. He eventually decided that he had to take a medical leave from his work at the Choices program in 2000. This medical leave grew from a short term leave to a long term disability (LTD) leave. The effective date of the LTD leave appears to have been January 31, 2002. He was off work for the full 30 months of LTD eligibility, which took him to the end of July, 2004. While on medical leave, Mr Smith continued to be engaged with his employer and union about his grievance, the contents of his personnel file, and his past negative work experiences.

#### *The 2005 Return to Work*

25. As the contractual LTD period was expiring, Mr Smith remained unwell. However he and his physicians decided that he would be better, and get better, by working rather than not working. This became a protracted and frustrating process for Mr Smith, his union, and also for staffing personnel at Capital Health. There was initially an issue with respect to the insurer's obligation to assist Mr Smith in preparing him for a return to work. That, however, was just the beginning.

26. Finding a place for Mr Smith to return to work became extremely complicated. The main complication appeared to be that Mr Smith was not looking to return to his previous employment at Choices – which he may have been entitled to do as of right if he had been able to return to work sooner. Instead, Mr Smith wanted to return to some similar or equivalent employment within Capital Health that did not involve having to deal with the supervisors that had made his employment life “awkward” at Choices in the past. As Mr Smith initially testified, “I don’t think it was in my mind to go back to Choices.” This appears to have been the preference of some of the Choices staff as well.

27. I appreciate that at different times in his evidence, Mr Smith also indicated that he would have been prepared to go back to certain positions at the Choices program – testifying at one point that he was surprised (in 2004) that Tom Payette still had a problem with him, and that he (Tony) would not have had a problem going back to Choices. I do not accept that evidence as accurate. My clear sense is that Mr Smith’s recollection has been affected by the passage of time, and rumination about his whole employment experience at Capital Health.

28. Mr Smith’s long-standing depression contributed to at least 30 months of long-term disability. He experienced clear and continuing anxiety when dealing with most of his superiors and even the contents of his personnel file – particularly when decisions were made which were adverse to his preferences. These facts clearly support the conclusion that Mr Smith would not have been interested in 2004 or in 2005 in returning to the Choices program under the supervision of Tom Payette. Indeed, Mr Smith spent some time during his meeting with the Capital Health CEO airing his negative history with Tom Payette. So I accept as accurate and as most reliable Mr Smith’s first comment to me under oath at the hearing, which was that “I don’t think it was in my mind to go back to Choices.”

29. Jennifer O’Handley was, at the relevant time, a Labour Relations Consultant with Capital Health. She assisted in looking for appropriate alternate placements for Mr Smith during 2004. She also engaged with Mr Smith, and others, on several return to work issues such as his interest or not in returning to Choices, and whether he was medically able or willing to work shift work. She discussed how one usually returns to one’s own former job when returning from an LTD leave, but that this was not an option being considered for Mr Smith – particularly after the LTD period had actually expired without an actual return to work. Labour Relations Consultant Erica Leal similarly indicated that while 95% of employees returning from LTD go back to their former employment, it was “not tenable” for Mr Smith to go back to Choices in 2004 or 2005.

30. A somewhat different position was taken by Cynthia Hamilton, who was also a Human Resources Consultant with Capital Health at the time of the return to work discussions involving Mr Smith. Ms Hamilton’s evidence was that a return to a position at Choices was indeed still on the table in 2005 for Mr Smith. However, in addition to the issues involving Mr Smith’s ability to work including whether or not he might be given an “alternate work area”, or day work as opposed to shift work (a position that changed over the course of time), she also recognized that there were also issues from the Choices side. Ms Hamilton explicitly indicated that there were concerns from Tom Payette that accusations of racism affected his managers’ ability to manage, there were concerns because of Tony Smith’s past history with “the team”, and some staff were concerned about the potential of further allegations of racism. All that being acknowledged, Ms Hamilton said that Tom Payette’s preference would not have blocked Tony Smith’s return to Choices.

31. David Collins has been the Manager of Labour Relations and Human Resources Consulting at Capital Health since 2002. Mr Smith declared in his evidence that Mr Collins had, in the course of return to work discussions in 2004,

talked about how Mr Smith had called all of his supervisors racist. Mr Smith also declared that Mr Collins was supposed to have told Mr Smith that Mr Collins would do everything he could to exonerate those supervisors.

32. Mr Collins was called to testify. I am not able to find, based on the evidence, that Mr Collins was proven to have said or even thought any such things as were declared by Mr Smith. The most that can be said about Mr Collins is that he was in the loop with respect to Mr Smith's return to work in 2004 and 2005, but had no direct responsibility for the issues relating to that return to work. Mr Collins provides no link between Mr Smith's troubles with Mr Payette, and the 2004 and 2005 return to work period.

33. There was another very real and practical complication affecting Mr Smith's return to work. In the time that Mr Smith had been on LTD leave, his employer had developed significantly more rigour in terms of qualifications for persons who would succeed as qualified candidates for counseling-type positions in the Choices program and elsewhere in Capital Health. The unfortunate reality for Mr Smith was that in 2004 he did not have those kinds of qualifications, and Capital Health was not prepared to recognize his previous experience at Choices as equivalent, nor to pay him and to concurrently fund his academic improvement so that he could possibly acquire those formal academic qualifications.

34. There were still more issues with respect to Mr Smith's return to work: where he would be employed, in which job classification, and his qualifications. Some jobs had rotational shifts which Mr Smith did not want. Some involved evening work, which again was not Mr Smith's preference. The pay level of some positions was also problematic for Mr Smith.

35. Whatever concerns I might have about Capital Health's failure in 2004 or 2005 to mandate a return by Mr Smith to his former employment at Choices, and their reasons for that, those decisions by Capital Health are beyond the scope of what I can adjudicate here. Mr Smith's own complaint to the Human Rights Commission in 2012 did not cite the failure to be returned to Choices as a manifestation of discriminatory treatment against him. While that may be because of a lack of contemporaneous knowledge on the part of Mr Smith in both 2005 and 2012 about what had been going on behind the scenes, without a new act of discrimination after February 21, 2011, I have no authority because of the limitation provisions in the *Human Rights Act* to fully untangle, expose, and adjudicate on the factors that went into the 2004 and 2005 decisions not to have Mr Smith return to Choices. I mention the concerns exposed by the evidence only as background in relation to Mr Smith's actual 2005 return to work arrangements.

36. Eventually, after an intervention by the CEO of Capital Health at the time, a place was found for Mr Smith starting in last week of September, 2005. This placement was in the job of "Occupational Therapist Assistant" ("OTA") located at the Cobequid Centre in Sackville as part of the Bedford/Sackville Mental Health Team. The Bedford/Sackville Team had been looking to fill a part-time Occupational Therapist position, and noted that Mr Smith did not even meet the formal qualifications for an OTA position.

37. Mr Smith said that there was no discussion about the formal qualifications for the OTA position when it was offered to him, leading him to wonder why the position had not been offered to him sooner - since there had been OTA positions posted previously. Erica Leal explained that Mr Smith's qualifications were accepted in "substitution" for the formal OTA position qualifications in order to place him as an OTA at the Bedford/Sackville Community Clinic.

38. Mr Smith understood that his placement was an accommodation. His immediate supervisor at the time, D'Arcy Bechard, also understood that this was a "duty to accommodate" placement. In reality there was no pre-defined role for Mr Smith's OTA position on the team. He was not actually filling a position. Mr Smith was given an opportunity by Mr Bechard to create his own job by using his skills to assist in the Clinic's primary task - which was to manage the symptoms of the Team's community-based client population. Mr Smith ultimately did that to the satisfaction of Mr Bechard, and later carried on with his largely self-defined role for the next several years. It was this same client population which would, in 2012, start to be serviced through the Bedford/Sackville Hub rather than through the Bedford/Sackville Community Clinic at the Cobequid Centre.

39. Mr Smith told the Inquiry that once he obtained this placement in the OTA job in Bedford/Sackville, he became distressed when he was notified that there was going to be a 6 month assessment period. He said that he saw that as an opportunity for Capital Health to get rid of him and to "keep me in check". However, Mr Smith understood at the time of his placement with the Mental Health Team at the Cobequid Centre in 2005 that his job was classed as a full-time, long-assignment for one year [*e.g.*, Exhibit 2, pp.326 - 327]. As Cynthia Hamilton pointed out, the *location* of the position in Bedford/Sackville was a "trial position", but that:

Should this trial position not remain, we will place you elsewhere in the role of Occupational Therapy Assistant.

There was no plan to "get rid of him". There was never any promise that the location of his work would not change. He could and would be placed elsewhere as an OTA if the trial position did not work out. Nevertheless, Mr Smith always remained a permanent employee at Capital Health until he chose to retire in 2012.

41. This conclusion is also supported by Capital Health's commitment to fund Tony Smith's permanent employment "even above complement". Erica Leal was the Human Resources Consultant at the relevant time. Her email correspondence to Jim Matheson in Capital Health Finance, dated November 25, 2005, explained how budget room had initially been created within the Bedford/Sackville Community Team, how it was decided to use that budget room for an OTA position, that Tony Smith would be welcome to remain in that position, and that the team:

. . . would gladly accept him on a permanent basis into the team, given the resources. It has already been concluded that Mr Smith would be placed elsewhere within the organization, even above complement should this arrangement no longer be viable. [e.g., Exhibit 2, p.341]

42. D'Arcy Bechard testified that he had also been told by Ms Leal that funding for Mr Smith was "permanent". Cheryl Billard, Mr Smith's actual supervisor in 2005, recalled telling Mr Smith not to worry about the "term" status in relation to his OTA position because she knew that he was a permanent employee. He was in fact a permanent, full-time employee, filling a position with the status of a long-term assignment.

43. At the hearing of this Inquiry, Mr Smith was shown a number of internal budgetary and management documents which related to how Capital Health attributed funding to positions, and how Capital Health allocated staff. It appears that several managerial level employees on several occasions attempted to get Capital Health's computer records to reflect that Tony Smith's position at the Cobequid Centre as an OTA was not going to end (as long assignments generally do after a year). When that proved a challenge, his managers consistently relied upon the practical work-around of renewing Mr Smith's "long assignment" each year. In my view, the entirety of the evidence demonstrates that even though no one in the finance department at Capital Health seemed capable of coding Mr Smith's OTA job



in the computer system as “permanent” rather than as a “long assignment”, he was always a permanent employee of Capital Health until the day that he chose to retire. He was repeatedly told so.

44. As Mr Smith’s first manager at the Cobequid Clinic, D’Arcy Bechard had access to some of the technical financial material relating to the funding of Tony Smith’s OTA position, as well as some of the managerial discussions surrounding that funding. In 2009, long after he had moved out of a management position, Mr Bechard took the initiative to belatedly share some of those managerial materials with Mr Smith. Sharing the material out of time and out of context did not do much other than to create unwarranted and quite unnecessary anxiety on the part of Mr Smith as to the status of his employment at Capital Health. It was really nothing more than an act of mischief on the part of Mr Bechard who, with Mr Smith, had come to an antagonistic and probably oppositional relationship with the Clinic manager at the time. Regrettably, the only person unsettled by this mischief appears to have been Mr Smith.

45. Mr Smith was placed into this Capital Health OTA position in September 2005 at an income equivalent to what he had enjoyed as a counselor in the Choices program – even though this was higher than the OTA position would contractually pay a fully qualified candidate. Mr Smith was also to be “red-flagged”: he would not receive raises as if he were still doing a counselor’s job.

46. It was clear to me based on the evidence that regardless of what Tony Smith’s employee costs were to Capital Health, the funding for his salary and benefits was secure. None of the technology issues in the payroll system (despite their recurrence) caused any real risk or jeopardy to Mr Smith. In fact Mr Smith was provided with work, and compensated for that work as agreed, until he chose to retire in 2012. While I appreciate that he worried a great deal about whether the

funding for his position would be maintained, for practical purposes it was never in any jeopardy. Mr Smith's anxiety was not based on any real cause. In that regard I rely particularly upon the evidence of Erica Leal and Cheryl Billard.

47. Even leaving the mischief and anxiety aside, the reality is that positions are never permanent. Funding of positions is similarly never permanent. People are permanent and fill positions as required. As Jennifer O'Handley put it, permanent employees could have non-permanent work. As Ms Billard put it more specifically for Mr Smith's OTA job: he was a permanent, full-time employee, filling a position with the status of a long-term assignment.

#### *The 2011 Transfer to the Hub*

48. Kim Fleming arrived as Tony Smith's new supervisor in the spring of 2009. From Mr Smith's point of view, he and she got off on a bad foot. Mr Smith imagined that she was threatening to take away "half his salary" when she spoke about finding out "where his hours were coming from". She also apparently said that she was "well aware" of Mr Smith's work history during their first get-acquainted meeting. While I do not find that Mr Smith's concerns were reasonable based even on his own recollection of his first meeting with Ms Fleming, I find that his reaction to that initial meeting does demonstrate Mr Smith's heightened sensitivity to situations where his knowledge of the whole context is limited, and he senses a lack of personal control over his work life. At Mr Smith's initiative I heard Dr Rosenberg speak about this during the course of the inquiry. For the purpose of the questions that I have to decide, and which I am able to decide, Mr Smith's heightened level of anxiety cannot be equated with any unfairness on the part of Kim Fleming. Nor can this anxiety be treated as a substitute for proof of discrimination based on race, colour, or an intent to retaliate against him for his 1994 human rights complaint.

49. Abetted to some extent by Mr Bechard, Mr Smith's relationship with Ms Fleming never really improved. Mr Smith was disturbed that another employee reported back to Ms Fleming about negative views about Ms Fleming that Mr Smith had expressed in a staff meeting. Mr Smith chose to understand his placement on an attendance management program as a personal thing rather than the exercise of a legitimate personnel management tool throughout Capital Health. Mr Smith described how he began to make notes for himself because he felt that Ms Fleming was checking up on him. He worried that Ms Fleming did not trust him about work outside of regular office hours. They had issues in relation to the caseload that Mr Smith was carrying. Mr Smith testified that by December of 2009, even though he had grievances and lawsuits in relation to different issues on the go, "she was the main stress for me", and he told her so.

50. With that background as context, in the fall of 2011, Capital Health was moving forward with a plan to re-organize its delivery of mental health services. Dorothy Edem, the Program Lead, explained that there had been an initiative starting in 2008 to better structure recovery and integration services in the community for clients with serious and long-term mental illness, or a functional impairment which required community support. By 2011, it had been decided that there would be three community "Connections", located in Halifax, Dartmouth, and Sackville. These Hubs would replace a system of service delivery that included services which were being provided by the Supportive Community Outreach Team (Cole Harbour), what had been called Clubhouses (in Halifax and Dartmouth), and the Community Health Clinic at the Cobequid Centre. By late 2011, after much institutional work, including lengthy change management processes with the union and with Cobequid Clinic staff, sometimes including Mr Smith, the Hub approach was ready for implementation in Sackville.

51. The most important aspect of the re-organization that had taken place over the course of at least 3 years was that the actual work tasks of supporting the mental health client population were being moved from some locations to others. In Sackville specifically those tasks were moving from the Cobequid Centre to the new Hub (physically located initially in the common room of a benevolent organization, and at a church hall). Dorothy Edem explained, in response to a question from Mr Smith, that his work tasks with his client population were tasks that had been assigned to the Hub in Sackville.

52. Susan Shaddick was the manager of community mental health services in Cole Harbour at the time of transitioning service to the Hub system. She also testified about bringing the Hub structure on stream, describing her responsibility as one of shifting *tasks*, rather than specific staff people, to the Hubs.

53. Cheryl Billard also testified about the transition. As she expressed it in her evidence, the plan was that staff who were supporting those with chronic mental illness would follow their caseload. She personally assured Mr Smith that his employment was protected, and explained how he would have a new reporting structure. At the same time, she could not see a role remaining for an OTA in the work of the Community Health Team once the Hub began to service the chronic mental illness clientele.

54. The actual transition of services, and the timing of the need for persons in the OTA role, were different at each Hub. Because the Sackville Hub was brand new and would receive its new patient population more immediately, the need for an OTA at the Sackville Hub was seen to be more pressing than at the other Hub locations.

55. The evidence which I accept is that Dorothy Edem and Cheryl Billard and Kim Fleming all discussed staff placement, and collaboratively came to a decision that Mr

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Smith's tasks would be delivered at the Sackville Hub. Ms Fleming's recollection is that this decision was made in October. There was correspondence to the Union about the staffing decisions on November 23, 2011 authored by Lesley Dagley which stated in its essential substance as follows:

Further to our meetings and correspondence with respect to the recovery and integration reorganization, we are continuing with changes to the team. We have recently notified the staff of the SCOTeam that the program is being dissolved and offered them placement in other areas of the Recovery and Integration Program.

The next step will be notifying three (3) staff of the Bedford/Sackville Community Mental Health Clinic that their clients have been identified as those who would be better served by the new "Hub" that will be established in the Bedford/Sackville area. Therefore, their positions will be transferred to the Bedford/Sackville Hub. The three (3) staff impacted are Neale Henderson (Social Worker), Cheryl Pierce (Social Worker) and Tony Smith (OTA).

It is expected that the new Bedford/Sackville Hub will be in place by the end of April 2012 as a location has yet to be secured. . . . [Exhibit 25, p.63]

56. The staffing decision in relation to Mr Smith was not formally communicated to him until a meeting attended by Mr Smith, Ms Fleming, and Cheryl Billard on December 9, 2011. Ms Billard had been included in the meeting at the initiative of Kim Fleming for a number of reasons, but specifically because of Ms Fleming's sensitivity to Mr Smith's difficult relationship with her, and her awareness that Mr Smith appeared to have a long-standing, trusting employment relationship with Cheryl Billard. Mr Smith was unhappy with the decision, and raised some issues which Ms Billard addressed over the next several days. A week after the December 9 meeting, Mr Smith indicated in a lengthy email to Ms Billard, with a copy to Ms Fleming, that:

Therefore, to reiterate for clarification and to formalize, I will abide by and accept, the CDHA, HR, Kim's and your decision/directive to work at the Sackville Hub. Historically, seeking another job within CDHA, HR, would not be

a viable option for me (this statement is clearly supported through documentation as well as, the other past work history above mentioned). [Exhibit 3, pp.661 – 662]

This was in turn followed by correspondence from Kim Fleming to Mr Smith on December 19, 2011, confirming the transfer of his “position as an Occupational Therapy Assistant, permanent full time, to the new Bedford/Sackville Hub.” [Exhibit 3, p.669]. The effective date of the transfer was to be April 23, 2012.

57. The fact that the Hub had to make do without his effort when Tony Smith later decided not to move to the Hub, and the fact that no other position from the Cobequid Clinic may have been the subject of a *directive* transfer rather than a *voluntary* transfer, do not change my understanding of the evidence that Tony Smith’s client population and work tasks were to be carried out from the new Sackville Hub as of April, 2012.

58. Mr Smith acknowledged in his evidence that he had been aware as early as January 2011 that his tasks could be transferred from the Cobequid Clinic to the new Sackville Hub. It is apparent from the evidence that he decided at some point during that year that he did not want to move. He made it clear to Lesley Dagley, Human Resource Consultant, that he did not want to move to the Hub. However this was not a choice that was open to Mr Smith in late 2011. The only choices he effectively had were to move with his job tasks to the Hub, to look for another position within Capital Health, or to cease his employment with the organization.

59. Mr Smith said during his evidence that he did not want to follow his work to the Hub because he felt that working at the Cobequid Clinic was more “secure”. He repeated that position strongly in his final submissions, as did counsel on behalf of the Commission. As counsel Ann Smith put it on behalf of the Commission, the sense of insecurity arose from Mr Smith feeling that he was “at the whim of others”. She

quoted Mr Smith as objecting to the move because he felt that “someone other than myself was making the decision”.

60. I frankly have difficulty with this position taken both by the Commission and Mr Smith. It is hard to accept Mr Smith’s “feeling” of being at the whim of others as reasonable, given that it was not within the scope of his job at Capital Health to decide where he would service his patient population. He had been as much a part of the planning process for the organizational change as he wanted to be. In addition, it does not strike me as at all reasonable for Mr Smith to cite a sense of insecurity as the basis for declining the chance to have permanent full-time work at the Hub, when the alternatives were no work at the Clinic, or no work at all because of a choice to retire. He essentially chose the path of least security. Mr Smith took short term illness leave and then wrote to Kim Fleming on March 27, 2012 giving notice of his intent to retire from Capital Health on June 1, 2012 [Exhibit 3, p.686]. That notice was accepted by letter from Kim Fleming to Mr Smith dated March 30, 2012 [Exhibit 3, p.687].

61. The record, for what it is worth, contains testimony from both Kim Fleming and by Dorothy Edem that the decision to move Tony Smith’s job tasks to the Sackville Hub was not related to his race or colour. By itself such assertions might or might not be true. However, here I am prepared to conclude that there was indeed no racial or colour reason for the task distribution, and that neither race nor colour were factors in the 2011 decisions about employment placement for Mr Smith. I come to this conclusion primarily because the development of the Hubs was a substantial undertaking in relation to service delivery for community mental health, over a long period of time, with apparent and considerable consultation involving staff, the community, the staff union, and the client population. This was no sham or trumped up justification for moving Mr Smith out of the Cobequid Clinic. For the same reasons, I cannot see the placement decision as a s.11 retaliatory act.

62. The only contemplated changes that were to result from Mr Smith's placement at the Hub were that his tasks would be performed from a different base location, and he would have a different reporting hierarchy. His work tasks themselves, his job title, his pay, and his security as a permanent employee of Capital Health, were not going to change at all. This is frankly obvious when reviewing Cheryl Billard's email to Mr Smith on December 14, 2011, following up on the concerns that he had expressed on December 9. That email, so far as relevant, states:

Hello Tony,

Thank you for meeting with Kim and me last Friday. It was important that we discuss the upcoming service changes and how these will affect your position in person. . . .The movement of this position does not affect your seniority or the status within the organization.

You have indicated your willingness to work with the team in the development of the new Hub. You have also been clear that it is not your choice or preference to move to the Hub. The movement of the client group as well as your position is as a result of a reorganization in clinical programming and how services are structured within the Mental Health Program. The work that you are doing as an OTA is being transferred to the "Hub". We are not able to offer you alternate work in Bedford/Sackville Community Mental Health.

Tony, if you are not interested or willing to move to the Hub, the other option available is to look for other positions to apply for within CDHA on your own accord. . . .

63. Mr Smith and the Commission raised a factual issue that arose in the course of Kim Fleming's evidence about when she knew about Mr Smith's 1994 human rights complaint. She had testified on direct about learning of the complaint during her work with internal counsel at Capital Health responding to the 2012 complaint. As Mr Smith and counsel for the Commission pointed out, a documentary basis existed to show that Ms Fleming would have had that information long before 2011.



Ms Smith's inclination to candidly share his work history would also support the idea that Ms Fleming knew of the 1994 complaint long before 2012. Ms Fleming's response to the documentary record was to accept it, but also to indicate that the information did not "resonate" with her at the time when it was communicated. I find Ms Fleming's explanation credible and reliable. It is consistent with the rest of Kim Fleming's evidence, and it makes sense in terms of her role at Capital Health.

64. I understand from the whole of the evidence that while Ms Fleming was well aware of Mr Smith's work history, including the fact that he had made a human rights complaint in the past. I also understand from the whole of the evidence that Ms Fleming was not factoring that awareness of Mr Smith's history into the decisions that she was making as a manager going forward. Unlike Mr Smith, Ms Fleming had no reason to ruminate on a past event which had no relevance for the decisions she was expected to make in her own work. She would have had no reason to keep that information top of mind. In addition I would also say that simply proving that Ms Fleming knew about Mr Smith's prior human rights complaint does not prove that any subsequent decision was based on that knowledge, nor that any decision she made was a retaliation because of that knowledge.

65. I appreciate that because of his previous experiences at Choices, and because of the evidence that he presented from Dr Rosenberg, that Tony Smith was particularly sensitive during his time with the Bedford/Sackville Community Team at the Cobequid Centre about whether job assignments, work tasks, and what I will call "supervision intensity" issues were grounded in part on his race or colour. This kind of concern was nourished during Mr Smith's time at Cobequid by D'Arcy Bechard – his front-line supervisor for the first year of his Cobequid placement.

66. Mr Bechard related to the inquiry how Tom Payette, Mr Smith's former front-line supervisor, had provided a warning to Mr Bechard about managing Mr Smith.

Mr Payette's warnings specifically made reference to Mr Smith's past complaints about race-based differential treatment. I did not hear from Mr Payette during the inquiry, and I noted that Mr Bechard's employment behaviour as well as his evidence before me had an element of intentional advocacy on behalf of Mr Smith. However, even with those cautions, I am of the belief that Mr Bechard's evidence about his interaction with Mr Payette is sufficiently consistent with Mr Smith's other evidence, and the documentary record provided to me, to allow the conclusion that Mr Payette spoke as described by Mr Bechard: that Mr Smith was a "troublemaker", and "prone to make complaints about racism."

67. Such comments by Tom Payette to Mr Bechard (as well as others which it is unnecessary to detail), provided the significant potential link in Mr Smith's employment history between his time at Choices, and his employment after 2005. Those comments would have deserved close attention if I had the jurisdiction to consider Mr Smith's 2005 return to work challenges – which I cannot without a link to something that occurred after February 21 2011. Furthermore, as pointed out by counsel for Capital Health during final submissions, and as I have referred to earlier, there is nothing articulated in Mr Smith's 2012 human rights complaint about not being returned to a position in the Choices program.

68. Even if I were to accept that Mr Payette's comments were accurately recounted by Mr Bechard, and I have no other evidence to consider a different conclusion, I have nothing in evidence to suggest that Mr Payette's attitude had anything to do with the 2011 reorganization of community mental health services, or the decision to place Mr Smith at "the Hub" in Sackville. In short, I have nothing in evidence to suggest that Tom Payette's attitude towards Tony Smith leaked through to or continued to contaminate any employment decision affecting Mr Smith in 2011. Tom Payette's views were not a factor in the task allocation decisions made by Kim Fleming, Cheryl Billard, Dorothy Edem, or Susan Shaddick.

69. I appreciate that Mr Smith made an effort to insinuate that Kim Fleming behaved towards him in a negative way – and therefore that she may have had similar attitudes towards him as had been harboured by Tom Payette. I heard from Ms Fleming. She denied being influenced in her supervision of Mr Smith by anything attributable to Mr Payette. Instead she was concerned about:

- a) the efficient deployment of human resources within her clinic,
- b) Mr Smith's level of effort, and eventually
- c) how staff attitudes towards her management style were distracting staff from the work that needed to be delivered to the public with mental health needs.

I am unable to conclude that Ms Fleming made any decision, let alone a discriminatory decision within the meaning of the *Act*, based Mr Smith's race or colour; or in retaliation because he had previously made a human rights complaint in 1994.

### *Conclusion*

70. Mr Smith's sensitivity towards supervision intensity and employment task assignment was, and remains, real. Mr Smith had reason from early on in his employment at the Choices program to be concerned that employment decisions which he did not control, or which he sometimes did not understand, might in fact be motivated by his race or colour. Indeed it was clear from Mr Smith's evidence at several turns that he was highly sensitive to the potential that any employment issue that did not go according to his preference, or that he did not understand, was in fact a somewhat shadowy way to take advantage of him, or to discriminate against him because of his race or colour, or was at least systemically racist. The

reality of Mr Smith's feelings, and concerns, are not enough on their own to establish a discriminatory act, or behaviour, or a discriminatory course of conduct by Capital Health or its staff. Mr Smith's concerns justified an inquiry – an inquiry which I have made based on the evidence provided to me. However, in order for me to make of finding of discrimination based on race or colour, or a finding of retaliation, the evidence needs to establish on a balance of probabilities that race or colour or retaliation was a factor in a decision made about him.

71. There was no link established in the evidence between any of Tom Payette's behaviours and attitudes and employment decisions, with those made or communicated to Mr Smith in 2011 by Kim Fleming. There was also no decision or behaviour made in relation to Mr Smith by anyone at Capital Health after February, 2011, in which his race, colour, or his previous human rights complaint, was a factor.

72. I have concluded that there was no act or behaviour towards Mr Smith by any individual at Capital Health, nor by that organization in any systemic way, in which Mr Smith's race or colour, or his prior human rights complaint, was a factor. I am unable to find that he suffered any discrimination during the time that I have authority to consider. Mr Smith's complaint, supported by the Nova Scotia Human Rights Commission, is therefore dismissed.

DATED this 6th day of November, 2015, at Halifax, Nova Scotia.



Donald C. Murray, Q.C.

Board of Inquiry, *Nova Scotia Human Rights Act*