

**IN THE MATTER OF:**     **THE NOVA SCOTIA *HUMAN RIGHTS ACT* (the “Act”)**  
**and**

**IN THE MATTER OF:**     **Board File No. 51000-30-H14-2627**

**BETWEEN:**

**Kathleen Symington**

**Complainant**

**- and -**

**Halifax Regional Municipality (Halifax Regional Fire and Emergency)**

**Respondent**

**- and -**

**Nova Scotia Human Rights Commission**

**Party**

## **DECISION**

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

**Hearing Date:**       **May 21, 22, 23, 24, 27, 28 and 30, 2019**

**Location:**             **Halifax, Nova Scotia**

**Counsel:**             **Ron Stockton and Nancy Elliott, Counsel for Kathleen Symington,  
Complainant  
Karen E. MacDonald, Counsel for Halifax Regional Municipality  
(Halifax Regional Fire and Emergency) Respondent and Kate Dewey,  
Article Clerk  
Kendrick Douglas and Kymberly Franklin, Counsel for Nova Scotia  
Human Rights Commission**

### Preliminary

1. This Board of Inquiry was appointed to consider the complaint filed by Kathleen Symington on May 19, 2016 ("Complaint"). The Complaint refers to conduct starting in January 2006, alleges that Halifax Regional Municipality (Halifax Regional Fire and Emergency) ("Halifax Fire") discriminated against her:
  - i. on the basis of gender;
  - ii. on the basis of her mental and/or physical disability; and,
  - iii. she experienced systemic discrimination.
2. Ms. Symington also alleges that Halifax Fire retaliated against her as a result of her previous complaints of discrimination stemming from Ms. Symington filing an earlier Human Rights complaint in 2004, as well as a workplace harassment complaint, alleging discrimination based on alleged acts of sexual harassment. ("2004 Complaints")
3. The Complaint also named the International Association of Firefighters Local 268 ("IAF") but that was dismissed by the Human Rights Commission and was not referred for inquiry. Neither was the issue of systemic discrimination referred for inquiry due to an earlier settlement between Halifax Fire and the Human Rights Commission.
4. Prior to the hearing the issue of the scope of the inquiry was discussed in a pre-hearing meeting. It was agreed that this inquiry would not review the circumstances alleged in the 2004 Complaints although reference to the fact of the complaints was permitted for the purpose of understanding the context of the allegation of retaliation. The parties respected this understanding.
5. Finally, as a preliminary issue, it was agreed that reference to the individual whom Ms. Symington identified in her 2004 Complaints should not be identified. The Board ordered any reference to that individual should be as A.B.
6. In May 2015, twenty five (25) months after the formal accommodation process for Kathleen Symington began with Halifax Fire, Ms. Symington was presented with an accommodated position as Stores Person. Ms. Symington did not accept that position and instead provided Halifax Fire with a medical opinion from her family physician that confirmed that she was unable to return to work with Halifax Fire in any capacity. Ultimately, she retired from Halifax Fire effective August 1, 2016.

7. Ms. Symington does not dispute that the offer of the Stores Person position was appropriate accommodation. Rather her complaint is that until that time Halifax Fire had failed to meet its obligation to accommodate her disability and return her to work. By May 2015 she claims that it was too late as the failure to affect her accommodation earlier caused a deterioration in her mental health to the point that she was unable to return to work. She says the delay or failure to accommodate her was, in part, retaliation for the 2004 Complaints. She also cites the length of time it took the bureaucratic process within Halifax Fire to complete the process as a failure of its duty to accommodate her and she says it was a breach of its duty to accommodate her in a timely way. She says gender also was a factor.
8. The scope of the Board's inquiry is whether Halifax Fire discriminated against Ms. Symington on the basis of her gender and/or her mental and/or physical disability. It is also asked to consider whether Ms. Symington was retaliated against as a result of the 2004 Complaints. Section 29(2) provides the temporal scope for analysis:
 

29(2) Any complaint must be made within twelve (12) 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.
9. The Court of Appeal in *Smith v Nova Scotia (Board of Inquiry)*, 2017 NSCA 27 and *Izaak Walton Killam Health Centre v Nova Scotia Human Rights Commission*, 2014 NSCA 18 confirmed the adherence to the plain wording of the legislation. Accordingly, the Board must focus its inquiry to the twelve month period from May 19, 2015 to May 19, 2016. To the extent that I deal with testimony and facts outside this temporal period, it is to understand the context of the allegations.

## **Background**

### **2004 Complaints**

10. Although there was limited evidence of the 2004 Complaints it was admitted for the purpose of the context of the retaliation complaint that was before the Board. The complaint alleges that from 2006, including the accommodation process, to May 2015, Halifax Fire took actions that were retaliatory to Ms. Symington for having filed the complaints that she did.
11. The allegations in the 2004 Complaints can generally be described as conduct, that if proven, could constitute vandalism in the form of damage to her vehicles, harassment and sexual harassment by Captain AB. The alleged breach of Workplace Rights policy was investigated by Michael Moreash, an independent investigator, and was dismissed. Prior to the Moreash investigation, Maureen Shabib had been hired in 2002 and did not find a basis to support the complaint. Following its own

investigation, the Human Rights Commission discontinued Ms. Symington's complaint, against Captain AB, arising from the same alleged conduct.

## Two Disciplinary Letters

### November 5, 2004 Letter

12. Following the dismissal of the 2004 Complaints, Captain AB filed a complaint against Ms. Symington claiming that she misused the Workplace Rights policy process. The complaint by Captain AB was found to be substantiated and Chief Director Michael Eddy issued a disciplinary letter dated November 5, 2004 advising that Ms. Symington would receive a 3 day suspension to take effect upon her return from her medical leave which she had started in January 2004 following a motor vehicle accident in which she had suffered serious injuries.

### August 22, 2006 Letter

13. Ms. Symington was off work from January 31, 2004 until her return in January 2007. It appears from the record that she was considered disabled for the purpose of LTD benefits and remained qualified for those benefits until May, 2006. During this period, Ms. Symington had a daughter, and once the disability benefits ended in May 2006, she began a parental leave until it ended in November 2006. She required eight weeks conditioning before she could return in January 2007.
14. District Chief Strachan contacted Ms. Symington on June 22, 2006 and August 2, 2006 relating to her leave status and absenteeism. According to District Chief Strachan, Ms. Symington never responded to either of the emails by August 22, 2006. On August 22, 2006 District Chief Strachan wrote a lengthy letter to Ms. Symington a lengthy letter addressing her level of absenteeism, the fact that Halifax Fire had not provided a copy of the November 4, 2004 suspension letter to the Union, and also addressed the fact that she was not responding to his communication in a timely way. The letter of August 22, 2006 ended by this jarring admonition:

I note that you have not responded to my email dated June 22, 2006 nor have you responded to my email of August 2, 2006. Your failure to respond to my email of June 22, 2006 will lead to further disciplinary action, and may include a further extension of the suspension referred to above. Kindly respond to these correspondences within 48 hours of receipt of this registered letter. Your failure to do so will be considered an abandonment of your employment.

15. Grievances were filed on September 1, 2006 against both the suspension letter of November 4, 2004 and the letter of August 22, 2006 addressing the issue of

absenteeism and uttering the threat of further suspension. It was immediately agreed by Halifax Fire that there would be no discipline on the basis of absenteeism. After almost two years of exchange between the IAF and Halifax Fire Management a settlement was reached on the November 4, 2004 letter. By letter dated May 1, 2008, Assistant Deputy Chief Williams agreed to take the November 4 suspension letter out of Ms. Symington's personnel file. The evidence is that Ms. Symington never did lose the three day suspension referred to in the letter. The evidence is that despite the settlement reached in May 2008, the November 4, 2004 and August 22, 2006 letters remained in Ms. Symington's personnel file as late as the winter/spring of 2019 when Ms. Symington's counsel accessed the file in preparation for the hearing of this inquiry. Halifax Fire acknowledged the letters ought not to have been in the file and attributed their continuing presence to human error.

### **January, 2007 to April, 2011**

16. Ms. Symington did return full time in January 2007. She resumed her duties and continued fulltime until she was recommended for surgery in April 2011.
17. In her direct testimony she said that in 2007 things at work "were pretty good, I guess." She said that things were still happening like verbal taunts suggesting that she "made things up" or that she vandalised her own car" but that she never said anything in response because "no one would believe me."
18. She asked for a transfer from B Platoon to D Platoon so that she would not be on the same shift rotation as Captain AB. By this time Captain AB was acting District Chief and the request for a new B Platoon was a result of a desire for a new start. During this four year stretch of work, Ms. Symington secured her Class 1 Fire Fighter designation and tested successfully to be a driver operator.
19. In 2011, Ms. Symington was experiencing worsening symptoms from the injuries suffered by her in the 2004 motor vehicle accident. Her surgeon recommended a neck fusion and diagnosed her with Myelomalacia. Halifax Fire accommodated Ms. Symington's sick leave until her retirement effective August 1, 2016.
20. Aside from the allegation that the failure to withdraw the November 2004 letter and August 2006 letters from her personnel files, Ms. Symington does not make any allegation in her complaint form about discriminatory conduct between January 2007 and April 2013. When she questioned on that point on cross-examination, she responded "I was hearing all kinds of things in the station...nasty things" but there was no detail in her evidence nor mention of such statements in her complaint form. There was no other evidence to suggest any other event that could be considered discriminatory or retaliatory in this time period. April 2011 is the last time Ms. Symington was at work.

### Accommodation Process

21. In April 2013, Ms. Symington was approaching two years on LTD and the issue of her return to work had to be addressed. With the change from an “own occupation” definition to an “any occupation” definition there was concern within Halifax Fire that Ms. Symington may not sustain her LTD coverage. In any event it was already two years since she began her leave and attention needed to be given to whether and when she was able to return to Halifax Fire.
22. In April 2012, Ms. Symington had undertaken a Functional Capacity Evaluation (FCE) at the request of Great-West Life (2012 FCE). The purpose was to assess whether she could return to her position with or without accommodation. She was assessed as able to work a 12 hour shift and “demonstrated abilities with to perform medium physical demand characteristics (PDC) work classification”. It was determined that she could not safely return to a firefighter position and the report cites the same conclusion from Ms. Symington’s surgeon, Dr. Christie, as support.
23. Not surprising, then, Ms. Symington remained off work and continued on LTD for the next year. In March 2013, Angela Boyd became involved in efforts to assess Ms. Symington’s ability to return to work. Ms. Boyd works for Halifax Regional Municipality in Workplace Health Services. I found Mr. Boyd to be a knowledgeable and a reliable witness. Ms. Boyd co-ordinated a meeting for April 11, 2013 involving numerous individuals who had roles in the accommodation process for Ms. Symington, including Great-West Life, Halifax Fire, Workplace Health Services, Human Resources, the IAF and, of course, Ms. Symington.
24. The meeting of April 11, 2013 was described by many of the witnesses who testified during the hearing. In attendance were Angela Boyd, Phil McNulty, Executive Officer for Halifax Fire, Brendan Meagher and Chris Camp for the IAF, Pat Clair for Great-West Life and Ms. Symington. Natasha Gibbs was to have attended as a Senior Human Resource Consultant but she ended up declining the meeting due to illness. According to notes kept by Ms. Boyd, Pat Clair was to determine whether the 2012 FCE was to be used as the basis for accommodation. Whether or not there was agreement to rely on the 2012 FCE became a very contentious point for Ms. Symington. It was never clear during the hearing exactly why that was so.
25. Ms. Symington testified that during the meeting, Executive Officer Phil McNulty was very positive that they would find a role for her. She said that he said there would be no issues with accommodation, there were lots of job vacancies and opportunities for bundling. In his testimony, Mr. McNulty did not specifically

embrace that description but agreed that he was trying to be very optimistic and hopeful that Ms. Symington would return to Halifax Fire. In the end, his optimism was borne out because they were able to identify a reasonable accommodation for Ms. Symington, although she argues that it came too late.

26. Aside from determining whether the 2012 FCE would be used, it was also one of the expectations following the April 11, 2013 meeting that Ms. Symington would present a formal request for accommodation. Mr. McNulty recalls asking for it but in his testimony he understands from information he learned subsequently that a written request was not required. Ms. Symington did eventually provide the written request for accommodation but not until June 30. She decided after the meeting that before presenting the written request that she wanted to meet directly with Chief Trussler who had recently assumed the role of Chief of Halifax Fire. The reason for her meeting request, she says, was so he would learn “about her” directly and not through others. She was concerned that Chief Trussler would form his opinion of her from people who had negative views of her or her history.
27. A meeting between Ms. Symington and Chief Trussler took place on May 23, 2013. Paul Andrews, a friend of Ms. Symington, attended with her. The meeting appeared to have lasted approximately 90 minutes. Ms. Symington knew in advance that the meeting would not be about her accommodation, yet she expressed a desire or need to meet the person “that would be accommodating her” as she understood the process.
28. Ms. Symington and Mr. Andrews each recalled that Chief Trussler said at this meeting that “there was nothing for her in Halifax Fire”. Chief Trussler allowed that he may have said that in the context of no jobs immediately available but that he would never assert or state that there was no possibility of her working in Halifax Fire. Ms. Symington points to this alleged declaration at the meeting as proof of a departmental bias against her. Yet it was she who advised Chief Trussler of the issues of her past discipline. To that point in time, he said he had not reviewed her personnel file, was not aware of the past discipline and there was no reason that he would be aware.
29. All the other evidence presented at the hearing is directly opposite the suggestion that Chief Trussler absolutely precluded any possibility of Ms. Symington’s return to Halifax Fire, including Ms. Symington’s recollection that he encouraged her to submit the letter requesting accommodation and to obtain the medical information required. The remainder of the evidence is that Halifax Fire was committed to its obligation to accommodate Ms. Symington’s return to Halifax Fire or possibly other opportunities within Halifax Regional Municipality (HRM).
30. The Board is satisfied that Ms. Symington’s and Mr. Andrews’ recollection of any comments by Chief Trussler is mistaken and that at most he was expressing concern

about the lack of current positions within Halifax Fire and HRM due to the administrative freeze imposed by Council and Chief Administrative Officer, Richard Butts. Chief Trussler was openly critical of that freeze during his testimony.

31. On June 30, 2013, Ms. Symington did send an email to Chief Trussler who had followed up with her on June 17, 2013 as he had not yet received the written request for accommodation. The email that Ms. Symington sent on June 30 is as follows:

I have sixteen years in the Halifax Regional Fire Service and due to my continued medical issues I am unable to return as a firefighter/operator. I am looking to be accommodated within fire. I cannot supply anymore medical information at this point, because my appointment on June 12 was cancelled. by surgeon. (sic) No new appointment date was given at this time.
32. Following receipt of this email a meeting was scheduled for July 11, 2013 to review where things stood for Ms. Symington. Notes of the July 11, 2013 meeting were kept by Angela Boyd. It records the attendance to include Ms. Boyd, Mr. McNulty, Ms. Symington, Carolyn Blair-Smith and a gentleman she identified as an unidentified friend of Ms. Symington which turns out to have been Mr. Andrews. Neither Mr. Meagher, nor any IAF representative, attended the meeting at Ms. Symington's request. The notes kept by Ms. Boyd reflect a growing suspicion and criticism by Ms. Symington of the sincerity of Halifax Fire to accommodate her. It is clear from her evidence and the evidence of other witnesses who attended the meeting that Ms. Symington felt as early as July 11, 2013 that Halifax Fire was renegeing on commitments made in April, especially commitments she felt were made by Mr. McNulty.
33. The material point from the July 11, 2013 meeting is that there was a real question whether the accommodation process could proceed on the basis of the 2012 FCE. Ms. Boyd testified that she made the decision that a new FCE was required based on the information that Ms. Symington had provided about her condition. The information she was provided on July 11, 2013 included comments from Ms. Symington that she did not feel she could work a 12 hour shift and that the 2012 FCE did not capture her current capabilities. I accept Ms. Boyd's evidence that she was concerned based on the description from Ms. Symington that she felt her physical condition was worsening and find it reasonable that Ms. Boyd would have made the decision to require a new FCE. Ms. Boyd made arrangements for a service provider close to Ms. Symington's residence to perform the new FCE.
34. The second FCE was scheduled for July 25, 2013 and Ms. Symington attended. As a result of symptoms reported by Ms. Symington, the physiotherapy clinic was concerned about proceeding without an advanced consultation with her surgeon. Regrettably, the appointment with Ms. Symington's surgeon did not take place until

March 28, 2014. Ms. Boyd testified that she did not follow up with Dr. Christie directly but she did follow up with the physiotherapy clinic which was regularly following up with Dr. Christie's office. There was no explanation for the delay in getting the appointment with Dr. Christie but no one attempted to blame Ms. Symington for the delay.

35. Following Ms. Symington's appointment with her specialist in March 2014, a third group meeting was scheduled to discuss her accommodation. It is clear based on the notes taken and the testimony before the Board that Ms. Symington was very frustrated with the fact that the accommodation process had not advanced.
36. The third group meeting took place on April 4, 2014. Ms. Symington attended as did Pat Clair, Angela Boyd, Brendan Meagher, Kevin Dean, President of the IAF, Paul Andrews, Lauren Nolan and Deputy Chief Hollett. Ms. Symington testified that she felt she was being blamed for the delay in arranging the new FCE. She also questioned the need for the new FCE and took the position that the 2012 FCE had already been "accepted." She testified that the discussion of the new FCE was cover for the fact that Halifax Fire had no position for her and that she "felt nothing had changed". That testimony ignores the fact that the delay in securing the new FCE was the length of time it took for an appointment with Dr. Christie to be arranged. This is not to blame Ms. Symington but is a fact that the second FCE could not advance without it, at least according to view of the physiotherapy clinic. It also ignores the fact that Ms. Symington herself questioned whether the 2012 FCE was an accurate description of her capabilities when they met in July 2013. It is inconsistent for her to testify that the 2012 FCE was accurate and that any discussion of accommodation should have proceeded based on that evaluation.
37. The second FCE went ahead on April 25, 26, 2014 and the results showed a marked change in Ms. Symington's capacities (2014 FCE). The 2014 FCE concluded that she could only perform 8 hour shifts and that she was assessed capable of performing light to lower medium range job duties. The assessment confirmed she was not able to return to a firefighter's position. It also confirms that Dr. Christie was making a referral to the Pain Clinic.
38. Having the updated 2014 FCE, Halifax Fire began a review of possible positions that might be available to Ms. Symington either within Halifax Fire or within HRM. The first discussion about the possibility of work outside Halifax Fire was raised by Brendan Meagher in April 2013 as he was traveling with Ms. Symington to the first group meeting to look at accommodation issues. At that time he mentioned that there may be options like park police or park patrol. My Symington was not receptive to work outside Halifax Fire because she believed that was her training. This suggestion by Brendan Meagher seemed to serve as an irritant to Ms. Symington in her dealings with the IAF. She repeatedly suggested that the IAF was

not interested in supporting her. I did not hear Mr. Meagher's suggestion as any capitulation or easing of Halifax Fire's responsibility. I heard his evidence rightly as trying to ensure Ms. Symington was aware that she had to consider all reasonable options that permitted her to return to gainful employment. I was impressed by Mr. Meagher's diligence and advocacy for Ms. Symington. He was genuine in his desire to want to assist her as the representative from the IAF who offered to assist. He and Ms. Symington entered Halifax Fire the same year.

39. Also at the April 2014 meeting, Ms. Symington was requested to prepare a resume of her experience. The purpose of the request was to ensure that those assisting in the accommodation process had a clear understanding of her skills and experience.
40. The process that led to the identification of the Stores Person position started with an internal Halifax Fire meeting on July 11, 2014. An Excel Spreadsheet was prepared by Laura Nolan for the purpose of identifying all presently available positions within HRM. This Stores Person position became the focal point of the meeting. There was a discussion of whether a position that matched Ms. Symington's skill set and also her currently assessed capacities according to the 2014 FCE. While some other possibilities were discussed early on, like the possibility of an M-100 by-law inspector, almost the entire focus by Halifax Fire was on the Stores Person position. It was clear from the evidence that Deputy Chief Hollett felt that represented a real opportunity and a practical response to Ms. Symington's need for accommodation. There was no evidence of any viable other job or position within Halifax Fire having been analyzed by Halifax Fire.
41. The Stores Person position had been left unfilled in Halifax Fire's own previous year budgeting process. The role supported the firefighting infrastructure ensuring the proper management of equipment and inventory. As a budgetary measure the decision was made to try to allocate the responsibility of the Stores Person position among different roles. That strategy was assessed to be ineffective and as a result the Stores Person position became a viable alternative for assessment for accommodation for Ms. Symington.
42. The assessment of the Stores Person position began in July, 2014 and was not completed until March 13, 2015 after approval for its reinstatement was given by the CAO. There was a great deal of discussion about the effect that the administrative hiring freeze had on the accommodation process for Ms. Symington. It is fair to say that none of the witnesses endorsed the policy implemented by Council and Mr. Butts. It appears the freeze may have affected Ms. Symington in two possible ways. First, according to the testimony of all HRM witnesses there was a limit on available jobs and at times they communicated that there were no jobs within Halifax Fire. Second, the need for CAO approval of the reinstatement of the Stores Person position added significantly to the length of the process. At the very least it took six

weeks from the time the request for the reinstated position was submitted to the CAO before it received final approval. Other than that specific time frame it appears a further seven or eight weeks was taken to prepare the position paper to validate the request. Ms. Gibbs testified that it meant having to make sure the presentation and rationale was detailed to withstand the scrutiny of the CAO review process.

43. Once the Stores Person position was identified by Deputy Chief Hollett in July 2014, work began in determining whether the position was within Ms. Symington's physical capacity and, if required, whether the position could be modified. That process was guided by Ms. Gibbs who worked with Dave Clement, Division Chief of Stores and Logistics to assess whether there was justification to reinstate the position. Ms. Boyd worked with Key Physiotherapy Rehabilitation Centre to complete a Job Site analysis. That was completed by December 12, 2014 and provided to Ms. Gibbs.
44. There was no clear evidence that explained the delay from December 12, 2014 until February 3<sup>rd</sup>, 2015 when the request for approval was submitted to the CAO and there was no evidence why the approval took six (6) weeks to achieve.
45. Nor was there evidence as to why the hiring freeze imposed by Council and the CAO did not contemplate the discretion for authority to deal with requests for accommodation. There was no written guideline for the hiring freeze.
46. It is also the case that Ms. Symington was in a dispute with Great-West Life through the fall of 2014 and that her disability benefits were discontinued. As part of her complaint, she suggested Executive Officer McNulty was responsible due to his interference with Great-West Life. However, the Great-West Life Policy was arranged through and managed through the IAF so Halifax Fire had no involvement in its management. Accordingly, there was no basis to that allegation.
47. There was no communication by Halifax Fire with Ms. Symington through the fall of 2014 about the Stores Person position. There was some ongoing communication about other possible positions but no other position was ever assessed as being appropriate to her skills. The first occasion on which Ms. Symington learned of the position is by email on May 15, 2015.

#### **Offer of Stores Person Position**

48. There was no contest of the medical evidence introduced. Halifax Fire accepted:
  - i. That throughout her period of medical leave that Ms. Symington was not able to fulfill her duties.

- ii. That Ms. Symington was not able to return to her position as a fire fighter and that she had to be accommodated.
  - iii. In May 2015, it accepted Ms. Symington's advice that she was disabled from returning to any occupation within Halifax Fire or HRM.
49. In February of 2015 Ms. Gibbs contacted Ms. Symington to determine whether she was in fact able to meet the physical demands of the Stores Person position or whether her condition had deteriorated such that she was totally disabled from continuing employment. The inquiry was the result of the publication of a lawsuit by Ms. Symington against Great-West Life, her disability insurer. In her lawsuit she claimed to be totally disabled.
50. Ms. Symington did not immediately respond to the inquiry and eventually the matter was referred to her counsel in the lawsuit and counsel for HRM. Upon advice of HRM counsel, a decision was made to convene a meeting with Ms. Symington to present the modified Stores Person position.
51. The meeting was scheduled for May 15, 2015 except that the IAF had forgotten to tell Ms. Symington about the meeting. Immediately following the abandoned meeting both Ms. Gibbs and Mr. Meagher contacted Ms. Symington to advise her of the mishap, that a new meeting would be called and that the purpose of the meeting was to formally present the Stores Person position to her. There was an attempt to schedule a second meeting for May 21, 2015 but Ms. Symington sent an email refusing to meet and indicating that she was not able to return to work in any capacity. She provided a note as set out from her family physician which read:
- (posttraumatic issue stress) Her emotional issues stem from the accident and work related issues. She is unable to work at any position within HRM/fire etc due to chronic daily persisting severe physical and emotional pain secondary to the accident.
52. Brendan Meagher followed up with Ms. Symington on multiple occasions from June 17, 2015 onwards asking whether she wished the IAF to file a grievance on her behalf and whether she was able to take another position. Ms. Symington responded with a long, critical email about the process of accommodation. The email contained complaints that the IAF failed to properly represent her interests. Mr. Meagher replied to confirm her wishes on the grievance and she replied with a lengthy reply ending with a non-answer answer. She wrote on July 14, in part:
- ...
- In May 2015 I sent a medical note to management from my Family Doctor stating that I will not be taking a job from either

HRM Fire or HRM. A month later you contact me stating that you would grieve management stopping the accommodation process. I am gone and now you want to start grieving things for me. WOW!

I do not feel that management handled this accommodation process properly.

If you want to grieve the process and how poorly it was handled and how poorly I was treated go ahead.

53. Ms. Symington retired from Halifax Fire effective August 1, 2016.

### **Legal Principles**

54. As stated earlier, my assessment is whether any incidents of discrimination or retaliation occurred within 12 months of Ms. Symington's complaint of May 19, 2016.

55. There are three distinct issues that have to be decided:

- i. Whether Halifax Fire retaliated against Ms. Symington as a result of the 2004 Complaint;
- ii. Whether Ms. Symington was discriminated against on the basis of gender; and,
- iii. Whether Halifax Fire met its obligation to accommodate Ms. Symington;

### **Retaliation**

56. In order to establish the allegation of retaliation Ms. Symington would have to show that

- i. there was knowledge of the previous complaint by the decision-maker,
- ii. 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,
- iii. that the retaliatory decision caused some adverse impact or consequence.

(See: *Smith v. Capital District Health Authority*, 420000-30-H10-1931)

57. There is absolutely no evidentiary basis that any of the elements of retaliation were met. It is significant that after Ms. Symington's return in January 2007 she had no specific complaint about any incident about the management of Halifax Fire. She did achieve two advancing designations between 2007 and April 2011. She never returned to the workplace after 2011.
58. Chief Trussler was the decision-maker from Halifax Fire, in collaboration with Deputy Chief Hollett, HRM Human Resource and Health Professional Staff. He became aware of Ms. Symington's history when she insisted on revealing that to him. I accept his evidence that he had not reviewed Ms. Symington's personnel file prior to his meeting with her and was not otherwise aware of the circumstances of the 2004 Complaints and purported discipline. I accept his evidence that the history played no role in the accommodation process.
59. It is also the case that numerous people were involved in the decision making process. This includes Ms. Boyd, a number of individuals from HRM Human Resources and Deputy Chief Hollett among others. I accept their evidence that they either were not aware of the disciplinary history or it was not something that would ever be part of their discussion around accommodation.
60. The evidence is also clear that the IAF had successfully arranged for the removal of the disciplinary letters from Ms. Symington's record. I agree that the continued presence of the offending letters as late as 2019 was inexcusable but as counsel for Halifax Fire correctly points out the record of the agreement to remove the letters were also in Ms. Symington's file.
61. I find further that there is no evidence at all to support the suggestion that anyone involved in the accommodation process was motivated by the 2004 Complaints in any of their decisions. The suggestion that they were so affected was advanced on the mere presence of the letters remaining in the file. That singular fact was the entire foundation of a hyper-exaggerated allegation of retaliation.
62. Based on my findings on the first two elements that had to be met to sustain an allegation of retaliation, it follows that Ms. Symington cannot meet the third element. Accordingly, this part of her complaint is dismissed.

### **Discrimination based on Gender**

63. In order to succeed on her claim of gender discrimination, Ms. Symington must be able to establish:
  - i. That she has a characteristic (or perceived) protected from discrimination under the *Human Rights Code*

- ii. That she experienced an adverse impact with respect to her employment; and,
  - iii. That the protected characteristic was a factor in the adverse impact.
64. Ms. Symington is alleging gender based discrimination and does present a characteristic protected from discrimination.
65. There was no evidence that for the twelve months preceding the complaint that Ms. Symington experienced an adverse impact with respect to her employment as a result of gender. She was not in the workplace. The allegation would have to be that her gender was a factor in her view of an unsuccessful accommodation. There was extensive evidence presented and I am convinced that there was a fully engaged effort to have Ms. Symington return to work. Deputy Chief Hollett and Ms. Boyd were each aware of their obligations. There was nothing in the documentary evidence that showed anything other than Halifax Fire trying to bring Ms. Symington back to work within the department. She did not suffer any adverse treatment due to gender
66. Accordingly, I dismiss the complaint of alleged gender discrimination.

### **Duty to Accommodate**

67. The third claim advanced by Ms. Symington is that Halifax Fire discriminated against her on the basis of her mental or physical disability. In order to succeed Ms. Symington has to demonstrate that:
- i. She has a characteristic (or perceived) protected from discrimination under the *Human Rights Code*;
  - ii. That she experienced an adverse impact with respect to her employment; and,
  - iii. That the protected characteristic was a factor in the adverse impact.
68. The medical evidence available includes the various functional capacity assessments and Ms. Symington's medical file from April 1, 2013 to May 31, 2015. There were no medical witnesses called to speak to Ms. Symington's condition but there was no contest over the records. Halifax Fire accepted the medical information as it was presented.
69. There is medical evidence that demonstrates that Ms. Symington possibly presented with a deteriorating mental health condition. The notes do discuss the stress of the circumstances caused by the issues with the insurance company and also the process of accommodation as she reports them. Dr. Langley records that Ms. Symington

refers to her efforts to keep her physical and psychological symptoms at bay. According to Dr. Langley's notes in June 2014 Ms. Symington was expressing anxiety about the possibility of being assigned to a fire inspector's role. She was anxious about the social interaction. At the same time she complained about the "poisious (sic) work environment. This has worsened over the years." There was no independent evidence of this for the time period this inquiry is concerned with and that makes sense given she was not in the workplace.

70. In November 2014 Ms. Symington was complaining about her frustration because of "her long fight with the Insurance company, work place, physicians assessment etc".
71. On April 30, 2015 Ms. Symington appears to have indicated to Dr. Langley that she could not go back to work. She voices her view that she cannot return to work as "she is really plagued (sic) with teh (sic) post traumatic stress eg after she has dealings with fire and insurance and union issue she is non functional for at least 2 weeks."
72. Following the last session on April 30, 2015 Dr. Langley did prepare the following note:
 

(posttraumatic issue stress) Her emotional issues stem from the accident and work related issues. She is unable to work at any position within HRM/fire etc due to chronic daily persisting severe physical and emotional pain secondary to the accident.
73. While Dr. Langley notes reflect discussion of Ms. Symington's mental health, I do not read them as her conclusive opinion that Ms. Symington presented with a mental health disability. In a letter that she wrote to Great-West Life on May 22, 2014 in support of Ms. Symington remaining on disability benefits, Dr. Langley does report that she made a referral to mental health services and that she had discontinued a treatment of an anti-depressant due to side effects. Dr. Langley records that Ms. Symington "feels that she has hit the wall". She records Ms. Symington as presenting with sleeping issues, increase in her guilt and that she claimed issues with her memory and concentration.
74. While there was no clear articulation by Dr. Langley describing a mental health condition, there is significant record, uncontested by Halifax Fire, to suggest that Ms. Symington presented with a mental health disability. I make that finding.
75. The analysis of her physical disability is much easier. There is clear record of Ms. Symington's physical limitations and there was no contest by Halifax Fire. I find that Ms. Symington presented with a physical disability.

76. The second element is whether Ms. Symington received an adverse impact with her employment because of either disability. There is no evidence to suggest that Ms. Symington suffered an adverse impact with her employment with Halifax Fire as it relates to this current complaint in the time frame with which this Board is concerned.
77. The evidence is that she returned to work from a medical and then a parental leave in early 2007. There was no evidence to suggest that she suffered any adverse impact in the four year period until her surgery in April 2011. As noted earlier this was a period when she achieved two certifications and advanced her career as a fire fighter. The reason that she took leave in 2011 was the chronic symptoms that first arose in her 2004 MVA. The leave started with surgical intervention. That leave from work and her continued absence from work was never challenged by Halifax Fire.
78. Ultimately she could not return to work in 2015 due to her physical condition. She was presented with an appropriate accommodated position and she was unable to accept that position for the reasons set out by Dr. Langley in her brief note of April 30, 2015.
79. Based on that note and Ms. Symington's own evidence, she was not able to return to Halifax Fire even in the accommodated position. Should there be any doubt about that the IAF contacted Ms. Symington after she refused the position to request of her whether she wished the IAF to file a grievance. She never provided that direction. There was no evidence or contention during the hearing that Ms. Symington was ever able to return to Halifax Fire prior to her retirement.
80. Ms. Symington's counsel argued that the length of time that it took to arrive at the accommodation was a breach of Halifax Fire's duty to accommodate. Counsel went further and suggested that the delay in the accommodation was a contributing factor in Ms. Symington's condition which prevented her from returning to work.
81. As to the suggestion that the delay contributed to her ill-health, there was no evidence introduced to prove that allegation. Counsel suggested that this could be inferred, but I disagree. Such a proposition requires appropriate medical opinion and the notes presented in this hearing are insufficient to establish the point. There are comments about the stress of the process and the effect on Ms. Symington due to the delay but the notes mostly reflect Ms. Symington's observation and do not constitute sufficient opinion evidence to support the proposition.
82. Counsel relies on the decision in *Toronto (City) v. CUPE, Local 79* 2014 CarswellOnt 12300 to suggest that there was a violation of Ms. Symington's rights as a result of

what it suggests is the unreasonable delay in finding an accommodation. At para 77 of that decision, Arbitrator Luborsky states the following:

77 These authorities accordingly indicate the standard for assessing the legitimacy of the amount of time taken to accommodate the employee's disability is also one of "reasonableness", which is a flexible concept to be assessed from an objective perspective that considers a number of open-ended factors in all of the surrounding circumstances. Given the imprecise measure of what 'timeliness' actually is in the context of an evolving fact situation that is part of the expected give-and-take between the employer, employee and union contemplated under the process envisioned in *Central Okanagan School District No. 23, supra*, all parties may be forgiven, to a reasonable degree, for errors, mistakes in judgment or failures to seize opportunities that in hindsight might seem obvious. Thus while it is apparent from the foregoing review of the authorities that a "small portion" of a delay in achieving a suitable accommodation attributable to the employer's conduct may be excusable and that there must always be some latitude to account for mistakes by all parties in the search for an accommodation, liability will nevertheless attach to the employer as "the person responsible for accommodating" the needs of the disabled employee without undue hardship under s. 17(2) of the *Code* where the measure of the delay as a result of the employer's action or inaction is of a more substantial degree, which is an imprecise line to be drawn having regards to all of the circumstances of a case.

83. In considering the assertion of a breach of a procedural duty as is suggested by Ms. Symington it is useful to consider the decision in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U* [1999] S.C.J. No. 46 ("Meiorin"). At para 64 to 66, MacLachlan, CJ, states:

64 Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.

65 Some of the important questions that may be asked in the course of the analysis include:

- (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

(b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

(c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

(d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in *Renaud, supra*, at pp. 992-96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.

66 Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally Lepofsky, supra. (emphasis added)

84. The interaction of the procedural and substance elements of the accommodation process is well explained in *Cruden v. Canadian International Development Agency* 2013 FC 520 (FC):

69 In my view, *Meorin* simply does not reasonably support the proposition that there exists a separate, procedural duty in the accommodation process which can be breached notwithstanding a substantive finding of undue hardship and which would attract remedies on its own. In paragraph 66 of *Meiorin*, which is the passage referenced by the Tribunal, the Supreme Court is merely stating that a court or tribunal can look at the procedure employed in the accommodation process as a practical tool for deciding whether an employer has established — on an evidentiary basis — undue hardship:

Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the procedure, if any, which was adopted to assess the issue of accommodation and, second, the substantive content of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally Lepofsky, supra [emphasis added in original].

70 That is not to say that the procedure used by the employer when considering accommodation cannot have significance in any given case; indeed, in practical terms, if an employer has not engaged in any

accommodation analysis or attempts at accommodation at the time a request by an employee is made, it is likely to be very difficult to satisfy a tribunal on an evidentiary level that it could not have accommodated that employee short of undue hardship: See, e.g., *Koeppel v. Canada (Department of National Defence)* (1997), 97 C.L.L.C. 230-024, 32 C.H.R.R. D/107 (Can. Human Rights Trib.) at paras 212 - 228. That is the very real and practical effect of the evidentiary burden to establish a BFOR resting with the employer.

71 Madam Justice Gray of the Supreme Court of British Columbia, in a judgment rendered after the decision under review, recognized this distinction. She stated in *Cassidy v British Columbia (Emergency & Health Services Commission)*, 2011 BCSC 1003 (B.C. S.C.) at paras 33 and 34:

Tribunal Member Lyster relied on *Meiorin* as authority for the proposition that an employer has both a procedural and substantive "duty" to accommodate a disabled employee to the point of undue hardship. However, in *Meiorin*, the Supreme Court of Canada did not consider whether the employer had treated Ms. Meiorin "fairly, and with due respect for her dignity, throughout the accommodation process". The focus of the analysis was whether the Aerobic Standard was appropriate. McLachlin J. considered that standard both "procedurally", relating to how the Aerobic Standard was set, and "substantively", relating to whether the employee could be accommodated without undue hardship to the employer. The distinction between a procedural analysis and a substantive analysis was an analytical tool for determining whether the Aerobic Standard was a BFOR, and whether the claimant had been accommodated to the point of undue hardship.

While McLachlin J. wrote that it may often be useful to consider any procedure adopted in assessing accommodation, she did not write that such an analytical tool created a separate duty that can be breached. The single question remains of whether the employer could accommodate the employee without experiencing undue hardship.

[emphasis added in original]

72 I agree. The evidentiary significance of the procedure used by the employer is, in my view, what the Supreme Court meant in *Meiorin* when it said that "it may often be useful as a *practical matter* to consider ... the procedure, if any, which was adopted."

73 Moreover, the plain words of paragraph 66 of *Meiorin* — "the procedure, *if any*, which was adopted" [emphasis added]- supports the opposite conclusion to that reached by the Tribunal, because it contains an acknowledgement that an employer may not have engaged in *any* accommodation analysis and yet may still be able to establish undue hardship. It is clear that one can not be said to have met a procedural duty to accommodate when one has not engaged in any procedure at all.

85. In this case, the accommodation process started in April 2013 at the initiative of Halifax Fire. By this time Ms. Symington was approaching two years on her LTD which would mean that she was facing a change of definition from her own occupation to any occupation in assessing her disability. Independent of that, the evidence supports that Halifax Fire was cognizant of its obligation to bring Ms. Symington back to the workplace, if at all possible.
86. The evidence supports the following points:
- i. Halifax Fire was appropriately diligent in ensuring that they had medical information that assessed Ms. Symington's physical capabilities. There was a strong contest by Ms. Symington about the delay in getting a second FCE when there had been a 2012 FCE available through Great-West Life. Based on the evidence I accept that Ms. Boyd made an appropriate decision to request a second FCE based on Ms. Symington's expressed concerns about the deterioration in her condition.
  - ii. Once a second FCE was identified as being required it was scheduled promptly. Unfortunately, that was delayed due to the need identified by the clinic retained to perform the assessment that further advice from Dr. Christie was required. There was a delay until March 28, 2014 before Ms. Symington could see Dr. Christie. There was some evidence that the clinic was following up regularly with Dr. Christie's office, but it was not precise enough to make such a finding. There is no suggestion that Ms. Symington was the cause of the delay, but neither was Halifax Fire.
  - iii. Arrangements for the second FCE were made soon after Ms. Symington was able to see Dr. Christie on March 28, 2014. The arrangements were confirmed after a meeting on April 4, 2014. At this time Ms. Symington continued to express strong concerns about the need for a second FCE and also a general dissatisfaction with the accommodation process. Still she did undergo further assessment and the 2014 FCE was available to Halifax Fire as of May 2014.
  - iv. Throughout the process Human Resources personnel were also working with Ms. Symington to obtain her resume in order to ensure that they were fully aware of all of her skills and educational background. The evidence does not support a finding that Ms. Symington was unco-operative but she seemed unreasonably critical and skeptical of every request made of her. It was clear from the

evidence that she lacked any belief that the accommodation process was valid.

- v. A meeting internal to Halifax Fire was convened on July 11, 2014 to review available positions from the inventory of jobs posted within Halifax Fire and within HRM. There was no evidence that the working group considered or canvassed any opportunities for bundling of responsibilities such as Executive Officer McNally believed could be done.
- vi. The working group, largely Deputy Chief Hollett, identified and then he and Ms. Boyd worked towards a modified Stores Person position for Ms. Symington. As already detailed, that modified position was ultimately offered to Ms. Symington in May, 2015.
- vii. From July 11, 2014 to October 2014 the focus of the efforts by Human Resources and Deputy Chief Hollett was engaging in assessment of whether the reinstatement of the Stores Person position was viable from an operational and budgeting analysis. The position had been eliminated in the most recent budgeting process and efforts were made to see if the work could be divided and assigned among other positions. It was determined the position could be justified to the CAO.
- viii. The approach of Human Resources personnel was that they would only consider existing vacancies or, in the case of the Stores Person position, the resurrection of the position. They were working under an undocumented directive from Council and the CAO that every position filled had to be approved by him personally. There was no written guideline for the directive and no advice how issues of accommodation were to be addressed within those constraints.
- ix. Once there was an agreement that a case for reinstatement of the Stores Person position could be made, focus was turned to whether the position could be modified to meet Ms. Symington's assessed capabilities and restrictions as set out in the 2014 FCE. That work was carried out by Ms. Boyd and a physiotherapist consultant and was completed by December 12, 2014.
- x. From December 12, 2014 to February 3, 2015, Human Resources was working on the formal request to the CAO for approval of the reinstatement of the Stores position. There was no evidence to explain

the time gap of December and January other than that the Human Resources consultant wanted to make sure it was thorough and compelling.

- xi. Chief Trussler and others in Halifax Fire were involved in lobbying for the approval of the position with a view of achieving the accommodation for Ms. Symington.
  - xii. Once approval for the Stores Person position was achieved there was a further delay attributable to the clarification sought by Halifax Fire as to whether Ms. Symington's condition had deteriorated. While the mere legal filing against Great-West Life was not conclusive, it was reasonable for Halifax Fire to make inquiries to be certain that Ms. Symington was able to accept the modified Stores position.
  - xiii. From the time of the 2014 FCE there was communication between Human Resources and Ms. Symington but she was never told until May 15, 2015 that there was a position identified for her. The explanation offered for the lack of communication was in effect they did not want to get Ms. Symington's hopes up in case the effort was not successful.
87. Although there are points of concern in the management of the matter they are not sufficient to support a finding that Halifax Fire failed in its obligation to accommodate Ms. Symington. It is concerning that Council would institute a hiring freeze without clear policy guidelines that provided direction on issues as fundamental as accommodation. Second, had the Stores Person position not been arrived at it would be a serious open question whether the approach carried by Human Resources to canvass only existing positions was sufficient effort in meeting Halifax Fire's legal obligation to accommodate. Finally, I find the decision not to inform Ms. Symington and the IAF that a possible accommodation within Halifax Fire was being explored was misguided and paternalistic. Halifax Fire should have been more transparent to her.
88. Halifax Fire cannot be blamed for the delay before July 11, 2014. The evidence is clear that on all occasions it was mindful of the need to advance the accommodation process and it did so in reasonable fashion. I am also satisfied that once the Stores Person position was identified the movement on the file until the end of November was reasonable. There is room to criticize the period of time it took once the modifications to the Stores Person position in the middle of December were completed but not so much as to determine that it constituted a breach of HRM's legal obligation to accommodate.

89. If as is expected in *Cruden, supra*, I consider the steps taken by Halifax Fire as well as the substance of its decision, I conclude that it satisfied its obligation to accommodate. While there was a limited window of unexplained delay, it is not so significant to conclude that it violated its legal duty to Ms. Symington or to suggest Halifax Fire was not diligent.
90. By email dated May 18, 2015, Ms. Symington advised Halifax Fire that she was not able to return to work and that position was supported by Dr. Langley. At that point Halifax Fire's legal obligation was to accommodate Ms. Symington's leave which they did. The evidence is that after May 18, 2015, Ms. Symington never made a new or renewed request for accommodation. There was no evidence that she recovered sufficient health to return. From Halifax Fire's perspective, she remained on medical leave until she retired, effective August 1, 2016.
91. Halifax Fire asserted that Ms. Symington was totally disabled and not able to return to work as of January 2015 when the lawsuit against Great-West Life was filed. I cannot conclude that. Based on the medical evidence, I conclude April 30, 2015 as the most reliable date to determine that she was not able to work.

### **Conclusion**

92. As outlined, the Board's function was to consider the complaints advanced by Ms. Symington in her complaint dated May 19, 2016, and determine whether there was any discrimination against her on any of the grounds that she alleged. The complaint was dated one year and a day after she advised Halifax Fire that she refused the Stores Person position and that she was medically unable to work in any position with Halifax Fire or HRM. There was no evidence of any discrimination or retaliation between May 19, 2015 and May 19, 2016.
93. Based on the evidence I find that Halifax Fire did not discriminate against Ms. Symington and did not retaliate against her for previously the 2004 Complaints. Accordingly her complaints are dismissed.

DATED at Truro, Nova Scotia this 9<sup>th</sup> day of October, 2019.

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Dennis James, Q.C.  
Board