IN THE MATTER OF: **THE NOVA SCOTIA *HUMAN RIGHTS ACT* (the "*Act*")**

and

IN THE MATTER OF: **Inquiry Case #H17-2340**

BETWEEN:

Maurice Carvery

Complainant

- and –

Halifax Regional Municipality and Halifax Regional Police

Respondents

- and –

Nova Scotia Human Rights Commission

DECISION

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

Hearing Date: **December 14, 2021**

Location: **Virtual Hearing**

Counsel: **Rubin A. Coward on behalf of Maurice Carvery, Complainant**
Karen MacDonald, Counsel for the Respondents Halifax Regional Municipality and Halifax Regional Police
Kymberly Franklin, Counsel for the Nova Scotia Human Rights Commission

By a complaint form filed with the Nova Scotia Human Rights Commission ("Commission") on January 25, 2018, the Complainant, Maurice Carvery, alleges that he was discriminated against by the Respondents in his employment on the basis of race and/or colour, contrary to Section 5 (1) (d) (g) (i) and (j) of the *Human Rights Act*, RSNS 1989, c. 214 as amended ("Act"). Specifically, the complaint is set out as:

> I, Maurice Carvery, complain against the Halifax Regional Municipality and Halifax Regional Police that from August 2009 and continuing to as recent as March 2017, the Respondent discriminated against me with respect to employment because of my race/colour.

This decision is on a preliminary motion advanced by the Respondent that the complaint was not filed within time as set out in Section 29 (2) and (3) of the Act. Section 29 (2) provides as follows:

> (2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.

Section 29 (3) provides as follows:

> (3) Notwithstanding subsection (2), the Director may, in exceptional circumstances, grant a complainant an additional period of not more than twelve months to make a complaint if to do so would be in the public interest and, having regard to any prejudice to the complainant or the respondent, would be equitable.

By letter dated, January 15, 2018, the Director granted Cst. Carvery was granted an extension to file a complaint. The Director accepted that based on medical evidence that Cst. Carvery presented exceptional circumstances that warranted consideration for an extension. The Director concluded that due to the Respondent's status as a municipal organization and its record system that there was no obvious prejudice to permit the extension. Finally, the Director considered that the Respondent is a public service provider and a substantial employer to ground her conclusion that an extension would be in the public interest.

The Director's letter does not specify the length of the extension by date or temporal period, but it is inferred that it was intended to provide a period of not greater than twelve months as set out in Section 29 (3) of the Act. The Board concludes that the Director extended for a period of one year, for a total of two years from the last action or conduct for Cst. Carvery to file his complaint.

The Board's decision on this motion does not address the merits of the claim, nor does it make final findings of facts. The summary of facts, as set out below, is a recitation of those minimum facts required to inform the singular issue of whether the claim advanced by Cst. Carvery was filed in time.

It is also the case that although identified separately in the complaint form, the Halifax Regional Police is not a separate entity from Halifax Regional Municipality, and for that reason the Board will refer to the Respondent, rather than the Respondents.

Summary of the Facts

Maurice Carvery served within the Halifax Regional Police ("HRP") from 2009 until he decided to leave in October 2014 to pursue a career with the Royal Canadian Mounted Police ("RCMP"). He is presently serving as a constable with the RCMP H Division. In his complaint form, Cst. Carvery alleges that he experienced forms of discrimination based on race and/or colour throughout his five years with HRP, involving numerous other members of the HRP, and materially, for this present motion, Sgt. Chris Thomas. Cst. Carvery identifies the most recent incident of discrimination by the Respondent to be an email that Sgt. Thomas sent from his work email to the Cst. Carvery's superior officers to whom he would report within the RCMP on June 18, 2016, following an encounter between Cst. Carvery and Sgt. Thomas while there were both off-duty.

The encounter, which was the subject of the June 18, 2016, email, is said to have occurred at the Greek Fest in Halifax in 2016. Sgt. Thomas sets out the details of his allegation of what occurred in his Affidavit dated August 24, 2021:

> 25. In June 2016, I attended the Greek Fest in Halifax with my two children, who were 7 and 10 at the time. I was walking through the parking lot to enter the festival and I saw Cst. Carvery there. He and I glanced at each other and I continued into the Greek Fest. We had no further interactions until I was leaving.
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> 26. I left the Greek Fest approximately two hours later and was walking with my two children on Purcells Cove Road to my vehicle. Cst. Carvery was driving his motorcycle, heading towards me. As he passed me, he took his hands off the handlebars and gave me the middle finger.

The June 18 email from Sgt. Thomas is as set out below:

> Re: Your unprofessional behavior
>
> Cst. Maurice Carvery,

Your actions last Saturday at Greek Fest crossed the line.

Two years ago when you were still with HRP, I reassigned your cadet. I unintentionally wounded you by this action and you apparently still have not recovered. Your exit email to me demonstrated this, as has your behavior over the past year. Interrupting other Police officers while they are working to voice your displeasure toward me (and doing the same to off duty HRP officers) confirms as well as strengthens the immature, unprofessional behavior you continue to be know for.

It should be noted you are not the only officer whose cadet I reassigned. You are however the only one who has not been able to get past it.

Last Saturday when you saw me with my kids at Greek Fest I intentionally kept my distance from you as you made clear in your exit email that you do not approve of my leadership style. Later, as I walked from Greek Fest to my car you drove past on your motorcycle and chose to give me the finger in front of my children and several other people. Had my kids not been there, I would have ignored it just as I have the stories of you bad mouthing me.

I could ask you to help me explain to a seven and ten year old why a Police Officer would give the middle finger to another Police Officer however, I doubt you have a positive explanation suitable for children. Nor do I care to speak to you again.

Having an Uncle who retired from the RCMP as Assistant Commissioner, I grew up listening to Police stories and understand what it takes to possess and maintain the professional mindset that is expected of Police Officers on and off duty. You don't have it.

You will note I have also addressed this email to your S/Sgt and Commanding Officer as your actions reflect negatively on the RCMP.

Additionally, I noticed how loud your motor cycle was as you passed. I don't know if your motorcycle tail pipes are legal or not and you should ensure it is street legal. This too could reflect negatively on you and the RCMP or put another member in an awkward position.

> Do not reply to this email. Should your supervisors have any questions I can be reached by phone numbers below and/or e-mail.
>
> Regards,
>
> Sgt. Chris Thomas
> Halifax Regional Police

Cst. Carvery replied to Sgt. Thomas by email dated June 29, 2016. His email provided the following response:

> Chris,
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> Do not use my professional email as a vehicle for your attempts to enlighten me with insight to your definition of professionalism. Furthermore, in light of the fact that you feel the compulsion to refer to an exiting email that was completely fitting, and are now grasping on your mere unsubstantiated hunch that my personal vehicle is not legal, is exact proof of the continued abuse, and harassment that I have endured at the hands of the HRP, and the likes of yourself. Do not contact me any further with this type of harassment, as this a gross misuse of workplace technical equipment.
>
> Regards,
> Cst. Carvery

Law

The Nova Scotia Court of Appeal has provided clear direction on the meaning of Section 29 (2). In assessing the Respondent's Motion, the Board is directed that "(t)he limitation clearly tolls from the events described in s. 29(2)." See *Smith v. Nova Scotia (Board of Inquiry)* 2017 NSCA 27 ("*Smith*"); *Izaak Walton Killam v. Nova Scotia (Human Rights Commission)* 2014 NSCA 81 ("*IWK*")

Cst. Carvery urges that the Board consider that the email communication from Sgt. Thomas sent from his HRP email on June 18, 2016, is continuation of conduct of discrimination that was ongoing throughout his employment. The date of June 18, 2016 is important because, if accepted as potentially discriminatory conduct, the claim is in time, given the extension granted by the Director. If not accepted, the complaint would be filed out of time, even with the Director's extension.

Again, the Nova Scotia Court of Appeal has provided guidance on what constitutes ongoing conduct. In *Nova Scotia Liquor Corp. v. Nova Scotia (Board of Inquiry)* 2016 NSCA 28, the Court provided the following:

> G. Did the Board err in law by treating statute barred conduct that was not discriminatory under the Act as evidence of ongoing misconduct by the Corporation?
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> 97 Ms. Kelly complained that she was prohibited from working at a wine fair in November 2004 because she was pregnant, although she did end up working at the event in a different capacity. Before the Board the NSLC challenged the veracity of Ms. Kelly's account, but also argued that the complaint would be statute barred in any event. It submitted that s. 29(2) of the Act prohibited a finding of discrimination in the circumstances. That section provides:
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> > 29(2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.
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> 98 The NSLC submits that the Board appeared to accept its argument with respect to the wine incident being statute barred, but then proceeded in its reasons to throw the practical effect of that finding in doubt. The Board's reasoning and conclusion help underscore the source of the concern.
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> …
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> 106 The Board quotes from *O'Hara v. British Columbia (Human Rights Commission)*, 2002 BCSC 559 in relation to what constitutes continuing conduct for the purpose of s. 29(2). That decision adopts the earlier reasoning of the Manitoba Court of Appeal in *Manitoba v. Manitoba (Human Rights Commission)*, [1983] M.J. No. 223, which described a "continuing violation" under that province's legislation as follows:
>
> > 19 What emerges from all of the decisions is that a continuing violation (or a continuing grievance, discrimination, offence or cause of action) is one that arises from a succession (or repetition) of separate violations (or separate acts, omissions,

> discriminations, offences or actions) of the same character (or of the same kind). That reasoning, in my view, should apply to the notion of the "continuing contravention" under the Act. To be a "continuing contravention", there must be a succession or repetition of separate acts of discrimination of the same character. There must be present acts of discrimination which could be considered as separate contraventions of the Act, and not merely one act of discrimination which may have continuing effects or consequences.
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> 107 I am satisfied that neither case supports the proposition that conduct found to not be a stand alone act of discrimination and statute-barred "is evidence to prove ongoing misconduct". The Board then cites the recent decision of this Court in *Izaak Walton Killam Centre v. Nova Scotia (Human Rights Commission)*, supra. Clearly that decision does not support the proposition that s. 29(2) can, or should, be interpreted as permitting statute barred conduct to be used as "evidence to prove ongoing misconduct".

The direction of the Court provides clear guidance such that for Cst. Carvery's complaint to continue, the Board must be satisfied that the June 18, 2016, email is capable of grounding a complaint of discrimination. This is true as any of the other alleged incidents referred to in the complaint would not be within the time period for filing a complaint, as set out in the Act, and as extended by the Director.

The Respondent makes two arguments in relation to the June 18, 2016, email. First, it says that the action of filing a complaint arising from the circumstances cannot constitute an act of discrimination. It contends that the email is an appropriate response to alleged behaviour, that if accepted as true, raises a legitimate question of whether Cst. Carvery breached his professional standards. Second, the Respondent says that the complaint must fail as the incident, even if it could be said to be discriminatory, was not related to Cst. Carvery's employment with HRP, which had ended in October 2014.

The Respondent's argument on the issue of whether the alleged incidents are related to Cst. Carvery's employment is as set out in part:

> 28. The Supreme Court of Canada examined the issue of what constituted discrimination with respect to or regarding employment in *McCormick v. Fasken Martineau DuMoulin LLP*, [2014] 2 SCR 108, 2014 SCC 39 (Tab 6, Book of Authorities). The Complainant became an equity partner in the Respondent law firm in 1979. In the 1980s, the equity partners adopted a

provision in the partnership agreement whereby equity partners would retire and divest their ownership shares at the end of the year in which they turn 65. In 2009 the Complainant filed a human rights complaint that this was age discrimination contrary to the British Columbia Human Rights Code.

29. The Respondent argued that the Human Rights Tribunal did not have jurisdiction to hear the complaint, as the Complainant was not in an employment relationship with the firm and therefore it was not discrimination with respect to employment. The Supreme Court of Canada agreed. In deciding who is in an employment relationship, the Court stated:

> 23 Deciding who is in an employment relationship for purposes of the *Code* means, in essence, examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. In other words, the test is who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations? The more the work life of individuals is controlled, the greater their dependency and, consequently, their economic, social and psychological vulnerability in the workplace: Guy Davidov, "The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection" (2002), 52 U.T.LJ. 357, at pp. 377-94; Arthurs, at pp. 89-90; *International Woodworkers of America v. Atway Transport Inc.*, [1989] OLRB Rep. 540; *Pointe- Claire (City) v. Quebec (Labour Court),* [1997] 1 S.C.R. 1015.

30. The Supreme Court of Canada revisited the issue in *British Columbia Human Rights Tribunal v. Schrenk*, [2017] 2 SCR 798, 2017 SCC 62 (Tab 7, HRM Book of Authorities). The Complainant brought a claim against the Respondent alleging employment discrimination based on religion, place of origin and sexual orientation. The Respondent argued the conduct was not discrimination "regarding employment" and was therefore beyond the jurisdiction of the Tribunal. The Respondent Shrenk

> was neither the Complainant's employer nor his superior in the workplace.
>
> 31. *Schrenk* involved a determination as to whether the BC Human Rights Code protected employees from discrimination by their co-workers, even when those co-workers had a different employer. The Supreme Court of Canada found that the legislation prohibited discrimination against employees whenever that discrimination had a sufficient nexus with the employment context. In determining whether the conduct had a sufficient nexus, Tribunals must conduct an analysis that considers all relevant circumstances. Factors for consideration included whether the Respondent was integral to the Complainant's workplace, whether the conduct occurred in the complainant's workplace, and whether the Complainant's work performance or work environment were negatively affected (para 67).
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> 32. The Supreme Court of Canada determined that on the facts of the case, the British Columbia Human Rights Tribunal had jurisdiction to hear the case. The Respondent was an employee of a company, Clemas, hired by the Municipality of Delta to be the primary construction contractor for a road improvement project. The Complainant was an employee of Omega and Associates, the engineering firm hired by Delta to supervise the project. The two companies worked together on the project, and it was in this context that the discriminatory conduct occurred. The Court concluded that the conduct amounted to discrimination regarding employment, as it was perpetrated against an employee by someone integral to his employment context (para 69).

The Commission participated in the hearing and agreed with the argument advanced by the Respondent. It submitted as follows:

> 47. The Complainant's allegations from a stand-alone point of view commencing with the actions of Chris Thomas after an encounter with the Complainant at Greek fest in 2016, you will note there is no employer/employee relationship between the Complainant and the allegations. The Complainant resigned from that relationship in 2014. Unfortunately, the Act is clear about the definition of employer and that of a person who can file a complaint.

48. The relevant definitions which are appropriate here are the definitions of, "employer", of "person" under s. 3 of the Act are;

> **3(e)** "employer" includes a person who contracts with a person for services to be performed by that person or wholly or partly by another person; and
>
> **3(k)** "person" includes employer, employers' organization employees' organization, professional association, business or trade association, whether acting directly or indirectly, alone or with anther or by the interposition of another;

49. The Act defines the meaning of discrimination in s. 4 as;

> For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

50. This complaint is predicated on an alleged violation of s.5(1)(d) and (i), which states, "No person shall in respect of (d) employment discriminate against an individual or class of individuals on account of, (i) race."

51. Based on the above this complaint cannot go forward because there is no jurisdiction by way of a viable Respondent that meets the definition of an employer/person under the Act, that additionally would fall under the statutory timeframe allowed by the Act in s. 29.

It is significant that the definition of employer set out in the Act does not attempt to set out a comprehensive definition for employer. Rather the definition provides an inclusive definition that enables an expansive view of what constitutes an employment relationship.

Justice Abella, writing for the Court in *McCormick v. Fasken Martineau DuMoulin* 2014 SCC 39, confirmed that there should be an expansive approach to the definition of employment or employ in human rights legislation. She states at Para 22:

> [22] The jurisprudence confirms that there should be an expansive approach to the definition of "employment" under the *Code*. Independent contractors, for example, have been found to be employees for purposes of human rights legislation, even though they would not be considered employees in other legal contexts: *Canadian Pacific Ltd. v. Canada (Human Rights Commission)*, [1991] 1 F.C. 571 (C.A.); *Pannu v. Prestige Cab Ltd.* (1986), 73 A.R. 166 (C.A.); *Yu v. Shell Canada Ltd.* (2004), 49 C.H.R.R. D/56 (B.C.H.R.T.). See also *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391 (C.A.); *Mans v. British Columbia Council of Licensed Practical Nurses* (1990), 14 C.H.R.R. D/221 (B.C.C.H.R.).

The Court in *McCormick*, supra, directs that control and dependency define the essence of the employment relationship for the purposes of the human rights legislation:

> [27] Control and dependency, in other words, are a function not only of whether the worker receives immediate direction from, or is affected by the decisions of others, **but also whether he or she has the ability to influence decisions that critically affect his or her working life. The answers to these questions represent the compass for determining the true nature of the relationship.**
>
> [28] While control and dependency define the essence of an employment relationship for purposes of human rights legislation, this does not mean that other indicia that courts and tribunals have developed, such as the *Crane* factors, are unhelpful in assessing the extent to which control and dependency are present. But such factors are unweighted taxonomies, a checklist that helps explore different aspects of the relationship. While helpful in framing the inquiry, they should not be applied formulaically. **What is more defining than any particular facts or factors is the extent to which they illuminate the essential character of the relationship and the underlying control and dependency. Ultimately, the key is the degree of control, that is, the extent to which the worker is subject and subordinate to someone else's decision-making over working conditions and remuneration: Geoffrey England, *Individual Employment Law* (2nd ed. 2008), at p. 19. (emphasis added)**

Cst. Carvery argues that the June 18 email was sent by Sgt. Thomas in his official employment capacity with the Respondent, and that was sufficient connection to his employment:

> Therefore, contrary to paragraph 6(a), as Sgt. Thomas submitted his complaint as a Senior representative of HRP/HRM using their address, phone number, his rank and status and their equipment, which all falls under HRP/HRM purview, and cannot for the sake of argument be separated in this matter.

Conclusion

The Board finds that the claim advanced by Cst. Carvery related to his employment with the Respondent was not filed within the time required by Section 29 (2) and (3), given the Director's extension. To have a valid claim Cst. Carvery would have to demonstrate that an act of discrimination related to his employment occurred no later than January 25, 2016, two years prior to the date of the claim, January 25, 2018. Based on the alleged facts presented to the Board, it is only the email of June 18, 2016, that could fit within the time frame. This is not to say that the email is or is not discriminatory, rather it confirms that this is the only alleged incident within the period of time in which a complaint had to have been filed.

For the purposes of this Motion, the Board is not prepared to accept the Respondent's first argument that the complaint by Sgt. Thomas itself could not constitute an act of discrimination. Given the scope of the email went well beyond the singular incident of the Greek Fest incident referring to matters that arose during Cst. Carvery's employment with the HRP, that is a factual determination that could only be concluded after a full hearing.

The Board does accept the argument of the Respondent and the Commission that the act of Sgt. Thomas sending an email of complaint alleging a breach of professional standards was not discriminatory conduct within the context of his employment with the Respondent. However inappropriate Sgt. Thomas's use of his work email to communicate his complaint may have been, the email complaint is not a basis to suggest that it related to Cst. Carvery's employment with HRP, which had ended in October 2014. As to his then current employment with the RCMP, the uncontested evidence is that there is no legal relationship between HRP and the RCMP such that Sgt. Thomas could be said to have a role in Cst. Carvery's employment relationship at that time. Any decision that the RCMP might have made because of Sgt. Thomas's complaint, was entirely outside the control of the HRP.

Even applying an expansive view as directed in *McCormick* and *Schrenk*, there is no evidence before the Board that the Respondent had any form of employment relationship with Cst. Carvery in 2016.

Accordingly, the Board dismisses the complaint of Cst. Carvery as being outside the time limit set out by the Act. In dismissing the complaint as being out of time, the Board is not

making a finding of the merits of Cst. Carvery's complaint which was very ably advanced by his representative.

DATED at Truro, Nova Scotia this 30th day of December, 2021.

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Dennis James, Q.C.
Board