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

and

IN THE MATTER OF: **Board File No. 51000-30-D17-0805**

BETWEEN:

Darlene Lawrence

Complainant

- and –

Searidge Foundation Inc.

Respondent

- and –

Nova Scotia Human Rights Commission

Party

DECISION

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

Hearing Date: **February 5, 6, 7 and 11, 2020**

Location: **Halifax, Nova Scotia**

Counsel: **Wayne Rideout, Counsel for Darlene Lawrence, Complainant**
Searidge Foundation, Drew Chopty and Caroline Ferguson-Davis for the Respondent
Kendrick Douglas, Counsel for Nova Scotia Human Rights Commission

Preliminary

The Complainant, Darlene Lawrence, worked as a Counsellor for Searidge Foundation Inc. ("Searidge") from December 16, 2016 until her employment was terminated on July 26, 2017. She was advised of her dismissal verbally by the Director of Searidge, Dr. Brian Reid PhD. At Ms. Lawrence's request, Dr. Reid prepared a letter of termination:

> When I informed you of my decision, you said "okay".
>
> I infer that you understood from our previous discussions that your refusal to fulfill duties required in your job description constitutes a cause that requires that I terminate your employment.
>
> This is not a judgment that you were incapable of fulfilling those duties. Rather, my action is the necessary response to your direct, conscious and repeated refusal to conduct yourself to perform duties as required. (emphasis in original)

What is not contained in the letter but is described in an accompanying file memorandum prepared by Dr. Reid, is the confirmation that Ms. Lawrence replied in response that "I have a right to protect myself."

The evidence during the hearing did not demonstrate Ms. Lawrence failed to fulfill her duties as a clinician other than she refused to attend clinical meetings. Dr. Reid recognizes this in the dismissal letter and Searidge did not advance the argument that Ms. Lawrence was unqualified or that there was any other ground to justify the termination of her employment. There is also no dispute that Ms. Lawrence did become isolated in the workplace and that she did not attend clinical meetings after a disciplinary meeting with Dr. Reid and Drew Chopty on April 19, 2017.

The parties differ on the circumstances that lead to the April 19 meeting. Searidge takes the position that there were incidents involving Ms. Lawrence which properly led to discussion and reprimand. Still her termination solely related to her decision to stop attending clinical meetings. Searidge denies that there was any discrimination against her.

Ms. Lawrence disputes the basis of various incidents and says the reprimands compromised her work environment. She says that she withdrew from clinical meetings because she felt under attack and that she was not safe working in the Searidge environment. She says that she was discriminated against in her employment due, at least in part, to her race, ethnicity or colour. Ms. Lawrence identifies as a Black woman with aboriginal heritage.

She filed a complaint with the Human Rights Commission dated December 8, 2017. In that complaint she alleges that she was discriminated against by Searidge contrary to Section 5 (1) (i), (j) (m) and (q) of the Human Rights Act on the basis of her race, ethnicity/colour, gender and/or aboriginal origin. Although the grounds of gender and aboriginal origin were identified the hearing, including the closing submissions, proceeded exclusively on the basis of race or colour discrimination.

By Order of Chief Judge Pamela S Williams, I was appointed as a Board to conduct an inquiry into the allegations. A hearing was held on February 5, 6, 7 and 11, 2020 in the community of Cornwallis, Nova Scotia. Following the hearing, briefs were filed on March 1, April 3 and April 24.

The Parties

Darlene Lawrence joined Searidge in December 2016. Prior to that she worked in a number of roles including 20 years as Executive Director of the Digby County Family Resource Centre from 1993 until 2014. She has a Bachelor of Arts in Psychology and has worked with numerous organizations as a counsellor. She has served on the Nova Scotia Status of Women Council and numerous other volunteer boards.

Searidge is a federally incorporated non-profit and operates as a drug addiction treatment centre in Upper Clements. It has a sister treatment centre in Quebec called Sobriety Home. Catherine Cosgrove was the controlling official of Searidge and Sobriety Home.

Dr. Reid was the Director of Searidge during the entirety of Ms. Lawrence's employment and was her direct report. Regrettably, he was not called to testify as a witness in the proceeding. For all matters discussed in the hearing he was the person who made the decision on whether discipline was required or justified. There was a statement taken of Dr. Reid by the Human Rights Commission investigator and included in the Commission's investigation material, but no party formally submitted the statement to be part of the evidentiary record before the Board. In light of the fact that he was not called, and his statement was not tested, little weight can be assigned to its contents.

Drew Chopty joined Searidge in February 2017. During the time we are concerned with he served as Director of Operations. He had some involvement in the various incidents but was serving in a secondary capacity and had no direct authority over Ms. Lawrence. Mr. Chopty has no post secondary education or formal training, but has worked in the field of addictions. He previously worked for Sobriety Home and was asked by Ms. Cosgrove to work at Searidge to assist with operational issues.

While the Board is mindful that Dr. Reid never testified, there is more than sufficient evidence to suggest that Searidge was a troubled work environment. In its own rebuttal brief filed on April 24, 2020, Searidge confirms that seven people of a modest size work force were fired in 2017. The rebuttal brief refers to this information as evidence to show

that Ms. Lawrence was not singled out due to her race, that she was treated in a manner comparable to other employees and that she was held to the same standards. Specifically, Searidge says:

> 17. To improve service to our patients, Searidge made the difficult decision in 2017 to terminate the employment of several employees who were found to be unable to meet Searidge's expected work standards. This fact was reported in the hearing by Mr. Brennan, and was acknowledged in Ms. Lawrence's initial complaint. It was also recorded in the disclosure by Ms. McNaughton.
>
> 18. In particular, Searidge terminated the employment of seven employees in 2017: three White females, two White males, one racialized female (Ms. Lawrence), and one racialized male. The number of female staff terminated is proportionate to the gender balance within Searidge's workforce.
>
> 19. All individuals whose employment was terminated were judged solely on the basis of their work performance and failure to meet Searidge's communicated expectations. There was no discrimination on the basis of sex or ethnicity, or any other protected characteristic.

The evidence suggests that there were serious challenges in management's approach to Ms. Lawrence. The response was unfocused, haphazard and teetered on the edge of incompetence. Of course, that is not the matter at hand. The issue is not whether Ms. Lawrence was wrongfully dismissed, rather the issue is whether her race, ethnicity or colour was a factor in her termination. In order to examine that issue, one must consider the numerous incidents referred to in her complaint or raised by Searidge and which were addressed during the hearing.

Orientation

Ms. Lawrence suggests that her mis-treatment by Searidge started from the earliest time with the organization. She was the only black employee at Searidge during the time in question. Her evidence is that she was not provided an adequate work space during her orientation and was not provided access to Searidge's policies and its templates that she required to do her job. She acknowledged that she did get an orientation but that it was spread out over a two-week period. She acknowledged that she did get a USB drive and was advised that "would contain everything that she would need".

Her evidence is that she was unaware of where to locate the Searidge policies and forms that she required to do her job. The evidence, however, was that Searidge's policies were

available on each desktop in the facility. An index or directory of the policies and forms that were required by employees was introduced as evidence by Searidge and Andy Sabean, the administrative support person, testified that she did set up the electronic files on the Searidge desktops in or about 2013. Ms. Sabean also testified that there was ample work space at various locations throughout the facility. The issue of a workspace did not seem to be a chronic issue as it was clear that for most of her time at Searidge, Ms. Lawrence did have office work space available to her. Her complaint is that she lacked a work space during orientation.

Ms. Lawrence said her specific complaint was that she did not or could not access the template forms that she needed to complete her duties. Based on the evidence she seemed unaware of the ability to access the forms through the desktop.

She also testified that the hard copy of the policy contained in binders was not available to her. This was disputed by the testimony of the various Searidge witnesses who confirmed there were multiple copies around the facility.

Mr. Henry Bent testified. He is a former employee at Searidge and he confirmed that at least for a period of time after Mr. Chopty arrived in February 2017, the binders were removed for at least a time as they were being updated. Again, this was contradicted by the evidence of numerous Searidge employees who denied there was a period when the hardcopies of the policies were unavailable to Ms. Lawrence.

Based on the evidence I find that the Complainant, has not proven the suggestion that she was treated differently in the orientation process. I accept the evidence of Ms. Sabean that the policies and templates were in electronic format and available through the desk top available to Ms. Lawrence. I accept her confirmation as well that there were work spaces that could be used by Ms. Lawrence during her orientation and initial weeks at Searidge. Finally, I accept hard copies of the policies were available to Ms. Lawrence.

Counselling Session with a client and family

In her complaint form Ms. Lawrence describes a circumstance of being criticized by Dr. Reid for conducting a session with a client and the client's family. The complaint alleges that Dr. Reid had initially approved the format and then subsequently changed his mind. The evidence is that Mr. Chopty was sent in to monitor the session and the direction from Dr. Reid following was that such a format for counselling was not to be repeated.

Mr. Chopty did confirm that he did attend the session that Ms. Lawrence. He confirmed that the session did work out and there was no evidence that the format was harmful or otherwise inappropriate. There was no explanation from Searidge about the concern for the counselling format. Ms. Lawrence says that the controversy over this session is a sign that Dr. Reid was hostile towards her from the earliest days of her employment. However, there was insufficient evidence to demonstrate that Ms. Lawrence was prevented from

employing this family format of counselling when other counsellors could use the format. The only evidence was that she could not utilize the format.

February Kitchen Incident

The first significant fracture in the relationship between Ms. Lawrence and Searidge occurred on February 16, 2017. The only direct evidence that the Board had on this incident was from Ms. Lawrence. Ms. Lawrence testified that a colleague, Ms. Swinemar, was offended by a Post It note left by someone following a client session that she led on the topic of indigenous spirituality. The note, which read "My spirit animal is your Momma." was insulting. It was thought by Ms. Swinemar that one of Searidge's clients was responsible. As a response, Ms. Swinemar chose to address clients to engage in discussion about the need for respect and mindfulness and she asked Ms. Lawrence to be involved in the approach to the clients.

The two women attended the kitchen during a mealtime for clients and spoke with the group of clients about the incident and the need for respect and mindfulness. Ms. Lawrence says that the tone was respectful and that she considered it a discussion and not a reprimand of any group or any one individual. Apparently, there were complaints from some of the clients that this occurred over a mealtime and was an intrusion into their personal time and space which is supposed to be protected.

Dr. Reid advised Ms. Lawrence and Ms. Swinemar that they could be considered insubordinate as only he, as the Director, can reprimand or discipline clients. Ms. Lawrence did not and does not see the incident as disciplinary and did not agree that it could be interpreted in that way.

Searidge also asserted that Ms. Lawrence and Ms. Swinemar breached policy by being in the kitchen during client mealtime. The contention is that it was a matter of policy that staff were not to be in the kitchen with residents during mealtime and that by approaching the clients as they did, Ms. Swinemar and Ms. Lawrence breached policy. The rule apparently was that staff was not to interfere with client mealtime and clients were not to interfere with staff mealtime.

There was a great deal made during the hearing whether this prohibition against staff and clients being prevented from accessing the kitchen during their respective mealtime was actually a policy. It is clear that it was not a written policy but seemed to be known at some level by most of the employees. Kathy Dudka, the Head Cook, may have been the source of the policy and although it seems a reasonable approach, I cannot consider that it was a formal policy that Ms. Lawrence should have known. According to Ms. Dudka she had no difficulty enforcing the kitchen rule and in her eight years as Head Cook she had to file a formal incident report on only one occasion. On all occasions she simply had to advise or remind staff of the rule. She never had an issue with Ms. Lawrence about her use of the kitchen.

In terms of the alleged incident of February, being in the kitchen was the lesser of the issues. The real issue that arises from the February incident is the suggestion that Ms. Lawrence (and Ms. Swinemar) was being insubordinate by seeking to discipline the clients. Dr. Reid raised his concern with both Ms. Lawrence and Ms. Swinemar expressing management's disapproval for how they handled the situation. Ms. Lawrence did not apologize nor did she accept on cross-examination during the hearing that it was an appropriate response by Dr. Reid. She does not see that there was an issue with the approach made to the clients that day. The evidence is that Ms. Swinemar did apologize.

Based on the evidence, I do not accept that Ms. Lawrence was insubordinate on February 16, and it seems regrettable that Dr. Reid defined the issue as he did. Neither do I accept the incident an example of Ms. Lawrence being treated differently than other employees or targeted by Searidge. While the evidence does not support a finding of insubordination, even on Ms. Lawrence's own evidence the interaction between staff and client was the subject of a complaint by clients. The concerns and discomfort arising from interrupting a mealtime to engage in such a discussion seems obvious and the inability to understand the possibility in retrospect is puzzling. It was reasonable that there would be discussion about the event among the staff. Accordingly, I cannot conclude race, ethnicity or colour was the genesis of this exchange.

April 5, 2017 Letter

Dr. Reid issued a disciplinary letter to Ms. Lawrence dated April 5, 2017 identifying two issues. First, it accuses Ms. Lawrence of uttering critical comments of Searidge's management to a colleague and then uttering the same comments in front of clients in the Smoke Shack. According to Searidge, the Smoke Shack was a designated structure for clients and that staff were not to attend. Second, she was admonished for raising concerns directly with Ms. Sabean concerning a change in policy so that overtime hours could no longer be banked, but were paid out instead. The point in the letter was that concern over the change should have been raised with management and not Ms. Sabean.

On the issue of communication concerning the shift in policy in banking hours, there was no evidence to suggest anything untoward by Ms. Lawrence, so there is no reason why she should have been disciplined for that. Ms. Sabean testified and she did not raise any concerns about Ms. Lawrence's inquiry. The evidence showed that the change in policy was not directed at Ms. Lawrence, but applied to all employees. It seems preposterous that she was disciplined for asking the office administrator about a change in overtime policy.

On the issue of the apparent criticism of management, Ms. Lawrence acknowledges her comment to a colleague that "There were too many Chiefs and not enough Indians" to the effect that Searidge was not well-managed. The letter from Dr. Reid specifically indicates that he was not concerned about "her stating her opinion in a private meeting to a fellow clinician", so that cannot be considered a point of discipline, but he was obviously concerned she made such comment in front of clients. In her statement to the Human

Rights Commission officer, Sandy Burrell confirmed that she was witness to the criticism by Ms. Lawrence and her making such statements in front of clients. Ms. Burrell's statement said that she agreed with the criticism, but felt it should not have been made before clients. Ms. Lawrence denies the allegation that she repeated such comments in front of clients. There was no evidence presented during the hearing to contradict Ms. Lawrence and I accept her position. However, I accept that such a complaint was made to Dr. Reid and that Dr. Reid was within his right to accept the account by Ms. Burrell. I do not conclude that such a complaint was made due to Ms. Lawrence's race, ethnicity or colour.

April 17, 2017 Meeting and Letter

Ms. Lawrence describes the meeting with Dr. Reid on April 17, 2017. She had read clinical notes by a colleague, Mr. Kassam, which were critical of Ms. Lawrence's dealings with a client. This will be discussed in greater detail below. For the sake of the letter it is sufficient to know that after reading the clinical notes, Ms. Lawrence went to see Dr. Reid to say that she felt unsafe in the workplace. She objected to the criticism and objected to the fact that the criticism was contained within the clinical notes as opposed to an incident report. In light of the other incidents previously identified, she now felt that she was being targeted.

Dr. Reid arranged to meet with her later in the day on April 17. When she arrived for the meeting he presented her with a letter reprimanding her for the treatment of a fellow staff person. The letter described an allegation from another staff member indicating Ms. Lawrence had been verbally abusive towards her. A movie night for clients had been arranged in the lounge the previous week. As a result of confusion in scheduling, a staff training session ran into the time period for the movie. The accusation by one of her colleagues is that Ms. Lawrence aggressively criticized her for allowing the staff meeting to intrude on the clients' time. The allegation was that Ms. Lawrence was aggressive at the door to the meeting room and then again later in the kitchen.

The disciplinary letter was created by Dr. Reid even though Dr. Reid had not spoken with the staff member directly but was relying on other employees; Ms. Burrell had not completed a written incident report until two days later on April 19. The reprimand was also issued before Dr. Reid spoke with Ms. Lawrence to obtain her perspective of the complaint.

The written statement by Sandy Burrell was introduced during the hearing, but Ms. Burrell was not called and there was no opportunity to question her on her statement. Clearly, the complaint raises a concern that needed to be investigated, so it could not be ignored by Searidge. Ms. Lawrence was asked to respond to the allegation in writing. She did respond by a letter dated April 18:

> I acknowledge that you have required that I respond in writing to the complaint dated April 17, 2017. I have determined this matter is so important to my employment and to my career that

> the timeframe you suggest does not allow me sufficient time to seek counsel and respond fully.
>
> I am in the process of retaining legal counsel and when reasonably appropriate, I will respond as you request. I have suggested to you that I am grieving this allegation, and you are formally put on notice that I am continuing to grieve formally. I am not aware that our entity has any existing grieving process. Please expeditiously, inform me as to that process. Subsequently, once I have received your written response and I have received legal counsel, I will endeavour to respond to your request.

Given the allegation was eventually set out in Ms. Burrell's statement, a request by Dr. Reid for an answer was appropriate. In her interview with the Human Rights Commission officer, Ms. Burrell stood by her complaint. It was wrong for a disciplinary letter to have been issued before having heard from Ms. Lawrence. Regrettably, Dr. Reid seemed to have reached a conclusion without investigation and Ms. Lawrence never did provide a substantive answer to the inquiry. There was also no evidence that Searidge responded to Ms. Lawrence's question about how to grieve the April 17 discipline. Sadly, an impenetrable wall had emerged between Searidge and Ms. Lawrence.

During her testimony before the Board, Ms. Lawrence testified that she did not speak to the Ms. Burrell in the manner alleged. In addition, Henry Bent testified as to his recollection of the circumstances of the movie night.

Mr. Bent was the only other first hand witness to the movie night circumstances, at least in part. His recollection is that he was involved in the staff meeting that interfered with the clients' movie night. He said there was a knock on the door of the lounge and there was a group of clients standing outside accompanied by Ms. Lawrence. He said Ms. Lawrence was not agitated and was not vocal, but that there was a client who was upset. Mr. Bent was not interviewed at the time of the alleged incident.

Ms. Lawrence denies the allegation and said that she and the group of clients waited for the meeting to conclude. She was concerned for the clients due to the disruption caused by the staff meeting, but she denies that she got upset with anyone. Based on the evidence before the Board, I accept Ms. Lawrence's recollection and find there was no such abusive behaviour by her at the door way to the meeting room. Her recollection is supported by Mr. Bent's recollection of her calm demeanor and there is no evidence to contradict it.

However, a complaint was clearly raised and Searidge had a responsibility to follow up. The investigation is not an example of Ms. Lawrence being treated differently by Searidge. It would have been better had the investigation been handled competently so that her view and relevant evidence was obtained before discipline was meted out, but it did not suggest

that race, ethnicity or colour was the genesis of the complaint by Ms. Burrell. In fact, Ms. Burrell's statement to Human Rights was generally supportive of Ms. Lawrence and certainly balanced. For example, she spoke to Ms. Lawrence's skills in gaining the confidence of clients.

April 19, 2017 Meeting and Letter

There was a further meeting between Dr. Reid and Ms. Lawrence on April 19, 2017. Without prior warning to Ms. Lawrence, Mr. Chopty also attended the meeting. The meeting lasted a significant amount of time; about an hour with Dr. Reid and Mr. Chopty in attendance and upwards of one further hour with just Mr. Chopty. It appears to have been convened to consider Ms. Lawrence's position at Searidge. At some point during the meeting, either at the request of Dr. Reid or Mr. Chopty, Ms. Lawrence was asked to repeat out loud that any further incidents would result in her dismissal. Regardless of who was the proponent of forcing Ms. Lawrence to repeat out loud like a Grade 2 recitation, it was disrespectful.

Mr. Chopty, who displayed inadequate insight into human resource issues, insisted that he was trying to encourage Ms. Lawrence to resolve the increasing tension by acknowledging her mistakes and it appears that a number of issues were reviewed. He denied using the phrase 'making a mountain out of a molehill' but he said he was trying to bring resolution to the situation. He claims that he offered Ms. Lawrence mediation during the meeting and many times subsequent, but that she would not respond. He said he would have made arrangements for Ms. Cosgrove to attend to facilitate a resolution had Ms. Lawrence only responded to their overtures. Ms. Lawrence's evidence is that she accepted the offer of having Ms. Cosgrove involved but that never came to fruition.

April 19 seemed to be the date that the relationship and Searidge was severed without ever having been repaired. Ms. Lawrence testified that she felt unsafe as a result of the numerous incidents being raised with her. Searidge clearly viewed her as a challenging employee. There was little effort by either party to make the relationship work after April 19. It is puzzling that a facility that is dedicated to rehabilitation was so inept at managing this situation such that the wounds never healed.

Ironically, despite the apparent importance of the April 19 meeting when she was told that complaints were flowing in, the only written communication that came out of the meeting was:

> Ms. Lawrence:
>
> At Searidge, we manage conversations between clinical staff and clients in a professional manner. We can use physical boundaries to model ethical boundaries.

> To aid a positive work environment, please attend to these guidelines:
>
> 1. Limit time in the Kitchen area to eating and simple business matters such as, writing scheduling notes on whiteboards.
>
> 2. The "Smoke Shack" is a facility for clients.
>
> Casual conversations could detract from professional connection. Maintaining a physical distance secures professional boundaries.
>
> Additionally, please ensure that your work schedule does not exceed 40 hours per week.

The Board can only conclude that the first entry refers back to the kitchen incident of February which has been addressed earlier in the decision. Searidge offered no explanation as to why it was being raised again although Mr. Chopty lay the matter at Dr. Reid's feet. On the second issue in the letter, the evidence from Searidge witnesses was inconsistent on the assertion that the Smoke Shack was only for clients. The evidence was clear that there was no known prohibition of staff attending the Smoke Shack. Mr. Chopty was at odds with other Searidge employees who testified that they were unaware of such a restriction. It is clear that Ms. Lawrence should not have been admonished for being in the Smoke Shack. Based on the evidence I conclude that policy did not exist prior to Ms. Lawrence's dismissal.

Alternately, if such a policy existed it was not consistently understood nor consistently applied. When Searidge was asked to produce a written policy about the Smoke Shack it was unable to provide one for the time period in which Ms. Lawrence was employed. Instead, it provided one dated June 14, 2018 and included the following:

> - Staff must never smoke around a client;
> - Staff will have a designated smoking area which will be a picnic table around the corner of the building past the support office;

This timing is consistent with Ms. Ritcey's recollection that the differentiation between the client and staff smoking areas occurred after one was designated for staff.

Patient XY

Lydia Ritcey confirmed that Ms. Lawrence withdrew from her dealings with other staff for the last few months of her employment. She described Ms. Lawrence as isolating from

everyone and said that this non-responsiveness had an impact on the work of the clinic. Ms. Ritcey ascribes Ms. Lawrence's detachment to a number of factors including her own criticism of Ms. Lawrence's dealing with a former patient, XY. She was at the intersection of a discussion about Ms. Lawrence's response to a family's request to assist XY. This incident was a significant point of dispute between the parties although it was never documented as an issue of discipline.

Ms. Ritcey had a Bachelor of Social Work and was working to complete her Master of Social Work degree. She started working at Searidge in 2017 and it was her first placement as a clinician.

There does not seem to be much contest of the circumstances. Ms. Lawrence was contacted by the mother of XY, a former Searidge client, who told her that XY was using drugs again that they were concerned about his personal safety. The family was understandably anxious about XY and asked that Ms. Lawrence contact him, which she did. She reached XY on the phone and she believed that he was operating a vehicle while she was speaking to him. After working to have him stop driving while they spoke, a lengthy conversation ensured. Ms. Lawrence described XY as despondent and said that he was describing his suicidal thoughts. Ms. Lawrence felt that she was not making progress for much of her conversation. At some point she challenged XY by saying that "there is nothing in your head" or words to that effect. Ms. Lawrence testified that she felt that she was not getting through to XY after 2 hours and this was a way of trying to get his attention. She said the point of her comment was that XY was only thinking about himself and that she was trying to focus him on the positive things in his life. She felt that by making those comments that she finally "broke through" and the conversation ended positively with XY promising to return to Searidge, which he did two days later.

The incident became a matter of internal disagreement when Ms. Lawrence recounted the exchange with Ms. Ritcey. Ms. Ritcey was concerned about the incident and felt that Ms. Lawrence's language was harmful as it could cause significant damage to XY's self esteem and be counter-productive to someone who is expressing suicidal thoughts. She was very critical of Ms. Lawrence's approach and recorded her concerns within the clinical notes for XY, as opposed to an incident report form which she was required to use. Unfortunately, Ms. Ritcey never responded to nor directly raised her concerns with Ms. Lawrence which was another missed opportunity for resolving matters. She did take her concerns about the incident to Dr. Reid.

When XY did return to Searidge he was assigned to a different counsellor, Mr. Kassam, as was the practice of the clinic. As described earlier, Mr. Kassam recorded his concerns about the incident in clinical notes, although indirectly, not referring to the details of the incident. Like Ms. Ritcey, Mr. Kassam did not raise his concerns directly with Ms. Lawrence. There was no evidence that Mr. Kassam raised his concerns with Dr. Reid, but Ms. Lawrence became aware of his entry in the clinical notes and raised the issue with Dr. Reid on April

17. She subsequently learned during the April 19 meeting that Ms. Ritcey had also recorded her concerns in the clinical records.

The matter was discussed during the April 19 meeting but Ms. Lawrence refused to accept that she was wrong or could have made a mistake. Mr. Chopty testified that by refusing to acknowledge the error and other issues, Ms. Lawrence was turning a "small issue" into a "large issue".

From Ms. Lawrence's perspective the fact that two of her colleagues embedded these critical comments in clinical notes was upsetting. She pointed to the Incident Reporting process which was to have been followed, rather than carried in the treatment file. During the hearing, Searidge presented a sworn statement from XY dated January 9, 2020 in which he described how he felt about the interaction. Given the fact that XY did not appear to testify, the Board is reluctant to ascribe weight to it. While the exchange with Patient XY was discussed, Ms. Lawrence was never disciplined for her handling of the situation. Still the approach to Patient XY, as any clinical treatment, was legitimately a matter for review. It is significant that the matter was raised by two colleagues. The letter from Patient XY introduced as Exhibit "18" does lend credence to the need for review of what had transpired. Given all of this, I cannot conclude that race, ethnicity or colour was the genesis for the concern being expressed by either of Ms. Lawrence's colleagues.

Request for an Independent Investigation

It is clear from all the testimony that Ms. Lawrence felt that the work place at Searidge was hostile to her. The combination of the manner in which Ms. Ritcey and Mr. Kassam recorded the incidents combined with the other matters outlined earlier caused her to believe she was not safe. It was also the case that Mr. Kassam and Ms. Lawrence were at odds. Mr. Kassam called Ms. Lawrence inappropriate names including referring to her as "That beast." Although she was not aware of the comment at the time, Ms. Lawrence was advised by Mr. Chopty that Mr. Kassam was disciplined for negative comments about her. There was also evidence from Ms. Ritcey that Ms. Lawrence was ungenerous towards Mr. Kassam. There was mutual antipathy.

Ms. Lawrence testified that she requested an independent investigation of the matters that were being recorded against her and that she would have welcomed Ms. Cosgrove's involvement. There was no explanation by Searidge as to why an independent investigation was not carried out. There was a dearth of clear evidence as to what was being done about the issues in the workplace. The Board had no evidence that Dr. Reid, Ms. Cosgrove or Mr. Chopty, or any other person attended to the unhealthy work environment other than through responding to these specific incidents. Ms. Ritcey's evidence was clear that the clinical work was being affected by the discordance in the workplace.

Mr. Chopty testified that he repeatedly offered mediation even though Dr. Reid was Ms. Lawrence's direct supervisor. There was no evidence Dr. Reid ever made an offer of mediation. Based on his statement to the Human Rights Commission investigating officer, Dr. Reid was of the view that Ms. Lawrence was the cause of the issues.

I accept the evidence of Ms. Lawrence that she requested an independent investigation of the various matters being raised with her. I accept that she was desirous of resolution and I accept that she was never given an explanation why Ms. Cosgrove did not attend to try to assist to work through her concerns about her place at Searidge. I accept that Dr. Reid appears to have failed in managing the strains in the workplace. Based on its rebuttal brief it appears that Searidge's main management strategy was termination of employment. A lot of them.

Refusal to Attend Clinical Staff Meetings

After April 19, Ms. Lawrence refused to attend clinical staff meetings due to her concerns about the workplace and her relationship with her colleagues.

The evidence was there was only one specific other incident after April 19 and prior to her dismissal in July. It was in early May when Ms. Lawrence was refused a request to drive a former client to Halifax. He had been accepted in Dalhousie University and she wanted to support the former client. This initially was denied by Dr. Reid for liability reasons, but he reversed his decision two days later. The evidence from the witnesses suggested that counsellors would drive clients if other support staff or volunteers were not available. I do not consider the initial refusal to drive the former client to be unreasonable and consider it consistent with Searidge's practice.

There was also reference about an exchange between Ms. Lawrence and Mr. Chopty about the selection of a movie for the movie night program that Ms. Lawrence was co-ordinating. Ms. Lawrence recalls a discussion about the appropriateness of a movie that she chose and that the response by Mr. Chopty was not to show that because of gratuitous, graphic sexual content involving a "Big Black guy". Mr. Chopty denied making such a statement. He attempted to introduce the results of a polygraph test to prove that he never stated it, but the Board refused to admit the test. It is clear that there was a disagreement between Ms. Lawrence and Mr. Chopty over the content of movies but there was no discipline arising from the incident. Nor was there any other evidence of any similar behaviour or comment by Mr. Chopty.

There was no evidence that Ms. Lawrence was ever warned in writing by Searidge that her failure to attend clinical meetings could result in the termination of her employment. Yet on July 26, 2017 her employment was ended by Dr. Reid for her failure to fulfill part of her duties. Ms. Lawrence testified that she explained to Dr. Reid her concerns about attending clinical meetings. She testified that Dr. Reid approved her absence from the meetings. There was no evidence to the contrary and I accept Ms. Lawrence's position that her

absence, at least initially, was excused. It is clear that her continued absence from clinical meetings was not sustainable over an extended period of time. But there was no evidence from Searidge that the concurrence to her absence given by Dr. Reid was ever formally withdrawn. Certainly, there is no documentary record and I am left with evidence that her ongoing absence was grudgingly tolerated until her employment was terminated.

Ms. Ritcey testified that a few days before Ms. Lawrence was dismissed, she refused direction from Dr. Reid to join a clinical meeting and, in fact, slammed her office door in his face. Ms. Ritcey was not in the immediate vicinity of Ms. Lawrence's office, rather she was in the common room or lounge down the hall from Ms. Lawrence's office waiting. She was not a witness to the conversation but claims that she was a witness to the door slam. Ms. Lawrence denies that she slammed the door although she acknowledges standing firm in her refusal to attend clinical meetings given the unresolved issues. The board is not satisfied that abstaining from important clinical meetings was an appropriate response.

There was insufficient evidence to demonstrate Ms. Lawrence could not participate in those meetings. At no point during the hearing did the Board hear evidence or even argument that in any way challenged Ms. Lawrence's qualifications or ability to perform as a clinician.

Law

In order to succeed in her complaint, Ms. Lawrence has to prove on a balance of probabilities the following:

> [1] that she has a characteristic (or perceived) protected from discrimination under the *Code;*
>
> [2] That she experienced an adverse impact with respect to the service; and
>
> [3] that the protected characteristic was a factor in the adverse impact.

There was no evidence of an overt act or incident of racism towards Ms. Lawrence. Instead she says that the workplace was hostile towards her and she attributes that hostility to race, ethnicity or colour. She says there was no justification for Searidge's conduct towards her and that in the absence of any other rational explanation, Ms. Lawrence asks the Board to draw an inference that the treatment afforded her was discriminatory, at least in part.

The Commission supports Ms. Lawrence's view of the circumstances and says that based on the evidence the Board can and should draw an inference that race, ethnicity or colour was a contributing factor to Ms. Lawrence's treatment, including the termination of her employment.

The Commission sets out in its argument authority for the proposition that Boards of Inquiry are often faced with circumstances of discreet behaviour that is, at least in part, motivated by racism:

> 71. In *Davison v. Nova Scotia Construction Safety Association21*, Chair Bankier wrote:
>
> > There is often little direct evidence with respect to events at issue in human rights cases, and the parties may have to rely on circumstantial evidence. Even in situations where there is no direct evidence, a Board of Inquiry can still make findings of fact based on circumstantial evidence. A convenient summary of the law with respect to circumstantial evidence in human rights cases can be found in *Fortune v. Annapolis District School Bard* (1992), 20 C.H.R.R. D/100 (N.S. Bd. Inq.) at paras 25 and 32-33:
> >
> > > ... Mrs. Fortune was not given consideration by the School Board for the position awarded to Mr. Robinson. There is no direct reference to the reason for this being the gender of Mrs. Fortune. However, if circumstantial evidence reasonably leads to the conclusion that gender was the most probable reason, the case has been made out. As is stated in *Beatrice Vizkelety, Proving Discrimination in Canada* (Toronto: Carswell, 1987), at p. 142:
> > >
> > > The appropriate test in matters involving circumstantial evidence ... may therefore be formulated in this manner: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses. ...
> > >
> > > ... While the Act does not make disrespectful conduct illegal per se, such a course of conduct is relevant in assessing whether an inference of discrimination on the basis of sex is appropriate. In other words, if an applicant who obviously possesses a characteristic that is a prohibited

> ground under the Act is not treated with the respect and dignity one expects all applicants to be accorded, an inference may be drawn that the characteristic in question is the reason for the poor treatment. If other circumstances support the inference then the case becomes clearer.

…

74. Chair Raymond, in *Cromwell*[22], provided comments that are applicable to the present matter. At paragraph 293 of the decision, she observed that:

> **The perception that a person is not on an equal footing with another can be expressed in very subtle ways** and perhaps most effectively by the use of sarcasm and negative teasing. When this occurs in the presence of co-workers, other supervisors or clients, this can have the effect of diminishing the person in the eyes of others in a nuanced but effective manner. As was noted the Nova Scotia Board of Inquiry in *Moore v. Play It Again Sports Ltd.*, 2004 NSHRC 2 (CanLII) at para 5 with reference to *Basi v. Canadian National Railway Co.* (No. 1) (1998) 9 C.H.R.A. D15029 (Can. Trib.), **attitudes and perceptions respecting race are rarely trumpeted in the workplace. I have considered the evidence to determine whether it is more probable than not that race is to be inferred as the reason or part of the reason for the differential treatment of the Complainant**.
>
> 294. …The Complainant is entitled to work in an environment where her race is not a factor. Disrespectful conduct, while not contrary to the *Act* per se, can lead to an inference of discrimination on the basis of race when the Complainant is treated differently than other employees and possesses a characteristic that is a prohibited ground under the *Act.*
>
> 295. **I have found that the Complainant was subjected to differential treatment in the context of disciplinary actions by the Respondent.** My overall

> conclusion from the evidence is that disciplinary action was an infrequent occurrence in the workplace. In the Complainant's case, a series of putative actions were taken by the Respondent. There was a rigor to the imposition of discipline that was excessive in the circumstances. This is particularly so given the reported work environment in which these events occurred. The fact the Respondent has policies and is entitled to enforce them does not provide an explanation for the choice of disciplinary reaction. Without such an explanation, I infer that race was a factor, whether intentional or not, in the differential treatment of the Complainant. (emphasis in original)

The Board accepts the Commission's submission that racism is not always express and can sometimes be inferred. I refer as well to the decision in *The Nova Scotia Barristers' Society v. Lyle Howe 2017 NSBS 3* (CanLii). In its decision the disciplinary panel was asked to consider whether complaints made against Mr. Howe were affected by his race, ethnicity or colour. The Panel provided this conceptual framework, which I find instructive:

> 38. We appreciate and agree with the argument made on Mr. Howe's behalf, that in 2017, discriminatory behaviour is rarely overt. A person whose behaviour is consciously or unconsciously informed by a racial, ethnic or colour bias can always find a reason or explanation other than race, colour or ethnicity to justify a decision. At the same time, a legal finding of discrimination and discriminatory impact is never based solely on the declaratory statement or supposition of an affected person. Neither perception, nor suspicion, nor even well-grounded apprehension, equates with legal proof of discrimination.
>
> 39. Therefore, in approaching our task of determining whether there have in fact been discriminatory impacts to Mr. Howe, we will consider whether race or colour or ethnicity could have been a factor, or could have been an influence, in the behaviour of others towards him. We believe this approach is consistent with the approach to findings of discrimination pursuant to s. 15 of the *Charter*: IAFF Local 268 v. Adekayode, 2016 NSCA 6, particularly at paras. 62 – 69. AT the end of the analysis there is really only one question to be answered: Does the behaviour of the individual or institution violate the norm of substantive equality on a relevant ground?

> 40. The Society's complaints against Mr. Howe in this proceeding involve complaints about several of his institutional and interpersonal interactions over the course of a relatively short career. We understand that we must evaluate those interactions with an appreciation of the historical disadvantage suffered by members of the black community in Nova Scotia in terms of professional and economic opportunity. We also understand that the "black community" of Nova Scotia is not homogeneous. The racialized black experience in Nova Scotia, as we can even glean from the anecdotal and personal experiences described in the evidence before us, is not homogeneous. The lack of homogeneity of the larger so-called "black experience" can not excuse specific and person differential treatment.
>
> 41. In drawing a legal conclusion about the proof, or not, of a discriminatory effect, we must be careful not to assume the discriminatory impact of one person's, or one agency's behaviour, necessarily contaminates the decisions of another person, agency, or institution. In that regard, we are aware that proof of discrimination sufficient to justify a remedy requires that the discriminatory attitude or behaviour have an actual impact on the identified person, and that the impact is concurrently relevant to a decision that we have authority to make.
>
> 42. So the question is this. Have individual members of a dominant group, or social institutions, impose burdens or expectations on Mr. Howe which are different that than the burdens or expectations imposed on lawyers with different racial or ethnic backgrounds? If so, the evidence of discrimination is real. If any such discrimination is relevant to our process, it would demand that we provide a remedy.

Throughout the hearing and in review of the evidence, I considered whether the various issues identified were related to appropriate standards that would be expected of any employee. I assessed whether Searidge imposed burdens or expectations on Ms. Lawrence which are different than those imposed on a clinician with different racial or ethic background.

In this case the Board finds that there were legitimate matters that were raised by Searidge with Ms. Lawrence including the appropriateness of the interaction with clients during mealtime, the investigation of complaints by a co-worker, the legitimate nature of the

inquiry in the call with XY and her failure to attend clinical meetings. I also considered that there were some issues raised that were difficult to understand being raised at all, especially as matters of discipline. These include the approach to Ms. Sabean about the change in the overtime policy to disallow banked time, Ms. Lawrence being at the Smoke Shack and the manner in which she was asked to recite aloud that any further incident would lead to termination. These incidents do raise concerns about how Searidge managed Ms. Lawrence's employment.

Based on the totality of the evidence, I make the following findings:

1. That there was a legitimate issue for discussion as a result of the approach taken by Ms. Lawrence and Ms. Swinemar to approach the clients and during mealtime. It was raised as a mater of concern by clients. I accept that Ms. Lawrence did not approach the clients in a disciplinary manner, but I accept that the incident was a legitimate issue for review and was not motivated by her race, ethnicity or colour. It is significant that Ms. Lawrence was not singled out and that both women were held to the same management standard.

2. Based on the evidence before the Board, I do not find that the reprimand letter of April 5 was substantiated and do not find that there was a reasonable basis for disciplining Ms. Lawrence. However, the evidence is clear that there was a report by Ms. Burrell that Ms. Lawrence was making statements critical of management in front of clinical staff. I accept that the incident was reported by Ms. Burrell, (she repeated that during the course of the Human Rights investigation), and Dr. Reid was well within his rights to assess whether he found the complaint to have merit. I note there was no suggestion or evidentiary basis that Ms. Burrell's complaint was motivated by Ms. Lawrence's race, ethnicity or colour.

3. Based on the evidence before the Board, I find that the letter of April 17, 2017 to be inappropriate given Ms. Lawrence was not interviewed to obtain her recollection of the complaint. I accept that the complaint was raised by Ms. Burrell (she again repeated the incident during the Human Rights investigation) and that Searidge had to respond to the allegation. Again, I note that there was no suggestion or evidentiary basis that Ms. Burrell's complaint was motivated by Ms. Lawrence's rate, ethnicity or colour.

4. The conduct of the April 19 meeting is concerning, in particular the requirement that Ms. Lawrence to speak out loud the warning that further misconduct would result in her dismissal. Based on the evidence it is an open question whether Searidge had grounds for the termination of her employment at that point, let alone to justify the disrespect shown to Ms. Lawrence by that request.

5. It was legitimate for Searidge to review professional concerns about the comments made by Ms. Lawrence to Patient XY in response to concerns of her two colleagues. Whatever her intention, the Board accepts that the questioning by her colleagues of how the manner was handled was reasonable. I accept the Commission and Ms. Lawrence's position that her efforts and the result of XY returning to treatment was positive, but this does not preclude review and assessment of the approach. Given that she was not disciplined for that incident Searidge's response seemed reasonable and it is regrettable that the parties, all of them trained clinicians, could not find a way to communicate. I do not find as a fact that the matter of Patient XY was raised was due to Ms. Lawrence's race, ethnicity or colour.

6. Searidge had a legitimate reason to be concerned about Ms. Lawrence's attendance at clinical meetings, but there was not reliable evidence as to how this issue was addressed by Searidge until Dr. Reid fired Ms. Lawrence. Ms. Lawrence testified that Dr. Reid was aware of her concerns and in essence, tolerated her absence. Dr. Reid was not called by Searidge or the Commission and did not answer this evidence. The fact that there was no prior written warning to Ms. Lawrence supports her testimony. However, it is clear from Ms. Ritcey's evidence that Dr. Reid's tolerance of Ms. Lawrence's absence had come to an end. I accept the evidence of Ms. Ritcey that Ms. Lawrence's absence from these meetings was impacting client care.

Ms. Lawrence asks that the Board consider all of the matters for which she was addressed as having no merit and suggests that in considering the totality of the record that the only logical explanation is that she was treated in the manner she was treated because of her race, ethnicity or colour. I do not accept that there was no merit to issues raised during Ms. Lawrence's tenure.

I cannot conclude based on the evidence that Ms. Lawrence's race, ethnicity or colour was a factor in her dismissal. Officially, Ms. Lawrence's employment was terminated due to her failure to attend at clinical meetings. There were legitimate management and patient interaction issues that were expressly addressed with her through her time at Searidge, but never was her competence questioned. Whether they could have been better managed is not the issue before the Board. The Board has to be satisfied that there was an evidentiary basis to prove that Ms. Lawrence was discriminated against.

In my view, it is material that the source of each of these significant concerns were clients or Ms. Lawrence's colleagues rather than being initiated by management. It is also material that she was not formally disciplined for the most significant issue raised during the hearing, which was the interaction with Patient XY. Also, in regard the April 5 discipline Dr. Reid did not discipline her for her expressing the view that Searidge was not well-managed; only that she expressed it in front of a client. Given that, I am not prepared to draw that inference that Ms. Lawrence and the Commission requests.

I find on that on the basis of the evidence present that the Complainant has not satisfied me that her gender, race, ethnicity or colour was a factor in her treatment at Searidge. It is understandable that there were concerns about Ms. Lawrence not attending clinical meetings. Ms. Ritcey's evidence is Ms. Lawrence's absence was affecting the treatment of clients. Whether or not Dr. Reid ought to have taken steps to warn Ms. Lawrence of the concern over her prolonged absence relates to the propriety of the dismissal from an employment perspective and not whether it was motivated by race, ethnicity or colour. For the reasons stated, and based on the evidence before the Board, I find that the Complainant has failed to provide that there was no explanation for Searidge's concerns with issues raised with her. There was insufficient evidence for the Complainant to meet the burden upon her to succeed in this complaint and, accordingly, the claim must be dismissed.

DATED at Truro, Nova Scotia this 15th day of July, 2020

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Dennis James, Q.C.
Board