THE NOVA SCOTIA HUMAN RIGHTS COMMISSION
BOARD OF INQUIRY

BETWEEN:

Yvette Beals

Complainants

-and-

3268073 Nova Scotia Limit3ed o/a
Dartmouth Comfort Inn (Windmill Road location)

Respondent

-and-

Nova Scotia Human Rights Commission

Respondent

Case Number: 5100-30-H17-1934

Decision

1. Yvette Beals has alleged that on October 13, 2017, she was discriminated against with respect to employment on the basis of mental disability. That was the day she was told that she was terminated from her employment at the Dartmouth Comfort Inn. She filed her complaint with the Nova Scotia Human Rights Commission on December 23, 2017, and I was appointed to inquire into the matter by nomination of the Chief Judge of the Provincial Court of Nova Scotia on November 22, 2018. The hearing took place on May 9, 2019.

2. The Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c.214 defines "mental disability" in s.3(l) as follows:

> "physical disability or mental disability" means an actual or perceived
>
> (i) loss or abnormality of psychological, physiological or anatomical structure or function,
> (ii) restriction or lack of ability to perform an activity,
> (iii) . . .
> (iv) learning disability or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
> (v) condition of being mentally impaired,
> (vi) mental disorder, or
> (vii) dependency on drugs or alcohol; . . . .

3. Yvette Beals leads a family that includes a spouse and three children. Despite the fact that she did not complete high school, and did not complete a community college program in home care, she has managed to obtain and keep a variety of jobs. Those jobs have included employment as varied as personal home care work, hairdressing, small business management, retail, and hotel front desk work. Ms Beals has sometimes been her family's sole breadwinner, and has sometimes worked several jobs simultaneously.

4. At the time of the hearing of this matter, Ms Beals was working in the hotel business. She has been in her current job since August 2018. The complaint before me relates to her termination from a front desk job at the Comfort Inn in Dartmouth by Mary Vandergrift in October 2017.

5. Ms Beals first began working with the Comfort Inn chain at a Bedford location. She applied to work at the Dartmouth location which was closer to her home. She was an attractive candidate for Ms Vandergrift who managed the Dartmouth location because Ms Beals was already trained on and familiar with the Comfort Inn chain's computer system.

6. Ms Beals started at the Dartmouth location in November 2016. After a week of training side by side with another employee, Ms Beals began working shifts on her own. She worked 3 shifts (8 am to 4 pm) every two weeks, always on the weekends. One weekend would be Saturday and Sunday, while the next would be Sunday only. At all relevant times these shifts represented a third job that was being juggled with others by Ms Beals.

7. Ms Beals felt that she was performing her job tasks competently. There was a list of tasks to complete, and she acknowledges that Ms Vandergrift brought the list to her attention. Ms Beals also received communication about work issues through an "Employee Book", indicating that this was how she usually heard from Ms Vandergrift after their initial interview and her hiring.

8. Ms Beals described some issues around a list of people who were barred from renting rooms, whether it was appropriate to sometimes accept cash in payment, and "about three months in" she was surprised at being expected to sometimes provide breakfast for guests. From time to time there was a person specifically hired to deal with the breakfast room, but at other times it fell to the front desk clerk to deal with this responsibility. Ms Beals did get some help with her tasks, and some work assignments, from the night audit person. She claims that she was late once due to a snowstorm, and that she had one sick call. She was not made aware of any specific complaints about her work from either Ms Vandergrift, or other staff.

9. In an email dated March 28, 2018, from Ms Beals to the investigator for the Nova Scotia Human Rights Commission, which all parties agreed could and should form part of the evidence, Ms Beals detailed some of the psychological issues of anxiety and distress that she attributed to her work on the front desk of the Dartmouth Comfort Inn. Without repeating the specific claims set out in her email, it is clear from the email that in the early months of 2017, Ms Beals recognized that some of her encounters with the hotel's customers and users were a source of mental distress to her. So too was the work environment and its various, and varying, obligations.

10. On May 20, 2017, Ms Beals asked Ms Vandergrift to reduce her hours to one shift a week. She attributed the request to a need to have a day off, and to be able to see a son's sports activities. Ms Vandergrift was prepared to make the change. However, by the time that schedule was put in place, Ms Beals had decided that her situation needed more than a reduction of hours. She visited a physician who wrote her guidance that she should take time off from her work entirely. The note, dated June 22, 2017, read:

> She is not fit for work for a health reason till further notice.

Ms Beals described her psychological situation at that time as one of stress and anxiety that was intense enough to interfere with her ability to sleep. She attributed the source of that stress and anxiety to "things going on a home, at work". In terms of work, she said that it was the "extra duties" that were "overwhelming".

11. Either before or after delivering the physician's note to Ms Vandergrift, Ms Beals and Ms Vandergrift spoke on the telephone. They each remember that chronology differently, but in my view the chronology does not matter. The gist of the telephone conversation was that Ms Beals needed to take some time away from work due to a "breakdown", and there was talk about staying in touch. Ms Beals says that she also spoke to the night auditor about her situation, and in fact passed the doctor's note to him to be left in the Employee Book.

12. Ms Beals did acknowledge that she never told Ms Vandergrift what her actual medical diagnosis was. The medical note did not specify the medical issue as psychological. I did not receive any evidence from a physician about the return to work, or the actual condition under medical management.

13. Ms Beals says that there were promises made at the time she went off in June that her job would be held for her. Ms Vandergrift does not recall that being part of any conversation. Ms Vandergrift said that there was no discussion about Ms Beals' job status at all, but she also claims a specific memory of Ms Beals telling her that she would be off for two months. Ms Beals says that she had not known how long it would take to be better and so could not have given a time for a return to work.

14. Despite these differing recollections of their telephone conversation, it is clear to me from the evidence of both Ms Beals and Ms Vandergrift that there was no discussion on the telephone or in writing about terminating Ms Beals' employment when she went off work for her "breakdown" or "health reason". There was no projected date for her return – neither tentative nor firm. There was no specific arrangement made for checking in with each other for an update on the situation.

15. On October 13, 2017, Ms Beals advised Ms Vandegrift that she had been cleared to return to work by her doctor. Ms Beals described this as a limited return to work because it would be the only job of her three to which she was returning. She testified that her doctor was only authorizing her return to work part-time.

16. When contacted in October, Ms Vandergrift advised Ms Beals that she did not have work available for her, that she had a "good team", and that she would pay her two weeks notice and terminate her employment. Ms Vandergrift advised me that staff had been advocating for Ms Vandergrift not to bring Ms Beals back as an employee.

17. That October termination is the key concern of this proceeding. Ms Vandergrift testified that because of complaints by co-workers, she had formed an intention to terminate Ms Beals as early as two months into her employment: by the end of January 2017. She testified about hiring a replacement in the early months of 2017, and intending to terminate Ms Beals as soon as the replacement could start.

18. Even if Ms Vandergrift had serious concerns about Ms Beals' job performance, which I doubt, I am not persuaded that she ever planned to terminate Ms Beals based on job performance due to following:

a) Ms Beals was not terminated when the "replacement" was hired;
b) Ms Beals was not terminated in May 2017 when Ms Beals asked to reduce her scheduled hours to a single shift per week;
c) Ms Beals was not terminated in June 2017 when there was a doctor's note and a voice to voice discussion between Ms Beals and Ms Vandergrift about Ms Beals' reason for being unable to continue to work; and,

d) Ms Vandergrift herself said at the hearing before me that in June 2017 she had "every intention of bring her [Ms Beals] back a that point"; and that after receiving the doctor's note, she still "intended" to bring Ms Beals back.

19. That leaves me with the question of why Ms Beals was terminated in October when she indicated that she was available to return to work. Ms Vandergrift indicated to me, and on her Record of Employment (ROE) forms, that Ms Beals was terminated due to lack of work. While that is what she says, and essentially what Ms Beals was told, I can not accept that to be the true or entire reason for Ms Beals' termination.

20. First, this is a business which had 22 employee positions at the time. The business experienced consistently high employee turnover. I simply do not believe that Ms Vandergrift could not foresee being able to find a single shift per week for a trained and available front desk employee, with breakfast experience, and who had assisted with some housekeeping – even as a casual.

21. More important than that staffing context though is the fact that I also have an acknowledgment from Ms Vandergrift herself that "staff" had advocated with her to not bring Ms Beals back. Ms Vandergrift acknowledged in her evidence that it was "staff input" which had changed her mind about bringing Ms Beals back to work. She also indicated that the staff complaints about Ms Beals earlier in 2017 had been more about her "attitude" than about her performance of job tasks. Ms Vandergrift also advised the Commission on March 28, 2018, during its investigation, in a letter that all parties agreed I should consider:

> The fact that Yvette was dealing with an Anxiety Disorder and Depression, was new information to me when I received this complaint. If Yvette had at any time spoken with me about her Mental Disability, I would have been willing to work with her, especially if this would have improved her work performance.
>
> We have several employees working here with both physical and mental disabilities. . . .

22. All of the references to "staff" made by Ms Vandergrift in communications to the Commission, and in evidence before me, were left anonymous. I can not and will not give any weight to the validity of anything attributed to anonymous "staff". Nor will I give any legitimacy to Ms Vandergrift's reliance on the thoughts of anonymous "staff".

23. The question that I have to decide is whether Ms Beals had an actual or perceived "mental disability" within the meaning of the *Act*, and whether that was a *factor* in the termination of her employment in October 2017. The law is that:

> While the word "nexus" is perfectly acceptable, I think it preferable to continue to use the terms more commonly used in the jurisprudence developed under the Code. All that is required is that there be a "connection" between the adverse treatment and the ground of discrimination. The ground of discrimination must somehow be a "factor" in the adverse treatment.

Pieters v. Peel Law Assn., 2013 ONCA 396, at para.59.

24. A "mental disability" within the definition provided by the *Act* may be a "mental disorder", language which evokes a recognized and diagnosable mental illness or condition as might be described in the *Diagnostic and Statistical Manual of Mental Disorders,* or which might qualify as a "mental disorder" under s.16 of the *Criminal Code*. However, the structure of s.3(1) of the *Human Rights Act* makes it apparent that the drafters of the *Act* also intended to protect people from discrimination based on "actual or perceived":

(1) loss or abnormality of psychological *function*;
(2) learning disability or a *dysfunction in one or more of the processes involved in understanding or using* symbols or spoken language; or
(3) *being* mentally *impaired*.

25. The common element of these three distinct modes of what the *Act* describes as "mental disability" is that there is an actual or perceived impact upon mental – including psychological - function. The definition is broad enough to include permanent as well as transient impacts to psychological or other mental functions. While a medically-recognized and diagnosable condition could certainly qualify as a "mental disability", that is not required by the language of the *Act*.

26. There has been previous consideration of the meaning of the phrase "mental disability" in Nova Scotia. In *Halliday and Michelin North America (Canada) Ltd*, 2006 NSHRC 5, at paras.79 and 81, the Board of Inquiry found that a case of "mental disability" had been established as a generalized anxiety disorder, demonstrated by symptoms of sleepiness, nervousness, and fidgeting, manifesting in excessive absences from work. The symptoms identified were all related to Mr Halliday's mental functioning. The case ultimately turned on issues of accommodation.

27. In *Trask v. Department of Justice (Correctional Services),* 2010 NSHRC 1- 2, at paras.106 - 107 the Complainant had symptoms of distress including abdominal symptoms, headaches, restless insomnia, and generalized anxiety; agitation and aggression at work; irritability towards co-workers; depression and withdrawal. That Board of Inquiry found, at paras.128 – 130, that anxiety-related disorders constituted a disability within the meaning of the *Human Rights Act*.

28. The Board in *Trask* adopted the view expressed in *Mellon v. Canada (Human Resources Development)(No.2)*, 2006 CHRT 3, at para.88, that even minor disabilities which have no permanent manifestation can constitute disabilities under the legislation so long as there is "sufficient evidence" before the Board to establish the disability's existence. Indeed, in *Mellon, supra*, at paras.88 – 103, the alerts to the employer about Mellon's anxiety were described as things the employer had the opportunity to observe even without a formal medical diagnosis or an explicit assertion of disability by the affected employee.

29. Did Ms Beals establish that she had a "mental disability" in the sense of an actual or perceived condition which affected the functioning of her mind? The Commission, in a post-hearing submission, suggested:

> In the instant case, there were no medical documents or testimony from any physicians. As noted above, it is imperative that Complainant's [sic] provide more than their "bare assertion" that they suffer from a disability.
>
> The prescription at page 74 of the Exhibit Book makes no reference to anxiety. There were neither progress reports nor any other documents indicating Ms Beals suffered from anxiety or that she was diagnosed with anxiety. I think it is important to highlight that the absence of such information does not mean or should not be construed as Ms Beals lacking credibility. It simply means there were no medical documents/files or viva voce evidence from her family physician (or any other medical professional) with respect to her condition.

30. To describe a symptom as "psychological", in its simplest dictionary definitions, means that something arises in the mind, or is related to the mental and emotional state of a person. As s.3(1) of the *Act* is drafted, and as it has been understood in the caselaw, it is my view that anything which disrupts a person's regular mental functioning: s.3(1)(i); or which impairs a person's regular mental functioning s.3(1)(v); is capable of constituting a "mental disability". These were the kinds of psychological and mental impacts described by Ms Beals in her evidence.

31. I believe that Ms Beals did establish that she had a mental disability connected with her work. Her testimony about this was unchallenged. She was suffering from stress at her work because of her tasks and because of what she felt she was exposed to because of the nature of her job. The stress that she was suffering was sufficient to not only disrupt her ability to sleep, but to be considered by her as a "breakdown". The symptoms were persistent enough for her to persuade her to request a reduction in her already very limited hours of work at the Comfort Inn. I am not discounting or ignoring Ms Beals acknowledgment that some of her stress was related to her own home environment. The point is that some of the disabling stress was emanating from her employment obligations.

32. I also believe from the whole of the evidence that Ms Vandergrift knew about Ms Beals' mental distress. I draw this conclusion from not only the note provided by Ms Beals' physician to Ms Vandergrift, but also the fact that the note was supplemented by the telephone conversation involving Ms Vandergrift and Ms Beals indicating that Ms Beals was in the throes of a "breakdown".

33. I appreciate that there was never a formal diagnosis provided to Ms Vandergrift. "Breakdown" or "mild breakdown" remained undefined. However, the conclusion is unavoidable that both Ms Vandergrift and Ms Beals were aware that Ms Beals was under psychological stress in June 2017. Both accepted that Ms Beals was not at that time able to perform the requirements of her Comfort Inn job because of her mental functioning. The record of evidence before me has more than a "bare assertion" of mental disability.

34. When Ms Beals notified Ms Vandergrift of her ability to return to work on October 13, 2017, the negative response appears to have been immediate and abrupt. There was no inquiry by Ms Vandergrift about Ms Beals' health. There was no request for clarification of the cause of Ms Beals' need for time off in June. There was no request for advice from Ms Beals' physician as to what functional disability had been experienced by Ms Beals, nor any inquiry as to how the previous work environment might have contributed to that condition. There was no inquiry as to whether a workplace accommodation might be appropriate – such as whether working in a different capacity might be more appropriate than continuing as a front-desk person.

35. It is my view that having accepted that an employee needed time off for a medical reason, and having maintained that employee as an employee for another 4 months until the employee said that she was available to return to work, the employer should have made some very basic inquiries of the employee when the request to return to work was made. Those basic inquiries would have included whether Ms Beals was well enough to return to work, whether aspects of the previous work or job had been psychologically harmful, and perhaps whether a physician, or the employee, had any suggestions for how to avoid a repeat of the psychological harm in the future.

36. The fact that those or similar inquiries were not made, together with the abruptness of the termination, and Ms Vandergrift's alternative attributions of the termination to "staff advocacy", or alternatively a "lack of work", lead me to the conclusion that Ms Vandergrift wanted to avoid the whole issue of Ms Beals' "mental disability" entirely. That effort in October to ignore, or to avoid addressing, the medical issue that had been discussed in June, demonstrates to me that there was actually a concern about Ms Beals' psychological suitability for her front-desk job.

37. That avoidant response by Ms Vandergrift qualifies as a response based on perceived "mental disability". The avoidance of the critical questions persuades me to infer that Ms Vandergrift perceived that Ms Beals had suffered, or might suffer again in the future, a loss of psychological function: s.3(1)(i), by resuming her front desk duties. The effort of Ms Vandergrift to ignore that issue during their interaction in October demonstrates to me that that issue was indeed a factor in the decision to terminate Ms Beals' employment. That termination was an adverse impact to Ms Beals, and constituted a violation of the *Human Rights Act*, s.5(1)(d) and (o).

38. A similar conclusion was reached by the Board of Inquiry in the case of *Hewey and 634623 NB LTD. (Peterbilt Nova Scotia)*, 2013 CanLII 91794, at para.60, where it was decided by E. Nelson Blackburn, Q.C. that:

> 60. Accordingly, I find Mr. Cunningham should have looked into the medical condition of the Complainant a little further after receiving the memo, Exhibit C-1, from his physician as to why he had to be off leave for a few months and Mr. Cunningham failed to do so and he turned a blind eye to any possible disability issues arising out of the Complainant's employment and treated it solely as the Complainant quitting by virtue of him taking his tool box and having a disagreement with Mr MacLean on January 7, 2010.

See also: *Mellon v. Canada, supra*, at paras.98 – 100; and *Halliday v. Michelin, supra*, at paras.86 – 87, and 91. An employer has an obligation to make basic inquiries about the health of an employee, as well as their ability to resume a job from which they had recently and previously taken medical leave.

39. I appreciate Ms Vandergrift's evidence about the mental disabilities of two other Comfort Inn employees which are known and which she has accommodated as the employer. I also appreciate that during the course of the later stages of the hearing, Ms Vandergrift expressed regret that she did not have a better appreciation of Ms Beals' mental health issues at the time – as she did in her March 28, 2018 letter to the Commission's investigator. However, given that she had been informed in June 2017 of a health issue that disabled Ms Beals from working, the responsibility of not knowing rests on Ms Vandergrift's shoulders. Having been informed, she failed to follow up. It is my conclusion that the failure to inquire was a conscious decision, which had the effect of being discriminatory.

Remedy

40. Although Ms Vandergrift failed to make a reasonable, appropriate, and necessary inquiry that would have permitted her to then think about whether accommodations were necessary for Ms Beals, the termination involved termination from what had been a part-time, single shift a week, employment. Very little evidence was provided about whether Ms Beals was fit for even that, or whether she might have been better suited for different duties on a different schedule, duties that did not involve the stresses or responsibilities of the front desk position. Nor was evidence provided about whether Ms Beals would have been interested in a re-assignment within the many jobs that existed at the Dartmouth Comfort Inn operation.

41. While I am willing to hear the parties as to the appropriate disposition of this matter, it struck me even during final submissions that with some active assistance, the parties might have been able to mediate a resolution of this among themselves. If there is some impediment, something that would make that impossible, I am not aware of it based on the evidence that I have heard. I would encourage the parties, with the assistance of the Commission, to craft an outcome for themselves relating to whether there is an avenue for Ms Beals to return to employment with the enterprise, or alternatively to determine what work was actually lost between October 13, 2017, and her acquisition of substitute employment a few months later.

42. If the parties do not feel able or willing to resolve this matter in terms of remedy, I will reconvene the hearing in relation to disposition at their request. If the parties can find a resolution between themselves, I am able to approve it pursuant to s.34(5) of the *Act*.

Dated this 5th day of June, 2019

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Donald C. Murray, Q.C.
Board of Inquiry Chair