

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2022 CHRT 34

Date: October 19, 2022

File No.: T2570/12720

Between:

Shawna Wilson

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Bank of Nova Scotia

Respondent

Ruling

Member: Kathryn A. Raymond, K.C.

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I. Overview of Decisions

[1] The Tribunal provides two preliminary rulings. The first confirms the existing scope of the allegations in the complaint; the second requires further disclosure by the Bank of Nova Scotia.

[2] The Bank of Nova Scotia seeks to strike portions of Ms. Wilson's Statement of Particulars ("SOP") and witness will-say that address allegations prior to November 24, 2014. The Bank says that the complaint that was referred to the Tribunal for inquiry by the Commission only involves allegations from November 24, 2014 to January 19, 2015. The Bank submits that this is because, in 2017, the Commission made a decision to deal only with the allegations in the complaint that span from November 24, 2014 to January 19, 2015.

[3] The Tribunal agrees that the allegations in the complaint are limited to those in the 2014–2015 period. Evidence of relevant events prior to November 24, 2014 may potentially be used as background narrative, context and/or substantive assessments respecting the 2014–2015 allegations to the extent and for the purposes consistent with this ruling. Issues respecting the relevance and admissibility of evidence prior to November 24, 2014 will be determined based upon the evidentiary record and submissions at the hearing. The key point is that any prior evidence offered must be relevant to the 2014–2015 allegations.

[4] The disclosure requested by Ms. Wilson that is required to be produced by the Bank of Nova Scotia is contact information for potential witnesses and certain documents relating to the use of her Employee ID. The latter requires the Bank to conduct a search that includes a search for electronic documents. The Tribunal has given preliminary directions respecting the parameters of the documents to be produced and offered suggestions about a methodology for the electronic search in the interests of the efficiency and proportionality of the electronic search.

II. The Bank's Motion About the Scope of the Complaint

A. Issues

A) What is the scope of the complaint that the Commission referred to the Tribunal?

- B) Can allegations from 2010–2011 included in Ms. Wilson’s SOP and will-say be determined by the Tribunal?
- C) If the Commission did not refer the 2010–2011 allegations to the Tribunal for inquiry, can the disputed content still be considered for another purpose such as narrative information?

B. The Facts

[5] Shawna Wilson worked at the Bank of Nova Scotia as a customer service representative. The Bank of Nova Scotia (the “Bank”) alleged that she was involved in procedural irregularities contrary to the Bank of Nova Scotia’s Guidelines for Business Conduct and accordingly terminated Ms. Wilson. In contrast, Ms. Wilson alleges that the reason for her termination was based on protected grounds – in particular, her family or marital status, race or colour, and disability. In this case, the Tribunal will ultimately need to decide if any of these protected characteristics were a factor in Ms. Wilson’s termination.

[6] When complainants file a complaint with the Commission, they are required to identify the “Date of Alleged Discrimination”. Ms. Wilson’s complaint was filed with the Commission on January 18, 2016. It identified two time periods: 1) April 2010–April 2011 respecting alleged harassment based on race; and 2) November 2014–January 2015, related to an alleged discriminatory investigation into fraud and termination from employment, based on race, disability, marital status and family status.

[7] While the complaint identified April 2010 to April 2011 as the first period of alleged discrimination, the detailed description of the allegations within the complaint referenced somewhat different dates. The narrative of the complaint also describes events that occurred after Ms. Wilson went on disability leave in April 2011. Ms. Wilson alleges that, while she was on leave, she was harassed by her managers about taking medical leave and told she had to return to work, or she would be fired. She claims that her managers indicated to the disability benefits insurer that she was faking her disability, which led to a delay in receipt of benefits. She says that she received a letter of termination in September 2011 which was later rescinded by the Bank after she retained legal counsel. It appears that this issue was resolved in October 2011. Ms. Wilson then claims that, when she returned to work

in November 2014, she was met with a discriminatory investigation and termination by the Bank. The remainder of the complaint addresses what occurred after she returned to work from medical leave.

C. The Legal Context

[8] The Commission has the authority pursuant to section 41 (1) of the *Canadian Human Rights Act*, R.S.C. 1985, c.H-6 (the “Act”) to screen out all or part of a complaint. This includes the authority to screen out complaints filed more than one year after the acts or omissions in issue.

[9] The Commission decided to screen out the part of Ms. Wilson’s complaint that allegedly occurred in 2010–2011 pursuant to section 41(1). The Commission made the decision that it would only consider and investigate the allegations in the complaint from the period November 24, 2014 to January 19, 2015. It did so for the following reasons:

...the allegations that span from mid-2010 to October 2011 are based on acts which occurred more than one year before the complaint was filed and which are separate and independent of the remaining allegations, and the complainant has not provided a reasonable explanation for the delay in filing.

The significant matters decided by the Commission are: 1) the complaint, which was filed in January 2016, was not filed within a year of the events in 2010–2011; 2) the delay in filing the complaint about these events spanned almost four and a half years from October 2011 to January 2016 and the Complainant provided no reasonable explanation for the delay; 3) the earlier allegations were found to be “separate and independent of the remaining allegations”; and 4) the Commission screened out the allegations from mid-2010 to October 2011.

[10] This decision (the “Section 41(1) Decision”) was communicated to the parties in a letter dated August 8, 2017. The Commission subsequently investigated and considered only the allegations dated November 24, 2014 to January 19, 2015. For reasons that do not need to be explained here, Commission staff subsequently prepared both a Report for Decision and a Supplementary Report for Decision that only dealt with the 2014–2015 allegations (normally only one Report for Decision would be prepared).

[11] The Board of Commissioners of the Commission makes final decisions for the Commission respecting what is referred to the Tribunal for inquiry. After reviewing these reports, the Board decided on November 18, 2020 to refer the complaint to the Tribunal (the “Referral Decision”), which it did pursuant to its authority in section 44(3) of the Act.

[12] The Decision was sent to the Tribunal by letter dated November 23, 2020 (the “Referral Letter”). A “Record of Decision” was attached to the Referral Letter. It consisted of three documents: 1) the Referral Decision; 2) an “Amended Summary of Complaint” form, which stated that November 24, 2014 to January 19, 2015 was the period of alleged discrimination; and 3) the original “Complaint Summary” form, described above, which identified the dates of the alleged discrimination as April, 2010 to April 2011 and November 2014 to January 2015.

[13] Following referral to the Tribunal, the parties were required to file SOPs as part of the Tribunal’s disclosure process. In paragraph 2 of her SOP, Ms. Wilson refers to the 2010–2011 allegations. Paragraph 2 states:

During her employment, Ms. Wilson was consistently harassed based on her race by her manager, Ms. Lamanna. As a result of this harassment, Ms. Wilson went on disability leave for chronic depression and anxiety in or around April 2011. While on disability leave, Ms. Lamanna and the branch manager (Mr. Nelson) continued to harass Ms. Wilson by calling her and telling her to return to work, or she would be fired. Ms. Lamanna and Mr. Nelson also reported to the insurer that Ms. Wilson was “faking” her disability, leading to a significant delay in Ms. Wilson receiving her disability payments.

[14] In paragraph 2 of her will-say statement, Ms. Wilson indicates that she intends to call evidence regarding the harassment she allegedly experienced in 2010–2011. In addition, Ms. Wilson states that she intends to testify that the harassment she experienced continued over the period 2011–2014 while she was on disability leave.

D. The Parties' Positions

The Respondent's Position Respecting Scope of the Complaint

[15] The Bank submits that the complaint referred by the Commission for inquiry by the Tribunal is limited to the period from November 24, 2014 to January 19, 2015, following the Commission's Section 41(1) Decision to screen out the allegations from 2010–2011 and to only consider the allegations arising from the period November 24, 2014 to January 19, 2015. It asks that the content in Ms. Wilson's SOP at para 2 and in para 2 of her will-say be struck so that these documents only address the allegations from November 2014–January 19, 2015. The Bank implies that, if this relief were granted, it would not permit the earlier allegations to be raised by Ms. Wilson at the hearing.

[16] The Bank filed a reply to clarify that it specifically agrees that events that occurred prior to 2014 and which explain what led to the investigation by the Bank and termination of Ms. Wilson are relevant. The Bank includes here Ms. Wilson's alleged access to relevant customer information in 2009. The Bank's objection relates to the inclusion of allegations that the Bank discriminated against Ms. Wilson and/or engaged in harassment on discriminatory grounds prior to 2014. This includes the specific allegations pertaining to the 2010–2011 period included by Ms. Wilson in her complaint, her SOP and the will-say she filed for this proceeding. The Bank also objects to the addition of what it describes as the "new" allegations of discrimination by Ms. Wilson concerning the events Ms. Wilson says occurred after October 2011, while she was on disability leave, and prior to her return to work in 2014.

[17] The Bank says it did not preserve any evidence about the 2010–2011 events because Ms. Wilson did not challenge the Commission's decision to screen out that part of her complaint. The Bank asserts that it would be prejudiced if allegations which are more than 10 years old are permitted to proceed now, in these circumstances.

[18] The Bank's submissions have been fully considered. It is not necessary to repeat them all here. The salient points are addressed below, which include two significant cases relied upon by the Bank: *Murray v. Canada (Human Rights Commission)*, [2014] F.C. 139

(CanLII) (*Murray*) and *Kowalski v. Ryder Integrated Logistics*, 2009 CHRT 22 (CanLII) (*Kowalski*).

The Complainant's Position in Response

[19] Ms. Wilson advances essentially three submissions for her position that the Bank's motion should be dismissed. Her first submission is that the Tribunal has "broad powers to hear and amend complaints." She says that the Tribunal can do so in the interests of procedural fairness and is not bound by a decision of the Commission respecting the temporal period of the complaint. Specifically, she submits that the Tribunal is not bound to follow a decision of the Commission respecting an issue of delay, citing *Dumont v. Transport Jeannot Gagnon*, 2001 CanLII 38314 (CHRT) (*Dumont*) at paras 11-13 in this regard. She suggests that, similarly, this would apply to the Commission's Section 41(1) Decision which addresses the temporal period of the complaint. Ms. Wilson further submits that the Tribunal has the authority to amend a complaint post-referral and hear related evidence where fairness requires that result.

[20] Ms. Wilson's second submission is that the Tribunal should hesitate to strike content from a party's SOP given that 1) the Tribunal has not heard the evidence, and 2) the Act should be interpreted in a broad and purposeful manner to give full effect to the rights of individuals to live their lives free from discrimination.

[21] Ms. Wilson's third argument is that she is alleging in her SOP and her will-say that the conduct she complained of was part of a systemic discrimination problem at the Bank. She emphasizes that both background and contextualizing allegations play an important role in cases involving systemic discrimination. She cites *Richards v. Correctional Service Canada*, 2020 CHRT 27 (CanLII) (*Richards*) at para 110, for the proposition that the Tribunal is entitled to consider systemic evidence to determine whether a complainant has suffered discrimination. As well, she points out that *Richards* recognizes that systemic discrimination allegations are "notoriously difficult to prove and often a continuing phenomenon", at para 107, which further underscores the importance of considering all relevant evidence.

[22] Ms. Wilson argues that allegations of systemic discrimination should not be struck “where they are sufficiently linked to the fabric of the complaints to be within the scope of the inquiry.” Ms. Wilson links the 2010–2011 events and the 2014–2015 complaint in her submissions for the motion, at para 5, as follows:

5. ...After being harassed and then placed on disability leave in April 2011, the (sic) Ms. Wilson’s next direct interaction with the Respondent about her employment was the November 2014 interrogation/termination. Those two events are necessarily connected with each other. They are necessarily bound by the prevailing culture within the Respondent prior to 2014 – a culture that Ms. Wilson says is defined by institutionalized discrimination. Ms. Wilson submits that her evidence on the pre-2014 period will influence the Tribunal’s decision on whether discrimination occurred – and its virulence - in the 2014-2015 period. It is evidence that must be heard.

6. Ms. Wilson submits that to do otherwise would be to ignore the “systemic” part of systemic racism. If a claimant can not look at historical at events to contextualize more contemporary examples of intersecting discrimination, then the very concept of systemic racism is of no force for claimants like Ms. Wilson, and of no meaning to the Tribunal.

[23] Ms. Wilson submits that if the Tribunal does not include the evidence and allegations from 2010–2011 in its assessment of liability, its decision will be seriously flawed respecting the issue of whether discrimination occurred in 2014–2015, and whether discrimination is systemic within the Bank.

[24] In addition to these arguments, Ms. Wilson adopts and relies upon the “Law” portion of the Commission’s submissions.

The Commission’s Position in Response

[25] The Commission framed the issues in this motion as being 1) whether the disputed content in the Complainant’s SOP should be struck considering the overall content of the SOP; and 2) whether the content is background and contextual information or a substantially new allegation. The Commission contends that the dates of the complaint do not preclude consideration of evidence that pre-dates or post-dates the period expressly referenced in the complaint. Like Ms. Wilson, the Commission submits that it is premature for the Respondent to object to evidence outside the period in the complaint without a full

evidentiary record. The Commission says that the disputed content consists of introductory paragraphs that help explain what led to the period of 2014–2015 that, in turn, led to the alleged discriminatory termination of Ms. Wilson. The Commission urges that this content not be read in isolation.

[26] The Commission further submits that the Act gives the Tribunal a broad discretion to hear complaints, citing sections 48.9(1), 48.9(2), 49 and 50. The Commission relies on *Polhill v. Keeseekoowenin First Nation*, 2017 CHRT 34 (CanLII) at para 14, citing *Canada (Attorney General) v. Parent*, 2006 FC 1313 (*Parent*), as authority for the principle that this includes that the Tribunal has the authority to amend complaints.

[27] The Commission also places notable reliance upon *Richards*, which it submits summarizes the key principles derived from the case law. The Commission implicitly submits that the key case law is *Carpenter v. Navy League of Canada*, 2015 CHRT 8 (CanLII) at para 40; *AA v. Canadian Armed Forces*, 2019 CHRT 33 (CanLII); *Connors v. Canadian Armed Forces*, 2019 CHRT 6 (CanLII); *Desmarais v. Correctional Service of Canada*, 2014 CHRT 5 (CanLII) at paras 55-56; *Sugimoto v. Royal Bank of Canada*, 2006 CHRT 2 (CanLII); *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at paras 141-142; *Casler v. Canadian National Railway*, 2017 CHRT 6 (CanLII) (*Casler*); *Parent* at para 30; *Kanagasabapathy v. Air Canada*, 2013 CHRT 7 (CanLII) at paras 29-30; and *Gaucher v. Canadian Armed Forces*, 2005 CHRT 1 (CanLII) at para 9. The principles in these cases include that the Tribunal will not strike factual assertions that are relevant to the complaint.

[28] On the issue of relevance, the Commission submits that there must be some factual foundation in the complaint that establishes a reasonable nexus with what is in the Statement of Particulars. A brand new allegation not reasonably connected to anything in the complaint, essentially a new complaint, is not permitted. As stated in *Casler* at para 7, the Tribunal is to ensure that there is a link to the allegations giving rise to the original complaint and that it is not bypassing the Commission's referral mandate under the Act. In other words, a determination of scope or amendment cannot introduce a substantially new complaint that was not considered by the Commission.

[29] The Commission further submits that the *Murray* decision relied upon by the Bank is distinguishable and is not applicable to this motion because the impugned content in this case is meant as background contextual evidence.

E. Analysis & Findings

Introduction

[30] What is not in issue in this motion is highly relevant to the Tribunal's framing of the issues and its ruling about the scope of the complaint. It also is relevant to the Tribunal's determination of the applicability and usefulness of the case law provided.

What is Not in Issue

[31] It is not disputed that the Commission has the authority to screen out all or part of a complaint pursuant to section 41(1) of the Act. It is not disputed that the mid 2010–October 2011 allegations were screened out by the Commission. There is a final and binding Section 41(1) Decision by the Commission of August 8, 2017 to this effect. Ms. Wilson does not suggest otherwise; rather her submissions relate to fairness, the jurisdiction of the Tribunal to permit the complaint to include what the Commission screened out and the scope of the evidence required to permit the issues in the complaint, including the systemic issues, to be decided.

[32] Motions to clarify the scope of a complaint can arise because there is an ambiguity respecting what was referred to the Tribunal based on the history of the complaint. The Tribunal has ruled that when the Tribunal does need to consider the history of a complaint for purposes of a motion to determine the scope of the complaint, formal, binding decisions of the Commission constitute the history of the complaint: *Jorge v. Canada Post*, 2021 CHRT 25 (CanLII) at para 225. Formal decisions include, for example, a section 41(1) decision and the Commission's decision respecting what is referred to the Tribunal. In this case, no ambiguity has been identified about the content of decisions of the Commission respecting what was referred to the Tribunal or otherwise respecting the history of this

complaint. This includes that the Commission made no attempt to establish any ambiguity about what it referred to the Tribunal in its submissions.

Implications for the Legal Arguments

[33] Some of the caselaw the Commission and Ms. Wilson rely upon considered ambiguities about what was referred to the Tribunal based on the history of the complaint. Because no ambiguity is alleged here, that case law has limited relevance. It does not address the primary circumstances in this case.

[34] These parties also rely upon case law that permits amendment of a complaint when the proposed new content falls within the scope of the complaint because there is a nexus between the proposed new content and the complaint. The Commission acknowledges that this is to be distinguished from allegations that effectively consist of a new complaint, which is not permitted. In the latter case, the case law is clear that parties are not permitted to circumvent or avoid the Commission's referral process.

[35] The Commission has exercised its discretion respecting referral in issuing a Section 41(1) Decision that concerns the disputed content in issue here. The Commission's submissions focus on the law respecting amendments in cases where there is no pre-existing relevant decision of the Commission specifically addressing the content of a proposed amendment. *Casler* concerned a decision of the Commission pursuant to section 41(1). However, that decision was negated by subsequent decisions on judicial review, and a re-referral of a broader complaint by the Commission. In the result, there was no binding section 41(1) decision that limited the temporal aspect of the complaint. The Commission's submissions do not explain 1) why Ms. Wilson should be permitted to circumvent the Commission's Section 41(1) Decision and its referral process; and 2) why Ms. Wilson should be permitted to resurrect "old" allegations that were previously found to be "separate and independent" from the 2014–2015 allegations and dismissed by the Commission.

Re-Framing the Issues

[36] The issue, with respect, is not whether the disputed content in the Complainant's SOP should be struck considering the overall content of the SOP. This approach fails to consider the existence of the Commission's Section 41(1) Decision.

[37] Further, the issue is not, as the Commission suggests, whether the content is background and contextual information or a substantially new allegation. It is not the case that the content is only sought to be included for background and context. Ms. Wilson describes the content as "background and contextualizing allegations in the context of cases involving systemic discrimination" (emphasis added). Ms. Wilson takes the position that this content is part of a systemic discrimination issue at the Bank and is highly important such that its omission would constitute a serious flaw in the Tribunal's decision. Ms. Wilson requests that the Bank's motion objecting to the disputed content be dismissed in its entirety. This would permit the disputed content to remain and be used for all purposes, including determinations of liability. The Tribunal concludes that the primary intent of the requested inclusion of this content is for purposes of liability. Nor, as the Commission submits, is the issue whether the impugned content a substantially new allegation. The content was addressed by the Commission's Section 41(1) Decision.

[38] Only the content referencing the bridging period between October 2011 and November 2014 is arguably "new". It was not mentioned in Ms. Wilson's complaint. However, this time period is simply referenced in Ms. Wilson's will-say without any particulars about what allegedly happened that would be arguably relevant to the allegations in 2014–2015. Without particulars from Ms. Wilson, the Tribunal cannot conclude that there is a new allegation within this time period and assess its relevance to the existing complaint, as referred.

[39] As stated at the outset, the issues are properly reframed as:

- 1) What is the scope of the complaint that the Commission referred to the Tribunal?
- 2) Can the disputed allegations in 2010–2011 be determined by the Tribunal? and,
- 3) If the Commission did not refer the 2010–2011 events to the Tribunal, can they still be considered for another purpose, such as narrative information?

The Murray Decision is Relevant

[40] As indicated, the Commission and Ms. Wilson argue that the *Murray* case relied upon by the Bank should be distinguished and is inapplicable. The Tribunal concludes that *Murray* is more on point than other case law relied upon in this motion.

[41] In *Murray*, the Federal Court judicially reviewed a decision by the Commission to dismiss a complaint. The Federal Court decided, based on the parties agreeing to such an order, to refer two issues back to the Commission for further investigation. The Commission then referred the complaint, using broad language, to the Tribunal. The language did not specify that the referral was narrowed to those two issues. A dispute arose before the Tribunal about the scope of the complaint. On judicial review of the Tribunal's decision on this issue, the Federal Court held that only allegations related to the two issues that were referred back to the Commission could be referred forward to the Tribunal. The court in *Murray* held that "the Commission's [referral] letter cannot be disconnected from the long history of the complaint and the context into which the Tribunal was being seized of Mr. Murray's complaint." The "long history and context" was a prior decision by the Federal Court that determined that the Tribunal was only seized of two issues and, therefore, could only refer two issues to the Tribunal. In other words, in *Murray*, the history of the complaint was relevant. What was relevant and appropriate history to consider was the prior decision of the Federal Court to refer two issues to the Commission to reconsider.

[42] Likewise, the history of the complaint is relevant here. That history is the Section 41(1) Decision of the Commission. Both *Murray* and this case share the commonality of a pre-existing binding decision that must be respected. *Murray* is relevant to the Tribunal's consideration of the scope of the complaint referred to it because the court in *Murray* addressed what was not within the jurisdiction of the Commission in that case.

[43] The cases to which the Commission and Ms. Wilson refer do not involve prior decisions of the Commission to not permit content in a complaint to proceed. They do not involve a Commission's decision to not refer content in a complaint to the Tribunal. They are, therefore, not particularly helpful to the Tribunal.

The Key Point

[44] The Tribunal understands that Ms. Wilson believes that the Tribunal has the authority and discretion to amend her complaint despite the Section 41(1) Decision by the Commission. Ms. Wilson is adamant that the Tribunal must consider the 2010–2011 allegations to find that discrimination occurred in 2010–2011, to find liability again in 2014–2015, and to provide a foundation for a ruling that systemic discrimination has occurred in her case, as argued in her submissions.

[45] However, and this is the key point of this ruling, the Tribunal does not have the authority to amend a complaint to re-insert content into a complaint that has been lawfully removed by a formal decision of the Commission as an exercise of its statutory authority. Any amendment sought by a party must involve content not previously ruled out by the Commission for the Tribunal to have jurisdiction to amend. Otherwise, the Tribunal would engage in a review of a Commission decision not to deal with part of a complaint pursuant to section 41(1), which it cannot do.

[46] In this regard, the Tribunal does not agree with Ms. Wilson’s interpretation of *Dumont*. *Dumont* is distinguishable because it addresses the Tribunal’s continued discretion to address a complaint once it has been referred for an inquiry. In contrast, Ms. Wilson is asking the Tribunal to consider allegations that have been specifically screened out and dismissed by the Commission. That is a decision that ends a matter as opposed to a decision of the Commission that directs that a matter proceeds.

[47] The Tribunal does not have the power to review the way in which the Commission chooses to exercise its discretion to not consider all or part of a complaint pursuant to Section 41(1) of the Act for reasons of delay, fairness or for any other reason. In short, the reasons argued by Ms. Wilson for amendment of the complaint to re-insert content that the Commission screened out are not properly considered by the Tribunal. The Tribunal lacks jurisdiction to do so.

[48] In this regard, it is highly relevant that Ms. Wilson is attempting to re-introduce now the same arguments that were in her original complaint respecting the April 2010–October 2011 period. The factual allegations of harassment prior to her return to work in 2014 in the

original complaint are further particularized in paragraphs 7-14. They primarily involve alleged harassment by her managers based on race leading to disability requiring a leave from work, followed by discriminatory interference with her medical leave and benefits. Ms. Wilson continued to explain the relevance of the earlier allegations at paragraphs 20-23 in her original complaint and the continuing nature of her allegations. Her main points are underscored below:

20. Ms. Wilson was terminated and "targeted" at Scotiabank for a series of intersecting reasons: her disability leave, her race, and the identity of her former common-law partner, in violation of 3(1), 7(a) and 14(1)(c) of the Canadian Human Rights Act.

21. First, Ms. Wilson was harassed during her employment on the basis of her race. This long-standing harassment was condoned by Mr. Nelson.

22. Second, Ms. Wilson was harassed while on disability-leave. Her disability was aggravated by receiving calls from Ms. Lamanna and Mr. Nelson telling her to return to work or she would be fired, by the delay in receiving her disability insurance payments, and by learning that this delay was the direct result of Ms. Lamanna and Mr. Nelson reporting that Ms. Wilson was "faking" to the insurer.

23. In the final culminating incident, Scotiabank brought Ms. Wilson in for a meeting to discuss her return to work, and used this meeting to accuse her of fraud without evidence or warning. These allegations were based solely on the identity of Ms. Wilson's common-law partner, who unbeknownst to Ms. Wilson, had been criminally charged with fraud.

24. Scotiabank's desire to "get rid" of Ms. Wilson had already been clearly established through the way in which she was treated during her employment and while on disability leave. Scotiabank used these unsubstantiated allegations of fraud as an excuse to terminate her employment instead of accommodating her return to work. (emphasis added)

[49] The allegations of harassment said to have occurred both before and during her medical leave, up to October 2011, were screened out by the Commission. Ms. Wilson's SOP and will-say contain nothing substantively new in this regard. The only exception is the addition of the October 2011–2014 allegation for which no particulars or substantive information is provided. The Tribunal does not have the jurisdiction to decide whether to uphold allegations that were expressly excluded from consideration as part of the complaint by the Commission in a decision that was not challenged in 2017 and became final. This is

so even if the Commission reached an unreasonable decision. The Tribunal has no jurisdiction to change that result.

Implications for Systemic Discrimination Claim

[50] Before leaving the issue of whether the 2010–2011 allegations are included in the scope of the complaint, Ms. Wilson’s assertion that this is a complaint about systemic discrimination should receive further comment. There is no express mention of systemic discrimination in Ms. Wilson’s complaint, her SOP or her will-say, as there is in the submissions she filed for this motion. However, with regard to the emphasized portion of the quotation above from paras 20-23 of her original complaint, Ms. Wilson asserted what may possibly be a generalized basis for such a claim in her original complaint or aspects of systemic discrimination. She claims that the Bank’s desire to get rid of her had been established in 2010–2011, that her treatment upon her return to work was a “culminating incident”, and that there were intersecting grounds to the discrimination she allegedly experienced. To be clear, the Tribunal is making no decision here about systemic discrimination. It is understood that Ms. Wilson wishes for the Tribunal to make a finding of ongoing systemic discrimination based on a combination of the 2010–2011 and the 2014–2015 allegations and/or on the alleged basis that the discrimination (on different but intersecting grounds) continued over the 2010–2015 period.

[51] The Commission had an opportunity to investigate the facts before making its Section 41(1) Decision and appears to have concluded that the alleged discrimination in 2010–2011 ended in October 2011. Based on the available record, it is possible that this is because the discriminatory actions alleged to have been taken by the Bank respecting Ms. Wilson’s disability appeared to have ceased and/or been corrected by October 2011. It may have appeared to the Commission that Ms. Wilson simply remained on disability leave after October 2011. Ms. Wilson did not file a complaint by October 2012, within the statutory time limit. In her complaint, Ms. Wilson did not allege further discriminatory interaction with the Bank until it became time for her to return to work.

[52] The Commission also had an opportunity to consider the 2014–2015 allegations at the same time it considered the 2010–2011 allegations. This is significant. As noted, the

Commission found in its Section 41(1) Decision that the earlier allegations are “separate and independent of the remaining allegations”. It reached this conclusion after presumably considering both sets of allegations in the complaint. The Commission likely turned its mind to whether the alleged discrimination continued from 2011 until 2014, when Ms. Wilson returned to work, to determine whether the discrimination was ongoing, as this is a foundational factual determination when a complaint may have been filed out of time.

[53] Today the Commission’s Section 41(1) Decision, which is based upon its finding that the earlier allegations are separate and independent from the later allegations, has the practical effect of determining that the complaint does not involve a continuation of systemic discrimination spanning the entire period of 2010–2015 based on all allegations of discrimination in the complaint, as filed. The Tribunal is not free to decide for purposes of liability that the earlier allegations are not separate and independent from the 2014–2015 allegations. To do so would be to find that the discrimination alleged in the complaint, systemic or not, was of a related and continuing nature. Such a conclusion would negate the Section 41(1) Decision. Again, even if the Section 41(1) Decision is unreasonable, the Tribunal has no jurisdiction to change that final decision.

[54] However, that does not mean that there can be no claim of systemic discrimination within the permitted time period of the complaint that was referred to the Tribunal. Rather, the effect of this determination by the Commission is to negate potential liability for systemic discrimination over the entire 2010–2015 period by requiring that the 2010–2011 allegations in the complaint not be considered as allegations that can give rise to liability on their own or in addition to the later allegations.

[55] The submissions Ms. Wilson filed for the motion reference systemic discrimination, racial profiling and intersecting grounds of discrimination. It will be appropriate to clarify what legal issues are included in the complaint before the Tribunal. This issue will be addressed in case management.

Can the Disputed Content Be Used for Purposes Beyond Liability?

[56] The Tribunal has considered whether paragraph 2 of the SOP and the corresponding portion of Ms. Wilson's will-say can remain as narrative. In this context, "narrative" means that the disputed content would remain for purposes of background, to aid the Tribunal's understanding of the events that occurred and for factual and evidentiary assessments but would not form a basis for a finding of liability against the Bank for the period 2010–2011.

[57] Parties are to include only relevant information in their SOPs. Likewise, evidence presented at the hearing must be relevant. Relevant background and contextual evidence about events that precede the actual allegations in a complaint are regularly permitted in proceedings before this Tribunal.

[58] However, in this case, the Tribunal must consider and reconcile several procedural concerns. For one matter, the Commission's Section 41(1) Decision must be respected. The Tribunal should not signal that it is possible for parties to "work around" a final and binding decision of the Commission by labelling the content as narrative or contextualizing evidence. This is a concern because the specific facts that give rise to the 2010–2011 allegations in the complaint would likely be asserted at the hearing.

[59] Also, there may be a significant amount of "background information" in this case. Hearing additional evidence that possibly may not turn out to be directly relevant to the issue of liability or that could potentially give rise to further issues would not bode well for the efficiency and focus of the hearing. If the information is permitted as background, the Bank will likely wish to respond because of the subject matter. Given the Tribunal's direction to the parties respecting the issue of prejudice below, it is reasonable to also anticipate that the Bank, Ms. Wilson or the Commission may wish to address concerns about prejudice at the hearing. This may add considerably to the complexity and length of the hearing.

[60] Of further potential concern, as noted, the dispute over this content extends beyond its use as mere background. The issue of its use to establish liability, including systemic discrimination, for the 2010–2011 allegations is addressed above and is not permitted. However, if Ms. Wilson is not allowed to use the 2010–2011 allegations to establish liability

for discrimination, she wishes to use them to establish liability for discrimination concerning the 2014–2015 allegations.

[61] The Bank objects to the use of the earlier factual information as even background or context. It relies upon *Kowalski* at paras 11-12, where the complainant argued that allegations that had been screened out of consideration by the Commission pursuant to section 41(1) should be permitted to remain as background information. Member Hadjis ruled that the inclusion of these allegations in the complainant's SOP was not just for background but was "...rather an attempt to litigate issues that the Commission decided not to refer to the Tribunal." Such a conclusion may be reached when a party includes content in an SOP that has been screened out by reason of a decision of the Commission. In this case, Ms. Wilson pressed to have content that had been removed from the referred complaint included as allegations or narrative. The former position is an attempt to re-litigate issues decided by the Commission and is not permitted.

[62] However, this does not negate the fact that the Commission's decision, and Ms. Wilson's SOP and will-say must be approached in a manner to ensure that Ms. Wilson is fully permitted to proceed with the complaint that the Commission did allow to proceed to inquiry. The Tribunal, therefore, considered whether the alleged facts underlying the 2010–2011 allegations could theoretically be used to help establish liability for discrimination concerning the 2014–2015 allegations.

[63] The Tribunal considered the nature of what a Section 41(1) Decision is: the factual information that gives rise to the 2010–2011 allegations cannot be used to establish liability for allegations in that period because a complaint about the earlier events has been filed out of time. However, the Tribunal observes that, in making the Section 41(1) Decision, the Commission did not issue an evidentiary ruling for the hearing of the complaint it eventually referred; the Commission found that the 2010–2011 allegations were separate and independent for purposes of a complaint. The Commission did not go so far so as to conclude that the earlier events were of no relevance to future events. The Commission did not decide that information within the earlier period could not be considered for another reason by the Tribunal in the course of its inquiry into the 2014–2015 allegations, nor does the Commission have the jurisdiction to make such an evidentiary ruling for the Tribunal.

[64] In this regard, it is possible that the facts that gave rise to the earlier allegations may be relevant to issues in this case apart from any liability they could independently establish. For example, the facts that gave rise to the earlier allegations may possibly be relevant to the witnesses' interpretation of events in 2014–2015. A witness's interpretation of events and their perceptions are often influenced by past experiences and interactions. An absence of context provided by a witness's past experience could lead to an incorrect assessment by the Tribunal of testimony respecting the 2014–2015 allegations, including the reasonableness, rationality and credibility of witnesses.

[65] Credibility is likely to be an important issue in this case respecting the reasons for what occurred. While intention is not a required element to establish discrimination, Ms. Wilson is alleging motivations by the Bank's witnesses in regard to the 2014–2015 allegations. In paragraph 13 of her SOP, Ms. Wilson states:

Ultimately Scotiabank brought Ms. Wilson in for a meeting purportedly to discuss her return to work, and then used this meeting to accuse her of fraud without evidence or warning. These allegations were based on her disability leave, her race, and the identity of her former common-law partner, who unbeknownst to Ms. Wilson, had been criminally charged with fraud. Prior to the interrogation, Scotiabank's desire to "get rid" of Ms. Wilson as discussed herein influenced the way in which she was ultimately interrogated and terminated.

[66] As noted, Ms. Wilson asserts that the Bank wished to "get rid of her" as an employee and says that this was established in the 2010–2011 period. In deciding to screen out the 2010–2011 allegations, the Commission did not extend its decision to ruling out the issue of motivation and intention regarding the 2014–2015 events, including Ms. Wilson's termination.

[67] In the event that Ms. Wilson's relationship with the Bank, prior to its investigative meeting upon her return to work, is found to be relevant to help understand people's attitudes and perceptions, it would be relevant, fair and of assistance to the Tribunal's inquiry to have contextual evidence about the prior interactions between Bank witnesses and Ms. Wilson.

[68] Similarly, the 2010–2011 allegations can, in theory, be used substantively for the purposes of liability in the 2014–2015 if they are intended to be introduced as evidence that

would support the 2014–2015 allegations. For example, the fact (if proven) that one of Ms. Wilson’s managers told her that she would be fired if she did not return from her disability leave is evidence, in theory, that that manager contemplated firing Ms. Wilson. That is evidence that might make it more likely that the Bank wanted to fire Ms. Wilson when she returned to work in 2014. If so, that may support Ms. Wilson’s claim that the Bank did not do a proper investigation before firing her in the 2014–2015 period. The Tribunal concludes that evidence respecting prior events may potentially be used in a substantive sense for the purpose of determining liability regarding the 2014–2015 allegations.

[69] Accordingly, there may be relevant evidence from the 2010–2011 period, depending on what is presented at the hearing. In this regard, this case differs from *Kowalski*. As explained above, in that case, allegations that were screened out of the complaint by the Commission were not permitted at the hearing. The complainant stated that he was not asserting that the allegations were discriminatory practices and was only asking to use the content as background. Member Hadjis declined to allow its use as background. Member Hadjis found that the content was irrelevant to the remaining allegations in the complaint that was referred by the Commission. *Kowalski* may be distinguished because the background information sought to be introduced was irrelevant to the complaint. In this case, based on the evidentiary record at the hearing, disputed information may have sufficient relevance to the complaint that was referred by the Commission, in which case related evidence may be properly admitted.

[70] If evidence respecting the facts that underlie the earlier allegations is accepted at the hearing because it is determined to be relevant to the 2014–2015 allegations, the Tribunal can control how that evidence is used in the course of decision-making and thereby ensure that the Commission’s Section 41(1) Decision is not negated.

[71] It is premature, however, to attempt to draw a bright line regarding the limits of permitted narrative information without the context of the evidentiary record at the hearing. Determinations about the relevance of evidence will be made at the hearing, not in an abstract manner now. The Tribunal is not prepared to make a decision at this time respecting the admissibility of evidence respecting matters prior to November 2014. It will do so as required at the hearing.

Addressing Concerns About Prejudice

[72] Given the Tribunal's decision to not permit the 2010–2011 allegations to be used as such, it is not necessary to make a determination about prejudice to the Bank in these reasons. However, the Tribunal wishes to comment on the issue of prejudice regarding whether the 2010–2011 allegations may be used as narrative information and/or for purposes of demonstrating that it is more likely than not that the 2014–2015 allegations are true. This comment applies to the use of older evidence, in general.

[73] Prejudice may be an issue for both parties at the hearing. Either may assert an inability to introduce evidence in response to alleged events that pre-date the 2014–2015 allegations. The Bank indicates that it wishes to introduce evidence dating back to 2009. This may pose obstacles for Ms. Wilson.

[74] In any event, the Bank says it did not preserve the evidence respecting the alleged incidents in 2010–2011 in its submissions for the motion. The Bank's factual assertion should have been supported by evidence. It is not. It is also not accompanied by any detail. The Tribunal is not prepared to make a finding about prejudice attached to events prior to 2014 without evidence and explanation respecting the alleged loss of specific evidence.

[75] The Tribunal will address any issues of prejudice raised by any party respecting any alleged loss or destruction of evidence at the hearing based on a relevant evidentiary record.

F. Addressing October 2011–2014 Events

[76] The allegations said to exist for the period October 2011–2014 in Ms. Wilson's will-say are not particularized in that document or in her SOP. There is nothing filed with her response to the Bank's motion to provide detail respecting what the allegations in this period may be. It is the Tribunal's understanding that Ms. Wilson was not at work during this period and that she was in receipt of disability benefits as of October 2011. It is not apparent on its face what might be relevant from this period.

[77] Ms. Wilson did not ask to be permitted to amend her complaint for the purpose of allowing this unspecified content nor did she ask to amend her SOP to provide these

particulars on the basis they would be relevant to a related complaint for the October 2011–November 2014 period.

[78] There is no basis in the record for the motion upon which the Tribunal could conclude that the harassment now alleged by Ms. Wilson during October 2011 until November 2014 is relevant to the existing complaint and, if so, how. Neither is there a sufficient basis for the Tribunal to determine whether information from this period ought to be permitted as either an allegation or background/context. Nothing can be assessed based on the bald assertion that additional allegations exist. The Tribunal notes that particulars respecting this time period were known by Ms. Wilson when she filed her complaint and should have been identified there and in her SOP. In the circumstances, the Tribunal declines to make an order that would have the effect of permitting amendment of the scope of the complaint for purposes of liability to include the October 2011–2014 period.

[79] If Ms. Wilson wishes to provide evidence respecting events from October 2011 until November 24, 2014 at the hearing, she is to provide particulars to the Bank, identify the overall intended purpose of the evidence and ascertain whether there is any objection. If so, the Tribunal will provide further directions.

G. Conclusion respecting 2010–2011 Allegations

[80] The Commission decided that the 2010–2011 allegations were separate and independent of the 2014–2015 allegations and declined to consider a complaint about the former because a complaint was not filed within a year of those events. As a result, the complaint about the earlier allegations was not referred to the Tribunal for inquiry by the Commission. The earlier allegations cannot be relied upon to establish liability for events prior to the complaint before the Tribunal, as referred. Even if the Commission arrived at an incorrect result in making its Section 41(1) Decision, the Tribunal has no jurisdiction to change that decision.

[81] The Tribunal declines to issue a ruling striking out the relevant portions of Ms. Wilson’s SOP and will-say. The content may remain for purposes of any relevant issues that may arise at the hearing, apart from the purpose of establishing liability by the Bank for

the 2010–2011 allegations. The Tribunal will issue any required rulings at the hearing respecting the potential admission and use of evidence from the 2010–2011 period. Before doing so, the parties will have an opportunity to address any issues of prejudice as a result of the proposed admission or rejection of such evidence.

III. Disclosure Motion

A. What Disclosure is Requested

[82] Ms. Wilson requests the following production:

- A) Any or all documents in the Bank’s possession including emails or memoranda sent to Bank staff at Ms. Wilson’s branch discussing the practice of Bank staff conducting work while: (a) using another staff member’s terminal; and/or (b) using another staff member’s employee number or ID, including identification of the steps taken by the Bank to gather these documents for production;
- B) Any Bank documents: (1) showing Ms. Wilson’s “Employee ID” as assigned by the Bank; and (2) demonstrating the relevance between the Employee ID number and accessing documents; and,
- C) The last known contact information for Sarah Yeboah, Agnes Owusu (or Agnes Nyame-Owusu), Imelda Aggabao, Vera Mijatovic, and Mary Lamanna (or Mary Anna Atsidakos).

[83] With respect to the request in paragraph A above, Ms. Wilson asks that she be in a position by way of the Tribunal’s ruling to verify that there has been a reasonable electronic search for relevant documents.

B. Issues

[84] At the disclosure stage, the core question is whether the documents sought are arguably relevant to the issues in the case. For a document to be required to be produced, it must be arguably relevant. The Tribunal does not permit a fishing expedition: *Guay v.*

Canada (Royal Canadian Mounted Police), 2004 CHRT 34 (CanLII) at para 43. Similarly, information related to locating witnesses will be required to be produced where the witnesses' evidence is rationally connected to an issue in the case, which is another way of describing "arguably relevant".

[85] In addressing disclosure, the Tribunal is obliged to consider proportionality as well as fairness. The Tribunal must balance the parties' rights to a full and ample opportunity to make their case with its obligation to conduct its proceedings fairly and expeditiously (see sections 48.9(1), 50(1) and 50(3)(c) of the Act. See also *Nwabuikwu v. Royal Canadian Mounted Police*, 2020 CHRT 9 (CanLII) at para. 16.)

C. Analysis & Findings

[86] As explained earlier, Ms. Wilson asserts that the Bank used its investigation into alleged fraud as an opportunity to terminate her based on her race, disability and family/marital status. In short, she alleges that the Bank's investigation was motivated by discriminatory intent and also did not establish any legitimate grounds for her termination. In contrast, the Bank asserts that Ms. Wilson was terminated as a result of security and regulatory concerns identified during its legitimate investigation. In particular, the Bank says that it was concerned about documents it believed Ms. Wilson had improperly removed from the Bank and provided to her former partner. The Bank asserts that these documents bear Ms. Wilson's employee identifying information which is persuasive evidence of her involvement.

[87] The documents and witness information requested in Ms. Wilson's motion for disclosure are said to be relevant because they may permit Ms. Wilson to challenge the information the Bank uses to connect her to the documents identified in her former partner's possession. The Tribunal agrees that documents which meet this criterion are arguably relevant to Ms. Wilson's argument that someone else at the Bank could have provided the documents to a third-party familiar with her former partner or to her partner directly. In turn, this is relevant to Ms. Wilson's allegation that the investigation was biased by discriminatory perceptions and assumptions about her. As a result, the Tribunal concludes that the Bank

must make further disclosure in this regard, subject to conditions of relevance and proportionality.

[88] Ms. Wilson's request that she be in a position to verify the electronic search for relevant documents is, in part, due to the Bank's indication that Ms. Lamanna had not been in its employ and did not appear in the Bank's system. It appears from the email evidence produced by Ms. Wilson for her motion in reply that a Ms. Lamanna did work at the Bank with Ms. Wilson and that she had an email address at the Bank.

[89] In all the circumstances, it is not unreasonable to proceed in a manner that permits verification of the methodology used for the electronic search, if needed. It is not uncommon in cases before the courts that involve an electronic search for documents for the parties to communicate, in any event, about search efforts. Electronic searches can trigger a significant amount of work for both parties because of the amount of electronic communication between employees and the potential for a large number of irrelevant documents to be initially identified by an electronic search and require review. Parties are often able to agree upon steps that minimize the amount of work for all concerned. It is, therefore, reasonable to proceed in a manner that encourages prior agreement about the conduct of the search between the parties. As well, the potential ability of all parties to access appropriate and relevant information about how the search for electronic records was conducted increases the assurance of each party that the search was conducted reasonably if the results are less than or significantly more than what is reasonably expected. The sharing of search methodology information may lead to the avoidance of or early resolution of further disputes about the reasonableness of the search between the parties and thereby contribute to the efficiency of the proceeding.

Working Using Other Staff Terminals or IDs

[90] The following documents must be produced:

Working Using Other Staff Terminals or IDs

Any or all documents in the Bank's possession including emails or memoranda sent to Bank staff at Ms. Wilson's branch discussing the practice

of Bank staff conducting work while: (a) using another staff member's terminal; and/or (b) using another staff member's employee number or ID.

[91] The intent is to ensure that the Bank conduct a search that is reasonably capable of retrieving documents on the topic of Bank staff conducting work while using another staff's terminal and/or employee number or ID. These would include documents that were sent to any staff at the Branch during the period(s) relevant to the complaint.

[92] In her motion, Ms. Wilson asks that the search include a search of the electronic documents of herself and all other staff at the Branch. Based on the information provided for the motion, it may not be proportionate or necessary for the search to include a search of the electronic documents of all other staff at the Branch. The motion materials indicate that any emails or memoranda sent to staff at Ms. Wilson's Branch would have been authored by management at the Bank. It is reasonable to assume that, at the very least, even if prepared by a non-management employee, those management personnel who work at and/or are responsible for the management of Ms. Wilson's Branch at the Bank would have been copied on such communications. It is also assumed by the Tribunal that there are more staff at the Branch than managers working at this Branch or otherwise employed within the Bank with management responsibility for this Branch. It should be less work for the Bank to focus its search upon relevant managers as opposed to all the staff who worked at the Branch during the relevant period.

[93] This direction is not necessarily a final ruling. It is hoped to be an efficient, proportional and effective approach to the search that is requested in the motion. The scope of the managers or staff to be included in the search are subject to adjustment, to be determined by the Tribunal, if required, through case management.

[94] Accordingly, as a preliminary direction, the Bank is to conduct a search for electronic and printed communications and documents to Ms. Wilson or other staff, authored by or copied to Ms. Lamanna and any other manager at the Branch or other managers within the Bank responsible for the Branch relevant to the subject matter, as described above, including but not limited to, any email, attachment, memo, other document, policy, file or folder containing branch records (the "documents").

[95] For clarity, the search for electronic documents is to include any archived or deleted electronic communications (emails and their attachments) that fall within the applicable parameters in addition to those documents that have not been archived or deleted. This is required to ensure that the search is complete.

[96] As a further preliminary direction, the parameters of the search are to be limited to periods of time that are relevant to the complaint (the “prescribed period”). It appears from the motion materials that the prescribed period should include November 1, 2010 to December 31, 2010 and March 1 to March 31, 2011. However, the Tribunal is not making a final determination about what the prescribed period is at this point in time as it has not necessarily received complete submissions from the parties on this point. The Tribunal will wait to hear from the parties in the event any dispute arises in this regard. It is also possible, for example, that further information about the relevant time period may be discovered by the search. Any dispute may be resolved in the course of case management.

[97] The parties are to make best efforts to reach agreement on the relevant prescribed period or periods within 10 business days of the receipt of this ruling.

[98] As noted, Ms. Wilson requests a summary of the steps taken by the Bank to find the documents, as necessary. The Bank is to maintain a record of its efforts in this regard. Should a party make a reasonable inquiry for information respecting the applied search methodology, the Bank is to disclose the steps it has taken to gather information and complete the search.

[99] As explained above, it is usually the case that electronic searches will initially lead to the identification of a large number of documents that will need to be reviewed and sorted for arguable relevance. There are no formal rules about the conduct of electronic searches in proceedings before the Tribunal as there are in some other legal contexts. This topic is not addressed in the Tribunal’s *Rules of Procedure under the Act (03-05-04)* (the “Rules”); rather each case involving electronic production before the Tribunal is addressed on an individual basis based on the Tribunal’s authority and discretion respecting procedural issues, as is recognized in section 50(3)(e) of the Act.

[100] To manage and minimize the anticipated delay caused by review of the initial results of the electronic search, the Tribunal offers the following suggestions to be considered by the parties. If necessary, the Tribunal may hear from the parties and provide any binding rulings that may be required respecting implementation of the search. The suggestions below are non-binding, but may be helpful to the efficient implementation of the Tribunal's order:

- i. The parties should make best efforts within 20 business days of this ruling to agree upon a deadline by which the Bank will have conducted its initial electronic search(es) to identify documents that fall within the existing parameters of the search (the "initial search") in accordance with the Tribunal's preliminary directions above and the parties' agreement respecting the prescribed period.
- ii. As applicable, the results of the initial search should be de-duplicated and any plainly irrelevant content that does not require detailed review removed from the results generated by the initial search.
- iii. The Bank should promptly inform the other parties of the number of documents that meet or may meet the parameters of the initial search following deduplication and removal of plainly irrelevant content.
- iv. If it is apparent from a preliminary review of the results that the initial search has identified a large number of irrelevant documents notwithstanding steps to reduce the content to what is or may be arguably relevant, the parties should make best efforts to agree upon key words to be used to search and limit the results to what is arguably relevant. Counsel for the parties should propose reasonable strategies in this regard and make best efforts to work together cooperatively.

[101] If the arguably relevant documents can reasonably be produced from the results of the initial search within 60 calendar days of its completion, the Bank is to advise the other parties and proceed to do so on or before the 60-day deadline; if not, the parties are to make best efforts to agree upon a reasonable deadline for completion.

[102] The parties are to ensure that the Tribunal is kept updated and informed of any dates or agreements respecting completion of the search.

[103] Should the parties be unable to agree upon the need for or content of additional search parameters or other aspects of implementation of the search or fail or be unable to meet agreed upon timelines, or fail to agree upon timelines, the Tribunal will address these

matters through case management upon request, and, if necessary, issue binding directions after hearing from the parties about any disputed issues.

[104] To be clear, as the Bank is required to produce any or all documents in its possession containing the relevant subject matter, the search is to include paper documents.

[105] Nothing in this ruling is intended to require production of documents or communications subject to privilege. Should any issues respecting privilege arise that the parties cannot resolve amongst themselves, the issue will be addressed through case management.

Ms. Wilson's Employee ID

[106] Ms. Wilson requests production of any and all Bank documents showing Ms. Wilson's "Employee ID" at the Bank. The Bank says that it produced documents to demonstrate what Ms. Wilson's Employee ID was and what her Operator ID was during the relevant time for this complaint, and it provided something called an Operator ID Record based on her Employee ID in its response to her motion.

[107] Ms. Wilson says she has no knowledge of this number. Ms. Wilson does not allege that the number provided is incorrect or that it changed, only that she is unfamiliar with it.

[108] It may be that Ms. Wilson is unfamiliar with the number assigned to her on the documents provided because it is a number assigned by the Bank for internal purposes. No evidence or argument has been offered by Ms. Wilson to demonstrate a reasonable basis for the Tribunal to doubt the accuracy of the number provided by the Bank.

[109] Ms. Wilson also has not satisfactorily explained why the Bank should be required to produce each and every document in its possession that bears her Employee ID number. The Tribunal expects that this would be a monumental task and serve no useful end. Documents are not arguably relevant simply because they bear Ms. Wilson's Employee ID. The Tribunal is not persuaded that it should order the production of further documents to show Ms. Wilson's Employee ID at the time relevant to the complaint at this juncture.

Accordingly, the Bank is not required to provide more documents with Ms. Wilson's Employee ID number.

Employee ID and Accessing Documents

[110] The second portion of Ms. Wilson's request respecting her Employee ID number is for disclosure of documents in the possession or control of the Bank demonstrating the relevance between the Employee ID number and Bank employees accessing documents at the Branch. Ms. Wilson appears to presume that there would be documents that demonstrate the relationship between the Employee ID number and accessing documents which is the underlying premise of the Bank's position. However, there is no evidence from Ms. Wilson in this regard, nor is it apparent what documents would need to contain to demonstrate relevance between the Employee ID and accessing documents among typical office records, beyond an express explanation in this regard.

[111] In response to a previous request, the Bank says that it has no documents respecting whether employees at the branch were sharing terminals in a manner that shared Employee ID numbers. Ms. Wilson says that she does not know how her Employee ID number could be used to show that she accessed company accounts.

[112] It may be that there is no document that expressly states that employees were sharing Employee ID numbers, despite Ms. Wilson's recollection, and that there are no documents that state how an Employee ID number is used to access accounts. The Tribunal recognizes that this may be more a request for the Bank's argument or for evidence from its witnesses and is perhaps not properly characterized as a request for documents.

[113] As noted, the Bank says that it has no documents respecting whether employees at the branch were sharing terminals in a manner that shared Employee ID numbers. However, this is not quite what Ms. Wilson is requesting. She asks for documents that would be relevant to how her Employee ID number could be used to show that she accessed company accounts.

[114] The Bank should clarify whether it has existing documents that indicate that Employee ID numbers are applied to and used to access documents. If it does, those are to

be produced. For example, if documents/policies exist that direct employees to enter or apply their Employee ID number in preparing documents or communications when working at terminals to record their access to company accounts, that should be produced. Any such written instructions or policies are clearly relevant to the Bank's position that Employee ID numbers become associated with client documents. If there are documents that are relevant to how Ms. Wilson's Employee ID number could be used to record or demonstrate that she accessed relevant company accounts, those are to be produced by December 2, 2022. If the Bank requires any further direction in this regard, the Bank may request further case management.

[115] If relevant documents exist but the Bank believes that their disclosure would cause undue hardship to third parties such as clients respecting personal or other matters, the Bank may request further directions and, if necessary, seek a confidentiality order pursuant to section 52 of the Act.

Witness Contact Information

[116] Ms. Wilson requests the last known contact information for Sarah Yeboah, Agnes Owusu (or Agnes Nyame-Owusu), Imelda Aggabao, Vera Mijatovic, and Mary Lamanna (or Mary Anna Atsidakos). Ms. Wilson indicates that these individuals were employees at the same branch as her and that they will be able to testify about the practice of employees using each other's workstations and credentials.

[117] As noted, in part, above, the Bank initially responded that it did not have employees by the names of Agnes Owsusu or Mary Lamanna. Ms. Wilson provided alternative names in her reply.

[118] The Tribunal agrees with and adopts the reasoning of Member Gaudreault in *Nur v. Canadian National Railway Company*, 2019 CHRT 5 (CanLII) ("*Nur*") at paras 214-233 respecting the appropriate approach to be taken to requests for production of witness contact information from a party that objects to sharing this information. Fundamentally, such disclosure should be required where the production of this information allows another party a reasonable opportunity to present their case through the evidence of relevant witnesses.

Naturally this is subject to the Tribunal's considerations of efficiency and proportionality which apply to all procedural decisions.

[119] Each request for disclosure of witness contact information is to be assessed on its own facts and will be considered based on arguable relevance, efficiency and proportionality. However, as a basic principle of fairness, when a party intends to subpoena a witness because their evidence is arguably relevant and their whereabouts are unknown and not readily ascertainable, another party who is in possession of the witness contact information is obliged to disclose such information, upon request.

[120] The issue is whether the testimony from these witnesses is arguably relevant. Ms. Lamanna is identified in the SOPs. Ms. Wilson says that her evidence is expected to be relevant to the issue of whether management was aware of or addressed the practice Ms. Wilson says existed of employees using each other's Employee ID numbers by virtue of sharing workstations or technology. She says that Ms. Lamanna was involved in workplace communications in this regard. Ms. Lamanna's testimony is arguably relevant.

[121] Ms. Wilson asserts that the other individuals named in her request worked at the same branch. She expects that they will testify that the same alleged practice existed in the workplace, namely that employees shared workstations and thereby shared Employee ID's. This is a sufficient connection to establish arguable relevance. Ms. Wilson has not had an opportunity to confirm that these proposed witnesses will provide the evidence that she asserts. However, she is entitled to speak with them to attempt to find out what their evidence would be, as is any party.

[122] As the employer or former employer of these potential witnesses, the Bank should have current or last known contact information for these individuals. It is reasonable to expect that the Bank would have information at the Branch or trackable, centralized information available about its employees and former employees that can be searched.

[123] To meet its disclosure obligations, the Bank is required to conduct a reasonable search for the contact information of the requested potential witnesses on the basis that their anticipated testimony is or is likely to be arguably relevant to the issues in contention in this case and to produce same to Ms. Wilson. This includes, if necessary for purposes of the

search, identifying the work and/or personal email addresses of these individuals on the Bank's servers and using that information to locate their contact information within the Bank's records.

[124] The Bank is to provide Ms. Wilson with the full name, last known address and any available email addresses of each of the individuals requested in her motion by November 17, 2022. As ordered in *Nur*, the Tribunal likewise directs that the contact information provided is only to be disclosed and used for purposes of this case, such as, for example, the need to serve a subpoena for this proceeding. This information shall not be used for any other purposes, consistent with the deemed undertaking rule, and shall not be published or distributed for any reason. As well, if contacted as potential witnesses, these individuals are to be notified of the Tribunal's order respecting the use of their personal information.

[125] Should Ms. Wilson wish to have any of these additional proposed witnesses testify at the hearing, she is to amend the existing list of witnesses to include their names and provide additional will-says respecting their anticipated evidence as a component of her SOP by December 16, 2022. If Ms. Wilson does not file a will-say for a named potential witness, the hearing will proceed on the basis that the individual will not be called as a witness at the hearing, subject to Rule 9 of the Tribunal's Rules.

IV. Orders For Both Motions

[126] Subject to the limitations below, the Tribunal grants the motion of the Bank to limit the scope of the complaint referred to the Tribunal for inquiry concerning Ms. Wilson's allegations to the period November 24, 2014–January 19, 2015 for purposes of liability.

[127] The Tribunal orders that the following limitations apply:

1. Content respecting the period before November 24, 2014 in Paragraph 2 of Ms. Wilson's Statement of Particulars, subsequent content in related paragraphs in her Statement of Particulars and paragraph 2 of the will-say of Ms. Wilson may remain in those documents but are subject to this ruling;
2. Evidence relevant to alleged facts or allegations by Ms. Wilson against the Bank for the period prior to November 24, 2014 is not permitted to be submitted at the hearing

for purposes of establishing the Bank's liability for events in the 2010–October 2011 period; and,

3. Any evidence respecting matters prior to November 24, 2014 sought to be admitted at the hearing by Ms. Wilson is to accord with this ruling by being relevant to the 2014–2015 allegations and is subject to any further direction or ruling of the Tribunal.

[128] The Tribunal grants the motion of Ms. Wilson requiring further disclosure by the Bank, in part, provides preliminary directions (described above) and issues the following orders:

4. Subject to any claim of privilege, any or all documents, including electronic documents, in the Bank's possession, including emails or memoranda sent to Bank staff at Ms. Wilson's Branch addressing the practice of Bank staff conducting work while: (a) using another staff member's terminal; and/or (b) using another staff member's employee number or ID, are to be disclosed.
5. The Bank is to maintain a record of its efforts to find the above electronic documents. Should a party make a reasonable inquiry for information respecting the applied search methodology for the electronic search, the Bank is to disclose the steps it has taken to gather information and complete the search.
6. Any Bank documents that indicate that Employee ID numbers are applied to and used to access documents and/or are used to record employee access to documents are to be disclosed by December 2, 2022.
7. The full name and any contact information for Sarah Yeboah, Agnes Owusu (or Agnes Nyame-Owusu), Imelda Aggabao, Vera Mijatovic, and Mary Lamanna (or Mary Anna Atsidakos) are to be disclosed by the Bank to Ms. Wilson by November 17, 2022. This information shall be disclosed strictly for the purposes of this inquiry, and shall not be used for any other purpose, or published or distributed for any reason, and, as well, the above individuals will be informed of the Tribunal's order and directions respecting the use of their personal information, if contacted.
8. Should Ms. Wilson wish to have any of the individuals identified as potential employee witnesses in her motion testify as witnesses at the hearing, Ms. Wilson is to amend the list of witnesses appended to her Statement of Particulars to include their names and is to file will-says for these witnesses by December 16, 2022.

Signed by

Kathryn A. Raymond, K.C.
Tribunal Member

Ottawa, Ontario
October 19, 2022

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2570/12720

Style of Cause: Shawna Wilson v. Bank of Nova Scotia

Ruling of the Tribunal Dated: October 19, 2022

Motion dealt with in writing without appearance of parties

Written representations by:

Mark Donald, for the Complainant

Giacomo Vigna, for the Canadian Human Rights Commission

Michelle S. Henry, for the Respondent