

Howard Siegel, psychological counselor who has provided counseling services to Mr. Cline. Alan Hume, Director, Human Resources, Valley Regional, was the only witness to testify on behalf of Valley Regional.

[4] Although Mr. Cline sought the assistance of the Nova Scotia Teachers' Union in this matter and was told by its union representative that Mr. Cline's claim constituted discrimination, the NSTU chose not to file a grievance in this matter and did not seek to be a party to this proceeding since he was no longer a Reserve Member on the union membership list. It is noteworthy that Mr. Cline was reinstated to Valley Regional's substitute teacher list in the spring of 2007.

ISSUES

[5] Valley Regional accepts that it bears the burden of proof that its mandatory retirement policy is saved by the exemption provisions of the *Nova Scotia Human Rights Act*. While the facts arising from this matter are relatively straightforward, the issues to be resolved are the following:

1. Is Valley Regional's mandatory retirement policy discriminatory?
2. If so, can the policy be justified and subject to an exemption under s. 6 of the Human Rights Act? And what is the applicable legal test to be applied for such an exemption?
3. If Valley Regional cannot justify the policy, what remedy should Mr. Cline be entitled to?

BACKGROUND AND EVIDENCE

[6] Mr. Cline provides extensive evidence of a lifetime of work as an educator and businessman. His university education is extensive. It includes a BBA from Franklin University in Illinois in 1964 and an MBA from Xavier University in Ohio in 1967. Mr. Cline's evidence is that his employment alternated between university and public school teaching, at various times teaching part-time as well as full time at the university level in addition to teaching as a substitute teacher in upstate New York. He taught part-time at Franklin University from 1968 to 1974. This period also included a three year, full-time position as "visiting scholar" at Cornell University in economics with field work in economic development. It is particularly noteworthy that Mr. Cline consistently combined his teaching work with self-employed work in the environmental consulting field. This work extended from working as a composting technician and community gardening consultant during the summers spent in upstate New York.

[7] In the final stage of Mr. Cline's university education, he obtained his Master of Education from Canisius College in 1989. He acquired a teacher's certificate at about

that time. He subsequently moved on to London, Ontario where he taught as a substitute teacher for both Catholic and public school boards. During the summer months, he took on consulting contracts with his wife doing home repair training and assessments.

[8] In 1994, Mr. Cline moved to Kentville, Nova Scotia. Initially, his work in Nova Scotia consisted entirely of university teaching, first at Acadia University as replacement faculty on a full-time basis in 1994-95, followed by Saint Mary's University as replacement faculty on a full-time basis in 1995-1996, then two years in the business faculty teaching organizational behavior and small business courses. He took on the part-time position of computer systems analyst in the business faculty at Mount Saint Vincent University in 1999 followed by teaching full time in the economics department of Acadia University in 2002-2001. His evidence is that his earnings as part-time faculty were relatively modest, as he was paid roughly \$1500.00 per course. By Mr. Cline's own assessment, university teaching opportunities were "drying up" at about 2002. A growing number of senior teachers were holding "bidding rights" to existing positions amid the consolidation of education faculties into fewer universities in the province. Finally, he obtained his TC -6 teaching license with the Province of Nova Scotia in June 2002 and became a substitute teacher with Valley Regional in 2002-2003.

[9] Mr. Cline's evidence is that he has typically sought to combine teaching with independent business ventures. As he had done previously in upstate New York and London, Ontario, Mr. Cline became a self-employed businessman in Nova Scotia upon his arrival in the province. He offered recycling and composting consulting services to residential and institutional clients. For example, Mr. Cline would work with school staff in the summer and provide instruction on such environmental topics as backyard composting.

[10] Mr. Cline's evidence is that he went through a difficult separation from his wife in February 2002, both emotionally and financially. It is Mr. Cline's evidence that prior to his separation he never had to worry much about financial stability of their household income as his wife always held a regular teaching job. From the time they married in 1992, Mr. Cline's evidence is that his wife was an educator and that her income covered basic household expenses. He therefore points out that his financial circumstances upon separation provided the motivation for obtaining his TC - 6 teacher's certificate.

[11] There is extensive evidence before the Board on substitute teaching in general as well as Mr. Cline's own experience with substitute teaching at Valley Regional. By his own assessment, Mr. Cline relied on his own prediction that as time passed, more public school teachers in Nova Scotia would be retiring, giving rise to an increase in demand for substitute teachers. Mr. Cline's initial June 2002 application for substitute teaching work set out at Tab 24 of Exhibit 2 indicates that Mr. Cline identified certain preferences in grade levels and subject areas. These included P-3, 4-6, 7-9 grades in the areas of social studies, business education, 10-12 social studies and computer related studies. He also identified 19 schools where he wished to be considered for substitute teaching, based largely on each school's proximity to his home as well as his own preference for middle and high schools for which Mr. Cline feels he is more qualified to teach. However, Mr.

Cline even remembers being called for substitute teaching by schools not even on his target list. Both Mr. Cline and Mr. Hume agree in their evidence that a renewal of Mr. Cline's intention to remain on the substitute teacher reserve list from year to year was simple to achieve, merely consisting of a phone call to Valley Regional to indicate such intention.

[12] The legal authority for granting substitute teaching work at Valley Regional is not in dispute. The Board accepts Mr. Hume's evidence contained in his March 2005 letter at Tab 3 of Exhibit 1 that Valley Regional (as well as other school boards in the province) does not maintain a personnel file for substitute teachers. Mr. Hume points to the useful definition of "substitute teacher" in the Teacher's Provincial Agreement at Article 32.01: "A 'substitute teacher' is a teacher or other qualified person engaged on a day to day basis to take the place of a person regularly employed as a teacher by a School Board": p. 52 of Exhibit 2." A substitute teacher must be hired to cover for an absent teacher "unless a substitute teacher is not operationally required": Article 32.20 of the TPA. Mr. Hume's March 2005 letter also indicates that a substitute teacher's job description is covered by Article 11 of the Teachers' Provincial Agreement as well as s. 26 of the *Education Act*.

[13] The application process which is used by Valley Regional (as well as most school boards in the province) is informal and straightforward. It requires the applicant to provide the following: a valid Nova Scotia teacher's license, a criminal records check as well as the child abuse registry check. Mr. Cline also estimated that it would take 1-3 years before he could make himself known to a school so that he could predictably be called upon by that school to do substitute teaching on a regular basis. Typically, a school principal or vice-principal has access to the substitute teachers list and will phone up a substitute teacher on the night before, or morning of, a requested assignment. The school would ask Mr. Cline if he was available (his evidence is that he was usually available unless he had previously received a call and had accepted an assignment with another school or had a medical appointment). Mr. Cline's evidence is that he never turned down substitute teaching assignment during 2002-2004.

[14] A record of Mr. Cline's actual days served as a substitute teacher with Valley Regional and covering the period 2001-2002 is set out at pp. 15-17 of Tab 3 of Exhibit 1. The record of days worked is generally not in dispute in this matter. Mr. Cline's evidence is that there was no long term absence for which he covered as a substitute teacher, as most of his work was for 1-2 days, some of these half days. The record indicates that Mr. Cline worked as follows:

2001-2002	3 days in June 2002
2002-2003	28.5 days (including 3 half days)
2003-2004	33.5 days (including 3 half days)
2004-2005	2 days (October 15-December 9, 2004)

[15] It is noteworthy that he last worked 33.5 days in 2003-2004, without any days in January and February 2004 with the majority being at Annapolis West Education Centre (“AWEC”). On cross-examination, Mr. Cline emphasizes having enjoyed a good rapport with the school principal at West King’s High in 2003, but does not remember his name. He also remembers West King’s as holding the best promise for repeat substituting work, although he admits that 30% of his substituting work in 2003-2004 was at AWEC. He states that he made a conscious effort not to pursue substituting jobs outside of Valley Regional and never taught at two school boards at the same time. He was consistently up at 6am, with lunch ready so that he could run out the door to a substituting job at a moment’s notice.

[16] Mr. Cline confirms that he did not do any substituting work in the fall 2004 after he taught at Landmark East from January – April 2003 as evidenced by his statement of earnings at Exhibit 6. He agrees on cross-examination that he relied on his medical prognosis to terminate his commitment at Landmark East and seek substituting work at Valley Regional. His record of work indicates that Mr. Cline worked a substantial number of days from April to June 2003. Mr. Cline acknowledges having received calls from Valley Regional during the period January to April 2003 to do substituting report but that he never alerted Valley Regional that he would not be available on account of his prior commitment to Landmark East. Mr. Cline’s evidence regarding Landmark East is in contrast to earlier testimony that he later retracted and corrected. Mr. Cline had previously indicated he did find work at Landmark East, a private school offering education programs to students with special needs. His substitute teaching “doubled” by November 2003 and was offered a full time position at the school by December on the basis of 2-3 days per week. However, he succumbed to “major stress” in the spring 2004 and was put off work. He never returned to Landmark East as he did not like the environment.

[17] Fiona Watson gives evidence on behalf of Mr. Cline. She is a teacher, presently full-time on sick leave with Conseil scolaire acadien provincial board, and previously a full-time teacher and colleague of Mr. Cline at Landmark East during the September 2002 to July 2003 school year. This is consistent with Ms. Watson’s Record of Earnings marked as Exhibit 5. She remembers Mr. Cline “dragging himself to school” on crutches and suffering from high stress. She recalls visiting him in hospital during that time. She remembers there were bullying problems at the school (student to teacher and student to student) resulting in stress for teachers. She praises him for his personal character, as he “lives simply, works diligently”.

[18] An issue that is marginally canvassed in the evidence but nonetheless significant is the rate of pay of substitute teachers. Mr. Cline reports his rate of pay as a Valley Regional substitute teacher to have been \$125.00 per day, even less at Landmark East (\$100.00 per day), without any benefits. Substitute teachers receive no travel allowance unless they substitute for itinerant or circuit teachers who may be working between two schools on the same day (Article 32.24 of the TPA), which was not the case for Mr. Cline.

[19] There is extensive medical evidence in support of Mr. Cline's submission that he was having medical issues while working as a substitute teacher with Valley Regional. Mr. Cline was treated by Dr. Yoell, his family physician from roughly 1995 to 2004, until March 2005 when Dr. Yoell retired. Unfortunately, there are no medical reports from Dr. Yoell in support of Mr. Cline's claim. Dr. Yoell determined that Mr. Cline was suffering from high blood pressure. Mr. Cline was diagnosed with anemia and a blood disorder by Dr. Fillpowicz in the spring 2002. He had internal bleeding in the fall 2002 and underwent day surgery in January 2003. Mr. Cline then moved on to Dr. Salazar as his family doctor. Mr. Cline was cleared to return to work in 2006. Dr. Salazar noted with caution in his evidence at the hearing that the bulk of his evidence consisted of his own review and interpretation of Dr. Yoell's chart notes on Mr. Cline. This included Dr. Yoell's observations of Mr. Cline's hypertension, gout and stress in November 2006, as well as in Dr. Salazar's evidence at the hearing of a recent conversation he had with Dr. Yoell. It is during this conversation that Yoell indicated to Dr. Salazar that Mr. Cline was suffering from hypertension, nose bleed and gout complicated by work stress (loss of work). However, Dr. Salazar stated that Dr. Yoell could not specify if the stress from his loss of work was related to Landmark East or Valley Regional.

[20] Dr. Salazar nonetheless identifies an entry in Yoell's chart indicating that Mr. Cline's blood pressure was "severe" in April 2003 and was related to Landmark East, although there was a "marked" improvement from April to the fall 2003. A September 2003 entry indicates that Mr. Cline may return to substitute teaching as his stress condition is "OK" and his blood pressure has improved. An earlier chart note of March 2002 indicates that Mr. Cline's high blood pressure from stress at that time may be related to his separation from his wife. While Mr. Cline appeared to be doing well with his blood pressure in the spring 2005 (within normal limits without medication), chest pain from financial stress appears to have returned in the fall 2005. On examination by Mr. Wood, Dr. Salazar is not able to identify specific visits or incidences in the August – October 2004 period, as the last chart entry for 2004 was February 2004 when Mr. Cline was treated for a rash and hypertension.

[21] Howard Siegel, consulting psychologist, provides evidence of Mr. Cline's psychological condition. He remembers having provided psychological services to Mr. Cline 4-5 years ago regarding relationship issues with Mr. Cline's wife. This service continued on an informal, non-fee based manner after that time. Mr. Siegel recalls Mr. Cline's inability to teach "coming up frequently" in their sessions and identified by Mr. Cline as a "source of great stress". Mr. Siegel concludes that Mr. Cline had manifested a high level of anxiety "in part" from stressors in his life, primarily his inability to work.

[22] Mr. Cline remembers the circumstances of getting notice of Valley Regional's decision not to continue to hire him as a substitute teacher. He states that it was in late August 2004 that Valley Regional's mandatory retirement policy first became known to him as he was told of the policy by support staff "at Valley Regional in a "polite manner". Mr. Cline remembers being "surprised" at the time. He asked what should be done and whether there was some flexibility, and was told that there was none.

[23] The impact of financial loss on Mr. Cline resulting from Valley Regional's decision not to continue to hire him suggests a period of self-doubt and stress for Mr. Cline. He applied to teach at King's Edgehill, a local private school with a low turnout and stable staff, but was told that no positions were available. His expectation was that he had built up his credentials with a few local schools to the point where he had become known to a number of schools and could reliably expect 3-4 days per week of substituting work for the year 2004-2005. This estimate was based on a combination of media reports of a trend in teacher retirements, his own experience as a substitute teacher at Valley Regional, his own observations of the work obtained by other substitute teachers as well as his experience as a substitute teacher in upstate New York. Instead, Mr. Cline was left to rely on his business interests with no uniform pattern of sales, having recently launched a new product in different jurisdictions including the United States. His market (income) had become a "guessing game". His social security income from the United States was roughly \$1300 per month in September 2004. He fell into debt with credit cards and fell into arrears with income taxes owed. However, this turned around for him as he had business income of \$80,000 in 2005 and \$150,000 in 2006.

[24] Mr. Cline provides evidence of the evolution of Valley Regional's mandatory retirement policy in the context of organizational changes which finally settled into the amalgamation of three school boards into Valley Regional. Valley Regional has a mandatory retirement policy that is set out at Exhibit 2, Tab 4. The Policy is consistent with, and is reflected in, the Teachers' Provincial Agreement for the August 1, 2005 to July 31, 2008 term. It covers discrimination on grounds including age at Article 6. Article 6.03 precludes discrimination to the age of 65 years and is conveniently set out in Mr. Hume's March 2005 letter: As a non-union employee, Mr. Cline was subject to the VR policy pertaining to non-union employees set out at Exhibit 2, Tab 16. Article 26.1 at of the Non-Employee Agreement provided for mandatory retirement at age 65. Valley Regional amended its mandatory retirement policy in May 2007 effectively removing the age requirement. Mr. Hume explains that this was due to the "inevitable coming" of changes to human right legislation in Nova Scotia.

[25] Mr. Hume provides valuable insights in his evidence of the reasonable expectation a substitute teacher can have of the number and frequency of substitute teaching assignments. He speaks from experience. He has been the Director of Human Resources at Valley Regional for the past two years, having been with Valley Regional for his entire career in teaching, starting as a teacher in Bridgetown (1976), then becoming a vice-principal (1985) and principal (1996). His own assessment is that a substitute teacher will "usually" make himself known to a school principal within days, weeks or a month or two of work. He suggests there are three groups of substitute teachers: (1) young, new education graduates who wish to secure permanent positions (about 50% of subs); (2) newly retired teachers who are limited to 69.5 days where they have chosen early retirement prior to age 65; and (3) teachers who chose to work part-time due to business and/or family circumstances. His own assessment is that the teaching certification level (TC 6) is not a condition that would advance (or hinder) a teacher's chances of securing substituting work. He also has no knowledge of a pending "crisis" in four years of teaching positions not being filled. He identifies one period

during the year where it may be more difficult to fill substituting positions: from late April (when retired teachers have reached their quota of 69.5 days) to early May (when newly graduated students become available). In addition, he cautions that not all regular teacher absences trigger an operational requirement for a substitute teacher. He also indicates a trend of shortages of French teachers as well as the high demand for high school science and math teachers. These would typically get more calls for work.

[26] Valley Regional's record of the number of days of substituting work is reviewed by Mr. Hume and set out in Exhibit 8 - "Summary of Days Worked by Substitute Teachers at Valley Regional – 2002-2007". Mr. Hume specifies that the records indicate the number of substitute teachers who were paid for at least ½ day, rather than the total number of substitute teachers on the list. He indicates that during the current 2006-2007 school year, 43% of subs worked a total of 30 days, with two members working in excess of 100 days, and two working more than 30 days. He expects that it is "not likely" that a substitute teacher would get more than 100 days of substituting per year except for cases of maternity or sick leaves. However, he notes that long term substituting assignments come with its own unique set of responsibilities such as submitting lesson plans, attending staff meetings and marking assignment, and preparing grades. He hastens to add that some substitute teachers have indicated to him that they do not want to be considered for long term substituting work on account of these regular teacher duties.

[27] Applications for substitute teacher work are made to the Human Resources Director at Valley Regional on a year-by-year basis. There is no structured, formal performance review of substitute teachers except for the case of a long term substitute teachers for the purpose to assisting with professional development for future hiring prospects. Mr. Hume states that there is an "informal evaluation of substitute teachers as an indication of performance" by virtue of the casual observations made by both the school administration (vice-principal and principal) and the absent teacher whom the substitute teacher is replacing.

SUBMISSIONS

[28] Mr. Cline's position is that he was precluded from substitute teaching by Valley Regional on account of being over the age of 65 years. He submits that this constitutes discrimination on the basis of his age and is in violation of ss. 6 (g) & (h) of the Nova Scotia *Human Rights Act*. He states that what struck him upon getting notice of Valley Regional's mandatory retirement policy was that he was never told his entire life that he could not work. He taught some thirty years, some at the masters level, thoroughly enjoying the work of teaching. He had quickly concluded that his U.S. social security benefits would not be enough to permit him to live comfortably. He had his sights set on working until he reached the age of 72 years. He found the denial of Valley Regional to be a "surprise", and over time felt "useless". He remembers having a "certain level of depression" as he missed not being in the classroom and around people in the same profession. When his name was returned to the list in 2007, he remembers feeling like something had been taken off his back.

[29] The Commission acknowledges that Valley Regional relies on the exemptions found in subsections (g) – “*bona fide* retirement or pension plan” and (h) “*bona fides* mandatory retirement plan” of section 6 of the *Act* for its defence, and acknowledges that the latter section must be the focus of the legal analysis in this matter. However, Mr. Wood submits that the legal interpretation must not be caught up in the specific language of the legislative provision and therefore not lose sight of broad human rights concepts. In so doing, the meaning given to such provision must be consistent, subject to context in light of the facts of the case and consistent with a broad, liberal interpretation of human rights legislation. Specifically, Mr. Wood invites the Board to consider the unique characteristics of a substitute teacher’s term of employment. There are no limits set for the duration of work for a substitute teacher as the teacher may stay on the eligibility list for an indefinite period. There is hardly any job security as there is no limit on the number of substitute teachers competing with the eligibility list, as well as no formal performance evaluation of substitute teachers.

[30] The Supreme Court of Canada decision in *Meiorin (British Columbia Public Service Employee Relations Comm.) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3, 35 C.H.R.R. D/257 (S.C.C.) is held out by the Commission as setting out the applicable test to be applied by the Board with the necessary adjustments: pp. 8-11 of the Commission’s brief. The threefold test in *Meiorin* sets out the employer’s obligation when relying on a *bona fides* occupational requirement (“BFOR”): (1) rational purpose connected to the mandatory retirement; (2) honest belief; (3) policy reasonably necessary to accomplish purpose. The *Meiorin* test is now commonly framed as whether the respondent is able to demonstrate that the impugned standard is reasonably necessary to accomplish its purpose, and whether the respondent accommodated the claimant to the point of undue hardship: p.9 Commission’s brief.

[31] A comprehensive review of Supreme Court decisions regarding discrimination from mandatory retirement is presented by the Commission. Mr. Wood submits that although the exemption provision in *Ontario Human Rights Commission v. Borough of Etobicoke* (1982), 3 C.H.R.R. D/781 (S.C.C.) (“*Etobicoke*”) consisted only of a BFOR, the Supreme Court of Canada chose to “import” the notion of “reasonably necessary” into the test. He distinguishes the Supreme Court decision in *Etobicoke* where a *bona fides* occupation qualification was imposed on firefighters where such “...limitation is imposed in the interests of the adequate performance of the work involved...” (p. 5 of the Commission’s brief). In contrast to the assessment of “cause” for dismissal in *Etobicoke*, Mr. Cline’s termination was not based on any performance appraisal “imposed honestly, in good faith...related in an objective sense to the performance of the employment...”.

[32] The Supreme Court of Canada in *Zurich Insurance Co. v. Ontario (Human Rights Comm.)* (1992), 16 C.H.R.R. D/255 (S.C.C.) upheld the “reasonableness” of the BFOR test while incorporating a subjective element to the test with regard to individual accommodation and assessment. *Zurich* is distinguished in that the subject matter was not employment related but rather concerned the setting of insurance rates based on an insured’s age and gender. In that case, it was determined that it was not practical to have individualized testing to determine risk for each insured. It was also accepted that “*bona*

fides” was to mean honestly held beliefs based on sound and accepted business practices. In contrast, Mr. Wood submits that Valley Regional has not provided any evidence of its efforts to do performance evaluation of Mr. Cline or shown that its mandatory retirement policy which resulted in Mr. Cline’s demise was undertaken on good faith based on sound business practice supported by actuarial advice.

[33] Ultimately, the Commission invites the Board to consider the decisions in *Bégin* and *O’Neill* where human rights tribunals have applied the *Zurich* test (both reasonableness and *bona fides*) to an employee on the basis of age. In *O’Neill v. C.P.U.* (1996), 28 C.H.R.R. D/24 (B.C.C.H.R.), the tribunal applied the entire *Zurich* test in interpreting an exemption for “any bona fides retirement, superannuation or pension plan” despite the absence of the term “reasonable” in the exemption. In *Bégin v. Richmond School Dist. No. 38* (2007), CHRR Doc. 07-067 BCHRT, the tribunal accepted the *Zurich* test as containing both a subjective and objective element in the context of a retirement plan and read into the exemption the concept of individual accommodation and reasonableness. It interpreted the objective test to pertain to whether the exemption sought was based on industry standards or business practice and whether there was a practical alternative.

[34] Valley Regional acknowledges that Article 6.03 of the Teachers’ Provincial Agreement precludes discrimination on the basis of age. However, it takes the position that its mandatory retirement policy must be considered a reasonable limitation of the right to be free of discrimination on the basis of age. There is nothing inherently wrong with discrimination on the basis of age except that it is precluded by legislation: *Lewis v. Burnaby School District No. 41 (Lewis)* [1995] 54 B.C.A.C. 161; *Campbell River TV Assn. V. I.B.E.W., Local 230* 71 L.A.C. (4th) 343, 1998 CarswellNat 3209. It sets out the following reasons for imposing such limitation as set out in Mr. Hume’s March 2005 letter: the benefit for both parties of having a set time for an ordering departure from work; and allowing employees to depart with dignity rather than performance based audits. Mr. Hume explains in his evidence that “new blood” does not necessarily mean “young” person. He adds that Valley Regional would typically seek to have an even distribution of teachers across various ages ranging from early, middle and end of career tenures.

[35] Mr. Lenethen submits that the evolution of human rights legislation has resulted in the exemption of mandatory retirement schemes from such legislation and the corresponding blanket acceptance of mandatory retirement initiatives. It argues that Valley Regional’s policy consists of a plan (scheme or practice) taking into consideration the *bona fides* qualifications of the job of teaching. Such “plan, scheme or practice” is explicitly provided for in s. 6 (h) of the *Act*. The latter provision is consistent with earlier Supreme Court of Canada decisions where Mr. J. Laforest defaulted on a determination of the issue of whether mandatory retirement schemes constituted discrimination: *University of Alberta v. Alberta (Human Rights Commission)* [1992] 2 S.C.R. 1103 (*Dickason*).

[36] While there is no lack of tests offered up by the jurisprudence in human rights discrimination matters, principles of statutory interpretation requires that these tests must be applied in connection with the legislative wording contained in the particular discrimination provisions of human rights legislation. Mr. Lenethen relies on the authority of *Meiorin* that such tests are only applicable insofar as they relate to the legislative provisions: “although the various human rights statutes have an elevated legal status ... they remain legislative pronouncements and ...this Court must interpret them according to their terms and in light of their purposes”. (emphasis added). Mr. Lenethen emphasizes the broad and extensive reach of Nova Scotia’s exemption provisions to the benefit of Valley Regional: a “BFOR”- type exemption – “bona fides qualification” (s. 6 (f)); a “retirement or pension” exemption (s. 6 (g)); and a “plan, scheme or practice” of mandatory retirement (s. 6 (h)).

[37] Mr. Lenethen relies on the New Brunswick Court of Appeal decision in *Potash Corp. of Saskatchewan Inc. v. Scott* (2006), CHRR Doc. 06-503, 2006 NBCA 74 as providing the appropriate test to be applied in this case and support for its position that the “reasonableness” test can be excluded from the *bona fides* requirement. Mr. Lenethen submits that Valley Regional applied its mandatory retirement policy equally and evenly. Specifically, it adopted the policy honestly (satisfying the “subjective” part of the *Potash* test) with regards to sound business practice (in compliance with the “objective” part of the *Potash* test). Valley Regional simply proceeded on the basis that it “...did not see anything wrong per se in a mandatory retirement policy with its objectives set out in the January 7, 1998 motion. In contrast, Mr. Wood distinguishes *Potash* from the Mr. Cline’s claim and submits that *Potash* is not binding on the Board. The New Brunswick *Act* is different from the Nova Scotia *Act* as the former features specific and distinct provisions for each type of discrimination. It is submitted by Mr. Wood that this distinction means that the New Brunswick legislation was meant to mean different things relative to the Nova Scotia provisions.

[38] At the heart of Mr. Lenethen’s submission is that the two-part *Zurich* test of “reasonableness” (objective) and “bona fides” (subjective) is mismatched to the “plan, scheme or practice” legislative provision in Nova Scotia and that only part of the *Zurich* test applied in *Potash* should be used in Mr. Cline’s case. That is, only the “bona fides” part of the *Zurich* test should be applied while the “reasonableness” part should be jettisoned for the simple reason that while the “reasonableness” part was statutorily mandated in the Ontario *Human Rights Code* in *Zurich*, it does not appear in the New Brunswick *Human Right Act*. He explains that the legislative provision in *Potash* is quite similar to that found in the Nova Scotia legislation in that it does not contain an explicit provision for “reasonableness”.

[39] Valley Regional further submits that the two-step test in *Zurich* is not the appropriate test in mandatory retirement matters. Mr. Lenethen relies on the authority of *University of Alberta v. Alberta (Human Rights Commission)* [1992] 2 S.C.R. 1103 (*Dickason*) where the Supreme Court of Canada chose not to use the “reasonableness” test in *Zurich*. However, Supreme Court of Canada nonetheless applied the s. 1 *Charter*

test in *R. v. Oakes* [1986] 1 S.C.R. 103 to determine whether the mandatory retirement policy in *Dickason* was “reasonable and justifiable”.

ANALYSIS

Is Valley Regional’s mandatory retirement policy discriminatory?

[40] The Board has no difficulty concluding that Valley Regional’s decision to deny employment to Mr. Cline on the basis that he has reached the age of 65 is discriminatory on the basis of age. The distinction made by Valley Regional between its obligations to a regular employee versus its obligations to Mr. Cline as a substitute teacher is an insignificant one for purposes of application of human rights legislation.

Can Valley Regional’s mandatory retirement policy be justified and subject to an exemption under s. 6 of the Human Rights Act? What is the appropriate test to be applied to justify such an exemption?

[41] The Board finds that s. 6 of the *Act* consists of a broad, far reaching statement of the elements which need to be proven by the employer in order to justify an exemption from discriminatory practice. It includes a requirement that discrimination be justified on the basis of a “qualification”, a “bona fide retirement or pension plan”, or a “bona fide plan, scheme or practice of mandatory retirement”. The Board accepts the Commission’s submission that the exemption provisions should not be narrowly construed. They should also not require that each part of the provision be interpreted with its own tailored test.

[42] The Board finds that the very “purpose” of the *Act* is generally to give a broad and liberal interpretation to human rights legislation, and, particularly, a strict interpretation of exemption provisions allowing differential treatment based on age. The Board also accepts Mr. Lenethen’s admission that the Nova Scotia legislation “expressly provided” for a “BFOR”- type exemption (s. 6 (f)). This therefore requires Valley Regional to submit to the classic BFOR test and proving that complying with the discrimination provisions of the Act would drive it to the point of “undue hardship”.

[43] It is difficult for the Board to understand and accept Mr. Lenethen’s reliance on the legal reasoning of the New Brunswick Court of Appeal in *Potash*. On the one hand, Mr. Lenethen acknowledges that the Court in *Potash* formulated an objective component within the “bona fides” exemption. On the other, he submits that the Court chooses to jettison the “reasonableness” test as it would “defeat the clear legislative intention shown in the New Brunswick *Human Rights Act*”. In this Board’s view, a broad interpretation of the Nova Scotia legislation would require the application of a “reasonableness” test as well as a “bona fides” and a “reasonableness” test on the authority of both *Etobicoke* and *Zurich* where the court “imported” the notion of “reasonableness”.

[44] However, Mr. Lenethen concedes that striping the bona fides part of the *Zurich* test and its “no practical alternative” element does not mean that the *bona fides* part of the *Zurich* test “does not have an objective component and is overly easy to satisfy”: p. 13 of the Respondent’s brief. Valley Regional therefore agrees with the Court’s formulation of an objective component within the *bona fides* tests and relies on *Potash* and that the proper test in this matter is the *bona fides* test with two elements: “subjective – honest belief that the alleged discriminatory actions were in the interest of sound and accepted business practice and were not taken for the purpose of defeating protected rights, and objective – that the belief was reasonable in the circumstances of the case.

[45] The Board finds that it is not particularly helpful to formulate some kind of backdoor objective test within the subjective *Potash* test in contrast to the *Zurich* double test combining a *bona fides* and a “reasonableness” test. Human right legislation requires a straightforward and purposeful approach to interpreting legislative intent. As was noted in *O’Neill*, if only the *bona fides* test from *Zurich* were to be applied, the exemption provision would be so broad as to be incompatible with the purpose of human rights legislation. The Board agrees with Mr. Wood that with such an interpretation, “...virtually no mandatory retirement scheme would be found to be discriminatory.” While Mr. Lenethen submits that the “reasonableness” test has been jettisoned, minimized or at least reformulated in other decisions such as *Dickason*, the Board disagrees and finds that a “reasonableness” test is significantly featured in the *Dickason* decision when the Court incorporated the *Oakes* test of “reasonable and justifiable” in their consideration.

[46] The Board chooses to test which the Board chooses to apply prominently features a combination of the subjective and objective tests established in *Etobicoke* and *Zurich* and recently applied in *Bégin* and *O’Neill* in the context of a workplace mandatory retirement plan. The Supreme Court of Canada has regularly and consistently applied a two-part test combining a subject and an objective element.

Does Valley Regional’s mandatory retirement plan meet the test?

[47] The Board finds that Valley Regional has met the burden of holding an honest belief that its mandatory retirement plan was appropriate. It accepts Mr. Hume’s evidence that Valley Regional recognizes that all of its teachers do not fit the mold of the full-time, career teacher. Some teachers prefer to strike a balance between work and family life. Mr. Hume’s general approach to appreciating the unique expectations of each teacher is consistent with Mr. Cline’s unique combination of splitting his life as a teacher and a businessman.

[48] However, Valley Regional has failed to satisfy the burden of showing that its mandatory retirement plan was “reasonable” with regards to sound business practice. The Nova Scotia exemption regarding a *bona fides* “plan, scheme or practice” of retirement suggests a comprehensive and well thought out, sound business initiative. Mr. Lenethen highlights Mr. Hume’s evidence of the challenges forced onto Valley Regional on

account of significant organizational change. He submits that that consistency and overall application of legislative requirements was sought during Valley Regional's organizational restructuring. However, the Board finds that the test to be applied in determining "reasonableness" is whether the policy sought to be upheld was consistent with, and a reflection of, sound business practices rather than administrative convenience and efficiency during turbulent times arising from organizational change. The Board does not accept that the disruption and complications arising from an inevitable and necessary occurrence such as organization change in itself constitutes a legitimate justification for discrimination on the basis of age.

[49] The Board accepts Mr. Wood's submission that Valley Regional is not able to satisfy the *Meiorin* test of showing that its plan was reasonably necessary to accomplish its purpose and was driven to the point of undue hardship in accommodating Mr. Cline. It is plainly obvious to the Board that Valley Regional's 2007 motion to do away with its mandatory retirement policy has not driven it to the point of undue hardship. Also, Valley Regional has not shown a rational purpose between the mandatory retirement policy and its efforts to recruit new teachers. The Board does not accept the rather vague and weak notion put forth by Valley Regional of its dutiful and business-minded intention of reaching out to "new blood" and insuring an orderly transition to new recruits to the teaching staff along with promoting youth employment generally.

[50] The Board agrees with Mr. Wood that Valley Regional has not provided any evidence of its efforts to do performance evaluation of Mr. Cline or shown legitimate business reasons behind its mandatory retirement policy. Board finds that accommodation should be painless and easy in Mr. Cline's case given the small number of substitute positions with the large pool of substitute teachers. It is objectionable that Valley Regional chooses to rely on its 1997 Board motion to subject employees to mandatory retirement and to hold it up as an "orderly plan for departure" of long serving employees. The Board finds the plan to be an empty one as it does not feature any performance evaluation of retired employees, proceeding instead to unceremoniously tell Mr. Cline: "Sorry, you're too old". To the contrary, Mr. Cline may be new blood. In the alternative, Valley Regional did not provide evidence of the requirement for new blood. Furthermore, it is disconcerting that long serving, but recently retired teachers could continue to be on the substitution list until they had reached the age of 65 or accumulated 69.5 days during the school year in view of the Policy's alleged purpose of securing "new blood".

[51] The Board finds it is hard to imagine how arbitrarily setting an age limit is more dignified than an open, transparent and structured process using objective criteria for performance appraisal. It is the Board's view that such arbitrarily set age limit is in fact more demeaning for the employee. Mr. Cline was obviously caught by surprise, without any recourse to obtain an explanation from his employer or to explain his situation.

[52] The Board finds that Valley Regional's notion of "new blood" as being the basis of its intention to recruit new teachers under its mandatory retirement policy is a rather blunt instrument. While it is praiseworthy that Valley Regional looks ahead and tries to

anticipate vacancies arising from teacher retirement as well as other factors such as out-migration of young teachers, the overwhelming evidence before the Board is that substitute teachers are not exclusively recent graduates being auditioned during the May-June period to fill full-time positions in the future. The Board concludes from the evidence that a large number of substitute teachers are long-serving teachers that may compromise the intention to secure new blood. In contrast, Mr. Cline is “new blood” potentially offering a unique perspective from his broad, multi-faceted work experience. The Board finds that Mr. Cline’s level of education is very impressive, with applied business and economics concepts tested in the “real world” in several places (upstate New York, Ontario and Nova Scotia) in economic development as well as self-employed business. The Board has no intention of stepping into Valley Regional’s role in setting out its own human resources practices. It finds Mr. Hume to have been a very practical and competent human resources manager with a wealth of experience at various levels of the education system. However, the Board fails to see how Mr. Cline’s skills and experience with one foot in sharing knowledge and the other in applying knowledge would be discounted as lacking an indication of “new blood” in public school teaching. To the contrary, The Board finds that Mr. Cline would potentially have “raised the bar” in the classroom.

DECISION

[53] The Board finds that Valley Regional discriminated against Mr. on the basis of his age. Valley Regional cannot justify such discrimination on the basis of s. 6 of the *Act*.

REMEDY

General Damages

[54] Mr. Wood submits that if the Board finds that Mr. Cline has been the victim of discrimination based on his age and that there is no justification substantiate by Valley Regional for such discrimination, the Board has to direct its mind to damages. The Commission does not seek an institutional remedy by way of a declaration as Valley Regional has already abandoned its policy.

[55] Both the Commission and Mr. Cline seek the following damages: general damages (so as to compensate Mr. Cline for inconvenience but not for the purpose of punishing Valley Regional); and special damages (for loss of income, which is calculated by Mr. Cline to be \$61,000.00 based on three years at \$15,000.00 per year along with 4% interest).

[56] Although it is not perfectly obvious how Mr. Cline “blended together” teaching duties with his independent business, the Board accepts his evidence that he firmly intended and sought out experiences which “blended together” teaching, learning and applying knowledge in the “real world” of independent consulting. This is in keeping

with evidence of his unique lifestyle. He “lives simply, works diligently”. The Board also accepts his evidence that he did not care much for the administrative burdens which come along with the teaching profession, including marking and report writing. Mr. Cline shows himself in his evidence to be a hands-on person. However, the Board cannot accept Mr. Cline’s evidence that he rarely declined a request to do substitute teaching, and, specifically, that he was never absent for a substitute teaching assignment during the 2002-2004 period. It is clear from the evidence that Mr. Cline pulled back from substitute teaching from September 2003 to April 2004 to work at Landmark East. He continued to be on the substitute teacher list during this time, without providing notice to Valley Regional of his significantly reduced availability to teach during that time.

[57] Mr. Cline’s fairly unique and commendable approach to combining teaching and consulting work came to a crashing halt in 2004, causing him to scramble to find both alternative teaching assignments as well as an increase in income to compensate for the loss of his wife’s income. While Mr. Cline’s own evidence is that he suffered from stress and anxiety, there is little medical evidence to substantiate the severity or cause of any disability Mr. Cline may have suffered in 2004. Unfortunately, it has not been possible for Mr. Cline to submit direct evidence from Dr. Yoell in support of his position that he was significantly ill and that the illness was caused by the end of his substituting work. Dr. Salazar is only able to interpret and extrapolate evidence from Dr. Yoell’s medical charts. It is also evident from Mr. Cline’s own evidence as well as that of Ms. Watson that incidences of bullying at a new school caused him to quit teaching at that school. The Tribunal concludes that there is little medical evidence supporting Mr. Cline’s submission that he suffered from high blood pressure, hypertension and stress resulting from being rejected as a substitute teacher by Valley Regional. Dr. Salazar makes a valiant effort to review and interpret Dr. Yoell’s notes, but is not able to determine two key issues pertaining to Mr. Cline’s stress-related condition: the severity of Mr. Cline’s condition at 2004; and the cause of Mr. Cline’s stress-related condition. In particular, Dr. Salazar is not able to determine whether the condition was related to Valley Regional or Landmark East. While Mr. Cline states on cross-examination that his high blood pressure began in 1996-1997, there is little evidence of the extent to which the condition had worsened around the summer 2004 and whether such deterioration was related to Valley Regional or Landmark East.

[58] The Board also finds that Mr. Cline persevered in the face of financial difficulties but quickly managed to expand his business interests with increased earnings from 2004 to 2007. It is therefore difficult for the Board to conclude that Mr. Cline is now in a worse financial position than he would have been had he continued as a substitute teacher. In fact, he may have used his misfortune to put his business venture on a more solid financial position thus enabling him to better weather the meager earning from substitute teaching.

[59] The Board therefore accepts Mr. Lenethen’s submission that this case does not warrant an award of general damages except for a nominal amount. Valley Regional has already abandoned its mandatory retirement policy, and has gone even further. Mr. Cline has been reinstated on the substitute teacher list. This clearly indicates to the Board that

Mr. Hume as well as Valley Regional have been well intentioned and have not abandoned Mr. Cline. Valley Regional has since done a complete reassessment of their mandatory retirement policy.

[60] Furthermore, the Board finds that there is the legislative exercise in Nova Scotia of amending the *Human Rights Act* with respect to mandatory retirement plans is not yet fully settled. It is not clear that the public debate is settled when the government has chosen to give royal asset to the new amendments but arranged that it not be proclaimed until July 2009, in excess of two years from the date of its proclamation. However, to Valley Regional's credit, it has chosen to act promptly and decisively in amending its mandatory retirement policy. The Board therefore awards general damages to Mr. Cline in the modest amount of \$1000.00.

Special Damages

[61] Special damages are sought on the basis of Mr. Cline's lost opportunity to do substitute teaching from 2004 to June 2007. On the one hand, the Board finds that it is not useful to characterize Mr. Cline's service to Valley Regional and corresponding earning as somehow constituting less than a job. Mr. Cline clearly did not benefit from much predictability and security in substitute teaching. Everything about his work was unpredictable: the total number days he would be called upon to teach as well as the type of courses and age level of students. He would not know before going to bed in the evening if he would be getting at phone call in the early morning to show up for work at a school with a principal and students he may barely have known. However, the Board finds that substitute teaching assignment were much valued by both Valley Regional and Mr. Cline. While Valley Regional was likely anxious to find a teacher to attend to a classroom full of students, Mr. Cline found it rewarding and personally satisfying to be with students at school on an as-needed basis, without the burden of administrative duties.

[62] There is undisputed evidence that Mr. Cline's substitute teaching assignments for the school years 2001 to 2004 with corresponding daily rate of pay were as follows:

2001-2002	\$114.00	3 days in June 2002
2002-2003	\$114.00	28.5 days (including 3 half days)
2003-2004	\$125.00	33.5 days (including 3 half days)
2004-2005	\$130.00	2 days (October 15-December 9, 2004)

[63] However, it is clear Mr. Cline was employed with Landmark East during the 2002-2003 school year as evidenced by his statement of earnings at Exhibit 6. The Board finds that Mr. Cline indicated in his evidence a reluctance to be encumbered with the administrative tasks that accompany full time teaching such as preparing lesson plans,

attending staff meetings, marking assignments and compiling grades. This would be consistent with Mr. Hume's observations that some teachers simply do not seek long term sub work as they want to avoid such added duties. The Board concludes that Mr. Cline would not likely have sought out long term substituting work as such status would carry with it administrative work which Mr. Cline wished to avoid.

[64] On the other hand, the Board finds Mr. Cline's projected increase in the number of substitute teaching days assigned to him to be too optimistic. Mr. Cline produces a calculation of loss of income as a result of Valley Regional's policy in what he calls a "prospective theory" with "expectations based on rational reasoning" drawn from his background as a planner, economist and businessman. He explains his life plan of withdrawing from teaching as he would reach the age of 72 years. On cross-examination by Mr. Lenethan, Mr. Cline admits to a miscalculation of his claim of loss income and states that the correct amount is \$61,954.28 based on 4% interest. The Board accepts Mr. Hume's evidence pertaining to the current 2006-2007 school year that substitute teachers typically worked a total of 30 days, with two members working in excess of 100 days, and two working more than 30 days.

[65] The Board finds that while Mr. Cline made it a point of indicating that becoming known and appreciated by a school principal would have the effect of increasing the likelihood of getting more substitute teaching assignments, he did not appear to actually benefit from such relationship. Mr. Cline insisted a particular school held great promise for an increase in substituting assignment in the future as he had proven himself to the principal. However, Mr. Cline could not remember the principal's name in his evidence at the hearing. In contrast to Mr. Hume's evidence of the greatest demand for substitute teachers being at the beginning of the calendar year, Mr. Cline's record of substitution work never indicates a spike in the number of days of substituting at that time. It is also difficult for the Board to establish a pattern of service from merely two consecutive full years of service as a substitute teacher. While Mr. Cline found his chances of work were enhanced by his qualifications with his masters of education, the Board accepts Mr. Hume's evidence that there is no indication that a master degree will enhance the amount of work available for a substitute teacher. It also accepts Mr. Hume evidence that he has never received a complaint or grievance on behalf of Valley Regional regarding a need for a substitute teacher that remained unfilled. Mr. Cline's specialization was not in the areas of highest demands: French immersion and high school science and math.

[66] While the Board appreciates Mr. Lenethan's submission that the extent to which Mr. Cline would have been employed from September 2004 to June 2007 is "purely speculative", it is still possible to make some projections based on the pattern of substitution assignment over two full years in 2002-2003 and 2003-2004. The Board finds that Mr. Cline would have been willing and capable of continuing his substitute teaching and would likely have been called upon to teach for an amount of days per year consistent with Mr. Hume's evidence of 43% of substitute teachers teaching for 30 days or less. The Board therefore chooses to apply Mr. Hume evidence of 30 days which the Board finds to be consistent with Mr. Cline's pattern of work over two years of service (28.5 and 33.5 days). The Board finds that Mr. Cline's expectation of getting more than

30 days of work per year was unfounded, due to the following circumstances: his preference to avoid administrative tasks which would have been inevitable in long term substituting work; his lack of suitability for the highly sought after French immersion and high school science and math teachers; and the absence of evidence to substantiate his claim that he could expect to be called upon more often as he had become better known at certain schools. The Board therefore finds that Mr. Cline is entitled to the following in compensation for lost opportunity, applying rates of \$130.00 per day in 2004-2006 and \$135.00 per day in 2006-2007:

2004-2005	30 days	X	\$130.00 /day	= \$3900.00
2005-2006	30 days	X	\$130.00/day	= \$3900.00
2006-2007	30 days	X	\$135.00/day	= \$4050.00
TOTAL				\$11, 850.00

[67] The Board also awards Mr. Cline pre-judgment interest on both general and special damages of 2.5%.

Gilles Deveau, Chair
Board of Inquiry