HUMAN RIGHTS TRIBUNAL OF ONTARIO

B E T W E E N:

Fay Grange

Applicant

-and-

City of Toronto, Mark Lawson, Ann Ulusoy, Lucy Troisi, Arthur Beauregard, Donna Kovachis, Kathy Wiele and Don Boyle

Respondents

INTERIM DECISION

Adjudicator: Leslie Reaume

Date: May 5, 2014

File Number: 2011-09766-I

Citation: 2014 HRTO 633

Indexed as: **Grange v. Toronto (City)**

APPEARANCES

Fay Grange, Applicant	)	Virginia Nelder, Counsel
City of Toronto, Mark Lawson, Ann Ulusoy, Arthur Beauregard, Donna Kovachis, Kathy Wiele and Don Boyle, Respondents	)	Amandi Esonwanne, Counsel
Lucy Troisi, Respondent	)	Naomi Calla, Counsel

[1] This is an Application filed under s. 34 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "*Code*"), alleging discrimination with respect to employment. The applicant self-identifies as a woman of African descent and attributes her allegations of discrimination to an intersection of the prohibited grounds of race, colour, ancestry, place of origin, ethnic origin and sex. The applicant is an employee of the organizational respondent, the City of Toronto (the "City"). The individual respondents are employees or former employees of the City.

[2] On October 17, 2012, the Tribunal issued a Case Assessment Direction ("CAD") granting the respondents' request for a Summary Hearing and directing the parties to address whether the Application should be dismissed for timeliness or no reasonable prospect of success.

[3] I have considered all of the materials filed by the parties including the Application, Response and Reply, and the written submissions on timeliness and no reasonable prospect of success. The applicant filed written submissions in relation to an earlier Notice of Intent to Dismiss ("NOID") issued by the Tribunal. The individual respondent Lucy Troisi has adopted the submissions of the other respondents. The parties also participated in an oral hearing by teleconference which took place on June 4, 2013.

[4] The Application was filed on September 2, 2011, and contains allegations of workplace discrimination spanning the years 2001 to 2010. The applicant alleges that her career and her health were detrimentally affected by workplace incidents arising from systemic discrimination against her as a woman of African descent. The applicant is still employed by the City but has been on medical leave since January, 2010.

[5] The applicant summarizes her allegations in her written materials in this way:

> The Application contains specific details of a series of incidents that together are evidence of a pattern of behaviour, policies and/or practices that form part of the social and administrative structure of the City of Toronto and reflect the culture of systemic discrimination against

> racialized individuals and women at the City of Toronto. These incidents resulted in the Applicant as a racialized woman being placed in a position of relative disadvantage.

[6] The applicant argues that her experiences from 2001 to 2010 form a "series of incidents" for the purpose of determining timeliness under the *Code.* She argues that the last incident occurred within one year of the filing of her Application. The last incident is alleged to be the posting of the position of Supervisor, Community Projects Funding, which took place on or about September 14, 2010. The applicant considers this incident both an act of discrimination and evidence supporting her allegation that throughout the material period of her employment, she was marginalized and under-valued as a woman of African descent. The applicant's explanation as to why she considers the posting of this position an act of discrimination against her are set out in more detail below.

[7] The applicant also argues against the respondents' assertion that the Application has no reasonable prospect of success. She argues that she will be able to link the various incidents which she alleges caused her disadvantage, with her identity as a woman of African descent. She relies, in part, on her own experiences in the workplace as compared to other employees who are not women of African descent. She intends to call other African Canadian employees to testify to their own experiences of racial and gender discrimination by management of the City, including African Canadian employees who worked in Parks and Recreation under the same managers as the applicant. The applicant alleges that these witnesses will support her allegations that there is a "culture of inequity and exclusion of racialized employees, and specifically African Canadian women" within the City. The applicant also relies on the City's own reports, policies and programs promoting diversity which, it is argued, support the applicant's contention that systemic barriers to equality in her workplace do in fact exist.

[8] In is an understatement to suggest that the respondents dispute both the factual allegations advanced by the applicant and her attempt to link those allegations to systemic discrimination. The respondents dispute the facts and the applicant's

perception that she was disadvantaged in any way. The respondents allege that the applicant is fundamentally resistant to organizational change and that it is she who has subjected the individual respondents to years of stress by threatening to or actually filing allegations of racism against them. With respect to the issue of timeliness, the respondents argue that the nature of the allegations and the temporal gaps between the incidents in the applicant's narrative should lead to a finding that incidents which pre-date the one year limitation period should be dismissed. The respondents also argue that the applicant's allegations have no reasonable prospect of success because the incidents are not discriminatory or because there is a reasonable explanation that will preclude a finding of liability under the *Code*.

The Nature of the Allegations

[9] The applicant has been employed by the City since 1992. She currently holds the position of Program Standards and Development Officer ("PSDO") although she has been on medical leave since January, 2010. The applicant attributes her medical condition to the experiences of alleged discrimination. The applicant argues that from 1992 until 2001 she had no major concerns with respect to her work environment, level of responsibility, or distribution of work.

[10] The applicant alleges, among other things, that she experienced differential treatment and a pattern of racial and gender-based discrimination which manifested in a variety of different ways over the course of that period, including, but not limited to: the removal of her supervisory and managerial responsibilities; assignment to less desirable positions or job duties; isolation and exclusion from formal and informal workplace networks; excessive monitoring; documentation and discipline; discriminatory promotion practices; the failure to deal with her allegations effectively when she complained about discrimination including the improper handling of a complaint regarding the use of the word "nigger" in her presence in the workplace.

[11] The applicant has provided particulars in the Application which she has organized chronologically beginning in 2001. The applicant's allegations from 2001 to

2003 relate largely to incidents which involve the respondent Donald Boyle after he became the Director of the applicant's division in the fall of 2001. The applicant alleges differential treatment in the form of inequitable work assignments, a failure to recognize her contributions to the organization in comparison to non-racialized co-workers, insufficient staffing and resource support, isolation and exclusion from formal and informal workplace networks, excessive monitoring and discipline, the removal of supervisory responsibilities, staff insubordination and inappropriate comments, and the promotion of non-racialized persons without competition.

[12] The applicant alleges that as a result of her workplace experiences from 2001 to 2003, she sought assistance from human resources. On May 13, 2003, she filed an internal human rights complaint. A memorandum of understanding was signed by the parties to the human rights complaint on August 21, 2013.

[13] The applicant alleges that her human rights concerns were not resolved by the agreement of August 21, 2003, although she acknowledges that there were some improvements in her work environment.

[14] Following the complaint in 2003, the applicant alleges that her performance bonus for the year 2003 was not paid on time in 2004, Mr. Boyle was dismissive about her concerns and resolution of that issue was delayed until July, 2006. The applicant alleges that in April, 2005, she attempted to raise concerns about ongoing inequities in work assignments and insufficient staff support with Mr. Boyle. The applicant also alleges that she attempted to raise with Mr. Boyle her view that his demeanour toward her was inappropriate. She alleges that she advised management of her ongoing human rights concerns and submitted a proposal for remedying those issues in April, 2005. The applicant alleges that there was no response from her employer.

[15] The applicant alleges that in the spring of 2005 there was an organizational restructuring in which she received a significant increase in responsibilities. She alleges that in February 2006 she was disadvantaged by a work reassignment during a period when the City was dealing with the possibility of a labour disruption. The applicant

alleges that she was the only person who was disadvantaged in this manner. The applicant alleges that she raised with management her concern that this potential reassignment, which would make it difficult for her to carry out her work, was part of a persistent pattern of isolation or exclusion from informal and formal work networks. She indicated that she wished to have her complaint about this incident addressed as a formal internal human rights complaint. The applicant alleges that she did not receive a response from the City. The applicant also alleges that throughout 2006 she continued to raise concerns about ongoing staff and resource issues associated with her portfolio which, she alleges, were not addressed.

[16] On July 28, 2006, the applicant was promoted. She alleges she was given more responsibility but did not receive a pay increase until she initiated a request. The applicant acknowledges that initially her experience and expertise were recognized in her role. However, the applicant alleges that despite positive feedback about her work, in November, 2007, a portion of her work was transferred to another staff member without consultation and without properly informing her. The applicant alleges that this aspect of her work was returned to her after she initiated a meeting with management.

[17] The applicant's particulars for 2008 include allegations of insufficient staff support, inequity in work assignments, and inappropriate office conduct including disrespectful behaviour toward her and challenges to her authority which were not resolved by management. The applicant alleges that reductions in her staff resulted in her working excessive hours to meet the demands of her department. The applicant alleges that to her knowledge, she was understaffed in comparison to others. The applicant alleges that in 2008 she was recommended as a candidate for the City of Toronto Diploma in Public Administration program but was unable to take advantage of this opportunity because of the inequity in work assignments and staff support which resulted in a chronically stressful work environment.

[18] The applicant alleges that in the spring of 2008, she was engaged in a conversation in the lunchroom when an employee of the City used the word "nigger". The applicant alleges that she was accused of "playing the race card" when she raised

this issue with management. The applicant alleges that management failed to take her concerns seriously, discipline the person who used the word “nigger”, or resolve the tension in the workplace caused by the dispute.

[19] The applicant alleges that she continued to experience inequity in work assignments and insufficient staff support into 2009. Her particulars include allegations about the removal of her supervisory and managerial responsibilities, the issuance in November 2009 of what the applicant alleges was an unnecessary letter of direction, exclusion from the investigation and resolution of an alleged over-expenditure in her portfolio. As a result of the stress she was experiencing, the applicant commenced a medical leave in January, 2010.

[20] The last incident in the series is alleged to have occurred in September, 2010, within one year prior to the filing of her application. The applicant alleges that while she was on leave in September or October 2010, she learned that a position had been posted by the respondent for a “Supervisor of Community Projects Funding”. The applicant alleges that the position was awarded to a White employee who was given partial responsibility for the applicant’s Recreation Grant program but at a higher classification and wage rate. The applicant alleges that the major responsibilities in the September 2010 posting are the exact duties that she carried out, at a lower pay grade, prior to her medical leave in January 2010.

[21] To summarize, the applicant alleges that for a period of approximately 10 years, she experienced a series of incidents which, when considered in the full context of her employment experience, will be found to be indicative of systemic racial and gender discrimination. She alleges that her efforts to resolve those issues internally provided only temporary relief, if at all. She further alleges that her experiences had the cumulative effect of causing her to leave the workplace on medical leave.

Analysis

[22] The *Code* identifies timely applications as those which are filed within one year of the last (or only) incident of discrimination by a person who believes that his or her rights have been infringed. All applications filed beyond that limitation period are subject to the requirements of section 34(2). Sections 34(1) and (2) of the *Code* read as follows:

> (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,
>
> (a) within one year after the incident to which the application relates; or
>
> (b) if there was a series of incidents, within one year after the last incident in the series.
>
> (2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

[23] The Tribunal has dismissed applications for lack of timeliness where a series of incidents is alleged, prior to hearing evidence either on the merits or with respect to the timeliness issue itself. In some cases, those decisions have involved a careful, complex and time consuming analysis of each of the allegations where the applicant is called upon to establish that the incidents constitute a bona fide series.

[24] To the extent that this decision departs from any of those earlier decisions it is with respect to how far the Tribunal should go in imposing a burden on the applicant to prove timeliness where a series of incidents is alleged. In my view, all section 34(1) applications should be treated in the same way whether they involve a series of incidents or allegations which are timely on their face: presumptively in time unless there is a compelling reason to inquire into timeliness as a preliminary matter. Applicants who allege a series of incidents should not face a higher preliminary burden than those who allege a single incident which appears timely on its face. My decision in

the Application before me is that there is no compelling reason to inquire into timeliness prior to hearing evidence on the merits of the Application.

[25] I cannot stress enough that this Interim Decision arises at the earliest stage in the hearing process, where my role is not to make assessments of credibility or findings of fact. In this case, the applicant's allegations are alleged to find their connection in systemic discrimination. The Ontario Human Rights Commission defines systemic discrimination as "patterns of behaviour, policies or practices that are part of the structures of the organization and perpetuate disadvantage" on the basis of one or more prohibited grounds under the *Code*.

[26] The Application alleges historic, systemic discrimination manifesting in various ways over approximately ten years of the applicant's career with the City. The respondents find the applicant's allegations incredulous and lacking in any perspective. There will no doubt be significant challenges for both parties in attempting to advance and defend against the allegations. However, as the Federal Court of Appeal stated in *Public Service Alliance of Canada v. Canada (Department of National Defence)*, [1996] 3 FC 789:

> Systemic discrimination is a continuing phenomenon which has its roots deep in history and in societal attitudes. It cannot be isolated to a single action or statement. By its very nature, it extends over time.

[27] In support of their request to dismiss this Application, the respondents have raised a challenge to the veracity of almost every fact alleged by the applicant and placed the burden on the applicant to prove that her allegations constitute a series of incidents *before* her Application proceeds to a hearing.

[28] In my view, this approach is inconsistent with the wording of section 34(1)(b) and the interpretive principles which apply to the adjudication of human rights claims. It also invites a compartmentalized analysis of allegations which are by their nature alleged to be interwoven. Systemic discrimination in the workplace can manifest as a series of seemingly disparate events arising from an invisible (to some) yet ubiquitous

institutional culture. In cases like this, it will be premature to ask "where is the connection between these incidents?" before the applicant has been permitted to lead the evidence which she believes will establish that connection.

[29] I have considered whether the Request of the respondents could be effectively addressed by hearing evidence in relation to the timeliness issue alone. However, in this case, that would involve an evaluation of nearly all of the evidence the applicant proposes to call on the merits.

[30] The Tribunal has observed on a number of occasions that allegations of discrimination, particularly those related to systemic racial discrimination and intersections of more than one prohibited ground, can be subtle, nuanced, and difficult to prove and that there is rarely direct evidence upon which to find a breach of the *Code*. A finding that the *Code* has been breached is more often the result of the Tribunal conducting a careful evaluation of the evidence of both parties and applying its expertise to draw the appropriate inferences from circumstantial evidence. For that reason alone, the Tribunal should take a cautious approach to disposing of allegations of systemic discrimination before the evidence is fully considered. This includes early dismissal under section 34(1)(b).

[31] More importantly, the statutory wording and context for the timeliness provision of the *Code* does not, in my view, support the argument that the Legislature intended the words "series of incidents" to cause the Tribunal to engage in a searching, detailed assessment of whether the events constitute a true series. That level of analysis, in my view, is better left for the hearing on the merits where both parties have the benefit of calling evidence in support of their positions.

[32] A plain reading of section 34 is that timely applications are those which are filed within one year of the last (or only) allegation of discrimination and untimely applications are barred unless they meet the criteria under section 34(2). Only where applicants exceed those timelines are they required to apply for a decision of the Tribunal to proceed. Where an applicant has missed the one-year limitation, even by one day, their

application will not proceed until they satisfy the Tribunal that there is a good faith reason for the delay and no substantial prejudice. In assessing good faith, the Tribunal often requires the applicant to produce evidence to support their explanations. In those cases it is appropriate to impose a burden on the applicant to prove that the criteria under section 34(2) has been met.

[33] Where the applicant alleges either a single incident or a series of incidents which fall in whole or in part within the one-year limitation period, those applications should be treated as if they are presumptively in time unless there is a compelling reason to inquire into timeliness before referring them to a hearing on the merits.

[34] I am not suggesting that section 34(1) allegations should never be scrutinized for timeliness. Even where an applicant alleges just one incident of discrimination, they can be incorrect or not telling the truth about when the incident occurred.

[35] However, the *Code* is clear that section 34(1) applicants need only believe that their rights have been infringed and file their applications with the Tribunal within a year of the last incident they believe to be discriminatory. There is no requirement for an applicant under 34(1)(a) or (b) to apply to the Tribunal for a decision permitting them to proceed with their application. In addition, no matter how far back in time an alleged series of incidents goes, applicants are not subject to the good faith and substantial prejudice provision found in section 34(2).

[36] In *Keith v. College of Physicians and Surgeons of Ontario*, 2010 HRTO 2310, the Tribunal made the important observation that the purpose of the one-year limitation period for filing an application is consistent with the policy objective, expressed elsewhere in the *Code*, that human rights claims should be dealt with expeditiously. Section 34(1)(b), which was added to the *Code* when the amendments took effect in 2008, embodies the equally important principle that time limits under the *Code* should reflect the myriad ways discrimination can manifest as singular or multiple incidents over time. In addition to the inclusion of section 34(1)(b), the *Code* was amended to increase the time limit from six months to one year. This extended limitation period

accounts in part for the complexities associated with initiating a formal Tribunal proceeding where the applicant lacks resources, fears negative repercussions, is struggling to understand the nature of what they are experiencing, or is attempting to preserve an ongoing relationship by seeking resolution at a more informal level.

[37] The Tribunal has long regarded the application of the good faith and substantial prejudice provision in section 34(2) as a jurisdictional issue. It arises where an application is untimely on its face whether the applicant alleges one incident or a series of incidents. Section 34(1)(b) does not operate in the same way. Alleging a series of incidents does not automatically give rise to the question: "does the Tribunal have the power to deal with this application?". If that were the case, the Tribunal would be required to adjudicate every claim about a series of incidents prior to permitting the application to proceed which is not consistent with section 34(1).

[38] In my view, the purpose of including "series of incidents" in 34(1) is to provide greater certainty that where applicants believe that they have experienced discrimination, the examples of which may vary and extend over time, their limitation period runs from the last incident and not the first. The applicant in this case alleges a series of incidents, the last of which falls within one year of the filing of her application. If she had alleged a single timely incident, her application would proceed unless there was some compelling reason to inquire into her assertion that her application is timely. In my view, all section 34(1) applicants should be treated in the same manner.

[39] The case before me is that the various allegations, when considered in the full context of the applicant's experience, will reveal a pattern of discriminatory treatment which has its roots in patterns of behaviour, policies or practices that are part of the structures of the organization. In a case like this, where the last incident in a series of incidents appears to be timely and can reasonably be viewed as an allegation of discrimination (as opposed to an allegation of something other than an act of discrimination), challenges to the nature and timing of the incidents alleged to fall within the series are best resolved by the hearing adjudicator who has the benefit of considering all of the available evidence before finding in favour of either party.

[40] This is not a case where the last incident appears to relate to the ongoing effect of an earlier act of discrimination rather than the act of discrimination itself. The case that is often cited by the Tribunal in relation to this distinction between an act of discrimination and its continuing effect is *Visic v. Ontario Human Rights Commission,* 2008 CanLII 20993 ("*Visic*"), a case which was decided prior to the amendments to the *Code* which came into force in 2008. That case was also adjudicated on the basis of section 34(1)(d) of the previous version of the *Code,* which was consistent with the good faith and substantial prejudice provision in the current *Code*.

[41] The Tribunal followed *Visic* in *Garrie v. Janus Joan Inc.*, 2012 HRTO 1955 ("*Garrie*"), in order to conclude that a wage differential paid to a disabled person should be characterized as a series incidents rather than the continuing effect of the original act which established the wage differential. The series of questions set out in *Garrie* are very useful to distinguish between an act of discrimination and its continuing effect, particularly where the facts are not generally in dispute. However, the facts alleged in the case before me are almost all disputed and significantly different in nature from the allegations in *Garrie*.

[42] The respondent in this case has relied on previous decisions by the Tribunal which have involved an analysis of the nature of the allegations, the gaps in time, if any, between allegations and an apparent lack of connection between the allegations in the series. I would not apply those factors to the kinds of allegations before me except in the clearest of circumstances. As I suggested earlier, to grant the respondents' request to dismiss this case because of gaps in time between the allegations and an apparent lack of connection between the incidents, is to reject, without evidence, the applicant's allegation that her experiences arise from systemic discrimination. There is no magic in the explicit use by the applicant of the words "systemic discrimination". In an employment case, where an applicant pleads a series of incidents which are alleged to arise as a result of a discriminatory culture or environment in the workplace, the Tribunal should be extremely careful not to dismiss allegations of this nature prematurely, without the benefit of evidence.

[43] While I have expressed my primary reasons for the decision not to dismiss for lack of timeliness, the request of the respondents also raises other issues. The first, which is specific to this case, is that the alleged lack of connection between the incidents in the series is actually a dispute between the parties about the facts – the respondents dispute almost all of the facts and/or perceptions advanced by the applicant and therefore disputes any connection among them. The respondents also have an explanation for last alleged incident, the posting of the position in September 2011, which they argue will lead to the conclusion that the incident is not discriminatory. On that basis, the respondents urge me to conclude that the last incident in the series is not independently capable of grounding a finding of a *Code* violation and therefore cannot be considered the last in a series of incidents. I would not dismiss this Application for lack of timeliness because the respondents have an alternative version to advance about the nature of the last incident.

[44] Second, to engage in a complicated process of compartmentalizing each allegation and assessing timeliness based on whether the allegation properly "belongs" to the series puts an applicant at a serious disadvantage where he or she alleges, as in this case, that the whole picture emerges when the allegations are considered together. It also encourages adversarial, unnecessary and complex preliminary proceedings in a system designed to be fair, just, expeditious and accessible to parties without legal representation.

[45] Third, the fact that section 34(1) does not require an applicant to apply to the Tribunal to establish that the facts alleged constitutes a series of incidents, suggests that the applicant's perception about how those incidents are linked is an important consideration. This is separate and apart from the application of the "no reasonable prospect of success" test, where the applicant's perception is scrutinized for evidence which might be reasonably available to support that perception. It is important not to conflate the two and dismiss for timeliness where the real issue is that an application likely has no reasonable prospect of success.

[46] I do not wish to be seen to be dismissive of the concerns of the respondents in this case about the potential prejudice associated with defending historical allegations of this nature. This decision has taken some time to formulate precisely because I have given careful consideration to the compelling issues raised in their materials and oral submissions. Ultimately, however, I have concluded that it is more appropriate for the respondents to appeal to the hearing adjudicator where evidence of real prejudice emerges. Those determinations will be made on the basis of evidence rather than speculation.

[47] The approach I have taken is not the same but it shares some commonalities with the approach taken in *Henry v. Waterloo (Regional Municipality),* 2011 HRTO 1927 ("*Henry*"). In that case, the Tribunal assumed the applicant's allegations to be capable of proof and determined whether the allegations are based on assertions of fact "that could reasonably be viewed as sufficiently similar or related to constitute, if established, a pattern of conduct, rather than on alleged incidents relating to discrete issues without some connection or nexus."

[48] In *Henry,* the Tribunal also made the following observation:

> The Tribunal's approach to what is a "series of incidents" is developing on a case-by-case basis. It has been said that events are not part of a series of incidents if there is a significant break in the temporal connection between them. A gap of more than one year between events has been considered in some cases to interrupt the series. See for example *Savage v. Toronto Transit Commission*, 2010 HRTO 1360, and *Chintaman v. Toronto District School Board*, 2009 HRTO 1225. The Tribunal has also considered the nature of the events and whether they may reasonably be viewed as a pattern of conduct, or are comprised of incidents relating to discrete and separate issues without some connection or nexus. See *Duggan v. Villa Care Centre Nursing Home*, 2010 HRTO; *Baisa v. Skills for Change*, 2010 HRTO 1621. The Tribunal has defined the word series as "a number of things or events of the same class coming one after another in spatial or temporal succession": *Pakarian v. Chen*, 2010 HRTO 457.

[49] The Tribunal in *Henry* also noted at paragraph 11 that decisions such as *Savage* and *Chintaman*, should not be read as imposing a rigid "less than one year" rule. To do

so would be to import a restriction into a discretionary provision that is not warranted by the words of s.34.

[50] My approach is also similar to the approach taken by the Tribunal in *DeFreitas v. Ontario Public Service Employees Union*, 2010 HRTO 2049 ("*DeFreitas*"), in the sense that the Tribunal relies largely on the applicant's belief that she can link her allegations. In that case, the Tribunal considered allegations of racial discrimination against a female employee over a period of several years and stated at paragraph 12:

> The underlying theme of the applicant's allegations is that she experienced marginalization as a racialized employee and/or reprisals for having filed a human rights complaint against the respondents. This theme includes her allegations that she was marginalized and reprised against by not being assigned specific work assignments within the scope of her job duties, by allegedly being subjected to an investigation when others weren't or wouldn't have been, and by being denied promotional opportunities. In my view, all of the allegations raised by the applicant in the new Application share this common theme, which provides a sufficient connection or nexus between these allegations to support a finding that they all form a "series of incidents" within the meaning of s. 34(1)(b).

[51] I am not suggesting that the Tribunal should not apply the criteria it has considered in series of incidents cases, although I do agree with the caution raised in *Henry* about gaps in time. What I am suggesting is the case before me is an example of the kind that is least likely to benefit from the application of that criteria. The first question the Tribunal should ask is whether there is a compelling reason to inquire into timeliness and avoid engaging in the level of scrutiny which I have been invited to undertake at this early stage in the application.

[52] If I am incorrect, then I would apply the same analysis as the Tribunal applied in I *DeFreitas*: the underlying theme of the Application is that the applicant experienced marginalization as a racialized woman at the City of Toronto, and that these experiences were a direct manifestation of the broader issues of systemic discrimination within her workplace. The applicant alleges that she experienced systemic discrimination in her workplace over a period of years culminating in the necessity to

take a medical leave. While she was on medical leave, she alleges that the respondents engaged in discrimination by advertising a position which is essentially her own but at a higher pay grade. As was the case in *Henry,* I find that the allegations are based on assertions of fact that could reasonably be viewed as sufficiently similar or related to constitute, if established, a pattern of conduct, rather than on alleged incidents relating to discrete issues without some connection or nexus.

[53] However, I prefer to dispose of this Application by finding that there is no compelling reason to inquire into timeliness. The last incident is an allegation of discrimination and it appears to be in time. The relationship between the last incident and each incident in the series and whether or not the applicant will be successful in advancing these allegations is a matter to be determined at hearing on the basis of real evidence.

No Reasonable Prospect of Success

[54] The respondents request that this Application be dismissed for no reasonable prospect of success. In applying that test, the Tribunal does not engage in assessments of credibility and the weighing of evidence. The applicant's allegations are assumed to be true. The role of the Tribunal is to examine the allegations and consider the evidence the parties propose to call to support their arguments. Where an applicant is unable to demonstrate that there is evidence that is or is reasonably available to her to support a violation of the *Code,* the application may be found to have no reasonable prospect of success.

[55] The Tribunal is very careful to ensure that an application is not dismissed at this early stage, before any evidence has been heard, on the basis that the respondent has an alternative explanation of the events. Apart from the dangers inherent in determining facts without the benefit of evidence, the Tribunal is mindful of the fact that in some cases the respondent is the party who has control over the evidence which could support the applicant's case.

[56] The Tribunal is not empowered to remedy general allegations of unfairness in areas such as employment, services or accommodation. Discrimination in the legal sense requires proof that unfair treatment is based, at least in part, on a person's race, gender, disability or other prohibited ground under the *Code*. In other words, the ground must somehow be a factor in the adverse treatment.

[57] The purpose of the summary hearing is to determine if there is evidence which is reasonably available to support the applicant's belief that the unfair treatment they experienced arises from discrimination. In order to proceed to a full hearing some evidence must exist, which goes beyond the applicant's feeling or belief that the ground played a role in what they experienced.

[58] I have carefully considered the written and oral submissions of the parties and I decline to exercise my discretion to dispose of the applicant's allegations in whole or in part, on the basis that there is no reasonable prospect of success. The respondents argue that the Application has no reasonable prospect of success either because the alleged incidents are not discriminatory or because there is a reasonable explanation that will preclude a finding of liability under the *Code*. These determinations are made by the adjudicator who hears and evaluates the evidence. The Tribunal has long accepted that it is often difficult to establish direct evidence given the subtle and nuanced ways in which racial discrimination manifests in our culture. The Tribunal is often called upon to draw reasonable inferences from circumstantial evidence which establishes that race is more likely than not one of the factors associated with the conduct in question. See, for example, *Phipps vs. Toronto Police Services Board,* 2009 HRTO 1604.

[59] Assuming the allegations of the applicant are true, which I am required to do at this stage, I cannot say that there is no reasonable prospect that the applicant would succeed. The applicant's allegations, if proven, could lead to a finding that she experienced discrimination as a result of a culture of systemic discrimination in her workplace.

[60] Pursuant to Rule 19A.6, I do not consider it necessary or useful to provide further reasons.

ORDER

[61] The Tribunal orders the following:

- The Requests for an order to dismiss the application on the basis of timeliness and no reasonable prospect of success are dismissed;
- The parties have 15 days from the date of this Interim Decision to advise the Tribunal if they wish to participate in mediation;
- Mediation is a voluntary process. If the parties wish to proceed to hearing rather than to mediation, the registrar will set a conference call for the purpose of setting hearing dates and conducting case management.

Dated at Toronto, this 5th day of May, 2014.

"Signed by"

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Leslie Reaume
Vice-chair