Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2017 CHRT 4
Date: February 17, 2017
File No.: T2111/2715

[ENGLISH TRANSLATION]

Between:

Nahame O'Bomsawin

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Abenakis of Odanak Council

Respondent

Decision

Member: Anie Perrault

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I. Introduction

[1] Nahame O'Bomsawin filed a complaint against the Abenakis of Odanak Council (the "Council") with the Canadian Human Rights Commission (the "Commission") on April 15, 2013. After the investigation, the Commission referred the complaint to the Canadian Human Rights Tribunal (the "Tribunal") for inquiry on September 15, 2015.

[2] Pursuant to section 7 of the *Canadian Human Rights Act* ("*CHRA*"), Ms. O'Bomsawin alleges that she was discriminated against on the ground of family status in a hiring process. She claims that she was denied the employment for which she applied—a contractual position as *Project Manager (Accreditation Coordinator)*—at the Odanak Health Centre. Ms. O'Bomsawin alleges that the Council set aside her application because she is the daughter of the Health Centre Director. The Council alleges that the successful candidate was more motivated than Ms. O'Bomsawin for the position, which was the determining factor for their choice.

[3] A hearing was held from December 20 to 21, 2016, in Sorel-Tracy, Quebec. Both the Complainant and the Respondent were represented by legal counsel at the hearing. The Commission elected not to appear at the hearing.

[4] After having heard the parties' arguments and considered the evidence, I find that Ms. O'Bomsawin's complaint is substantiated for the following reasons.

II. Facts

A. Abenakis of Odanak

[5] Ms. O'Bomsawin is a member of the Abenaki First Nation in the Odanak reserve. Born in Montréal, she grew up in the Odanak community. She left the community at about age 18 to complete her education in Montréal, but returned on a regular basis. Her parents still live in the community.

[6] The Odanak community is located on the east bank of Saint-François River, 32 km east of Sorel in the regional county municipality of Nicolet-Yamaska in the Centre-du-Québec administrative region.

[7] Many members of the Odanak community have the same family names without being related. In the present case, Ms. O'Bomsawin and the current Council Chief, Rick O'Bomsawin, have the same family name, but they are not related.

B. Ms. O'Bomsawin's qualifications

[8] Ms. O'Bomsawin is the daughter of Odanak Health Centre Director Deny O'Bomsawin. She began working at the Odanak Health Centre in 2004 as a project leader in charge of organizing a conference. She was then 18 years old, and it was a student job for her. Ms. O'Bomsawin seems to have done a good job. There were no complaints and she completed her mandate.

[9] From 2005 to 2008, she studied at the University of Montréal and earned a bachelor's degree in communication science. From 2008 to 2009, Ms. O'Bomsawin completed a diploma with a specialization in management.

[10] In August 2009, she applied for and obtained the position of *Coordinator of the National Training Program for Community Water Quality Controllers* at the Odanak Health Centre. She obtained this position without having an interview. Her mandate began in August 2009 and ended in January 2011 when the program funding ended. There were no complaints made during her mandate.

[11] In February 2011, Ms. O'Bomsawin applied for and obtained the position of *Community Organizer in the Child and Family Services Program (SEFPN)* with the Grand Council of the Waban-Aki Nation. She was interviewed to obtain this position.

[12] In October 2011, Ms. O'Bomsawin resigned from her position with the Grand Council of Waban-Aki. In examination-in-chief and in cross-examination, she explained that she was unhappy in her position and thought that she would have other job possibilities either in Montréal or with the Council.

[13] In February 2012, she was given a three-month mandate as a *Project Manager – Food Safety Program* in the Odanak Health Centre. Ms. O'Bomsawin obtained this mandate after sending her CV and without having to go through an interview. Her mandate ended in May 2012.

C. Contractual position – Project Manager (Accreditation Coordinator)

[14] On July 9, 2012, the Council passed a resolution and mandated the Odanak Health Centre to carry out an accreditation process for the Health Centre. The Health Centre Director then drafted a competition notice for the position of Accreditation Coordinator and posted it. After seeing the notice of competition posted at the Odanak Health Centre, Ms. O'Bomsawin applied on July 16, 2012, for the *Contractual position – Project Manager (Accreditation Coordinator)* (the "position").

[15] It appears from the hearing that the notice of competition was posted twice. The second time, the closing date of the competition was different from the first time. It was not demonstrated to the Tribunal what the first closing date was—it was later than the date finally posted—but the parties agree that the official closing date of the competition was July 26, 2012.

[16] The position's job description and requirements were the same in the two notices of competition. According to the notice of competition, the position's main responsibilities consisted in developing a conceptual framework, supervising the accreditation process, liaising between the staff and Accreditation Canada, coordinating and encouraging self-assessment, handling accreditation visit logistics and attending regional networking and training meetings in preparation of the accreditation visit.

[17] The requirements were as follows:

A. University education completed in project management or management
B. Experience as a project manager
C. Interpersonal communication skills
D. Ability to work well under pressure

E. Excellent oral and written communication skills
F. Experience with government organizations
G. Local knowledge
H. Bilingual (English – French)

[18] The position posted was funded by Health Canada, which was responsible for granting the accreditation certificate sought by the Odanak Health Centre. Health Canada had not requested any particular requirements for this position.

D. Selection committee

[19] In early August 2012, a few days after the end of the competition, the Council Chief to whom the Odanak Health Centre reports, asked the Council's Human Resources advisor, Robert St-Ours, to oversee the process related to this competition notice. He did not seem satisfied with the process already put in place by the centre director, Deny O'Bomsawin, who is the Complainant's father.

[20] Mr. St-Ours met with Deny O'Bomsawin, Health Centre Director, and offered to set up a process with interviews. Mr. O'Bomsawin agreed and a selection committee was set up. The committee would conduct interviews.

[21] The committee consisted of Mr. St-Ours, who was then the Council's Human Resources Advisor, and Daniel G. Nolett, General Manager of the Council. Odanak Health Centre Director Deny O'Bomsawin did not sit on the selection committee, nor did Council Chief Rick O'Bomsawin.

E. Assessment of candidates

[22] In August 2012, as of the closing date of the notice of competition, three people applied for the position, Ms. O'Bomsawin and two other candidates. The interviews for the position were held in early October, and Ms. O'Bomsawin was interviewed on October 1, 2012. After one of the candidates withdrew, there were only two candidates remaining: Ms. O'Bomsawin and the other person.

[23] Two months elapsed between the end of the notice of competition (July 26, 2012) and the beginning of the interviews (October 1, 2012). During that time, no changes were made to the competition, the position was not posted again, and there were no changes to the description of duties or experience required.

[24] The selection committee members used an evaluation grid to carry out interviews. This grid contains the following evaluation points with the weighting indicated below:

A. Training – 25 points
B. Project management experience – 20 points
C. Quality of answers – 15 points
D. Knowledge of programs – 10 points
E. English – 10 points
F. Overall evaluation – 10 points
G. Maturity (enthusiasm, motivation and life experience) – 10 points

Total: 100 points

[25] Ms. O'Bomsawin was interviewed on October 1, 2012. The interview lasted 45 minutes. In her opinion, the interview proceeded normally. Ms. O'Bomsawin stated that she was asked standard questions. It was her second work interview. Ms. O'Bomsawin was not required to provide written samples of her communication skills.

[26] Based on the testimony of Messrs. St-Ours and Nolett, they also indicated that Ms. O'Bomsawin's interview was acceptable, but that she seemed to lack motivation. The evaluation grid filed at the hearing indicated that Ms. O'Bomsawin received a score of 78 from Mr. Nolett and 83 from Mr. St-Ours. The other candidate received a score of 74 from Mr. Nolett and 77 from Mr. St-Ours.

[27] Despite the fact that the notice of competition indicated that a university education was required and that the notice had not been amended, 25 and 23 points were awarded to both candidates for this criterion by the two members of the selection committee. The scores were identical, and yet only Ms. O'Bomsawin has a university education, having completed a bachelor's degree.

[28] The members of the selection committee informed the Tribunal, during their testimony, that in their view such training was not required. According to them, their views were based on information provided by Health Canada that a college-level education and relevant professional experience as a project manager were sufficient for the position. That is why they awarded the same score to both candidates, even though it is apparent from the CVs submitted that one of them clearly had a university education and the other did not.

[29] It has not been demonstrated that this opinion on the part of the members of the selection committee was based on a requirement of Health Canada, which was funding the project. In any event, despite the fact that two months had elapsed between the closing date of the competition notice and the start of interviews, the notice of competition was never amended to reflect the opinion of the members of the selection committee and thus indicate to potential candidates the actual training required for the position according to the members of the selection committee.

[30] A re-posting of the position with different qualifications might have allowed for more candidates to compete for the position in question. As a result, at the time the interviews were held, the candidates who had applied had done so on the basis of a competition notice indicating that a university education was required.

[31] In addition, it was clear that the Complainant's project management experience was much greater than that of the other candidate, as was reflected on the evaluation grid itself, which indicates a score of 15 points for Ms. O'Bomsawin and 5 for the other candidate.

[32] Ms. O'Bomsawin also obtained a higher score on her knowledge of the programs. Mr. Nolett gave her 9 points out of 10 and Mr. St-Ours gave her 5 out of 10. The other candidate obtained 3 and 2 out of 10 respectively.

[33] Upon reading the evaluation grids submitted, the other candidate managed to exceed Ms. O'Bomsawin in the quality of her answers and motivation. The other candidate received 15 out of 15 from both committee members for the quality of those answers, compared to a score of 12 and 13 for Ms. O'Bomsawin. With respect to motivation, the

other candidate received a perfect score of 10 out of 10 from both members of the committee, but Ms. O'Bomsawin was only given 4 and 5 respectively.

F. The Council's decision

[34] On October 29, 2012, the Council met to make a decision on the position. At the Council meeting, the evaluation grids were not submitted. Mr. St-Ours verbally informed the Council members of the scores and made a recommendation. Despite having been given a lower score from both members of the selection committee, he recommended the other candidate.

[35] In their testimony Messrs. St-Ours and Nolett indicated that their joint recommendation to choose the other candidate, despite Ms. O'Bomsawin's higher score on the evaluation grid, was due to the fact that the other candidate appeared to have been more motivated by the position. It was resolved by the Council to hire the other candidate for the position.

[36] It is very rare for the Council to have to choose a candidate for jobs of this kind. Normally this type of decision is made by senior management, without the Council's input.

[37] The Executive Director of the Council, Mr. Nolett, confirmed that the situation was rare and unique in his testimony. Its uniqueness resulted from the fact, according to the testimony heard, that one of the candidates was the daughter of the Health Centre's Director.

[38] Claire O'Bomsawin, a longstanding Council member who testified at the hearing too, also indicated that this process was unusual and that they had proceeded in this way because [TRANSLATION] "Nahame is Deny's daughter."

[39] Ms. O'Bomsawin was notified of the Council's decision on October 31 and requested a meeting with Messrs. St-Ours and Nolett. A few days later, on November 2, 2012, she met with both members of the selection committee. Messrs. St-Ours and Nolett reiterated to Ms. O'Bomsawin that it was the Council's choice. Mr. St-Ours confirmed that

during the meeting he mentioned to Ms. O'Bomsawin that [TRANSLATION] "sometimes the Council's decisions can produce victims…".

[40] Mr. Nolett confirmed during his testimony that during the meeting that he told Ms. O'Bomsawin that she [TRANSLATION] "she had already been given three contracts at the Health Centre without an interview and that it caused a lot of talking in the community…". The two committee members also confirmed during their testimony, along with Ms. O'Bomsawin, that the motivation criterion raised by the Council as being an important criterion in choosing the candidate, had not been addressed at that meeting.

III. Legal framework

[41] Within the meaning of section 7 of the *CHRA*, it is a discriminatory practice to refuse to employ an individual on a prohibited ground of discrimination. Family status is a prohibited ground of discrimination under section 3 of the same *Act*.

[42] It has been determined by many different tribunals and by this Tribunal in particular that a complainant must establish a *prima facie* case of discrimination. According to the Supreme Court of Canada's decision in *Ontario (Ontario Human Rights Commission) v. Simpson-Sears Ltd.*, 1985 CanLII 18 (SCC), at paragraph 28, a *prima facie* case in such a context is one that deals with allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of a reply from the respondent.

[43] In the context of the present complaint, Ms. O'Bomsawin must show, according to section 7 of the *CHRA*, on a balance of probabilities, that: (1) she has a personal characteristic protected from discrimination; (2) that the Council refused to employ her; (3) that the protected characteristic was a factor in refusing to employ her (*Moore v. British Columbia (Education)*, 2012 SCC 61, at para. 33 ("*Moore*"); *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39, at paras. 56 and 64 ("*Bombardier*")).

[44] The Justices of the Supreme Court expressed themselves as follows in *Bombardier, supra*:

> [63] Finally, in *Moore*, a more recent case, Abella J. wrote the following for the Court:
>
> > . . . to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur. [Emphasis added; para. 33.]

[45] In the case with which we are now concerned, the alleged discrimination is employment-related. The Complainant alleges that she was refused employment on the basis of a prohibited ground of discrimination, namely, family status.

[46] With respect to hiring, there appears to be a consensus between the parties hereto that the test established in *Shakes v. Rex Pak Ltd.*, (1982), 3 C.H.R.R. D/1001, at paragraph 8918 (Ontario Board of Inquiry) ("*Shakes*") applies here.

[47] The test establishes a *prima facie* case when:

A. the complainant was qualified for the particular employment;
B. the complainant was not hired;
C. someone no better qualified but lacking the distinguishing feature, which is the basis of the complaint of discrimination, subsequently obtained the position.

[48] Although the parties appear to agree on these criteria, the Tribunal would like to add at this point that the test developed in *Shakes* serve only as a guide and should not be applied in a rigid or arbitrary manner. Thus, the circumstances of each case must be examined in order to determine whether the application of any of these criteria, in whole or in part, is appropriate (see *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para. 18; *Canadian Human Rights Commission v. Canada (Attorney General)*, 2005 FCA 154, at

paras. 25-30). *Bressette v. Kettle and Stony Point First Nation Band Council,* 2004, CHRT 40 ("*Bressette*"), as well as *Premakumar v. Air Canada*, (2002), C.H.R.D., at para. 77 (C.H.R.T.) (QL).

[49] I am of the opinion that in the case before us, the multi-part test established in both *Shakes* and *Moore* may be applied. More specifically, the test set out in *Shakes* is helpful in determining whether the prohibited ground of discrimination was a factor in the alleged adverse treatment.

[50] In response to a complaint, a respondent may submit evidence showing that its actions were not discriminatory or avail itself of a statutory defence under the *CHRA* to justify the discrimination. In this, the Council attempted to show that its actions were not discriminatory and that the hiring of another candidate was based instead on the skills of that other candidate. The burden therefore falls on Ms. O'Bomsawin to demonstrate that the Council's explanation is merely a pretext for discrimination (see *Bressette*, *supra*, at para. 34).

[51] Furthermore, it is important to add that it is rarely possible to show direct evidence of discrimination. As a result, direct evidence of discrimination or intent to discriminate is not required to establish the existence of a discriminatory act within the meaning of the *CHRA* (see *Bombardier*, at paras. 40-41). Thus, the Tribunal's task is "… to consider all the circumstances and evidence to determine if there exists the "subtle scent of discrimination" (see *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT) ("*Basi*"); *Tabor v. Millbrook First Nation*, 2015 CHRT 9, at para. 14).

[52] In addition, as was noted by the Federal Court of Appeal in *Holden v. Canadian National Railway Company*, (1991) 14 C.H.R.R. D/12 (FCA) ("*Holden*") at paragraph 7, it is not necessary to show that discrimination was the sole basis for the acts complained of for the complaint to be deemed substantiated. It is sufficient for a prohibited ground of discrimination to have been a contributing factor in the employer's decision (see *Bombardier*, at paras. 44-52).

IV. Analysis

A. The prima facie case

[53] Ms. O'Bomsawin claims that she was qualified for the position, that she was not hired and that the individual who was hired obtained the position even though she was no better qualified and because she did not have the alleged prohibited ground of discrimination.

[54] I agree that a *prima facie* case for these elements has been made.

[55] In this case, the first two elements in *Moore* are not in dispute. First, Ms. O'Bomsawin is the daughter of the director of the Odanak Health Centre. The characteristic family status is present, as the term "family status" includes the particular identity of a family member (see *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66, at paras. 39-41). And, in a close-knit Indigenous community such as that of Odanak, it is even more present. Second, there is no question that Ms. O'Bomsawin was refused the position at the Odanak Health Centre.

[56] With respect to the third element in *Moore*, I am satisfied based on the evidence on a balance of probabilities that the characteristic of family status was a factor in the employer's refusal to hire Ms. O'Bomsawin. She had the required qualifications, namely a university education at the bachelor's level at the time of the interview. She had experience in project management and had university training to that effect. Ms. O'Bomsawin had a certain knowledge of the programs, having previously worked at the Odanak Health Centre. Mr. St-Ours, in his testimony, even acknowledged [TRANSLATION] "*that she was knowledgeable about Health Canada programs and that she had a particular qualification, more than the other candidate*." Later in his testimony, Mr. St-Ours even goes so far as to admit that Ms. O'Bomsawin was [TRANSLATION] "*overqualified*" for the position.

[57] She had not been the subject of a complaint in her previous employments. The witnesses who appeared even confirmed during their testimony that they had no complaints about Ms. O'Bomsawin's past work.

[58] Mr. Nolett even acknowledged having provided her with a letter of recommendation in May 2012.

[59] Ms. O'Bomsawin was not chosen for the position, and the individual who was chosen was not more qualified (I would even say she was less qualified — she did not have a university education at the bachelor's level at the time of the interview and had no project management experience) and, in effect, lacked the distinguishing feature on which the complaint was based.

[60] Mr. Nolett indicated to the Tribunal that it was important to judge candidates on all of their skills. Yet it would appear that the candidate chosen was hired solely on the basis of the motivation criterion and not on all of the criteria, as is apparent from the score grids and the results of the two candidates, which shows a higher overall score for Ms. O'Bomsawin than that of the candidate chosen, and this by the admission of the witnesses before the Tribunal.

[61] Ms. O'Bomsawin was refused employment, and family status was a factor in the Council's decision. It is not necessary that family status be the sole and unique factor for discrimination to occur; it is sufficient for it to have been one of the factors (*Holden*, *supra*).

[62] A "subtle scent of discrimination" (*Basi*, *supra*) was present during the hearing. The witnesses referred to the fact that Ms. O'Bomsawin had been given jobs in the past because she was the daughter of the director of the Centre. Even if that were the case in the past, that is not what is before the Tribunal. The fact that there might have been discrimination in the past and that Ms. O'Bomsawin was given jobs because she was the daughter of the director of the Centre—and I am not taking a position here because that is not what is before me—does not give the Council permission to also discriminate, but in the opposite direction.

[63] It was mentioned a number of times in the various testimonies that [TRANSLATION] "this was the subject of much talk in the community". What was the subject of much talk? The fact that Ms. O'Bomsawin is the daughter of Deny O'Bomsawin. Were her skills the subject of much talk? Mr. St-Ours replied that they were not.

[64] Mr. Nolett and Claire O'Bomsawin also testified that it was rare for the Council to make a determination on such employment contracts. When asked [TRANSLATION] "Was this the first time?", Claire O'Bomsawin, who has been a member of the Council for a number of years, immediately replied, [TRANSLATION] "Yes, because she was Deny's daughter!"

[65] Lastly, during the meeting on November 2, 2012, between Ms. O'Bomsawin and the members of the selection committee to discuss the decision that had been made by the Council a few days earlier, motivation was not raised. Neither Mr. St-Ours nor Mr. Nolett told the Complainant that motivation was a decisive factor in the Council's recommendation and decision. To the contrary, in that meeting, reference was made, in veiled terms, to the fact that Ms. O'Bomsawin's being the daughter of the director of the Centre could have had an impact.

[66] Mr. St-Ours acknowledged in his testimony that he told Ms. O'Bomsawin that [TRANSLATION] "sometimes the Council's decisions can produce victims". Mr. St-Ours did not discuss the criterion of motivation with the Complainant in that meeting.

[67] Mr. Nolett also acknowledged in his testimony that Ms. O'Bomsawin was not told about the motivation explanation in that post-mortem meeting. He also acknowledged that he said something like [TRANSLATION] "1, 2, 3 contracts without an interview, there was starting to be talk in the community".

[68] For these reasons, I find that the Complainant has established a *prima facie* case of discrimination under section 7 of the CHRA on the basis of family status.

B. Council's explanation

[69] In this case, the Council tried to demonstrate that its actions were not discriminatory and that the hiring of another candidate was instead based on that candidate's skills.

[70] Thus, the Respondent claimed that the chosen candidate was more motivated for the job than the Complainant and that this factor was determinative in the choice that had to be made.

[71] Yet, in light of the evaluation grid used by the Council for interviews, the motivation criterion was only worth 10 out of 100 points and also included [TRANSLATION] "life experience". More than two months passed between the date on which the competition closed and the interviews, and yet no change to the evaluation grid was made to reflect the apparent importance of the motivation criterion according to the comments made by the Council's witnesses. In fact, the Council, in a very subjective manner and without respecting its own evaluation grid, decided to make motivation the only criterion in this case, to give it more weight than it is indicated in its own evaluation grid, in order to justify a decision that was clearly discriminatory with respect to Ms. O'Bomsawin.

[72] The Council also argued several times that the competition notice did not reflect the real prerequisites for the position and that education and experience were not as important as the competition notice indicated. Yet, at the time of that finding in August 2012, the Council preferred to not re-post the position with a new description. Today, it cannot plead its failure to do so as justification of its choice.

[73] The Council would have had to, for transparency purposes, at least inform the candidates who had applied for the position on the basis of the advertised notice that the criteria had been changed.

[74] In its Statement of Particulars, the Council also argued that the refusal to hire Ms. O'Bomsawin was based on a *bona fide* occupational requirement, that is, the ability to maintain and develop interpersonal relationships. In the Council's opinion, that ability must be considered a *bona fide* occupational requirement in this case, and considering that the applicant did not show or otherwise demonstrate that she had this, it alone constitutes a reason to refuse to hire her.

[75] Apart from advancing this argument, the Respondent did not provide any evidence to establish a *bona fide* occupational requirement. Namely, to establish a *bona fide* occupational requirement, subsection 15(2) of the *CHRA* sets out that the Respondent must establish that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate

those needs, considering health, safety and cost. Again, the Council did not provide any evidence of undue hardship.

[76] For all of these reasons, I find that the Council's evidence is not convincing and is simply a pretext.

V. Complaint substantiated

[77] On the balance of probabilities, I therefore find that the Council engaged in a discriminatory practice under section 7(a) of the *CRHA*, based on family status, by refusing the hire the Complainant, Nahame O'Bomsawin.

VI. Relief

[78] When the Tribunal finds a complaint to be substantiated, it has the power to make orders pursuant to section 53 of the *CHRA*. In this case, Ms. O'Bomsawin is asking the Tribunal to order the Council to compensate her for loss of wages, for pain and suffering and for having engaged in a discriminatory practice wilfully or recklessly, and to award her interest on that compensation. Sections 53(2)(c), 53(2)(e), 53(3) and 53(4) apply. We will analyze each one based on the evidence before us.

A. Loss of wages (s. 53(2)(c))

[79] Section 53(2)(c) of the *CHRA* states that the Tribunal can order the Respondent, who was found to have engaged in a discriminatory practice, to compensate the victim for any wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice.

[80] Certain rules must be respected when this section is applied. First, in *Chopra v. Canada (Attorney General)*, 2007 FCA 268, paragraph 37 ("*Chopra*"), the Federal Court of Appeal specified that there must be a causal link between the discriminatory practice that the Respondent was found to have engaged in and the loss claimed.

[81] Furthermore, the *CHRA* clearly states that the Tribunal may compensate the victim for any or all of the wages that the victim was deprived of. Again, in *Chopra*, paragraph 40, the Federal Court of Appeal clarified the Tribunal's discretion by basing the application of this rule on an important premise, that is, the mitigation of losses:

> Society has an interest in promoting economic efficiency by requiring those who have suffered a loss to take steps to minimize that loss as it is not in the public interest to allow some members of society to maximize their loss at the expense of others, even if those others are the authors of the loss.

[82] Ms. O'Bomsawin applied for the Accreditation Coordinator position at the Odanak Health Centre when she was unemployed. Only two people were interviewed for the position. Even though the Respondent had time to re-post the position between August and October 2012, and thus maybe receive more applications for the position, the Council preferred of its own accord to continue with the process with only two candidates, one of whom was Ms. O'Bomsawin. I have already found, based on the evidence before me, that Ms. O'Bomsawin was a victim of discrimination. In the absence of this discrimination, I am convinced that she would have been hired because overall she had more of the required skills and experience than the other candidate for the job that she applied for.

[83] The Tribunal has full jurisdiction to compensate the victim of discrimination even if the victim did not lose a job, but lost the opportunity for having one. In fact, in *Canada (Attorney General) v. Singh,* 2000 CanLII 15208 (FC), at paragraphs 86-89, the Federal Court upheld the Tribunal's decision for compensation of the loss of wages resulting from a loss of an opportunity for a position, "although there is no guarantee".

[84] Ms. O'Bomsawin claims that she is entitled to $50,138.43 in compensation for loss of wages, which represents the difference between what she would have supposedly earned in three years if she had obtained the contract, less the wages that she actually earned during those three years.

[85] She mitigated her losses because she did get another job. That job, according to the notices of assessment filed in evidence, allowed her to earn $78,823.95 in wages. Because that work was not performed on a reserve, it was taxable and she paid

$14,302.38 in taxes according to those same notices of assessment. She therefore earned a net salary of $64,521.57.

[86] If Ms. O'Bomsawin had been given the Accreditation Coordinator position, she would not have had to pay taxes on her salary because the work would have been performed on a reserve.

[87] However, I disagree with Ms. O'Bomsawin on the amount that she claims that she would have earned if she had gotten the job. In fact, there is no evidence that the salary that would have been paid to her is the one claimed by her, that is, 21 hours/week at $35/hour.

[88] First, the competition notice did not state a salary. The salary was to be discussed with the person who got the job based on his or her skills and experience. Ms. O'Bomsawin did not demonstrate that she would have earned $35/hour. However, according to the various testimonies, Ms. O'Bomsawin apparently earned between $26 and $35 per hour in her previous jobs at the Odanak Health Centre.

[89] Also, the evidence at the hearing showed that the Council was concerned about paying a salary that was in line with its pay grids and that Ms. O'Bomsawin's past wages had not always respected those grids. The person who got the Accreditation Coordinator job and who carried out the three-year mandate earned $21/hour.

[90] In light of the foregoing, and because the Complainant clearly, at the time of the interviews, had more skills and experience than the other candidate, and because it was a three-year mandate, which would have been Ms. O'Bomsawin's longest mandate at the Odanak Health Centre, it seems fair to me to find that the hourly wage on which the loss of wages will be based is $26/hour, that is, the wage that Ms. O'Bomsawin received when she did her three-month mandate as a project manager for the food safety program.

[91] Thus, based on a three-year contract of 21 hours/week, $26/hour, the total salary that would have been paid to Ms. O'Bomsawin is $85,176, tax free.

[92] If we subtract the salary earned by Ms. O'Bomsawin during those years (mitigation of losses principle) less the tax that she paid on that salary, that is, $64,521.57 based on the notices of assessment submitted, the net loss is $20,654.43.

[93] Ms. O'Bomsawin is also arguing that she had to work 35 hours/week to earn a lower salary than what she would have earned if she had worked only 21 hours/week for the Odanak Health Centre and is asking for compensation for the difference. She submits that she could have gotten another job or generated income by working 21 hours/week via a three-day week.

[94] I do not believe that Ms. O'Bomsawin is entitled to compensation regarding the number of hours worked per week. The evidence has not established that if the Complainant had been awarded the Accreditation Coordinator contract, she would have used the remaining hours in the week to find another job. The Complainant herself was vague on this issue, alleging that she would have instead prioritized her quality of life.

[95] For these reasons, I order the Respondent to pay the Complainant $20,654.43 for lost wages.

B. Compensation for pain and suffering (s. 53(2)(e))

[96] Pursuant to section 53(2)(e) of the *CHRA*, the Complainant is seeking $20,000 for the pain and suffering she allegedly experienced as a result of the discriminatory practice. The Complainant claims that she experienced major stress since the public announcement by the Council that she did not get the job for which she had applied. She claims to have experienced a form of betrayal, that this decision somehow forced her to leave the community and move away from her family. She had to see a physician and was prescribed medication to help her recover from these events. However, the Complainant did not provide any expert evidence to demonstrate the link between her medical situation and the loss of employment opportunity she suffered. There is no expert evidence in this case.

[97] This does not mean, however, that Ms. O'Bomsawin did not experience any stress related to this situation. The community of Odanak is a small community and the feeling of

betrayal within the community cannot be denied, particularly within an Aboriginal community. Despite her qualifications, Ms. O'Bomsawin did not get the job and the person who did get the job was no better qualified than Ms. O'Bomsawin; quite the opposite. Ms. O'Bomsawin gathered from a message sent to her that she was not judged on her qualifications but based on the mere fact that she was someone's daughter. The feeling of injustice was real.

[98] However, $20,000 is the maximum amount under the *Act* that may be awarded and it is usually awarded by the Tribunal in more serious cases: when the scope and duration of the Complainant's suffering resulting from the discriminatory practice justify the full amount.

[99] Based on the evidence, and because I find that Ms. O'Bomsawin did suffer a prejudice for the manner in which she was treated, I order the Council to pay her $10,000 for the pain and suffering she experienced.

C. Special compensation (s. 53(3))

[100] Ms. O'Bomsawin is asking that the Council pay her $7,500 in special compensation under section 53(3) of the *CHRA*. This section of the *CHRA* provides that the Tribunal may order the person to pay such compensation not exceeding $20,000.00 to the victim as the Tribunal may determine if the Tribunal finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[101] According to *Canada (Attorney General) v. Johnstone*, 2013 FC 113, paragraph 155 (varied on other grounds, 2014 FCA 110), section 53(3) is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the *Act* to be intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.

[102] As with section 53(2)(e), the maximum amount is only awarded in the most serious cases.

[103] The facts in the evidence tendered showed that the Council was concerned that this [TRANSLATION] "was the subject of much talk in the community", mainly about the fact that Ms. O'Bomsawin was the daughter of the director of the Odanak Health Centre. The witnesses confirmed that the process put in place and more specifically the fact that the decision made by the Council was "unique" in that Ms. O'Bomsawin was the director's daughter.

[104] In my view, Messrs. St-Ours and Nolett exhibited behaviour devoid of caution when they decided to ignore all of the candidates' qualifications and chose the other candidate based solely on the motivation criterion, a criterion that was only worth 10 out of 100 points on their evaluation grid.

[105] Their explanations during the hearing were clearly more of a pretext than a fair and reasonable explanation. These mitigated explanations from the Council combined with the evidence at the hearing that [TRANSLATION] "this was the subject of much talk in the community", and that the Council appeared to be concerned by this gossip persuaded me that they acted with full knowledge that they were not treating Ms. O'Bomsawin fairly. The Council's behaviour was devoid of caution and clearly seemed not to care about the consequences. The Respondent's objective was to make sure Ms. O'Bomsawin did not get the position.

[106] For these reasons, I order that the Council pay Ms. O'Bomsawin compensation in the amount of $7,500 for having engaged in the discriminatory practice recklessly.

D. Interest (s. 53 (4))

[107] Pursuant to section 53(4) of the CHRA and Rule 9(12) of the *Tribunal Rules of Procedure (03-05-04)*, I order that interest be paid on all amounts to be paid to Ms. O'Bomsawin. Interest shall be simple interest calculated on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada. It shall accrue from the date of the decision by the Council not to hire the Complainant, that is, October 29, 2012, until the date of payment of the award of compensation.

VII. Order

[108] Nahame O'Bomsawin's complaint is found substantiated and it is ordered that the Abenakis of Odanak Council:

A. Compensate the victim in the amount of $20,654.43 for the wages the victim was deprived of.
B. Compensate the victim in the amount of $10,000 for the pain and suffering she experienced.
C. Compensate the victim in the amount of $7,500 for having engaged in the discriminatory practice wilfully.
D. Pay interest on the foregoing compensation amounts in accordance with the terms outlined in paragraph 107 of this decision.

Signed by

Anie Perrault
Tribunal Member

Ottawa, Ontario
February 17, 2017

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2111/2715

Style of Cause: Nahame O'Bomsawin v. Abenakis of Odanak Council

Decision of the Tribunal Dated: February 17, 2017

Date and Place of Hearing: December 20 and 21, 2016

Sorel-Tracy, Québec

Appearances:

Jérémie John Martin, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Kathleen Rouillard, for the Respondent