Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2018 CHRT 18
Date: June 22, 2018
File No.: T2161/3516

Between:

Thomas Dixon

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Sandy Lake First Nation

Respondent

Decision

Member: Sophie Marchildon

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I. Context

[1] The hearing took place in the Sandy Lake First Nation community in Northern Ontario. The Sandy Lake First Nation has a population of 3000 band members and it is governed by an elected council composed of a Chief, a Deputy Chief and Councillors. The Tribunal registry officer and I, the adjudicator, were well received in the community. I feel honored for having lived this experience, in this beautiful and thriving community.

[2] The Complainant, Mr. Thomas Dixon ("the Complainant") is a "Sixties Scoop" survivor and has suffered from this terrible experience. I am aware of the "Sixties Scoop" from chairing the *First Nations Child and Family Caring Society and al v. AGC* case where we publicly recognized the trauma and suffering the "Sixties Scoop" children, families and survivors went through in our decision (2016 CHRT 2). Moreover, Mr. Dixon testified that he was called a "throw away" and "garbage" by some members of the Sandy Lake First Nation community. In his view, this is because, they did not consider him to be a part of the community since he was adopted in a family of the Sandy Lake community as a child.

[3] I want to recognize Mr. Dixon's suffering and wish him healing, love, hope and a good future. Mr. Dixon is an intelligent man and does not deserve to be called a "throw away" or "garbage". No human being is worthless especially not children who were adopted in other communities as a result of the "Sixties Scoop". They should be honored for their resilience and courage. Every human being is immensely precious and unique and nothing justifies infringing the dignity of a person.

A. Procedural Overview

[4] On May 5, 2014 Mr. Dixon filed a complaint with the Canadian Human Rights Commission ("CHRC" or "the Commission") alleging that the Sandy Lake First Nation (the "Respondent") discriminated against him pursuant to sections 5 and 14.1 of the *Canadian Human Rights Act* ("*CHRA*").

[5] Additionally, Mr. Dixon had filed a previous human rights complaint with the Commission on June 25, 2013, also against the Respondent. On the first conference call, I explained to Mr. Dixon that the Tribunal was not seized of his previous complaint (File Number: 20130712, "Complaint 1"), which was dismissed by the Commission in a letter dated January 22, 2014. Additionally, I explained to Mr. Dixon that the Tribunal was only seized of the retaliation allegations of his second complaint that he filed with the Commission on May 5, 2014 (File Number 20140458, "Complaint 2" or "retaliation complaint"). The other portion of Complaint 2 pursuant to section 5 of the *Act*, was not before the Tribunal. In fact, the Commission's referral letter indicated:

> "The Commission has reviewed Mr. Thomas Dixon's complaint against Sandy Lake First Nation, File Number 20140458. The Commission has decided pursuant to Section 44 (3)(a) of the *Canadian Human Rights Act* (*CHRA*), to request that you institute an inquiry into the retaliation allegation pursuant to section 14.1 of the *CHRA* as it is satisfied that, having regard to all the circumstances, an inquiry is warranted. **The Commission is not requesting an inquiry be instituted into the allegation under section 5 of the *CHRA*. (emphasis added).**"

The dismissal of section 5 allegations in Complaint 2 was not judicially reviewed at the Federal Court which is the proper forum to challenge the Commission's decision to only refer a portion of the complaint.

[6] I explained that as such, the only allegations before me that I needed to adjudicate, were the ones related to the alleged retaliation.

[7] Mr. Dixon was asked to provide an Amended Statement of Particulars which focused on the allegations related to retaliation in Complaint 2.

[8] During the first conference call, the Commission confirmed it would not be participating at the hearing. I asked Mr. Dixon if he was going to be represented by a lawyer at the hearing. Mr. Dixon said that he would not be represented by a lawyer. Given that Mr. Dixon was self-represented, I explained the process before the Tribunal, the applicable legal tests, and sent all parties a copy of the *Tabor* decisions (*Millbrook First Nation v. Tabor*, 2016 FC 894 ("Tabor FC") and *Tabor v. Millbrook First Nation*, 2015 CHRT 18) in order to provide Mr. Dixon with an example of retaliation complaints. I would

like to acknowledge the Commission who provided some assistance to Mr. Dixon, without providing legal advice, to prepare his amended statement of particulars and answer some of his questions.

[9] I also explained the hearing process in one of our last conference calls and copied the explanations in a summary that was provided to all parties including Mr. Dixon.

[10] At the beginning of the hearing, Mr. Dixon was surprised that Commission counsel was not present to represent him because Mr. Dixon had testified in another case the previous week and the Commission counsel had been present at that hearing. In the Tribunal conference calls, I had explained to Mr. Dixon that the Commission would not be participating at the hearing. Despite this, I asked Mr. Dixon at the beginning of the hearing if he wanted to adjourn to find a lawyer to represent him. Mr. Dixon said he could not afford a lawyer, and indicated we should begin with the hearing.

[11] With this in mind, I want to outline the many efforts made to assist Mr. Dixon so he could present his case both in advance of the hearing, and during the hearing. For example, the hearing process was explained to him on a conference call and again in writing in a summary of the call and also at the hearing. Finally, at the hearing, the Respondent counsel Ms. Asha James, was gracious enough not to object when I helped Mr. Dixon with my questions and, to ensure his documents were properly entered into evidence.

[12] Mr. Dixon was also asked in a conference call if he required subpoenas for his witnesses and he informed the Tribunal that he would let us know. We asked him a number of times and he finally said he needed a subpoena for one of his witnesses. The registry officer sent the signed subpoena partly filled out with the information letter indicating that the party requiring the subpoena needs to fill the date and time of the witness's appearance before the Tribunal. Unfortunately, Mr. Dixon's witness did not attend at the hearing. The witness did however show up in person when the Tribunal was no longer sitting for the day, and explained that given that the date and time were provided over the phone by Mr. Dixon to him and not in writing, the employer refused his leave. The witness was asked to explain this in a letter and to send it to the Tribunal. He agreed to do

so, but never followed up on this request. Mr. Dixon did not request an adjournment of the hearing to properly serve the subpoena in order to have the witness testify.

[13] Someone from the community erupted into the hearing and threatened the Complainant for filing his complaint and proceeding with the hearing. The hearing was briefly interrupted and the matter was reported to the Nishnawbe Aski Nation Police. While this assists in confirming Mr. Dixon's allegations that some community members harass him, he did not seek to add this to his complaint and he presented no evidence to link these actions to the Band, as such this does not establish that the Band and council retaliated against him.

[14] Finally, Mr. Dixon raised new allegations in his final written arguments which were submitted after the hearing had concluded. I informed Mr. Dixon during a conference call after the close of hearing where the parties had the opportunity to provide oral submissions, that this could not be addressed in final arguments since no evidence was tested or provided at the hearing.

B. The retaliation allegation to be adjudicated by the Tribunal

[15] On June 25, 2013, Mr. Thomas Dixon filed a complaint with the Commission (File Number 20130712) for discrimination on the grounds of national or ethnic origin and family status ("Complaint 1").

[16] Complaint 1 was dismissed by the Commission and the decision was not judicially reviewed by Mr. Dixon. He claims he did not receive any letter indicating that Complaint 1 was dismissed. Therefore he says he was not aware the complaint was dismissed.

[17] In February of 2014, Mr. Dixon alleges he received an inbox message from Mr. Sonny Mamakeesic, a community member of the Sandy Lake First Nation, that correspondence relating to his Complaint 1 (File 20130712) had been enlarged ("Letter poster") and was on display at the community "Northern" Store in the Sandy Lake community (the "Northern Store"). Mr. Dixon was living in Thunder Bay at that time, therefore, he asked Mr. Mamakeesic to take pictures of the Letter poster and to send them to him. He also requested another Sandy Lake community member and former Band

Councillor, Mr. David Kakegamic, to go to the Northern Store in Sandy Lake where the Letter poster was displayed, to confirm it was there. Mr. Kakegamic testified at the hearing and explained that he went to the Northern store and did confirm the Letter poster was there however, he did not see who posted it. He also measured the Letter poster and determined it was 4 feet by 3 feet in size.

[18] On May 5, 2014, Mr. Dixon filed a retaliation complaint under section 14.1 (part of Complaint 2) against Sandy Lake First Nation.

[19] On July 13, 2016, the Commission referred the retaliation portion of the complaint to the Tribunal, to conduct an inquiry into the events surrounding the display of the Commission letter at the Northern Store. This Commission letter, or rather Letter poster, which had been posted on a community bulletin board at the Northern Store, is the CHRC's January 22, 2014 Record of Decision, dismissing the Complainant's Complaint 1.

[20] It is alleged that the Letter poster was on display at the Northern Store on or about February 12, 2014 and was roughly 4 feet by 3 feet in size. The Commission dismissed the other section 5 of the *CHRA* allegations contained in Complaint 2.

II. Legal Framework

[21] Section 14.1 of the *CHRA* provides that it is a discriminatory practice for a person against whom a complaint has been filed, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[22] The onus of establishing retaliation rests on the complainant, who must present a prima facie case. The standard of proof for establishing a prima facie case of retaliation, as with other allegations of discrimination, is the balance of probabilities (see *Quebec* (*Commission des droits de la personne et des droits de la jeunesse*) *v. Bombardier Inc.* (*Bombardier Aerospace Training Centre*) ("*Bombardier*"), 2015 SCC 39 at paras. 55-69. To establish a prima facie case of retaliation, complainants are required to show that they have made a complaint under the *CHRA*; that they experienced adverse treatment following the filing of their complaint from the person they filed a complaint against or any person acting on their behalf; and, that the human rights complaint was a factor in the

adverse treatment (*see Moore v. British Columbia (Education),* 2012 SCC 61 (CanLII) at para. 33; see also *Tabor v. Millbrook First Nation*, 2015 CHRT 18, at para. 6), affirmed by the Federal Court in *Millbrook First Nation v. Tabor*, 2016 FC 894.

[23] On this last part of the test, the Complainant must establish a connection between the filing of a complaint and the adverse treatment following the complaint. If this connection is not demonstrated in a complete and sufficient manner, the complainant will not have met its burden of proof. In other words, it is not sufficient to prove the filing of a complaint and to have experienced an adverse treatment; the evidence must demonstrate a link, a connection between the adverse treatment and the filing of a complaint. When an individual or an organization is named as respondent and alleged to have retaliated against a complainant, the evidence must demonstrate that the adverse treatment is a result of the respondent's actions or the actions of someone acting on their behalf.

[24] That being said, a "causal connection" is not required as there may be many different reasons for a respondent's acts. It is not necessary that a prohibited ground or grounds be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that a prohibited ground or grounds be one of the factors in the actions in issue (see *Holden v. Canadian National Railway Co., (1991) 14 C.H.R.R. D/12 (F.C.A.) at para. 7; and, Bombardier*, supra, at paras. 44-52).

[25] To prove a previous human rights complaint was a factor in any adverse treatment a complainant suffered, the Tribunal may consider any relevant evidence including the reasonableness of the complainant's perception, which is measured so as not to hold the respondent accountable for unreasonable anxiety or undue reaction by the complainant (see *Wong v. Royal Bank of Canada*, 2001 CanLII 8499 (CHRT); and *Bressette v. Kettle and Stony Point First Nation Band Council,* 2004 CHRT 40 (CanLII)).

[26] Retaliation is a discriminatory practice under the *CHRA* (see sections 4 and 39 of the *CHRA*). Proof of intent is not required to make out a retaliation complaint. A complainant may demonstrate that the human rights complaint was a factor in the alleged adverse treatment received following the filing, based on the complainant's reasonable perception of the incidents or otherwise (See *First Nations Child and Family Caring*

Society of Canada et al. v. Attorney General of Canada, 2015 CHRT 14 at paras 3-30; see also *Tabor v. Millbrook First Nation*, 2015 CHRT 18 paras. 5-12, affirmed by the Federal Court in *Millbrook First Nation v. Tabor*, 2016 FC 894). As explained in previous jurisprudence, the *CHRA* is primarily aimed at eliminating discrimination, not punishing those who discriminate. Therefore, "the motives or intention of those who discriminate are not central to its concerns" (*Robichaud v. Canada (Treasury Board*), 1987 CanLII 73 (SCC) at para. 10 [*Robichaud*]). Rather, the *CHRA* is "…directed to redressing socially undesirable conditions quite apart from the reasons for their existence" (*Robichaud* at para. 10). Furthermore, to require proof of intent to establish discrimination would "…place a virtually insuperable barrier in the way of a complainant seeking a remedy" as "[i]t would be extremely difficult in most circumstances to prove motive…" (*Ont. Human Rights Comm. v. Simpson-Sears*, [1985] 2 SCR 536, 1985 CanLII 18 (SCC), *at paragraph 14*). As the Tribunal has stated many times: "Discrimination is not a practise which one would expect to see displayed overtly" (*Basi v. Canadian National Railway, 1988 CanLII 108* (CHRT)).

[27] As such, the complainant is not required to prove intent in order to substantiate a retaliation claim under the *CHRA*. A complainant must present sufficient evidence to justify that their human rights complaint was a factor in any alleged adverse treatment they received from a respondent following the filing of their complaint, whether based on a reasonable perception thereof or otherwise.

[28] As for the respondent, they can either present evidence to refute the allegation of prima facie discrimination, put forward a defence justifying the discrimination, or do both (*Bombardier*, supra, at para. 64). Where the respondent refutes the allegation, its explanation must be reasonable. It cannot be a pretext to conceal discrimination. (See *Moffat v. Davey Cartage Co. (1973) Ltd., 2015 CHRT 5*, at para 38)

[29] The Respondent may also present a defence such as the one found in section 65 of the *CHRA*. This is the case here. Section 65 of the *CHRA* states:

> 65 (1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director,

> employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.
>
> (2) An act or omission shall not, by virtue of subsection (1), be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

[30] Furthermore, it should be kept in mind that discrimination is not usually practiced overtly and, consequently, proving it by way of direct evidence is often difficult. Therefore, 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)). As the standard of proof in discrimination cases is the ordinary civil standard on a balance of probabilities, "[a]n inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses" (Béatrice Vizkelety, Proving Discrimination in Canada (Toronto: Carswell, 1987) at p. 142).

III. Analysis

A. Did Mr. Dixon make a complaint under the *CHRA*?

[31] The parties agree that there was a complaint made by Mr. Dixon against the Sandy Lake First Nation. The evidence also supports this and, the letter from the Commission dismissing Complaint 1 is relied upon by the complainant and also forms part of the evidentiary record before the Tribunal as R-1. The Commission letter dismissing a complaint necessarily suggests a complaint was filed. This first part of the test is met.

B. Did Mr. Dixon experience adverse treatment following the filing of his complaint?

[32] The evidence demonstrates that the Commission's decision letter was enlarged to roughly 4 feet by 3 feet in size and was posted for at least a day and a half, at the Northern General store near the main public entrance, where anyone from the community could see

it. This alone, is an adverse treatment and the human rights complaint is intimately linked to this unfortunate event.

[33] The Sandy Lake First Nation submits there was no adverse impact given that Mr. Dixon's evidence before the Tribunal is unrelated to the filing of Complaint 1. Rather, his evidence pertains to the adverse impacts of the allegations contained in Complaint 1, which were dismissed by the Commission. I agree with this characterization and therefore, I do not consider the arguments pertaining to Complaint 1 as part of this analysis. However, I find the evidence establishes that the Letter poster was placed at the Northern store from February 11, 2014 to February 12, 2014. Moreover, Mr. Dixon testified he was really shocked, angry and disappointed to find out about the Letter poster. He said he wondered why they would do such a thing to hang his file in a public place.

[34] Both Chief Bart Meekis and Joseph C. Meekis testified they heard in the Band Office about the Letter poster. The evidence also shows that aside from verifying if the Letter poster was still posted at the Northern store, the Respondent did not investigate it further.

[35] I believe the display of this Letter poster and its content can be construed as an adverse treatment.

[36] Access to the CHRC decision letter as it will be explained in greater detail below, was limited to a small number of people and was not intended to be distributed publicly, especially without the consent of the Complainant. The question remains: is having a Commission dismissal letter of their human rights complaint enlarged and posted in a public space in a small community a reasonable outcome that can be expected from this process or is it unusual and could be perceived negatively? I believe it is not a reasonable outcome and it is indeed unusual and negative. Moreover, any reasonable person who files a complaint and is placed in the same situation as Mr. Dixon could feel violated in their dignity and self-worth. Mr. Dixon testified on this aspect and how it made him feel. Mr. David Kakegamic also testified that he perceived someone must hate Mr. Dixon to do such a thing.

[37] Finally, having heard the evidence and assessing this particular situation, I find it important to mention that this type of conduct is to be discouraged. I find Mr. Dixon experienced an adverse treatment following the filing of Complaint 1.

[38] The difficulty rests in establishing the connection between the filing of the complaint, the adverse treatment and the Respondent, Sandy Lake First Nation. The retaliation complaint is against Sandy Lake First Nation. Therefore, even if a complaint was filed and there was adverse impact and the complaint was a factor in the adverse impact, the fundamental question here is did the Respondent, Sandy Lake First Nation or someone acting on their behalf retaliate against Mr. Dixon for filing a complaint by directing the Letter poster to be made and then posted at the Northern Store? I will examine this in the next section.

C. Was the human rights complaint a factor in the adverse treatment? Was this adverse treatment caused by the Respondent, Sandy Lake First Nation or any person acting on their behalf pursuant to section 14.1 of the *CHRA*?

[39] I find the human rights complaint was a factor in the adverse treatment experienced by Mr. Dixon. This was evidenced by the fact that the Letter poster, which was put on the board of the Northern store, was the Commission's decision not to deal with Mr. Dixon's first human rights complaint pursuant to section 41 (1) (d) of the *CHRA*. They are intimately linked.

[40] I will now move on to the second question in this section. Was this adverse treatment caused by Sandy Lake First Nation Band and Council or any person acting on their behalf pursuant to section 14.1 of the *CHRA*?

(i) Complainant's position and evidence

[41] In sum, Mr. Dixon argues that the Respondent, or someone on their behalf, had to be involved in the adverse treatment. Mr. Dixon testified: "And I said to myself, who would do such a thing? Then I know it must have come from the Chief and Council, I thought".

[42] In support of his argument, Mr. Dixon submits that the CHRC dismissal letter was sent to Chief and Council and that he never received it. Mr. Dixon testified he did not know anything about it because he kept waiting for any correspondence from his Law Firm or from the Commission and he did not receive anything. The CHRC letter would not have been sent to anybody in the community. It had to have been sent to the Chief and Council because all correspondence that relates to community issues has to go through the Chief and Council. In addition, only a limited number of people would have access to the CHRC letter and they would be Band employees.

[43] On this point, Mr. Kakegamic testified the correspondence was directed at Chief and Council and only Chief and Council had access to that correspondence.

[44] As evidence supporting his argument that the respondent was responsible for enlarging and posting the Letter poster, Mr. Dixon suggests that a photocopy of the letter was made for the Council meeting and that there were two copies of the letter in the Chief and Council's possession. Mr. Dixon submits that there is only one photocopier in the community capable of doing large copies and it is in the Lands and Resources Office.

[45] Further, he submits the only people able to operate such a complex machine are Band employees such as Mr. Moonias Fiddler. Mr. Fiddler or another Band employee had to be the ones who made the copy at the direction of the Chief and Council. Mr. Dixon testified: "I think that letter was done by a Band employee because I can't see anybody else who knows how to operate that machine". Mr. Dixon argues that because the Letter poster was posted during the day at the Northern store, it was done during working hours and therefore posted by a Band employee.

[46] Mr. Kakegamic testified that he was surprised to see the Letter poster because he has never seen legal correspondence posted up on a bulletin board like that, no person on their own would post it without a directive from leadership either by the Chief, the Deputy Chief or a quorum of Councillors.

[47] Mr. Dixon also relies on the vicarious liability common law principle (*Bazley v. Curry*, [1999] 2 S.C.R. 534): The employer was vicariously liable for: (1) employee acts authorized by the employer; and (2) unauthorized acts related to the work. If this test is

met, it enables a decision maker who is applying common law principles in the context of a civil suit to find an employer liable in situation where an employee committed a tort while working. For reasons explained further in this decision, the common law principle does not apply here.

[48] Mr. Dixon also submits that the current Chief, Bart Meekis, who was also Sandy Lake First Nations' Chief at the time the complaint was filed, contradicted himself on the number of copies provided and on who made the presentation at the Council meeting. He also did not bring any documentation to support his assertions.

[49] While Mr. Dixon's version of the facts above mentioned may be possible, it has to be proven on a balance of probabilities for Mr. Dixon to be successful in making his case.

[50] I do find it rather strange that this type of confidential letter which was sent only to the parties to Complaint 1 before the CHRC, namely the Band counsel, the Chief, Mr. Joseph C. Meekis, the Executive Director or Band Manager and Mr. Dixon, would find its way on a public board at the Northern store. Also, Mr. Dixon claims he never received a copy of this letter. Moreover, Mr. Dixon and Mr. Kakegamic both testified they saw the name on the Letter Poster and it was addressed to Chief and Council. It is beginning to look like a subtle sent of discrimination.

[51] Mr. Dixon also alleges retaliation at a Chief and Council meeting where someone reported to him he was called a drug dealer when he certainly is not.

[52] Mr. Dixon also alleges retaliation from Chief and Council for speaking out on issues in the community. All his past examples were related to Complaint 1 which was dismissed, except one new allegation, where he alleges he never received a response from Chief and Council when he requested a referral letter from them to pursue his education. Mr. Dixon submits he faxed a request to Mr. Kakegamic accompanied by a letter and never received a response from the Chief and Council. He filed a fax document and a letter into evidence as C-5 and C-6. Chief Bart Meekis admitted he saw the document since Mr. David Kakegamic presented this to the Council. However, he does not recall if he or the Council replied to Mr. Dixon.

[53] Additionally, Mr. Dixon alleged that the Chief used the local radio station to deter people from making human rights complaints. Mr. Dixon felt this was directed towards him as retaliation.

(ii) Respondent's position and evidence

[54] In sum, the Sandy Lake First Nation submits that they are not responsible for the Letter poster that led to the retaliation complaint.

[55] Chief Bart Meekis and Mr. Joseph C. Meekis both testified that they had access to the Record of Decision, and the only staff who may have seen the decision other than Mr. Allan Rae, would have been the Executive Assistant who received the copy that went to Chief Meekis by mail.

[56] The Respondent's witnesses, Chief Bart Meekis and Joseph C. Meekis both testified they did not leave the CHRC decision letter out.

[57] Mr. Joseph C. Meekis testified that he made a copy of the CHRC decision letter and gave it to Mr. Allan Rae to present to Chief and Council. Mr. Meekis explained that, while he did not attend the Council meeting, he retrieved the CHRC decision letter from Mr. Rae after the Council meeting and, placed it in his filing cabinet, in his office. While the filing cabinet is unlocked, the office is locked after hours and no one can access it except the cleaning ladies and a night watchman.

[58] The Respondent explained that access to the photocopier machine in the Lands and Resources Office is not restricted to employees. As such, anyone could have made a copy. The evidence demonstrates that some students were able to operate the machine and therefore, it may not be as complex as Mr. Dixon describes it. Furthermore, during the cross-examination of Mr. David Kakegamic, he mentioned that he was able to go into the Lands and Resources Office without an appointment, and that "anyone can go and visit". Mr. Kakegamic testified that the printer is an area that is accessible to the public and is not locked away in an area where access to it is restricted to only certain individuals. I accept Sandy Lake First Nation's argument that this means the machine is not placed in a location that is only accessible by Band employees.

[59] I also accept that the photocopy could have been ordered online or done elsewhere. In any event, the evidence is not there to establish the copy was made from the machine in the Lands and Resources Office by an employee acting on behalf of the Chief and Council.

[60] All of the Respondent's witnesses denied being personally involved or directing an employee to copy, enlarge and post the Letter poster. The fact that Chief Bart Meekis did not remember how many copies of the letter were made in 2014 or who made a presentation at the Band council is not enough to set aside his testimony as a whole. The evidence does not establish with certainty how many copies of the Commission decision letter there were. There was at least one hard copy of the Commission decision letter sent by email from Sandy Lake First Nation counsel to the Chief and Council which was then printed and, one sent by registered mail. Finally, the lack of documentation to support Sandy Lake First Nation's position is not fatal to their defense. I cannot accept Mr. Dixon's argument on this point.

(iii) Analysis

[61] I find it is impossible from the documentary evidence to determine if the Letter poster was addressed to Chief and Council or to Mr. Dixon. First, the Facebook post screen grab of the letter poster filed in evidence as C-2 by Mr. Dixon, is illegible and, the larger pictures of the Letter Decision filed in evidence as C-1 by Mr. Dixon, are missing the first page that would show who it is addressed to. I find this peculiar that Mr. Dixon would only have received two pictures and not three.

[62] Mr. Dixon suggests that only someone working for the Band would have access to the area in which the machine was located. Given Mr. Kakegamic's testimony, I find that the equipment was accessible to members of the community.

[63] However, even if I were to accept Mr. Dixon's arguments that Mr. Fiddler knew how to operate such a photocopier machine since he was trained to operate the photocopier which was admitted by Chief Bart Meekis in his testimony, the evidence does not prove that it was Mr. Fiddler who acted on behalf of Chief and Council. Moreover, Mr. Fiddler

was not called to testify at the hearing. There is no evidence linking the large photocopy to the actual photocopier machine. Mr. Dixon testified that he took the pictures of the photocopier prior to the last Tribunal Conference call which was held on September 18, 2017. Mr. Dixon filed the pictures in evidence as C-4. Mr. Kakegamic testified that he saw large posters of maps in the Lands and Resources Office near the photocopier and confirmed that the photocopier was the same one as in the pictures filed in evidence as C-4. The problem with this evidence is that the photocopier that was in the Lands and Resources Office at the time when the Letter poster was made is not the same as the photocopier in the pictures. The photocopier in the pictures was bought in 2016, approximately two years after the Letter poster was made.

[64] Finally, no evidence was brought to support who made the copy and who posted it.

[65] If the letter was leaked in error by the Chief and Council to someone from the community and therefore playing a factor in the discriminatory practice, this was not supported by the evidence. It becomes clear when I assess Mr. Dixon's evidence alongside with the evidence provided in response by the Sandy Lake First Nation. The main issue here is we have no evidence as to who made the Letter poster and who posted it at the Northern store. All we have are assumptions. Moreover, both Mr. Dixon and Mr. Kakegamic testified they assumed this is what happened. While this may be sufficient for an investigation or a mediation, it is not sufficient to make a finding of retaliation under section 14.1 of the *CHRA* before the Tribunal.

[66] In addition, no explanation was given by Mr. Dixon as to why he did not ask Mr. Kakegamic or Sonny Mamakeesic to take the Letter poster down and to bring it to Mr. Dixon once the pictures were taken. The evidence establishes the area where the Letter poster was posted is accessible to the public, near the main entrance of the store.

[67] Finally, the evidence does not establish on a balance of probabilities that this adverse treatment occurred under the direction of Sandy Lake First Nation Band and Council or any person acting on their behalf. To be successful before the Tribunal there needs to be something more than suspicions or presumptions. There needs to be evidence. I recognize the difficulty of such a task especially that discrimination is rarely

displayed overtly but this cannot override the requirement to support allegations with evidence and not assumptions. While I am convinced that some people want to hurt Mr. Dixon and that the posting of the Commission letter in a public place in such a way is quite appalling, the evidence is insufficient to convince me that this was orchestrated by the Respondent Sandy Lake First Nation.

[68] While I have great compassion for Mr. Dixon and do believe he is genuinely convinced the Sandy Lake First Nation retaliated against him, I do not find the evidence is complete and sufficient to find the complaint to be substantiated. More importantly, the evidence is insufficient to determine the posting of the enlarged Commission letter was done by the Sandy Lake First Nation or someone on their behalf.

[69] Given my finding that it was not proven on a balance of probabilities that the posting of the Letter poster was caused by the Chief and council or someone on their behalf, thus failing to satisfy this part of the retaliation test, I do not need to proceed to the analysis under section 65 of the *CHRA*.

(iv) Other retaliation allegations

[70] Now turning to the retaliation allegation that Mr. Dixon was unable to access funding to continue his education without the support letter from Chief and Council and, as a result having his application declined. Chief Bart Meekis did confirm that he received the request that Mr. Dixon sent. While I accept that Mr. Dixon did not receive funding and lost his education which is very disconcerting, Mr. Dixon did not succeed in proving this was connected to his human rights complaint.

[71] Another retaliation allegation raised by Mr. Dixon was that at a Chief and Council meeting he was falsely called a drug dealer. He did not attend the meeting and did not call the person who reported this to him to testify and did not want to disclose the name of this person for fear of retaliation. All I have is Mr. Dixon’s testimony that someone told him he was called a drug dealer. While hearsay evidence is certainly admissible at the Tribunal, the probative value (weight) of the hearsay evidence remains at the appreciation of the

Tribunal. In any event, Mr. Dixon did not succeed in proving this happened and that it was connected to his human rights complaint.

[72] The last retaliation allegation that I need to address is that Mr. Dixon alleges the Chief used the local radio station to deter people from making human rights complaints. Mr. Dixon felt this was directed towards him as retaliation. Other than Mr. Dixon's assertion, there is nothing in the evidence to support this.

(v) Vicarious liability and the *CHRA*

[73] Although not required given my findings above, I want to address Mr. Dixon's argument regarding vicarious liability. Mr. Dixon submits that the Tribunal should consider the vicarious liability of the Respondent. The analysis in retaliation allegations is entrenched in section 14.1 of the *CHRA*. It is a discriminatory practice for a person against whom a complaint has been filed under Part 1, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim. Human rights legislation does not create a common law cause of action (see *Seneca college of Applied Arts and Technology v. Bhadauria*, 1981 CanLII 29 (SCC), [1981] 2 S.C.R. 181, at page 195. See also *Chopra v. Canada (Attorney General)*, 2007 FCA 268, at para. 36). For example, in *Cashin v. C.B.C.*, 1990 CanLII 650, the Tribunal explained :

> (…) Moreover, that court has also expressed the view that one should not try to fit human rights remedies into inappropriate legal doctrines. For example, when asked in *Robichaud v. Brennan* to decide whether an employer was liable (vicariously or otherwise) for sexual harassment of an employee by a supervisor, the Supreme Court looked first at the purpose of the *Act* and the wording and intent of the remedies provided by the *Act*, avoiding the problem of determining whether the employer's liability for discriminatory acts of its employees fell under the tort doctrine of vicarious liability or some other rubric.
>
> (…)
>
> In concluding that the *Act* contemplated the imposition of liability on employers for all acts of their employees, Laforest J. said that:

> "..It is unnecessary to attach any label to this type of remedy; it is purely statutory."

[74] Given that vicarious liability in the common law sense does not apply, I dismiss this argument. I dealt with the retaliation complaint in applying section 14.1 of the *CHRA*.

IV. Conclusion

[75] For the reasons above, I dismiss the retaliation complaint (complaint 2 File Number 20140458).

Signed by

Sophie Marchildon
Tribunal Member

Ottawa, Ontario
June 22, 2018

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2161/3516

Style of Cause: Thomas Dixon v. Sandy Lake First Nation

Decision of the Tribunal Dated: June 22, 2018

Date and Place of Hearing: October 3 and 4, 2017

Sandy Lake First Nation, Ontario

Appearances:

Thomas Dixon, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Asha James, for the Respondent