Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 20
Date: May 10, 2019
File No.: T2065/6614

Between:

Angele Kamalatisit

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Sandy Lake First Nation

Respondent

Decision

Member: George E. Ulyatt

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I. Overview

[1] Angele Kamalatisit (the "Complainant") filed a complaint against Sandy Lake First Nation (the "Respondent") under s.5 of *The Canadian Human Rights Act*, R.S.C. 1985, c. H-6, (the "Act").

[2] The complaint against the Respondent concerns the Complainant's tenure at Sandy Lake First Nation. She alleges that she was unilaterally ordered by the Council to permanently leave Sandy Lake First Nation, a reserve on which she had lived for a period of ten years with her common law partner, Ringo Fiddler (hereinafter referred to as "Ringo"). She alleges that the Council's decision constituted discrimination based on her marital/family status, race, national ethnic, origin and/or sex.

[3] The Canadian Human Rights Commission (the "Commission") amended its statement of particulars to include the issues of "(i) whether the complaint relates to the provision of 'residential accommodation', within the meaning of s.6 of the *Act*; (ii) whether [the Complainant] has been denied or was treated in an adverse differential manner with respect to such accommodation or services or residential accommodation". The Complainant consented and the First Nation did not contest the amendment.

[4] The Respondent denies the allegation and, in the event of a finding of *prima facie* discrimination.

II. Review of the Evidence

[5] According to the evidence, the Complainant is a Cree born in 1972 in Fort Alberni. The Nation in Fort Alberni is very remote and has a population of approximately 900. Fort Alberni is a First Nation and a Treaty Nation.

[6] The Complainant is fluent in Cree and English and has spent time in Timmins, Ontario and attended residential school but did not finish high school. The Complainant met Ringo and lawfully moved to the Respondent's land, Sandy Lake, in 2002. The Respondent states that her status at Sandy Lake was as a guest. This is a fact and the Complainant agreed to it.

[7] Sandy Lake is a band within the meaning of the *Indian Act* R.S.C., 1985, c. 1–5 in Northwestern Ontario. The Nation is a signatory to Treaty 5.

[8] In July 2011, the Complainant brought her son Dylan Shaganash ("Dylan") to live with her and Ringo in Sandy Lake. Before that, Dylan lived on the Constant Lake reserve, where he was a member. The evidence is that Dylan had some legal issues prior to coming to Sandy Lake and came to Sandy Lake with the consent of former Chief Adam Fiddler and the Chief of Constant Lake, Roger Wesley.

[9] The Complainant lived for ten years on the reserve as a guest and in that time held various jobs in the store, restaurant and gas station. Also, the Complainant, along with her partner Ringo, volunteered at the fire station and the Complainant volunteered with youth activities and community celebrations.

[10] The Complainant testified that she had social activities that involved hunting and fishing. The Complainant, Dylan and Ringo resided in band housing provided to Ringo's father who had passed it on to him when he moved next door in a house allocated to him by the First Nation as a band member. At the time of the move there were no issues concerning Ringo and his extended family residing there.

[11] The governance of the Nation is by ten elected officials, one Chief, one Deputy Chief and eight councillors. The evidence disclosed that Chief Bart Meekis and Robert Kakegamic filled the positions of Chief and Deputy Chief. Chief Meekis, prior to 2012 held the position of Deputy Chief for two terms and councillor for three terms.

[12] The Band council, in conjunction with a council of Elders, are responsible for the administration of the Band. Chief Meekis indicated that there were by-laws but could not name them and the only by-law that was apparent was the by-law on non-alcohol consumption or possession on the First Nation.

[13] It is common ground that the Band had passed no by-laws concerning visitors. Elder Kakegamic was called by the Respondent with respect to the legal traditions and he testified that non-members of the band were their guests and had to respect the community, the Elders and treat all others well. This included the Chief and council. The

Complainant testified that she was expected to live in harmony with others and she was in agreement with Elder Kakegamic.

[14] Many of the facts are not in dispute. It is common ground that the Complainant was a guest of the Respondent.

[15] There were no apparent issues between the Complainant and the Respondent until subsequent to the 2012 council elections.

[16] Ringo, in 2010, with the moral support and no active participation of the Complainant, ran for a position as councillor. Initially, there were issues raised whether someone living in a common law relationship was eligible to run. Ringo testified that Elder Kakegamic went on the Sandy Lake radio and was negative about the eligibility of people living in common law relationships being appropriate. Ultimately, Ringo was allowed to seek office but was unsuccessful.

[17] There is no evidence of what occurred between the 2010 election and the 2012 election, where Ringo ran a second time for council and lost again.

[18] In 2012, as was the custom for holding elections every two years, there was an election for Chief, Deputy Chief and council. Ringo ran again and was unsuccessful. Ringo and others believed that there had been a misuse of funds and were dissatisfied with the present council. Also, Ringo and Thomas Dixon, a member of Sandy Lake, were concerned about the results of the election and spoke about it to others, including Harvey Kakepetum, another unhappy band member.

[19] The allegations were that Chief Meekis and Harvey Kakegamic had breached their terms of office and were having extra marital affairs. Ultimately three documents were prepared 1) a letter dated July 17, 2012 addressed to Harvey Kakegamic; 2) a letter dated July 17, 2012 to Bart Meekis; and 3) a petition dated July 17, 2012.

[20] The letters to Harvey Kakegamic, Exhibit A1-1 and to Chief Meekis, Exhibit A2 are both anonymous and requested them to step down, failing which “evidence has been gathered that will be used against you. If you fail to resign voluntarily, this information will be released to the membership”.

[21] Ringo testified that David Kakegamic, another unhappy band member, wrote this letter and had Ringo hang it up at the Northern Store in Sandy Lake. With respect to the letter to Chief Meekis, his recollection was vague but he thought that David Kakegamic had written this letter, had put it in an envelope and had mailed it to the Chief.

[22] The third document, the petition, Exhibit A1-3, states as follows:

> Sandy Lake First Nation membership hereby remove you (named herein) from office by act of this petition.
>
> Bart Meekis, You are hereby removed from office for inappropriate behaviour contrary to the Oath of Office of the Sandy Lake First Nation.
>
> - Having extra marital affair(s) with married woman (sic) in our community and while on business trips for the First Nation while in office.
> - Fathering several children from these extra mal (sic) affairs while in office
> - Failing to ensure the well-being of our children come first
> - Failing to ensure aspirations of the membership comes first
> - Repeatedly ignoring community members – self serving
>
> Harvey Kakegamic, You are hereby removed from office for inappropriate behaviour contrary to the Oath of Office of the Sandy Lake First Nation.
>
> - Having extra marital affair(s) while in office
> - Overstepping the boundary of the position of Band Councillor
> - Overstepping the boundary of the position of Board Member
> - Ensuring your family benefits first before membership (nepotism)
> - Repeatedly ignoring community members – self serving.
>
> The Sandy Lake First Nation Band Membership (not council) will conduct a Bi-Election within a month of removal from office to replace vacant positions in Council.
>
> The remaining Council will continue to act on behalf of the community on a Quorum basis until the completion of the said bi-election.
>
> Yours, Sandy Lake Band Membership

[23] The evidence of Ringo was that he had seen the above document, the petition, and believed that it was written at the home of Thomas Dixon Sr., and that he took it around and gathered a few signatures. There is no evidence that shows that the Complainant was involved in writing the letters or the petition, even if Ringo's friends were coming to their

house to discuss these issues. In fact, the Complainant specifically denies having been involved in drafting the letters or the petition. Furthermore, she testified specifically that she did her best to stay away from these political issues as it was not for her to be involved, since she was not a member of the First Nation and could not vote. Also, Ringo and Thomas Dixon testified that the Complainant was not involved and their evidence was not challenged. At one point, Frankie Fiddler, Ringo's brother and the son-in-law of councillor Harvey Kakegamic, attended upon Ringo and asked whether he or the Complainant were involved in the letters or the petition. Ringo advised Frankie Fiddler that they had not been, to which Frankie Fiddler had responded with words to the effect that "it doesn't look too good".

[24] After the two letters of July 17, 2012 were sent to Harvey Kakegamic and Chief Meekis, and after the petition was circulated in the community, the Complainant wrote a Facebook post concerning Harvey Kakegamic. The Complainant said that she posted on Facebook an allegation that Harvey Kakegamic was having an extra marital affair. The Complainant testified she was angry and wanted to strike back.

[25] There was then another thread of conversation on Facebook, which began with a post from an unknown person using the name 'Laker Sandy", which questioned what kind of leader would kick someone off the reserve just because he is not a band member. Many people replied and two main views were expressed. The Complainant was concerned for herself and her son Dylan staying in the community while Ms. Meekis was defensive of the council and thought the Complainant should leave. Ms. Meekis testified at the hearing that she was a band member and a cousin of Chief Meekis. The posts by the Complainant were mostly benign. The Complainant was trying to defend herself and her son from the criticism. Ms. Meekis testified that the exchanges caused concern in the community.

[26] These posts were probably published between August 19 and August 21, 2012. The Chief testified that he had no knowledge of the Facebook posts and no evidence was led that they had any impact on the decision of the council to have the Complainant and her son leave.

[27] However, upon cross examination, Chief Meekis acknowledged that he knew of Ringo's activities and his continued opposition to the Chief's alleged misconduct.

[28] On August 7, 2012, a letter addressed to the Complainant was drafted by the Sandy Lake First Nation Council but was not sent to her. It read as follows:

> Sandy Lake First Nation Chief and Council have been made aware of concerns of your presence in our community. There have been reports of your negative public commentary of our local community. This is creating hardship for our people.
>
> We openly welcome and encourage visits to our First Nation but expect certain courtesy in return. Our people hold us responsible to promote harmony, peace and well-being to the best of our ability. It is a daily struggle, but because this is and always will be our home, we do the best we can to encourage positive change for members and residents of Sandy Lake. We cannot tolerate this type of action or behaviour from people who are here as guests.
>
> There are continued allegations and reliable reports from within our community that you have been and continue to cause social unrest by inciting negative remarks and public commentary. You are not a band member of Sandy Lake First Nation and you are here as a guest.
>
> Remaining here while there are allegations and reliable reports against you is creating hardship for our people. In the best interests of our community, we have decided that you are to leave Sandy Lake First Nation. You are not allowed to return to Sandy Lake First Nation, otherwise you will be charged with Trespassing on a Reserve. Any expense incurred is your responsibility.
>
> Sincerely,
>
> SANDY LAKE FIRST NATION COUNCIL

[29] The Chief and council also authored a second letter dated August 15th, which was addressed to Dylan. The language used in the letter to the Complainant (August 7, 2012) and the letter to Dylan (August 15, 2012) used different language. In the letter to Dylan the letter states "You are ordered to leave on the next available flight." (Exhibit A1-6) Whilst in the letter to the Complainant the wording was not as imperative or demanding, the intentions and expectations were the same.

[30] Surprisingly, both letters were not delivered to the Complainant and Dylan until August 30th. There is little evidence of what emerged between the date of the letters and

their delivery on August 30th. However, on August 31st the Chief and band council met and the band, based a decision on an alleged threat to the Complainant, made the decision to remove the Complainant and Dylan from the community.

[31] Around 4:00 p.m. that day, the Chief, leading a contingent which included the Deputy Chief, seven of the eight councillors, a NAP officer (a band police officer) and band security officer, went to Ringo's home where the Complainant and Dylan were living. The Complainant, Dylan and Ringo saw the contingent approaching and fearful for their safety, the Complainant and Dylan went inside and Ringo waited outside with his father who came to support him. The contingent was prevented from entering the house by Ringo and his father. A commotion ensued and the facts show that Ringo and his father ultimately reached a reasoned approach. The Chief and security officer entered the house and advised the Complainant that two tickets were waiting for her and Dylan and that they were to be taken in the morning to Sioux Lookout. The Complainant argued that she had no money and didn't know anyone in Sioux Lookout. Ultimately the group left saying they would be back for her and Dylan in the morning. According to the Complainant's testimony, the events of that day left her visibly shaken. She could hardly sleep, felt sick, was having panic attacks and was afraid she was having a heart attack.

[32] Later on in the evening of August 31st, the Complainant, Dylan and Ringo travelled surreptitiously to the nursing station as the Complainant feared she was having a heart attack. The reason for the surreptitious movement was because the Complainant feared the Chief and council would take action against her. The Complainant and Dylan, as her companion, were medically evacuated to Thunder Bay, Ontario. This effectively destroyed the family as the Complainant and Dylan could not return to Sandy Lake. The evidence was that there was never a reunification with the family or extended family. The Complainant and Ringo were forced to sell articles to pay bills and their life changed dramatically.

[33] The Chief testified that the allegations against the Complainant of causing angst in the community were based on reliable reports and this is why it was decided to ask both the Complainant and her son to leave. However, Chief Meekis could not provide the names of members of the band who had complained via Facebook or directly to him about

the Complainant's behaviour. All Chief Meekis said was there were some negative comments made about the Complainant.

[34] Before the Tribunal, the band called Chief Meekis and Elder Kakegamic, who testified that there was an expectation of good behaviour for guests on the Nation; that the behaviour expected of a guest whether they lived there for a few days or for a long period of time was the same. The witnesses, who testified on behalf of the band respecting the "bad behaviour", were Chief Meekis and Nora Meekis. Both gave testimony that the Complainant was causing community unrest.

[35] The testimony of Ms. Meekis was that she had "heard rumours some people wanted the Complainant to leave". She stated that she also heard from the Elders, unnamed, that they wanted the Complainant to leave. Not one individual was named or called from the band to give that evidence. No dates and no times or instances were given with respect to the Complainant's bad behaviour.

[36] In fact, Elder Kakegamic testified concerning the Complainant that:

1. he did not talk to the Chief and could not comment on the Chief's evidence;
2. that he was not involved in the decision to remove the Complainant; and
3. that during the Complainant's time in the community she was respectful of the community and its Elders.

[37] The Nation argues that the letter that was drafted on August 7, 2012, but sent to the Complainant on August 30, 2012, arose out of concern for her. The concerns, the band argues, were due to the unrest in the community because of the Complainant's actions.

[38] The Nation argues that the Chief and council followed legal traditions and customary laws. Yet, Elder Kakegamic indicated that it would be customary for the Chief and council to speak to the Complainant about her behaviour prior to any action being taken. According to the evidence disclosed, there was no approach from the Chief or council to defuse the alleged tensions if these tensions existed.

[39] The evidence of Chief Meekis and Elder Kakegamic was consistent that the band had asked individuals in the past to leave the Nation. The evidence suggested that these

requests were usually for liquor related matters or more serious problems. Exhibit 34 is a sample of “eviction letters” but it is interesting to note that the eviction letters were written after 2012 and this is why I consider them to be of limited assistance as these letters post-date the present case by four years.

[40] It is quite clear that the letter of August 7, 2012 to the Complainant instructed her to leave. As facts unfold, it is clear that the Complainant had no choice and that she had to leave.

[41] On August 30, 2012 the Chief, council and Elders had a meeting and decided to have the letters of August 7th and 15th, respectively, served upon the Complainant and Dylan. Two security officers attended to the Complainant’s place of work and had the letter served to her.

[42] On August 31, 2012 the Chief testified that the council and Elders had heard rumours that there were threats to the Complainant. There were no specifics given. Notwithstanding the alleged seriousness of the threats, the Nation did not take any proactive action or investigation, nor was anyone sent to the Complainant’s residence to advise her of the threats. It is strange that the letters were drafted on August 7th and 15th, sent on the 30th, but that the alleged threats only happened on the 31th. In summary, I would say that the timeline of events does not support the Nation’s allegations.

III. Legal Framework and Analysis

[43] As explained earlier, the Complainant filed a complaint based on s.5 of the *Act*, but later the Commission asked to add s.6 of the *Act* as well. The Complainant agreed and the Respondent did not oppose it. The Commission’s counsel argued that discrimination could be found under s.6, namely the denial of residential accommodation. The Complainant’s complaint was based on multiple prohibited grounds of discrimination, namely marital and family status, sex, race, and/or national or ethnic origin. The Complainant, in her statement of particulars, asked *inter alia* a) that the council of Sandy Lake First Nation apologize to her and her family; and b) damages in the amount of $20,000.00 for pain and suffering. The evidence at the hearing was centered on the issue of family and marital status and not

on the other alleged grounds. The issues of sex, race and national origin were not canvassed and this is why this decision will be based solely on the ground of family and marital status.

[44] The hearing proceeded in Thunder Bay from August 29–31th. Evidence was called which included the Complainant, Angele Kamalatisit, Ringo Fiddler, Dylan Shaganash, Thomas Dixon (a member of the Nation), Zach Kakegamic (a member of the Nation and an elder of the Nation), Chief Meekis and Nora James Meekis (a member of the Nation and a cousin of Chief Meekis). The Complainant had initially filed a complaint under s.5 and s.14. The Commission amended the complaint to include s.6. The hearing did not address s.14 of the *Act*. Much of the evidence is as to the status and the concept of guests on the Nation. Not in dispute, are certainly the activities of Ringo, who ran for election in 2010 and 2012, and the ongoing animosity between the Chief and council, Ringo and his associates.

[45] The *Act* at s.5 states:

> Discriminatory Practices
>
> Denial of good, service, facility or accommodation
>
> 5. It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public
>
> i. to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
>
> ii. to differentiate adversely in relation to any individual,
>
> on a prohibited ground of discrimination.

[46] s.6 of the *Act* provides:

> 6. It is a discriminatory practice in the provision of commercial premises or residential accommodation
>
> (a) to deny occupancy of such premises or accommodation to any individual, or
>
> (b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

[47] The Respondent argues that the Complainant failed to make forth a *prima facie* case under s.5 or s.6 of the *Act*. With respect to s.5 of the *Act*, the Respondent takes the position that the Complainant's situation, namely the access to residential accommodation, doesn't fall under the definition of "general public". The Respondent states that the Federal Court of Appeal has defined "a service customarily available to the public" in *Canada (Human Rights Commission) v. Canada (Attorney General),* 2016 FCA 200 at para. 52 as follows:

> A service customarily available to the public requires a presence of two separate components: first something of benefit must be available and, second, this benefit must be held out or offered to the public or accordingly, to use the words of the Tribunal, language in s.5 of the CHRT requires "a connection" between the benefit and the process by which it is provided.

[48] In its closing submissions, the Respondent added a new argument concerning s.5 of the *Act*. The Respondent argued that: i) there was a breach of an implied term of an unwritten private agreement with the First Nation; ii) challenge to the *Indian Act* and; iii) that the actions were *bona fide* and justified under s.15 of the *Act.* It also added that its actions were justifiable under s.15 of the *Canadian Human Rights Act*.

[49] The Commission, in its reply submissions, pointed out that these issues were not raised in the statement of particulars nor at the hearing. It also pointed out that Rule 9(3)(a) of the *Canadian Human Rights Tribunal Rules* provides that a party who does not raise an issue shall not later raise it at the hearing.

[50] Ultimately, the Commission does not object to these new issues being raised and has chosen to respond to them. The Tribunal's Rules of Procedure, at s.6(1), provides as follows:

> Statement of Particulars
>
> 6(1) Within the time fixed by the Panel, each party shall serve and file a Statement of Particulars setting out,
>
> a. the material facts that the party seeks to prove in support of its case;
>
> b. its position on the legal issues raised by the case;

> c. the relief that it seeks;
>
> d. a list of all documents in the party's possession, for which no privilege is claimed, that relate to a fact, issue, or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;
>
> e. a list of all documents in the party's possession, for which privilege is claimed, that relate to a fact, issue or form of relief sought in the case, including those facts, issues and forms of relief identified by other parties under this rule;
>
> f. a list identifying all witnesses the party intends to call, other than expert witnesses, together with a summary of the anticipated testimony of each witness.

[51] The Commission pointed out that the Respondent's arguments of law and facts were not clearly addressed at the hearing or in the Statement of Particulars. 9(3) of the *CHRT Rules of Procedure* provide:

> **No previously undisclosed evidence, issue, relief**
>
> 9(3) Except with leave of the Panel, which leave shall be granted on such terms and conditions as accord with the purposes set out in 1(1), and subject to a party's right to lead evidence in reply,
>
> a. a party who does not raise an issue under Rule 6 shall not raise that issue at the hearing;
>
> b. a party who does not, under Rule 6, identify a witness or provide a summary of his or her anticipated testimony shall not call that witness at the hearing;
>
> c. a party who does not disclose and produce a document under Rule 6 shall not introduce that document into evidence at the hearing;
>
> d. a party who does not, under Rule 6, identify the relief which it seeks shall not make representations in respect of that relief at the hearing; and
>
> e. a party who has not complied with 6(3) shall not introduce an expert report into evidence nor call an expert witness at the hearing.

[52] In the present circumstances, the Respondent has not complied with 9(3) of the *CHRT Rules of Procedure* in seeking leave from the Tribunal. Therefore, the Respondent's new arguments will not be considered.

[53] It is well established law that in a case or claim of discrimination under s.5 or s.6 of the *Act*, the Complainant bears the onus or burden of establishing a *prima facie* case based upon a prohibited ground. As explained in *Stanger v. Canada Post Corporation*, 2017 CHRT 8 at para 12:

> To demonstrate *prima facie* discrimination in the context of the CHRA, complainants are required to show: (1) that they have a characteristic or characteristics protected from discrimination under the *CHRA*; (2) that they experienced an adverse impact with respect to a situation covered by sections 5 to 14.1 of the *CHRA*; and, (3) that the protected characteristic or characteristics were a factor in the adverse impact (see *Moore v. British Columbia* (Education), 2012 SCC 61 at para. 33; *Siddoo v. I.L.W.U., Local 502*, 2015 CHRT 21, para. 28). The three elements of discrimination must be proven on a balance of probabilities (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center) ("Bombardier")*, 2015 SCC 39 at paras. 55-69).

[54] It is not necessary for the Complainant to demonstrate that the discriminatory grounds were the sole reason but a factor in the Respondent's actions (*Stanger,* at para 14). Furthermore, the *prima facie* test is a flexible one and one that will turn on to particular facts.

[55] The parties appreciate that there is little precedent for a definition of "residential accommodation" in s.6 of the *Act*. However, in the case of *Laslo v Gordon Band Council,* 1996 CanLII 455 (CHRT), the Tribunal dealt with discriminatory practice for residential accommodation. More recently, in the case of *Ledoux v Gambler First Nation*, 2018 CHRT 26 at para. 94 the Tribunal stated:

> 94. However, I am persuaded that the Respondent's attempts to cite rental arrears and violation of Gambler's policy as well as ignoring Gordon's appeal were pretexts designed to deny Gordon the ability to return to his house. It is not reasonable to accept the Respondent's claim that Gordon could return to Gambler any time when it actively took steps to prevent Gordon from reclaiming his house. Although never explicitly said in the evidence, even if the Respondent genuinely believed that Gordon was better off at the Lodge, that intention does not absolve it of discriminatory behaviour. It is clear to me that the Respondent did not want the Complainant to return to Gambler and by having Roxanne Brass occupy his house, it denied Gordon his residential accommodation and discriminated against him on the basis of disability.

[56] As for discrimination based on family or marital status, the case of *B. v. Ontario* (Human Right Commission) 2002 SCC 66 at paragraph 60 is useful and states:

> The appellants also assert that the dismissal of Mr. A does not amount to discrimination because the decision was based solely on personal animosity. Even if we were to accept that assertion, the animosity did not result from any action or behaviour of Mr. A, but rather solely because of his marital and familial affiliations. Thus the appellant's automatic attribution to the wife and daughter's behaviour to Mr. A reflects stereotypical assumptions about Mr. A that have nothing to do with his individual merit or capabilities. This is precisely the kind of conduct which the Code aims to prevent. (Underline added)

[57] In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General),* 2005 FCA 154, commonly referred to as *Morris*, at paragraphs 28-30, the FCA reflected on the *prima facie* test:

> [28] A flexible legal test of a prima facie case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative sphere of discrimination from employment, and from the provision of goods, services, facilities, and accommodation. Discrimination takes new and subtle forms. Moreover, as counsel for the commission pointed out, it is now recognized that comparative evidence of discrimination comes in many more forms than the particular one identified in Shakes.
>
> [29] To make the test of a prima facie case more precise and detailed in an attempt to cover different discriminatory practices would unduly 'legalise' decision-making and delay the resolution of complaints by encouraging applications for judicial review. In my opinion, deciding what kind of evidence is necessary in any given context to establish a prima facie case is more within the province of the specialist Tribunal, than that of the Court.
>
> [30] Nor are more detailed legal tests of a prima facie case likely to bring greater certainty to the administration of the *Act*. As the jurisprudence illustrates, even within the single area of discrimination in employment, variations in fact patterns are infinite. Whether, as a question of law, shakes would be found to apply in any given situation might be far from easy to predict. Increasing the number and specificity of legal rules does not necessarily enhance certainty in the administration of the law.

[58] In light of the test described above, the Complainant must prove three elements to the satisfaction of the Tribunal:

1. That she possesses a protected characteristic under the *Act*;
2. That she experienced an adverse impact as a result of s.5 or s.6 of the *Act*; and
3. That the protected characteristic was a factor in the adverse impact on the Complainant.

[59] Once this has been established by the Complainant, the Respondent "can either present evidence to refute the allegation of *prima facie* discrimination, put forward a defence justifying the discrimination, or do both" (*Quebec v. Bombardier Inc.*, 2015 SCC 39, para 64). Moreover, "where the respondent refutes the allegation, its explanation must be reasonable. It cannot be a pretext to conceal discrimination" (*Dixon v. Sandy Lake First Nation*, 2018 CHRT 18, para 28). As for a potential justification for the discrimination under the scheme of the *Canadian Human Rights Act*, it must be made under s.15 (1) or (2).

Analysis

(i) *Prima Facie* Case of Discrimination

[60] I first have to determine if the Complainant has a characteristic protected from discrimination under the *CHRA*. The evidence filed by the Complainant related entirely to the prohibited ground of family and marital status.

[61] In *B. v Ontario (Human Rights Commission)*, 2002 SCC 66, the Court found that the Complainant was discriminated against on the basis of her marital and/or family status. In the judgment, the court stated at paragraph 36:

> In our view, when the terms "marital status" and "family status" are read in the context of the provisions at which they appear, as well as the broader context "as a whole", it is clear that these terms encompass discrimination claims based on the particular identity of the complainant's child or spouse. Although this view is based primarily on the wording of the provisions in question, it is further supported by the principles of interpretation applicable to human rights statutes.

[62] The Tribunal has also addressed the issues in *Stanger v. Canada Post Corporation*, 2017 CHRT 8 at paragraphs 52 and 55, which state as follows:

> 52. Re-examining the respondent's position in light of the foregoing jurisprudence, one is compelled to conclude that the CHRA's protection against marital status discrimination cannot be confined to the period commencing on the date of a legally solemnized marriage. Such a narrow and restrictive interpretation would frustrate the purposes of the CHRA, and create the absurd result whereby the termination of employees on the basis of their recent marriage would be reviewable under the CHRA, while the termination of employees on the basis of their imminent marriage would not be. The respondent's position ignores the fact that marriage does not spontaneously come into existence without any antecedents; hence the extension of marital status protection to the engaged couples in *Jensen and Gipaya*.
>
> …
>
> 55. Rather, the scope of the protection granted by the ground of marital status has been ascertained by a more qualitative assessment of the relationship in question at the relevant time. Hugessen J.A. in *Schaap-FCA* tacitly acknowledged that the relationship giving rise to marital status discrimination was essentially 'a relationship of husband and wife' (para. 17). In *Gipaya*, the complainant, who cohabited with her colleague, had purchased a house with him, and had announced their engagement, was protected '… by virtue of her status of being engaged or being in a common-law spousal relationship.' (para. 115). In *502798 N.B. Inc.*, the human rights board of inquiry had found that the testimony of the complainant and his colleague that ' … they were living as a married couple, without specifying particulars of their cohabitation …' was sufficient, and the Court endorsed the finding that they had marital status at the relevant time (paras. 6, 41-42). In *Jensen*, the tribunal found that the complainant was protected under the statute because the respondent perceived her as married (para. 37). The emphasis placed on <u>perception</u> in the *Jensen* case has been subsequently underscored by the Supreme Court of Canada in *Quebec (C.D.P.D.J.) v. Montreal* 2000 SCC 27, where the Court held that the ground 'handicap' in Quebec's *Charter of Human Rights and Freedoms* can include both an ailment, as well as the perception of such an ailment (para. 72).

[63] First, it is noteworthy that at no time did the Respondent challenge the relationship between Ringo and the Complainant. I conclude that the Complainant has established that she had a characteristic protected from discrimination under the *CHRA*, namely that she was in a common law relationship with Ringo.

[64] Second, I have to determine if the Complainant and her son have experienced an adverse impact with respect to a situation covered by s.5 and/or 6 *CHRA*. There is evidence establishing that the Complainant was denied occupancy of her residential

accommodation, which is a situation protected by s.6. It does not appear that the Respondent disagrees that the Complainant had lived with her common law partner Ringo for approximately ten years in the Sandy Lake First Nation.

[65] The issue is whether the band treated the Complainant in an adverse manner with respect to the residential accommodation when it ordered her to leave. The answer in my opinion is yes.

[66] The third part of the analysis is whether the adverse differential treatment was established by the evidence to be based in whole or in part on one or more of the prohibited grounds listed by the Complainant, namely, family and marital status, sex, national or ethnic origin and race.

[67] Clearly, there is a connection between the marital and family status of the Complainant and the Respondent's decision ordering her to leave the Nation. Obviously, the Complainant has been victimized as a result of her relationship with Ringo and the Band's request that she leaves Sandy Lake was based on Ringo's involvement in local politics.

[68] In this context, I find that the evidence establishes on a balance of probabilities that the Complainant was denied occupancy of a residential accommodation under s.6 of the *Act* and that it was based on a prohibited ground namely, family/marital status. As previously stated, there was little, if any, evidence called with respect to the other prohibited grounds alleged.

[69] As an attempt to refute the finding of *prima facie* discrimination, the Nation has argued, *inter alia*, that the Complainant was a disruptive force causing angst and a lack of harmony in the community by her conduct and Facebook posts.

[70] With respect to these allegations, there was no evidence that the Complainant was causing unrest or that she was herself involved in any political activities. In fact, Ringo, the Complainant and Dylan all denied such behavior or involvement from the Complainant. Furthermore, Elder Kakegamic specifically testified that the Complainant complied with the

rules of the First Nation, was well behaved and was not a problem. The Nation's evidence was poor, unconvincing, and based upon hearsay and innuendo.

[71] In a further attempt to refute the allegations of discrimination brought against the Nation by the Complainant, the Respondent alleged that the Complainant was removed from the Nation due to an anonymous phone call to Councillor Russell Kakepetum on August 31st), threatening "Ringo's girlfriend" (the Complainant). The Respondent did not bring any evidence about this event nor was it able to explain what the threat was about.

[72] In the present circumstances, I consider that the threat, if any, was based upon hearsay at the hearing from Chief Meekis and also Councillor Kakepetum who did not testify at the hearing. One would have thought that Councillor Kakepetum would have been called as his evidence would be crucial. Furthermore, the Respondent confirmed that it did not conduct an investigation about the threat, that no protection was offered to the Complainant and that it did not warn the Complainant that such threats had been received against her.

[73] In light of the lack of evidence presented by the Respondent in regard to this event, I conclude that there was never a threat made against the Complainant.

[74] Additionally, I find the timeline of events to be incoherent. Indeed, the evidence shows that the two eviction letters were respectively drafted on August 7th and 15th, which means that the decision to evict the Complainant and her son was made many weeks before the threatening phone call. I also find that the Council's reaction was incoherent, since no action was taken by the Chief or any individual, to help the Complainant. Elder Kakegamic testified that the Chief ought to have met with the Complainant to counsel her before the step to expel her was taken.

[75] It is clear to me that the band targeted the Complainant because she was the common law partner of Ringo. Ringo was involved in running for elections in 2010 and 2012, meeting with other disgruntled band members and the publishing of allegations against council and the Chief. Ringo, however, was a band member and was sheltered from retaliatory action, thus the Complainant became the target and ultimately, the victim.

[76] I am satisfied that the actions against the Complainant were unfounded and designed to retaliate against Ringo based on his involvement in local politics. As previously stated, the Facebook comments of the Complainant were defensive, benign and certainly, as the Chief testified, not part of his reason for having the Complainant removed as he was not aware of the posts. In this context, the actions taken against the Complainant were based on marital/family status, which is a prohibited ground according to s.3 of the *Act*. That is to say, the adverse treatment the Complainant experienced was based on the identity of her spouse. Thus, there is a connection between her marital status – the prohibited ground – and the adverse treatment she received by the First Nation. I also find that the Respondent was not able to refute the *prima facie* discrimination established by the Complainant.

[77] The Complainant has met her onus and has established, on the balance of probabilities, a *prima facie* case of discrimination based on s.6 of the *Act* on the ground of her family/marital status. Any claims under s.5 are dismissed as there was insufficient evidence to establish that the adverse impact was covered by s.5 *CHRA*. Also, it should be noted that the First Nation, the Respondent, did not call sufficient or credible evidence to establish a defence under s.6 of the *Act*, as explained in the following section of this ruling.

(ii) The Nation's Defence or Justification Under s.15 of the *Act*

[78] There is no basis for which s.15 is applicable since the respondent did not succeed in presenting a *bona fide* justification for expulsing the Complainant and her son from Sandy Lake. It is true that the respondent tried to explain that the Complainant was ordered to leave because threats were made against her. However, as I have concluded earlier, I do not believe that there was ever any threat made against the Complainant. In their Statement of Particulars, the respondents did not address s.15 and furthermore, if it had been argued, I would have dismissed it as I did not find there was any evidence of a threat made against the Complainant.

[79] In reviewing the evidence and the testimonies in regard to the alleged threats, I accept the testimonies of the Complainant, Ringo and Elder Kakegamic. The evidence of Chief Meekis was unconvincing and questionable. The Chief was often vague and unsure of his evidence. In sum, the evidence of the Respondent was woefully inadequate in establishing that a) the Complainant was a disruptive force; and b) that there was any threat made against her. Where there were any discrepancies between the evidence of the respondent namely, the Chief, and the Complainant, I accept the evidence of the Complainant, Ringo and Elder Kakegamic.

[80] The respondent did not meet its burden of establishing a defence under s.15 *CHRA.*

IV. Remedies

[81] The Tribunal, in granting a remedial order, is governed by s.2 of the *Act* which provides that the purpose of the *Act* is to "the principle that all individuals should have an opportunity equal to other individuals (…) without being hindered in or prevented from so doing by discriminatory practices (…) ." It is accepted law that orders under s.53 are designed to promote the objects of the *Act*. It is well established that the aim of s.53 is not to punish but to 1) mitigate any losses suffered by a victim; and 2) prevent and exclude discrimination (*Cassidy v. Canada Post Corporation & Raj Thambirajah*, 2012 CHRT 29 at para. 192).

[82] As explained by the Commission's counsel, s.53 is designed to be interpreted in a purposeful fashion that promotes the objectives of the statute. It is not to be vindictive but to mitigate any loss suffered by the victim and to prevent and discourage discrimination.

[83] To accomplish this, the Tribunal's remedial discretion must be exercised on a principled basis, having regard to the causal link between the discriminatory practice and the loss claimed. See *Chopra v Canada (Attorney General)*, 2007 FCA. 268 at para. 37, which states as follows:

> [37] The fact that foreseeability is not an appropriate device for limiting the losses for which a complainant may be compensated does not mean that

> there should be no limit on the liability for compensation. The first limit is that recognized by all members of the Court in Morgan, that is, there must be a causal link between the discriminatory practice and the loss claimed.

[84] In other words, the Tribunal's remedial discretion must be exercised reasonably, in consideration of the particular circumstances of the case and the evidence presented (*Hughes v Elections Canada*, 2010 CHRT 4 at para. 50).

[85] The Tribunal in the past has commented that the task of formulating remedies can be one which requires flexibility. In the case of *Tanner v Gambler First Nation* 2015 CHRT 19 at para. 161, our Tribunal stated:

> The aim in making an order under s.53(2) is not to punish the person found to have engaged in a discriminatory practice, but to eliminate – as much as possible – the discriminatory effects of the practice (see *Robichaud v Canada* (Treasury Board), 1987 2 S.C.R. at para. 13).

[86] The Complainant in her claim for leave asked for an apology, criminal charges against band members and an award of $20,000.00 for pain and suffering.

Section 53(2)(a)

[87] This section of the *Act* provides that the Tribunal may make an order against the person found to have engaged in a discriminatory practice to cease the discrimination practice.

[88] In the present case, the discrimination was specific to one individual and not a group or a community at large. I order the band and the community to follow what Elder Kakegamic testified as the traditional law. If the traditional laws had been followed, the matters would hopefully not have proceeded as they did.

[89] I order that the official statement requiring the Complainant and her son to leave Sandy Lake, which was posted on the city's website, be removed. If the official statement is found anywhere else, it has to be removed as well.

Section 53(2)(b)

[90] Under this section, the *Act* provides that the Respondent shall make available any rights, opportunities or privileges that are being or were denied to the victim as a result of the practice. In the present circumstances, I order that the Respondent, including the Nation, the Chief and council, allow the Complainant back on the First Nation. There should be no difficulty with this as Chief Meekis indicated that she was welcome to return, subject to the same rules and regulations all guests must abide by. I therefore order that the Complainant and her children and grandchildren be allowed back to live with Ringo in the house allocated to him on the Sandy Lake First Nation subject to her obeying all of the obligations as a guest.

Section 53(2)(e)

[91] This section of the *Act* allows a Tribunal to award up to $20,000 for pain and suffering as a result of the discriminatory practice.

[92] In the case at hand, the Complainant was not only discriminated against but she was also an innocent victim between the band, Ringo and his supporters. The Complainant testified in her own words that she felt threatened, bullied, upset, disappointed, afraid and panicked, sick and distraught. The events of August 31, 2012 are shocking in the behaviour of the Chief and the band councillors. To have the Chief, Deputy Chief, seven councillors, a NAP officer and band security attend to the Complainant and Ringo's home was abhorrent. There was no need for such a show of force and it only could have been intended to frighten and scare the Complainant. They were successful for the Complainant hid in the house until the commotion had died down.

[93] The events continued to play out after the group had left. The Complainant was scared, unable to sleep, had a panic attack and was afraid she was having a heart attack. Not only was the Complainant scared but so were Ringo and Dylan. Ringo took the Complainant and Dylan hidden in his car to the nursing station where she received a medical evacuation the next morning to Thunder Bay. For the Complainant, the impact of being forced to leave on short notice from the community which was her home for ten

years, to leave her family circle, to leave the community, to leave her jobs, to go and live in a woman's shelter, was devastating.

[94] As a result of these actions, she was forced to be separated from Ringo and has not been allowed to return to what she considered home. Ringo and the Complainant were also forced to sell their possessions to pay the bills. As a result of the actions of the band not only her life, but Ringo and Dylan's, were also severely impacted.

[95] The Complainant throughout this was able to maintain her dignity and took what would be considered the high road. In her closing submission she stated at paragraph 12:

> Sadly, Harvey Kakegamic, Frankie Fiddler and John Kelly Fiddler passed away, I mean no disrespect towards them but they had to be mentioned in this continued case. I would also like to acknowledge my sincerest condolences to their families.

[96] In the final paragraph of her submission she stated:

> There are days that I think of the day in Sandy Lake when council tried to barge into our home that still frightens me and I could not protect my son. I felt like they took all my rights away as a mother. During those times I still cry about my incident.

[97] In arriving at a decision with respect to the quantum of damages for pain and suffering, I have looked at previous awards made by our Tribunal.

[98] In *Warman v. Kyburz,* 2003 CHRT 18, at paragraphs 106 – 110, the Tribunal made an award of $15,000.00 based on retaliatory grounds in referring to the Complainant in negative terms, trying to have her fired and veiled threats to her life stating:

> ii) Compensation for Pain and Suffering;
>
> [106] Subsection 53(2)(e) allows the Tribunal to make an award of up to $20,000 to compensate the victim of a discriminatory practice for any pain and suffering that he experienced as a result of the discriminatory practice. In this case, the Commission asks that Richard Warman be awarded the maximum award permissible under the legislation.
>
> [107] Certainly, the retaliatory actions taken by Mr. Kyburz in this case were very serious. Not only did Mr. Kyburz repeatedly disparage Mr. Warman publicly in the most negative terms, it appears that he actively attempted to interfere with Mr. Warman's employment, going so far as seeking to have

him fired from his job. Even more worrisome are the veiled threats that Mr. Kyburz made to Mr. Warman's life.

[108] It was clear from his testimony that Mr. Warman was somewhat shaken by his experiences with Mr. Kyburz. He described the fear that he felt for his own safety, as well as for the safety of those close to him. He also testified to the impact that Mr. Kyburz' retaliatory actions have had on his day-to-day life, and the measures that he has felt it necessary to take for his own safety, which have included involving the police.

[109] That said, Mr. Warman strikes the Tribunal as a resilient individual, who was clearly on something of a personal mission to stop people such as Mr. Kyburz from disseminating their vitriol over the Web. It appears that Mr. Warman's conviction as to the justness of his cause has served to insulate him somewhat from the negative effects that Mr. Kyburz' actions may have otherwise had on a less strong individual. In this regard we note that there is no medical or other evidence before us that would suggest that Mr. Warman has suffered any health-related consequences as a result of Mr. Kyburz' actions.

[110] In all of the circumstances, we are of the view that an award of $15,000 for Mr. Warman's pain and suffering is appropriate.

[99] In *Seeley v. Canadian National Railway*, 2010 CHRT 23 (CanLII) at paragraphs 186-189, the Tribunal stated:

(iv) Pain and suffering

[186] Section 53(2) of the *CHRA* provides for compensation for pain and suffering that the victim experienced as a result of the discriminatory practice, up to a maximum of $20,000.

[187] The Complainant testified that the whole situation was deeply disturbing and that it had upset her very much. She further added I lost my career. I was discarded because I had kids. She said that following the July 2005 letter of termination she was depressed: I was shocked and deeply affected. My family noticed the changes. I was irritable. I felt violated and that I had been treated with no regards.

[188] Her husband also testified that after she was fired, the Complainant was hurt, upset and irritable.

[189] No medical evidence was produced to substantiate these claims. Nevertheless, I agree that CN's conduct and nonchalant attitude towards her situations was disturbing for the Complainant and that it must have upset her. Taking this into consideration, I order CN to pay to the Complainant $ 15,000 in compensation for her pain and suffering.

[100] In the present circumstances, the conduct of the band was so outrageous that the complaints referred to above pale in comparison. Moreover, the impact of band's conduct was extremely negative on the Complainant, who described very thoroughly how much she suffered from being ordered to leave Sandy Lake. Accordingly, the damages are set at $20,000 for pain and suffering.

[101] The Complainant had also asked that criminal charges be pursued against the Respondent. However, the Tribunal has no authority to order same.

Section 53(4)

[102] Under this section I further order that the Complainant receive interest from August 2012 to the date of payment in accordance with Rule 9(12) of the *CHRT Rules of Procedure*.

[103] If the parties are unable to agree on the amount I will retain jurisdiction and the parties may speak to this.

Signed by

George E. Ulyatt
Tribunal Member

Ottawa, Ontario
May 10, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2065/6614

Style of Cause: Angele Kamalatisit v. Sandy Lake First Nation

Decision of the Tribunal Dated: May 10, 2019

Date and Place of Hearing: August 29 to 31, 2017

Thunder Bay, Ontario

Appearances:

Angele Kamalatisit, for herself

Brian Smith, for the Canadian Human Rights Commission

Asha James, for the Respondent