Tribunal canadien des droits de la personne

Canadian Human Rights Tribunal

Citation: 2019 CHRT 50

Date: December 18, 2019

File No: T2256/1118

Between:

Hayley Nielsen

Complainant

- and -

Canadian Human Rights Commission

the Commission

- and -

Nee Tahi Buhn Indian Band

Respondent

Decision

Member: Gabriel Gaudreault

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I. Background

[1] Ms. Hayley Nielsen (complainant) is from Burns Lake, a small community located in British Columbia. She is a member of the Nee Tahi Buhn First Nation (Nation) and holds her “Indian” status under the *Indian Act*, L.R.C. (1985), ch. I-5. Ms. Nielsen is of mixed origins, her father being Caucasian and her mother being a member of the Nation.

[2] In 2014, Ms. Nielsen applied for nomination as councillor on the Nee Tahi Buhn Indian Band Council (respondent). In December of that year, she was elected for a 4-year term ending in November 2018.

[3] During her term, Ms. Nielsen alleges that she was the subject of discriminatory remarks by the then-Chief of the Nation, Mr. Raymond Morris. These discriminatory remarks were allegedly made in the context of her term for the respondent and referred to her race, national or ethnic origin and religion.

[4] Ms. Nielsen alleges that she had no choice but to leave her position as councillor prematurely in March 2017, due to the toxic environment within the Band Council caused by the actions of Mr. Raymond Morris.

[5] Specifically, she alleges that she underwent an adverse differential treatment in the course of her employment (section 7 *CHRA*) and that she was the victim of harassment in matters related to employment (section 14 *CHRA*). These discriminatory acts are alleged to be based on her race, her national or ethnic origin and her religion.

[6] In August 2016 Ms. Nielsen filed a complaint with the *Canadian Human Rights Commission* (Commission) which was referred to the Tribunal in February 2018. The Commission, which represents the public interest, fully participated in the Tribunal hearing.

[7] Ms. Nielsen is seeking reparations for the alleged discriminatory practices she suffered. She seeks the following remedies:

- $5000 in damages for pain and suffering (subsection 53 (2)(e) *CHRA*);
- $25,500 in damages for lost wages (honorariums) (subsection 53 (2)(c) *CHRA*);

- A letter of apology from the respondent, to be published on the Band's Facebook feed and in the local Burns Lake newspaper.

[8] The Commission, in turn, supports Ms. Nielsen's reparations, but also seeks systemic reparations, in the public interest, so that such acts do not happen again. It seeks the following remedies, according to section 53(2)(a) *CHRA*:

- That the respondent cease the discriminatory practices and take measures to prevent such practices from happening again. Specifically, the respondent will have to develop human rights and anti-harassment policies in consultation with the Commission;

- After these policies are created, the respondent is to engage an expert trainer to train the Band Council's employees, the councillors and the Chief on these new policies.

[9] I would like to specify that the respondent's participation in the Tribunal process was minimal, on the whole. I will address this problem in section II of this decision (Preliminary remark – Minimal participation of the respondent).

[10] Although Mr. Frank Morris appeared at the hearing as its representative, the respondent did not present a defence in this case.

[11] During the hearing, Mr. Frank Morris was quite inactive. He did not cross-examine Ms. Nielsen and only very briefly cross-examined Ms. Debbie West, a witness of the complainant. He did not file documents or present a defence under section 15 *CHRA.* Nor did he present any evidence to rebut the presumption of section 65 *CHRA.*

[12] I have ensured that I have given each party the opportunity to present a complete and full defence and I must render my decision with the evidence that was presented at the hearing, both the limited documentation from Ms. Nielsen, her testimony, that of Ms. West as well as the very short cross-examination and finally the brief testimony of Mr. Frank Morris.

[13] For the following reasons, I find that Ms. Nielsen's complaint is well founded and I will order compensation for the discrimination she was the victim of (subsection 53 (2) *CHRA)*.

II. Preliminary remark — Minimal participation of the respondent

[14] As previously mentioned, the respondent's participation in this complaint was minimal. I think it is appropriate to give a brief overview of this lack of participation. Of course, this minimal participation is reflected in the Tribunal's official record.

[15] When the complaint was referred to the Tribunal, the respondent was represented by Mr. Johny Najm. He was speaking on behalf of the former chief, Mr. Raymond Morris. A statement of facts was filed in the Tribunal's record. However, no list of documents or witnesses was filed. Mr. Najm also joined a few teleconferences.

[16] That said, in January 2019, Mr. Najm informed the parties and the Tribunal that he was withdrawing from the case and that he would no longer represent Mr. Raymond Morris. At the same time, he informed the Tribunal and the other parties that Mr. Frank Morris would be the respondent's only witness at the hearing. It was after Mr. Najm's departure that the respondent's lack of participation became clear.

[17] Throughout 2019, the Tribunal attempted many times to contact the respondent. These steps, including attempts by the clerks to call, sending emails, and even sending a bailiff to the Band Council office to serve a notice of hearing, were inconclusive. The respondent's participation was then non-existent.

[18] A hearing was scheduled in April 2019, but was cancelled due to the respondent's lack of participation. New hearing dates were set in June 2019, but were again postponed due to the respondent's lack of participation.

[19] After numerous attempts to contact the respondent, the Tribunal was finally able to contact Ms. Patricia Prince, Band Chief at the time, and another councillor, Mr. Mark Morris.

[20] Having contacted them, the Tribunal attempted to convince them to join a teleconference. The first attempt unfortunately failed. The teleconference was postponed and the respondent was informed.

[21] On July 4, 2019, the respondent surprisingly joined a case management teleconference. During this call, four Band Council representatives were present: Ms. Patricia Prince, Mr. Victor Burt, Mr. Mark Morris and Mr. Frank Morris.

[22] Clear instructions were given by the Tribunal during this call for further action. The respondent expressed the desire to retain the services of a lawyer. The Tribunal ordered the respondent to follow up on this matter before August 23, 2019. In addition, hearing dates were set for November 4 to 8, 2019, at Burns Lake, with the consent and availability of all parties, including the respondent's representatives.

[23] By August 23, 2019, the respondent had not followed up with the Tribunal regarding its efforts to retain the services of counsel. The Tribunal followed up with it, but once again without success.

[24] On September 6, 2019, the Tribunal sent correspondence to the parties declaring the case ready to proceed. The respondent did not respond. On October 11, 2019, the Tribunal sent a notice of hearing to the parties. The respondent did not respond. Finally, on October 29, 2019, the Tribunal sent instructions regarding the filing of documents at the hearing. The respondent still did not respond.

[25] The hearing began on November 4, 2019, 9:30 am, at Burns Lake. Ms. Nielsen was present, as was Ms. Samar Musalam, counsel for the Commission. Mr. Frank Morris, Deputy Chief of the Band, was also present as the respondent's representative. Considering the presence of all parties, the hearing was able to begin.

[26] The Tribunal heard evidence from Ms. Nielsen and the Commission on that first day. The evidence was succinct.

[27] In the afternoon, when it was the respondent's turn to present its evidence, Mr. Frank Morris was clearly not ready to proceed. He had documents with him that he wanted to file, but stated that he had run out of time to collect all the documents that he felt were

necessary. He explained that he had contacted various individuals to collect the missing documents, but that they had not responded. He also stated that he had run out of ink in his printer.

[28] With the consent of the other parties, the hearing was adjourned to Tuesday, November 5, 2019, to give Mr. Frank Morris a little more time to prepare. The Commission indicated that it had never received any documents from the respondent, and in doing so stated that the admissibility of such documents would eventually have to be addressed.

[29] The following day, Mr. Frank Morris arrived late at the Tribunal hearing. Mr. Frank Morris explained that he had tried to contact the other councillors, but without success. He had also attempted to retrieve certain documents, particularly from the finance department, but without success.

[30] I explained to Mr. Frank Morris that it was the respondent's turn to present its defence and to file its evidence. I told him this was his opportunity to give his side of the story to the Tribunal. I also pointed out that the respondent should have had time get ready since January 2019 and that the four councillors present on the call in July 2019 were all aware of the hearing.

[31] Mr. Frank Morris testified very briefly, just a few minutes. He also stated that he had no further defence to offer the Tribunal. I made sure that Mr. Frank Morris understood the gravity of the situation and the consequences that would ensue if the respondent did not provide a defence. I asked him several times if he wished to explain to me what he understood about the complaint and make his comments to me, but he declined to do so. I also asked him if he wished to file the documents that he had mentioned the day before, which he immediately declined. Mr. Frank Morris simply had nothing else to add.

[32] I understand from all the exchanges between the parties and the Tribunal that there have been some difficulties within the Band Council including an arbitration which took place in August 2019 in relation to the constitution of the Band Council and the election of the Chief and Councillors. I take note of these difficulties. That said, I have decided that this situation does not prevent the Tribunal from proceeding as planned for several

months, especially since the hearing had already been postponed on more than one occasion.

[33] Mr. Frank Morris and Ms. Nielsen confirmed that Ms. Patricia Prince, Mr. Victor Burt and Mr. Frank Morris himself were still on the Council, despite the result of the arbitration. In other words, it appears that the formation of the Band Council has not ultimately changed substantially. I understand that out of 4 members, only one has changed.

[34] I recall that Ms. Prince, Mr. Burt and Mr. Frank Morris were all present on the teleconference of July 4, 2019. Thus, three Council members, including the Chief, were well aware of the Tribunal's proceedings and the dates of the upcoming hearing. However, only Mr. Frank Morris appeared in person at the hearing to represent the respondent.

[35] Finally, while Ms. Musalam was making her final arguments, Mr. Frank Morris suddenly stood up and stated that he was leaving the hearing. As he was heading for the exit, he stated that he did not have time "for this type of thing". I asked him whether he would not rather prefer to stay, which he declined and dashed off. He did not return before the hearing closed.

[36] That being said, it is unfortunate that the respondent did not take the opportunity it had to fully participate in the Tribunal's proceeding. Between January 2019 and November 2019, the Tribunal offered the respondent, on many occasions, the opportunity to present a full and complete defence. After the call on July 4, 2019, and despite the presence of several councillors and the Chief, the respondent chose to limit its participation at the hearing.

[37] Even at the hearing, the Tribunal was flexible and understanding of the respondent's situation. It gave additional time to the respondent's representative so that it could retrieve missing documents, prepare its testimony and file its evidence. Nevertheless, the respondent's representative left the hearing during the final arguments and ultimately did not file any documents.

[38] That said, I recall that the *CHRA* requires that the complaints' inquiries be dealt with informally and expeditiously, in accordance with the principles of natural justice and the rules of practice (subsection 48.9 (1) *CHRA*).

[39] In my view, the respondent had ample opportunity to present, in person or through counsel, its evidence and representations (subsection 50 (1) *CHRA*) and Rule 1 (1) of the *Canadian Human Rights Tribunal Rules of Procedure 03-05-04 (Rules)).*

[40] The ultimate role of the Tribunal is to hear the complaint (subsections 48.9 (1), 49 (1) and 50 (1) *CHRA*) and to decide on it as required by subsections 53 (1) and (2) *CHRA.*

III. Issues in dispute

[41] The objective of the *CHRA* is to guarantee each individual the enjoyment of the right to equal opportunities with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations within society, regardless of any considerations based on grounds of unlawful discrimination (section 2 *CHRA*).

[42] It is well established that in the case of discrimination, it is the complainant's onus to present sufficient and complete evidence to satisfy the burden of its case. In other words:

> […] sufficient evidence to the contrary is that which relates to the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in favour of the complainant, in the absence of a reply by the respondent employer.
>
> (*Ontario Human Rights Commission v. Simpsons-Sears* [*Simpsons-Sears*], [1985] 2 RCS 536, at para. 28)

[43] Three elements must be proved by Ms. Nielsen for her to meet her burden of proof, namely:

1) She has one or more prohibited grounds of discrimination under the *CHRA*;

2) She has suffered an adverse impact (in this case, under sections 7 and 14 *CHRA*);

3) The prohibited ground or grounds of discrimination was (were) a factor(s) in the manifestation of the adverse impacts.

(*Moore v, British Columbia (Education)* [*Moore*], [2012] RCS 61, at para. 33 *and Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)* [*Bombardier*], [2015] RCS 789; *Simpsons-Sears*, supra, at para. 28).

[44] The evidence presented must be analyzed on the balance of probabilities. I recall that the prohibited ground of discrimination does not have to be the sole factor in the manifestation of the adverse impact. In addition, direct evidence of discrimination or evidence of intent to discriminate is not necessary for the complainant to meet its burden of proof (*Bombardier*, at paras. 40 and 41).

[45] As the Tribunal often points out, discrimination is not usually committed openly and with intent. In doing so, the Tribunal must analyze all circumstances of the complaint in order to determine whether there is a subtle scent of discrimination (see *Basi v. Canadian National Railway Company* [*Basi*], 1988 CanLII 108 [CHRT]).

[46] Circumstantial evidence can help the Tribunal to draw inferences when evidence presented in support of allegations makes such inferences more likely than assumptions or other possible inferences (see *Basi*, supra). That said, the circumstantial evidence presented at the hearing must still be substantially related to the decision or conduct impugned to the respondent (*Bombardier*, supra, at para. 88).

[47] It is my view that when the Tribunal analyzes the evidence to determine whether a complainant has met its burden, it must analyze the evidence as a whole. This may include evidence that was presented by the respondent (*Brunskill*, supra, at para. 64) which, if it so desires, may attempt to rebut the complainant’s evidence.

[48] Thus, the Tribunal could conclude, on the balance of probabilities, that the complainant has, or has not, presented sufficiently complete evidence on these 3 elements. If the evidence is not complete and sufficient, the complaint is rejected.

[49] Conversely, if the Tribunal concludes that the evidence is sufficiently complete, the onus now belongs to the respondent party. The latter may present a justification for its decision or conduct, as provided for by section 15 *CHRA*. The complainant may, in turn, present evidence to rebut this justification. In doing so, it would attempt to show that the respondent's justification is, in fact, a mere pretext.

[50] Once again, the Tribunal will assess these elements on a balance of probabilities. It is as a result of all this analysis that the Tribunal may conclude that discrimination exists or not (subsections 53 (1) and (2) *CHRA*).

[51] Finally, the respondent could limit its liability, in applicable cases, by rebutting the presumption of section 65 *CHRA*.

[52] It is under this analysis that I will address the evidence presented at the hearing.

IV. Analysis

[53] The facts of this complaint are relatively simple. I should point out that Ms. Nielsen testified at the hearing: her testimony was clear, direct, imbued with certainty and emotion. Ms. Nielsen was able to present the facts of her complaint with specific recollections of the events.

[54] Some of the information she presented at the hearing was corroborated with documentary evidence or the testimony of Ms. Debbie West, making Ms. Nielsen's testimony credible and reliable.

[55] The respondent did not offer a defence on the record. Mr. Frank Morris provided some information, nothing more. The respondent was unable to neither rebut Ms. Nielsen's allegations nor attack the reliability of her testimony or that of Ms. West.

[56] Therefore, I have no reason to question the facts that were presented by Ms. Nielsen and her witness, Ms. West. I therefore give credence to the facts they presented to me.

A. Prohibited ground(s) of discrimination under the CHRA

[57] The prohibited grounds of discrimination alleged in Ms. Nielsen's complaint are national or ethnic origin (Aboriginal and Caucasian origins) as well as religion (non-practising).

[58] According to the evidence presented at the hearing and in her own terms, Ms. Nielsen describes herself as half Aboriginal and half Caucasian. Specifically, her mother is a member of the Nation and holds "Indian" status under the *Indian Act*. Her father is of Caucasian descent. That is why she defines herself by these two origins. She also confirmed that she held her status under the *Indian Act*.

[59] Ms. Nielsen also made it clear that she does not practice a religion.

[60] In connection with the evidence filed and the facts of the complaint, for example, it was presented that Mr. Raymond Morris, who had been elected Chief of the Nation on December 12, 2014, for a 4-year mandate, sent emails to Ms. Nielsen calling her a "white bastard".

[61] It is recognized that the *CHRA* also prohibits discrimination that is based on the **perceived** membership in a protected group (see *Polhill v. Keseekoowenin First Nation*, 2019 CHRT 42, at para. 68. See also *Warman v. Kyburz*, 2003 CHRT 18, at para. 52; *Québec (Commission des droits de la personne et des droits de la jeunesse)* v. *Montréal (City of)* ; *Québec (Commission des droits de la personne et des droits de la jeunesse)* v. *Boisbriand (City of)*, [2000] 1 R.C.S. 665; *Rail Canada Inc.* v. *Canada (Human Rights Commission.) (no 2)* (1999), 33 C.H.R.R. D/127 (CHRT)).

[62] I believe it is the fact that Ms. Nielsen is perceived to be of Caucasian origin (in other words, "white", to use the words of Mr. Raymond Morris) that is at issue in this complaint. I recall that Ms. Nielsen is also of Aboriginal origin, her origins coming from her maternal lineage.

[63] As for religion, it is the fact that Ms. Nielsen does not practice a religion, specifically that she does not pray at the beginning of Band Council meetings, nor at the beginning of public meetings, that prompted derogatory comments by the former chief Mr. Raymond Morris.

[64] It is interesting to note that, to my knowledge, the Tribunal has never dealt with the question of whether the fact of not practicing a religion, of having no religion, of being a non-believer, of being an atheist or agnostic is covered by the prohibited ground of discrimination of religion under section 3 *CHRA*.

[65] I do not intend to dwell at length on the subject since I firmly believe that the ground of religion includes the fact of not practicing religion, of not having a religious belief, of being atheistic or agnostic, or a non-believer.

[66] The purpose of the *CHRA* is to allow individuals to be equal in fact and in law, independently of any personal characteristics. It is the fundamental concept of equality of chances, equality of opportunities, which is the essence of our Act (see section 2 *CHRA*).

[67] The *CHRA* aims to protect individuals against discriminatory practices that are based in particular on their personal characteristics. In this case, it is religion. Whether in matters of employment, services, property, facilities, accommodation, commercial premises or residential accommodation, etc. (sections 5 to 14.1 *CHRA*), all individuals are entitled to equal opportunities, regardless of whether they have one or more beliefs, or have none.

[68] Interpreting the *CHRA* otherwise could lead to absurd results in that people who are non-practicing, non-believers, atheistic, agnostic, etc., would not receive any protection under our Act because they do not have, strictly speaking, a religion. Let us illustrate this potential non-sense with a simple example.

[69] An employer embraces religion *x* and requires that his 3 employees (A, B and C) submit to the practices of this religion *x.* A is a non-believer; B and C practise religion *y.* The employees consider that the employer's requirements are discriminatory and want to file a complaint about it.

[70] If we consider that the fact of being non-believing, non-practicing, atheistic, agnostic, etc., is excluded from the prohibited grounds of discrimination of religion (section 3 *CHRA*), only employees B and C would, in fact, be protected by the *CHRA.* Why? Because they identify with a religion or because they practice a religion, unlike employee

A. Therefore, only employee A, who is non-believing, non-practicing, atheistic or agnostic, would have no remedy under the CHRA. This is illogical.

[71] This result would be nonsense and is not at all the purpose of the *CHRA*. Even more so, it is precisely the equal opportunities for all that the *CHRA* aims to protect, independently of their membership in a religion or not.

[72] If a doubt persists, I recall that our Tribunal is obliged to consider the values of the *Canadian Charter* when interpreting its own Act (see *Doré v Barreau du Québec*, 2012 SCC 12, at para. 35 and *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42).

[73] Thus, the precepts established by the Supreme Court of Canada in matters of religion, freedom of religion, beliefs, etc., are clearly fundamental to the *CHRA.*

[74] Without going into a review of the jurisprudence in the matter, suffice it to say that the concept of freedom of religion has generated a great deal of ink, including by the Supreme Court of Canada. It has been a long time since the Supreme Court confirmed that the *Canadian Charter* protects both believers and non-believers (section 2a) *Canadian Charter*. See also *R. v. Big M Drug Mart Ltd.*, [*Big M Drug Mart*], [1985] 1 RCS 195, at para. 123; *S.L. v. Commission scolaire des Chênes*, [2012] CSC 7, at para. 32)

[75] Provincial courts have followed the important teachings of the Supreme Court in this area and have in turn confirmed that non-believers and believers are equal in fact and in law and benefit from the same protections (see, for example, *Commission des droits de la personne et des droits de la jeunesse (*in Québec, see for example *Payette v. Laval (City of)*, 2006 QCTDP 17, at paras. 108 and subsequent. In Ontario, see, for example, *R.C. v. District School Board of Niagara*, 2013 HRTO 1382. In British Columbia, see, for example *Mangel and Yasué obo Child A v. Bowen Island Montessori School and others*, 2018 BCHRT 281).

[76] Accordingly, I conclude that Ms. Nielsen was able, on a balance of probabilities, to prove that she has two prohibited grounds of discrimination under the *CHRA*, namely national or ethnic origin and religion (*Moore*, supra).

B. Adverse impacts under sections 7 and 14 CHRA and existence of a nexus between the prohibited grounds of discrimination and these adverse impacts

[77] For the following reasons, I find that Ms. Nielsen was able to demonstrate, on a balance of probabilities, that she has suffered an adverse impact under sections 7 and 14 *CHRA*. She was also able to prove the existence of a nexus between this adverse impact and the prohibited grounds of discrimination that are her national or ethnic origin and her religion.

(i) The general facts proven at the hearing

[78] Ms. Nielsen is a member of the Nee Tahi Buhn Nation. In 2014, she applied to be appointed as councillor on the Band Council. She won her election and was appointed for a 4-year mandate, beginning on December 12, 2014, and ending on November 12, 2018.

[79] 3 other members were elected: Ms. Charity Morris (Councillor), Mr. Cody Reid (Deputy Chief) and Mr. Raymond Morris (Chief). I understand from the evidence that Mr. Reid is the son of Ms. Nielsen.

[80] Ms. Nielsen explained that she had decided to run for office so that she could participate actively in her community and be involved with its members.

[81] It was expected that councillors would receive a salary of $1500 per month for their work, and the Chief $2500. Ms. Nielsen calls them honorariums, which is of little importance in our circumstances. In addition, it was not discussed that Ms. Nielsen would not be able to keep her other job at the water plant, a job which she retained.

[82] At the beginning of her mandate, Ms. Nielsen confirmed that the relationship between herself, the councillors and the Chief was good. Collaboration was the order of the day, and the atmosphere was pleasant.

[83] She quickly addressed the issue of not practicing religion with the general manager of the Band, who at the time was the wife of Mr. Raymond Morris. Ms. Nielsen explained that she did not wish to pray at the beginning of the council meetings or assemblies. She

also did not want to be asked to say or make the prayer. She was told that this would not be a problem.

[84] Ms. Nielsen explained that the situation quickly began to deteriorate between her and the Chief. When the councillors took a different position than Mr. Raymond Morris, that was when everything got worse. According to her, he liked everything to go his way. The situation gradually deteriorated and the working environment became increasingly negative and cold.

[85] Ms. Nielsen stated that Mr. Raymond Morris was sending her very negative comments both by text message, emails and by voice. Among others, he told her that she should not have had the opportunity to sit on the council because she was non-practicing.

[86] Ms. Nielsen does not have a copy of these text messages, which she states she ignored for some time. But in her testimony, it is clear that the situation persisted over time and that it happened on a number of occasions. She added that the manager of the Band, the wife of Mr. Raymond Morris, attempted to mitigate her husband's reactions by saying that he had had a bad night.

[87] Without going into all the details, an incident occurred in May 2016 when the councillors tried to limit the use of certain sums of money by Mr. Raymond Morris. Some explanations are included in an email from Ms. Nielsen sent to Mr. Raymond Morris dated May 16, 2016. It appears that he did not appreciate this approach by the councillors because he virulently replied to Ms. Nielsen.

[88] Two emails were sent by Mr. Raymond Morris to Ms. Nielsen in May 2016, during this series of events. The two emails were filed at the hearing.

[89] In the first, Mr. Raymond Morris wrote: "I resign fucken[sic] white bastards run it". I understand that when he says "run it", he was referring to the leadership of the Council or the Band, but this is of little relevance. In the second email, he continued his comments and wrote again to Ms. Nielsen: "white bastards".

[90] Ms. Nielsen felt directly targeted by these vulgar words, which refer directly to her Caucasian origins. She also explained that she felt that her son, Mr. Reid, was also the target of these comments.

[91] Following receipt of these emails, a public assembly was held on May 17, 2016. It was scheduled for 9 am, but Mr. Raymond Morris arrived nearly three hours late. Ms. Nielsen testified that she had approached him before the assembly to ask him if he wanted to meet her in private and discuss the emails of the previous days. He declined her offer and told her that he stood by his words. She also asked him if he wanted to apologize for having called her “white bastard”, to which he replied that he doesn’t apologise.

[92] The assembly began and Ms. Nielsen explained that at this type of assembly, members of the community can attend. There were members of the public in the room and Mr. Raymond Morris, in front of everyone and including the other councillors, loudly proclaimed that since Ms. Nielsen does not practice religion, she should not serve as a councillor.

[93] Ms. Nielsen, when she testified about this event, broke down in tears. I note that this event still hurts her. The resurfacing memories do not allow her to contain her tears. The words still make her suffer and it is clear that she is still shocked by the remarks made by Mr. Raymond Morris.

[94] Ms. Nielsen had already explained to the manager of the Band as well as to the councillors that she would not be praying. This had not been a problem in the past. As such, she does not understand why Mr. Raymond Morris suddenly stated publicly and to members of her community that she had no religious beliefs and that for this reason she should not sit on the council.

[95] She also confirmed that Mr. Raymond Morris had never apologized for what had happened. She is well aware that Mr. Morris’s intervention at this meeting was unfair, especially since she has always respected the religious beliefs of others.

[96] Despite this event, Ms. Nielsen remained in office until March 2017, almost ten months later. However, because of the harassment and unfair treatment she was

subjected to at the hands of Mr. Raymond Morris and the resulting toxic environment, she decided to resign.

[97] The evidence shows that she is not the only councillor to have left her position: Ms. Charity Morris also resigned because of the harassment committed by Mr. Raymond Morris. Finally, her son Mr. Cody Reid, who was Deputy Chief, also left office before the end of his term.

[98] That said, Ms. Nielsen stated that she believed that the respondent did not have any policy against harassment nor a human rights policy. The only training she remembers attending was provided by the police department in relation to violence.

[99] Ms. Nielsen testified that her experience as a councillor was stressful for her and that the work environment affected her greatly. Mr. Raymond Morris's messages, comments and emails were vulgar and affected her greatly. The working environment was cold, negative and unhealthy. Ms. Nielsen explained that she avoided going to the office when she could, to escape the toxic environment caused by Mr. Raymond Morris. She was only going to the office when necessary, for example for meetings and assemblies.

[100] Ms. Debbie West, who was manager of the Band Council, testified in the same vein as Ms. Nielsen. She described the work environment as negative and toxic. She was also the object of remarks by Mr. Raymond Morris. When she talks about it, Ms. West becomes very emotional: tears flow. I see that she is still affected by what may have happened in her own professional relationship with Mr. Raymond Morris.

[101] Ms. Nielsen testified that the effects of Mr. Raymond Morris's actions are still present to this day. His public comments have tarnished her reputation. She explained that Mr. Morris spread false information about her in connection with her term as councillor. This false information concerned, among other things, her involvement in management of the Council and the undue use of certain sums of money.

[102] Ms. Nielsen also explained that she had been threatened and intimidated since her complaint was filed. Some people think that she should not have the opportunity to continue working at the water plant while the proceedings of our Tribunal are under way.

Another councillor, Mr. Mark Morris, also mentioned that she should not have the right to remain within the Nation while the proceedings are under way.

[103] I do not intend to dwell further on these matters, but suffice it to note that the deterioration of this relationship between Ms. Nielsen and Mr. Raymond Morris appears to have had repercussions far beyond the specific facts of this complaint.

[104] Once again, Ms. Nielsen struggled to hold back her tears when she recounted these collateral effects to me. She explained that she is still under stress from everything that has happened and has a great deal of difficulty sleeping. She still feels the negativity and consequences of these events, which prevents her from continuing her life with serenity.

(ii) Adverse differential treatment in the course of employment (section 7 b *CHRA*)

[105] That being said, section 7 *CHRA* prohibits anyone, directly or indirectly, to refuse to employ or to continue to employ any individual (subsection a) or to adversely differentiate them in the course of employment (subsection b).

[106] It is clear to me that it is subsection 7 b) *CHRA* that applies in the circumstances since the respondent did not refuse to employ or continue to employ Ms. Nielsen. It is rather the respondent's adverse differential treatment that is in play in this complaint, adverse differential treatment which has caused adverse impacts to Ms. Nielsen. It was the consequence of these adverse impacts that ultimately led Ms. Nielsen to resign prematurely from her position.

[107] As I have already explained in *Brunskill v. Canada Post Corporation*, 2019 CHRT 22, at paras. 90 and subsequent, when we analyze section 7 *CHRA*, the content of subsection 15 (1) (a) *CHRA* is relevant to the extent that it is the defence that a respondent may invoke to justify adverse differential treatment.

[108] Specifically, subsection 15 (1) (a) *CHRA* provides that "[i]t is not a discriminatory practice if" "any refusal, exclusion, expulsion, suspension, limitation, specification or

preference" is based on a *bona fide* occupational requirement. In other words, an employer who refuses, excludes, suspends, limits or who puts in place conditions or limitations on an employee could be justified in so doing if it can demonstrate that it was a *bona fide* occupational requirement. The *bona fide* occupational requirement is provided for in subsection 15 (2) *CHRA*.

[109] Therefore, refusals, exclusions, expulsions, suspensions, limitations, specifications or preferences represent actions that could be committed by an employer and which, without justification, could be considered as adverse differential treatment of an employee in the course of employment.

[110] In this case, the evidence shows that Mr. Raymond Morris, who, I recall, was Chief of the Nation and sat on the Band Council with three other councillors, expressed his belief that Ms. Nielsen should not have the opportunity to sit on the Council because she does not practice religion. These comments, made at the assembly of May 17, 2016, in the presence of other councillors and members of the community, are particularly categorical, brutal and shocking.

[111] When relying on the grounds of religion, Mr. Raymond Morris attempted to suppress Ms. Nielsen's right to equal opportunities, by stating publicly that since she does not practice a religion, she should not have the opportunity to hold the position of councillor.

[112] Similarly, Mr. Raymond Morris's vulgar comments, specifically the terms "white bastard", are outrageous. These comments are directly based on Ms. Nielsen's mixed origins. She felt that because of her origins she was treated differently, which is also an infringement of section 7 b) *CHRA.*

[113] The Federal Court of Appeal, in *Tahmourpour v. Canada (Attorney General)*, 2010 CAF 192, at para. 12, teaches us that for an adverse differential treatment to be discriminatory, it must be harmful, hurtful or hostile.

[114] The evidence shows that Mr. Raymond Morris's comments, both about Ms. Nielsen's origins and her religion, were hostile, hurtful and harmful. And since I have no

reason to question the credibility and reliability of the testimony of Ms. Nielsen and Ms. West, I believe that Ms. Nielsen was able to meet her burden of proof and demonstrate that her national or ethnic origin as well as her religion were a factor in the adverse differential treatment in the course of employment, pursuant to section 7 *CHRA.* She therefore meets the three criteria of *Moore*, supra.

(iii) Harassment in matters related to employment (section 14 (1)(c) *CHRA*)

[115] Subsection 14 (1)(c) *CHRA* provides that harassing someone in matters related to employment on a prohibited ground of discrimination is a discriminatory practice.

[116] Harassment is not defined in the *CHRA.* That said, the Tribunal's jurisprudence provides a useful and relevant insight into what constitutes harassment in matters related to employment, which is generally defined as unsolicited or unwelcome conduct, linked to a prohibited ground of discrimination and which has adverse consequences for the victim (see for example *Alizadeh-Ebadi v. Manitoba Telecom Services Inc.* [*Alizadeh*], 2017 CHRT 36, at para. 163 as well as *Morin v. Canada (Attorney General)* [*Morin*], 2005 CHRT 41, at para. 246).

[117] The Tribunal has often written that harassment is essentially the creation of a hostile work environment that undermines the complainant's personal dignity (see, among others, *Alizadeh*, supra, at para. 163, *Dawson v. Canada Post Corporation*, 2008 CHRT 41; *Chopra v. Health Canada*, 2008 CHRT 39; *Hill v. Air Canada*, 2003 CHRT 9).

[118] I would qualify by pointing out that in my view, in matters of harassment, creation of a hostile climate is not always a prerequisite to the extent that, for example, in *Duverger v. 2553-4330 Québec Inc. (Aéropro)* [*Duverger*], 2019 CHRT 8, it was determined that post-employment harassment was also protected by the *CHRA.*

[119] Therefore, the important element is rather the existence of a sufficient connection with the employment context (see *Duverger*, supra, at paras. 108 and subsequent. See also *British Columbia Human Rights Tribunal v. Schrenk*, 2007 SCC 62, at paras. 37, 38 and 40).

[120] Having said that, I would point out that a vulgar, crude or tasteless joke, on its own, will not generally constitute harassment. There must be a form of persistence or repetition in the alleged conduct (*Alizadeh*, supra, at para. 163 and *Morin*, supra, at para. 246). Nevertheless, a single serious or grave incident may be sufficient (see for example *Stanger v. Canada Post Corporation*, 2017 CHRT 8, at paras. 19 to 22; *Alizadeh*, supra, at para. 163; *Morin*, supra, at para. 246).).

[121] I am of the opinion that a reasonable person under the same circumstances and going by current social norms would have been shocked by the comments made and the actions of Mr. Raymond Morris.

[122] In addition, it is clear that Mr. Raymond Morris's comments referred to both the Caucasian origins of Ms. Nielsen ("white bastard") and to her religion (not practicing religion). These words and actions were unwelcome and unacceptable. Ms. Nielsen felt targeted and shocked that Mr. Raymond Morris was making such remarks. Quickly, after the assembly on May 17, 2016, she intervened and asked Mr. Raymond Morris to meet her to discuss the situation, which he refused. She also asked him to apologize, which he also refused to do.

[123] It is also important to recall that the events of May 2016 merely represent the culmination of Mr. Raymond Morris's vulgar comments against the complainant. Other text messages and other comments had also been made in the past. Although Ms. Nielsen did not file written evidence on this matter at the hearing, I give credence to her testimony. The evidence therefore shows that not only does the element of repetition exist, but the severity of the incidents is high enough to constitute harassment.

[124] I would add that the creation of a hostile and unhealthy workplace has also been proven, as has the fact that the harassment occurred in matters related to employment; the link with the employment context is more than evident (*Duverger*, supra, at para. 125). Both Ms. Nielsen and Ms. West confirmed that the workplace environment was negative, toxic and cold. Both denounced Mr. Raymond Morris's attitude and the effect of his actions on the work environment. They also confirmed that Ms. Charity Morris and Mr. Cody Reid also left their positions because of the negativity of the workplace. Finally, Ms. Nielsen

explained that she avoided going to the office as much as possible in order to stay away from this toxicity.

[125] It does not take more than that to convince me that Ms. Nielsen was able to meet, on the balance of probabilities, her burden of proof. She met the three criteria of *Moore*, supra, and I find that she was the victim of harassment in matters related to employment pursuant to subsection 14 (1) (c) *CHRA* and that the prohibited grounds of national or ethnic origin and religion were a factor in the adverse impacts she suffered.

C. Lack of justification by the respondent and its liability for the acts committed by Mr. Raymond Morris (sections 15 and 65 *CHRA*)

[126] As I mentioned earlier, the respondent did not present a defence at the hearing. Mr. Frank Morris, the respondent's representative, provided no evidence to rebut Ms. Nielsen's allegations. He did not present any justification under section 15 *CHRA,* nor did he present evidence to limit the respondent's liability under section 65 *CHRA.* As no evidence was offered by the respondent to justify its actions (section 15 *CHRA*), I will quickly address the presumption of subsection 65 (1) *CHRA.*

[127] Although I was not presented with any argument as to the applicability of the presumption contained in section 65 *CHRA*, I consider that it is important to explain why it applied to this case.

[128] Subsection 65 (1) *CHRA* provides that:

> 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.

[129] In the case before us, Ms. Nielsen chose to file a complaint against the Band Council directly rather than against the chief at the time of the events, Mr. Raymond Morris, the individual who was the source of discriminatory practices.

[130] In my view, the function of Band Chief is covered by the designation “officer, director, employee or agent” of section 65 since it is a paid function, where the work of the chief is done for the benefit of and as a representative of the Band Council.

[131] It is important to define precisely what the function of chief is, since this function is as similar to that of an employee as that of a director or officer of the council. What is important is that when Mr. Raymond Morris expressed the insults in question, he did so in his capacity as Band Chief, and that as a representative of the Band Council.

[132] In this context, and given the absence of any rebuttal by the respondent under subsection 65 (2) *CHRA*, I conclude that this presumption applies and that the actions by Mr. Raymond Morris, while he was Band Chief, incurred the liability of the Band Council itself.

V. Remedies

[133] Considering that Ms. Nielsen was able to meet her burden of proof and in the absence of justification by the respondent, she is entitled to receive compensation for the discrimination suffered under section 53 (2) *CHRA.*

A. Reparations requested by Ms. Nielsen

(i) Damages for discriminatory practice

[134] Ms. Nielsen sought $5,000 for pain and suffering, which I am awarding her, for the following reasons.

[135] The discriminatory comments made by Mr. Raymond Morris are particularly serious and shameful. It is unacceptable to insult someone by calling them “white bastard” just as it is unacceptable to express at a public assembly that a councillor should not have the opportunity to hold her position because she does not practice a religion.

[136] As I pointed out in *Willcott v. Freeway Transportation*, 2019 CHRT 29, at para. 234, the Supreme Court of Canada took judicial notice of the systemic and historical factors

affecting First Nations, including the fact that Aboriginal people are victims of racial prejudice (see *R. v. Williams*, [1998] 1 RCS 1128m and cited in *Commission des droits de la personne et des droits de la jeunesse v. Blais*, 2007 QCTDP 11 (CanLII)).

[137] What is peculiar here is the use of biased language by the Chief of the Nation against another elected councillor, who is also a member of the same Nation. The words used by Mr. Raymond Morris are strong and have definitely injured Ms. Nielsen, who had trouble controlling her emotions at the hearing.

[138] I heard a calm and sensitive woman, testifying with credibility and confidence. On the other hand, when she recalls the words used by the chief, when she remembers how toxic and unhealthy the environment was, when she explains how she felt targeted, humiliated and shocked, I heard a woman who suffered, a woman who was broken.

[139] I also heard the testimony of Ms. West, who was employed by the Council at the time of the events of the complaint. Ms. West not only corroborated the presence of an unhealthy and toxic environment, having herself experienced the wrath of Mr. Raymond Morris, but she also confirmed that Ms. Nielsen was affected by what was happening. She particularly noted that Ms. Nielsen was hemmed in and looked particularly exhausted and tired.

[140] That being said, Ms. Nielsen felt compelled to resign as a councillor because of the actions of Mr. Raymond Morris. I recall that she expressed that she decided to apply as a councillor because she wanted to be involved within her community and with its members. Unfortunately, Ms. Nielsen found discrimination and suffering in this function, which she should never have suffered.

[141] In addition, she explained that the impacts still remain to this day. Among other things, she explained that it is difficult for her to maintain good relations with members of the community because of her reputation tainted by Mr. Raymond Morris. She also said that some members believe she committed wrongdoing while she was a councillor. She was threatened with not being able to continue working at the water plant, a job she had held for a long time. She was also told that during the proceedings before our Tribunal, she should not have the right to remain within the Nation. Finally, she read derogatory

remarks about her on Facebook from other members, after what had happened with Mr. Raymond Morris.

[142] The objective of awarding damages for pain and suffering is to compensate the complainant, to the extent possible, for the suffering and the pain she has suffered, including the inherent harm to her dignity.

[143] For all these reasons, I am awarding her the sum of $5,000 under section 53 (2) (e) CHRA, which is very reasonable.

(ii) Damages for lost wages

[144] Ms. Nielsen is also seeking $25,500 for lost wages under subsection 53 (2) (c) *CHRA.* I also award her these damages.

[145] The reasoning behind this request is simple. Ms. Nielsen explained that she left her position as councillor prematurely in March 2017, while her term ended in November 2018. On the balance of probabilities, I give credence to the evidence filed by Ms. Nielsen on this subject.

[146] Ms. Nielsen explained that because of Mr. Raymond Morris's discriminatory words and actions, all of this created a hostile and unhealthy work environment, which led her to leave her position as councillor prematurely since the situation was unbearable.

[147] Indeed, Mr. Raymond Morris' emails, words and text messages continued over time and culminated with the events of May 2016. I point out that I determined that the words and actions of the former chief were the cause of this toxic environment, which was not only detailed by Ms. Nielsen, but also corroborated by Ms. West in her testimony. I have already reiterated on a few occasions that Councillor Charity Morris and Deputy Chief Mr. Cody Reid also left their positions prematurely because of this environment. Ms. Nielsen explained that she no longer wanted to go to the office in order to stay away from this toxic climate.

[148] All this caused her significant stress and as a result created sleep problems. She explained that this affected her life in general, that her reputation had been tainted, that

she had difficulty maintaining good relations with the other members. Her only avenue was to leave her position prematurely in order to protect herself and preserve her mental health.

[149] I am of the opinion that the balance of probabilities argues for the establishment of the causal link between the premature departure of Ms. Nielsen in March 2017 and the discriminatory practices committed by Mr. Raymond Morris. As a corollary, there is a causal link between the discriminatory actions suffered by Ms. Nielsen and her alleged loss of wages (*Chopra v. Canada (Attorney General)*, 2007 FCA 268).

[150] As prescribed in subsection 53 (2) (c) *CHRA*, the Tribunal may compensate the victim for all or a fraction of lost wages caused by the action.

[151] Ms. Nielsen testified that councillors were paid $1,500 per month as honorariums. This information was also corroborated by Ms. West who, I recall, was a manager in the Council. She explained that she was aware of the honorariums of $1,500 per month allocated to the councillors because of her work and her duties that led her to have access to this type of financial information.

[152] I have nothing in the evidence that would allow me to question the testimony of Ms. Nielsen and Ms. West on this matter. Their testimony is also corroborated by the documentary evidence, since Ms. Nielsen filed some of her statements from CIBC Bank. These documents were admitted into evidence with the consent of the respondent's representative, Mr. Frank Morris.

[153] In these statements, from which certain personal information was redacted, it appears that Ms. Nielsen received deposits of $1,500 per month from Nee Tahi Buhn on a recurring basis. Ms. Nielsen did not file all her statements between December 2014 and March 2017 but she filed close to ten and I consider this to be sufficient.

[154] Mr. Frank Morris was quick to testify in relation to this monthly amount of $1,500 paid to the councillors. He first tried to reduce the value of the documents filed by Ms. Nielsen, in particular since the first page of her document contains no date, no signature, etc.

[155] In her testimony, Ms. Nielsen specifically explained that she was the one who wrote the first page of her document, in order to give a general picture of the months where she received fees. I understand the Ms. Nielsen used a writing program, such as *Word*, to create this document. The goal was to assist the parties and the Tribunal and to summarize the information found in the bank statements themselves.

[156] I am not ready to reduce the value that must be given to the CIBC Bank statements as the respondent asked, since the first page is a summary created by Ms. Nielsen. It is not the summary itself that is important under the circumstances, but the bank statements themselves. The first page is useful, but it is not this document that constitutes the evidence. It is the bank statements that I take into consideration in my decision since they corroborate the testimonies of Ms. Nielsen and Ms. West in that the councillors received an amount of $1,500 per month in honorariums from the respondent.

[157] Mr. Frank Morris also briefly explained that it was the councillors themselves who awarded these honorariums and that the amounts were not correct or authorized. In fact, I understand that Mr. Frank Morris seems to be questioning the legitimacy of the amount of honorariums paid to the councillors.

[158] This question is not relevant under the circumstances because the Tribunal does not have a mandate to review the Council’s decisions nor to rule on the legitimacy of such decisions. My role is not to decide whether or not this amount is legitimate, but rather to determine whether discrimination exists and, if so, to compensate the complainant for the lost wages she has suffered, among other things.

[159] Under the circumstances, the balance of probabilities argues in favour that Ms. Nielsen received from the respondent, as honorariums, an amount of $1,500 per month, which was corroborated by both testimonial and documentary evidence.

[160] Ms. Nielsen sought 17 months of compensation for lost wages, for a total amount of $25,500 (17 months at $1,500 per month). That said, she testified having resigned in March 2017 and that her mandate would otherwise have terminated in November 2018.

[161] Although initially Ms. Nielsen's position was that she had left in June 2016, information that we find, for example, in her statement of particulars or the document she created regarding her CIBC Bank statements, she has repeated on more than one occasion during her testimony that she resigned in March 2017. She was clear to this effect in her direct examination. She also corrected herself when she filed her document summarizing her bank statements and stated that there was an error and that her resignation had actually taken place in March 2017.

[162] That being clarified, between her premature departure and the planned end of her term, I calculate approximately 20 or 21 months of work.

[163] It is not clear to me why Ms. Nielsen is specifically requesting 17 months of lost wages: did she deduct months of leave or vacation? The evidence does not allow me to answer this question. Nevertheless, Ms. Nielsen explained in her opening remarks, her testimony and her statement of particulars, that she was seeking 17 months of wages, at $1,500 per month. Therefore, I believe she has been consistent in her submissions on this matter.

[164] Section 53 (2) (c) *CHRA* provides that the Tribunal may compensate the victim for all or a fraction of lost wages caused by the discriminatory practice. As a corollary, it follows that a victim cannot be overcompensated either (*Chopra v. Canada (Attorney General)* [*Chopra CF*], 2006 FC 9, at paras. 41 and 42 and see appeal of this decision, *Chopra v. Canada (Attorney General)*, 2007 FAC 268). However, there must be a causal link between the lost wages and the discriminatory practice, as is the case here.

[165] Ms. Nielsen is therefore entitled to be put back into the position in which she found herself previously, as if she had not experienced the discriminatory practices. In fact, had it not been for Mr. Raymond Morris's discriminatory practices and comments, Ms. Nielsen would have maintained her duties and received her monthly fees until November 2018. The loss of wages is the result of the discriminatory actions committed by Mr. Raymond Morris.

[166] In this case, Ms. Nielsen did not prove the specific date of her resignation. She simply explained that she left in March 2017 and was seeking compensation for wages lost for a period of 17 months.

[167] As such, I award her $25,500 for lost wages under subsection 53 (2) (c) *CHRA.*

(iii) Letter of apology

[168] I do not intend to dwell at length on this question since it was decided by the Federal Court in *Canada (Attorney General) v. Stevenson,* 2003 FCTD 341, that the *CHRA* does not allow the panel to order a party to make an apology.

[169] This decision of the Federal Court was followed by the Tribunal later in a number of decisions (see, among others, *Brown v. National Capital Commission and Public Works and Government Services Canada,* 2006 CHRT 26, at para. 293; *Culic c. Canada Post Corporation,* 2007 CHRT 1, at paras. 315 and 316; *Goodwin v. Birkett,* 2004 CHRT 29, at para. 27; *Groupe d'aide et d'information sur le harcèlement sexuel au travail de la province de Québec Inc. v. Barbe*, 2003 CHRT 24, at para. 78).

[170] Ms. Nielsen did not present any arguments that would allow me to depart from this well-established jurisprudential trend and consequently, I dismiss this request.

B. Reparations requested by the Commission

[171] The Commission supports Ms. Nielsen in the personal remedies that she is seeking before the Tribunal. In addition, the Commission is seeking its own remedies. Specifically, it asks that the respondent cease its discriminatory practices and that it take concrete measures, in consultation with the Commission, to prevent similar actions in the future (subsection 53 (2) (a) *CHRA*).

[172] It asks that the respondent to develop human rights and anti-harassment policies, which will be reviewed by the Commission.

[173] After creation of these policies, it asks that the respondent hire an external expert to train the councillors of the Band Council, the Chief and the Band Council's employees, on these new policies.

[174] Ms. Nielsen testified that when she was appointed councillor and during her term, she was not aware of the respondent having human rights and anti-harassment policies. She also confirmed that she did not receive any training on these matters. The only training she confirmed having received was provided by the police department and was in relation to violence.

[175] This was also corroborated by Ms. West. To her knowledge, the respondent had not implemented this type of policies, nor did she receive training on these matters.

[176] Since the respondent did not present any evidence on this subject, nor filed any document or policy, I give credence to the testimonies of Ms. Nielsen and Ms. West. I have no reason to question the information that they presented to me at the hearing. Therefore, the balance of probabilities argues in favour that the respondent has no human rights and anti-harassment policy and that it does not offer any training to its employees, councillors and chief on these matters, which are of great importance.

[177] The respondent cannot evade application of the *CHRA* and the rights and obligations contained in it. Since the abrogation of the former section 67 in 2008, First Nations Band Councils in Canada have also had to comply with the obligations of the *CHRA* and must ensure that their workplaces are free of harassment and adverse differential treatment based on prohibited grounds of discrimination under the *CHRA.*

[178] As I wrote in *Nur v. Canadian National Railway Company* [*Nur*]. 2019 CHRT 5, at para. 92, the procedures and policies of a company, whether they relate to human rights, discrimination, harassment, accommodation of persons with special needs, etc., are the vehicles, the tools, that are used so that the company can meet its legal obligations in the area of human rights.

[179] The policies and procedures serve to prevent, educate, teach and take action in the area of human rights. Even if *Nur* related to a company's policies and procedures, I am of

the opinion that the comments made in that decision apply to all federal associations, organizations, agencies, etc., including band councils.

[180] I find that the Commission's request is entirely appropriate under the circumstances and I will address it.

[181] I order the respondent to cease the discriminatory practices and to put measures in place to prevent such practices from happening again. In order to achieve this, I order it to develop human rights and anti-harassment policies, in consultation with the Commission.

[182] Following creation of these policies, I order the respondent to hire an external expert to train the Band Council's employees, councillors and the Chief on these newly adopted policies.

[183] Only one concern remains. While Mr. Frank Morris, representative of the respondent, did not present a defence in this complaint, one element emerged from his various interventions at the hearing and that is the existence of disorganization within the respondent.

[184] I believe that the minimal participation of the respondent in the Tribunal's proceedings, teleconferences, etc., highlights the difficulties that prevail within the respondent. The delays required to attend the hearing (almost 21 months), particularly because of the difficulties in having the respondent's participation, demonstrate that time is an important factor to consider.

[185] Despite this, I am firmly of the opinion that the Respondent's institutional disorganization does not justify granting it an exemption from meeting its legal human rights obligations. And I have no doubt that the Commission, which will be a consultative agent in this case, will remain alert, pragmatic and sensitive to the difficulties that the Council and the Nation may face.

[186] Consequently, I am adapting the time limit so that the respondent can comply with this order and I grant 18 months from the date of this decision. Finally, I am clear that **I do not retain jurisdiction** in this case.

C. Interest

[187] Ms. Nielsen did not specifically request payment of pre-judgement interest as permitted in subsection 53 (4) *CHRA.*

[188] In this regard, I have already expressed that despite the absence of a specific request on the matter, I believe that the panel has discretion to grant interests (see *Willcott v. Freeway Transportation,* 2019 CHRT 29, at paras. 277 to 282).

> [277] Pre-judgement interest is not a separate category of damages that a complainant may claim. Interest is part of the entire claim. As such, it is not necessary to expressly claim it since it arises naturally from the original loss.
>
> [278] Interest forms an element of the compensation process. The objective of awarding damages is to return the injured person to the situation in which they would have been, had there been no question of the harm suffered (see *Apotex Inc. v. Wellcome Foundation Ltd.* [*Apotex*], [2001] 1 FC 495, at paras. 120 and 121).
>
> [279] in addition, interest:
>
> > […] on compensation has the objective, among others, of preventing the person found guilty of a discriminatory act from taking advantage of the delays created by the quasi-judicial process and, especially, to fairly compensate the victim of the discriminatory act for the harm suffered and thereby from the delay in being compensated.
> >
> > (*Duverger v. 2553-4330 Québec Inc. (Aéropro)*, 2019 CHRT 18, at para. 318. The same idea is expressed in *Apotex,* supra, at para. 122).
>
> [280] The panel has a discretion to award interest on damages and amounts awarded (see *Brunskill.* supra, at para. 168). Subsection 53 (4) *CHRA* reads as follows:
>
> > Subject to the rules made under section 48.9, an order to pay compensation under this section **may** include an award of interest at a rate and for a period that the member or panel considers appropriate.
> >
> > [Emphasis mine]

> [281] The Tribunal also has rules in place for calculation of interest on damages. To this end, Rule 9 (12) of the *Rules of Procedure (*03-05-04) provides that:
>
> > 9(12) Unless the Panel orders otherwise, any award of interest under subsection 53(4) of the *Canadian Human Rights Act*,
> >
> > a. shall be simple interest calculated on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada; and
> >
> > b. shall accrue from the date on which the discriminatory practice occurred, until the date of payment of the award of compensation.
>
> [282] The conjunction of subsection 53 (4) *CHRA* and Rule 9 (12) of the *Rules of Procedure* clearly inform the parties that when proceeding before the Tribunal, the panel has the discretion to order interest on compensation. They are also aware of how it will be able to calculate the interest and from what date interest will accrue, that is, **the date on which the discriminatory act occurred,** up to the date of payment of the compensation.

[189] Considering the evidence that has been filed, the culmination of events of this complaint began on May 15, 2016, when Mr. Raymond Morris sent the first email containing discriminatory language against Ms. Nielsen. I therefore award, for damages for pain and suffering, interest from that date.

[190] In regard to the loss of wages, since Ms. Nielsen had no choice but to leave her position as councillor because of the adverse differential treatment and harassment committed by Mr. Raymond Morris, and the date of her departure is in March 2017, I award interest from March 1, 2017.

VI. Decision

[191] For all these reasons, I award Ms. Nielsen an amount of $5,000 under subsection 52 (2) (e) *CHRA.*

[192] The interest is calculated at a simple rate on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada, calculated as of May 15, 2016, up to the date of payment of compensation.

[193] I award Ms. Nielsen an amount of $25,500 under subsection 53 (2) (e) *CHRA.*

[194] The interest is calculated at a simple rate on a yearly basis at the Bank Rate (monthly series) established by the Bank of Canada, calculated as of March 15, 2017, up to the date of payment of compensation.

[195] I order the respondent to cease the discriminatory practices and to take measures to prevent such practices from happening again in the future. Specifically, I order the respondent, within 18 months following the date of this decision:

- to develop human rights and anti-harassment policies, in consultation with the Commission;
- after the creation of these human rights and anti-harassment policies, to hire an external export to train its employees, councillors and chief, on these new policies.

Signed by

Gabriel Gaudreault
Tribunal Member

Ottawa, Ontario
December 18, 2019

English version of the Member’s decision

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T2256/1118

Style of Cause: Hayley Nielsen v. Nee Tahi Buhn Indian Band

Decision of the Tribunal Dated: December 18, 2019

Date and Place of Hearing: November 4 and 5, 2019

Burns Lake, British Columbia

Appearances:

Hayley Nielsen, for herself

Samar Musallam, for the Canadian Human Rights Commission

Frank Morris, for the Respondent