JEAN BIGNELL-MALCOLM

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

EBB AND FLOW INDIAN BAND

Respondent

REASONS FOR DECISION

MEMBER: Julie C. Lloyd

2008 CHRT 3
2008/01/25

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I. INTRODUCTION

[1] The complainant, Jean Bignell-Malcolm, is a First Nations woman of Cree descent. She alleges that the respondent, Ebb and Flow Indian Band, refused to hire her as the Director of Education for the Ebb and Flow School because of her race and ethnic or national origin, contrary to section 7(a) of the *Canadian Human Rights Act* (*CHRA*).

[2] The respondent, Ebb and Flow Indian Band, is a First Nations band constituted under the *Indian Act* of Canada. The Ebb and Flow community is located approximately two hundred kilometers north of Winnipeg, Manitoba and is comprised of persons of different races, ethnic and national origins, though the majority of the population is Ojibway.

[3] The hearing extended 5 days in October of 2007. The complainant, the respondent and the Canadian Human Rights Commission were represented by counsel.

II. THE ISSUES

[4] The issues for determination in this complaint are as follows:

a) Has the complainant made out a *prima facie* case that the respondent engaged in a discriminatory practice by refusing to hire her because of her race or her national and ethnic origin?

b) If the complainant has made out a *prima facie* case of discrimination, has the respondent provided a reasonable explanation for the otherwise discriminatory conduct?

c) If the complaint is found to have been substantiated, what remedies are appropriate?

III. EVIDENCE AND ANALYSIS

[5] Where a complainant, as Ms. Bignell-Malcolm has, makes an allegation that she has been refused employment for discriminatory reasons, the onus starts with her. The

complainant must first make out a *prima facie* case of discrimination. If such a case is proved, then the onus shifts to the respondent to provide a reasonable explanation.

a) Has the complainant, Ms. Bignell-Malcolm, made out a prima facie case of discrimination?

[6] There is no rigid test to be applied where considering whether a *prima facie* case of discrimination has been made out in a complaint alleging refused employment. A trier of fact must be flexible and sensitive to the facts of each case. Ultimately, the question will be whether the complainant has satisfied the test set out by the Supreme Court of Canada in *Ontario Human Rights Commission v. Simpson Sears* [1985] 3 S.C.R. 36 at 558 ("*O'Malley*"): if believed, is the evidence led by the complainant complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer from the respondent?

[7] That being said, it will often be sufficient for the complainant in circumstances such as this to prove the following facts. First, that she or he applied a job for which he or she was qualified, but did not receive it. Second, that a person no more qualified, but not sharing a personal characteristic enumerated as a prohibited ground of discrimination in the *CHRA*, got the job, or that the employer continued to advertise for the position (see *Shakes* v. *Rex Pak Ltd.* (1982), 3 C.H.R.R. D/1001*; Israeli* v. *Canadian Human Rights and Public Service Commission* (1983), 4 C.H.R.R.D. and *Premakumar* v. *Air Canada* [2002] C.H.R.D. No. 3, (at paragraph 77).

[8] The relevant evidence led by this complainant is as follows.

Complainant's Evidence

[9] Ms. Bignell-Malcolm testified that she had been a resident of the Ebb and Flow community for more than 20 years by the time the events relevant to this complaint took place. She moved to the community after marrying a member of the Ebb and Flow Indian Band in about 1982 and she became a member of the Band in 1984.

[10] Ms. Bignell-Malcolm testified that she began working at the Ebb and Flow School in 1983, working first as a secretary. In 1992 she commenced a Bachelor of Education degree with a focus in aboriginal education. While she earned her degree Ms. Bignell-Malcolm worked at the Ebb and Flow School as a counselor. She completed her Bachelor of Education degree in about 1998 and then continued her studies, earning a 5^{th} year certificate in education and administration, again with a focus on aboriginal education. Ms. Bignell-Malcolm was a teacher at the Ebb and Flow School from 1995 to 1999 and then commenced work with the Western Region Tribal Council in Dauphin, Manitoba, as its Director of Education. Ms. Bignell-Malcolm continued to live in the Ebb and Flow community and commuted to and from Dauphin.

[11] In about May of 2003, Ms. Bignell-Malcolm learned that the Ebb and Flow Indian Band was looking for a Director of Education for its school. A job posting for the position had been published in the community. Ms. Bignell-Malcolm testified that she reviewed the job requirements listed in the posting and knew that she met each of the listed requirements. The qualifications listed for the position included those of a University Degree in Education with a 5^{th} year designation in Administration and four years of previous experience in education administration. Ms. Bignell-Malcolm applied for the job.

[12] On June 23 of 2003, Ms. Bignell-Malcolm was interviewed for the position. In attendance at the interview were the Band Chief, the four members of the Band Council,

the four members of the Band's Education Committee, and at least one of the community's Elders. Ms. Bignell-Malcolm described the interview as a very positive experience. For close to an hour she shared her thoughts and vision for the Ebb and Flow School and education system. She described the tone of the meeting as very amicable.

[13] On July 10, 2003, Ms. Bignell-Malcolm learned that she had been offered the job. Ralph Beaulieu, the Chief of the Ebb and Flow Indian Band, had written to advise her that she was being offered the position of Director of Education. The Chief had also advised Ms. Bignell-Malcolm that the start date for the position would be August 1, 2003 and that there would be a meeting set up later in the month of July to discuss the terms of her employment, including her salary. A salary range for the position had not been included in the job posting or in the offer of employment. Ms. Bignell-Malcolm wrote to the Western Region Tribal Council resigning her position effective August 1, 2003.

[14] In mid-July, 2003, Ms. Bignell-Malcolm received a telephone call from a friend and former colleague at the Ebb and Flow School. Her friend advised Ms. Bignell-Malcolm that she had heard rumours that the Chief and Band Council had decided to offer Ms. Bignell-Malcolm a salary much lower than one she should receive given the position, her education and experience. She further advised that the salary offer would be made in an attempt to discourage Ms. Bignell-Malcolm from taking the job. Ms. Bignell-Malcolm testified that she did not take much notice of this information. It was her testimony that after such a positive interview experience, after being offered the job and welcomed by the Chief to the Ebb and Flow School system, she was sure that she would be treated fairly regarding the terms of her employment, including the matter of her salary.

[15] On July 23, 2003, Ms. Bignell Malcolm attended at a further meeting to discuss the terms of her employment. She testified that she arrived for the meeting at noon, the time she was advised that the meeting would start, and that she was made to wait nearly two hours before being called in. In attendance at the meeting were again, the Chief, the Band Councilors and the members of the Education Committee. Ms. Houle, the acting Director of Education was also in attendance along with at least one Elder. Ms. Bignell-Malcolm testified that the atmosphere at this meeting, unlike that of the June 23, 2003 interview meeting, was very tense. There was no opening prayer, which was the community's custom before meetings commenced. She testified that Chief Beaulieu advised her that the Band would offer a salary of $52,000.00 per annum. Ms. Bignell-Malcolm testified that she was taken aback by this offer. She was earning $60,000.00 per year working as Education Director for the Western Region Tribal Council. She was also aware that the former Direction of Education for the Ebb and Flow School system earned an annual salary of over $60,000.00 and she knew that at least one of the school counselors at the school, an employee to whom she would be much superior, earned $58,000.00 per year. Ms. Bignell-Malcolm expressed her concern about the salary level and proposed that she receive $72,000.00. She was asked to leave the room to allow the other attendees to discuss further the matter of her salary.

[16] When she returned to the meeting room, Ms. Bignell-Malcolm testified that Chief Beaulieu said to her sternly, "The offer is $55,000.00. Take it or leave it." She testified that she immediately accepted the job. She had resigned her position as Director of Education for the Western Region Tribal Council and felt that she had no choice but to accept the position even though she thought the salary unduly low. The Chief told her

that he would give her until Friday, July 25, 2003 to tender a written acceptance of the offer. She testified that the next day, July 24, 2003, she gave the letter accepting the offer to her husband, Robert Malcolm, who worked at the Band office, and asked him to deliver it to the Chief's office. A copy of the letter was entered as evidence at the hearing. The letter carries a stamp that indicates it was received at the Band office on July 24, 2007.

[17] On July 24, 2003, at 11:00 p.m., Ms. Bignell-Malcolm testified, Chief Beaulieu called her at home, waking her up. The Chief advised that the offer of employment had been rescinded. He did not tell her why. He did, however, mention that he had received a petition from some residents of the community, implying, she believed, that this petition was, at least in part, the reason for the decision to rescind the offer of employment. The Chief did not read the petition to her or summarize its content.

[18] The position of Director of Education continued to be performed by Ms. Houle, who was at the time the acting Director of Education. Ms. Houle had a four-year Education degree and had been a school counselor at the Ebb and Flow School for several years. Ms. Houle had neither training nor experience in education administration. She was Ojibway. The Band continued to advertise for the position of Director of Education and eventually hired Arlene Mousseau for the position. Ms. Mousseau had a Bachelor of Education degree. Ms. Mousseau, did not, however, have the 5^{th} year certificate in education and administration earned by Ms. Bignell-Malcolm, an advertised requirement for the position, and did not have Ms. Bignell-Malcolm's experience either in teaching or administration. Ms. Mousseau was not Cree. She was Ojibway.

[19] I find that a *prima facie* test of discrimination has been made out on these facts alone. The complainant, Ms. Bignell-Malcolm, has led evidence in support of the asserted facts. First, she was qualified for the job of Director of Education for the Ebb and Flow school. Then, she applied for the job and did not get it. Ms. Houle, who continued as acting Director of Education, was not more qualified and was not of Cree descent. Ms. Houle did not share Ms. Bignell-Malcolm's race or national or ethnic origin. The respondent continued to advertise for the position and it was later filled by Ms. Mousseau. Ms. Mousseau was not more qualified for the position and again, being Ojibway, did not share Ms. Bignell-Malcolm's, race or national or ethnic origin.

Additional Evidence

[20] While not necessary for Ms. Bignell-Malcolm to make out her *prima facie* case of discrimination, other evidence was tendered by the complainant at the hearing that will be relevant to my analysis of whether the respondent's explanation for its *prima facie* discriminatory conduct was reasonable. I will deal with this evidence here to suit the narrative.

[21] Ms. Bignell-Malcolm, prior to filing the within complaint, retained counsel and commenced a civil law suit for wrongful dismissal after her employment offer was rescinded. In the course of advancing the civil litigation, Ms. Bignell-Malcolm received a copy of the petition mentioned earlier. Further, counsel for Ms. Bignell-Malcolm examined Ms. Houle for discovery in the civil law suit and her transcript on discovery as well as the petition were tendered as evidence. Ms. Bignell-Malcolm testified that it was upon hearing Ms. Houle's evidence and upon reviewing the petition, that she became convinced that she had been a victim of discrimination and filed the within complaint. I

did not hear evidence about the status of the wrongful dismissal suit at the time of the hearing of this complaint.

[22] Counsel for the respondent argued that neither the petition nor the transcript were admissible before this Tribunal as evidence. I find, however, for the following reasons that both the petition and the transcript of the examination for discovery of Ms. Houle are admissible.

[23] There is a principle of general application in civil litigation that evidence obtained in one proceeding is confidential and is not to be disclosed for any purpose other than those of the proceeding in which the evidence was obtained (*Lac d'Amiante du Quebec Ltee.* v *2858-0702 Quebec Inc.* [2001] 2 S.C.R. 743 ("*Lac d' Amiante*") and *J-Sons Inc.* v. *N.M. Paterson & Sons Ltd.,* [2003] M.J. No. 461 (C.A.) ("*J-Sons*"). In the province of Manitoba, where Ms. Bignell-Malcolm commenced her wrongful dismissal action, this principle has been codified in Rule 30.1(3) of the Manitoba *Court of Queen's Bench Rules*, Manitoba Regulation 553/88 as amended. All parties and their lawyers are deemed under this Rule to have undertaken not to use evidence collected for any other purpose.

[24] In civil litigation, the discovery process undertaken before the trial of a matter allows parties adverse in interest to compel one another to disclose documents and to answer questions whether the other party wants to make disclosure and answer questions or not. This invasion of privacy is deemed necessary to do justice between the parties to a law suit in advance of a trial. The fruits of discovery, however, must be used only to serve this justice and must otherwise be kept confidential. It is improper to use them for any collateral purpose or in any other proceeding (*J-Sons*, supra and *Lac d'Amiante*, supra). This principle of confidence protects individual privacy interests and preserves the integrity of the process of civil litigation as without this protection of privacy, parties to a law suit might fail to make complete disclosure of all of the facts relevant to a law suit. Persons found to have violated this rule of confidentiality can be held to be in contempt of court (*N.M. Paterson & Sons Ltd.* v. *St. Lawrence Seaway Management Corp.* [2002] F.C.J. No. 1713 aff'd [2004] F.C.J. No. 946 (C.A.)).

[25] While the *CHRA* directs that this Tribunal is not bound by the ordinary rules of evidence (s. 50(3)(*c*)), section 50(4) directs that a panel may not admit in evidence anything that would be inadmissible in a court by reason of any privilege. My reading of *Lac d'Amiante*, particularly paragraph 42 of that decision suggests to me that the principle of confidence is a form of privilege. LeBel J., discussing the common law roots of the principle of confidentiality, writes that where evidence is relevant and not protected by some <u>other</u> form of privilege, the evidence is producible and the principle of confidence attaches. For the purpose of the following analysis I will assume without deciding that the principle of confidence is a form of privilege.

[26] The confidence principle is not, however, without limit. The Supreme Court of Canada in *Lac d'Amiante*, supra, identified that while the principle of confidentiality is central to the protection of privacy interests and to the preservation of the integrity of the civil litigation system, there can be circumstances where exceptions are properly made.

[27] One exception to the confidence principle identified in *Lac d'Amiante* arises in the context of impeachment. The confidentiality rule can be found to have no application where a party wishes to establish in another proceeding that a witness has given inconsistent versions of the same fact (*Lac d'Amiante*, supra, at para. 77). This exception is codified in the Manitoba Rules. Rule 30.1(6) directs that the confidentiality

undertaking does not prohibit the use of evidence obtained in one proceeding to impeach the testimony of a witness in another proceeding.

[28] The transcript of Ms. Houle was tendered for the purpose of impeaching her testimony and accordingly, the evidence is admissible, being an exception to the principle of confidentiality.

[29] The following is the relevant excerpt of the transcript of the examination for discovery of Ms. Houle:

"Q: Do you speak Saulteaux?

A: Yes, I do, fluently too.

Q: What language do the teachers use when they are in a classroom? English or Saulteaux?

A: English and we have a Native Studies, Native language. And that's one of the reasons the elders didn't really accept Jean, because she is Cree and none of us are Cree. We are all Ojibway.

Q: So the elders didn't like the idea of having somebody Cree who has a Cree background as education director?

A: Yes, they also said how are we going to communicate with her when she doesn't even speak our language.

Q: The elders, I take it, all speak at least some level of English?

A: Some."

[30] A second exception to this principle is evidence can be found to be admissible in another proceeding where to do so would serve the interests of justice. (*Lac d'Amiante*, supra, at para 76). This exception has also been codified in the Manitoba Rules. Rule 30.1(8) directs that a court may order that the deemed confidentiality undertaking can be held inapplicable where it is found that the interests of justice outweigh any prejudice that would result.

[31] I find that the petition is admissible in service to the interests of justice. First, the petition is evidence of a nature that would support an inference that the respondent had included a discriminatory consideration in its decision to rescind Ms. Bignell-Malcolm's offer of employment. The purpose of the relevant section of the *CHRA* is to eliminate discrimination in the area of employment. It has been long recognized that the purpose of human rights legislation is that of the protection of fundamental human rights, a purpose of vital importance in Canadian society (*Zurich Insurance Corp*. v. *Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at paragraph 57). Admitting evidence that would support an inference of discrimination serves a purpose of vital importance and serves the interests of justice.

[32] Weighing the interests of justice against the prejudice that might be visited on the respondents should this document be disclosed, I find that the balance favors disclosure. In reaching this conclusion I note that the petition was circulated widely among the Elders in the Ebb and Flow community and was given to a child for delivery to the Chief in a public place. I also note that in the minutes of the Chief and Council meeting dated July 25, 2003, during which the decision to rescind the job offer was made, the petition was made an attachment. It does not appear that this document was dealt with in a manner that would suggest it was intended to be kept confidential.

[33] Further, a petition is a document of a rather public nature. Petitions, such as this one, are a demand or a prayer issuing from its signators to a governing body, a public body, in the hope that the governing body, here the Chief and Council, will take a particular

action. This type of document is not one that one would consider confidential in most circumstances. I find that little prejudice would be visited on the respondent by the disclosure of the petition and that the interests of justice outweigh any prejudice that might be experienced. I find for these reasons that the document is admissible in the present proceeding.

[34] A relevant portion of the petition reads as follows: "It took many years for the previous Chief and Council to gain control over our Education and it was their promise to us that we would always have our own people administering our Education program. Jean does not even speak our language. As Elders we promote our Education program. Will an interpreter be provided to us when we speak to Jean?"

[35] The Manitoba rules regarding this confidentiality principle contemplate that a party will seek a court's approval in advance of disclosing evidence produced in any particular proceeding. The complainant did not do so. It is possible that the respondent may have some recourse before the Manitoba Court of Queen's Bench. I do not believe, however, that the complainant's failure to seek such prior approval means that this Tribunal is unable to admit the evidence if satisfied that admission is proper and appropriate in the circumstances, as I have on the facts before me.

b) Has the respondent provided a reasonable explanation for the prima facie discriminatory conduct?

[36] As a *prima facie* case of discrimination has been made out, the onus shifts to the respondent to provide a reasonable explanation for its otherwise discriminatory conduct. The respondent has the burden of rebutting the complainant's *prima facie case* by providing a reasonable explanation for its decision to rescind Ms. Bignell-Malcolm's offer of employment. (*Morris* v. *Canada (Canadian Armed Forces*), [2005] F.C.J. No. 731 at paragraph 36 (C.A.), *Lincoln* v. *Bay Ferries Ltd*., [2004] F.C.J. No. 941 at paragraph 23 (C.A.))

[37] The evidence led by the respondent and relevant to its explanation, was as follows.

Respondent's Evidence

[38] Charles Cochrane gave evidence at the hearing. Mr. Cochrane was the first Director of Education for the Ebb and Flow School, holding the position from 1997 to 2003. It was Mr. Cochrane's evidence that in 1995 the Band decided to assume direct control of its education system. The Department of Indian and Northern Affairs controlled the local school before then. Mr. Cochrane described that between 1995 and 2003 there were extensive community consultations while the community's education policy was finalized. The education policy manual was finally published in January of 2003.

[39] Mr. Cochrane described that during this period of extensive consultation, the community made a clear direction that they wanted to ensure that any Director of Education for the Ebb and Flow School must be fluent in Saulteaux.

[40] Chief Beaulieu gave evidence at the hearing. The Chief testified that the job posting for the position of Director of Education was supposed to include fluency in the Ojibway language as a requirement, but the requirement had been omitted. The Chief described that this language requirement was a widespread community expectation: the community expected that the Director of Education for the Ebb and Flow School would speak Saulteaux. Chief Beaulieu testified that it was the Band manager, Robert Malcolm, who prepared the job posting and that the Chief had not reviewed the posting in advance of it being circulated. Robert Malcolm is the husband of Ms. Bignell-Malcolm, and the Chief

testified that while the omission may have been an error, he suspected that Mr. Malcolm had omitted the qualification deliberately so that his wife would be able to win the position even though she did not speak Saulteaux and was therefore not qualified.

[41] Chief Beaulieu testified that when the job candidates were interviewed, no questions were asked with respect to fluency in Saulteaux. The Chief testified that each of the interviewers were supplied with a list of questions that were to be asked of each candidate. This list of questions did not include a question asking whether the candidate was fluent in Saulteaux. The list of questions had been prepared by Mr. Malcolm, the Band manager, and again the omission was the result of Mr. Malcolm's mistake or misdeed. Ms. Bignell-Malcolm was offered the job, the Chief testified, because her qualifications and her performance in the interview were superior to the other candidates. As the language requirement had not arisen, it was decided that Ms. Bignell-Malcolm was the most qualified. Had any of the persons involved in the interview and candidate selection process remembered that fluency in Saulteaux was a requirement for the position of Director of Education, Ms. Bignell-Malcolm would not have been offered the job.

[42] The Chief testified that the meeting of July 23, 2003 was acrimonious in tone. The Chief did not remember whether Ms. Bignell-Malcolm was made to wait for two hours before being called in. He testified that Ms. Bignell-Malcolm was rude from the moment she joined the meeting. The Chief testified that Ms. Bignell-Malcolm announced as soon as she entered the room that she would not work with the Education Committee. He testified that she pointed her finger aggressively at him and declared, "I will only talk to you." He testified that he was shocked by Ms. Bignell-Malcolm's behavior at the meeting. He testified that Ms. Bignell-Malcolm was offered, at first, $52,000.00 per year, that Ms. Bignell-Malcolm objected that the salary was far too low. He had further discussions with the panel members and increased the offer to $55,000.00 per year. He testified that Ms. Bignell-Malcolm did not accept the job during the meeting. She was given until Friday, July 25, 2007 to consider the offer and to tender a written response.

[43] The Chief testified that it did not occur to him, until the evening of July 24, 2003, that as Ms. Bignell-Malcolm did not speak Saulteaux, she was not qualified for the position of Director of Education. On that evening, Chief Beaulieu testified, he was playing pool with his brother. A young girl from the community came to the pool hall and gave him the petition mentioned earlier in these reasons. The Chief testified that it was only upon looking at the petition that he realized the mistake made that led to Ms. Bignell-Malcolm being offered the position. The Chief testified that he immediately went to his father's home. His father had been the Chief of the Ebb and Flow Indian Band for twenty years prior to the start of Chief Beaulieu's tenure as Chief. Chief Beaulieu's father had signed the petition. The Chief testified that he sought his father's advice and that his father told him that he should listen to the Elders. The Chief testified that he decided to follow his father's advice; he decided to listen to the Elders and to rescind the employment offer because the petition had reminded him that fluency in Saulteaux was a requirement for the position of Director of Education and that for this reason, Ms. Bignell-Malcolm was not qualified for the job. The Chief denies that race, national or ethnic origin were considerations informing the decision. Language was the only consideration.

[44] Chief Beaulieu testified that he called the members of his Band Council. He was able to reach two of the four councillors and the two he spoke to were in agreement that the offer made to Ms. Bignell-Malcolm must be rescinded because she was not fluent in the Ojibway language. The Chief testified that after having obtained the approval of a majority of Chief and Council, he immediately called Ms. Bignell-Malcolm to advise her that the offer was being rescinded. The next morning the Chief and his council members met at the Band office and formally ratified the decision. The Chief testified that he did not receive Ms. Bignell-Malcolm's letter accepting the job until Monday, July 28, 2003. The Chief testified that he did not know why the letter carried a stamp indicating that it had been received in the Band office on July 24, 2003. He testified that it was Mr. Malcolm, the Band Manager and Ms. Bignell-Malcolm's husband, might have stamped the letter and marked it with a date that was incorrect.

Is the Respondent's Explanation Reasonable?

[45] I find that if the respondent's explanation was believable, it may have been a reasonable one. However, for the following reasons I find that the explanation tendered by the respondent is not credible and that accordingly the respondent has failed to discharge its onus of rebutting the complainant's *prima facie* case of discrimination.

[46] The explanation given by the respondent has two key elements. First, that fluency in Saulteaux was a requirement for the Director of Education position. Second, that the Chief and Council rescinded the offer on July 24, 2003 as that was the date that the Chief read the Elders petition and remembered that fluency in Saulteaux was a job requirement. I find, for the following reasons, first, that the evidence supports an inference that fluency in Saulteaux was not a requirement for the position of Director of Education when Ms. Bignell-Malcolm was offered the job. Second, I find that the evidence supports an inference that the decision to rescind the job offer was made not on July 24, 2003, as the Chief testified, but earlier.

Fluency in Saulteaux not a job requirement

[47] In finding that the evidence supports an inference that Saulteaux was not a requirement for the position of Director of Education at the time the job was offered to Ms. Bignell-Malcolm, I note first that the education policy manual does not identify that the position of Director of Education could be filled only by a person fluent in Saulteaux. In his testimony, Mr. Cochrane speculated that the omission of the language requirement likely arose because at the time of the community consultation he was the Director of Education and was fluent in Saulteaux. He was expected to hold this position for years to come and so the language requirement was overlooked. Mr. Cochrane, however, in his testimony, described his role as being in large part that of a transcriber during the community consultations. He testified that he listened to the community consultations and recorded the conclusions reached and the directions made. If the community had directed expressly that the position of Director of Education could be held only by a person fluent in Saulteaux, and if Mr. Cochrane's job was, as he described, one largely of the transcription of community directions, one would expect to find the requirement in the policy manual.

[48] I also find it to be significant that the matter of fluency in Saulteaux as a job requirement for the Director of Education position did not arise at any time between the date Ms. Bignell-Malcolm was interviewed for the job, being in early May, 2003, and July 24, 2003, the date the Chief testified that he finally remembered the requirement and

rescinded, with his Council's approval, the job offer. Surely, in all of the circumstances, the requirement would have occurred to someone earlier than July 24, 2003. First, the education policy document was published in January of 2003, just a few months before the position of Director of Education was advertised. One would expect that the content of the policy would be reasonably fresh in the minds of people in the community. Even if this Tribunal were to accept that the language requirement was improperly omitted from the job posting and the list of interview questions, it is difficult to believe that the requirement would not occur to anyone involved in the interview and candidate selection process before Ms. Bignell-Malcolm was offered the position on July 10, 2003.

[49] I note that the interview process was undertaken by at least a dozen of the leaders of the Ebb and Flow community. The entire Board of Education was in attendance, the Chief and Council and at least one Elder. Further, Ms. Bignell-Malcolm was a long time resident and active member of the Ebb and Flow community and had been employed in the school for several years. It would have been well known in the community that Ms. Bignell-Malcolm did not speak Saulteaux. I find the respondent's evidence that the language requirement did not arise because it had been improperly omitted from the job posting and the interview question list to be not credible. In all of the circumstances, it seems to me that had fluency truly been a job requirement, that requirement would have occurred to someone involved in the interview and candidate selection process and Ms. Bignell-Malcolm would not have been offered the job on July 10, 2003.

[50] I also find it difficult to believe that two more weeks would pass by between July 10, 2003 and July 24, 2003 until the Chief finally remembered the job requirement. I find that the inference that arises on all of the evidence relevant to this element of the respondent's explanation is that fluency in Saulteaux did not arise as a job requirement for the position of Director of Education, because it was not a job requirement for the position at the relevant time.

When did the respondent decide Ms. Bignell-Malcolm should not be appointed Director of Education?

[51] I find that the evidence is most consistent with an inference that the respondent made its decision to rescind the job offer before July 24, 2003, contrary to the respondent's assertion.

[52] Ms. Houle testified that news travels fast in the little community of Ebb and Flow. She testified that she began receiving telephone calls soon after the job was offered to Ms. Bignell Malcolm. Members of the community, she testified, were upset that Ms. Bignell Malcolm was being offered the position of Director of Education. Ms. Houle also testified that she spoke to Chief Beaulieu at the time she began receiving these calls and that he had confirmed to her that he was receiving similar telephone calls. The Chief testified that he did not recall receiving any telephone calls. I find the Chief's evidence on this point non-credible and prefer that of Ms. Houle. I believe that the Chief was well aware that members of the community were unhappy that Ms. Bignell-Malcolm had been offered the position of Director of Education shortly after the offer was made on July 10, 2003.

[53] Further, both the respondent and the complainant agree that the meeting of July 23, 2003, a meeting at which the final details of Ms. Bignell-Malcolm's engagement were to be worked out, was acrimonious. The Chief describes that Ms. Bignell-Malcolm was rude, confrontational, demanding and unreasonable right from the start of the meeting.

Ms. Bignell-Malcolm denies this. One would expect that this would be a meeting at which a spirit of good-will would prevail, particularly at its beginning. Ms. Bignell-Malcolm had just been offered a job that she was to be starting in a week. Why would a person, soon to be the Director of Education, at a meeting that included members of the Board of Education, take that very opportunity to announce that she would not work cooperatively with that very Board? Why would she be rude and disrespectful? Further, if her behavior was as utterly inappropriate as described by the Chief, one would expect that the panel would have considered rescinding the offer at that time rather than to increase the salary proposal by $3,000.00 a year. I find the respondent's evidence regarding Ms. Bignell-Malcolm's behaviour to be non-credible. A more credible explanation for the acrimonious tone of this meeting is that a decision had been made by the respondent in advance of the meeting to try to encourage Ms. Bignell-Malcolm to refuse the job by offering her an unduly low salary and generally treating her poorly at the meeting.

[54] I also find it to be significant that the petition dated July 24, 2003 and delivered to the Chief that evening carries a note at the end of the signatures: "I have spoke to the other Elders in the Community, but because of the AWAKE, a lot of these Elders were not home. So, verbally they agreed to sign, but ran out of time due to the rush of this letter (sic throughout)." I did not hear evidence to explain what the AWAKE was, but it appears that the AWAKE was an event that had caused some Elders to be away from their homes when the petition was being canvassed. One cannot help but wonder why the petition was undertaken so quickly after the acrimonious negotiation meeting, and why there is a reference to the shortness of time. It seems reasonable to infer that this petition was undertaken after the meeting for the purpose of fabricating a justification for the Chief and Council to rescind Ms. Bignell-Malcolm's job offer after the respondent had been unsuccessful in causing her to decline the job during the July 23, 2003 meeting. The reference to time pressure suggests that the person or persons circulating the petition knew that Ms. Bignell-Malcolm had been given only until the next day to present a written acceptance.

[55] Further I find it to be significant that the respondent did not tell Ms. Bignell-Malcolm that the job offer was being rescinded because she was unqualified. Why would the respondent fail to disclose this reason to her? If fluency in Saulteaux was a requirement for the job; a requirement that the interview and candidate selection committee disregarded in error, one would expect that the respondent would be forthright, confess its error and tell Ms. Bignell-Malcolm that she was unqualified by reason of her lack of fluency. The respondent did not do that.

[56] For these reasons, I find that the respondent has failed to provide a reasonable explanation for its *prima facie* discriminatory conduct. The evidence supports the inference that fluency in Saulteaux was not, as the respondent asserted, a requirement for the position of Director of Education at the relevant time. Further, the evidence supports an inference that the respondent decided that Ms. Bignell-Malcolm would not be the Director of Education for the Ebb and Flow School not in the evening of July 24, 2003, as the respondent asserted, but no later than the meeting of July 23, 2003. The respondent's explanation is not credible and therefore it is not reasonable. I find that the complaint has been made out on the basis of this evidence alone.

[57] There is, in this case, further evidence that tends to suggest more directly that the respondent's conduct was based, at least in part, on a discriminatory animus. Namely, the transcript of Ms. Houle's examination for discovery and the petition, both of which were discussed earlier.

[58] During her discovery, Ms. Houle agreed that the community had a problem with Ms. Bignell-Malcolm because she was Cree and also because she did not speak the language. During her testimony before this Tribunal, Ms. Houle stated that what she meant to say during her examination for discovery was that the Elders were concerned that Ms. Bignell-Malcolm was Cree only because they would be unable to communicate with her.

[59] I find that the transcript effectively impeaches the testimony given by Ms. Houle at the hearing of this matter. The transcript contains sworn evidence given by Ms. Houle in a proceeding undertaken before Ms. Bignell-Malcolm had filed the within complaint alleging discrimination on the ground of race and national or ethnic origin. During her examination for discovery, Ms. Houle would have had no reason but to communicate truly and accurately the concerns expressed by the Elders. For these reasons, I prefer the evidence given by Ms. Houle at her examination over the evidence given by her at the hearing. I find that this evidence supports an inference that the respondent's decision to rescind Ms. Bignell-Malcolm's offer of employment was based, at least in part, on discriminatory considerations.

[60] I also find that the petition supports an inference of discriminatory animus. In the petition the Elders express not one, but two reasons for their objection to Ms. Bignell-Malcolm being hired as Education Director. The petition identifies a concern about her lack of fluency in Saulteaux, but a second concern expressed was that Ms. Bignell-Malcolm was "not one of our people." Indeed, the wording used was, ". . . we would always have our own people administering our Education program. Jean does not even speak our language." This wording suggests that the Elder's primary concern was race, national or ethnic origin and that language was a secondary concern. I find that this petition is further evidence that would support an inference that the respondent's decision was based, at least in part, on a discriminatory consideration.

The Respondent's Alternate Defence: Aboriginal Employment Preference Program

[61] The respondent argued that if I find that its decision was based, in whole or in part, on the consideration of race or national or ethnic origin, the decision is not discriminatory for reason of Aboriginal Employment Preference Program created by the Canadian Human Rights Commission. I find for the following reasons that the respondent cannot rely on the Aboriginal Employment Preference Program.

[62] The Canadian Human Rights Commission has recently reviewed and updated its Aboriginal Employment Preference Program. This program is enabled by section 16 of the *CHRA*, which allows an employer to create a special program designed to prevent disadvantage or reduce disadvantage when the disadvantages are based on or related to a prohibited ground of discrimination, such as race, national or ethnic origin. The CHRC program directs that it is not a discriminatory practice for an employer to give preferential treatment to aboriginal persons in hiring, promotion or other aspects of employment, when the primary purpose of the employer is to serve the needs of aboriginal persons. Aboriginal preference is a defence that can be used by an employer if a complaint is made alleging a person was denied employment because they were not aboriginal.

[63] I find that this program does not afford a defence to the respondent. First, the respondent specifically denied, in its response to Ms. Bignell-Malcolm's complaint that its decision was in any way related to her race, national or ethnic origin. The explanation provided by the respondent was that its decision was based on language alone. It is nonsensical for the respondent to insist that it did not base a decision on race, national or ethnic origin and then to argue in the alternative that if they did, they did so pursuant to a special program that had been created in the community. These positions are not alternative to one another; they are wholly inconsistent with one another.

[64] Further, the Commission's program contemplates the employment of aboriginal persons in preference to non-aboriginal persons. The program also allows employers to require job applicants to have knowledge and/or experience with the language, culture, history and customs of a particular First Nation, band or tribe when such requirements are directly related to the job requirements. However, the Program does not allow for preference to be given to members of a particular First Nation, band or tribe. The Commission's program strikes an important balance. The program recognizes the historic disadvantages suffered by Aboriginal persons, the importance of redressing past wrongs and of preserving the cultural heritage and autonomy of our First Nations people. The program does not, however, allow First Nations persons to discriminate against one another on the basis of their membership in a First Nation, band or tribe.

Respondent's alternative defence: *Bona Fide* Occupational Requirement

[65] The respondent has also argued in the alternative that should this Tribunal find that the respondent's decision not to hire Ms. Bignell-Malcolm was made at least in part on the basis of race, national or ethnic origin, then requiring that the Director of Education have a facility in the Saulteaux language is a *bona fide* occupational requirement of the position of Director of Education. I find this defence has no application to the facts of this case.

[66] Language is not coincident with and race, ethnic or national origin. Persons of Ojibway descent may or may not speak Saulteaux. Persons of Cree descent may or may not speak Saulteaux. Fluency in a particular language cannot, without more, be a *bona fide* occupational requirement justifying discrimination on the basis of race, national or ethnic origin.

Conclusion

[67] For the reasons outlined above, I find that the complaint has been substantiated.

IV. REMEDIES

a) Compensation for lost wages

[68] Ms. Bignell-Malcolm asks for compensation for lost wages from September 1, 2003 to December 31, 2006, pursuant to section 53(2)(*c*) of the *CHRA*. Section 53(2)(*c*) empowers a tribunal, upon having found a complaint substantiated, to compensate the victim for any or all of the wages that the victim was deprived of as a result of the discriminatory practice.

[69] The Federal Court of Appeal has recently considered the analysis appropriate to making awards in compensation for lost wages. In *Chopra* v. *Canada (Attorney General*), [2007] F.C.J. No. 1134, Pelletier J.A., writing for the Court, directs that the central consideration when considering such an award is to determine whether there exists a causal connection between the lost wages and the discriminatory act or acts. The principles that limit recovery in damage assessments in civil litigation, such as

remoteness and foreseeability, have no application. A wrongdoer may be ordered to compensate its victim for losses caused by his or her conduct whether or not such losses could have reasonably been foreseen. Section 53(2)(*c*) gives the Tribunal discretion when considering an award in compensation for lost wages. The section directs that a tribunal may order compensation in respect of "any or all" wages lost as a result of discriminatory conduct, though this discretion must be exercised in a principled manner (*Chopra*, supra, at para. 37). Further, although a tribunal may consider whether a victim has taken steps to mitigate his or her damages, mitigation is not a mandatory consideration. Mitigation can be considered should the Tribunal view it to be appropriate in the circumstances.

[70] Ms. Bignell-Malcolm obtained alternate employment fairly quickly after the respondent failed to hire her. She was required to find employment outside the Ebb and Flow community and to commute to and from work. The positions she obtained were less remunerative than the position of Director of Education in the Ebb and Flow School system, a position she accepted at a salary level of $55,000.00. Between September of 2003 and December of 2006, Ms. Bignell-Malcolm worked for five different employers. The only significant break in her employment was between April of 2004 and December of 2004. In April of 2004 Ms. Bignell-Malcolm testified that she decided to resign from her job at the Sioux Valley Education Authority. She testified that in the spring of 2004 she wanted to help plan her daughter's wedding. She was also very homesick and depressed. She decided that she would leave her job, move back home and set up a restaurant with her daughter. The restaurant did not succeed and was closed down by the end of December, 2004.

[71] Between September of 2003 and December of 2006, Ms. Bignell-Malcolm earned a total income of $134,330.86. Had she been working as the Director of Education for the Ebb and Flow Indian Band during this time earning a salary of $55,000.00 per annum, she would have earned a total income of $187,916.66. I find that it is appropriate that Ms. Bignell-Malcolm receive compensation for lost wages. In respect of quantum, I order that she receive the difference between the income actually received between August 1, 2003, being the date upon which her job as Director of Education for the Ebb and Flow School system would have commenced, until December 31, 2006, except that I do not include any compensation for the months of May, 2004 through December, 2004, as Ms. Bignell-Malcolm left her job voluntarily to pursue other interests. Although the duty to mitigate is not a mandatory consideration under this head of damages, I find that it is appropriately applied here to reduce the award for lost wages.

b) Compensation for pain and suffering

[72] Ms. Bignell-Malcolm seeks an award, pursuant to section 53(2)(*e*) of the *CHRA*, that she receive compensation for pain and suffering. She testified that the respondent's conduct, found herein to be discriminatory, caused her significant distress. She describes trembling, and feeling like she was in shock after the Chief called late in the evening, waking her. She also testified that she suffered distress arising from the discrimination. She testified that her distress arose in part because she did not know the reasons that this job, a job that she very much wanted, had been taken from her so abruptly. She describes that she was depressed, that she suffered because she had again to leave her own community to work. She was homesick and worried about her family.

[73] I find that the respondent's conduct caused Ms. Bignell-Malcolm to suffer serious pain and suffering. I order the Respondent to pay Ms. Bignell-Malcolm $7,000.00 in compensation for pain and suffering.

c) Special Compensation

[74] The complainant asks for special compensation. Section 53(3) of the *CHRA* empowers the Tribunal to award a maximum of $20,000.00 should the Tribunal find that a respondent has engaged in a discriminatory practice either wilfully or recklessly. I find that the respondent's conduct was wilful and that it was reckless. I find that the Chief and Council rescinded Ms. Bignell-Malcolm's employment when they knew or ought to have known that they were engaging in a discriminatory practice. I find that the deceitful manner in which the job was rescinded suggests a degree of knowledge on the part of the respondent that they knew what they were doing was wrong. Special compensation is accordingly appropriate and I award $5,000.00.

d) Legal Expenses

[75] The complainant asks for an order directing that the respondent pay the legal expenses incurred by her during the course of this proceeding. The complainant also asks that the respondent pay the legal fees incurred during her pursuit of the wrongful dismissal law suit. Sections 53(2)(*c*) and 53(2)(*d*) both empower the Tribunal, where it finds that a complaint is substantiated, to make among other orders, an order that the respondent compensate the victim for `any expenses incurred by the victim as a result of the discriminatory practice.'

[76] Chairperson Sinclair has recently made a careful review of Federal Court jurisprudence dealing with this issue (*Mowat* v. *Canada Post Corporation,* 2006 CHRT 49). He concludes that the predominance of authority from that court is that the Tribunal has the power to award compensation for legal expenses under section 53(2).

[77] I agree with this conclusion and am further persuaded that this Tribunal has the jurisdiction to award legal expenses for the reasons articulated by Chairperson Mactavish (as she then was) in her decision of *Nkwazi* v. *Canada (Correctional Service)*, [2001] C.H.R.D. No. 29 [*Nkwazi*]. Chairperson Mactavish notes that human rights legislation, given its fundamental and quasi-constitutional status is to be given a liberal and purposive construction, not only in respect to the rights protected under such statutes, but in respect of the remedial powers conferred (*Nkwazi,* at para. 13; see also *Canadian National Railway Co.* v. *Cana*da [1987] 1 S.C.R. 1114 at 1136; *Robichaud* v. *The Queen*, [1987] 2 S.C.R 84.)

[78] The Federal Court of Appeal decision in *Chopra* does not deal expressly with the matter of legal costs. The decision deals with a claim for lost wages. The decision does, however, consider the proper interpretation of section 53(2)(c), which is one of the sections of the *CHRA* that confer upon this Tribunal the jurisdiction to award legal costs. Pelletier J.A. directs that the central consideration when making awards pursuant to this section is that of a causal nexus between the expenses incurred and the discriminatory conduct. Considerations such as remoteness, foreseeability have no application, and mitigation can be considered where appropriate, but is not a mandatory element of the analysis. Awards made pursuant to this section are always discretionary.

[79] Turning first to the claim for legal costs incurred in this complaint, I find that it is appropriate to order that some of these expenses be paid. I find that the respondent's discriminatory conduct caused Ms. Bignell-Malcolm to engage the services of legal

counsel. But for this discriminatory conduct, Ms. Bignell-Malcolm would not have filed this complaint and would not have reasonably sought the assistance of counsel. I find, however, that it is significant that the Canadian Human Rights Commission was represented at the hearing. Commission counsel do not represent complainants, they represent the public interest. It was perfectly reasonable for Ms. Bignell-Malcolm to engage counsel to represent her interests.

[80] However, counsel for the Commission took an active role in examining witnesses and in closing submissions. Counsel for the complainant was of great assistance to the Tribunal, but shared much of the work during the hearing with Commission counsel. In these circumstances I find that the respondent should not be made to pay all of the complainant's legal fees. I order that the respondent will pay the reasonable legal expenses incurred by Ms. Bignell-Malcolm in her pursuit of this complaint, provided that the respondent will pay only one half of the legal expenses incurred by the complainant from October 22, 2007 to October 26, 2007, being the dates of the hearing.

[81] Turning to the legal expenses incurred by the complainant in the wrongful dismissal action commenced by her and discussed earlier, I prefer not to exercise my discretion to order these expenses payable. It appears that the legal expenses incurred in respect of the wrongful dismissal suit were to some extent caused by the discriminatory conduct: had the respondent not rescinded the employment offer, Ms. Bignell-Malcolm would not have commenced the law suit. However, the reason that the complainant commenced a civil suit rather than a human rights complaint was not the discriminatory conduct *per se*, but the failure of the respondent to be frank in respect of the reasons underlying its decision. While there is some nexus between the discriminatory conduct and these legal expenses, I decline to order that the respondent compensate the complainant for these legal expenses.

e) Other Expenses

[82] The complainant seeks compensation for rent while working outside of her community. She claims $1,218.91 for rent while working at the Sapotewak Education Authority for three and a half months; rent in the amount of $2,200.00 paid while working at the Sioux Valley Education authority for four months, and rent in the amount of $1,500.00 paid while working in Winnipeg for six months. These claims are for living expenses incurred during the time period for which I have ordered the respondent to pay lost wages. The income earned by the complainant while working at these jobs will be deducted from her lost wage claim, and so it is reasonable that the costs associated with earning this income be paid by the respondent and I so order. I do not, however, order that the respondent compensate the complainant for her January 4, 2004 hotel bill, her cellular phone charges, a fitness club membership, furniture (that she still owns) or cable hook-up and service charges.

f) Interest

[83] Interest is payable in respect of all the awards made in this decision. The interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the Bank Rate (Monthly series) set by the Bank of Canada, per Rule 9(12) of the Tribunal's *Rules of Procedure*. With respect to the compensation for pain and suffering and the special compensation, the interest shall run from the date of the complaint. With respect to the award for lost wages, interest will run from December 31, 2006. For legal costs, interest will run from October 26, 2007, being the last day of the hearing. Interest will be payable in respect of the other expenses from the date each expense was incurred.

f) Retention of jurisdiction

[84] The Tribunal will retain jurisdiction to receive evidence, hear further submissions and make further orders, if the parties are unable to reach an agreement with respect to any issues arising from the remedies ordered in the within decision. Should the parties require direction on any remedial matter they may request same within 60 days of the date of this decision.

"*Signed by*"

Julie C. Lloyd

OTTAWA, Ontario

January 25, 2008

PARTIES OF RECORD

TRIBUNAL FILE:	T1171/5306
STYLE OF CAUSE:	Jean Bignell-Malcolm v. Ebb and Flow Indian Band
DATE AND PLACE OF HEARING:	Winnipeg, Manitoba October 22 to 26, 2007
DECISION OF THE TRIBUNAL DATED:	January 25, 2008
APPEARANCES:	
Karlee Blatz	For the Complainant
Giacomo Vigna	For the Canadian Human Rights Commission
J.R. Norman Boudreau	For the Respondent