Canadian Human Rights Tribunal **Tribunal canadien des droits de la personne**

BETWEEN:

MAURICE BRESSETTE

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

KETTLE AND STONY POINT FIRST NATION BAND COUNCIL

Respondent

RULING ON JURISDICTION - SECTION 67 - CANADIAN HUMAN RIGHTS ACT

MEMBER: J. Grant Sinclair

2003 CHRT 41

2003/12/08

INTRODUCTION

[1] Maurice Bressette is the complainant is this matter. He filed a complaint with the Canadian Human Rights Commission dated March 30, 2002 in which he alleged that the respondent, Kettle and Stony Point First Nation Band Council, discriminated against him by not hiring him as a Family Caseworker at the respondent's Children Services Department, contrary to section 7 of the *Canadian Human Rights Act*. The ground of discrimination alleged is family status.

FACTS

[2] The Kettle and Stony Point First Nation Council is a Band Council as defined in s. 2(1) and established under s. 74 of the *Indian Act*. The complainant Maurice Bressette is a Status Indian and member of the Kettle and Stony Point First Nation.

[3] In August 2001, the Band Council established a hiring committee to conduct interviews to staff the position of Family Caseworker in its Children Services Department. This is a budgeted position and is fully funded on an annual formula basis by the Ontario Ministry of Community and Social Services. The Children Services Department deals with children and family situations within the Band where children or families are experiencing difficulties.

[4] A number of persons were interviewed for this position, including the complainant, Deb Herman, Dorothy French, Heather Bressette and Georgina Bressette. The hiring committee recommended Deb Herman for the position and also recommended Dorothy French as the alternate. Because Dorothy French questioned the qualifications of Deb Herman for the position, the Band Council did not make any decision to staff the position, but deferred the matter to the Finance/Personnel Committee.

[5] Lorraine George, who was the chair of this Committee in 2001, gave evidence on this motion. She said that, at this time, the Band had a deficit of $800,000 and $1,000,000. The Committee had been mandated by the Band Council to identify ways of addressing this deficit. The Committee produced two documents, "Deficit Recovery Strategy" and the "Finance/Personnel Business Plan" which were directed to this problem.

[6] Some time before the February 6, 2002, Band Council meeting, Stan Sabourin, the Band Administrator, who was cognizant of both the staffing and financial needs, had discussions with Ms. George about reorganizing certain job functions which could result in some savings. He recommended that Eva Bressette, who held the full-time position as Band Representative, be given the position of Family Caseworker and this be done by way of internal transfer.

[7] Mr. Sabourin also recommended that duties of the Band Representative be assigned to the in-house legal counsel, thus eliminating the separate Band Representative position. The responsibility of the Band Representative is to represent the Band children at hearings which involve child protection issues.

[8] The Band is funded under various funding agreements with the federal government. The Band general account is funded through CFNFA Contribution Agreements, under which the Band receives core funding and non-core funding. The core funding is for general expenditures. Non-core funding is tied to specific programs and is to be used for that program only.

[9] The Band Representative is a non-core funding position. The amount of the funding is reviewed annually and is based on the caseload of the previous year. Because the caseload has not been at a level to support the full-time salary of Eva Bressette, the balance is paid from the Band general account. Because her Band Representative duties did not occupy her full time, EvaBresssette did some of the duties of a family caseworker in the Children Services Department.

BAND COUNCIL AND FINANCE/PERSONNEL COMMITTEE MINUTES

[10] The minutes of the Finance/Personnel Committee dated Wednesday, February 6, 2002, show that the Committee agreed with the staffing recommendation of Mr. Sabourin relating to the internal transfer of Eva Bressette and that the move be made for financial and professional reasons. There was also a request from Eva Bressette requesting the transfer.

[11] The minutes of the Band Council meeting of Thursday, March 21, 2002 show that the recommendation to transfer Eva Bressette to the position Family Caseworker was adopted. The minutes also set out that the Band's in-house legal counsel would take on the duties of Band Representative. There is no reference in these minutes to any financial benefits that may accrue from this decision. The implementation of this decision resulted in two staff positions instead of three, one which is fully funded by the province.

ARGUMENT OF THE RESPONDENT IN SUPPORT OF THE MOTION

[12] The respondent's position is that the Tribunal is without jurisdiction to hear Mr.Bressette's complaint by reason of s. 67 of the *Canadian Human Rights Act*. Section 67 provides that nothing in this *Act* affects any provision of the *Indian Act* or any provision made under or pursuant to the *Indian Ac*t. The respondent argues that the decision to staff the Family Caseworker position and transfer the Band Representative responsibilities to the in-house legal counsel was a decision taken pursuant to the *Indian Act* and therefore is beyond the scrutiny of this Tribunal. The basis for this assertion, is that the decision of the Band Council was a financial decision with a collateral staffing aspect. The Band had a large deficit and this staff restructuring contributed in a small way to a cost saving.

a) Legal Argument

[13] The respondent referred to four cases in which s. 67 of the *Indian Act* has been considered. The four cases can be divided into two categories, those where the Tribunal

had no jurisdiction to hear the complaint, and the second category where jurisdiction was confirmed.

[14] The first case in the first category is *Canada (Human Rights Commission) v. Canada (Department of Indian Affairs and Northern Development*), [1995] 3 C.N.L.R. 28 (F.G.T.D.). This case involved s. 115 of the *Indian Act*, which gave specific power to the Minister of Indian Affairs to decide matters of policy with respect to providing funding for the maintenance of native children attending a residential school. In this case, the Minister adopted a policy requiring native children to attend the school closest to where they resided and the government would no longer fund expenses for those who wished to attend religious schools away from home. The *Indian Act* also provided in s. 118 that Catholic children could not be assigned to Protestant schools without parental consent.

[15] The complainant in this case had a daughter who had been attending a Catholic school away from home and was denied further governmental assistance. The Canadian Human Rights Tribunal declined jurisdiction on the basis that the Minister's funding decision was a decision under the *Indian Act* and therefore was exempt under the *Act*. The Federal Court on review, agreed with the Tribunal that the policy adopted by the Department was specifically authorized under the *Indian Act*, and as such, was a decision exempt under s. 67 of the *Act*.

[16] The next case is *Canada (Human Rights Commission) v. Gordon Band Council*, [2001] 1 F.C.124 (F.C.A.). In this case the complainant was a Status Indian who lived on the Gordon First Nations Band Reserve with her non-Indian spouse. She applied for rental housing on the Reserve, which was denied by the Band Council. She filed a complaint with the Canadian Human Rights Commission that she had been discriminated against on the basis of sex and family status. The Tribunal concluded that it lacked jurisdiction under s. 67 of the *Act*. The case was ultimately heard by the Federal Court of Appeal which decided that the decision to refuse housing was a decision made by the Band Council under s. 20 of the *Indian Act*, which confers on the Band Council authority to deal with possession of land on the Reserve.

[17] The first case in the second category of cases is *Desjarlais v. Piapot Band,* No 75 [1989] 3 F.C. 605 (F.C.A.). In this case, the Band fired its Band Administrator pursuant to a formal resolution of the Band Council. The resolution was a vote of non-confidence for Ms.RoseDesjarlais based on complaints because of her age. The Band Council terminated her employment and she filed a complaint with the Canadian Human Rights Commission alleging discrimination because of age.

[18] The Federal Court of Appeal held that a vote of non-confidence is nowhere expressly or impliedly provided for by the *Indian Act*. Accordingly it was not a decision taken pursuant to the *Indian Act* and the complaint could be heard by the Tribunal.

[19] The last case is *McNutt v. Shubenacadie Indian Band*, [1998] 2 F.C. 198 (F.T.D.); 256 N.R. 109 (F.C.A.). In this case, a non-Indian spouse who lived on the reserve with the permission of the Band Council, was denied social assistance from the Band. The

federal government had contracted with the Band to provide funding for social assistance on the Reserve. The Band Council administered the social assistance program in accordance with the contractual provisions which included guidelines. Under s. 3.01 of the Guidelines, a non-Indian spouse who resided legally on the reserve was clearly eligible for benefits.

[20] The Federal Court held that the Band Council's decision to deny benefits did not come within s. 67 of the *Act*. Although this was a decision by the Band Council, the Court pointed out that not all decisions of a Band Council are immunized by s. 67 of the *Act*. The social assistance program and the authority of the Band to administer it was pursuant to the contract between the Federal Government and the Band, not under the *Indian Act*. As such, s. 67 of the *Act* did not apply.

[21] The respondent agreed that if the decision of the Band Council was a staffing decision, s.67 would not operate to oust the Tribunal's jurisdiction. But, the respondent argued, the Band Council's decision must be viewed as a package. What appears initially to be a staffing matter really is part of an overall financial strategy directed to reducing the Band's financial deficit.

[22] The respondent first referred to ss. 69, 81 and 83 of the *Indian Act* as supporting the Band Council's decision as a financial decision under the *Indian Act*. In the final analysis, however, the respondent looked to two Regulations under the *Indian Act*. The first is the *Indian Band Revenue Moneys Order*, SOR/90-297 as am., which provides that the Bands listed in the Regulation are permitted to control, manage, expend their revenue moneys. The second is the *Indian Band Revenue Moneys Regulations*, C.R.C. 1978 c. 953 as am., which provides that any expenditure by a Band of revenue monies is subject to the *Indian Act*.

[23] The respondent argues that these two Regulations permit the Band Council to manage, control and expend its revenues, which actions are subject to the *Indian Act*. Because the Band Council's motivation for the restructuring and staffing of the two positions was primarily for financial reasons, and is authorized by these Regulations, it must be concluded that the impugned decision taken was pursuant to the *Indian Act*.

THE COMMISSION'S POSITION

[24] The Commission characterizes the decision of the Band Council in the opposite way. For the Commission, the staffing of the Family Caseworker position was the primary purpose for the Band Council's decision. The so-called financial decision was not a strategy referred to in either of the two position papers put out by the Finance/Personnel Committee. It was only after the hiring committee's decision was challenged and deferred to the Finance Committee, was this restructuring recommendation brought forward.

a) Legal Argument

[25] The Commission referred to a recent decision of this Tribunal in *Bernard v. Waycobah Board of Educatio*n, (1999), 36 C.H.R.R. D/51 (CHRT). In this case the complainant was a member of the Waycobah First Nation. Her employment as school secretary was terminated by the Board of Education because of her conduct on two or three occasions which led the Board to believe that she had a mental disability. She filed a complaint with the Commission alleging discrimination on the ground of disability.

[26] The respondent argued that s. 114 (2) of the *Indian Act*, which authorizes the Minister to establish, operate and maintain schools for Indian children, authorized the Board of Education to make the decision it did. The Tribunal rejected the respondent's argument that the Tribunal had no juristiction to hear the complaint. In its view, there was not a sufficient link between s. 114(2) and the decision of the Board.

ANALYSIS AND CONCLUSION

[27] In my view, the decision of the respondent involves both a staffing aspect and a financial aspect. But, in my opinion, the predominant purpose behind the decision of the Band Council was to staff the Family Caseworker position. The fact that a small financial benefit resulted does not detract from this conclusion.

[28] This is demonstrated by the chronology of events in which a hiring committee was struck to select a candidate for the position of Family Caseworker. The choice of the hiring committee was challenged and for this reason, the Band Council deferred the matter to the Finance Committee. It was not deferred because of financial considerations or because a new strategy was adopted. The position had to be staffed and money was allocated for the position. From the beginning, it was a staffing need not a financial need, that drove the whole process.

[29] Further, in my view, none of the cases cited by the respondent are similar to this case. On the other hand, the *Waycobah* decision is much more akin in that both facts situations involve a staffing decision. In *Waycoba*h, there was not a sufficient nexus between the decision of the Band Council and the *Indian Ac*t. In my opinion, none of the provisions of the *Indian Act* cited by the respondent, including the two Regulations, supply this nexus.

[30] Every staffing decision involves the control, management or the expenditure of money. The consequence of the respondent's position is that any staffing decision of a Band Council would be beyond the jurisdiction of the Tribunal. Even the respondent conceded that this could not and should not be the case under the *Indian Ac*t.

ORDER

[31] For the foregoing reasons, the motion of the Kettle and the Stony Point First Nation Band Council is hereby dismissed.

Signed by

J. Grant Sinclair

OTTAWA, Ontario

December 8, 2003.

CANADIAN HUMAN RIGHTS TRIBUNAL
PARTIES OF RECORD

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APPEARANCES:

Maurice Bressette On his own behalf

Patrick O'Rourke For the Canadian Human Rights Commission

Jonathon George For the Respondent