

Canadian Human Rights
Tribunal



Tribunal canadien des droits de
la personne

Citation: 2015 CHRT 9

Date: April 29, 2015

File Nos.: T1658/1311, T1659/1411

Between:

Stacey Lee Tabor

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Millbrook First Nation

Respondent

Decision

Member: Sophie Marchildon

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I. Complaint & Background

[1] To begin with, I would like to honour and acknowledge the Mi'kmaq (Mi'kmaw) First Nations people and the Millbrook First Nation community. The hearing of this matter was held on traditional Mi'kmaw territory and close to the Millbrook community, in Truro, Nova Scotia. I was impressed and find it worth mentioning that the parties and witnesses who participated in the hearing, the majority of whom live together in the Millbrook community, were respectful and cordial amongst each other, even in the midst of conflict and litigation. I find their behaviour exemplary and commend them for it. In this decision, when referring to Millbrook First Nation, I am referring to the First Nation as an employer and not to the community as a whole or individual community members.

[2] The Complainant, Ms. Stacey Lee Marshall Tabor, is a Mi'kmaw First Nation woman and a member of the Millbrook First Nation. She comes from a family of fishers and began fishing at 16 years of age. She also comes from a family that fought for their aboriginal and treaty rights. Donald Marshall, her uncle, fought for his treaty right to fish. The Supreme Court of Canada recognized Mr. Marshall had a Mi'kmaq treaty right to fish for sustenance and trade in *R. v. Marshall*, 1999 CanLII 665 (SCC).

[3] Like her uncle, Ms. Tabor stands up for what she believes in. Ms. Tabor has also exercised her treaty right to fish by doing some unlicensed fishing. It is also clear from Ms. Tabor's testimony that her passion is fishing. She wants to practice this passion and wishes to someday realize her dream of being a fishing boat captain. In fact, to her knowledge, she was the first First Nations woman to qualify to be a fishing boat captain in Nova Scotia. However, like many other people who have attempted to be the first to do something, it can often be a challenge to be a pioneer. Despite her aspirations and qualifications, Ms. Tabor has only been able to work, on a few occasions, as a Deckhand and First Mate for the Millbrook First Nation fishery.

[4] Ms. Tabor claims Millbrook First Nation has denied her employment in its fishery over several years because she is a woman. Specifically, she asserts Millbrook refused to consider her for a captaincy in its fishery in 2008. She contends her situation is reflective of a larger practice on the part of the First Nation to exclude women from participating in its

fishery. Ms. Tabor also claims her exclusion from captaining a vessel in 2008 was based on her marital status, because Millbrook First Nation had issues with her husband following his captaincy in 2007 and held those issues against her as well. Ms. Tabor alleges Millbrook's actions are discriminatory practices pursuant to sections 7 and 10 of the *Canadian Human Rights Act* [the *CHRA*].

[5] For its part, Millbrook First Nation denies the allegations made against it. It claims Ms. Tabor was not selected for a captain's job in 2008 because there was a more qualified candidate. It also denies having a practice of excluding women from participating in its fishery.

[6] Following the filing of her complaint, Ms. Tabor contends Millbrook First Nation retaliated against her pursuant to section 14.1 of the *CHRA*. The retaliation allegations will be analyzed in a separate decision.

[7] After hearing from the parties and reviewing all the evidence, submissions and affidavits before me, I find Ms. Tabor's complaint under sections 7 and 10 of the *CHRA* to be substantiated for the reasons that follow.

II. Analysis of the complaint

A. Legal Framework

[8] In human rights cases, the complainant has the burden of proof of establishing a *prima facie* case. A *prima facie* case is "...one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent" (*Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC) at para. 28 [O'Malley]).

[9] Millbrook's submissions focus mainly on its decision to choose another candidate over Ms. Tabor when she applied for a captain's license in 2008. As such, Millbrook argues the test from *Shakes v. Rex Pak Ltd.*, (1982) 3 C.H.R.R. D/1001 [*Shakes*] should be applied to determine if Ms. Tabor has established a *prima facie* case. That test is: (1) she was qualified for the job; (2) not hired; and, (3) that someone no better qualified,

but lacking the distinguishing feature, in this case, of being a woman, subsequently obtained the position (see *Shakes* at para. 8918).

[10] However, in *Premakumar v. Air Canada*, 2002 CanLII 23561 (CHRT) the Canadian Human Rights Tribunal (the Tribunal) stated:

[77] While both the *Shakes* and the *Israeli* tests serve as useful guides, neither test should be automatically applied in a rigid or arbitrary fashion in every hiring case: rather the circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether Mr. Premakumar has satisfied the *O'Malley* test, that is: if believed, is the evidence before me complete and sufficient to justify a verdict in Mr. Premakumar's favour, in the absence of an answer from the respondent?

(see also *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at paras. 17-18; and, *Morris v. Canada (Canadian Armed Forces)*, 2005 FCA 154 at paras. 24-30)

[11] I agree with this statement and find it would be inappropriate to apply the *Shakes* test in the circumstances of this case. The nature of the allegations raised in this complaint are broader than the individual 2008 decision to choose another candidate over Ms. Tabor for a captain's role. Prior to 2008 and on an ongoing basis, Ms. Tabor alleges a systemic practice of denying employment opportunities to women in the Millbrook First Nation fishery, including herself. Moreover, it is Millbrook who characterizes the 2008 captain's decision as being based on a comparison of the qualifications between Ms. Tabor and the chosen candidate. In her complaint and evidence, Ms. Tabor states she was not provided with such an explanation for Millbrook's 2008 captain's decision.

[12] Therefore, applying the *O'Malley* test to the context of this case, to demonstrate *prima facie* discrimination Ms. Tabor had to establish: that she had a characteristic or characteristics protected from discrimination under the *CHRA* (section 3 of the *CHRA*); that she was refused or deprived employment or treated adversely in employment (section 7 and/or 10(a) of the *CHRA*); and, that the protected characteristic or characteristics were a factor in the refusal to employ her (section 7(a) of the *CHRA*) or the

practice that deprived her of employment opportunities (section 10(a) of the *CHRA*) (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33 [*Moore*]).

[13] If a *prima facie* case is established, a respondent can avoid an adverse finding by calling evidence to show its actions were not discriminatory; or, by establishing a statutory defence that justifies the discrimination. In this case, Millbrook led evidence in an effort to show that its actions were not discriminatory. Therefore, it had an evidential burden to rebut the *prima facie* case to avoid an adverse finding (*Peel Law Association v. Pieters*, 2013 ONCA 396 at para. 68 [*Pieters*]). However, the ultimate burden of proof remained on Ms. Tabor to establish Millbrook's evidence was false or a pretext (see *Pieters* at para. 74).

[14] Furthermore, it should be kept in mind that discrimination is not usually practiced overtly and, consequently, proving it by way of direct evidence is often difficult. Therefore, the Tribunal's task is to consider all the circumstances and evidence to determine if there exists the "subtle scent of discrimination" (see *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT)). As the standard of proof in discrimination cases is the ordinary civil standard on a balance of probabilities, "[a]n inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses" (Béatrice Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987) at p. 142).

[15] Finally, it is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient that a discriminatory consideration be one of the factors in the actions in issue (*Holden v. Canadian National Railway Co.*, (1991) 14 C.H.R.R. D/12 (F.C.A.) at paragraph 7).

B. Ms. Tabor's case

[16] The events giving rise to Ms. Tabor's complaint span over a decade, mainly from 1996 to 2008. The evidence offered in support of her complaint can be divided into the following categories: (i) derogatory comments regarding women; (ii) difficulty getting funding for captain's training; (iii) work experience with Millbrook and its fishery from 2000-

2006; (iv) the 2007 lobster season; (v) the 2008 captain's license; and, (vi) the experience of other women in Millbrook's administration and fishery. On a *prima facie* basis, the following are my findings of fact related to each of these categories of evidence, unless specified otherwise.

[17] Based on this evidence, I find Ms. Tabor has established a *prima facie* case of discrimination pursuant to sections 7 and 10 of the *CHRA*, on the compound grounds of sex and marital status.

(i) Derogatory comments regarding women

[18] Ms. Tabor began her experience working for Millbrook in 1996 when she was a summer student working as a fisheries guardian. Of the four fisheries guardians working for Millbrook that summer, Ms. Tabor was the only female. She described the working environment as sexist and chauvinistic.

[19] It was during her 1996 summer experience that Mr. Alex Cope, at the time and currently the Band Administrator for Millbrook First Nation and an elected Band Councillor, first made comments regarding the role of women in the fisheries. Mr. Cope made comments to the effect that the only place for women's breasts on a boat was on the bow as a figurehead. Mr. Cope repeated the comments at a dinner in Ms. Tabor's home, in front of their guests, in 2005. This time the comments were specifically directed towards Ms. Tabor.

[20] Craig Tabor, the Complainant's husband, confirmed Ms. Tabor's testimony when he also testified that he was present for and heard Mr. Cope make the same comments during the get together at the Tabors' home in 2005.

(ii) Difficulty getting funding for captain's training

[21] By 1998, Ms. Tabor wanted to get training to become a captain. She decided to pursue a Master Limited course, a form of captain's training and certification, at the Nova Scotia Community College School of Fisheries in Pictou, Nova Scotia. She found out other

men from Millbrook were taking the course and the First Nation was funding their training. However, when she approached Millbrook for funding for the training, she was denied the funding and told there were no more spots available at the school.

[22] Despite this denial, Ms. Tabor phoned the school and was told a spot was still available. She registered for the Master Limited course on a Friday and began attending the school the following Monday.

[23] Ms. Tabor testified that Mr. Cope was angry at her for going to the school and told her, in a phone conversation, she should not be there as she was taking the spot from someone else. She tried many times to find out who the person was that she was allegedly taking a spot from, but was unable to do so. She also does not recall many Millbrook community members being present at the school for the course. In her recollection, there were only two other Millbrook community members attending the course.

[24] Near the end of the course, Ms. Tabor contacted Ms. Clara Gloade, a former Band Councillor for Millbrook First Nation and member of the Native Women's Association of Nova Scotia (the Association), to enquire whether there were any other options to receive funding for her fisheries training. Ms. Gloade supported Ms. Tabor's pursuit of fisheries training and offered her a job at the Association to help with the tuition fees.

[25] Ms. Gloade testified before the Tribunal. She tried to obtain funding for Ms. Tabor's course by bringing the issue before Millbrook's Chief and Council, but was unsuccessful. It is Ms. Gloade's opinion that Millbrook was reluctant to fund Ms. Tabor's course because she is a woman. As a result, and given she wanted to help Ms. Tabor obtain training to realize her ambition of becoming a captain, Ms. Gloade helped Ms. Tabor obtain employment at the Association in an effort to assist with her tuition fees.

[26] On the last day of her training, Ms. Tabor learned Millbrook would fund her course after all. Ms. Tabor successfully completed the Master Limited course, including meeting a minimum requirement for time at sea fishing.

(iii) Work experience with Millbrook and its fishery from 2000-2006

[27] Millbrook's fishery fishes various species of marine creatures. A large part of their catches are lobster, rock crab and snow crab. The lobster fishing season usually runs from the beginning of May to the end of July, followed by the snow crab season that usually runs from the end of June to September.

[28] Following her training at the School of Fisheries, Ms. Tabor worked various seafaring jobs outside of Millbrook First Nation. She started working for Millbrook in 2000. Her first position was "doing ropes", which is a form of fishing gear preparation and is done on land.

[29] In 2001 and 2002, Ms. Tabor worked as a Deckhand fishing lobster out of Pictou Landing. Her duties included regular deck jobs, such as fishing and separating lobster, baiting traps and painting buoys.

[30] Following the 2002 lobster season, Ms. Tabor made her interest known to Adrian Gloade, the Millbrook First Nation Fisheries Manager, that she was interested in fishing the snow crab season as well. Fishing snow crab is more demanding than fishing lobster, as the boat goes further out at sea and for longer periods of time, usually 2-3 days, but it is also more lucrative. Ms. Tabor was told she did not have enough experience to go snow crabbing. However, around the end of June 2002, Mr. Tabor received a call from Adrian Gloade offering him a position as a Deckhand on a snow crab boat. At that time, Mr. Tabor did not have any fishing experience in Millbrook's fishery. His only experience with Millbrook's fishery at that point, from earlier in 2002, was preparing gear and painting buoys.

[31] Later in September 2002, while Ms. and Mr. Tabor were driving together in front of the Band office, Mr. Cope flagged the couple down and explained he needed their help to go out snow crab fishing. According to the Tabors, at that time, there was a shortage of fishers because a number of them were on strike and refusing to fish. The Tabors agreed to fish the rest of the 2002 snow crab season and Ms. Tabor was assigned to a vessel as a First Mate fishing out of Port Bickerton. A First Mate has added responsibilities on top of those of the Deckhands, including overseeing the crew and navigating the boat when the

captain is not available. The position requires more training and sea experience than that of a Deckhand.

[32] Three weeks into her assignment as First Mate, Ms. Tabor informed Adrian Gloade that she was five weeks pregnant. She continued to fish the 2002 snow crab season until a particularly rough time at sea caused her some stomach pain. She decided to stop fishing for the season for the safety of her pregnancy.

[33] On March 14, 2003, Ms. Tabor gave birth to a son.

[34] Around July or August 2003, Ms. Tabor called Adrian Gloade about securing another position with the fishery. As a snow crab vessel was short a crew member, Ms. Tabor was given an opportunity to go out on a "hitch". A "hitch" is the period of time from when the vessel leaves the wharf to go out to sea until it returns to land. As mentioned above, in the case of snow crab fishing, a hitch could last a few days. Unfortunately, during the hitch in 2003, Ms. Tabor was injured and, thereafter, was no longer available to fish for the rest of the 2003 season.

[35] In Ms. Tabor's experience, to apply for a fishing position with Millbrook's fishery, one needs to call or show up at the Band office, or speak with Adrian Gloade. The Fisheries Department then decides whether a job is made available to an individual. There is no formal application process or forms to fill out. This was Mr. Tabor's experience as well. As he explained, it is the informal, however, usual process to be followed when someone is interested in obtaining a job in the fishery.

[36] From 2004 to 2006, Ms. Tabor made several attempts to gain employment fishing for Millbrook by calling or appearing in person at the Band office. Despite her Master Limited certificate and fishing experience, she was unsuccessful in doing so. When she would request work, she was treated dismissively.

[37] During this time, and given she could not secure employment with Millbrook's fishery, she eventually gave up trying to work in the fishery. She dedicated herself to taking care of her child, along with working other non-fishing jobs, including making lobster traps for Millbrook in 2004.

[38] Ms. Loretta Bernard, a former Band Councillor and former receptionist for Millbrook, also testified before the Tribunal and corroborated Ms. Tabor's accounts of trying to gain employment in the fishery. She witnessed Ms. Tabor calling and coming into the Band office to request work on the fishing boats. Ms. Tabor was not taken seriously by Millbrook officials. Ms. Bernard described their behavior as rolling their eyes, making jokes about Ms. Tabor, and making comments about the place of women in the community, namely that they should stay home with their kids.

(iv) 2007 lobster season

[39] Mr. Tabor also worked for Millbrook's fishery. His first position, in April 2002, was painting buoys and preparing gear prior to the fishing season. In fact, he first met and worked with Ms. Tabor in April 2002 and she taught him how to make lobster traps and prepare the gear for the lobster fishery. As mentioned above, Mr. Tabor was subsequently offered a position as a Deckhand for the 2002 snow crab season, his only prior experience in the fishery being painting buoys and preparing gear earlier that year. Mr. Tabor continued to work as a Deckhand during the 2003 lobster and snow crab seasons. In 2004, Adrian Gloade approached him to take his captain's training even though he did not have the sea time required to complete this training. While he did his captain's training in 2004, he lacked a first aid certificate, along with the minimum requirement of sea time, to complete his Master IV Class certificate. Despite this, he mentored as a First Mate over the course of the 2004 and 2005 seasons and fished both lobster and snow crab. For the 2006 and 2007 lobster seasons, Mr. Tabor was awarded a captain's license, on a boat named the Chief Rachael Marshall, fishing out of Lismore. He was given the captain's position without asking for it. He eventually completed his first aid certificate and received his Master IV Class certificate in 2009.

[40] As mentioned above, Mr. Tabor corroborated Ms. Tabor's assertion that all that needed to be done to get a job with the fishery was to make your interest known by calling or speaking in person to Adrian Gloade or to appear at a council meeting and manifest your interest. He also testified about the drug tests administered by Millbrook for those who wanted to fish. They are usually offered around March or April and all fishers have to

take the test before the fishing season commences. There is a second opportunity for a person to take the drug test again if the first one is failed. According to Mr. Tabor, he failed more drug tests than he passed, but was still allowed to go fishing. In her testimony, Ms. Tabor corroborated Mr. Tabor's evidence on this issue.

[41] A captain normally chooses his own crew and Mr. Tabor wanted to hire Ms. Tabor as a Deckhand for the Chief Rachael Marshall in 2007. However, he encountered resistance from Millbrook to let him hire her. After much insistence, Mr. Tabor was able to get Ms. Tabor on his crew. This was the first time Ms. Tabor was employed in Millbrook's fishery, on a fishing boat, since 2003. She ended up steering the boat for most of the 2007 lobster season.

[42] At the end of the 2007 lobster season, Mr. Tabor was asked to go out fishing snow crab for Millbrook on a different boat. He left the fishing gear from the Chief Rachel Marshall on the wharf to dry out, as is the usual practice, so it would not become moldy when later stored. The gear remained on the wharf for a few weeks. It took longer than usual for the gear to dry out since it rained the first week. Mr. Tabor also conceded that the gear remained out on the wharf longer than usual because he was out snow crab fishing. While at sea snow crab fishing, Millbrook hired people to remove the fishing gear from the wharf and deducted the costs for doing so from Mr. Tabor's 2007 earnings from Millbrook's fishery.

[43] In the past, Mr. Tabor was asked by Millbrook to help remove gear from the wharf for other fishers, and was never paid to do so. According to Mr. Tabor, it is common practice in Millbrook for fishers to help each other out and he does not understand why Millbrook had to pay people to remove his gear in 2007.

[44] There was also a disagreement between Millbrook and Mr. Tabor regarding the lobster sales arising from the Chief Rachael Marshall. Millbrook identified a shortfall between Mr. Tabor's pay and the lobster sales from his boat. Mr. Tabor claims there are discrepancies in Millbrook's accounting and that some lobster sales were not properly attributed to his boat.

[45] In 2007, Mr. Tabor was also involved in a small claims action initiated by Frank Gloade, a former Deckhand of his from the 2006 season. In 2006, Frank Gloade was asked by Millbrook to leave Mr. Tabor's crew before the end of the season in order to fish snow crab for Millbrook on another vessel. As a result, Mr. Tabor had refused to pay Frank Gloade for the part of the fishing season where he was assigned to the other boat. Frank Gloade pursued Mr. Tabor in small claims court for breach of contract. Millbrook supported Frank Gloade in the action.

[46] Following the small claims court proceedings, around August 2007, Mr. Cope told Mr. Tabor he would not fish or work in any capacity for Millbrook ever again. Mr. Tabor has not worked for Millbrook since that time. Despite the dispute with Millbrook over gear storage and sales in 2007, Mr. Tabor believes it is the small claims court action that was the catalyst for Mr. Cope telling him he would never work for Millbrook again.

(v) 2008 captain's license

[47] Following her experience as Deckhand in 2007, and seeing as Mr. Tabor was not returning to work in the fishery, Ms. Tabor was interested in taking over the license for the Chief Rachael Marshall for the 2008 lobster season. In or about early January 2008, she and Mr. Tabor approached Mr. Cope regarding the lobster sales issue from the 2007 season. During this conversation, Ms. Tabor indicated to Mr. Cope her interest for the captain's license for the Chief Rachael Marshall for the upcoming lobster season.

[48] On January 8, 2008, Ms. Tabor went to a Band Council meeting, attended by Mr. Cope and Adrian Gloade, where she reiterated her interest for the captain's license for the Chief Rachael Marshall.

[49] In January or February 2008, in a phone conversation, Ms. Tabor spoke with Adrian Gloade over speakerphone in Mr. Tabor's presence. Mr. Gloade informed her that, despite her interest, Millbrook allocated the Chief Rachael Marshall captain's license to Frank Gloade. During this conversation, when pressed by Ms. Tabor as to the reasons why she was not chosen for the captain's license, Ms. Tabor described Adrian Gloade as becoming evasive and indicated that the Fisheries Committee had considered her for a

license, but that she did not “stand out”. When Ms. Tabor asked why she was not notified that the decision was upcoming, Adrian Gloade told her the Fisheries Committee was in a rush to allocate the licenses due to an upcoming meeting involving the Department of Fisheries and Oceans. Mr. Tabor corroborated Ms. Tabor’s evidence regarding the phone conversation with Adrian Gloade and that she was told at that time that she did not get the licence as it was given to Frank Gloade.

[50] As a result, Ms. Tabor did not receive a captain’s license for the 2008 lobster season.

(vi) Experience of other women in Millbrook’s administration and fishery

[51] Ms. Tabor also testified that, to the best of her knowledge, there has never been a female captain in the Millbrook fishery. Furthermore, very few women work in the fishery, and those that do, work in low-level positions, usually on land, or perform administrative duties. Ms. Tabor feels angry, hurt, frustrated, humiliated, degraded, embarrassed and, at times, depressed that her own First Nation would exclude her from its fishery. She testified that the whole experience leading to her complaint has “taken the wind out of her sails” and that she is exhausted by having to continually try to prove herself to people who do not want to take notice of her.

[52] Ms. Gloade also testified as to her experience as a Band Councillor for Millbrook First Nation for almost 20 years. She raised local women’s issues before Band Council on many occasions. She stated she was always outvoted on issues regarding women at Band Council. Based on her observations and experiences on Band Council, she believes women, including Ms. Tabor, are treated differently than men in Millbrook.

[53] Ms. Bernard, also in her experience as a Band Councillor for over 14 years and receptionist for Millbrook for approximately 9 years, corroborated Ms. Gloade’s assertions regarding women in Millbrook First Nation. Ms. Bernard testified that women are treated differently than men and that many leaders and councillors of the community believe women should not work and should stay at home with their children. In her view, this kind of thinking is commonplace in Millbrook. Ms. Bernard added that, to her knowledge, there

are very few women working in Millbrook's fishery, and the ones that do, mostly work low-level positions in the office or baiting traps on the wharf.

C. *Prima facie* case established

[54] Ms. and Mr. Tabor testified for many hours, but answered questions succinctly and without hesitation. More importantly, their testimony was consistent with the allegations in the complaint and their affidavits, even when challenged under cross-examination. Mr. Tabor testified with a considerable amount of detail that corroborated Ms. Tabor's testimony. Although married to Ms. Tabor, I had no reason to believe Mr. Tabor was testifying in a self-serving manner in support of his wife. Overall, I found Ms. and Mr. Tabor's evidence to be credible and reliable.

[55] Ms. Gloade and Ms. Bernard also corroborated the larger context of Ms. Tabor's evidence regarding the way women in Millbrook and, more specifically, in the fisheries are treated.

[56] When considered as a whole, the evidence brought forward in support of Ms. Tabor's complaint shows, on a *prima facie* basis, a pattern whereby she has been denied employment opportunities in Millbrook's fishery. It begins with the comments by Mr. Cope, a prominent authority and decision-maker in the community. Mr. Cope's comments may indicate Millbrook's attitude towards employing women in the fishery. Coupled with her difficulty in getting funding for her captain's training, the subtle scent of discrimination begins to permeate.

[57] Despite her training and experience, including obtaining a Master Limited certificate with all its corresponding requirements of sea time experience and other certifications, Ms. Tabor only rises to the position of First Mate with the Millbrook fishery. Her one season as a First Mate coming in 2002 when there is a shortage of fishers. Otherwise, from 2000 to 2003 Ms. Tabor works mostly as a Deckhand on a few occasions.

[58] From 2004 to 2006, despite contacting the Band office and Adrian Gloade multiple times by phone and in person for a job opportunity to go out fishing, Ms. Tabor cannot secure employment with Millbrook's fishery. Ms. Bernard testified that Ms. Tabor's

requests for employment in the fishery are not taken seriously by officials in Millbrook because she is a woman. This further corroborates Millbrook's *prima facie* attitude towards employing women to fish in its fishery.

[59] In contrast to Ms. Tabor, Mr. Tabor begins fishing for Millbrook at the request of Adrian Gloade and receives employment in the fishery without issue, including regular work in both the lobster and snow crab fishery every year. Adrian Gloade even approaches him about getting his captain's training. Once Mr. Tabor completes his captain's training, and despite not meeting all the requirements to get his captain's certification, he quickly rises in rank, becoming a captain in 2006 without asking for it. This notwithstanding failing some drug tests.

[60] In 2007, Mr. Tabor's second year as a captain, he attempts to hire Ms. Tabor on his crew. It takes much convincing on his part for Millbrook to agree thereto. At the end of the 2007 lobster season, disagreements arise between Mr. Tabor and Millbrook over gear storage and sales, along with a small claims court action. The result of the small claims court action is that Mr. Tabor is told he will never work for Millbrook again. He in fact has not returned to work for Millbrook since that time.

[61] All these facts culminate with Millbrook's decision not to award Ms. Tabor a captain's license in 2008. By her account, despite making her intentions known, Millbrook did not even consider her for the role of captain. This is consistent with Ms. Tabor's evidence regarding the way Millbrook treated her other applications for work in the fishery from 2004-2006. It is also consistent with Ms. Tabor's other evidence regarding Millbrook's views of women working in the fishery.

[62] Based on the *prima facie* facts leading up to the 2008 decision, I am satisfied on a *prima facie* basis that sex was at least a factor in Ms. Tabor being denied the captain's license. Therefore, a *prima facie* case under section 7 of the *CHRA*, based on sex, has been established.

[63] On a *prima facie* basis, I am also satisfied that the fact that Ms. Tabor is married to Mr. Tabor was a factor in Millbrook's decision not to award her a captain's license in 2008. The ground of marital status encompasses discrimination based on the particular identify

of a spouse or family member (see *B. v. Ontario (Human Rights Commission)*, 2002 SCC 66). In my view, there is a *prima facie* link between the alleged performance issues Millbrook had with Mr. Tabor's captaincy in 2007; the 2007 small claims action; Mr. Tabor's assertion that he was told he would not work for Millbrook again; and, Ms. Tabor not being considered for a captaincy in 2008. Given the sequence and proximity of the events between 2006 and 2008, and Millbrook's hesitance to allow Mr. Tabor to hire Ms. Tabor in 2007, I believe sufficient evidence was presented to warrant an explanation from Millbrook as to the marital status allegation. Therefore, I am satisfied that a *prima facie* case under section 7, based on marital status, has also been established.

[64] Finally, the combined evidence of Ms. Tabor, Ms. Gloade and Ms. Bernard on their experience in Millbrook's administration and fishery leads me to believe, on a *prima facie* basis, that Ms. Tabor's experience may be reflective of a larger practice whereby women are deprived of employment opportunities in Millbrook's fishery. Ms. Tabor's evidence regarding the comments about women in the fishery and her difficulty in gaining employment with Millbrook's fishery; combined with Ms. Gloade and Ms. Bernard's evidence regarding Ms. Tabor's treatment; how women's issues are not taken seriously by Millbrook; that very few woman work in the fishery; and, that those who do work in the fishery, are given low-level positions, satisfies me that a *prima facie* case, pursuant to section 10(a) of the *CHRA*, has been established on the ground of sex.

D. Millbrook First Nation's response to the complaint

[65] As mentioned above, Millbrook led evidence to attempt to demonstrate that its actions were not discriminatory. It addressed each aspect of Ms. Tabor's case: (i) the derogatory comments regarding women; (ii) Ms. Tabor's difficulty in getting funding for her captain's training; (iii) Ms. Tabor's experience with Millbrook and its fishery from 2003-2006; (iii) the 2007 lobster season; (iv) the 2008 captain's license; and, (v) the experience of other women in Millbrook's administration and fishery.

[66] From Millbrook's initial response to this complaint to the Commission in 2008; to the filling of its affidavits before the Tribunal; and, finally, to its presentation of testimonial

evidence at the hearing of this matter, Millbrook's explanations to the actions giving rise to this complaint were constantly changing and evolving. Various inconsistencies in Millbrook's position and evidence will be highlighted in the following pages. Overall, I find Millbrook's evidence to be unconvincing, unreliable and pretextual. Having considered all of Millbrook's evidence and weighing it against the evidence offered by Ms. Tabor, on a balance of probabilities, I find Millbrook discriminated against Ms. Tabor.

(i) Derogatory comments regarding women

[67] In responding to the allegation that he made comments to the effect that the only place for women/breasts on a boat was on the bow as a figurehead, Mr. Cope's testimony was inconsistent with his sworn affidavit.

[68] In his affidavit he swore he never made the comment in 1996. With regard to the allegation that the comment was repeated in 2005, Mr. Cope swore in his affidavit that it was actually Mr. Tabor who made the comment then. He added that he found it saddening that Mr. Tabor was now attributing the comment to him in order to advance Ms. Tabor's complaint.

[69] In his testimony in chief, Mr. Cope confirmed the statements in his affidavit. However, on cross-examination, he was presented with Millbrook's initial response to the complaint before the Commission, filed by its counsel and dated September 2, 2008. A portion of that response states:

Alex Cope does agree that he made the comment regarding the front of the boat however, he made the comment in jest to Ms. Tabor's husband, Craig Tabor, who is Alex Cope's nephew.

[70] Mr. Cope then explained that he may have said the comments jokingly, along with others who were saying it as well. According to him, it was an ongoing joke and not specifically directed at Ms. Tabor.

[71] Mr. Cope's testimony on this issue was unconvincing and unreliable. It is clear the comments were made. Based on Mr. Cope's comment that it was an "ongoing joke", and Ms. and Mr. Tabor's *prima facie* evidence, I find the comments were also made on more

than one occasion. The fact that the September 2008 statement mentions the comments were made to Mr. Tabor also leads me to accept Ms. and Mr. Tabor's evidence that the comments were directed towards Ms. Tabor in 2005.

(ii) Difficulty getting funding for captain's training

[72] In his affidavit, Mr. Cope stated Millbrook was reluctant to pay for Ms. Tabor's captain's training course because she had previously enrolled in the course in 1997, but did not finish it. However, when testifying, he explained that Millbrook initially offered the course to ten people. Ms. Tabor only found out about the training once the spots were full; and, Millbrook was not initially willing to fund her spot as she circumvented the Band by going directly to the school to get another spot opened up. This resulted in one more spot than Millbrook was willing to fund. Adrian Gloade also testified that Ms. Tabor only expressed interest in the training once the spots were full and that she contacted the school directly and had a spot opened up for her.

[73] On this issue, Millbrook also challenged the reliability of Ms. Clara Gloade's evidence regarding Ms. Tabor's difficulty in getting funding for captain's training. According to Millbrook, Ms. Gloade's recollection of people and events, in general, was not accurate. Millbrook also noted that Ms. Gloade has spent her lifetime championing First Nations women's issues in Nova Scotia; therefore, it is not surprising to hear how she describes the situation of First Nations women in Millbrook. According to Millbrook, it would be counter-intuitive for someone, whose very essence and entire career has centered around the plight of Aboriginal woman in Nova Scotia, to suggest anything less than she did about the Millbrook Fishery.

[74] While I agree Ms. Gloade's memory has faded, and that she could not recall some events and some individuals, this does not, in my view, affect the reliability of her whole testimony. On the specific point that she attempted to champion Ms. Tabor's cause before Millbrook's Council to obtain funding for her course at the School of Fisheries, and her understanding from Ms. Tabor that this was because Millbrook was reluctant to fund her

course, I find her evidence reliable. I also accept her evidence that women are treated differently than men in Millbrook as will be discussed later in these reasons.

[75] While Ms. Gloade's testimony is not determinative of why Ms. Tabor was initially denied funding for her captain's training, it does corroborate Ms. Tabor's assertion that she had challenges receiving funding.

[76] I do find it concerning however that Millbrook would argue that, given Ms. Gloade defended First Nations women's rights all her life, this necessarily affects her credibility. I find this to be an unwarranted attack on her integrity as nothing in her evidence leads me to question her motives for testifying or the credibility of what she said.

[77] Overall, I find Millbrook's explanation for Ms. Tabor's difficulty in getting funding for her captain's training to be unreliable and unconvincing.

[78] Ms. Tabor explained the reason why she did not complete the course in 1997: it was to take care of her father who was ill. This is a legitimate reason for dropping out of the course and was not challenged by Millbrook.

[79] In this regard, I note Mr. Cope's response about Millbrook's willingness to only fund a certain amount of spots was not previously raised in his affidavit. Mr. Cope's affidavit simply stated:

37. Millbrook was originally hesitant to pay for Stacy's enrollment in this program as Millbrook had previously provided funding for Stacy for a course in 1997 and Stacy walked away from the program without finishing. It is not Millbrook's practice to fund additional education programs when a band member has failed to complete an earlier program (this point is also relevant to a later complaint).

[80] Incidentally, I also note Mr. Cope testified after, and was present for, Ms. Tabor's testimony explaining why she left the course in 1997 and describing Mr. Cope's statements to her in 1998. In my view, the inconsistency between Mr. Cope's affidavit and testimony puts the credibility of Mr. Cope's response to this issue in question. I believe Mr. Cope adjusted his response to this allegation in light of Ms. Tabor's testimony.

[81] Mr. Cope's explanation for Millbrook's initial denial of funding is also unconvincing when weighed against Ms. Tabor's *prima facie* evidence. That is, Mr. Cope stated there were ten spots being funded by Millbrook at the school. However, Ms. Tabor's evidence was that she only recognized two community members at the training. If only 2 out of 10 spots showed up to the training this may explain why Millbrook eventually agreed to pay for Ms. Tabor's training, but that explanation was not advanced by Millbrook. Rather, during his testimony, Mr. Cope explained: "We contested it but ended up paying for the spot because we have a reputation of paying our bills".

[82] Aside from Mr. Cope's testimony, Millbrook did not substantiate the funding of ten spots at the school or that Ms. Tabor's attendance at the school resulted in an extra spot that Millbrook had to fund. Considering the evidence on this issue as a whole, and in view of my findings that Millbrook's explanation here is not credible or convincing, I find it more probable than not that Millbrook simply did not want Ms. Tabor to attend captain's training.

(iii) Experience with Millbrook and its fishery from 2003-2006

[83] Millbrook's explanation for Ms. Tabor's alleged difficulties in gaining employment with the fishery from 2003-2006 is that she chose to stay at home with her son. It was Adrian Gloade's understanding that the Tabors had decided that Ms. Tabor would stay home and care for their son while Mr. Tabor went out to fish.

[84] While Ms. Tabor did stay at home for some time in 2003 following the birth of her son, her *prima facie* evidence was that, from 2004 to 2006, she made several attempts to gain employment in Millbrook's fishery without success. Aside from working some non-fishing jobs, she stayed at home with her children during this time, not voluntarily, but rather because she was ignored, laughed at and, ultimately, not able to get a job in the fishery.

[85] Ms. Bernard corroborated Ms. Tabor's assertion regarding her attempts to gain employment in Millbrook's fishery. Millbrook challenged the credibility of Ms. Bernard's testimony on this issue as well. As a Band Councillor, and having allegedly witnessed discrimination, Millbrook questions why she did not raise the issue at Band Council or

before the Fisheries Committee. Millbrook also questioned the motives behind her testimony, because she left Band Council on bad terms.

[86] Ms. Bernard gave me no reason to doubt her testimony that she witnessed Ms. Tabor coming to seek work in the fisheries on numerous occasions and that her application was not taken seriously. Aside from Millbrook questioning the motives behind Ms. Bernard's testimony, it did not demonstrate in its evidence anything to refute Ms. Bernard's testimony or Ms. Tabor's interest in gaining employment in its fishery from 2004 to 2006.

[87] While Millbrook questioned Ms. Tabor's interest in fishing given she was not pursuing further training and certifications, her unchallenged response was that she gave up on these options because the First Nation did not support her through funding or related employment opportunities. Ms. Tabor's repeated and consistent response is credible and reasonable given she fished in 2007 when given the opportunity and kept pursuing that opportunity in 2008. Therefore, in my view, Adrian Gloade's testimony regarding Ms. Tabor's child care responsibilities does not provide a reasonable explanation as to why she was not able to secure employment in Millbrook's fishery from 2004-2006.

(iv) 2007 lobster season

[88] Millbrook's evidence on this issue focused on alleged performance issues it had with Ms. and Mr. Tabor's tenure on the Chief Rachael Marshall in 2007.

[89] On the gear storage issue, Millbrook claims the Tabors left their fishing gear on the wharf for weeks and that it received complaints about this from workers on the wharf. It claims it eventually had to pay to hire a third party to remove and store the gear. Mr. Tabor did not deny the fishing gear from the Chief Rachael Marshall was left on the wharf longer than usual, but questioned the need to hire a third party to remove it.

[90] Millbrook also claims the Tabors did not bring the boat back in proper condition. It provided pictures to show the boat before and after the 2007 lobster season to illustrate the damage the Tabors allegedly did to the boat.

[91] The pictures of the boat presented by Millbrook were undated. Adrian Gloade, who brought forward the pictures, testified that he did not take them and was unsure as to when they were taken. It is also difficult to see any difference between the before and after pictures, aside from a difference in cleanliness. Four of the nine pictures are of rope wrapped around the propeller. No damage to the boat is apparent from the pictures.

[92] In response to Millbrook, Mr. Tabor explained that there is normal wear and tear to any fishing boat at the end of the season. While he encountered problems with the Chief Rachael Marshall in 2007, he had previously identified those issues to Millbrook following the 2006 season, however, they were not fixed prior to the 2007 season. Otherwise, the only deficiency with the boat he encountered at the end of the 2007 season was a rope that had wrapped around the propeller, which happened on the last day of the season. Mr. Tabor was not aware of any maintenance issues with the boat until Millbrook's counsel filed its response to this complaint with the Canadian Human Rights Commission (the Commission) in 2008.. Mr. Tabor added that, while a captain is responsible for maintaining the condition of the boat, for example by changing the engine oil, a captain is not a boat mechanic. Mechanical issues with the boat or its engine are dealt with by a trained mechanic, which Millbrook has on staff. Mr. Tabor explained how he changed the engine oil during the 2007 season and mounted a protector over the propeller in an attempt to keep the boat's fins from cutting the lobster trap lines.

[93] I find the boat maintenance issues raised by Millbrook in relation to the Chief Rachael Marshall in 2007 to be unreasonable and pretextual. Aside from the statements of Adrian Gloade and Mr. Cope, and the problematic before and after pictures, Millbrook did not substantiate that there was any damage caused to the Chief Rachael Marshall by Mr. Tabor in 2007 or any repairs needed to the boat as a result. It is telling that Mr. Tabor was only made aware of these alleged maintenance issues when Millbrook, through its counsel, filed its response to the complaint before the Commission in 2008. In contrast, with the gear and sales issues, Millbrook confronted Mr. Tabor shortly after they arose, requested compensation from him and provided details to support the allegations, including a bill in the case of the gear storage issue. With the maintenance issues, no compensation was requested from Mr. Tabor and no details were provided as to what

damage Mr. Tabor allegedly caused to the boat in 2007. In this regard, clause 1(15) of the *Employment Agreement* between Millbrook and Mr. Tabor in 2007 provided (**emphasis added**):

On the termination or end of the term of this Agreement, the Captain shall return the Vessel to the First Nation on or before the date of termination or the last day of the term, and the Captain shall return the Vessel to the First Nation in substantially the same condition as it was in when the Captain took possession of her, fair wear and tear expected, and the Captain may return the Vessel by properly securing it to the wharf as designated by the First Nation, and immediately notifying the First Nation of the Vessel's whereabouts. **The Captain and a representative of the First Nation shall do a survey of the Vessel to determine the condition of the Vessel and to ensure the Vessel is in substantially the same condition as it was when the captain took possession of her.**

No survey of the Chief Rachael Marshall from the 2007 lobster season was filed in evidence. In my view, all the above reasons demonstrate Millbrook's alleged maintenance issues with the Chief Racahel Marshall in 2007 are pretextual.

[94] Adrian Gloade and Ms. Dawn Ellis, Senior Finance Clerk for the Millbrook First Nation fishery, also provided extensive evidence on how captains are paid and how the First Nation makes money through the fisheries. This was related to the disagreement between Millbrook and Mr. Tabor regarding lobster sales from the Chief Rachael Marshall in 2007.

[95] In sum, a captain and crew's pay is determined at the start of the season, with approval from Millbrook. The First Nation provides the boat and supplies and recovers those expenses from the sale of the lobsters caught. It also takes a percentage of the sales as its profit, with the remainder going back to the captain. When a boat comes to shore, the lobster catch is weighed and a landing slip is provided to the captain accounting for the amount of lobsters caught. The captain then sells the lobsters to a buyer approved by Millbrook. The buyer pays Millbrook directly and the amount is credited to the captain's boat.

[96] On this issue, Millbrook's September 2008 response to Ms. Tabor's complaint claimed: "Mr. and Ms. Tabor took lobster to another buyer outside of the Band after being specifically told not to do so". Adrian Gloade testified that the First Nation did not receive payment for the final weeks of Mr. Tabor's 2007 lobster season. He called Millbrook's approved buyer, who stated they had not dealt with Mr. Tabor. According to Adrian Gloade, once he determined who Mr. Tabor had sold his lobster catch to, he asked them if they knew they were to send payment for the lobsters to the First Nation and not to Mr. Tabor. The buyer was not aware of this and were going to pay Mr. Tabor. Therefore, payment to Mr. Tabor was stopped and sent to Millbrook instead.

[97] In response, Mr. Tabor explained that he only ever sold his lobster catches to J & K Fisheries or North Nova in 2007, Millbrook's two approved buyers.

[98] On cross-examination, Adrian Gloade testified that he probably gave Mr. Tabor permission to sell to another buyer, he was just not informed of the change and the buyer was not instructed to pay the First Nation. This is contradictory to Millbrook's previously stated 2008 response. Then Adrian Gloade was presented with accounting documentation indicating payments from the approved buyer to Millbrook, including a copy of a dated cheque, which coincide with Mr. Tabor's final weeks of the 2007 lobster season. His response was that the cheques arrived late and the approved buyer had told him that they did not deal with Mr. Tabor. Ultimately, Adrian Gloade testified that he was not aware of any intentional discrepancies with Mr. Tabor's sales during the 2007 season. As a result, I find Adrian Gloade's evidence on this issue to be unreliable.

[99] With regard to the sales shortfall between Mr. Tabor's pay and the landings from his boat, Ms. Ellis stated that the shortfall occurred because Mr. Tabor's expenses and weekly pay draws exceeded the weekly catches. In Ms. Ellis' opinion, the cause of the shortfall was because Mr. Tabor's pay seemed high. Ms. Ellis added that since 2008, Millbrook has set a standard pay for captains and crew members in response to these types of shortfalls.

[100] I found Ms. Ellis' evidence to be reliable. What I draw from her evidence on the lobster sales shortfall issue is that Millbrook and Mr. Tabor were in conflict with each other

over this issue. As explained above, Mr. Tabor believes there are discrepancies in Millbrook's accounting for the sales of the Chief Rachael Marshall in 2007 and that some sales were not properly attributed to this boat.

[101] It is also clear that Millbrook and Mr. Tabor were in conflict over the gear storage issue. Mr. Tabor also provided *prima facie* evidence on his conflict with Millbrook over Frank Gloade's small claims court action. Despite these conflicts, Millbrook denies saying to Mr. Tabor that he would never work for them again or that it prevented him from fishing for them since that time. According to Millbrook, Mr. Tabor was no longer interested in fishing after 2007, which it claims is evidenced by the fact that he pursued studies in other fields.

[102] While it is true that Mr. Tabor went on to study other fields, I also accept his explanation that he did this as an alternative to Millbrook's refusal to hire him. This is corroborated by Millbrook's September 2008 response to the complaint:

Neither Mr. nor Ms. Tabor were issued permanent contracts through the Band for the 2008 fishing season due to the issues that the Band had with respect to the boat operated by Mr. and Ms. Tabor during the 2007 fishing season.

Further, Mr. Tabor was not considered for an employment contract because he had informed the Band he had taken the RCMP entrance exam and was waiting to hear back from the RCMP with respect to entering their training program and that he also intended to take the Band's heavy equipment course so that he could go to western Canada to work.

[103] I find the conflict between Millbrook and Mr. Tabor over gear storage, sales and the small claims court action were factors in Millbrook's refusal to hire Mr. Tabor in 2008. I also find Millbrook's refusal to hire Mr. Tabor then factors into Millbrook's decision not to hire Ms. Tabor in 2008.

[104] That is, aside from Millbrook claiming there was a more qualified candidate for the captain's license in 2008, Millbrook argues Ms. Tabor's performance in 2007 provided added justification for its licensing decision. In its view, given it was mostly a two person

crew in 2007, it was reasonable that it would discuss performance issues regarding the Tabors when deciding on the most qualified person to captain the vessel the following year. Furthermore, according to Millbrook, their *Employment Agreement* with Mr. and Ms. Tabor in 2007 held both the captain and crew responsible for many duties. Millbrook contends Ms. Tabor's performance issues in 2007 included, based on its *Employment Agreement*, holding her responsible with Mr. Tabor for any deficiencies in maintenance, gear storage and sales. Millbrook specifically referred to clauses 1, 1(1), 1(3), 1(10) and 2 of the *Employment Agreement* as holding the captain and crew responsible for issues related to the boat.

[105] There is nothing in the *Employment Agreement* that convinces me that Ms. Tabor could be held responsible for issues related to sales, maintenance and gear storage. Most of the duties and responsibilities enunciated in the *Employment Agreement* begin with the recital "The Captain shall...", including maintaining the vessel and equipment in good condition (clauses 1(1) and 1(5)) and sales (clauses 1(6) and 1(7)). The *Employment Agreement* also holds the captain strictly liable for any damage to the boat:

The Captain acknowledges that he is responsible for the cost of any damage, loss of and/or repairs pertaining to the fishing vessel, its equipment, (mechanical, electronic etc.) and fishing gear that is attributable, directly or indirectly, to the negligence of the Captain and or the Crew Members under his command.

[106] The other clauses referred to by Millbrook state:

Clause 1: The Captain and the Crew Members (the first mate and the deck hand) shall be available to work at reasonable times and for reasonable periods of times to perform such duties as are required by the First Nation.

Clause 1(3): The Captain and the Crew Members shall fish the First Nation's Vessel during the 2007 lobster season in LFA-26-A, until the conclusion of the 2007 lobster season, [...] and is to carry out such fishing duties in a diligent, effective and efficient manner.

Clause 1(10): The Captain is responsible for any training and command of the Crew Members on the Vessel during the 2007, LFA- 26- A, lobster season and the periods required before and after the season to maintain the Vessel and equipment.

Clause 2: The term of this Agreement is for the term, commencing the 1st day of May 2007 and ending two (2) weeks after the end of the Lobster season (15th July 2007). A breach of any term or condition of this agreement by the Captain or a crew member shall be deemed "just Cause" for dismissal of that person and the First Nation may terminate the services of that person or persons for a the breach of any term or condition of this Agreement [...].

It is not clear to me how these clauses relate to sales, maintenance and/or gear storage, let alone that they support Millbrook's argument of holding the crew responsible for these issues.

[107] Aside from Ms. Tabor being a crew member on the Chief Rachael Marshall in 2007, Millbrook did not convince me that the gear storage and alleged sales issues, along with the pretextual maintenance issues, somehow demonstrated poor performance by Ms. Tabor. There was insufficient evidence that Millbrook did a performance evaluation for the captain and crew of the Chief Rachael Marshall in 2007, let alone that an individualized assessment of Ms. Tabor's performance was done.

[108] Mr. Cope and Adrian Gloade did comment on the state of the Chief Rachael Marshall's engine following the 2007 lobster season, and that this reflected Ms. Tabor's inability to change the oil of a boat. However, aside from making this comment, Millbrook did not substantiate this claim. Furthermore, Ms. Tabor explained that she knows how to change the oil of a boat, however she did not change the oil of the Chief Rachael Marshall in 2007. In my view, Mr. Cope and Adrian Gloade's unsubstantiated claim about Ms. Tabor's ability to change the oil of a boat adds to my finding that the maintenance issues alleged by Millbrook from the 2007 lobster season are contrived.

[109] I also believe associating the gear storage and alleged sale issues to Ms. Tabor is pretextual as well. As I found above, Millbrook was in conflict with Mr. Tabor over the gear storage and sales issues, along with the small claims court action. This resulted in

Mr. Tabor being excluded from future work with Millbrook. Given Millbrook's insufficient explanation and evidence in support of associating the gear storage and alleged sales issues to Ms. Tabor, I believe it is more probable than not that Millbrook grouped Ms. Tabor into the conflict it had with Mr. Tabor because she is his wife. In fact, Ms. Tabor assisted Mr. Tabor in challenging the alleged sales issues by advocating on his behalf before Band Council regarding those issues.

[110] If Mr. Tabor was excluded from future work because of his conflict with Millbrook, and Ms. Tabor is associated with this conflict as well, it is probable that Millbrook excluded her from future work on this basis as well. For this reason, I believe Ms. Tabor's marital status was a factor in her not being considered for a captain's license in 2008.

[111] As will be explained in the following pages, I also believe Ms. Tabor's sex was a factor in her not being considered for a captain's license in 2008.

(v) 2008 captain's license

[112] Millbrook contends Ms. Tabor did not formally apply for the captain's license in 2008. Despite this, Millbrook argues that it appropriately considered her for the license and compared her qualifications to the other two candidates who applied for the license before making their choice. In comparing Ms. Tabor's qualifications to those of Frank Gloade, the candidate chosen for the license, Millbrook says his qualifications were superior.

[113] In my view, Millbrook's position, that Ms. Tabor did not apply but was still considered for the 2008 captain's license, is contradictory and pretextual. I find Millbrook did not consider Ms. Tabor for a captain's license in 2008 because she is a woman and because of the conflict it had in 2007 with Mr. Tabor.

[114] On the first point about not formally applying, Mr. Cope and Adrian Gloade testified that, while Ms. Tabor had attended a Band Council meeting in January 2008 and stated her intention to apply for the captain's license, she did not formally apply and they did not hear from her again after this. Two other candidates contacted the Band office and applied for a license.

[115] When Mr. Cope and Adrian Gloade were asked how a person formally applies for a license, they agreed that there is no formal application process. Rather, a candidate is required to contact Adrian Gloade and, subsequently, take and pass a drug test. This is consistent with Mr. and Ms. Tabor's evidence that there is no formal process to apply for a position with the Millbrook fishery. That is, you only need to make your intention known and a job is usually made available. However, Mr. Cope and Adrian Gloade's reversal in positions – formal application process vs. no formal application process – highlights another reason for me to question the reliability of their evidence.

[116] Despite the lack of a formal application, according to Mr. Cope and Adrian Gloade, in early 2008 the Fisheries Committee held a meeting where it discussed the candidates for the captain's license, including Ms. Tabor. During that meeting, Mr. Cope and Adrian Gloade state the Fisheries Committee determined Frank Gloade had better qualifications and more experience than Ms. Tabor. As a result, Frank Gloade was promised the captain's license, subject to drug testing.

[117] On this issue, Adrian Gloade initially testified that he did not recall having a conversation with Ms. Tabor following the decision to promise Frank Gloade the captain's license. However, on cross-examination, he stated that, while he may have spoken to Ms. Tabor, she only asked him about the bidding process for the fishing license. He claims he did not inform her at that time that she would not receive the license.

[118] I find Adrian's Gloade's statement is not credible as it does not fit with the preponderance of evidence in this case. It is logical that Adrian Gloade and Ms. Tabor would discuss the process for allocating fishing licenses (open bid system or employment contract), given Ms. Tabor had attended a Council meeting and stated her intention to apply for a captain's license. However, it does not seem probable that they would have only spoken about the process for allocating fishing licenses given the Chief Rachael Marshall license Ms. Tabor was interested in had already been promised to Frank Gloade.

[119] The timing of this conversation coincides with when Mr. Cope and Adrian Gloade say the Fisheries Committee met and determined Frank Gloade would be awarded the license. It further coincides with Ms. and Mr. Tabor's *prima facie* evidence regarding when

they spoke to Adrian Gloade. In response to Millbrook, Ms. Tabor added that, as the decision to award the captain's license to Frank Gloade was made before drug testing occurred on April 9, 2008, she saw no reason to take the drug test. In my view, Ms. Tabor's explanation and evidence on this issue is logical and credible. I find Adrian Gloade informed her in January or February 2008 that she would not receive the captain's license. His statement to the contrary is unreliable.

[120] To reinforce its decision to hire Frank Gloade over Ms. Tabor, Millbrook called Mr. Allan Tobey to testify. He was qualified as an expert on the *Fisheries Act* and its regulations, and their application to Frank Gloade and Ms. Tabor in comparing them for a captaincy. He also provided a report, which opines as to who was more qualified to captain a fishing boat in 2008 as between the two candidates.

[121] Mr. Tobey's report concludes Frank Gloade was more qualified in 2008, based on having superior training (a Fishing Master IV Class certificate) and experience (fished for lobster in Lismore in 2003, 2004, 2005 and 2006). To form his opinion, Mr. Tobey was provided with Frank Gloade's "affidavit", an unsigned statement, prepared by Millbrook's counsel, attesting to Mr. Gloade's qualifications and filed on consent of the parties for the truth of its contents. Mr. Tobey's evaluation of Ms. Tabor's qualifications was based on "a copy of someone's affidavit" and he was told that she had been a student Deckhand for a few years but no area was specified. Mr. Cope's affidavit provides information on Ms. Tabor's qualifications as described by Mr. Tobey:

- a) 2001 – student deckhand with Millbrook fisheries;
- b) 2002 – student deckhand with Millbrook fisheries;
- c) 2002-2003 – student deckhand with Millbrook fisheries;
- d) 2007 – First Mate on *Chief Rachel Marshall*.

Mr. Cope's affidavit also specifies that Ms. Tabor received her Master Limited certificate in 1998.

[122] On cross-examination, it came out that Mr. Tobey was not provided with a complete overview of Ms. Tabor's seafaring experience prior to working for Millbrook, along with

other training certificates she received for simulated electronic navigation, marine emergency duties, and proficiency in radio. In response, Mr. Tobey became defensive and was dismissive of Complainant Counsel's suggestion that some of the additional training certificates were superior to the certifications held by Frank Gloade. In Mr. Tobey's opinion, Ms. Tabor's additional experience and certifications were related to the shipping industry. As his opinion was sought and delivered based on a comparison of the "fishing experience" and "actual experience in Lismore", this additional information did not change his opinion that Frank Gloade was more qualified. Ms. Tabor had an inferior captain's certificate (Master Limited) and had only one fishing season in Lismore (2007). Her two other fishing seasons being in Pictou Landing (2001-2002); and, she did not complete the fishing season in 2003.

[123] I did not find Mr. Tobey's evidence to be reliable or useful in this case. Mr. Tobey was provided with incomplete information to make a comparison of the qualifications of Ms. Tabor and Frank Gloade; and, the information he was provided with came solely from Millbrook. In this regard, I note Mr. Cope's affidavit prefaces Ms. Tabor's fishing experience from 2001-2003 as being "student". Mr. Cope explained that this was because Ms. Tabor was part of a mentoring program during this time. While less experienced fishers may mentor with more experienced fishers, and I note some of Mr. Tabor and Frank Gloade's experience was described as "mentoring"; that said, neither Mr. Tabor nor Frank Gloade were described as "students" while they mentored. In my view, Mr. Cope's characterization of Ms. Tabor as a "student" from 2001-2003 is an obvious attempt to discredit her fishing experience.

[124] Along with the one-sided information relied upon to produce his expert report, the fact that Mr. Tobey was so fixed in his opinion and not open to challenges thereon, makes me question the neutrality of his opinion. In any event, even if I accept Frank Gloade was more qualified than Ms. Tabor in 2008, Mr. Tobey's opinion does not assist in determining whether a comparison of the qualifications of candidates was actually done by Millbrook or that Ms. Tabor was actually considered for the 2008 captain's license.

[125] In this regard, Millbrook also pointed out that Ms. Tabor's Master Limited certificate was expired in 2008. Millbrook adds that it is improbable that she would have been able to

reacquire her certifications prior to the 2008 lobster season. I fail to see why the fact that her Master Limited certificate was expired in 2008 is relevant to Millbrook's position in response to this complaint. While it may reinforce its argument that Frank Gloade was more qualified than Ms. Tabor, it does not shed light on Millbrook's position that a comparison of the qualifications of candidates was actually done. As mentioned above, I do not believe Ms. Tabor was considered for a license, let alone that her qualifications were considered alongside those of Frank Gloade.

[126] On this issue, both Mr. Cope and Adrian Gloade stated in their affidavits and testified before the Tribunal that Millbrook is required to submit each captain's certificate to their insurance company. According to them, insurance rates will depend on the qualifications of the captain. They must select the highest qualified captain who applies, because insurance is very costly for new or inexperienced captains and, if there is an accident, Millbrook would have to explain why a more experienced captain was not chosen.

[127] However, on cross-examination, neither Mr. Cope nor Adrian Gloade were able to say whether there was actually a cost difference between different captains based on experience and qualifications. Nor were they able to produce any insurance documentation in this regard. Given Mr. Cope and Adrian Gloade were unable to substantiate their claim, whether through their testimony or through documentation, that there is different insurance premiums based on the qualifications and experience of captains, I find Millbrook's insurance argument to be pretextual.

[128] Furthermore, according to Millbrook, experience fishing in Lismore was a heavily weighed consideration in awarding the captain's license. Frank Gloade had fished for lobster in Lismore from 2003 to 2006, while Ms. Tabor only had the one season in Lismore in 2007. Interestingly, Frank Gloade's experience fishing in Lismore corresponds to the same time period where Ms. Tabor could not gain employment in Millbrook's fishery. If Frank Gloade was more qualified than Ms. Tabor in 2008, it is in part because he was given training and fishing opportunities Ms. Tabor was not. As discussed previously, Frank Gloade and Mr. Tabor rapidly gained training and experience fishing for Millbrook. In some cases, Mr. Tabor did not even have to request employment or training before being

offered it by Millbrook, including a captaincy. However, as Ms. Tabor established in her *prima facie* case, from 2004 to 2006, despite contacting the First Nation multiple times for a job, she could not secure employment with Millbrook's fishery. This lack of experience is then held against her in the 2008 competition.

[129] In my view, the situation in 2008 was the same as it was from 2004 to 2007. Ms. Tabor testified, and was corroborated by Ms. Bernard, that her requests for employment in the fishery from 2004 to 2006 were not taken seriously by officials in Millbrook because she is a woman. Mr. Tabor also experienced resistance from Millbrook to hire Ms. Tabor as part of his crew in 2007. There is no reason to believe that Millbrook's attitude towards Ms. Tabor changed in 2008.

[130] I find Millbrook's explanation for not awarding Ms. Tabor the captain's license in 2008, based on qualifications, to be unreliable, unconvincing and unreasonable. The impression I am left with after analyzing Millbrook's response to this complaint is that it crafted an explanation to Ms. Tabor's allegations, after the fact, and tailored its argument and evidence in an attempt to narrow the issues in this complaint to a simple comparison of the qualifications of Ms. Tabor and Frank Gloade for the 2008 captain's license. The emphasis on qualifications, including having an expert testify on the issue in an attempt to validate a stated "formal" comparison of candidates; and, raising an insurance issue related to qualifications, which was not supported by any documentation or otherwise, are all indications of this. It is also contradictory in my mind, and indicative of a pretext, that Millbrook would, on one hand, argue Ms. Tabor did not apply for the captain's license in 2008 and, on the other hand, say she was fully considered based on comparing her qualifications against the other candidates who applied. As stated above, the issues in this complaint are much broader than the 2008 captain's decision and Ms. Tabor's treatment in the years leading up to that decision is indicative that she was not considered at all for that license and that Millbrook's response to this complaint is pretextual.

[131] Furthermore, I found Millbrook's main witnesses, Mr. Cope and Adrian Gloade, testified in an unreliable manner. They relied heavily on their affidavits when testifying and would often times read their affidavits before answering questions. When confronted with omissions in his affidavit, Mr. Cope responded with words to the effect of "I wasn't asked

the question”, which puts in question the reliability of his affidavit. Most importantly, and as stated above, Mr. Cope and Adrian Gloade made statements during their oral evidence, which have been highlighted throughout this decision, that contradict their affidavits and Millbrook’s previously stated position to the complaint, and which did not accord with the preponderance of evidence in this case. I believe Mr. Cope and Adrian Gloade’s evidence was changing and evolving in light of evidence in support of Ms. Tabor’s case and in an attempt to justify Millbrook’s actions. In this regard, I note Millbrook is their employer and many of the allegations in this complaint involve actions or decisions taken by them in their roles with Millbrook First Nation.

[132] Overall, the evidence indicates Ms. Tabor was not considered for a captain’s license in 2008 and that her sex was a factor. This finding is consistent with the way in which Ms. Tabor was treated by Millbrook when applying for jobs in the fishery from 2004 to 2006. Ms. Bernard corroborated this allegation and Millbrook did not provide a reasonable explanation to it. The fact that her lack of experience is then used against her in 2008 perpetuates the discrimination based on sex.

[133] As a result, and pursuant to section 7 of the *CHRA*, I find Millbrook did not consider Ms. Tabor for a captain’s license in 2008 because she is a woman.

(vi) Experience of other women in Millbrook’s administration and fishery

[134] A majority of Millbrook’s witnesses, those who live in the community, asserted that as First Nations people they have been discriminated against for being First Nations and, therefore, they would not discriminate against others. Aside from these answers appearing to be rehearsed, because each witness was asked the same question and answered essentially the same way, I do not accept this logic. Having suffered discrimination does not guarantee that a person will not discriminate against another person. This is especially not convincing when the witnesses are claiming they were discriminated against on the basis of being First Nations, which is completely different from the main grounds alleged in this case: sex and marital status. With regard to discrimination based on sex, I would add

that the prejudices and stereotypes surrounding differences between men and women transcend race, culture and ethnicity.

[135] In response to the evidence that there are few women working in Millbrook's fishery, let alone actually fishing, Mr. Cope and Adrian Gloade stated in their affidavits that there were 7 women working in Millbrook's fishery in 2007 and 5 in 2008. Adrian Gloade believes these numbers are significant considering how small Millbrook's fishery is. According to Adrian Gloade, Millbrook hires on average 40-65 crew members annually to work on its fishing boats. He also mentioned that Millbrook encourages women to be involved in the fishery and pays for their training if they want it, which it did for Ms. Tabor as well.

[136] According to Millbrook, the 5 women working in Millbrook's fishery in 2008 were Michelle Gloade, Margaret Gloade, Jean Abram, Carla Asprey and Karen Asprey. Michelle Gloade and Karen Asprey provided affidavits and testified before the Tribunal. Margaret Gloade and Carla Asprey only provided affidavits.

[137] Michelle Gloade works as an administrative assistant for the Millbrook fisheries office. In 2005/2006, Carla Asprey was Manager of the Millbrook fisheries wharf and, according to Karla Asprey, now performs "dock-side monitoring" with the fishery. Insufficient evidence was provided to determine Jean Abram's position with the Millbrook fishery. Overall, of the 5 women identified by Millbrook, only 2 have actually fished for Millbrook: Margaret Gloade and Karen Asprey.

[138] Margaret Gloade's affidavit indicates she works as a Deckhand fishing snow crab. She states she has been employed in the Millbrook fishery on and off for approximately 20 years. Over this period of time, she indicates she has been involved in trap construction, maintenance, cleaning boats and has worked as a Deckhand.

[139] Ms. Asprey fishes for hagfish/slime eels with her husband. While she holds the fishing license for their boat, her husband is the captain. She testified that she does not spend much time on the boat. Mainly, she builds traps, baits and gets supplies for the boat. She explained that, while she is not a captain, she could be if she wanted to. She is also convinced Millbrook would pay for her captain's training and certifications as it has

done with others. According to Ms. Asprey, Millbrook encourages women to work in its fishery. She also testified she has never experienced discrimination on the basis of her sex from Millbrook's Fisheries Department, Mr. Cope or Adrian Gloade.

[140] I find Ms. Asprey's testimony is not particularly convincing or useful in this case. Her statements regarding her ability to be a captain and having the First Nation pay for her training are anecdotal; and, there was no elaboration on how Millbrook encourages women to work in the fishery. Furthermore, her role in the fishery fits with those of other women in Millbrook. That is, she works mainly on land. Therefore, I do not find Ms. Asprey's testimony to be supportive of Millbrook's position of encouraging women to fish or supporting them in their pursuit of higher fisheries training.

[141] The fact remains, as presented by Millbrook, that out of the 45-60 people working as crew members in Millbrook's fishery in 2008, 2 were women. Furthermore, it appears that women working in Millbrook's fishery, especially at the time the complaint was made, predominantly occupy non-fishing positions. I find it misleading that Millbrook would say 5 women work in the fishery, and that this is significant, given only 2 actually fish and the others work non-fishing jobs. This is another example that leads me to believe Millbrook's response to this complaint is pretextual.

[142] Currently, there are still few women working in Millbrook's fishery. Mr. Cope admitted there has been a steady decline in women working in the fishery. He also indicated that in 2014 there were only 4 women working in Millbrook's fishery. Based on their testimony and affidavits, these four women include Michelle Gloade, Margaret Gloade, and Karen Asprey. The fourth woman was not identified, although Mr. Cope's affidavit indicates she may work in the snow crab fishery. Otherwise, as mentioned above, only Margaret Gloade and Karen Asprey actually fish for Millbrook, with Ms. Asprey only doing a limited amount of fishing based on her testimony.

[143] On its own, the statistical evidence of women being a minority in Millbrook's fishery does not substantiate that Ms. Tabor, or women generally, are denied employment opportunities in Millbrook's fishery (*Canada (Attorney General) v. Walden*, 2010 FC 490 at paras. 109-110). However, it is circumstantial evidence from which inferences of

discriminatory conduct may be drawn (*Canada (Human Rights Commission) v. Canada (Department of National Health and Welfare)*, 1998 CanLII 7740 (FC) at para. 22).

[144] In my view, the statistical evidence reinforces Ms. Tabor's evidence regarding the comments about women in the fishery and her difficulty in gaining employment and funding for training within Millbrook's fishery. When combined with Mr. Tabor's evidence on his career path with Millbrook's fishery, a stark contrast between the treatment of men and women in Millbrook's fishery emerges. Finally, there was Ms. Gloade and Ms. Bernard's evidence regarding Ms. Tabor's treatment and their own experience with Millbrook's administration and fishery, evidence I found to be credible despite Millbrook's challenges thereto as addressed above. With specific regard to Ms. Gloade, I would note that while she could not remember some conversations and events, her consistent and repeated impression of her two decades on Band Council, through her testimony and affidavit, was that men and women are treated differently in Millbrook. This long-term impression is reliable and is distinguishable from remembering specific events or conversations. For all these reasons, I am convinced that Ms. Tabor's experience, and the statistical representation of women in Millbrook's fishery, is reflective of a practice of depriving women of employment opportunities fishing for Millbrook's fishery.

[145] As a result, I find Millbrook has engaged in a discriminatory practice pursuant to section 10(a) of the *CHRA*.

E. Complaint substantiated

[146] In weighing all the evidence on a balance of probabilities, and pursuant to the analysis above, I find Ms. Tabor's complaint under sections 7 and 10 of the *CHRA* to be substantiated. Ms. Tabor has presented sufficient evidence to establish that she has been denied employment opportunities to fish for Millbrook's fishery because she is a woman. This culminated in the 2008 decision not to consider her for a captaincy, where her marital status was also a factor in her being denied that employment opportunity. I also find Ms. Tabor's situation is reflective of a larger practice within Millbrook's fishery of depriving

women employment opportunities to fish. I find Millbrook`s response to Ms. Tabor`s evidence not to be credible and to be pretextual.

[147] The circumstances that led to this complaint are unfortunate given the events not only happened in a small community, but amongst family members. Moving forward, I trust the parties will be able to move past this situation and achieve reconciliation. I am also hopeful that Ms. Tabor will one day be able to realize her dream of becoming a captain of a fishing boat.

III. Order

[148] As the complaint has been substantiated, I may make an order against Millbrook First Nation pursuant to section 53(2) of the *CHRA*. However, the parties have agreed that they will first try to resolve the issue of remedy amongst themselves. I therefore invite the parties to begin settlement discussions in response to the findings in this decision. I will seek an update from the parties thereon following the release of the reasons for my decision on Ms. Tabor`s retaliation complaint.

[149] Until such time as the issue of remedy is finally resolved, the Tribunal retains jurisdiction in this matter.

Signed by

Sophie Marchildon
Tribunal Member

Ottawa, Ontario
April 29, 2015

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1658/01311 & T1659/1411

Style of Cause: Stacey Lee Tabor v Millbrook First Nation

Ruling of the Tribunal Dated: April 29, 2015

Date and Place of Hearing: July 28 to 30, 2014
August 1, 2014
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September 16, 2014

Truro, Nova Scotia

Appearances:

Gary A. Richard & Daniel F. Roper, for the Complainant

No one appearing, for the Canadian Human Rights Commission

Thomas J. Kayter, for the Respondent