

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2022 CHRT 17

**Date:** May 20, 2022

**File No.:** T2437/9619

**Between:**

**Stacey Bird**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Paul First Nation**

**Respondent**

**Decision**

**Member:** Colleen Harrington

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## **I. Overview**

[1] Stacey Bird (Complainant) is a member of the Paul First Nation (Respondent). She is a single mother of three daughters and was a caregiver to her own mother when she was experiencing failing health.

[2] Ms. Bird was hired as a kindergarten teacher at the Paul First Nation School for the 2017-2018 school year. Ms. Bird taught at the school for approximately 4 weeks in September of 2017. During this time, she relied on her mother and other family members to care for her youngest daughter while she was at work, but this situation became untenable when her mother was suddenly hospitalized. Ms. Bird requested a leave of absence for 5 weeks to be able to care for her daughter while her mother was in the hospital. The Director of Education for the Paul First Nation would not approve the leave request until Ms. Bird provided 5 weeks of lesson plans and materials.

[3] Ms. Bird alleges that she was not reasonably accommodated by her employer when she requested an urgent leave of absence to fulfil her childcare obligations. She says that the condition imposed on her as a single parent in order to take a leave of absence was too onerous and led to her resignation. When she wrote to the Respondent to explain her situation and offered to return to work after her mother was out of the hospital, she was ignored for several weeks. Ms. Bird says the Respondent's conduct constitutes discrimination on the basis of her marital and family status, contrary to section 7 of the *Canadian Human Rights Act*, RSC 1985, c H-6 (*CHRA*).

[4] The Paul First Nation submits that Ms. Bird has failed to establish a *prima facie* case of discrimination and asks that her complaint be dismissed.

## **II. Decision**

[5] The condition Ms. Bird was required to meet before the Respondent would approve her leave of absence interfered with her childcare obligations. This requirement led, in part, to her decision to resign from her employment. I find that the Respondent discriminated

against Ms. Bird on the basis of her family status, contrary to s.7(b) of the *CHRA* and, as such, she is entitled to a remedy pursuant to s.53(2) of the *CHRA*.

### **III. Factual Context**

[6] For the most part, the relevant facts are not disputed.

[7] Ms. Bird, whose traditional name is Tatanka Tha Wiya (White Buffalo Calf Woman), describes herself as a professional trained and guided in the traditional ways. She is very connected to the Stoney and Cree culture and languages of the Paul First Nation (PFN), as well as the land, the people and their ceremonies. Education is valued in her family, and Ms. Bird was encouraged by her Elders to become a teacher.

[8] When Ms. Bird graduated from high school, this was celebrated by her family and community. She started her post-secondary education at Red Deer College. While there, Ms. Bird had her first two children a year apart. She withdrew from college for a time to enjoy her children and be a mom, but her own mother encouraged her to finish her education, so she enrolled at the University of Alberta. While there she became pregnant with her third child. She testified about the challenges she experienced while pursuing her education as a mostly-single mother of very young children. These included homelessness, health issues and an investigation by child and family services when she brought her newborn baby to class.

[9] Despite the challenges she experienced, Ms. Bird convocated from the University of Alberta with a degree in elementary education in June of 2017. She provided letters from professors and her practicum supervisor that speak to her strengths and perseverance as a student teacher.

[10] As a member of the PFN who had pursued post-secondary studies to become a qualified teacher, Ms. Bird was understandably encouraged by PFN's Director of Education, Nicole Birk-Calihoo, to apply for the position of kindergarten teacher for the 2017-2018 school year. Although she stated she was still recovering from the stresses associated with completing her degree, Ms. Bird agreed to apply for the position in June of 2017. However, she withdrew her application because her mother was not well and she told Ms. Birk-Calihoo

she would prefer to be a substitute teacher instead for the time being, because of her caregiving responsibilities.

[11] Ms. Birk-Calihoo encouraged Ms. Bird to apply for the job again later in the summer and she agreed to be considered for the position. She had a job interview with Ms. Birk-Calihoo and the PFN School Principal, Keri Card-Esau, in August 2017 and was offered the job. Ms. Birk-Calihoo and Ms. Card-Esau both testified that Ms. Bird told them she could have some difficulty finding childcare as this had been an issue for her throughout her university studies. Ms. Card-Esau told her that she was welcome to bring her child to school if she needed last minute childcare, as other staff at the school often did.

[12] Ms. Bird testified that, as soon as she knew she had been offered the job, she went to the PFN daycare and completed an application for the care of her youngest daughter. She says she told the daycare staff that her daughter was not yet walking and she was led to believe that she would be accommodated in either the infant or toddler room. She testified that she confirmed the daycare registration on August 28, 2017 and she signed her one-year teaching contract on August 31, 2017.

[13] On September 1, 2017, the first day of school, Ms. Bird brought her youngest daughter to the PFN daycare but was advised by staff that they could not care for her because she was not yet walking. The daycare's Director, whom Ms. Bird says she had spoken to beforehand, was now on a month-long leave of absence.

[14] This was obviously a stressful and unwelcome start to her first teaching job. Ms. Bird testified that she took her daughter to school with her and told Ms. Card-Esau what had happened. She then took her daughter home and Ms. Card-Esau encouraged her to send an email to the daycare, which she did. The email, entered as evidence at the hearing, was sent on September 1, 2017 to the PFN Band Manager, the Human Resources Director, and the Band Council member responsible for the daycare. In her email, Ms. Bird expressed how disheartened she was to have been denied childcare and stated that she had limited childcare options, as her mother was very ill and was in a wheelchair. She indicated that her other relatives work or go to school and that "this obstacle is threatening my job when it really shouldn't." Ms. Bird did not receive a response to this email from anyone. Rather, after

her employment ended, she sought a response from the daycare and was provided with a letter from the Director dated October 11, 2017 stating that “the daycare has not formally denied [her] Childcare services.”

[15] Ms. Bird testified that, while waiting for a response to her September 1 email about the daycare, she was very busy with her new job. She was also caring for her mother and grandmother, who were now caring for her daughter while she was working. Ms. Bird testified that her mother told her not to worry because she wanted Ms. Bird to succeed in her new career.

[16] Ms. Bird only worked as a teacher at the PFN School for the month of September, a total of approximately four weeks. During this time Ms. Bird prepared and submitted to Ms. Card-Esau two emergency sub plans as required. Sub plans are lesson plans that can be provided to a substitute teacher who is called in to teach a class when the classroom teacher is absent. Ms. Bird also provided Ms. Card-Esau with a plan that set out an overview of her year (a “year at a glance” plan). These were the only plans that were required to be submitted by teachers at this early point in the year.

[17] Ms. Bird had clear ideas about how she wanted to incorporate her culture and language into her classroom. She testified that she was making a cultural centre with the assistance of an Elder but that Ms. Card-Esau told her she needed to focus on basic skills like numeracy and literacy and some life skills instead. Ms. Card-Esau felt that, while Ms. Bird had good ideas around language and culture, she did not feel that she was honouring the provincial curriculum.

[18] On the afternoon of Thursday September 28, 2017, Ms. Bird advised Ms. Card-Esau that she had just received notice that her mother was being hospitalized the next morning for a period of 3 to 5 weeks for rehabilitation related to her mobility, and Ms. Bird would need to step into the role of caregiver for her children. Ms. Card-Esau asked Ms. Bird if she wanted to take a leave of absence starting on Monday, October 2 and provided her with an application form, which Ms. Bird immediately completed and returned to her. On the Application for Unpaid Leave of Absence form submitted by Ms. Bird on September 28, 2017, she wrote “I have no childcare and my mother has been admitted at the Glenrose

hospital for rehabilitation for 3-5 weeks effective Friday Sept.29, [20]17". Ms. Bird requested a 5-week leave of absence.

[19] Ms. Card-Esau testified that she provided her authorization for the requested leave but, because of the length of the absence, she needed the approval of the Director of Education as well, so she forwarded it to Ms. Birk-Calihoo. Ms. Birk-Calihoo wrote on the Leave Application: "before approved need 5 weeks of lesson plans and materials".

[20] Ms. Card-Esau returned the leave request form to Ms. Bird the next morning, Friday September 29, 2017. There is some discrepancy in the evidence about what Ms. Card-Esau and Ms. Bird discussed at this time. While Ms. Bird took the position at the hearing that she rescinded her leave request, then asked to use her 2 emergency sub plans to look for childcare and Ms. Card-Esau would not allow her to do this, I do not accept that this is what happened. Neither Ms. Bird's human rights complaint, nor her interview with the Commission, which was entered as evidence at the hearing, support this version of events. Rather, I accept that, after receiving the response to her leave request, Ms. Bird asked Ms. Card-Esau if she could submit her 2 emergency sub plans instead of the 5 weeks of lesson plans in order to take the leave of absence. Ms. Card-Esau said no and asked Ms. Bird if she could provide the requested lesson plans and materials by Monday October 2, 2017. Ms. Bird said she could not, so she rescinded her leave request and indicated she would try to find alternate childcare instead, but that she may need to be absent from work if she was unable to do so.

[21] Ms. Card-Esau's interview with the Commission was also entered as evidence. During that interview, the Commission's investigator asked Ms. Card-Esau if it would have been reasonable to expect Ms. Bird to prepare 5 weeks of lesson plans over the weekend, given that she was a single mother. Ms. Card-Esau said it was probably not reasonable, but that she would have been open to discussing alternatives with Ms. Bird.

[22] In her interview with the Commission, which was entered as evidence, and in her testimony at the hearing, Ms. Birk-Calihoo said that she also would have been open to suggestions from Ms. Bird about the 5 weeks of lesson plans. For example, if Ms. Bird had asked to provide one week at a time, she would have said yes. However, this is not what

was communicated to Ms. Bird on the morning of September 29, 2017. Ms. Bird understood that, if she could not provide 5 weeks of lesson plans and materials to Ms. Card-Esau by Monday morning, she could not take her requested leave of absence to care for her child.

[23] Ms. Bird testified that she was feeling the weight of mounting pressures and responsibilities by the time Ms. Card-Esau returned her leave form. She had tried unsuccessfully to find others to assist her with childcare and had found last-minute care for her daughter that day (September 29) with a family member in another community. Ms. Bird was dealing with all of these pressures in her life while at work, where she was responsible for several young children. She was a new teacher, trying to create a culturally relevant learning experience for her students while navigating a very busy first month of school and the expectations of her principal. It was in this context that she received a text from her babysitter shortly after 2 p.m. asking to drop her daughter off because they were going to attend a funeral. As children are not permitted to attend funerals in her culture, Ms. Bird had to ensure her daughter was returned to her.

[24] In her human rights complaint, she wrote, "I crumbled at this message and I couldn't handle the corner I was coerced into so I went to the acting vice principal and showed her my messages. I was in distress by this time for my mom being in the hospital, having no child care, the demand for me to provide over a month of lesson plans and worried for the wellbeing of my other 2 children who were in school." She says she was excused to go get her child and, while she was leaving, she called her brother, who was a Band Council member responsible for the education portfolio. She says when she asked him why her leave of absence was denied when their mother was in hospital and the daycare had refused her child, he asked her "where's your husband?" She explained that her children's father did not live with them, that he lived in Edmonton, and he and his family worked full time so could not help with childcare.

[25] Ms. Bird says that her call with her brother made her even more upset because of his lack of understanding and support, so she went to speak to Ms. Birk-Calihoo, who had denied her leave request. Ms. Bird spoke to Ms. Birk-Calihoo and Delores Lambert, the Human Resources Director for PFN, at the Band Council office. It is undisputed that she was very upset by this time, crying and speaking loudly. She showed them the text from her



babysitter and she mentioned the requirement for 5 weeks of lesson plans in order to take a leave of absence. Although they tried to speak to her and calm her down, she was too upset. She testified that she gave her notice to resign from her employment impulsively because she was very distraught and could not handle all of the pressures on her.

[26] Ms. Card-Esau testified that when Ms. Bird returned to the school after speaking to Ms. Lambert and Ms. Birk-Calihoo, she was very agitated and loud. Ms. Bird said that it was ridiculous to expect her to prepare 5 weeks of lesson plans and she told Ms. Card-Esau multiple times that she quit. Ms. Card-Esau said in her interview with the Commission that she had no chance to interject and engage with Ms. Bird because she was out of control emotionally. Ms. Bird then left the school to go pick up her child.

[27] Following this encounter with Ms. Bird, Ms. Birk-Calihoo sent Ms. Lambert an email setting out her account of what had happened. She wrote that, at approximately 3:00, Ms. Bird came into the Band office visibly angry because she “feels that the expectations put on her by being a teacher are too great and unreasonable.” She wrote that Ms. Bird told them her mother was ill and no one in the family will help her and that the daycare would not accept her child until she could walk. Ms. Birk-Calihoo noted that, although she tried to offer her support, Ms. Bird would not engage or accept assistance because she was so upset. As such, they accepted her verbal resignation immediately.

[28] On October 4, 2017 Ms. Card-Esau wrote an email to Ms. Birk-Calihoo and Ms. Lambert stating that Ms. Bird resigned by walking off the job at 2:15 on September 29 because she was unhappy that she was not given a 3 to 5 week leave of absence without having planning materials available for substitute teachers. She stated that a Record of Employment (ROE) was needed. The email does not mention Ms. Bird rescinding the leave request and, indeed, Ms. Birk-Calihoo testified that she did not know about this at the time.

[29] It is not disputed that no one from the Respondent reached out to Ms. Bird about what happened on September 29, 2017. Rather, Ms. Bird wrote a letter, which is dated October 1, but which she says she delivered to the Band office on October 13, 2017, two weeks after her last day at work. She brought several copies, which were date stamped by

the receptionist and placed into the mailboxes of the Chief and Band Council members, the Band Manager, Ms. Card-Esau, Ms. Birk-Calihoo and Ms. Lambert.

[30] In the letter, Ms. Bird explained what was happening when she gave her notice and why she reacted the way she did. In her human rights complaint, she said she had been advised by her family members to do so in order to be able to return to work to fulfill her contractual obligations. She concludes the letter by stating that she is willing to return to work after five weeks and continue with her one-year contract once her mother is home. She states that if that is not a choice available to her, further action will be taken.

[31] On October 23, 2017, although no one had responded to her letter, a ROE was issued by the Respondent which stated that Ms. Bird quit and was not returning.

[32] Ms. Card-Esau, Ms. Birk-Calihoo and Ms. Lambert testified that they did not receive Ms. Bird's letter in their mailboxes in the Band office. Rather, Ms. Lambert said she received the letter sometime later from the Chief, who asked her to deal with it. She responded to Ms. Bird on November 8, 2017, saying "it is unclear as to what the request or expected outcome of this document is" and offered for Ms. Bird to file a grievance with the Band's Employment Appeal Board.

[33] By this time, Ms. Bird said she felt so much time had passed without anyone responding to her letter that the matter had devolved into "lateral violence". She says she had offered to engage in a traditional form of resolution with 3 elders and was ignored, and she had also offered to return to work after 5 weeks. She did not trust the Respondent's offer of dispute resolution and, as she had already filed her human rights complaint with the Commission, she decided to pursue that instead.

[34] Emails dated November 9, 2017 were filed as evidence showing that a discussion had occurred between the Band Manager, Ms. Lambert and Ms. Birk-Calihoo about offering Ms. Bird substitute teaching jobs or a contract. The Band Manager responded to Ms. Birk-Calihoo to say he had asked her to prepare this process for implementation "just in case we wish to go down that avenue."

[35] Ms. Birk-Calihoo suggested that Ms. Bird should have called her over the weekend following her resignation to talk but that, because she did not, she had no choice but to fill the kindergarten teacher position, as the children in that class were her priority.

[36] Ms. Card-Esau took the position that Ms. Bird abandoned her class and her job on September 29, 2017. She said by the time she received Ms. Bird's letter several weeks later she had already replaced her.

#### **IV. Issues**

[37] The issues for the Tribunal to decide are:

- A. Has the Complainant proven on a balance of probabilities that she was treated in an adverse differential manner in relation to her employment on the basis of her marital or family status, contrary to section 7(b) of the *CHRA*?
- B. If so, what remedies should be awarded that flow from the discrimination?

[38] The Respondent confirmed that it would not be relying on a defence under section 15 of the *CHRA*, but rather would be calling evidence to refute the allegations of *prima facie* discrimination.

#### **V. Positions of the Parties**

[39] Despite agreeing prior to the hearing that her complaint was limited to whether she was discriminated against in her employment on the basis of her marital or family status, Ms. Bird called evidence at the hearing and made submissions that address broader concerns that she and her family have with PFN's leadership and with others in the Nation. An attempt to broaden the scope of the complaint at the hearing is unfair to the Respondent.

[40] As set out in the *CHRA*, the Tribunal receives its jurisdiction to inquire into a complaint from the Canadian Human Rights Commission. The Commission investigated Ms. Bird's complaint of employment discrimination contrary to section 7(b) of the *CHRA* and referred it to the Tribunal for an inquiry. Another complaint filed by Ms. Bird relating to the PFN daycare's refusal to care for her daughter in September 2017 was not referred by the Commission to the Tribunal. As such, references to the daycare refusing her service are

included in this decision to establish the factual context of the complaint. I am not deciding whether the daycare's actions were discriminatory.

[41] In light of the Commission's screening decisions, the Tribunal does not have the jurisdiction to make findings or order remedies in relation to many of the larger issues raised by Ms. Bird at the hearing and in her closing submissions.

**(a) Complainant**

[42] In her human rights complaint, Ms. Bird says that she had been denied childcare services by the PFN daycare and was then denied a leave of absence from her employment in the event of a family emergency. She says there were "no other suggestions to accommodate me in any way as I was coerced into the choice I had to make between my employment and my family."

[43] In her closing submissions Ms. Bird says the Respondent's "decision to terminate my employment based on my 'disturbing public meltdown' was not a carefully considered professional decision. It was a shallow excuse to undermine the teachings of our ancestors, my late mother, my elders of the Nation, and U of A professors who supported me in earning my degree."

[44] In terms of a remedy, Ms. Bird is asking for lost wages for 3 years, damages for pain and suffering in the amount of \$20,000, and an amount of \$1,500 for "10 months Loss of Child Care within PFN Daycare", for a total of \$171,500. She also says that, "as a remedy for a healing process, we're suggesting head stones for our deceased loved ones so we can be at peace with ourselves."

[45] In addition to the remedies sought, Ms. Bird provides recommendations to ensure accountability for "Management and Leadership" and that a healing program be put in place based on the Nation's women in collaboration with Elders. She also provides numerous recommendations meant to improve the PFN daycare, Finance department, Administration, Health, Public Works and Recreation departments, as well as Social Services, the school and the Education department.

[46] Finally, she says that, if she is reinstated as a teacher in the school, she wants to enroll her children so they are closer to her, without “barriers, interference or denied access from anyone.” She says this was a barrier she faced because she could not work as a teacher and act as a parent in the same place.

**(b) Respondent**

[47] The Respondent denies that it has discriminated against Ms. Bird. It argues that, in order to prove discrimination on the basis of family status, she must meet the legal test set out in *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 (CanLII) [*Johnstone*], which it describes as the leading authority on family status discrimination.

[48] The Respondent cites paragraph 88 of *Johnstone*, which says: “It is only if the employee has sought out reasonable alternative childcare arrangements unsuccessfully, and remains unable to fulfill his or her parental obligations, that a *prima facie* case of discrimination will be made out.”

[49] The Respondent’s position is that the Complainant has not and cannot establish a *prima facie* case of discrimination based on the protected ground of family status because:

- there was no differential or discriminatory treatment of her by PFN staff;
- to the contrary, sustained efforts were made by school staff to try to support and accommodate her;
- Ms. Bird did not make reasonable efforts to try to find reliable childcare; and
- ultimately, accommodation was not reached because she refused to communicate or engage in any capacity with PFN staff.

[50] The Respondent argues that the remedies sought by the Complainant are broad and extensive and are not appropriate to the circumstances.

### (c) Complainant's Reply

[51] In replying to the Respondent's arguments, Ms. Bird says she was up front about her caregiving responsibilities and she "accepted the position on the blind faith and belief that there would be understanding and accommodation" if required.

[52] She notes that there is nothing in her employment contract requiring her to perform the unpaid work of preparing 5 weeks of lesson plans in order to take an unpaid leave of absence. She needed to be excused to resolve her personal family emergencies. "If such accommodations had existed we wouldn't be having this inquiry. Instead, more pressure was placed on me to accommodate a substitute with unpaid or uncompensated work under a false legal obligation to use weekend hours that would place my own children and myself at risk."

[53] Ms. Bird says that the Respondent's "after the fact accommodations and presentation of evidence after terminating me is the only scenario that is staged." She argues that the Respondent has admitted to "a premeditated constructive dismissal based on a very small three week measuring stick of [the principal's] very high standards."

[54] She also says she will not try and prove any efforts she made to apply for other employment or childcare when she has been stating from day one that she was a full-time caregiver to her late mother until her passing.

## VI. Legal Framework

[55] The purpose of the *CHRA* is to extend the laws of Canada to give effect to the principle that all individuals have an opportunity equal with others "to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so" by reason of discrimination (s.2 *CHRA*).

[56] Section 7(b) of the *CHRA* states that: "It is a discriminatory practice, directly or indirectly, in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination." The prohibited grounds of discrimination are set

out in section 3 of the *CHRA* and include marital and family status. Childcare obligations fall within the scope of protection offered by the ground of family status (*Smolik v. Seaspan Marine Corporation*, 2021 CHRT 11 (CanLII) at para 14).

[57] The Complainant bears the onus of establishing a *prima facie* case of discrimination. 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-employer" (*Ontario Human Rights Commission and O'Malley v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536, at p. 558).

[58] The Respondent is correct that the *Johnstone* case has established the applicable test for *prima facie* discrimination based on childcare obligations under the *CHRA*. The Federal Court of Appeal in *Johnstone* determined that, in order for a complainant to prove on a balance of probabilities that they experienced discrimination, they must show that it is more likely than not that:

- i. A child is under their care and supervision;
- ii. A childcare obligation engages their legal responsibility for that child, as opposed to a personal choice;
- iii. Reasonable efforts were made to meet the childcare obligation through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and
- iv. The impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of a childcare obligation.

[59] The following paragraph from the Tribunal's decision in *Brunskill v. Canada Post Corporation*, 2019 CHRT 22 (CanLII) is applicable to a case such as this, where the Respondent has confirmed that it is not relying on a *bona fide* occupational requirement (BFOR) defence under section 15 of the *CHRA*, but has rather called evidence in an attempt to refute the allegations of *prima facie* discrimination:

[64] When the Tribunal must decide whether a complainant has met the burden of proof for his or her case, it must consider the evidence in its entirety. This also includes the evidence filed by the Respondent. In other words, evidence presented before the Tribunal by the Complainant and the Respondent should not be analyzed in silos. Consequently, the Tribunal may

decide that [the Complainant] failed to meet the burden of proof for his case if (1) in the absence of a response from the Respondent, he fails to present sufficient evidence that meets the burden of proof for his case; or (2) the Respondent was able to present evidence that refutes the Complainant's allegations and, consequently, prevents the latter from meeting the burden of proof for his case.

[60] When, as in this case, a respondent presents evidence in an effort to refute an allegation of discrimination, its explanation for the impugned conduct must be reasonable, it cannot be a "pretext" - or an excuse - to conceal discrimination (*Moffat v. Davey Cartage Co.(1973) Ltd.*, 2015 CHRT 5 (CanLII) at para 38).

## **VII. Analysis**

[61] Ms. Bird alleges that the Respondent breached section 7(b) of the *CHRA* by requiring her to meet an unreasonable condition before granting her requested leave of absence that would have allowed her to meet her childcare obligations. She says this requirement led her to resign from her employment. I will apply the 4-part *Johnstone* test in order to determine whether Ms. Bird has proven that she was discriminated against by the Respondent in her employment.

### **(i) Ms. Bird had legal responsibility for the children under her care**

[62] The first two parts of the *Johnstone* test require Ms. Bird to prove that: (i) her children were under her care and supervision and (ii) the childcare obligation in question engaged her individual legal responsibility for her children, as opposed to a personal choice.

[63] There is no dispute that Ms. Bird's children were under her care and supervision at the relevant time. She had primary care and responsibility for her three young daughters, whose father lived in Edmonton, worked full-time and was unavailable to assist with childcare. While the older two children were in school during the day, someone had to be home to meet their bus after school. They did not attend the PFN School. Her youngest daughter was not yet two years old in September of 2017 and had been denied a spot at the PFN daycare earlier that month.



[64] There is no question that, when Ms. Bird's primary childcare provider – her mother – suddenly went into hospital, her legal responsibility for her children was engaged. Her daughter had to be cared for while Ms. Bird was at work. It was for this reason that she requested a leave of absence for the period of time her mother was expected to be in the hospital.

**(ii) Ms. Bird made reasonable efforts to secure alternative childcare**

[65] The third part of the test requires Ms. Bird to prove that she had made reasonable efforts to meet her childcare obligations through reasonable alternative solutions, and that no such alternative solution was reasonably accessible.

[66] The Respondent argues that Ms. Bird did not take reasonable steps to secure childcare, even though she had advised them during her job interview about the difficulty she had had finding reliable childcare when she was at university. It says that, even though she had a car, she did not make attempts to find alternative daycare outside of the PFN, but only tried to use the PFN daycare. The Respondent also says the Complainant adduced no evidence to show her daughter was actually registered at the PFN daycare in any event.

[67] The Respondent also argues that a reasonable person in the Complainant's circumstances would have foreseen that her mother's health was deteriorating and so should have put some effort into finding reliable childcare. It argues that "the entire month of September went by and Ms. Bird made no efforts to secure alternative childcare anywhere. From an objective standpoint, it is submitted that Ms. Bird's actions were simply not reasonable given her circumstances."

[68] I do not agree with the Respondent in this regard. The evidence leads me to find that Ms. Bird has proven on a balance of probabilities that she made reasonable efforts in the circumstances to meet her childcare obligations.

[69] Ms. Bird had always been up front with the Respondent about her childcare situation. From the first job interview, which she had to cancel because her mother was in the hospital, she told the Respondent about her caregiving responsibilities. Ms. Bird also communicated

her situation to Ms. Birk-Calihoo and Ms. Card-Esau at the job interview in August and they told her she could bring her daughter to school if she needed last minute childcare.

[70] I believe Ms. Bird's evidence that, as soon as she was offered the job, she applied to the PFN daycare for a spot for her youngest child. She was under the impression her daughter had been accepted by the daycare by August 28 and she started work on September 1. She took reasonable steps, as a responsible and conscientious parent, to ensure childcare was in place for her first day of work. However, when she brought her daughter to the daycare on September 1, she was turned away. Ms. Bird took Ms. Card-Esau's advice and wrote to the Respondent to advise what had happened. No one responded to her.

[71] From her first day on the job, Ms. Bird was very busy as a new teacher, setting up her classroom and teaching her classes. When she was not working, she was caring for her 3 daughters and offering support to her mother, who had kindly offered to provide childcare to enable Ms. Bird to work as a teacher. Ms. Bird's evidence was that her other family members were also working or going to school so were not able to assist her with childcare.

[72] Ms. Bird provided evidence that she asked a friend to babysit at one point, but that this person could not be relied on, as they left in the middle of the day to return to Red Deer. On September 29, 2017, the day her mother went into the hospital, Ms. Bird found another family member to babysit her daughter and by 2 p.m. this person had texted her to say they needed to return her daughter because they were attending a funeral.

[73] I heard no evidence about how close other communities were to the PFN, but I do not agree that Ms. Bird should have been expected to drive around to neighbouring communities looking for alternative childcare in the very brief period of time between being offered the job and starting work, or during her full-time employment as a teacher.

[74] I find that Ms. Bird did the best she could in the very brief timeframe in question. There is no reason to believe Ms. Bird should have known her mother would be hospitalized on short notice. While she may have had some health issues, she was still providing adequate care during Ms. Bird's first month of teaching, right up until she went into the

hospital on September 29. Ms. Bird's mother was her most reliable childcare provider, more so than other family members, friends or the PFN's own daycare.

[75] The Respondent argues that Ms. Bird should have arranged to have her child dropped off on the afternoon of September 29, 2017, to be looked after in the school office, which was equipped with books and mats. Not only was Ms. Bird concerned about her youngest daughter being returned to her before the funeral, but she was also concerned about who would meet her two older daughters at the school bus. Also, Ms. Bird testified that, as a result of her experience being investigated by child and family services while at university, she was very sensitive about ensuring that her children were properly cared for.

[76] I accept that Ms. Bird has proven that she made reasonable efforts to meet her childcare obligations through reasonable alternative solutions and that no such alternatives were reasonably accessible to her at the time she made her leave request. When faced with the sudden hospitalization of her mother, who was her childcare provider, she had no time to find a reasonable alternative to caring for her child herself.

**(iii) The 5-week lesson plan requirement interfered with Ms. Bird's childcare obligations in a manner that was more than trivial or insubstantial**

[77] The fourth part of the test requires Ms. Bird to prove that the impugned workplace rule interfered in a manner that was more than trivial or insubstantial with the fulfillment of a childcare obligation.

[78] The "impugned workplace rule" in this case was the requirement that Ms. Bird provide 5 weeks of lesson plans and materials before being granted a leave of absence to fulfill her childcare obligations.

[79] Ms. Birk-Calihoo testified that, when she received Ms. Bird's request for a leave of absence, she had no policy or previous experience to rely on in considering a lengthy leave request, especially from a new teacher. She testified that she called 2 other First Nations and a provincial school and they told her their expectation was that a teacher requesting a leave of absence should do some planning for the substitute teacher who would take over

their class. Ms. Birk-Calihoo said she thought Ms. Bird would come back to her classroom more seamlessly if she provided lesson plans for the full 5 weeks of her leave.

[80] One of Ms. Bird's witnesses was an experienced teacher who has worked for different school boards. She testified that, in her experience, if a teacher plans to take more than 3 days off, 3 days of lesson plans would be required and then the substitute teacher would be expected to take over and make the ongoing lesson plans. She also testified that, even if a teacher leaves sub plans, they are not always used because substitute teaching is "of the moment". She said that substitute teachers are professionals who can step into a classroom and do what they need to do. The Respondent's witness Ms. Bernard testified that substitute teachers at the PFN school were qualified teachers.

[81] Another of Ms. Bird's witnesses who works as an Educational Assistant at a school in Red Deer confirmed that it was her understanding that, when requesting a longer leave of absence, a teacher is responsible for 3 days of lesson plans, then the substitute teacher takes over making the lesson plans after that. She noted that substitute teachers do testing and report cards for teachers, so lesson plans are well within what they are qualified to do.

[82] Ms. Bird was working very hard in her first month of this new job, trying to make her classroom culturally relevant for her students. It was in this context that she was faced with having to prepare 5 weeks of lesson plans and materials in a very short period of time in order to take an urgently needed leave of absence. By the time she was notified of this leave requirement, her mother was already in the hospital, which was obviously stressful and upsetting for her. Ms. Bird testified that she had to care for her 3 daughters over the weekend and, starting on Monday, had to take over the weekday care of her youngest daughter that her mother had been providing.

[83] The Respondent argues that Ms. Bird overreacted to having to make 5 weeks of lesson plans without considering or discussing her options to deliver them. It says that "Ms. Bird was presented with a viable option by PFN for dealing with her child care situation: Take a 5 week leave of absence but take some time over the weekend to prepare 5 weeks of lesson plans. If 5 weeks of lesson plans is not realistic, then let's discuss and come up with a different solution. Ms. Bird refused to engage or discuss and so no alternative was

possible.” The Respondent notes that accommodation is not a one-way street and that Ms. Bird had a duty to work towards her own accommodation.

[84] The Respondent also says that the task of preparing 5 weeks of kindergarten lesson plans was not overly onerous. It says that Ms. Bird could have used her predecessor’s lesson plans to prepare her own, or approached the Respondent to ask for more time to prepare them. Ms. Birk-Calihoo noted that Ms. Bird had a full-time teaching assistant in her classroom who could have helped her prepare the plans and, as kindergarten is not as involved as higher grades, she could have easily found lesson plans on the internet.

[85] Ms. Card-Esau testified that she told Ms. Bird at the time that they could break the lesson plans down week by week to make the requirement more manageable, so she would not need to provide all 5 weeks of lesson plans at once. While I accept that this would have been a reasonable offer to make at the time and, upon reflection, both Ms. Card-Esau and Ms. Birk-Calihoo came to realize this, I do not believe that they offered this to Ms. Bird at the time of her leave request.

[86] I do not find that Ms. Bird was invited by the Respondent to “discuss and come up with a different solution” to the requirement of preparing 5 weeks of lesson plans over the weekend. If lesson plans were as readily available as the Respondent says they were, it would have been reasonable for Ms. Card-Esau to provide Ms. Bird with this information at the time she returned the leave application to her. Instead, she asked Ms. Bird if she could prepare 5 weeks of lesson plans over the weekend, something she has acknowledged was probably not reasonable. When Ms. Bird asked the principal if she could use her emergency sub plans instead of providing the lesson plans, she said no.

[87] Ms. Card-Esau testified that it would be determined on a case-by-case basis whether a teacher’s emergency sub plans could be used for a leave of absence. She said if there is a sudden traumatic event where a teacher cannot prepare a lesson plan, they could draw from the teacher’s long-range year-at-a-glance plan, which Ms. Bird had submitted. Although Ms. Bird’s childcare situation could be described as a sudden traumatic event, the Respondent did not seem to view it as such. There is no hierarchy in terms of the prohibited grounds of discrimination. An emergency childcare situation should have been treated with

the same seriousness as one related to disability, for example if Ms. Bird herself suddenly had to be hospitalized and could not attend work.

[88] The Respondent is correct that employees must act reasonably in the search for accommodation. However, Ms. Bird was not requesting a leave that would start in a week. Her mother was in the hospital, she had no other reliable childcare, and she was being asked to prepare 5 weeks of lesson plans for a substitute teacher who should be capable of taking over a classroom and teaching her students for that period of time. This was only one month into the school year and Ms. Bird was a kindergarten teacher which, according to the Respondent, is not as complex or involved as teaching higher grades. The employer controls the workplace and, in considering an urgent leave request, the Respondent had an obligation to consider Ms. Bird's individual circumstances.

[89] On the day that her childcare provider was hospitalized for a period of several weeks, Ms. Bird found herself in a situation where her application for leave to care for her children was not yet approved. Ms. Bird did not feel she could meet the Respondent's requirement of preparing 5 weeks of lesson plans over the weekend while also caring for her 3 daughters. At that moment, she felt it was more feasible to find alternate childcare and continue to work, so she told Ms. Card-Esau that she was rescinding her leave request.

[90] I accept that the 5-week lesson plan requirement interfered with Ms. Bird's obligation to care for her children in a manner that was more than trivial or insubstantial and therefore breached section 7(b) of the *CHRA*.

### **VIII. Conclusion and Remedies**

[91] I find that Ms. Bird has proven on a balance of probabilities each of the four elements of the *Johnstone* test with respect to her allegation under section 7(b) of the *CHRA* as it relates to the 5-week lesson plan requirement. While the Respondent called evidence in an effort to disprove that she was discriminated against, I do not find that it was able to do so.

[92] Having found that Ms. Bird was treated in an adverse differential manner in relation to her employment on the basis of her family status, the Tribunal may make an order pursuant to section 53(2) of the *CHRA*. The Complainant has asked the Tribunal to award

her damages for pain and suffering, lost wages, and reimbursement for childcare costs. She also asks for the Tribunal to order the Respondent to pay for headstones for her loved ones and to implement a healing program and several recommendations involving the PFN's administration.

i. Compensation for pain and suffering.

[93] Section 53(2)(e) of the *CHRA* allows the Tribunal to award compensation to a victim of discrimination “for any pain and suffering that the victim experienced as a result of the discriminatory practice”, up to an amount of \$20,000. I note that the Tribunal tends to reserve the maximum amount of \$20,000 for the very worst cases or the most egregious of circumstances (*Christoforou v. John Grant Haulage*, 2021 CHRT 15 (CanLII) [*Christoforou*] at para 98).

[94] The aim of a remedial order under section 53(2) of the *CHRA* is not to punish the Respondent but to eliminate, to the extent possible, the discriminatory effects of the practice (*Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 SCR 84 at para 13). There must be evidence that a complainant experienced pain and suffering and there must be a causal link between this and the discriminatory practice.

[95] Ms. Bird has asked for the maximum amount available for pain and suffering under the *CHRA*. She testified about the impact the Respondent's discriminatory treatment had on her, both on September 29, 2017 and following that. In her letter of October 1, 2017 (delivered to the Respondent October 13, 2017), she says that when she received the leave request form from Ms. Card-Esau with the requirement of 5 weeks of lesson plans she felt cornered. She says the experience made her feel unsupported and unprotected and as though she had been stripped of her dignity. Both Ms. Bird and the Respondent's witnesses testified about how upset she was when she went to speak to Ms. Birk-Calihoo and Ms. Lambert after receiving the text from her babysitter. She spoke to them about the requirement for 5 weeks of lesson plans and how this was unfair. Ms. Bird said that she experienced mental health struggles following this experience and that she sought counselling and guidance from Elders, including her mother and her uncles.

[96] In the course of determining an award for pain and suffering, the Tribunal in *Christoforou* endorsed the analysis applied by the Human Rights Tribunal of Ontario (HRTO) in evaluating the appropriate compensation for injury to dignity, feelings and self-respect. The HRTO primarily applies two criteria: (i) the objective seriousness of the conduct and (ii) the effect on the particular applicant who experienced discrimination (See *Arunachalam v. Best Buy Canada*, 2010 HRTO 1880 (CanLII) [*Arunachalam*] at para 52; *Sanford v. Koop*, 2005 HRTO 53 (CanLII) at para 35).

[97] The first criterion recognizes that pain and suffering is generally more serious depending, objectively, upon what occurred. “For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect” (*Arunachalam* at para 53).

[98] The second criterion recognizes a complainant’s particular experience in response to the discrimination. “Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious” (*Arunachalam* at para 54).

[99] Applying the objective criterion to Ms. Bird’s situation, I have found that the discriminatory conduct she experienced was the requirement that she provide 5 weeks of lesson plans before her leave request would be approved. This is not a case where the discriminatory conduct was longstanding. In fact, it occurred over a very short period of time and was a one-time event. While I accept that the leave requirement was part of the reason she impulsively resigned from her employment, she was not dismissed by the Respondent and the Respondent provided evidence that it was willing to re-employ her.

[100] In considering the subjective criterion, I note that Ms. Bird was only a month into her job at the time of the discrimination, but she did have a lot going on in her life and had been through a lot prior to obtaining the job. She had experienced a great deal in completing her



university degree and, due to the child and family services investigation, she was sensitive to situations involving the care of her children.

[101] This was not a situation where the work she was required to do in order to take her leave of absence was offensive or demeaning to her. However, when her mother was suddenly hospitalized, she expected assistance and accommodation from the Respondent. Instead she was presented with what she felt was an impossible task given her childcare responsibilities over the weekend. She was understandably disappointed and upset with the situation.

[102] Ms. Bird testified about a number of factors that led to her experiencing mental health struggles in relation to her employment situation, including the pressure she was under as a first-year teacher, the stresses associated with her mother's illness, and being a sole parent to three young children. She was upset that she had been denied childcare through the Respondent's daycare, that the Respondent would not give her a letter of termination as she requested, and that it took a few weeks for the Respondent to respond to her October 13 letter. She found the human rights complaint process itself to be frustrating and her mother, who had been involved in assisting her with the process, tragically passed away before the complaint went to a hearing. It is clear that the entire course of events has had an impact on her mental health. However, only some of the pain and suffering she experienced can be attributed to the Respondent's discriminatory conduct.

[103] In *Abreu v. Transport Fortuna*, 2020 CHRT 35 (CanLII), the Tribunal awarded \$7,000 for pain and suffering in a case where the complainant learned she was pregnant shortly after she began working as an administrative assistant for the respondent. The complainant had to miss work on numerous occasions for check-ups related to her high-risk pregnancy. The respondent dismissed the complainant a little over a month after she was hired and her sick leave due to her pregnancy was one of the factors the respondent used to justify her dismissal. The Tribunal found that the Respondent discriminated against her on the grounds of sex and disability. This case shares some similarities with Ms. Bird's in that the complainant also worked for the respondent for only one month. The key difference, however, is that the discrimination and related remedy in *Abreu* included the termination of the complainant's employment.

[104] While Ms. Bird may have felt “cornered” by the 5-week lesson plan requirement and this was part of the reason she quit, I accept that the Respondent was willing to discuss alternatives to “fix” this otherwise intolerable condition of her employment. Also, although Ms. Bird wrote a letter indicating she would be willing to return to work after a 5 week leave, when the Respondent responded to her letter and offered to deal with her concerns through its Employment Appeal Board, she refused.

[105] I have found that the Respondent showed a lack of consideration of Ms. Bird’s situation as a single parent whose mother – her childcare provider – was suddenly hospitalized, and this lack of consideration interfered with her childcare obligations. I accept that this caused her pain and suffering and I find that an award of \$6,500 is appropriate in the circumstances.

ii. Lost wages

[106] Ms. Bird has requested that the Tribunal order the Respondent to pay her lost wages for a period of 3 years. The Tribunal has found that there must be a causal connection between the discriminatory act and the wage loss claimed (*Chopra v. Canada (Attorney General)*, 2007 FCA 268 (CanLII) at para 37).

[107] Ms. Bird claims that the leave condition imposed on her as a single parent was too onerous and led to her resignation. While I accept that the discriminatory 5-week lesson plan requirement contributed to her impulsive decision to resign, I do not find that there is a causal connection between the discrimination and any wage loss claimed. Rather, I find that the Respondent would have been willing to either discuss options to accommodate a 5-week leave of absence or to discuss re-employing her after a leave. However, Ms. Bird did not provide evidence that she was in a position to return to work after 5 weeks, and she chose not to engage in the Respondent’s offer to resolve her employment issues.

[108] Ms. Bird has variously described herself as being constructively dismissed, terminated, and coerced into resigning. I do not agree with these characterizations. The Respondent clearly did not terminate Ms. Bird’s employment. The only action the Respondent took was to require 5 weeks of lesson plans before approving her leave. It did

not substantially alter the terms of her employment or fail to comply with her employment contract such that she could argue that she was constructively dismissed.

[109] After speaking to Ms. Card-Esau about her leave request, Ms. Bird felt she had a better chance of finding replacement childcare in order to continue teaching, than to prepare 5 weeks of lesson plans. She told Ms. Card-Esau she was rescinding her leave request. She had no intention of resigning at that time.

[110] Ms. Bird was already experiencing the stress of her mother's hospitalization and the realization that she would not be taking a leave of absence, but would have to find alternate childcare, when she received the text from her babysitter a couple of hours later saying they could not care for her child because they had to attend a funeral. This highlighted for Ms. Bird that she did not have reliable childcare options. She became overwhelmed and gave her notice.

[111] Ms. Birk-Calihoo testified that, if Ms. Bird had reached out to her over the weekend to discuss her circumstances, she would have been willing to discuss options to receive the 5 weeks of lesson plans in order to accommodate her leave of absence.

[112] Neither party contacted the other over the weekend. Ms. Card-Esau testified that she did not want to second guess Ms. Bird's decision to resign which is why she did not reach out to her after she left. She testified that she very quickly replaced Ms. Bird.

[113] Ms. Bird did not reach out to the Respondent until two weeks later, when she delivered her letter to the Band office on October 13, 2017. In her letter, she suggested that she could come back to work after 5 weeks, when her mother returned home. However, Ms. Bird did not provide evidence that she was in a position to return to work after 5 weeks.

[114] The Tribunal was not informed if or when exactly Ms. Bird would have considered herself to be in a position to return to work. She testified that she had not been in a position to work full-time for the Respondent in September of 2017 because of her caregiving responsibilities, and that she felt pressured by Ms. Birk-Calihoo to take the job. The evidence before the Tribunal is that she was urged by her Elders to send the October 13 letter offering to fulfil her contract, despite her ongoing caregiving responsibilities. She testified that she

continued to be a caregiver to her mother, whose health continued to progressively worsen. Her evidence was that she worked very little following her resignation from her teaching job because of her caregiving responsibilities and she did not apply for another teaching job until the following year, in September of 2019.

[115] When Ms. Lambert reached out to Ms. Bird on November 8, 2017 and offered for her to file a grievance with the Nation's Employment Appeal Board, she refused. Ms. Bird says she declined to participate in this process because she felt that the delay in responding to her letter amounted to "lateral violence". At the same time, she was requesting a letter from the Respondent indicating it had terminated her so that she could apply for employment insurance.

[116] Ms. Bird was upset that the Respondent did not agree to her request for a traditional dispute resolution process with three Elders, but rather relied on its own employment policies, which was a fair and reasonable way to proceed in the circumstances. She stated that she did not trust PFN's Employment Appeal Board and decided to pursue her human rights complaint instead.

[117] The Respondent says it was working towards a resolution package to propose to Ms. Bird concurrently with the offer to engage with the PFN's Employment Appeal Board. It provided copies of emails between Ms. Birk-Calihoo, Ms. Lambert and the Band's Manager confirming that discussions were being held about offering Ms. Bird further work with the Nation. This was never presented to Ms. Bird because her response to Ms. Lambert's November 8, 2017 letter was: "I'm no longer available for anything to do with this issue. I will keep these documents from the Nation for the Human Rights Commission and my lawyer."

[118] I do not find that Ms. Bird experienced wage loss as a result of the discrimination. For the first 5 weeks following her resignation, there was no wage loss because she would have been on unpaid leave in any event. Ms. Bird did not provide evidence as to if or when she could actually have returned to her full-time teaching job. She also chose not to engage with the Respondent after it contacted her on November 8, 2017 and offered her the opportunity to resolve her employment issues in accordance with its employment policies. As such, I decline to award Ms. Bird lost wages as requested.

iii. Childcare costs

[119] Ms. Bird did not provide an explanation for why she is seeking \$1,500 for 10 months of loss of childcare with the PFN daycare. As indicated earlier, the Commission did not refer her complaint against the daycare to the Tribunal for an inquiry. I do not find that the Respondent's discriminatory treatment of Ms. Bird was linked to the daycare's decision to deny her daughter care in September 2017. I decline to make such an award.

iv. Other Remedies Sought

[120] The additional requests set out in Ms. Bird's submissions - including paying for headstones for her loved ones, that a healing program be put in place, and her recommendations meant to improve many PFN departments and to ensure accountability for "Management and Leadership" - are similarly unrelated to the complaint the Commission referred to the Tribunal and to the discriminatory treatment Ms. Bird experienced. I decline to order any further remedies as requested.

[121] With regard to her request that, if she is re-employed by the PFN school, her children be allowed to enroll in the school, I see no reason related to her complaint why her children could not be enrolled at the school, if they are otherwise eligible. It is clear that the Respondent was prepared to offer Ms. Bird work at the school or in the education department in November of 2017 and I would expect that, if she wishes to apply for work there again, she would be welcome to do so.

**IX. Order**

[122] As Ms. Bird's complaint is substantiated, the Tribunal hereby orders:

The Respondent Paul First Nation shall pay to the Complainant compensation for pain and suffering in the amount of \$6,500.

*Signed by*

Colleen Harrington  
Tribunal Member

Ottawa, Ontario  
May 20, 2022

## **Canadian Human Rights Tribunal**

### **Parties of Record**

**Tribunal File:** T2437/9619

**Style of Cause:** Stacey Bird v. Paul First Nation

**Decision of the Tribunal Dated:** May 20, 2022

**Date and Place of Hearing:** June 7-11 and June 21-25, 2021, By Videoconference

#### **Appearances:**

Stacey Bird, for herself

Christian E. Villeneuve, for the Respondent