

**Canadian Human  
Rights Tribunal**



**Tribunal canadien  
des droits de la personne**

**Citation:** 2024 CHRT 16  
**Date:** March 21, 2024  
**File No.:** HR-DP-2832-22

**Between:**

**Joanne Johnson**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Membertou First Nation**

**Respondent**

**Decision**

**Member:** Athanasios Hadjis

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## **I. OVERVIEW**

[1] The Respondent, the Membertou First Nation (the “MFN”), dismissed the Complainant, Joanne Johnson, from her position as the general manager of its bowling alley. She alleges that the MFN had a policy that established a different set of preferential rules for Indigenous persons. Ms. Johnson claims the fact that she is not Indigenous was a factor in how the MFN managed her employment and her dismissal, resulting in a discriminatory practice based on her colour, national or ethnic origin, and race.

[2] The MFN denies Ms. Johnson’s allegations and contends that she was terminated during her probationary period because of her performance and insubordination. It maintains that the prohibited grounds of discrimination were not factors in the decision.

## **II. DECISION**

[3] For the following reasons, I find that Ms. Johnson has not established that her colour, national or ethnic origin, or race were factors in how the MFN treated her or in her dismissal or that the MFN had a discriminatory employment policy that gave preference to Indigenous persons or members of the MFN.

## **III. BACKGROUND**

[4] The MFN is a Mi’kmaq community located on Cape Breton in Nova Scotia. It operates several enterprises on its territory through its Membertou Development Corporation, including a gaming facility. In 2011, the MFN hired Ms. Johnson as a cashier in the gaming facility. She is not Indigenous and is not a member of the MFN. After about four years, Ms. Johnson was promoted to a supervisory position as lead cashier, filling in from time to time as manager.

[5] In 2018, the MFN opened a new facility, its family and entertainment centre known as the Lanes Bowling Alley (the “Lanes”), which consisted of bowling lanes, sports simulators, and a full bar and restaurant.

[6] Ms. Johnson saw a poster advertising for the Lanes' general manager position. She applied believing she would be a good fit given her experience and education. She holds a degree in business administration from St. Francis Xavier University, and the poster listed this type of degree as a preferred qualification.

[7] Ms. Johnson was hired in July 2018, after being interviewed by a three-member panel. She signed the MFN's letter of offer on July 19, 2018. It states that her employment is subject to a six-month probationary period, following which a review will be conducted by the Chief Operating Officer ("COO"). The clause added that she may be dismissed if she did not pass her probationary period.

[8] Ms. Johnson began working in the position on August 1, 2018. The Lanes' construction had not been completed, but she immediately began preparations to staff the operation. Eventually a total of 68 employees were hired at the Lanes, most of whom worked part time. Ms. Johnson and the Lanes' supervisors made recommendations to the MFN's human resources (HR) department regarding candidates, but it was HR that had the authority to hire them.

[9] The Lanes opened to the public in November 2018. Ms. Johnson claims that, in the lead-up to the opening and in the months thereafter, she had issues with senior management and staff, which I expand upon later in this decision. Ms. Johnson was particularly concerned about the conduct of one employee, whom I need only refer to in this decision as AB (not her real initials). The MFN had appointed AB as customer relations and events supervisor at the Lanes. AB was Indigenous and a member of the MFN. She was not called to testify at the hearing.

[10] Ms. Johnson's six-month probationary period was to end on February 3, 2019. Shortly before this date, she met with the MFN's COO, Richard Paul. He filled out a standard MFN annual performance appraisal form for director, manager, and supervisory positions to assess Ms. Johnson's performance to date. In several of the categories, he checked off that she needed improvement and, in others, that she met standards. Ms. Johnson's total summary rating was 64%. The "meets standard" range is indicated on the form as being 62% to 74%.

[11] Mr. Paul's comments on the form about her overall performance were that she had done a "good job in some areas" and that she was starting to understand the important role of managing time, people, and the operation. He added that her probationary period was being extended by three months, which he wrote was not an easy decision and was made through the "corporate executive and HR." Mr. Paul added that he and Richard Stevens, the HR manager, would provide Ms. Johnson "a coaching document with follow-up." He listed several recommendations for improvement.

[12] The extension of the probationary period was to end on May 3, 2019. The date passed, and Ms. Johnson still did not have any news from the MFN about her employment status. On May 8, 2019, she spoke to Mr. Paul after a general meeting and asked him "Where do we stand?" She testified that he told her, "You're OK." She then travelled to Toronto to visit an established bowling operation for research into improving the data integration of the Lanes point-of-sale system.

[13] While she was away, she and Mr. Paul exchanged emails regarding AB, in which Ms. Johnson expounded on her concerns about AB's performance as an employee. The exchange continued upon her return to Cape Breton the following week. Ms. Johnson's last email in the exchange was sent in the evening of May 23, 2019. The next day, May 24, 2019, she received an email with a letter informing her that her employment was terminated effective immediately and that, as a probationary employee, she was not entitled to notice. However, to assist her in transitioning to new employment, the MFN was providing her two weeks' pay in lieu of notice.

[14] The letter noted that she could appeal her dismissal directly to the MFN's Chief and Council in writing within 15 days. Ms. Johnson filed an appeal, but she testified that she never got any response from the MFN. The MFN's witnesses were unable to explain what had happened to her appeal, but her dismissal was never rescinded.

[15] It was difficult for Ms. Johnson to find another job as a woman in her mid-50s. She testified that, in job interviews, she had to explain the gap in her career path. The community where she resides is small and everyone wondered why she was no longer employed at the MFN after all those years. It took Ms. Johnson one and a half years to finally secure another

job at a seniors' residence. She states that she was devastated emotionally as well as financially.

#### **IV. THE SECTION 7 ALLEGATION**

##### **A. THE SECTION 7 ISSUES**

[16] Ms. Johnson alleges that her colour, national or ethnic origin, and race, which are prohibited grounds of discrimination under s. 3 of the *Canadian Human Rights Act*, R.S.C. c. H-6 (CHRA), were factors in how the MFN treated her during her employment and its decision to dismiss her. Ms. Johnson claimed in her complaint that she was discriminated against in the course of her employment within the meaning of s. 7 of the CHRA as a result of a policy or practice, within the meaning of s. 10. I will first deal with the s. 7 allegation and leave my consideration of the s. 10 allegation for later in the decision.

[17] Section 7(a) of the CHRA says that it is a discriminatory practice, directly or indirectly, to refuse to continue to employ an individual on a prohibited ground of discrimination. Section 7(b) provides that it is a discriminatory practice in the course of employment to differentiate adversely in relation to an employee based on a prohibited ground of discrimination.

[18] Ms. Johnson must prove that the alleged discriminatory practice was, on its face, discriminatory, which is more formally referred to as establishing a *prima facie* case of discrimination.

[19] To establish a *prima facie* case, Ms. Johnson must prove that it is more likely than not (i.e., on a balance of probabilities) that:

- 1) she has a characteristic protected under the CHRA (i.e., a prohibited ground of discrimination);
- 2) she experienced an adverse impact with respect to her employment; and
- 3) the prohibited ground of discrimination was a factor in the adverse impact

(see *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 at para 69).

[20] Ms. Johnson is not required to prove that the MFN intended to discriminate against her (*Quebec (Commission des droits de la Personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39 [*Bombardier*] at paras 40-41). It is the result, or the adverse impact or effect, that is significant (*Ont. Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536, 1985 CanLII 18 at paras 12, 14).

[21] The protected characteristic need not be the only factor in the adverse treatment (*First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 25).

[22] To determine whether discrimination occurred, the Tribunal considers the evidence of all parties. If the complainant proves the three *prima facie* elements of discrimination on a balance of probabilities, then the burden shifts to the respondent to justify the discrimination. In employment cases, the commonly claimed justification is that there is a *bona fide* occupational requirement, meaning a genuine or real occupational requirement, that justifies the discrimination (*Bombardier* at paras 36-38). If the respondent does not establish a justification, the complaint is substantiated (*Bombardier* at para 64).

[23] Accordingly, the issues to be determined with respect to Ms. Johnson's allegation of discrimination in the course of employment are:

- 1) Has Ms. Johnson established a *prima facie* case of discrimination? That is,
  - a. Does Ms. Johnson have a characteristic protected under the CHRA?
  - b. Did Ms. Johnson experience an adverse impact with respect to employment?
  - c. Was Ms. Johnson's protected characteristic a factor in the adverse impact?
- 2) If Ms. Johnson established a *prima facie* case of discrimination, did the MFN establish a valid justification for the discriminatory practice and particularly a *bona fide* occupational requirement?

## **B. THE EVIDENCE**

[24] It is helpful to go through all the evidence relating to Ms. Johnson's employment and dismissal from the Lanes before addressing whether each of these steps in the analysis has been met.

[25] Ms. Johnson's evidence was basically two-fold. To begin with, she pointed to the many positive elements in her performance as general manager. She then gave evidence that she alleges shows how the MFN unjustifiably criticized or undermined her work and how the MFN treated Indigenous employees in a more favourable manner than her. She claims this ultimately extended to the MFN's decision to dismiss her.

[26] In its evidence, the MFN contends that Ms. Johnson had performance issues from the outset of her first probationary period. The MFN maintains that it did not treat her in a differential manner. It was her performance issues that led to her termination. I set out below the areas of Ms. Johnson's performance that she says were positive and the areas where she believes the MFN treated her adversely in her efforts to manage the Lanes. I then present the MFN's evidence in response to these claims, namely its concerns about her performance.

### **(i) Positive elements in Ms. Johnson's performance**

[27] Ms. Johnson testified about the numerous achievements in her performance, which demonstrate the passion she had for her work.

[28] Right from the outset of her employment, she knew that she had to equip herself with specific knowledge of the bowling business for the Lanes to be successful. Thus, for instance, the MFN sent her to other bowling operations in Boston, Toronto, and Prince Edward Island to learn about best practices.

[29] Ms. Johnson points out that she was always mindful of the need to keep costs down. For example, when she went to Boston along with two Lanes' technicians who were going to be trained, she researched all options and found the least expensive means to attend was by driving instead of flying, resulting in significant cost savings for the MFN.



[30] In the months leading up to the Lanes' opening in November 2018, Ms. Johnson sought out staff that the MFN would need to hire to run the business. Interviews were held in accordance with the MFN's hiring policies, in October 2018, to select the 60 or so employees that would be needed. One week before opening day, the selected employees were supposed to come in for training. However, only 36 showed up, which would have meant that the operation would be understaffed at the opening. Ms. Johnson needed to have people hired "on the fly," in her words. She had already arranged for three international university students to be hired. She took the initiative to ask them if they had any friends who would be willing to work. Ten international students showed up and seven were hired. Through this and other initiatives, the Lanes were able to be sufficiently staffed and, ultimately, 68 workers were hired in total.

[31] Ms. Johnson notes that she managed more employees than any of the other MFN operations. She realized that the MFN did not have an adequate scheduling software application to assign workers their shifts. She investigated and acquired a good product for this purpose. Mr. Paul was so impressed with how well the application worked that he asked Ms. Johnson to share it with the managers of the MFN's other businesses.

[32] The Lanes were extremely popular when they first opened and had some big line-ups of customers who had not reserved lanes. She needed to find a way to manage the situation and, after some quick research, found a software application that staff could use. She took the initiative and purchased a tablet on which the application was loaded to apply the system.

[33] Similarly, there was a high demand for large parties of customers who, in addition to bowling, wanted to be served food. Ms. Johnson had seen an application being used at one of the other bowling alleys she had visited. She acquired the software and had the staff trained to use it.

[34] Ms. Johnson observed during construction that there was no private secure space set aside for staff to count cash, so she spoke to the Lanes' architect and arranged to have a cash office built just off the bowling desk. She also noticed that if customers walked with their winter boots in the bowling lanes area, the floors could be damaged and the wet floors

could pose a danger. As a result, she arranged to install a coat rack across from the bowling desk where customers could leave their boots and outerwear.

[35] Ms. Johnson implemented a recycling plan for the Lanes' waste management since the MFN did not already have one. She arranged for beverages to be purchased in cans instead of bottles because they are easier to store and return for deposit reimbursement. Ms. Johnson used the reimbursed deposit money to purchase a blender for the staff to make healthy shakes, rather than consume less healthy food and drinks. She also used the reimbursed deposit money to purchase \$50 gift cards to be awarded weekly to an employee.

[36] Ms. Johnson arranged for all garbage cans to be removed from the building and replaced solely with recycling bins to discourage waste. No paper was given to customers. A washer/dryer unit was installed to clean wash cloths, eliminating the need to use paper towels. She even used some of the Lanes' budget to buy staff thermos bottles to encourage them not to use disposable coffee and drink cups. Ms. Johnson claims that she was thus able to minimize the Lanes' garbage and carbon footprint. Only one regular bag of garbage was generated per week.

[37] The Lanes had 40 display monitors throughout the facility, which needed to be cleaned regularly. Ms. Johnson spoke to a university chemist who recommended an environmentally friendly screen cleaner, which she ordered be used.

[38] Ms. Johnson filed in evidence an email that she sent to Mr. Paul in April 2019 in which she updated him on all her upcoming activities. She referred to the possibility of establishing a take-out menu and of beginning a marketing campaign directed at teenagers. Ms. Johnson mentioned that she was reviewing the Lanes' financials and developing a plan to cut labour costs. She referred to staff training in the use of the software that had been acquired for the Lanes and her plans to distribute gratuities and tips through payroll.

[39] Ms. Johnson testified about how her mission in her work was also to help others gain fulfilling employment at the Lanes and feel good about themselves. A person that she hired as a lane technician is still working there and is considered a leader among staff. Ms. Johnson had another employee hired who had been struggling in her job at a different MFN operation. The employee thrived at her Lanes' job. Another person, who was a member of

the MFN community, was struggling with substance dependency problems. She hired him, and he thanked her for caring about him.

[40] Ms. Johnson called Shannon MacAuley to testify at the hearing. Ms. MacAuley stated that, after she was hired to work at the Lanes, Ms. Johnson noticed that her CV said she had qualifications in office administration and graphic design. Ms. Johnson was her first employer to recognize these qualifications, and she assigned her work in those areas. Ms. MacAuley testified that she felt there was “something magical” about working at the Lanes with Ms. Johnson. She felt at home, at a place that could offer her a career, adding that Ms. Johnson had “opened up [her] world.”

[41] Ms. Johnson also had John Miller testify. He served for many years with the MFN in many capacities, including as its director of finance. The MFN asked him to assist in the Lanes’ operations in matters relating to his expertise in accounting. As such, Mr. Miller worked closely with Ms. Johnson. In his opinion, she was a good person who was doing an excellent job.

[42] Ms. Johnson submits that all this evidence demonstrates her commitment and passion for her work and that her job performance was above par.

**(ii) The MFN’s actions and omissions regarding Ms. Johnson’s management of the Lanes that she alleges show that the MFN treated her adversely as a non-Indigenous person**

[43] Ms. Johnson alleges that her achievements at her job came about despite the MFN’s actions and omissions regarding the management of the Lanes, which she claims demonstrates that it discriminated against her based on her protected characteristics.

[44] I set out these actions and omissions below but, in some instances, I have also incorporated the evidence advanced by the MFN in response to these claims.

**a. The MFN's failure to respond to Ms. Johnson's requests**

[45] To begin with, Ms. Johnson points to numerous instances where the MFN failed to respond to her requests to improve the Lanes' operations.

[46] For instance, on December 12, 2018, she emailed Mr. Stevens asking him, "Please set me up for a training session on how to do coaching documents and verbal and written warnings, etc..... in case I need things." No one ever responded to this email, and she was not given the requested training.

[47] The MFN counters that Article 7.1 of its personnel policy spelled out clearly the steps to be taken on discipline. Managers are to give verbal warnings with an entry in the personnel file for first offences. Managers or directors issue written second warnings. Third offences result in a notice of dismissal after the matter has been discussed with the COO. As general manager, Ms. Johnson should have made herself aware of the policy and known how to follow it. She should not need to be trained on this. The position's job description said that she had the duty to comply with the MFN's personnel policy. Ms. Johnson acknowledged that she did not keep a copy of it in her office and did not consult it for staffing issues. Mr. Paul testified that he did not have to go in and explain policies to managers in any of the MFN's other businesses.

[48] In February 2019, Ms. Johnson emailed Mr. Stevens to tell him about an employee who was short by over \$400 in her cash. Ms. Johnson asked Mr. Stevens what steps needed to be taken to dismiss the employee and recover the funds. Instead of dismissing the employee, Mr. Stevens just deducted the missing sum from the employee's next paycheque and noted it in her personnel file. The employee, who was a member of the MFN, was not dismissed or disciplined.

[49] The MFN points out, however, that Mr. Stevens' actions complied entirely with the MFN's personnel policy. Article 3.4 of the policy says that employees are liable for any cash shortage that may occur during working hours, and it is deducted from their wages. Mr. Paul testified that before someone can be dismissed, a proper investigation needs to be conducted with conclusions based on evidence. Eventually, the police may need to be called

in to investigate. This is consistent with the personnel policy. The employee quit before an investigation could be held, according to Ms. Johnson.

[50] Also in February 2019, Ms. Johnson emailed Mr. Stevens asking to hire an additional person part time to the position of cash office/bowling operations supervisor to further tighten the Lanes' cash procedures. She suspected that staff were not processing data correctly. Mr. Stevens and the MFN never addressed her staffing request.

[51] Ms. Johnson filed in evidence a February 2019 email exchange with Mr. Stevens that she claims further shows how senior MFN management was preventing her from doing her job properly. Ms. Johnson explained to Mr. Stevens in the email that she had previously sent a request directly to the Chief and Council to have the salary of an employee who had been promoted to the position of lane technician increased to reflect this reclassification. She testified that she was never formally trained on how to get employees reclassified. Ms. Johnson's wrote in her email that the request was redirected to several people but did not end up being approved. Yet, when the employee, who is Indigenous and a member of the MFN, personally asked Chief and Council to have her pay reflect the work she was doing, the increase was approved.

[52] However, as the MFN pointed out, the full email exchange provides the rationale for not granting pay increases automatically when job tasks change. Mr. Paul explained to Ms. Johnson in another email that just because work assignments change does not mean that the person has been "promoted." It is understandable to want to promote and retain workers, but operational costs must always be considered. That is why all promotions and pay increases must be approved first by the COO.

[53] Mr. Paul testified that a salary review committee, comprised of councillors, an HR representative, and him, exists. The committee first assesses and decides every wage raise request and then makes a recommendation to the Council. Ms. Johnson never made a request to the committee. As for promotions, there is a process in place for those types of opportunities to be posted and enable employees to apply for them.

[54] In March 2019, Ms. Johnson emailed Mr. Stevens to advise him that one of the lane technicians would be going on leave for several weeks in May. Ms. Johnson asked him to

create an internal job posting to replace the technician while on leave. According to Ms. Johnson, Mr. Stevens made no effort to assist her in getting a replacement.

[55] In April 2019, the funding from an employment assistance program that was paying a very good employee's salary ended. Ms. Johnson emailed Mr. Paul proposing that the employee be retained. She undertook to review the Lanes' revenue and expense figures to find a funding source for the continued employment. After initially asking for some additional information, Mr. Paul and the MFN failed to follow up. The employee got a job somewhere else, and the Lanes lost a good worker.

[56] Ms. Johnson sent an email to Mr. Stevens on April 21, 2019, asking if he was available to meet with her and an employee who had missed several shifts and left her job early several times. Mr. Stevens never responded to the email. Ms. Johnson pointed out in her testimony that Mr. Stevens had by this point still not provided her any coaching on how to issue warnings to employees, which she had requested in her December 2018 email to him. This is why she asked him to participate in this meeting.

[57] As mentioned earlier, the MFN maintains that these are issues that fell squarely within a general manager's responsibilities, and Ms. Johnson should have known how to deal with them herself in accordance with the detailed personnel policy.

**b. The MFN's unwillingness to address concerns about an employee if they are Indigenous**

[58] Ms. Johnson highlighted in her testimony an incident involving an employee whom I need only refer to as CD (not her real initials). In May 2019, Ms. Johnson and Mr. Miller had gone to a bowling facility in Toronto to observe its cash management operations with that alley's expert. Part of the exercise involved reviewing the Lanes' security camera footage and comparing it with the data generated by the Lanes' point-of-sale terminals. They observed that CD had ordered food and alcohol for customers but did not collect the money. On May 16, 2019, Ms. Johnson emailed Mr. Stevens, with a copy to Mr. Paul, to inform them of this discovery and the need to take action before CD's next shift. In her examination-in-chief, Ms. Johnson testified that Mr. Paul's only email response to her was, "Is [CD] native?"

AB was copied on Mr. Paul's email and AB replied to him that CD is not. Ms. Johnson's testimony was her only evidence for this allegation. She did not produce a copy of this email exchange as she describes it.

[59] However, in cross-examination, the MFN entered into evidence an email chain of 20 messages, with the subject heading "Evidence of Theft." The chain begins with what appears to be Ms. Johnson's initial email to Mr. Paul of Thursday, May 16, 2019, at 2:48 p.m. Contrary to Ms. Johnson's testimony, Mr. Paul's first response 22 minutes later simply asks her to send him the evidence, adding that an investigation must be started immediately and that CD's access to additional cash must be prevented. A series of other emails follow that day between Ms. Johnson and Mr. Paul, in which she shared some more details about her observations. AB was also copied on the exchange since she was acting manager while Ms. Johnson was away.

[60] The email chain continued the following day, Friday, May 17, 2019. At 6:59 a.m.; AB wrote to Ms. Johnson and Mr. Paul asking what instructions they had for her. Mr. Paul responded with a short email at 9:42 a.m. asking, "Is [CD] a band member or a community member?" AB responded five minutes later, "No she is not." The email chain then continues for another eight exchanges between Ms. Johnson, Mr. Paul, Mr. Stevens, and AB, in which strategies and options are discussed for dealing with CD. The email chain ends on Saturday, May 18, 2019, at 5:13 p.m.

[61] Ms. Johnson maintains that there was an earlier email from Mr. Paul with the Indigenous reference, since she recalls having turned to Mr. Miller immediately after receiving it and remarking to him, "Can you believe it?" That conversation could only have occurred on Thursday, May 16, 2019, because Mr. Miller had left Toronto by Friday, May 17, 2019, and she did not speak to him that day. I note, however, that Mr. Miller did not mention anything about this conversation in his testimony, and Ms. Johnson did not ask him any questions about it. She later stated that Mr. Miller would not have been able to recall it anyway since it occurred four years earlier. Nevertheless, the question was never put to him at the hearing.

[62] Taking all the evidence into account, I am not persuaded on the balance of probabilities that Mr. Paul made the comment in the manner alleged by Ms. Johnson. The documentary evidence simply does not support it. Ms. Johnson asserted that the MFN had withheld portions or doctored the emails, but there is no evidence to support this allegation. The MFN and its legal counsel affirmed unequivocally that they had disclosed the entire email exchange, and Ms. Johnson did not produce any emails to counter this statement.

[63] This is not to say that something akin to what Ms. Johnson recalls did not occur. Mr. Paul clearly asked if the employee was an MFN member. He explained in his evidence the significance of his question. If the employee was a member, Mr. Paul would need to give the Chief and Council a heads-up, since members have a right to bring their complaints and grievances directly to them. Mr. Paul pointed out that not all MFN members are Indigenous. Some are members through marriage. The question about whether CD was a member was not intended to suggest that any preferential treatment be given to CD.

[64] I appreciate Ms. Johnson's recollection that the conversation had to have occurred on the Thursday, but nothing else supports her claim. Mr. Miller was not asked to confirm it, and I also note that Ms. Johnson's recollection in her evidence-in-chief, before the email chain was presented to her in cross-examination, was that only three emails were exchanged between her, AB, and Mr. Paul. The documentary evidence clearly shows that there was a much longer exchange, which extended over two days.

[65] It has therefore not been proven that Mr. Paul made the alleged comment.

### **c. The MFN's failure to provide Ms. Johnson a coaching document**

[66] In Ms. Johnson's performance appraisal report, which Mr. Paul prepared at the end of her initial probation period in February 2019, he commented that her probation was being extended for three months and that he and Mr. Stevens would be helping her "by providing a coaching document with follow-up."

[67] The coaching document was never in fact provided to Ms. Johnson before she was terminated in May 2019. Ms. Johnson suggested at the hearing that even if no coaching document was prepared, the MFN should at least have provided her with an action plan for



the Lanes. Mr. Paul testified that he would have expected her to develop the action plan for him to approve. Mr. Stevens, in cross-examination, appeared to contradict this statement, saying that he understood it was up to an employee's direct manager to draft an action plan. I note, however, that a close review of the testimonies shows that the questioning may have been unclear as to what was being referred to—whether “coaching” and “action plans” were understood to be synonymous or not. I therefore hesitate to make any finding of contradiction on this point.

#### **d. Post-dismissal evidence**

[68] Ms. Johnson submits that the MFN's conduct after she was dismissed in May 2019 supports her allegations of discrimination. Ms. MacAuley testified that, after the termination, AB told her not to speak to Ms. Johnson, warning her that doing so would affect her employment. The remark made Ms. MacAuley nervous, but she ultimately shrugged it off. She did not perceive it as a threat. She has maintained her friendship with Ms. Johnson despite what she described as AB's “inappropriate” comment. Ms. MacAuley testified that no one else made any similar comment to her.

[69] Ms. Johnson claims that other employees were similarly told not to speak to her after receiving Mr. Paul's written message to staff announcing that Ms. Johnson would no longer be general manager. However, those other employees were not called to testify, and Ms. Johnson's evidence is thus hearsay. Although the Tribunal may receive and accept hearsay evidence, I do not find it appropriate to assign any weight to these otherwise uncorroborated hearsay statements.

[70] Ms. Johnson also points to how her appeal of the dismissal was dealt with as further evidence of discriminatory treatment. Mr. Stevens' termination letter of May 24, 2019, stated that as per the personnel policy, she could appeal the dismissal to the Chief and Council in writing within 15 days. She sent her appeal letter on June 1, 2019. Yet, she never received any response.

[71] Mr. Paul confirmed in his testimony this type of appeal letter is normally vetted by the Chief as CEO to determine if the matter warrants bringing to a meeting of Chief and Council

or whether the matter will be dealt with outside of Council. Mr. Paul was unable to explain in his testimony what happened to Ms. Johnson's appeal.

[72] Ms. Johnson also claims that if she were an MFN member, she could have complained about her situation to the Chief and Council. Mr. Paul testified that members of the MFN have a right as members to contact their councillor to complain about any concern they may have on any topic and to ask that their issue be raised at a meeting of the Chief and Council.

**e. The MFN's preferential treatment of AB and the lead-up to Ms. Johnson's termination**

[73] As alleged in Ms. Johnson's complaint, the MFN hired three managers to oversee the Lanes' operations prior to their opening—a food and beverage manager (who left for personal reasons in February 2019), AB (who was the customer relations and events supervisor), and Ms. Johnson (who was the general manager). The job description for AB's position involved working with customers to arrange parties and events and proactively reaching out to attract new customers. This required providing customers with "outstanding service through friendly, quick, efficient, accurate and safe assistance."

[74] Ms. Johnson alleges that she faced numerous incidents of incompetence, insubordination, and absenteeism with AB. Yet, the MFN did not support Ms. Johnson in disciplining AB and later insisted on promoting her to the assistant manager position, with which Ms. Johnson could not in good conscience agree. Instead, Ms. Johnson believed that AB should have been dismissed in accordance with the MFN's policy.

[75] How the MFN dealt with AB is key to Ms. Johnson's case since it was right after an exchange of emails with Mr. Paul and Mr. Stevens over AB's role that Ms. Johnson's employment was terminated.

[76] Ms. Johnson testified that her concerns about AB had emerged before the Lanes opened for business. On November 9, 2018, Ms. Johnson met with Mr. Paul to discuss them. She told him about a cardiopulmonary resuscitation machine that had been purchased for the Lanes. A rebate program for reimbursement of its cost was available, and

Ms. Johnson asked AB to apply for it in August 2018. She learned several months later that the paperwork had not been filed.

[77] Ms. Johnson also explained that another Nova Scotia bowling facility had emailed her saying that it had been trying to contact AB repeatedly to arrange a visit of the Lanes, but AB had not responded. AB's voicemail was full, and she did answer its text messages.

[78] Customers had begun to book their Christmas parties. A large corporate client wanted to reserve the facility, but its calls to AB had gone unanswered, so the client called Ms. Johnson directly.

[79] Ms. Johnson also told Mr. Paul about an incident involving the seven international students who were hired at the last minute before the Lanes' opening. Paperwork had been filled out for their employment, and AB was tasked with getting it to the MFN payroll office. One month later, the payroll office contacted Ms. Johnson asking for the students' paperwork. The package had somehow never made it to the office.

[80] Having raised all these concerns with Mr. Paul, Ms. Johnson asked him what his plan of action was. He did not impose any disciplinary measures on AB and only confirmed to Ms. Johnson that AB had some similar performance issues at another MFN business where she used to work.

[81] In January 2019, another issue developed involving AB. Several employees reported to Ms. Johnson that AB had been drinking alcohol at the Lanes without paying. She was also instructing staff, in her capacity as supervisor, to turn on lanes for people who had not paid. Ms. Johnson raised the problem with Mr. Paul and Mr. Stevens. She testified that nothing was done, and she was not given any direction on the next steps to be taken.

[82] Another incident involving AB occurred on the day of the Super Bowl in February 2019. Ms. Johnson was off that day, but she connected to the Lanes' camera system to see if any help was needed. AB was working at the bar, and Ms. Johnson observed her drinking beer. Some prizes were being raffled off to customers around 9 p.m. At one point, when AB left her post to draw the raffle tickets, a customer who appeared inebriated ran behind the bar. Another employee observed him and ordered him out of the building. AB ran out after

them and brought the customer back in, which Ms. Johnson found very dangerous to staff and the other customers.

[83] Ms. Johnson later spoke to AB about her conduct but did not report it to senior management. Ms. Johnson did not see the point since her prior complaints about AB were left unanswered. She was waiting for direction on how to deal with this sort of problem.

[84] However, according to Ms. Johnson, a Lanes' bartender, who is an MFN member and who had observed some of AB's more serious misconduct, reported it directly to the Chief and Council, and only then did Mr. Stevens react by issuing a coaching document on February 19, 2019, to AB directing her not to drink while working at the Lanes. Ms. Johnson also signed the document. Ms. Johnson points to this sequence of events as indicative of the preferential treatment shown to MFN members like the bartender over her, a non-Indigenous person.

[85] Mr. Stevens' evidence on this point differs somewhat. Several employees told him that AB was observed drinking while on duty. He prepared a coaching document instructing her not to drink when she was at the Lanes, unless she is there as a patron and making that clear to staff. The document was meant to be a disciplinary document and was also intended to be an example to all staff that this conduct will not be tolerated. Both he and Ms. Johnson signed it. It is the first step in the disciplinary process set out in the personnel policy.

[86] Ms. Johnson acknowledges that in the weeks after Mr. Stevens gave AB the coaching document, her conduct improved. She stopped drinking at the Lanes. Ms. Johnson prepared AB's performance appraisal report in March 2019. She scored AB as either meeting or exceeding job standards and requirements. AB's overall total score was 69%, and Ms. Johnson's comments were that AB is a valued employee and continues to grow into her position, displaying leadership qualities and good decision-making skills. In the areas for improvement, Ms. Johnson noted that as the day-to-day operations become more familiar, prioritizing and time management "should fall into place simultaneously." Ms. Johnson testified that she wanted to present positive points in the performance appraisal report since she had observed an improvement over the previous couple of weeks.

[87] However, there were still issues about AB not dealing with bookings properly. For instance, in April 2019, AB had accepted a booking for a large party to take place on a Tuesday, for which \$1,800 worth of food was ordered. No one showed up. It turned out the party was to occur the following day. Ms. Johnson blames the mix-up on AB for refusing to use the reservation software to keep track of bookings. Ms. Johnson reported the incident to Mr. Paul and Mr. Stevens, but AB was still not disciplined. She claims that Mr. Paul said he would draft another coaching document for AB, but none was ever prepared.

[88] Despite these issues with AB's performance, Ms. Johnson observed that the MFN not only did little to discipline or correct AB's conduct, but it also set her on a path to be promoted.

[89] As I have already mentioned, Ms. Johnson and Mr. Miller were visiting a large bowling operation in Toronto the week of May 13, 2019. While there, Ms. Johnson received an email from Mr. Paul on May 15, 2019. He referred to several items that had been discussed at a meeting he had convened with Ms. Johnson and other senior Lanes staff on May 8, 2019. Mr. Paul's email included the following text:

Items to get done before the end of the day 1/ Staff being advised that [AB] is second in command 2/ [AB] getting access and use of your office when she is acting manager for professional, privacy, optics etc. I hope you see this as me helping the situation not hindering. Let me know if you want to send acting manager message? Do you have any issues with [AB] working out of your office.

[Sic throughout]

[90] The MFN submits that by "second in command," Mr. Paul was referring to AB being promoted to the position of Ms. Johnson's assistant manager. Ms. Johnson disagrees. She contends that the only thing discussed at the May 8 meeting was AB filling in for her on an acting basis while she was away. Ms. Johnson responded by email about one hour later, noting that AB would not have any need for extra office space if she just cleaned up her existing space. Ms. Johnson went on to say, "I will make it very easy for you, Richard... I will be back next Monday and I will clean out that office of whatever personal items I have in there and you can give that office to [AB] permanently."

[91] Whether or not the assistant manager position was being referenced in this exchange, it clearly became the topic in a second series of exchanges between Ms. Johnson and Mr. Paul about a week later, after her return to Cape Breton. On May 22, 2019, Ms. Johnson wrote an email to Mr. Paul with information that she wanted to share “after seeking advice from several sources,” which she did not specify. The email dealt entirely with AB. Ms. Johnson stated that she had recorded 23 incidents of customers calling her to complain that AB had not responded to their calls to have events booked. Ms. Johnson also said that there were four instances where AB “lied” to her, such as when AB told Ms. Johnson she would come to work late due to a dentist appointment when in fact she was in a meeting at the MFN office. Ms. Johnson goes on in the email to refer to the previously mentioned drinking incidents, AB not paying for her meals, and the mistaken \$1,800 booking. Ms. Johnson sums it all up in the email as “countless examples of insubordination and incompetence.”

[92] Ms. Johnson concludes the email by saying that she cannot trust AB and that while she is willing to work with AB to rebuild that trust, it cannot be as assistant manager. Ms. Johnson ends by saying that if she is to continue as the Lanes’ general manager, she needs someone in the assistant manager’s role she can trust.

[93] Mr. Paul replied the next day, noting the “many meetings” he and Mr. Stevens had with Ms. Johnson to help her understand the many areas of managing staff, including policy and procedure. Mr. Paul added that at the meeting of May 8, 2019, the decision was made to give AB the authority to manage as assistant manager and provide leadership in Ms. Johnson’s absence.

[94] But Ms. Johnson in her next response an hour later made it clear that she did indeed want the MFN to hire an assistant manager, just “someone besides [AB].” AB could then focus on the job she was hired to do according to her job description. One hour afterwards, Ms. Johnson wrote to Mr. Paul and Mr. Stevens to report an additional incident of AB drinking at the Lanes the previous weekend and “bossing people around.”

[95] Ms. Johnson had apparently been on stress leave since returning from Toronto, so in the evening of May 23, 2019, Mr. Paul emailed to ask her if she would be filing a doctor’s

note. She responded that she would not, having realized that the decision to appoint AB as assistant manager was final. Ms. Johnson's email reads as follows:

No require [sic] for doctor's note...I explained to you my concerns and you have answered them. You said you are appointing [AB] Assistant Manager tomorrow morning. You have made the decision. No need to prolong any longer. As I indicated, I am unable to work with an Assistant Manager who has proved many times to be untrustworthy and incompetent. No person should be expected to work under those conditions, it is [a] recipe for disaster and failure. All who I have consulted for advice, advised me not to do it. I started this journey with good intentions and felt I really could make a difference, especially for the employees and I know in my heart I always had their best interest in mind and truly made a difference for most of them.

Kind regards,

Joanne Johnson

[96] Ms. Johnson's employment was terminated the following day.

**(iii) The MFN's concerns with Ms. Johnson's performance as general manager**

[97] The MFN contends that Ms. Johnson had difficulties mentoring, motivating, and dealing with staff at the Lanes. She took a stand-offish position to her superior's efforts to improve her performance. She demonstrated defiance and insubordination, particularly with respect to the matter involving AB, and was therefore terminated. The MFN claims that Ms. Johnson's protected characteristics were not factors in any incidents relating to her employment and termination.

[98] To begin with, the MFN points out that it had promoted her to a head cashier position in her prior employment at the casino.

[99] At the Lanes, she was selected for the general manager position by a hiring committee composed entirely of MFN members, including Mr. Paul. She was one of 11 candidates. Three of the other candidates were MFN members, yet she was selected ahead of them. Mr. Paul testified that he was in favour of her appointment when she was hired. He pointed out that the two general managers who succeeded Ms. Johnson after her dismissal were not Indigenous nor MFN members.

[100] Ms. Johnson acknowledged in her testimony that during her employment at the Lanes, she was never witness to any derogatory statements against her based on race or national/ethnic origin. She also agreed that in her exchanges with the MFN, including her appeal to the Chief and Council about her termination, she never alleged that she had been discriminated against on a prohibited ground of discrimination. Ms. Johnson confirmed in her testimony that she has seen the MFN dismiss Indigenous employees as well. She also acknowledged that she had no statistics or figures documenting the number of non-member and non-Indigenous employees who have been hired or dismissed by the MFN.

[101] The MFN contends that from early in Ms. Johnson's probationary period, concerns began to emerge about her performance.

[102] On October 31, 2018, the director of HR wrote an email to Mr. Paul complaining about Ms. Johnson, describing her treatment of him as "unacceptable" and disrespectful. She challenged his hiring decisions, which did not fall under her authority. He stated that Ms. Johnson spoke to him in a forceful and sarcastic tone with comments that "shocked and surprised" him.

[103] Ms. Johnson testified that she never was shown this email and did not recall having any conversations of the sort with the HR director. She only dealt with Mr. Stevens, the HR manager.

[104] On November 26, 2018, Mr. Stevens sent an email to Mr. Paul, with the subject heading "Lanes concerns for today." It contained a list of 11 items including:

- Ms. Johnson was hiring people "on the spot" without waiting for the Chief and Council's presence or involvement;
- Ms. Johnson was switching employees' duties, offering supervisory positions, and then retracting the offers, saying it was a joke;
- Employees were not getting their mandatory breaks as required by law;
- Employees had not seen their job descriptions and did not know what to do;
- AB was acting like she was a manager, ordering people around even when she was off shift and drinking at the bar; and
- Employees were feeling undermined and belittled.



[105] Mr. Stevens concluded the email by stating that in his opinion, Ms. Johnson needed to read up on applicable labour standards so that she is aware of what she can do or say, and what she cannot.

[106] Mr. Paul testified that the email was based on complaints that Mr. Stevens received as HR manager. Mr. Paul did not follow up on and investigate these matters since they were not filed formally in writing by any of the complaining employees. Ms. Johnson confirmed that the complaints were not forwarded to her except for the question about AB drinking at the bar. As for the other items, she does not recall any employees making these complaints, noting that the email was sent just days after the opening and the Lanes were very busy.

[107] On January 14, 2019, the HR director wrote again to Mr. Paul complaining about Ms. Johnson, claiming she was sending out unprofessional temporary letters of offer. The HR director stated that staff were telling him that they were afraid of her and unwilling to complain because they feared they would be fired. Mr. Paul replied with a defence of her hiring actions as being consistent with the direction given to her to staff the Lanes quickly for the opening. The HR director replied that she was nonetheless continuing to be disrespectful to staff, arguing that this type of attitude and management style was contrary to every policy on respect and the MFN's code of conduct.

[108] Ms. Johnson reiterated in her testimony that she did not recall being disrespectful to the HR director.

[109] These concerns ended up being reflected in the annual performance appraisal report for Ms. Johnson, which Mr. Paul prepared in February 2019. As I already mentioned, the appraisal stated that Ms. Johnson's probationary period would be extended for another three months.

[110] The appraisal report also identified a significant number of deficiencies in Ms. Johnson's performance. They include the following:

- Under "Leadership," her messaging to employees needed to be consistent with the plans and goals of the COO and Corporate Executive. Some employees had raised issues because they felt nothing was being done. Ms. Johnson was marked as needing improvement in her consistency in applying and following policies;

- Under “Operational Effectiveness – Planning and Priorities,” Mr. Paul recommended that she focus on the function and operation of the Lanes and that she come up with a priority list about what is important and what others can be doing. Mr. Paul testified that she never ended up providing him the priority list;
- Under “Job Knowledge and Skills,” Mr. Paul wrote that he had discussed with her policy and procedures dos and don’ts and made suggestions, but then, down the road, it was as if the discussions never happened. He recommended that Ms. Johnson take responsibility for issues arising at the Lanes;
- Under “Dealing with Difficult People,” Mr. Paul noted that there were instances where Ms. Johnson used an aggravated tone in dealing with employees and customers. He referred to the “dog incident,” which involved a couple of customers who had left their dogs in their car outside. Ms. Johnson got on the public address system, identified their car, and said they needed to deal with their dogs immediately and if not, they would be thrown out of the Lanes and the SPCA would be called. The couple sent a formal letter of complaint to the Chief and Council about how they were treated. The recommendation under this heading was that she ask questions before making statements, that she delay decisions, and that she consider whether there is another solution. Mr. Paul acknowledged in his testimony that this was the only complaint about Ms. Johnson to have been filed with the Chief and Council;
- Under “Coaching and Discipline,” it was noted that some employees had sent comments saying they had felt threatened and had concerns. It was recommended that Ms. Johnson be more consistent when dealing with employees’ issues and demands. Mr. Paul testified that some employees felt there was uneven treatment depending on whether they were on her “good side” or not. He added that this comment was intended to provide Ms. Johnson a “heads-up,” that this is what employees are saying and that she needs to deal with it;
- In the overall comments and recommendations, Mr. Paul noted that the decision to extend Ms. Johnson’s probation did not come easy. He recommended that she gain a better understanding of the MFN’s policies, understand when and how to apply them fairly, and what her role and authority are. She should learn all areas of the business.

[111] Mr. Paul testified that what he was looking for from the general manager, particularly regarding leadership skills, is that the person be humble and accept responsibility rather than deflect it onto others, as she was doing. He wondered why Ms. Johnson was not adhering to the applicable policies, when other managers reporting to him would practically memorize the policy books to avoid problems.

[112] Overall, Mr. Paul characterized her appraisal as being in between positive and negative. It was meant to give her guidance on how to be a good manager and leader.

[113] He was surprised, however, with the handwritten “Employee Comments” that she added when she received the performance appraisal report. She wrote the following:

***A probationary period is not just a period for management to decide whether or not an employee is a good fit for the organization. It is also a time period for the employee to decide whether the organization is a good fit for them.*** Upon accepting this position, my vision has remained constant to focus on employee empowerment, performance and well-being. I have set my priorities with this goal in mind. This sort of vision aligns with my management style of providing employees with a succession plan reaching their full potential through improved performance, keeping in mind the cost benefit of less turnover of staff.

(emphasis added)

[114] Mr. Paul interpreted these comments as an example of someone who does not take responsibility for their performance and necessary improvements they need to make. Saying that it is her right to evaluate the employer during probation was derogatory to an employer who was trying to assist her. It showed him that Ms. Johnson was “not getting” that everything is found in the MFN’s personnel policy and that everyone is to be treated fairly and equally, instead of always coming back to him and HR for advice that was already given and where the policy says clearly how to proceed.

[115] Mr. Paul testified about a meeting that he convened with Lanes’ staff, including Ms. Johnson, on February 20, 2019. Due to the complaints about the Lanes’ operations, he felt compelled to call the meeting and just reiterate what the MFN’s policies are because it seemed to him that they were not being followed. This guidance should be the general manager’s role, but it seemed the information was not getting through. It was Ms. Johnson’s responsibility to pass these messages down. This is not part of a COO’s normal duties, and Mr. Paul has not needed to hold similar meetings in the MFN’s other businesses. The items that needed to be discussed included minutiae that as a COO he normally should not have to deal with, such as how servers communicate with the kitchen, how credit cards are refunded, and the supervisors’ role in preparing coaching documents for their staff.

[116] In the ensuing months, Mr. Paul still felt that his concerns about the Lanes’ operations needed to be addressed. He concluded that monthly meetings had become important to

hold and that he would need to attend them. As a result, he decided to convene the staff meeting of May 8, 2019, referred to earlier in this decision.

[117] Mr. Paul testified that among the items he brought up at the meeting was his plan to set up an organizational structure with Ms. Johnson at the top and AB as her assistant manager. He claims that no one objected to his direction at the meeting. His notes from the meeting indicate that AB was tasked to prepare an organizational chart to reflect the structure Mr. Paul was putting in place.

[118] On May 15, 2019, Mr. Paul wrote an email to Ms. Johnson following up on the meeting. He advised her that while she was on her business trip to Toronto, he had begun implementing some of the items discussed at the staff meeting. The email included the paragraph excerpted earlier, which referred to AB being “second in command” and her gaining access to Ms. Johnson’s office when serving as acting manager. Mr. Paul explained in his evidence that AB’s office was basically a closet and lacked privacy, so when replacing Ms. Johnson, she would need a professional space to meet with people.

[119] Mr. Paul testified he was surprised by Ms. Johnson’s reaction, expressing that she would “clean out that office” upon her return. He considered it childish. He understood her to be saying that she was resigning. In his over 40 years supervising staff, Mr. Paul was never spoken to this way by an employee.

[120] He was even more shocked by the exchange of emails that began on May 23, 2019. The list of incidents that Ms. Johnson had compiled against AB showed him that she was keeping a file on AB to use against her in the future. Mr. Paul realized that Ms. Johnson had a complete lack of trust in AB. If there were indeed lapses in AB’s performance, it was Ms. Johnson’s duty as a manager to talk to and coach AB.

[121] Mr. Paul took as an ultimatum from Ms. Johnson the statement in her last email that day, stating that “no person should be expected to work under those conditions” with an assistant manager who is “untrustworthy and incompetent.” She was telling him that unless he changed his decision on how the Lanes were organized, she would no longer be general manager. Mr. Paul testified that it was at that moment he decided to terminate her

probationary employment. However, he consulted with the Chief and Council before implementing his decision.

[122] He maintains that the fact that Ms. Johnson is not an MFN member or Indigenous had nothing to do with his decision. Despite his repeated directions to her and advice to follow policies, she never admitted that it was her responsibility to get things done at the Lanes, not the COO's. Mr. Paul points out that the general manager hired to replace Ms. Johnson was someone of Lebanese origin, and he was later succeeded by a woman of Jamaican origin. Neither were Indigenous nor members of the MFN.

### **C. ANALYSIS – A *PRIMA FACIE* CASE UNDER SECTION 7 WAS NOT PROVEN**

[123] I have outlined the evidence in this case. Does it establish discrimination on a *prima facie* basis under s. 7 of the CHRA? For the following reasons, I find that Ms. Johnson has only established the first two components of the test. She has not proven the third component, that is, that the prohibited grounds of discrimination were factors in how she was treated during her employment and in her termination.

[124] I will analyze each of the three steps of the test.

#### **(i) Ms. Johnson has protected characteristics under the CHRA**

[125] It is not in dispute that Ms. Johnson is not a member of the MFN and is not Indigenous. She does not identify as a racialized person. In cross-examination, she stated that she was not alleging that she was dismissed because she was “white.” However, she maintains that a factor in the MFN's decision to dismiss her was the fact that she does not possess those identities that relate to race, colour, and national or ethnic origin. This is sufficient to establish that she has a protected characteristic within the meaning of the CHRA. There is no distinction in the CHRA between persons who are discriminated against for being members of a particular protected group and those who are discriminated against for not being a member of the group (*Deschambeault v. Cumberland House Cree Nation*, 2008 CHRT 48 at para 39). The first element of the *prima facie* case has been proven.

**(ii) Ms. Johnson experienced an adverse impact**

[126] The notion of adverse treatment connotes “something harmful, hurtful or hostile” (*Tahmourpour v. Canada (Attorney General)*, 2010 FCA 192 at para 12), though a fairly broad and permissive definition of “adverse” is still in keeping with the scheme of the CHRA (*Kelsh v. Canadian Pacific Railway*, 2019 CHRT 51 at para 112).

[127] Ms. Johnson clearly experienced an adverse impact when the MFN terminated her employment as the Lanes’ general manager. Termination is undoubtedly harmful to someone’s employment relationship.

[128] Ms. Johnson alleges, however, that she was also adversely treated during her employment. In her final submissions, she referred to several instances of this.

[129] Ms. Johnson pointed to the fact that her probationary period was extended for an additional three months after the six-month performance appraisal report, whereas AB’s was not. Furthermore, in Mr. Paul’s concluding comments in Ms. Johnson’s performance appraisal report, he stated that he and Mr. Stevens would be helping her by providing a coaching document with a follow-up. It was ultimately never provided before her dismissal, whereas AB received one.

[130] I am prepared to accept that being required to remain on probation can be considered harmful since it renders a person’s employment more uncertain than if they were not on probation and that the failure to get a coaching document as promised harmed her ability to improve her performance. I am satisfied that these constituted an adverse impact for Ms. Johnson.

[131] As another illustration of adverse treatment during her employment, Ms. Johnson referred to the instance when she submitted a pay raise request for a lane attendant who had begun working as a lane technician, normally paid at a higher rate. Ms. Johnson states that her request was refused for no reason, but when the employee appealed to the Chief and Council as an MFN member, the pay raise was approved. Ms. Johnson submits that this demonstrates adverse treatment. I am not persuaded by this argument. To begin with, as the MFN argued in its final submissions, no independent evidence was adduced that the

events occurred as Ms. Johnson alleges. The employee in question did not testify and no document was produced supporting Ms. Johnson's claim as to how the pay raise was awarded. The MFN also contends that the process for salary review is complex and involves going through a salary review committee comprised in part of councillors. I am therefore not persuaded that the increase came about solely because of a simple appeal by the employee to the Chief and Council. Moreover, even if the events occurred as Ms. Johnson alleges, she was not harmed by the fact that the employee was more successful than Ms. Johnson. I do not consider this adverse treatment.

[132] Ms. Johnson contends that MFN senior management refused to take action when she first brought up the issues regarding AB about drinking while on duty, letting friends bowl for free, and not paying for her meals. Ms. Johnson claims Mr. Paul did not allow her to issue a coaching document to AB as contemplated by the MFN's policies because Ms. Johnson was still on probation. However, when the bartender, who is an MFN member, reported to HR that AB had been drinking, Mr. Paul agreed to allow Ms. Johnson to present a coaching document to AB. In effect, Ms. Johnson is alleging that the MFN only allowed her to exercise her managerial authority when an MFN member intervened, but not otherwise. Again, I do not see how this is harmful to Ms. Johnson. The fact that management reacted when a certain individual or member made a complaint about AB was not necessarily harmful to Mrs. Johnson.

[133] Ms. Johnson also referred to the incident involving the employee CD and Mr. Paul's alleged question about whether she was Indigenous, implying that this demonstrated uneven treatment of employees depending on whether they were Indigenous or not. I already found earlier in this decision that the evidence does not support her recollection of what occurred. Moreover, even if that were the case, I do not see how this incident harmed, hurt, or showed hostility towards Ms. Johnson.

[134] Finally, Ms. Johnson points to her circumstances after her termination. She highlights the fact that she never received a response from the Chief and Council to her appeal of the dismissal that she filed within 15 days, in accordance with her termination letter and her rights under the MFN's personnel policy. There was no explanation in the evidence for the MFN's failure to reply to Ms. Johnson's appeal. Mr. Paul explained that such appeals are

normally vetted by the MFN's Chief and, depending on the strength of the appeal submission, the matter may be referred to the Council for consideration. Even if, in this instance, the Chief saw no reason to follow up with the appeal, I agree that a reply should have been sent to Ms. Johnson. The MFN's legal counsel formally apologized at the hearing for this omission.

[135] Yet, I am not persuaded that the mere absence of a reply constitutes adverse the treatment. The lack of a response to her request essentially amounted to a denial of the appeal, against which Ms. Johnson could have exercised any recourse that might be available to her, in the ordinary course, like any employee who is dismissed and whose appeal to higher management is denied. She was not harmed by the absence of a formal response.

[136] Ms. Johnson claims that if she had been an MFN member, she would have also had the right to petition the Chief and Council about the termination decision. She claims that the fact that she does not have the same right constitutes adverse treatment. Mr. Paul confirmed that MFN members have a right to speak to their councillors about any issue they may have regarding the MFN's activities. However, there was no evidence that this would yield any result that could impact on Ms. Johnson's or any employee's dismissal. It is simply a right that members possess to complain to their elected councillors about anything. There is no evidence that this right is akin to an employment-related appeal process, like the one set out in the personnel policy. Her submission is based only on conjecture.

[137] In sum, therefore, Ms. Johnson has proven that she was adversely impacted, but only by having her probationary period extended and not receiving her coaching document, and by being terminated from her employment.

**(iii) Ms. Johnson's colour, national or ethnic origin, and race were not factors in the instances of adverse impact**

[138] I find that Ms. Johnson's colour, national or ethnic origin, and race were not factors in the following instances of adverse impact.



**a. The probationary period and the coaching document**

[139] I am not persuaded by Ms. Johnson's claims that prohibited grounds of discrimination were factors in the decision to extend her probation or in the failure to provide her a coaching document.

[140] To begin with, Article 2.8 of the MFN's personnel policy states explicitly that a performance review is completed at the six-month point, following which the MFN can decide whether to confirm the employment, extend the probation, demote the employee, or terminate them. In this case, the MFN decided to extend the probation. The grounds are clearly set out in Mr. Paul's performance appraisal report of Ms. Johnson, where many deficiencies in her performance are listed under several headings. The overall comments and recommendations highlight the need for Ms. Johnson to gain a better understanding of the MFN's policies and how to apply them fairly.

[141] Ms. Johnson questions why her probation was extended while in contrast AB's was not. She was promoted within a few months. The fact that AB's probation was not extended does not demonstrate that the prohibited grounds of discrimination were factors in the decision to extend Ms. Johnson's probation. The two employees' respective overall appraisal scores are not necessarily comparable, as there is a 5% variance between them (64% vs. 69%). More importantly, the nature of the jobs is different. Ms. Johnson had the most senior job at the Lanes, and one could understand if concerns about her performance would affect the MFN's decision on whether to confirm her employment. AB had a lower-ranking position.

[142] Furthermore, AB's performance appraisal report, which Ms. Johnson wrote, noted in all categories that AB met the standards and in a couple of areas exceeded them. Aside for a few comments about "some issues with time management" and not sharing information with managers where necessary, the remaining comments were positive, noting that AB was a valued employee. Ms. Johnson testified that the positive comments reflected an encouraging improvement in performance in the preceding weeks.

[143] On the other hand, Ms. Johnson's performance appraisal report noted that improvement was needed in at least four areas: fairness and consistency, receptiveness to

feedback, verbal communication, and policy compliance. Whatever Ms. Johnson's motivation, the fact remains that the comments in AB's performance appraisal were not as concerning as those in Ms. Johnson's performance appraisal report.

[144] As for the coaching document issue, I note that AB was given her coaching document a month before her performance appraisal report was prepared and only because of her misconduct warranting discipline. The coaching document was not given as part of AB's appraisal process. Ms. Johnson, on the other hand, was never subject to any disciplinary action that warranted a coaching document. It is true that Mr. Paul never followed up with a coaching document for Ms. Johnson, as he had indicated would be given, and no explanation was provided in the evidence. The MFN argued that because Ms. Johnson was dismissed a couple of months after she signed the performance appraisal report, there had been insufficient time to prepare it. No evidence was presented in support of this argument. However, in and of itself, this omission does not prove that Ms. Johnson's race, colour, or national or ethnic origin were in any way factors in the document not being prepared.

[145] Consequently, I cannot conclude that there was any differential treatment between Ms. Johnson and AB regarding their probationary periods and the coaching documents, let alone one based on any prohibited grounds of discrimination, within the meaning of s. 7(b) of the CHRA.

#### **b. The termination**

[146] I am satisfied that the MFN's reasons for terminating Ms. Johnson's employment were linked entirely to its perception of her performance as a general manager. The evidence simply does not support Ms. Johnson's allegation that her national or ethnic origin, race, or colour were factors in the decision to dismiss her.

[147] As I have already noted, she was selected for the job even though other candidates in the running were MFN members. Mr. Paul was on the selection board and supported her candidacy. The MFN had every hope that she would be successful at managing its new business at the Lanes, as demonstrated by funding her training at other bowling facilities in Canada and the United States.

[148] However, before long, MFN senior management became aware of questions relating to her performance. The HR director presented to Mr. Stevens and Mr. Paul a whole list of issues that had emerged by the time the Lanes were scheduled to open.

[149] Furthermore, Mr. Paul testified that he was bothered by the fact that Ms. Johnson would come to him and Mr. Stevens constantly when she encountered problems managing staff instead of resolving them herself as they emerged, by applying the MFN's policies already in place. Ms. Johnson contends that she was told that, while on probation, she was not allowed to take any disciplinary decisions on her own. Mr. Paul denies this claim but, in any event, even if those instructions were given, it is evident that Ms. Johnson was unclear about what to do in certain instances and sought information and coaching. As general manager, the MFN expected her to be able to handle the matters herself.

[150] The MFN's concerns were ultimately laid out in Ms. Johnson's February 2019 performance appraisal report. It was far from glowing. It noted that, based on what senior management was hearing from employees, Ms. Johnson was not consistent in applying and following policies and regulations with all employees and that she gave inconsistent feedback. The report added that Ms. Johnson resisted feedback and failed to apply advice about policy "dos and don'ts." There were concerns about the aggravated tone that Ms. Johnson used with customers and employees. Mr. Paul wrote as a recommendation that Ms. Johnson needed to take responsibility for issues arising at the Lanes.

[151] Mr. Paul's concern about how Ms. Johnson tended to refuse to take responsibility and deflect blame was confirmed in her response to the performance appraisal report. Rather than accept responsibility for any failings in her management of the Lanes, she turned the discussion around and asserted to the MFN that one of the purposes of the probation was for her to decide if the organization was a good fit for her.

[152] Ms. Johnson may indeed feel that this is a function of probation, but I am satisfied from Mr. Paul's testimony that he interpreted this as an affront to his authority and a confirmation that she failed to accept responsibility for her actions.

[153] Things did not improve in the ensuing months, in Mr. Paul's eyes, such that he had to convene staff meetings to deal with mundane matters that he should normally not need

to address as a COO. Ms. Johnson claims that, nevertheless, at the end of the probationary period, Mr. Paul said her situation was “OK.” He denies ever having said that, noting that those decisions are ultimately taken after consultation with the Chief and Council, which had not occurred in her case. In any event, any opinion that he may have had before her business trip to Toronto understandably changed after his later email exchanges with her regarding AB.

[154] Mr. Paul and Mr. Stevens had exclusive authority to appoint employees to the various positions at the Lanes. As COO, Mr. Paul decided to appoint AB as assistant manager. Clearly, Ms. Johnson did not approve. In her opinion, AB was not ready for the job, especially in light of the list of incidents that Ms. Johnson had compiled against AB. Ms. Johnson was not ready to accept Mr. Paul’s decision. She responded that AB could have her office “permanently” and later that she could not work under the conditions being imposed on her.

[155] I find it understandable and reasonable for Mr. Paul to have taken these responses to be an ultimatum—either AB goes, or Ms. Johnson goes. He considered the ultimatum as a form of insubordination. Mr. Paul felt the bond of trust between the MFN and Ms. Johnson as general manager of the Lanes was broken and the relationship could no longer be sustained.

[156] Mr. Paul’s decision to end the employment relationship with Ms. Johnson was reasonable. There is nothing in the evidence leading up to the decision that proves or establishes on the balance of probabilities that Ms. Johnson’s national or ethnic origin, race, and colour were factors in the MFN reaching this conclusion.

[157] Before closing the analysis of the s. 7 allegation, I should also refer to several incidents mentioned by Ms. Johnson in her testimony that she did not specifically cite in her final submissions as instances of discrimination. Ms. Johnson testified that HR did not follow up on her requests for part-time employees and for a replacement worker. She also complained that the MFN made no effort to renew funding from an employment assistance program to retain a good employee. Mr. Paul and Mr. Stevens did not specifically address this evidence in their testimony, and Ms. Johnson’s evidence is thus uncontradicted. There

is no reason to doubt her account, and I therefore accept that these omissions occurred as alleged.

[158] However, there is nothing in the evidence to link these omissions to a prohibited ground of discrimination. Mr. Paul may very well have made a serious mistake that impacted the Lanes' operations by not following up on Ms. Johnson's requests, as she claims. But that alone is not enough to establish that discriminatory grounds were factors in these omissions.

[159] Ms. Johnson testified about the negative comments that were allegedly said about her after her departure. I already held that I would not rely on hearsay accounts about what third parties may have heard. Ms. MacAuley did testify about a remark from AB that she should not talk to Ms. Johnson. However, there is no evidence that this was anything more than a personal statement from AB. There is nothing to associate it with the senior managers (Mr. Paul and Mr. Stevens) nor the MFN as an organization. Moreover, the remark may be indicative of the strained relationship between AB and Ms. Johnson, but not necessarily of any connection to a prohibited ground of discrimination.

[160] Finally, I note in passing that it would appear Ms. Johnson's probationary period ended a few weeks before she was sent the termination letter. No specific date for the end of the second period was stated in the performance appraisal report or any other document in evidence, just the mention of the three-month period. I do not know what impact a dismissal several days after the expiry of the probationary period would have relative to her rights in employment law. The MFN did seemingly pay her a sum in lieu of notice, even though they claimed that she was still on probation. Whatever the case, the fact that the termination was post-probation is of no consequence to my finding that Ms. Johnson's protected characteristics under the CHRA were not factors in the dismissal decision. The evidence shows that the only factors in the decision related to the MFN's assessment of her performance.

[161] For all these reasons, I find Ms. Johnson did not prove that the MFN engaged in discriminatory practices under s. 7 of the CHRA.

## V. THE SECTION 10 ALLEGATION

[162] Ms. Johnson wrote in her complaint that the MFN “has a hiring policy where they give preference to Aboriginal (Membertou community) people.” She added that there is one set of rules for the Indigenous employees and another set of rules for the non-Indigenous employees. Ms. Johnson then gave as an example Mr. Paul’s alleged email asking if CD was Indigenous.

[163] Apparently based on this allegation, the Summary of Complaint form, which the Canadian Human Rights Commission prepared and attached to the complaint, states that the sections of the CHRA relevant to this case are s. 10 along with s. 7.

[164] Section 10 addresses systemic discrimination (*Emmett v. Canada Revenue Agency*, 2018 CHRT 23 at paras 69-70 [*Emmett*]). Section 10(a) of the CHRA, which is the provision relevant to the allegations in this case, states that it is a discriminatory practice for an employer to establish or pursue a policy or practice that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[165] This means that Ms. Johnson must prove that the MFN was pursuing a policy or practice that deprived or tended to deprive non-Indigenous persons of employment opportunities, on a balance of probabilities (*Emmett* at para 71).

[166] There is no evidence that Ms. Johnson was deprived of any employment opportunity during her employment, let alone based on a policy or practice. She was of course terminated, which could be considered the ultimate denial of an employment opportunity, but I have already determined that prohibited grounds of discrimination were not factors in the dismissal. There is no evidence that any policy or practice existed leading to her being let go other than a decision to terminate her employment due to performance issues, not connected to any prohibited ground of discrimination.

[167] No evidence was led of any other person being denied an employment opportunity based on a prohibited ground. In fact, the evidence with respect to Ms. Johnson’s

successors in the general manager position establishes the contrary since neither of them was Indigenous nor an MFN member.

[168] Ms. Johnson referred in her final submissions to the “process” that enabled MFN members to have their requests approved by the Chief and Council while Ms. Johnson’s similar requests to senior management were not. She gave as an example the case of the employee whose salary she claims was adjusted only after the employee spoke directly to the Chief and Council. However, as I noted earlier, I did not find the evidence presented in support of this allegation persuasive.

[169] I therefore find that Ms. Johnson has not proven that any policy or practice existed that deprived or tended to deprive non-Indigenous persons of employment opportunities.

## **VI. CONCLUDING REMARKS**

[170] At the close of the hearing, it was gratifying to witness a sincere and amicable exchange between Mr. Paul and Ms. Johnson. They said that they still consider each other friends. Ms. Johnson said throughout the hearing that she always had the Lanes’ best interests at heart. The achievements that she highlighted in her evidence are unchallenged. I am convinced that they are true. She provided Ms. MacAuley a great career opportunity and helped other employees. Every measure that she took to improve the Lanes’ operations was made in good faith.

[171] But in the end, Ms. Johnson’s complaint essentially boiled down to her opinion that AB did not deserve to be promoted to the assistant manager position. This really upset her. She felt AB was not competent enough for the job. I do not question the genuineness of this belief or that it was rooted in a sincere concern for the Lanes’ best interests. However, Ms. Johnson had no authority to make hiring decisions. That rested with HR and ultimately Mr. Paul. Whatever his motivation, he believed as the COO of the MFN’s business that the promotion was appropriate. The staffing action would have had no impact on Ms. Johnson’s employment. Her job would have been untouched. But she just did not agree with the decision and essentially gave Mr. Paul what he considered an ultimatum: “Either AB goes, or I go.” Mr. Paul selected the second option.

[172] As a result, the employment relationship came to an end. Discriminatory grounds were not a factor in this outcome.

**VII. ORDER**

[173] For these reasons, the complaint is dismissed.

*Signed by*

Athanasios Hadjis  
Tribunal Member

Ottawa, Ontario  
March 21, 2024



# Canadian Human Rights Tribunal

## Parties of Record

**File No.:** HR-DP-2832-22

**Style of Cause:** Joanne Johnson v. Membertou First Nation

**Decision of the Tribunal Dated:** March 21, 2024

**Date and Place of Hearing:** April 3-6, 2023, videoconference

April 8 and 14, 2023, written submissions

### **Appearances:**

Joanne Johnson, for the Complainant

Tony Mizik K.C., for the Respondent