Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Between:

Valerie Deschambeault

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Cumberland House Cree Nation

Respondent

Decision

Member: Athanasios D. Hadjis
Date: November 4, 2008
Citation: 2008 CHRT 48

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[1] The Complainant, Valerie Deschambeault, is a Métis woman. In 2004 and 2005, she applied twice for a job with the Respondent, the Cumberland House Cree Nation. On both occasions, she was not selected. She alleges in her human rights complaint that she was denied the position because she is Métis and not "of treaty origin", i.e. she is not a First Nation member of the Cumberland House Cree Nation (the Band). She did not specify in her complaint form which provision of the *Canadian Human Rights Act* (*CHRA*) she alleges to have been violated. However, in the "Summary of Complaint" form that the Commission attached to her complaint, s. 7 is cited as the "applicable section" of the *CHRA* and "national or ethnic origin" is given as the "relevant prohibited ground" for the alleged discrimination.

[2] For the reasons set out below, I have found that her complaint is substantiated. I have also determined that the Band cannot, in the present case, benefit from the immunity provided in s. 7 of the *CHRA*.

I. Facts

[3] For most of her life, Ms. Deschambeault has lived in the Northern Village of Cumberland House (the Village), which is situated on an island (Pine Island) on the Saskatchewan River in a remote area of north-eastern Saskatchewan, some 350 km from Prince Albert. The Village shares the island with the Cumberland House Cree Nation Reserve. They are located just a couple of kilometres apart from each other. They share some services, such as the island's one arena, and their respective residents attend each other's schools (one on each side). There is one post office on the island, situated on the Village side.

[4] Not all of the registered members of the Band reside on the reserve. According to figures published by Indian and Northern Affairs Canada, only 592 of the 1062 registered Band members live on the reserve (February 2007 figures). Most of the members living off the reserve reside in the Village. The Village's population is composed almost entirely of Band members and Métis. Some Métis live on the reserve as well. Thus, the lives of the First Nation Band members and the Métis are very much intertwined. They have grown up together and in many cases are related to one another. However, as Ms. Deschambeault testified, some people still

make a point of distinguishing between those who are First Nation Band members ("treaty") and those who are Métis.

A. The 2004 Competition

[5] In 2004, Ms. Deschambeault was working as an addiction counsellor at the Pine Island Health Centre, an outpatient treatment centre located in the Village. She saw a notice that had been posted by the Band in the Village's post office advising that a competition had been opened for the position of Residential School Healing Facilitator.

[6] This position was created as a result of an agreement that the Band had reached with the Aboriginal Healing Foundation, an organization that was established in 1998 following the issuance of a report by the Royal Commission on Aboriginal People. The Foundation's purpose was to assist with the support and rehabilitation of individuals who suffered abuse under the residential schools system. Its funding came from the Government of Canada.

[7] The Band had signed the agreement with the Foundation in June 2004 for the funding of a healing project. Its goals included striving to eliminate all forms of family and community violence arising from the legacy of physical and sexual abuse in residential schools and supporting individual, family and community healing. The project called for the establishment of a two-year term position of a healing facilitator to coordinate and facilitate the support.

[8] Ms. Deschambeault had previously held a position with the Métis Addictions Council of Saskatchewan regarding a project that had been funded by the Foundation. The job included visiting Métis communities and working with residential school victims in need of healing. She therefore applied to compete for the facilitator's position. The job posting for the position did not mention any preferential hiring policy for Band members.

[9] The selection process was administered by Lisa Cook, who was the Band's Health Director at the time. Six persons applied and the Band invited them to be interviewed. Four of the applicants agreed to attend the interview, including Ms. Deschambeault. She was the only

one of the four who was Métis. The other three candidates were all First Nation as well as members of the Band.

[10] Lisa Cook testified that she had prepared a series of interview questions for the candidates, in conjunction with the human resources department of the Prince Albert Grand Council, an umbrella organization made up of twelve Saskatchewan First Nations, including the Band. The questions themselves were then approved by the Band Council. The interviews were conducted by a panel composed of the Chief and all four other members of the Band Council, as well as two representatives from the Grand Council's human resources department, one Band elder, and Lisa Cook.

[11] The interview panellists were to take turns asking one or two of the questions to each of the candidates. The panellists were provided with question sheets containing spaces to jot down notes. Lisa Cook testified that after the interviews were completed, the panel members discussed their respective scores for each candidate. She wrote down the points given by each panel member on a board. She then averaged out the results for each candidate.

[12] Ms. Deschambeault placed first. Ms. Cook testified that she took the results and presented them at a meeting of the Band Council. She was asked to stay outside the room while the Band Council deliberated, a request that Ms. Cook testified she found very surprising. One Council member told her that "Band members would deal with Band membership issues". Ms. Cook is First Nation but not a member of the Band.

[13] The Band Council decided to hire Kathleen Settee-Cramer (Ms. Cramer), who is First Nation and a member of the Band. Ms. Cramer had placed second in the interview panel's scoring.

[14] Patricia Laliberte acted as secretary to the Band Council for a two-week period in 2004. She testified that she was present at a meeting of the Band Council where the matter of the

appointment for the facilitator's position was discussed. She recalls members of Council indicating that it should be a Band member who is hired.

[15] Lisa Cook testified that the following day, the then Chief of the Band, and one of the Band's councillors both told her that Ms. Cramer obtained the position because Council had decided to select a Band member.

[16] Ms. Cramer gave evidence that after being informed that she had been selected for the position, she overheard the same councillor who had spoken to Ms. Cook say that she had obtained the job "because she was a Band member". She then spoke to her father, who is a former Band chief, about what she had heard. After "verifying", he confirmed to her that she had been selected because she was a Band member. She testified that she was saddened by this news. She had been friends with Ms. Deschambeault since childhood and knew that Ms. Deschambeault was more qualified than she was. She nonetheless opted to accept the position as she felt she could still "make a difference" within her community with respect to the program that she would administer.

[17] Shortly thereafter, Ms. Cramer told Ms. Deschambeault about what she had learned regarding the competition. Although Ms. Deschambeault was very hurt and disappointed at not having been given the job despite placing first in the interview panel's assessment, she did not want to cause any harm to Ms. Cramer. Ms. Deschambeault decided to let matters go and did not file any complaint with the Band following the competition.

B. The 2005 Competition

[18] Although the facilitator position was for a two-year term ending in 2006, Ms. Cramer resigned from the job on March 16, 2005. She testified that she found the workplace "unhealthy" and that she felt "harassed". Immediately after resigning, Ms. Cramer became a candidate in that month's Band Council election. Band regulations apparently stipulate that candidates must resign from their Band employment positions during election periods. The Band

therefore contends that the real reason for her resignation was so as to run for Council. Ms. Cramer did not end up winning a council seat.

[19] Whatever her true motivations for resigning may have been, the end result was that the facilitator position fell vacant before the end of its term. Lisa Cook had been away on personal leave when Ms. Cramer resigned. Upon her return in April 2005, Angus Mackenzie, a newly elected Band councillor who had been given charge of the health portfolio, instructed Ms. Cook to prepare the selection process to fill the position. The advertisement for the job had already been posted by the Band while Lisa Cook was on leave.

[20] The Band Council had recently assembled a new Health Committee comprised of four Band members, which was to advise the Council on issues relating to the health care portfolio. Lisa Cook was informed that the seven-member committee assessing the applications for the facilitator position would be comprised of the four Health Committee members along with one former Band councillor (Raymond Chaboyer), Mr. Mackenzie, and one Elder. Ms. Cook testified that the Grand Council opted not to participate in the process this time.

[21] The selection process that Lisa Cook organized was similar to the 2004 competition's, with some minor changes. Scoring was to be made on a scale of 1 to 5 rather than 1 to 4, for instance, and a more elaborate essay portion was added to ensure that the candidates had the requisite report writing skills. This latter component was, however, not factored into the panel's final scoring of the candidates.

[22] Three persons applied for the position, Clara Cook, Ms. Deschambeault, and Ms. Cramer (who was in effect re-applying for the position). Ms. Deschambeault was the only non-First Nation and non-Band member to apply. She testified that she had seen advertisements for the competition at the post office and the gas station, and she had heard an announcement on the local radio station. She saw that the required qualifications and tasks were unchanged from the 2004 competition. She also testified that she ran into the Band's newly elected Chief, Walter Sewap, at the gas station and asked him if the competition was going to be restricted to Band

members. He replied that the competition was open to anyone, not just Band members, and that the newly created Health Committee would be overseeing the process and making a recommendation for selection to Council. She felt reassured and decided to apply.

[23] The interviews were held in May 2005. Three of the interview panellists had to recuse themselves from the evaluation of Clara Cook because they were related to her. All seven participated in the questioning of Ms. Cramer and Ms. Deschambeault. Lisa Cook testified that she felt Clara Cook should not have been screened into the competition. The position had been advertised as being restricted to persons who had completed their Grade 12 high school diploma or equivalency. Clara Cook had not indicated in her resume having completed a Grade 12 education. Lisa Cook was, however, instructed to screen in all of the applicants, including Clara Cook.

[24] After the candidates were interviewed, the interview panel met and tabulated its results. A handwritten summary or tally sheet documenting each interviewer's scores was filed in evidence. It shows that each assessor gave a score that ranked Ms. Deschambeault either first or tied for first with Ms. Cramer. All four of the panellists who assessed Clara Cook ranked her last or tied for second with Ms. Cramer. The overall average scores placed Ms. Deschambeault clearly first, with a score of 55 out of 70, Clara Cook second with 46 and Ms. Cramer with 42.

[25] There were a number of apparent anomalies in the scoring. One interviewer, Ernest Chaboyer, gave Ms. Deschambeault a score of 74, even though the maximum possible score was 70. A review of Ernest Chaboyer's scoring sheets for each candidate that he interviewed shows that he entered a score for one of the interview questions at two spots on the scoring sheets, resulting in double entries. I note that he assigned Ms. Deschambeault full marks for all but one of the interview questions, where he gave 4/5. This could suggest that his intended score for Ms. Deschambeault was 69/70, much higher than his score for Ms. Cramer (25/70). He did not rate Ms. Cook because she is his sister. Nevertheless, even if one were to remove all of Ernest Chaboyer's scores from the overall tabulations, the revised averages would still result in Ms. Deschambeault ranking first.

[26] Another problem, highlighted by Raymond Chaboyer in his testimony, was that although the tally sheet contained scores from the elder who sat on the interview panel, he did not recall the elder actually asking any questions or entering any scores on his sheet. However, even if the elder's scores were also set aside, along with Ernest Chaboyer's, Ms. Deschambeault would still have ranked first.

[27] Lisa Cook testified that the interview panel decided to recommend Ms. Deschambeault to the Band Council for the position. Ms. Deschambeault stated in her evidence that she received a telephone call that evening from Ernest Chaboyer informing her that she had scored highest and that the panel would be recommending her to Council. He even asked her when she would be available to begin working.

[28] Ernest Chaboyer delivered a report of the panel's findings recommending Ms. Deschambeault, to a meeting of the Band Council the following day, May 16, 2005. After considering the matter, the Band Council passed a motion that Clara Cook be hired for the position, effective that date.

[29] Ms. Deschambeault testified that she was very hurt and angered at being turned down a second time, especially after having been told the previous evening by Ernest Chaboyer that she had placed first in the panel's assessment and had been recommended for hiring. She felt it was not right for her to be turned down a second time after again having scored highest amongst all the candidates. In July 2005, she filed a human rights complaint with the Commission. She was advised by the Commission that the complaint required additional detail. Her modified complaint, which the Commission ultimately referred to the Tribunal and gave rise to the present case, was submitted to the Commission on February 14, 2006. The discriminatory conduct alleged in the complaint spans the period from July 22, 2004, to May 16, 2005, i.e., covering both the 2004 and the 2005 competitions.

II. What are the legal principles applicable in this case?

[30] It is a discriminatory practice under the *CHRA* to refuse to employ a person on the basis of national or ethnic origin (ss. 3 and 7).

[31] A complainant must first establish a *prima facie* case of discrimination (*Ont. Human Rights Comm. v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28 ("*O'Malley*")). A *prima facie* case, in this context, is one that covers the allegations made and that, 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. Once the *prima facie* case is established, the onus then shifts to the respondent to provide a reasonable and non-pretextual explanation for the otherwise discriminatory behaviour.

[32] It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the complaint to be substantiated. It is sufficient that the discrimination be one of the factors in the employer's decision (*Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12 at para 7 (F.C.A.); *Canada (Attorney General) v. Uzoaba* [1995] 2 F.C. 569 (T.D.)).

[33] In *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029 at para. 38481 (CHRT), the Tribunal stated that discrimination is not a practice that one would expect to see displayed overtly. Rarely are there cases where one can show by direct evidence that discrimination is purposely practiced. A tribunal should therefore consider all circumstances to determine if there exists a "subtle scent of discrimination".

[34] In the employment context, the findings in a number of decisions have served to illustrate what type of evidence is needed to establish a *prima facie* case of discrimination. In *Shakes v. Rex Pak Ltd.*, (1981), 3 C.H.R.R. D/1001 at para. 8918, the Ontario Board of Inquiry held that a *prima facie* case could be established by demonstrating:

- that the complainant was qualified for the particular employment;

- that the complainant was not hired; and

- that someone no better qualified but lacking the distinguishing feature, which is the gravamen of the human rights complaint, subsequently obtained the position.

[35] In *Israeli v. Canadian Human Rights Commission*, (1983), 4 C.H.R.R. D/1616 at 1618 (C.H.R.T.), aff'd (1984), 5 C.H.R.R. D/2147 (C.H.R.T.- Rev. Trib.), the Tribunal modified this analysis to address situations where no appointment is made after the complainant who qualified for the position has been rejected and the employer continues to seek applicants.

[36] While the *Shakes* and *Israeli* approaches serve as useful guides, neither one should be automatically applied in a rigid or arbitrary fashion in every hiring case (*Canadian Human Rights Commission v. Canada (A.G.)*, 2005 FCA 154 ("*Morris*") at paras. 23-30; *Singh v. Canada (Statistics Canada)* (1998), 34 C.H.R.R. D/203 at para. 161 (C.H.R.T.); *Premakumar v. Air Canada*, 2002 CanLII 23561 at para. 77 (C.H.R.T.)). The circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate.

A. Has Ms. Deschambeault established a *prima facie* case of discrimination?

[37] In my view, Ms. Deschambeault has established a *prima facie* case of discrimination with regard to both the 2004 and 2005 competitions. The evidence she and the Commission have led demonstrates that she was qualified for the facilitator position under both competitions, having been ranked first amongst all of the candidates being considered in each instance. She was not hired for the job both times. Finally, the evidence shows that someone no better qualified than she was (and in fact, less qualified according to the panels assessing the candidates on both occasions) was hired. These other persons who were hired lacked the distinguishing feature that is the gravamen of Ms. Deschambeault's complaint (i.e., they were not Métis, but were First Nation members of the Cumberland Lake First Nation). The three components of the *Shakes* analysis have therefore been established.

[38] The Band argues that Ms. Deschambeault's status as a non-Band member is "not like the descriptors of 'race' or 'ethnicity' for the purposes of this analysis". The Band points out that unlike "race", it is possible to gain or lose band membership status throughout one's lifetime. For instance, women who were not band members have acquired band membership by marrying a male band member. Others acquired their "Indian" status in 1985, through the enactment of Bill C-31 (*An Act to Amend the Indian Act*), which reinstated many individuals who had earlier lost their status.

[39] I disagree. To begin with, the present complaint alleges discrimination on the basis of national or ethnic origin, not race. The *CHRA* provides that adverse differential treatment of individuals based on their national or ethnic origin constitutes a discriminatory practice. There is no distinction made in the *CHRA* between those persons who are discriminated against for being members of a particular national or ethnic group and those who are discriminated against for *not* being members of a particular group.

[40] Ms. Deschambeault has established *prima facie* that she was denied an employment opportunity because she lacked a certain national or ethnic origin. She was not First Nation, and in particular, not a Cumberland House Cree Nation member. It should not make any difference that Ms. Deschambeault could have later acquired Indian status by marrying a Band member, for instance, any more so than to say, by analogy, that a victim of a discriminatory practice based on her religion could potentially convert to another religion at a later time. The fact that they were adversely differentiated at a given point on the basis of their then current status (be it actual or perceived national/ethnic origin, religion, family status, sexual orientation, etc.) is sufficient to make a finding of discrimination.

[41] The Band also appears to suggest that all of the candidates in both competitions were of the same national or ethnic origin, as both Indians and Métis fall within the meaning of "aboriginal peoples of Canada" under s. 35(2) of the *Constitution Act, 1982* (i.e., "the Indian, Inuit and Métis peoples of Canada"). I gather that the Band would like the Tribunal to conclude

from the language of this constitutional provision that there could therefore not have been any discrimination in the present case, although its submissions on this point were not very explicit.

[42] To the extent that the Band is actually advancing this argument, I do not agree with it. That would constitute a far too restrictive definition of "national or ethnic origin" under the *CHRA*. First of all, as the Supreme Court noted in *R. v Powley*, 2003 SCC 43 at para. 10, the term "Métis" in s. 35, while not encompassing all individuals with mixed Indian and European heritage, refers to distinctive peoples who, have a recognizable group identity separate from their Indian or Inuit and European forebears. Moreover, in a broader sense, the Band's argument appears to ignore the fact that the aboriginal peoples of Canada as referenced in the *Constitution Act, 1982*, are comprised of many nations or ethnic groups, possessing unique cultures, languages, traditions and history. It appears to suggest that adversely differentiating on the basis of these national or ethnic origins should be treated differently than differentiation between, for instance, European national origins as they have been historically defined. This is patently absurd.

[43] In any event, the provisions of the *CHRA* do not require that a complainant and a respondent be of different national or ethnic origins in order for a complaint to be a substantiated. Section 4 of the *CHRA* states that "anyone" found to be engaging or to have engaged in a discriminatory practice may be subject to a Tribunal order. It is thus entirely possible for a Tribunal to find that an individual was a victim of discrimination at the hands of someone who is of the same origin, if it is established the victim's origin was a factor in the adverse differential treatment.

[44] I therefore find that a *prima facie* case of discrimination has been established.

B. Has the Band provided a reasonable explanation?

(i) The 2004 Competition

[45] The Band did not lead any evidence that could provide any explanation, let alone a reasonable one, to justify the *prima facie* case of discrimination that the Commission and Ms. Deschambeault established.

[46] The Band called three witnesses at the hearing, Chief Walter Sewap, Angus Mackenzie, and Raymond Chaboyer. Chief Sewap was elected to his post in April 2005, just prior to the 2005 competition. He testified that he could not give any information regarding the 2004 competition because he was not on the Band Council at the time. Mr. Mackenzie was first elected to Council in April 2005. He did not provide any evidence regarding the 2004 competition.

[47] Raymond Chaboyer was a member of the Band Council at the time of the 2004 competition. He did not sit on the interview panel that assessed the candidates for the facilitator position that year. This witness often confused the 2005 competition with the 2004 competition when giving his evidence. When ultimately pressed in cross examination to state who had placed first in the competition of 2004, he could not recall. When asked why the Band Council did not hire Ms. Deschambeault in 2004 despite her having been recommended by the interview panel, he could not remember, claiming it was too long ago. In the end, Raymond Chaboyer's evidence provided no explanation whatsoever for the decision not to hire Ms. Deschambeault in 2004, a decision that I have found was *prima facie* discriminatory.

[48] In its final written submissions, filed after the hearing had ended, the Band made several arguments based on the documentary evidence regarding the 2004 competition. It pointed to a number of discrepancies in the scoring documents (questionnaires) regarding the 2004 competition that were filed in evidence. Some interviewers apparently wrote down scores for several of the questions while others did not. This allegedly resulted in "certain applicants" obtaining higher scores than others "for no apparent reason". It was also alleged that "one or

more" interviewers "abandoned" scoring on a scale of 1 to 4, and gave overall percentile rankings. Lisa Cook and another panellist allegedly gave more points to Ms. Deschambeault for not having a criminal record than to the other candidates. In addition, not all of the questionnaires were signed by the panel members.

[49] These "explanations" are in my view simply pretextual, if not just mere afterthoughts on the part of the Band, produced in a belated effort to come up with an explanation. Most of these "inconsistencies" were never even raised with any of the witnesses. Lisa Cook was not asked any questions about why she allegedly scored the candidates' absence of any criminal backgrounds differently. The other "inconsistencies" were barely explored in the Band's cross examination of the Commission's witnesses. These points were certainly not broached with the Band's witnesses.

[50] More importantly, no evidence was led in any way demonstrating that these alleged inconsistencies were even put before or considered by the Band Council in 2004 when it decided to reject the committee's recommendation and hire Ms. Cramer instead of Ms. Deschambeault.

[51] The Band argued that Ms. Laliberte was mistaken in her evidence regarding a councillor who stated that a Band member should be preferred for hiring. The discussion, it is alleged, related to the appointment of a health director, not the facilitator. The Band also raised the possibility that other discussions were held at that council meeting to which Ms. Laliberte was not privy. I have no evidence, however, to support either assertion. There is no indication what those alleged other discussions were. The Band was not even able to produce the minutes that Ms. Laliberte recorded of that Council meeting. Thus, there is basically no evidence before me to contradict Ms. Laliberte's testimony.

[52] In fact, I am left with no evidence whatsoever to explain why the Band made the decision not to hire Ms. Deschambeault, despite the interview panel's recommendation. I have already determined that a *prima facie* case of discrimination has been established. In the absence of any

explanation, I find that Ms. Deschambeault's human rights complaint with regard to the 2004 competition has been substantiated.

(ii) The 2005 Competition

[53] Given my finding that Ms. Deschambeault's complaint with respect to the 2004 competition has been substantiated, discussion about the 2005 competition is in a sense moot. The facilitator's position for which she competed in 2004 was to have been for a two-year term. There is no evidence before me to suggest that Ms. Deschambeault would not have completed her term, had she been hired. Ms. Cramer resigned from the position for personal reasons about eight months after being hired. She claims that she felt compelled to leave because of an "unhealthy" work environment and "harassment" from one or more councillors. She felt that Council did not cooperate with her, partially because she was considered an activist and trouble-maker within the community. The Band argued that she simply quit in order to run for Council, as demonstrated by her decision to reapply for the same position in 2005 after she failed to win a seat. Whichever view best reflects reality, there is no reason to believe that Ms. Deschambeault would have resigned her post before the end of the term. Therefore, there would not have been any need for a competition in 2005.

[54] Besides, I find that the Band's explanation for not hiring Ms. Deschambeault in 2005, in spite of the recommendation of the interview panel, is not reasonable on the evidence or is otherwise just a pretext to justify the discriminatory practice.

[55] The Band argued that the role of the interview panel in 2005 was merely to provide the Band's council with a recommendation, which was not binding on the Band. Council was to reserve the right to come to its own decision regarding the successful candidate. Chief Sewap testified that Council had overruled other such hiring recommendations in the past, a point that was also confirmed by Lisa Cook.

[56] However, in the context of the present human rights complaint, this argument is irrelevant. While it may be within the Band Council's discretion to appoint whomever it wishes,

and even reject an interview panel's recommendation, it cannot do so on the basis of discriminatory grounds. If a prohibited ground constitutes even one of several factors in its decision, then the Band will have run afoul of the *CHRA* (see *Holden*, *supra*). Thus, it is unsatisfactory for a respondent to simply argue, in answer to a *prima facie* case of discrimination, that "the ultimate decision rested with the Band Council" and that it had every right in its discretion to hire whomever it wished. In the face of the evidence led in this case tending to show that the Complainant was the most qualified, it was incumbent on the Band to at least lead some evidence suggesting that Clara Cook was more qualified or otherwise explaining why she was selected over Ms. Deschambeault.

[57] The Band alluded to the discrepancies in the 2005 scoring process referred to earlier (the total score of 74 on 70 given by Ernest Chaboyer and the elder's participation in the scoring). Raymond Chaboyer claimed he had difficulty accepting the scoring results. Chief Sewap said he had concerns as well. They both claimed that these concerns were factors in the Band Council's hiring decision. Yet, no further elaboration was given about the Council's deliberations. What factors were actually considered by Council? How were the candidates assessed if the interview panel's recommendations were discounted or discarded? When the discrepancies were identified, why did Council not send the matter back to the interview panel for reassessment? As I mentioned earlier, if the Band had concerns about the discrepancies, eliminating the scores affected by them would have still yielded the same result: Ms. Deschambeault would emerge as the clear leader, ahead of both Ms. Cramer and Clara Cook. So why was Clara Cook selected? Moreover, if the discrepancies gave rise to general doubts about the overall reliability of the process, on what basis did the Band actually make its decision to select Clara Cook over the others? No answer was provided to any of these questions in the evidence.

[58] Raymond Chaboyer's evidence was particularly weak in this regard. He frequently confused the 2004 process (in which he would have not had any involvement other than as a councillor) with the 2005 process (in which he participated as an interview panellist and later as a member of Council). He professed to have no faith in the "process", claiming that Lisa Cook had "made up" the questionnaires, which were "just handed" to him and the panellists.

Lisa Cook and Chief Sewap testified, however, that the questions had been approved by the Band Council in advance. Raymond Chaboyer also testified that due to his lack of any faith in the process, he did not "bother scoring" anyone at all. However, the tally sheet with the panel's scores that was brought back to Council shows that Raymond Chaboyer did participate in the scoring. He acknowledged in cross examination that he did not remember if he scored people.

[59] It should be noted, in passing, that Clara Cook is Raymond Chaboyer's sister. The tally sheet shows that he did not participate in the interview panel's scoring regarding her candidacy. There is no evidence of whether he recused himself from discussions at Council about her candidacy, but the minutes show that one unnamed councillor abstained.

[60] The Band argued that while the memory of Raymond Chaboyer "may have been less than perfect", there is nothing to suggest his credibility or honesty was compromised. The witness' honesty is not what is in issue here, however, but rather whether his testimony contributes any evidence to support the Band's answer to the *prima facie* case of discrimination. In this regard, his less then perfect memory seriously weakens his evidence such that very little weight can be assigned to it.

[61] I am not persuaded by the Band's explanation regarding the impact of these scoring discrepancies. There is hardly any evidence before me to support the contention that they were even considered by Council in its decision. As I just explained, Raymond Chaboyer's testimony carries almost no weight. Chief Sewap's evidence in this regard is called into question by his failure to elaborate on how the alleged scoring discrepancies were dealt with by Council and what factors were in fact considered in deciding to hire Clara Cook. In my view, the Band's explanation has not been established.

[62] Moreover, even if it were demonstrated that the Band Council did turn its mind to these scoring discrepancies, the questions about why Clara Cook was selected over Ms. Deschambeault remain unanswered, as I mentioned earlier. Thus, I find that the evidence about the scoring problems do not constitute a reasonable answer to the *prima facie* case of

discrimination, which leads me to conclude that the Band has raised them simply as a pretext to justify the Band's discriminatory practice.

[63] Ms. Deschambeault's complaint with regard to the 2005 competition has therefore also been substantiated.

C. Is the Band's decision immune from the operation of the *CHRA* due to s. 67?

[64] The Band contends that irrespective of my findings regarding the facts alleged in Ms. Deschambeault's complaint, its decision regarding the facilitator's position is immune from the operation of the *CHRA*, pursuant to s. 67, and that in turn, the matter at issue in this case falls beyond the jurisdiction of the Canadian Human Rights Tribunal. I am not persuaded by the Band's submissions in this regard.

[65] Section 67 provides as follows:

> Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.
>
> La présente loi est sans effet sur la *Loi sur les Indiens* et sur les dispositions prises en vertu de cette loi.

[66] It is common ground that the Cumberland House Cree Nation is a "band" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. In order to invoke s. 67, a band must demonstrate that the sections of the *CHRA* that are engaged by the Tribunal's inquiry into the complaint, will affect a provision of the *Indian Act* or a provision made under or pursuant to the *Indian Act*. The term "provision made under or pursuant to the [Indian] Act" in s. 67 encompasses any *decision* made under or pursuant to the Act (see *Re: Desjarlais* (1989), 12 C.H.R.R. D/466 at para. 10 (F.C.A.)). In my view, the Band has failed to establish this link.

[67] The Band argues that the facilitator's position was created for and directed at the health of the Band's members who have suffered from the legacy of the residential schools system.

Such health concerns, it is contended, "land squarely under the responsibility" of the Band's Council, which "has the authority to deal with such issues via the *Indian Act*". In particular, the Band refers to the "authorities" listed in s. 81(1) of the *Indian Act*, including the authority to "provide for the health of residents on reserve" (s. 81(1)(a)), and "with respect to any matter arising out of or ancillary to the exercise of powers under s. 81(1)" (s. 81(1)(q)).

[68] This argument is, however, misleading. Section 81(1) does not set out the "authorities" of a band *per se* but rather the purposes for which a band may make by-laws. The list of purposes is set out in ss. 81 and following is quite extensive and wide ranging. It includes the above noted provision of health care to residents on reserve, but also the regulation of traffic, the observance of law and order, the construction and maintenance of roads, bridges and other local works, the survey and allotment of reserve lands, taxation and licensing of businesses, appropriation and expenditure of money, and many other areas. In the present case, there is no evidence that the Band adopted any by-law with respect to any of the decisions relating to the agreement with the Aboriginal Health Foundation and the decisions regarding the staffing of the facilitator position.

[69] I do not agree with the Band's contention that its mere capacity to adopt by-laws with respect to these matters gives rise by implication to the s. 67 exception. The Federal Court of Appeal decision in *Re: Desjarlais*, *supra* at para. 12, suggests that at the very least, a by-law must have been adopted pursuant to ss. 81 and following of the *Indian Act*, to be relied upon by a band raising a s. 67 *CHRA* defence. There is an obvious rationale to this finding. Were each of the wide-ranging purposes listed in ss. 81 and following to constitute a "provision" within the meaning of s. 67 even where no by-law had been adopted, the effect would be to shield practically all band council decisions from the operation of the *CHRA*. Such an interpretation would not be consistent with the principle articulated in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 339, that exceptions to human rights legislation must be narrowly construed.

[70] As the Federal Court stated in *Shubenacadie Band Council v. Canada (Human Rights Commission)* (1997), 31 C.H.R.R. D/347 at para. 29, aff'd 2000 CanLII 15308 (F.C.A.), if it was Parliament's intention to immunize all decisions of Indian band councils from the overview of the *CHRA*, Parliament would have expressly so provided rather than enacting s. 67. Section 67 immunizes decisions authorized by the *Indian Act* and its regulations, but not all decisions made by Indian band councils.

[71] The Band claimed that the *Shubenacadie* case can be distinguished from the present one because the government funded social assistance payments that had been denied to the complainants in that case were deemed to be "customarily available" to the complainants within the meaning of s. 5 of the *CHRA* and thus "guaranteed" to them. In the present case, it is argued, the Band had the authority under its agreement with the Foundation to fill the facilitator's position at its discretion. Ms. Deschambeault had no "guaranteed right" to the job. I fail to see the relevance of this distinction to the question of whether the Band can rely on s. 67.

[72] In support of its submissions on s. 67, the Band relied on the findings of the Federal Court of Appeal in *Canada (Human Rights Commission) v. Gordon Band (Council)*, [2001] 1 F.C. 124 ("*Laslo*"). In my view, the Band's reliance is misplaced. In that case, the complainant was a status Indian who lived on the Gordon First Nation Band Reserve with her non-Indian spouse. Her request for housing from the band was denied and she filed a complaint alleging discrimination based on sex and family status. The respondent raised s. 67 of the *CHRA* in its defence. Just as in the present case, the Gordon Band had not adopted any by-law regarding the matter at issue there (i.e., allocation of housing), namely, a by-law pursuant to s. 81(1)(*i*), which authorizes the making of by-laws for the survey and allotment of reserve lands among band members.

[73] The Federal Court of Appeal agreed with the Tribunal's finding that it lacked jurisdiction to hear the case. The Court held, at para. 26, that s. 67 applies to decisions that, by virtue of their subject matter, are within the authority *expressly granted* by a provision of the *Indian Act*. The band's decision in that case was found to be expressly authorized under s. 20 of the *Indian Act*.

Section 20 provides that "no Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of land has been allotted to him by the council of the band".

[74] The Court found that by necessary implication from the words of this provision, the band council had the authority under the *Indian Act* to decide at its discretion whether to allot land to a given band member. The recognition of this authority under s. 20 therefore necessarily implied that such decisions would be "made under or pursuant to the *Indian Act*". That was the basis for the Court's decision in favour of the band in *Laslo*. I note, however, that the Court did *not* state that a band's *mere capacity to pass by-laws* under ss. 81 and following constitutes an "expressly granted" decision making authority under the *Indian Act*.

[75] In contrast to *Laslo*, the Band in the present case has not identified to the Tribunal any similar provision in the *Indian Act* granting the Band express decision making authority relating to the staffing of the facilitator position in this case. The Band, in its final submissions, referred to its internal "Regulations respecting the Personnel Management of Cumberland House Cree Nation Programs / Institutions /Corporations", which the Band allegedly adopted "pursuant to the inherent and legally recognized right of First Nations to function as employers". The Band argues that these regulations are "evidence of a similar authority as considered in the *Gordon* matter". However, these regulations were never tendered in evidence before the Tribunal. More importantly, other than the Band's blanket contention of a "similar authority" as in the *Gordon* case, no link to any specific provision of the *Indian Act* has been identified as the source of this "similar" expressly granted decision making authority.

[76] In sum, therefore, I am not persuaded that the Band Council's decision regarding the staffing of the facilitator position, under its agreement with the Aboriginal Health Foundation, was made pursuant to an authority expressly granted by a provision of the *Indian Act*. Consequently, the Band's claim for immunity under s. 67 of the *CHRA* has not been substantiated.

III. What remedies are Ms. Deschambeault and the Commission seeking?

A. Lost wages (s. 53(2)(*c*))

[77] Section 53(2)(c) of the *CHRA* provides that a victim may be compensated for any and all wages that she was deprived of as a result of the discriminatory practice. Ms. Deschambeault testified that the annual salary for the facilitator's position was $40,000. The Band did not lead any evidence to the contrary. Had Ms. Deschambeault been hired in 2004, she would have worked six months in that year. Instead, she remained employed in her existing job at the Pine Island Health Centre, where she continued to earn a lower income. Her lost wages resulting from the Band's failure to hire her in 2004, therefore, are as follows:

2004:

$20,000 (Facilitator salary for remainder of 2004).
\- **$11,250 (Income actually earned for remainder of the year)**
$ 8,750

2005:

$40,000 (Facilitator's annual salary)
\- **$21,828 (Income actually earned)**
$18,172

2006:

$20,000 (Facilitator salary until the end of the term)
\- **$14,063 (Income actually earned to the same date)**
$ 5,937

Total lost wages: $32,859

The Band is therefore ordered to pay Ms. Deschambeault the sum of $32,859 as compensation for lost wages.

B. Expenses Incurred (s. 53(2)(*c*))

(i) Expenses related to training

[78] A victim may be compensated for any expenses incurred as a result of a discriminatory practice (s. 53(2)(*c*)). According to the Band's agreement with the Aboriginal Health Foundation, the facilitator was to receive some training, described as "24 1-week 'train the trainer' healing modules". Ms. Deschambeault claims that these modules would have provided her with sufficient education and training experience to maintain employment in "any human services related field". Having been denied the opportunity to gain this training, she "made the choice" to leave her employment at the Pine Island Health Centre and move, in 2005, to Saskatoon where she enrolled in the Criminal Justice Program at Regency College. There was, however, also some indication in the evidence that her employment with the health centre would have ended in any event if she did not take steps to improve her academic qualifications. There had been a changeover in management and new employment policies had been adopted.

[79] Ms. Deschambeault finished the program in 2006 and decided to follow up by completing the Addiction Counselling Diploma Program being given by the Saskatchewan Institute of Applied Sciences and Technology. This required that she move again, to Prince Albert this time.

[80] Ms. Deschambeault is therefore claiming from the Band the expenses that she incurred relating to this training, including tuition, housing, and vehicle expenses. I am not persuaded, however, that the "modules" she would have followed as a facilitator are equivalent to the education that she has actually received since 2005, one that has enabled her to gain new employment, in 2008, at a health facility in Montreal Lake, Saskatchewan. Ms. Deschambeault very responsibly chose to turn the misfortune brought upon her by the Band into an opportunity to improve her academic qualifications and experience. For this, she must be commended. However, the expenses related to her decision are not as a result of the Band's discriminatory practices, within the meaning of s. 53(2)(*a*) of the *CHRA*. Consequently, she is not entitled to be compensated by the Band for these expenses.

(ii) Other expenses

[81] Ms. Deschambeault has incurred some expenses as a result of the discriminatory practices that led to the filing of her complaint. These include:

Photocopy costs	$150.00
Administration costs, binders (i.e. stationery)	$ 48.98
Travel costs from the Northern Village of Cumberland House to Prince Albert and back to attend a mediation session (for herself and Ms. Cramer who accompanied her at the mediation)	$547.60
Accommodation and meals at the mediation	$ 84.00
Total:	**$830.58**

[82] Ms. Deschambeault is entitled to be compensated by the Band for these expenses that she incurred as a result of the discriminatory practices leading to the filing of the present human rights complaint.

[83] However, I am not persuaded, on the evidence, that the she incurred the costs that she is claiming regarding the rental of a laptop computer. This expense claim is denied.

[84] In addition, there are no "exceptional circumstances" in this case to justify awarding Ms Deschambeault compensation for the time that she has spent preparing her case (see *Canada (Attorney General) v. Lambie* (1996), 29 C.H.R.R. D/483 at para. 41 (F.C.T.D.).

C. Pain and Suffering (s. 53(2)(*e*))

[85] A victim of a discriminatory practice may be compensated up to $20,000 for any pain and suffering that she experienced as a result. Ms. Deschambeault testified about the sadness and

disappointment she felt at being turned down for a job that she longed to do and for which she felt herself more than competent to perform. It was particularly painful to learn that she was denied this opportunity because she was not a member of the Cumberland House Cree Nation. She also expressed disappointment that she was unable to contribute, as she felt she could, to the healing process within the community, which essentially includes both the Village and the reserve. Their residents not only share institutions like schools and arenas, they live side by side with each other, Métis and First Nation alike, particularly within the Village. She testified that she no longer feels at home within the community in which she grew up.

[86] In all of the circumstances, Ms. Deschambeault is entitled to be compensated for her pain and suffering in the amount of $8,000.

D. Special compensation (s. 53(3))

[87] Section 53(3) provides that the Tribunal may order a respondent to pay up to $20,000 in compensation to the victim if the respondent is found to have engaged in the discriminatory practice wilfully or recklessly. In my view, there is evidence that the Band acted recklessly in committing the discriminatory practices in this case. It opted to deny Ms. Deschambeault the employment opportunity for which she otherwise was qualified and should have received – as the first ranking candidate – because she was not a Band member. No other reason was given in the evidence. The Band has maintained an attitude that it can do as it pleases, claiming that it has every right to appoint whomever it so chooses, as if it can function above the human rights of others.

[88] In the circumstances, I order the Band to pay Ms. Deschambeault $5,000 in special compensation pursuant to s. 53(3).

E. Interest

[89] Interest is payable in respect of all the awards made in this decision (s. 53(4) of the *CHRA*). The interest shall be simple interest calculated on a yearly basis, at a rate equivalent to

the Bank Rate (Monthly series) set by the Bank of Canada. The interest shall run from the date of the complaint with respect to the compensation for lost wages, pain and suffering and special compensation. The interest regarding the compensation for expenses, which were apparently incurred after the complaint was filed, will run from the date of this decision.

F. An order for measures to redress the discrimination and prevent its recurrence (s. 53(2)(*a*))

[90] The Commission has requested an order pursuant to s. 53(2)(*a*) of the *CHRA* requiring the Band to work with the Commission to ensure that future hiring practices conform with the *CHRA*. Given my findings in this case, the order is warranted. The Commission's request is granted.

[91] The Band is ordered to take measures, in consultation with the Commission on the general purposes thereof, to prevent the same or similar discriminatory practices from occurring in the future.

Signed by

Athanasios D. Hadjis
Tribunal Member

Ottawa, Ontario
November 4, 2008

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1253/6507

Style of Cause: Valerie Deschambeault v. Cumberland House Cree Nation

Decision of the Tribunal Dated: November 4, 2008

Date and Place of Hearing: June 2 to 4, 2008

Prince Albert, Saskatchewan

Appearances:

Valerie Deschambeault, for herself

Daniel Poulin, for the Canadian Human Rights Commission

Christopher K. Hambleton and Thomas J. Waller, for the Respondent