

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES
DROITS DE LA PERSONNE

LORETTA KEEPER-ANDERSON

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

SOUTHERN CHIEFS ORGANIZATION INC.

Respondent

DECISION

MEMBER: J. Grant Sinclair 2008 CHRT 26
2008/06/20

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I. INTRODUCTION

[1] The Complainant is Loretta Keeper-Anderson. Her complaint is against the Southern Chiefs Organization Inc. (SCO), an umbrella organization made up of 36 southern Manitoba First Nations communities.

[2] Ms. Keeper-Anderson is a First Nations woman from the Fisher River First Nations and is the mother of seven children. She has a Bachelor of Arts degree and several years experience working with First Nations in southern Manitoba.

[3] Ms. Keeper-Anderson was first hired by SCO in May 2001 as a researcher for the Framework Agreement Initiative/Child and Family Services Table. She worked as a researcher until November 27, 2001, when she became SCO/CFS project manager.

[4] The FAI is a master contribution agreement between Canada and the Assembly of Manitoba Chiefs (AMC). Under the FAI, the AMC has signed a sub-agreement with the Manitoba Keewatinowi Okimakanak (MKO) to coordinate the CFS program on behalf of all the First Nations in Manitoba. MKO signed a sub-sub-agreement with SCO to coordinate the CFS program for the First Nations in southern Manitoba.

[5] The AMC/MKO agreement requires MKO to provide progress and financial reports to the AMC Executive on the CFS work plan activities in accordance with a reporting date schedule. The reports must meet this schedule for the funding to flow from Canada to the AMC and then to MKO and SCO.

[6] The project which Ms. Keeper-Anderson managed involved meeting with each of the First Nations communities in southern Manitoba to interview and collect information from the elders and from others in the communities regarding traditional child rearing.

[7] After the information was gathered, it was to be translated from Cree and Ojibway to English and compiled into a Consolidated Report to be presented to the AMC and MKO and used for negotiating a self-government agreement on Child and Family Services with the federal government.

[8] On February 12, 2004, Ms. Keeper-Anderson left SCO. She purported to go on sick leave because of complications with her pregnancy and thereafter on maternity and parental leave. Ms. Keeper-Anderson claims that she had every intention of returning to SCO after her leave was over.

[9] The SCO's position is otherwise: SCO says that Ms. Keeper-Anderson never requested or received authorization to take sick or maternity leave as required under the SCO's employment policy. And says SCO, just prior to leaving in February 2004, she told some staff members that she quit. The SCO claims that Ms. Keeper-Anderson resigned her position on February 12, 2004.

A. Ms. Keeper-Anderson's Human Rights Complaint

[10] Ms. Keeper-Anderson's human rights complaint is two-fold. First, she claims that SCO has failed to provide a harassment-free workplace. Secondly, she claims that SCO wrongfully terminated her employment and treated her negatively during her employment. For these two allegations of discrimination, she relies on sex (pregnancy) as the prohibited ground. Her complaint to the Canadian Human Rights Commission is dated October 13, 2004.

II. FACTS

A. The Alleged Harassment

(i) The First Incident - SCO Golf Tournament Dinner - September 2002

[11] In September 2002, SCO held a golf tournament at the Kingswood Golf & Country Club Ltd. in La Salle, Manitoba. Approximately 75 people were in attendance, including Chiefs and Council, business partners and SCO staff.

[12] It was Ms. Keeper-Anderson's birthday and a male prankster, a Rent-A-Nerd was hired to attend the golf tournament dinner as a surprise for her birthday.

[13] Ms. Keeper-Anderson testified that without her knowledge or permission, the Rent-A-Nerd was given personal information about her. In her view, the Rent-A-Nerd used this information to publicly humiliate her. She said he joked about the large number of children she has, the fact that she breast-fed all her children, and the size of her breasts.

[14] After the golf tournament dinner was over, Ms. Keeper-Anderson said that she told Elva McCorrister, SCO Executive Director, that she was very uncomfortable with the Rent-A-Nerd's comments about her. She kept her personal life very private from her professional life and felt it was inappropriate to make that kind of information public.

[15] Ms. Keeper-Anderson spoke to her supervisor, Stuart Wuttke, immediately after the incident and told him how upset she was. She also told Bethany Ettawacappo and Eileen Doerksen, two SCO staff who were seated at her table, that she was embarrassed by the conduct of the Rent-A-Nerd.

[16] She did not file any formal complaint with Mr. Wuttke or with Ms. McCorrister.

[17] Later, Ms. Keeper-Anderson learned that Donna Hall, an administrative assistant at SCO, was the one who had given the information to the Rent-a-Nerd.

[18] Ms. McCollister said that prior to the dinner, it was vaguely mentioned to her that an act or a comedian would be performing at the golf tournament dinner. She did not know it would be a Rent-A-Nerd.

[19] Ms. McCorrister did not recall Ms. Keeper-Anderson voicing her complaint at the dinner. The next morning, she met with her staff, told them she did not authorize this, and refused to authorize SCO payment for the Rent-A-Nerd.

(ii) The Second Incident -The October 2003 Meeting

[20] Ms. Keeper-Anderson alleges that shortly after she advised SCO in October 2003 that she was pregnant, Grand Chief Margaret Swan, Elva McCorrister, and Stuart Wuttke had a meeting. Ms. Keeper-Anderson was not at the meeting. But she testified that during the meeting, those three discussed the fact of her pregnancy and Chief Margaret Swan told Mr. Wuttke to "get rid of Loretta because she's pregnant". Ms. Keeper-Anderson said that Mr. Wuttke told her that he was to fire her, but he refused because he did not have a good reason for doing so.

[21] Chief Swan did not remember this meeting. But she did remember having meetings with Ms. McCorrister about Ms. Keeper-Anderson's work performance. As to Ms. Keeper-Anderson's allegation that she wanted Ms. Keeper-Anderson fired because she was pregnant, Chief Swan said this was ludicrous.

[22] Chief Swan has seven children, is a single parent, and worked during all of her pregnancies. She believed that she was more lenient with Ms. Keeper-Anderson because she was pregnant and a single parent.

[23] Ms. McCorrister's recollection was that Chief Swan had called this meeting. She was not happy with the progress of CFS program. There had been a recent SCO summit and Ms. Keeper-Anderson was one of the presenters. Her presentation did not go well and the chiefs had a number of complaints about her.

[24] Chief Swan was upset about this. She was responsible to the chiefs for the CFS project and she wanted it done well. In any case, Ms. Keeper-Anderson was not terminated and continued to work as the project manager.

(iii) The Third Incident - December 2003 Christmas Party

[25] In December 2003, SCO held their annual Christmas party at the Royal Crown Restaurant in Winnipeg. At the time, Ms. Keeper-Anderson was four months pregnant. It

was Chief Swan's practice at the Christmas party to ask each employee to come to the front and she would present them with a Christmas gift.

[26] When Ms. Keeper-Anderson went up to the front, she said that Chief Swan commented, "I'm surprised you haven't had a miscarriage yet with all the pressure we've put you under this year at Southern Chiefs". Ms. Keeper-Anderson said that she was visibly upset by Chief Swan's comment.

[27] Ms. McCorrister said that it was the practice of Chief Swan to make a comment to each of the staff when they were called up to receive their gift. Ms. McCorrister could not recall Ms. Keeper-Anderson approaching her to complain about Chief Swan's comment at the Christmas dinner. Nor did Ms. Keeper-Anderson ever put any complaint in writing.

[28] Chief Swan did not recall exactly what she said to Ms. Keeper-Anderson, but may have said something like she was surprised Ms. Keeper-Anderson didn't have a miscarriage because of all the stress everyone at SCO was experiencing.

[29] But she did not intend her comment to be derogatory or insulting. When she would give a gift a staff member, she would say good things or sometimes funny things about them. Things to make them feel good, not bad. She made a personalized comment to each employee. She did not single out Ms. Keeper-Anderson.

[30] Ms. Keeper-Anderson never told Chief Swan that she was offended by her comment. If she had, Chief Swan said, she would have apologized.

(iv) The Fourth Incident - Del Assiniboine's Queries re: Ms. Keeper-Anderson's Maternity Leave - January/February 2004

[31] Elva McCorrister went on sick leave in January 2004. Del Assiniboine took her place as the Acting Executive Director. Ms. Keeper-Anderson claims that on at least three separate occasions in January/February 2004, Mr. Assiniboine initiated discussions with her regarding the specific dates of when she planned to take maternity leave, when she would return to work, and if she was going to recommend someone to replace her while she was gone.

[32] She assured Mr. Assiniboine that she would give SCO adequate notice before she went on maternity leave. She recommended Jeff LaPlante, a policy analyst who worked with her on the project and who could continue the work without interruption.

[33] Ms. Keeper-Anderson claimed that her assurances did not satisfy Mr. Assiniboine's concerns. She felt that she was being harassed by Mr. Assiniboine by his questioning as to when she planned to take her maternity leave.

[34] Mr. Assiniboine's usual position at SCO was health advocate. He explained that in the Indian world, they are always concerned with their babies, born or unborn and as they are growing up until they become adults.

[35] He would always make a point of visiting not only Ms. Keeper-Anderson, but all the staff in the office, when he came in. He would spend a few minutes in each of their offices talking to them. That was the context within which, he says, he would ask Ms. Keeper-Anderson how she was feeling, if she was doing well and when she planned to take maternity leave.

B. Probationary Status

[36] Ms. Keeper-Anderson received a letter dated December 2, 2002, from Stuart Wuttke stating that he was placing her on probationary status from December 2, 2002 to March 31, 2003. He set out a number of reasons for doing so. These included her unsatisfactory performance at the November 27-28, 2002 SCO summit, when delivering her oral report;

her failure to provide timely budget updates and quarterly and annual reports for the CFS project; her failure to attend regularly monthly meetings of the CFS directors for southern Manitoba; her lack of involvement at the FAI/CFS internal and joint meetings; and her failure to act as a manager and her inability to direct staff. Her lack of management of the program and failure of her team to produce quality work had raised serious concerns about the viability of the project.

[37] Mr. Wuttke placed certain conditions on her probationary status, which included requiring her to attend CFS directors meetings as outlined, provide a supplementary report on the status of the CFS project and complete all community reports and the Consolidated Report by March 30, 2003.

[38] Interestingly, another of the conditions was that Ms. Keeper-Anderson must attend her law school classes to a maximum of 1.5 days per week. Ms. Keeper-Anderson found this condition very confusing because Mr. Wuttke was telling her that she was not keeping up with her work, and yet requiring her to attend 1.5 days a week at to law school.

[39] At this time in 2002, Ms. Keeper-Anderson was attending law school part-time and working at SCO. Mr. Wuttke had encouraged her to go to law school and he had assured her that she would be assisted with her job responsibilities.

[40] She missed some meetings because she was at law school. She was not being helped with her job. She was also getting criticism from upper management about not getting her work done.

[41] On occasion, Mr. Wuttke would call her and tell her about an important meeting that she had to attend. This began to happen with more frequency and she missed a lot of classes. So she withdrew from law school, did not finish the first term and came back to work full-time.

[42] Ms. Keeper-Anderson refused to sign the letter acknowledging the terms of her probationary status. She said that she discussed the letter with Mr. Wuttke and told him that there were conflicting requirements within the letter. His response was that the letter came from higher authority and he was required to write it.

[43] Ms. Keeper-Anderson testified that she spoke to Ms. McCorrister about her probationary status and that she wanted to appeal it. According to Ms. Keeper-Anderson, Ms. McCorrister said that she did not need to write a letter and to disregard Mr. Wuttke's letter. Ms. Keeper-Anderson asked Ms. McCorrister what she meant by that and Ms. McCorrister told her that she would not be placed on probationary status.

[44] Nonetheless, Ms. Keeper-Anderson wrote to Ms. McCorrister on December 5, 2002, informing her, as per their conversation, that she would be submitting an appeal in writing regarding her probationary status by January 15, 2003. Ms. Keeper-Anderson did not follow up and never submitted an appeal.

[45] In her evidence, Ms. Keeper-Anderson also addressed the timelines imposed by Mr. Wuttke. She said that during this time, the project staff consisted of only herself and one other person. Ms. Keeper-Anderson spoke on numerous occasions to Mr. Wuttke and Ms. McCorrister about the problems she was having to completing the reports. She had to send the reports back to each community to each of the persons interviewed for their review. The information gathered from the communities was in Ojibway or Cree and had to be translated into English.

[46] Eventually the project did hire three translators a few months after Mr. Wuttke's letter. The Consolidated Report was completed in July 2003 and the community reports were done earlier.

[47] It is noteworthy that on January 29, 2003, shortly after she was put on probationary status, Dave Rundle, the Executive Director of the Anishinaabe Child and Family Services for the three First Nations communities in the southern Manitoba, wrote to Marlyn Bennett, Research Coordinator, First Nations Research Site on January 23, 2003.

[48] In his letter, Mr. Rundle recommended Ms. Keeper-Anderson for the position of Lead Researcher for the Children and Disabilities in Canada Research Project. He described Ms. Keeper-Anderson as the Project Manager for the FAI/CFS Project at SCO. He noted that one of her primary duties was to carry out community consultations within the Southern First Nations communities which Ms. Keeper-Anderson had successfully completed.

[49] Ms. McCorrister also wrote to Marlyn Bennett on January 21, 2003, recommending Ms. Keeper-Anderson for this position. She also noted that Ms. Keeper-Anderson had successfully completed the Community Consultation for the CFS/FAI for the First Nations in southern Manitoba.

C. Ms. Keeper-Anderson Leaves the SCO

[50] Wednesday, February 11, 2004, was a regular payday. Ms. Keeper-Anderson did not receive hers. She phoned Mr. Assiniboine on February 12, 2004, and asked him why she had not been paid. She said his response was that he was justified in holding back her pay because he did a review of her personnel file and noticed that she was placed on probationary status in December 2002.

[51] Mr. Assiniboine's version is somewhat different. He said that he explained to Ms. Keeper-Anderson that SCO did not have enough money at that time to pay all the staff. SCO had not received its funding from MKO. MKO couldn't access funding through the AMC because SCO had not provided its reports on a time.

[52] As Acting Executive Director, he decided that senior management would not be paid and any money SCO had in the bank would be used to pay the administrative assistants. Those not responsible for reports or finances would be paid first.

[53] He was not paid on that day, nor was Chief Swan or Ms. McCorrister. However, Mr. Assiniboine was able to arrange an extension to SCO's line of credit and everyone was paid on February 13, 2004, including Ms. Keeper-Anderson.

[54] Mr. Assiniboine's version of their discussion about her probationary status also differs considerably from that of Ms. Keeper-Anderson. He testified that Steve Clark, Executive Director of MKO had raised concerns at a meeting with SCO on February 9, 2004, about Ms. Keeper-Anderson's failure to submit reports on a timely basis and her lack of participation at CFS committee meetings.

[55] After the meeting, Mr. Assiniboine reviewed Ms. Keeper-Anderson's personnel file and noticed that she had previously been placed on probationary status for many of the same reasons as expressed by Mr. Clark. He also noted that Ms. Keeper-Anderson had not attended a February 11, 2004 meeting when requested to do so by Chief Swan because she said she was too busy.

[56] During their telephone conversation, Mr. Assiniboine said that he raised these concerns with Ms. Keeper-Anderson and told her that he was considering putting her on

probationary status again or taking some sort disciplinary action. This had nothing to do with her not getting paid. Her response was, "that's it, I'm out of here".

[57] Ms. Keeper-Anderson did agree that she said to Mr. Assiniboine at the end of their telephone conversation, "I'm out of here". But she did not say that she quit.

[58] Mr. Assiniboine also testified that on February 13, 2004, he spoke to Gladys Cochrane who told him that Ms. Keeper-Anderson had handed in her keys, cell phone and said, "I quit".

[59] On February 16, 2004, Mr. Assiniboine wrote to Ms. Keeper-Anderson that she has been away from work without her supervisor's permission. This could be considered an abandonment of employment should she continue to stay away without authorization.

[60] He enclosed a copy of SCO Personnel Policy Manual so that she could follow the proper procedures to request leave. He also wrote that if she does not respond by March 1, 2004, he would consider that she has abandoned her position and he would take the necessary action to hire someone to fill the position.

[61] Mr. Assiniboine was not sure whether this letter was sent to Ms. Keeper-Anderson. She said that she never received it.

[62] When Ms. McCorrister returned from her sick leave, she learned that Ms. Keeper-Anderson was not working at SCO. She said that Ms. Cochrane told her that, on February 12, 2004, Ms. Keeper-Anderson had handed in her keys and her cell phone on and said that she quit.

[63] Ms. Cochrane gave Ms. McCorrister the February 12, 2004 memorandum she had prepared at the time. In this memorandum, Ms. Cochrane recorded that Ms. Keeper-Anderson had handed in her keys to SCO offices, her parking pass and her cell phone and chargers. There was no mention in her memorandum that Ms. Keeper-Anderson told her that she quit. Ms. Keeper-Anderson denied that she said this to Ms. Cochrane.

[64] Ms. McCorrister also testified that at a farewell luncheon on February 13, 2004 for other employees leaving SCO, Ms. Keeper-Anderson approached her and they hugged. When Ms. McCorrister asked her how she was doing, she replied, "you know I quit. Didn't you hear I quit?"

[65] On March 22, 2004, Ms. McCorrister wrote to Ms. Keeper-Anderson that SCO had not heard anything from her since she handed in her keys and cell phone to Gladys Cochrane on February 12, 2004. She referred to SCO's leave policy and procedures and noted that Ms. Keeper-Anderson never made a formal request for sick or maternity leave, either orally or in writing. She concluded that SCO has assumed that she has abandoned her position and SCO will be filling it in the near future. It is very puzzling that in her letter, Ms. McCorrister made no mention of the fact that Ms. Keeper-Anderson had told her more than a month earlier that she had quit.

[66] Ms. McCorrister explained that every SCO employee goes through orientation. They are given a copy of SCO Personnel and Policies Manual which has the policies and procedures for sick leave, maternity leave, and parental leave.

[67] Sick leave for more than three days must be supported by a doctor's certificate given to the Executive Director. For maternity leave, the employee must notify the Executive Director at least four weeks before the leave is to commence which can not start earlier than 11 weeks before delivery. The employee must also provide a doctor's certificate confirming the pregnancy and the estimated delivery date.

[68] The employee must make a request in writing to the Executive Director for parental leave at least four weeks before the leave is to start. When leaving SCO, the employee must return their cell phone, their office keys, and any other equipment that belongs to SCO.

[69] Ms. Keeper-Anderson's telling of the events is that she went on sick leave on February 12, 2004. Before she left on that day, she handed in her office keys, her cell phone and parking pass to Gladys Cochrane, SCO Office Manager.

[70] Ms. Keeper-Anderson agreed that she did not make any formal request for sick or maternity or parental leave. Part of the reason for not doing so was because of the comments Chief Swan had made at the Christmas party. She took those words literally and felt she was being pressured. She did not want to tell them that she had complications with her pregnancy and have it used against her.

[71] Ms. Keeper-Anderson did get a medical certificate dated February 13, 2004, from her doctor which indicated that Ms. Keeper-Anderson was unable to work due to illness and pregnancy. Ms. Keeper-Anderson had spoken to someone at the Employment Insurance office who told her that if she wanted to claim EI sick leave and maternity benefits, she had to obtain a doctor's certificate and a Record of Employment (ROE).

[72] She met with Bethany Ettawacappo, SCO Financial Officer at the time and submitted the medical certificate to her. She asked Ms. Ettawacappo to prepare an ROE and told her that she would be returning to SCO after her leave was finished.

[73] Ms. Ettawacappo prepared the ROE dated February 13, 2004. In the Comments section of the ROE, she wrote, "16 - employee on sick leave February 16/04- May 12/04, maternity incl. parental leave May 13/04 to May 13/05."

[74] Ms. Ettawacappo testified that she was the person who prepared the ROEs. She also said that she had never been told that the ROE had to be approved by management. During her time at SCO, she only issued three ROEs and this was the first for sick leave. Ms. Ettawacappo was not aware that SCO had a Personnel Manual. So she was not aware that when an employee wanted to take leave, they had to make a written request. She did say, however, that an employee would probably have to, that would be assumed.

[75] Ms. Ettawacappo did not tell Mr. Assiniboine that she had issued an ROE for Ms. Keeper-Anderson. She did not speak with Ms. McCorrister about this because she left SCO on February 24, 2004, before Ms. McCorrister returned to work.

[76] Ms. Keeper-Anderson submitted the ROE and medical certificate to EI and applied for sick leave benefits and maternity benefits. Her application was approved on March 8, 2004, effective February 15, 2004, for sickness benefits to May 4, 2004, and subsequently for 50 weeks of maternity and parental leave benefits.

[77] As to Ms. McCorrister's March 22, 2004 letter, stating that she had abandoned her position, Ms. Keeper-Anderson's response was that she had taken the proper procedures to let SCO know that she was going on leave, as per her discussion with Ms. Ettawacappo.

[78] She did not abandon her position with SCO. It was evident from the ROE that she would be returning. She did not request holiday or vacation pay because she had every intention of returning to SCO. She also denied that she told Ms. Cochrane that she was quitting.

[79] Ms. Keeper-Anderson did not discuss the ROE with Mr. Wuttke, her supervisor, or contact him after February 13, 2004, to tell him that she had left on sick leave.

D. The Second ROE

[80] Ms. Keeper-Anderson received a letter from Ms. McCorrister dated August 24, 2004, advising her that SCO had issued a new ROE because the February 13, 2004 ROE was incorrect. Now the comment section of the new ROE read, "E "Quit - not returning."

[81] SCO did not discover the February 13, 2004 ROE, until it was found under a pile of papers in August 2004 by the new finance officer when she was cleaning up the office. SCO was alerted that a ROE had been issued when the EI office called about Ms. Keeper-Anderson's benefits.

[82] Ms. McCorrister explained that SCO had obtained legal advice that the first ROE was completed without SCO management authority by Ms. Ettawacappo on information supplied by Ms. Keeper-Anderson herself. SCO was advised to issue a new ROE that accurately reflected the facts.

[83] According to Ms. McCorrister, SCO would issue a ROE when a manager or the executive director informed the finance officer that an employee was leaving SCO. The finance officer would then have the authority to issue an ROE setting out the reason why the employee is leaving.

E. Legal Proceedings

[84] After Ms. Keeper-Anderson received Ms. McCorrister's March 22, 2004 letter, on March 29, 2004, she telephoned Ms. McCorrister and told her that she had not abandoned her position, that she planned to return to work as soon as possible, and that she did not take holiday pay because she had every intention of returning to work after her maternity leave was over.

[85] According to Ms. Keeper-Anderson, Ms. McCorrister said that she would not reconsider her decision. Ms. Keeper-Anderson then retained a lawyer who wrote to SCO on June 28, 2004. Her lawyer asserted that, contrary to the SCO's position, Ms. Keeper-Anderson had not abandoned her job. Rather, she was on sick leave with respect to complications arising from her pregnancy and this was clearly set out in the February 13, 2004 ROE. Her lawyer asked that, in accordance with the *Employment Standards Code*, Ms. Keeper-Anderson be reinstated at the end of her maternity leave.

[86] SCO responded on August 19, 2004, in a letter from its legal counsel. SCO's position was that its internal investigation confirmed that Ms. Keeper-Anderson did in fact resign from her position on February 12, 2004.

[87] Examples in support of this conclusion were her telephone conversation with Mr. Assiniboine on February 12, 2004, in which Ms. Keeper-Anderson said, "That's it. I'm out of here", and hung up the phone.

[88] And after she had talked to Mr. Assiniboine, she went to Gladys Cochrane's office and handed in her keys and cell phone, said that she quit and left the office without further explanation.

[89] Ms. Keeper-Anderson's lawyer replied on August 25, 2004, saying that she was reviewing the issues raised in the SCO's letter. Nothing resulted from this exchange of letters between the lawyers and Ms. Keeper-Anderson did not pursue any further legal action.

III. REASONS FOR DECISION

A. Harassment - S. 14 of the CHRA

[90] For some time, there has been indications in the jurisprudence that the gender component of harassment is broad enough to encompass all unwelcome conduct targeting the victim's gender which poisons the work environment.

[91] The main conceptual structure for harassment under s. 14 of the *CHRA* was first enacted by the Supreme Court in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252. There the Court said that the test for sexual harassment is unwelcome conduct of a sexual nature that poisons the work environment.

[92] This test was further elaborated by the Federal Court in *Canada (Human Rights Commission) v. Canada (Armed Forces)*, [1999] 3 F.C. 653 ("*Franke*"). In *Franke*, the Court pointed out that the conduct or comments must be sexual in nature or gender-based. The range of conduct which would qualify for harassment includes gender-based insults, sexist remarks, or comments about a person's look or appearance. It would also include jokes or comments that cause awkwardness or embarrassment.

[93] The conduct must be unwelcome. What must be examined is the response or reaction of the complainant at the time of the incident. Did the complainant expressly or by her behavior show that the conduct was unwelcome. Did the complainant notify the employer of the alleged unwelcome conduct. If the conduct was sexual in nature or gender related and shown to be unwelcome, there must be further inquiry, namely, whether the conduct resulted in a poisoned work environment.

[94] This will depend on the persistence or seriousness of the conduct. In *Franke*, the Court considered that the more serious the conduct, the less repetition is necessary to establish harassment. The less serious, the more persistence must be demonstrated. The Court also pointed that, when determining whether the conduct falls within the ambit of sexual in nature or whether it is sufficiently severe or persistent to create a poisoned workplace, the reasonable person standard applies.

[95] Ms. Keeper-Anderson relies on four incidents to demonstrate a breach of s. 14. It is not clear whether Ms. Keeper-Anderson considers the "pay cheque" incident to be harassment or adverse differentiation. In my opinion, it does not matter how it is characterized. As will be seen, I conclude that it is neither.

[96] Consider then the four alleged incidents of harassment. It is clear that the Rent-A-Nerd comments as reported by Ms. Keeper-Anderson were gender-based. They referenced the number of her children, that she was breastfeeding and the size of her breasts.

[97] At the dinner, Ms. Keeper-Anderson told both SCO executive director and her supervisor that she was upset and embarrassed by the comments. That the comments crossed the boundary of her professional and private life and were unwelcome.

[98] But I am not persuaded that the conduct of the Rent-A-Nerd was so serious and/or persistent as to create a poisoned work environment for Ms. Keeper-Anderson. They may have been embarrassing or upsetting for Ms. Keeper-Anderson. It was an isolated incident. The presence of the Rent-a Nerd was nothing more than a transient event. It did not become an enduring feature of Ms. Keeper-Anderson's employment experience. Nor is there any evidence that it negatively altered her working conditions at SCO.

[99] I characterize the same way the remarks made by Chief Swan at the December 2003 Christmas party. They were gender-based to the extent that they referred to Ms. Keeper-Anderson's pregnancy. Ms. Keeper-Anderson said that she was upset by this. But both

Ms. McCorrister and Chief Swan testified that Ms. Keeper-Anderson never told them that she was offended by the Chief's comments.

[100] Again it was a one-off incident. It occurred more than a year after the Rent-a Nerd. Chief Swan testified that she did not single out Ms. Keeper-Anderson. It is very difficult to conclude that this had the effect of "poisoning" Ms. Keeper-Anderson's workplace environment.

[101] As to the October 2003 meeting, Ms. Keeper-Anderson was not present. She did not say how she learned that Chief Swan wanted her fired because she was pregnant. The only evidence is that Mr. Wuttke told her that he was to fire her but refused because there was no reason to do so. Ms. Keeper-Anderson was not terminated. She continued to work at SCO.

[102] Finally, there is the allegation that Mr. Assiniboine repeatedly asked her, during January/February 2004, when she would be taking maternity leave. Mr. Assiniboine's evidence was that as the SCO health advocate, he had a genuine interest in Ms. Keeper-Anderson's well being. And as acting executive director, he would have to know when Ms. Keeper-Anderson would be taking maternity leave and plan accordingly for the project. I fail to see how these inquiries could be characterized as gender-based harassment.

[103] A final consideration is that these incidents were unrelated, isolated, and occurred over the period from September 2002 to January 2004. They were certainly not persistent.

[104] I have concluded that a reasonable person would not, in these circumstances, consider that these incidents were sufficiently serious or repetitive as to poison Ms. Keeper-Anderson's work environment. Ms. Keeper-Anderson has not established a contravention to s. 14 of the *CHRA*.

[105] Ms. Keeper-Anderson referred to telephone conversation that she had with Mr. Assiniboine on February 12, 2004. She claims that Mr. Assiniboine told her that she had not received her pay cheque because she had been placed on probationary status in December 2002.

[106] It is not clear whether Ms. Keeper-Anderson is alleging harassment or adverse differentiation. In my view, given the facts, it is neither. I accept Mr. Assiniboine's evidence that the reason why Ms. Keeper-Anderson was not paid on this day was that SCO did not have the funds to do so.

[107] Other SCO staffs including Chief Swan, Ms. McCorrister and Mr. Assiniboine were not paid. Ms. Keeper-Anderson was not singled out on this occasion. And she was paid two days later, as were the others.

B. Termination of Her Employment - S. 7 of the *CHRA*

[108] Dealing now with the termination of her employment, Ms. Keeper-Anderson has established a *prima facie* case of discrimination under s. 7(a) of the *CHRA*. But for her pregnancy and the sickness related to the pregnancy, she would not have absented herself from the workplace; but for her absence from the workplace, SCO would not have formed the opinion that she had abandoned her job. The conclusion of abandonment led to the refusal to continue to employ.

[109] SCO now has the burden of providing a reasonable, non-discriminatory explanation for its conduct. SCO initially took the position that Ms. Keeper-Anderson had abandoned her employment. However, this position became untenable on March 29, 2004 when

Ms. Keeper-Anderson called in to say, quite unequivocally, that she had not resigned her position and was planning to come back.

[110] This is when the true refusal to continue to employ occurred. At this point, SCO's position was based, not on any theory of abandonment, but apparently on Ms. Keeper-Anderson's previous failure to provide advance notice of - and obtain advance authorization for - her absence from the workplace. Moreover, it would appear that the refusal was also based on the effluxion of time, a lapse of over two months.

[111] Viewed from the perspective of March 29, 2004, is reliance on Ms. Keeper-Anderson's earlier breach of the leave policy a reasonable explanation for no longer employing her? I do not think so for these reasons:

- a) at the time SCO refused to reconsider its decision, it knew of Ms. Keeper-Anderson's true intent, i.e. to return to work after her pregnancy-related leave;
- b) for a significant amount of time prior to March 29, 2004, SCO knew that Ms. Keeper-Anderson was pregnant and would be seeking maternity leave in the near future.

[112] SCO made no attempt to establish that timely compliance with the leave policies was a *bona fide* occupational requirement. Therefore the only avenue available to rebut the *prima facie* case is to demonstrate that its employment refusal was unconnected with Ms. Keeper-Anderson's pregnancy. This, it has been unable to do.

[113] Its position from March 29, 2004 onward amounted to a refusal to retroactively grant the complainant leave related to the birth of her child. Again, while such a refusal may have been completely justifiable on the grounds of undue hardship - given the lapse of time and the possibility that someone new may have already been hired - no such justification was alleged in this case.

[114] By the same token, SCO did not attempt to justify its actions on the grounds that Ms. Keeper-Anderson's somewhat surreptitious means of obtaining a ROE without going through proper channels revealed dishonesty incompatible with the maintenance of the employment relationship.

[115] What is left is the fact that SCO, in refusing to reconsider its conclusion of abandonment, did so in full knowledge of the pregnancy-related reasons for the complainant's absence, and her intention to return to work as soon as possible. In these circumstances, its refusal to continue to employ her was based, at least in part, on the prohibited ground of sex. Therefore, this aspect of the complaint has been substantiated.

IV. REMEDY

[116] Ms. Keeper-Anderson requested that the Tribunal award:

- (1) lost income for the period May 2005 to May 2007 being \$90,000 at \$45,000/annum;
- (2) lost of benefits of \$5,000;
- (3) \$5,000 for pain and suffering;
- (4) \$15,000 as damages for the willful and reckless conduct of SCO;
- (5) costs incurred in selling her house;
- (6) legal costs;
- (7) interest on the above amounts.

[117] Before I can decide what Ms. Keeper-Anderson should receive by way of remedy, I need to know the total income received from all sources by Ms. Keeper-Anderson from May 2005 to May 2007, and whether she is required to reimburse EI for EI benefits or any other government agency for income assistance benefits which she received in that period.

[118] Ms. Keeper-Anderson is also to provide any legal accounts showing the legal costs she incurred relating to her complaint.

[119] Ms. Keeper-Anderson is to provide the Tribunal and SCO counsel with this information by July 15, 2008. In the meantime, I urge the parties to try and agree on compensation for Ms. Keeper-Anderson.

[120] I remain seized of this complaint until the question of remedy is finalized.

"Signed by"

J. Grant Sinclair

OTTAWA, Ontario
June 20, 2008

PARTIES OF RECORD

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APPEARANCES:	
Loretta Keeper-Anderson	For herself
No one appearing	For the Canadian Human Rights Commission
Harold Cochrane/Voula Kotoulas	For the Respondent