

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES
DROITS DE LA PERSONNE

KAREN SCHUYLER

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ONEIDA NATION OF THE THAMES

Respondent

DECISION

MEMBER: Dr. Paul Groarke 2006 CHRT 34
2006/08/18

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I. INTRODUCTION

[1] Karen Schulyer is a member of the Oneida Nation of the Thames in southern Ontario. She left the community when she was young and returned to take up the senior administrative position in the Band Administration. She was later diagnosed with cancer and hospitalized.

[2] After Ms. Schuyler left the hospital, she advised the Band that she wanted to return to a part-time position. This did not work out, and she filed a complaint with the Canadian Human Rights Commission, on January 20, 2004, alleging that the Band had failed to accommodate her.

[3] When Ms. Schuyler returned to work, her relationship with the Band Council continued to deteriorate. She believed that Council was angry that she filed the first complaint and was retaliating. After a rather arduous series of events, she was dismissed. This led to a second complaint, which was not filed until January 20, 2004.

[4] The two complaints were referred to the Tribunal by the Canadian Human Rights Commission (the CHRC). A hearing was held in London, Ontario in May, September and December, 2006. The following decision reviews the evidence led by both sides and disposes of the complaints.

II. FACTS

[5] It is helpful to know something about the operations of the Band before proceeding to the facts. During Ms. Schuyler's tenure, the Executive Administrator was the most senior position in the Band administration. This position has now been replaced by a Director of Operations, possibly because of the issues that arose in the present case.

[6] Randy Phillips worked as a policy analyst for the Oneida Nation and was later elected as Chief. He testified that the power to make decisions in the Band rests generally with Council. Council meets approximately once a week, in the evening. Ideally, decisions are made by consensus. When that fails, a vote is held and the majority decides the motion. The Executive Administrator may raise issues at the Council but does not participate directly, other than to advise Council.

[7] Mr. Phillips testified that Ms. Schulyer did not have a good relationship with Council. He was kind enough to say that some of this was a reflection of the difficulties inherent in the position. Council tended to blame the Executive Administrator when its policies were not being implemented.

A. Performance review: July 2000

[8] Ms. Schuyler was hired by the Band Council as the Executive Administrator in June, 1998. She proposed a management contract, which Council declined. She was given a standard Council contract in July, which included a six month period of probation.

[9] Chief Harry Doxtator was Chief of the Oneida for approximately twelve years and has served as the Grand Chief of the Association of Iroquois and Allied Indians. He worked with Ms. Schuyler for four or five years and was the head of the probationary committee.

[10] There were problems from the start. Chief Doxtator testified that there was a questionnaire given to staff. There was also an interview scheduled with Ms. Schuyler, which she called off, apparently on the basis that she was concerned with the use of the questionnaire. She wanted to see the questionnaires.

[11] It seems clear that the committee felt that Ms. Schuyler was a poor manager. She followed "unusual management practices" and sometimes failed to follow proper procedures. The process quickly became adversarial. I accept Chief Doxtator's testimony that she said it was going to cost them a lot of money if they wanted to get rid of her.

[12] Ms. Schuyler, for her part, complained that it took three years to complete the probationary review. There was a lot of haggling. At one point, the evaluation committee wrote her a letter, asking her to address a number of concerns. She sent them an extensive reply on May 13, 1999.

[13] It was not until June 20, 2000, however, that the committee conducted the review process. Ms. Schuyler was ranked as average or below average on all of the "performance factors" in the personal evaluation. It contained "outstanding" scores for initiative, assertiveness and confidence. The truth, however, is that the evaluation committee expressed concerns about her performance.

[14] Ms. Schuyler refused to sign the evaluation. In a written response, on June 26, 2000, she took the position that the failure of the Council to separate the roles of Council and the administration undermined the authority and credibility of the Executive Administrator. It seems characteristic that she did not acknowledge the difficulties she had experienced in maintaining her working relations with other people.

[15] In spite of the disagreements, a number of recommendations came out of the evaluation report. One was that an *ad hoc* grievance committee be established to deal with any issues relating to the Administrative Executor. One was that Ms. Schuyler obtain her grade twelve equivalency.

[16] The report went to Council on July 25, 2000. It was discussed by Council in the early morning hours, after one of the regular meetings. Ms. Schuyler thought this was unfair. Chief Doxtator did not agree. The matter was pressing and there was no other time to deal with it.

[17] The Councilors concentrated on the things that the program managers had said. The Committee had sent questionnaires to the Chief, Council and staff. She says that she wasn't able to respond properly because she didn't have the questionnaires. They said that the questionnaires were destroyed.

[18] Council ultimately accepted the report and requested a six month follow up. This was scheduled but never occurred. Ms. Schuyler felt that the process was one-sided and incomplete. She says that she was forced to agree to things "under duress" as a result of the hour and the emotional pressure placed upon her.

[19] Ms. Schuyler felt that she was being treated differently because she had lived off the reserve for 35 years. The draft evaluation stated that she needed to reintegrate herself into the community. She asked them to remove this reference from the final evaluation. She didn't feel any need to be reintegrated into the community. It is notable that her position changed in cross-examination.

[20] It seems clear that the bulk of the problem lay with the twenty five program managers who reported to the Executive Administrator. Ms. Schuyler's relations with these managers were strained, to say the least. There was a controversial email that made the rounds on November 28, 2000 with a copy to Ms. Schulyer complaining about her management style. The significance of this email is simply that there was dissatisfaction among the staff.

[21] Ms. Schuyler says the problem was with Council. Her relationship with Council was poor and continued to worsen over the entire period of the complaints. The lines of authority weren't clear and the program managers continually went to Council behind her back. At one point, she stated that the staff probably didn't like her because she had disciplined them.

[22] Randy Phillips took the side of the program managers and remembers an intervention from the Canadian Human Rights Commission or Labour Board. There was an attempt to mediate the dispute on January 27, 2001. It appears that fifteen to twenty people participated. This included Ms. Schuyler, a number of program managers, the Chief and two Council members.

[23] It all sounds very trying. Ms. Schuyler was on the defensive and discussed a possible human rights complaint with one of the mediators. There was an agreement drawn up at the end of the mediation. Only three of the program managers signed it: the rest refused. They were apparently unhappy with the process. The review of Ms. Schuyler's job performance continued.

[24] There was a meeting between the evaluation committee and Ms. Schulyer, on March 22, 2001, to do the follow up. She protested. The committee asked her to put her concerns in writing, which she did by means of a written memorandum, dated April 25, 2001. There was no response.

B. Cancer: July 2001

[25] Ms. Schuyler became sick in July 2001. She was hospitalized for about eight days, with a bowel blockage. She couldn't keep food down and was getting very weak. She was fed intravenously. Eventually, the blockage cleared itself. After she left the hospital, Ms. Schuyler took sick leave, and then a vacation. She was off work until the beginning of September.

[26] Ms. Schuyler testified that she was being treated for peptic ulcers at this time and was losing weight. I allowed a letter from Dr. McDonough into evidence but excluded his case notes. The doctor has apparently moved to Ireland and is no longer available. The Tribunal can relax the rules of evidence in the interests of determining the truth.

[27] The Respondent has not disputed the rough outlines of the situation described in the letter. The letter states that Ms. Schulyer was under stress. The details of Ms. Schuyler's medical record are not in issue. It is apparent that the deteriorating situation at work was affecting her physically. She was tired and couldn't concentrate.

[28] Ms. Schuyler went through a number of medical tests between September and November. In November, her doctor ordered her to take two weeks off work. This was

followed by another note, again to stay off work. She had a colonoscopy on December 21st.

[29] Ms. Schuyler's doctors discovered that she had cancer of the colon. There were more tests and she went into surgery at the beginning of February. She was in the hospital for eight days and part of her colon was removed. She was at home, recovering, until May, 2002, and took chemotherapy up until September.

C. Part-time: May 6, 2002

[30] In her final submissions, Ms. Schuyler states that she was determined to get back to work.

"After having been through a life-threatening experience, I wanted an opportunity to return to normal life. I thought returning to work part-time would be the beginning of that. I knew I could not fulfill the entire role of Executive Administrator on a part-time schedule but felt I still had valuable contributions to make".

In April, Dr. McDonough agreed that Ms. Schuyler could return to half-time work.

[31] Ms. Schuyler then contacted Holly Elijah, the Acting Executive Administrator, who must have spoken to Chief Doxtator. The Chief phoned Ms. Schuyler and told her that Council was concerned about her returning to work. The evidence suggests that they felt that she wouldn't be able to deal with the pressure. But I agree with Ms. Schuyler: they didn't want her back.

[32] Chief Doxtator informed Ms. Schuyler that the human resources committee would have to review the situation. She would have to meet with them. Ms. Schuyler felt that they were simply trying to stop her from coming back. There was nevertheless a band policy. An employee had to meet with a human resources committee before returning to work from a long absence.

[33] There was some antagonism on both sides. On May 6th, Ms. Schuyler apparently told Chief Doxtator that her cancer was a disability and the Band would have to accommodate her under the *Canadian Human Rights Act*. Chief Doxtator responded that they needed a medical note.

[34] Ms. Schuyler was feeling mistrustful. She wrote a letter to Chief Doxtator two days later, expressing her disappointment with the fact that they hadn't given her part-time work. She delivered the letter to his office the next day. She also met with the Human Resources Committee.

[35] The meeting was on the litigious side. The committee raised seven points, ranging from medical documentation to the hours that she wanted to work. They also indicated that they felt obliged to respect the contracts that had been entered into while she was away. They apparently felt that they were already full staffed.

[36] The committee made it clear that her position had been given to someone else. There was a real reluctance to bring her back. The meeting lasted an hour and a half. The committee wanted her to take a lesser position. They agreed to draw up a position for her, but it wouldn't be the same position or the same salary. She felt they were delivering a message from Council. They didn't want her back.

[37] Ms. Schuyler broke down in tears on the stand. The Committee gave her an awful feeling. They acted as if "cancer was catching or something". She expected more compassion. It didn't matter to them if she was feeling better or not. It didn't matter to them whether she was still alive or not. Ms. Schuyler said that the Committee felt that she was "mentally incapable of handling any kind of workload".

[38] It was a complicated situation. In spite of this, I am satisfied that, behind the indifference, Council and the staff had some genuine concerns for Ms. Schuyler's well-being. Ms. Elijah testified that the thought on the reserve was that she was going to die. This does not mean that they wanted to accommodate her.

[39] The Human Resources Committee told Ms. Schuyler that they would provide a written recommendation to Council. Charlie Cornelius said that they would show it to her first. She received the report on May 14th. She discussed it with Lois Cornelius, a member of the Committee, who supplied it to her. She told Ms. Cornelius that she wasn't happy with the statement in the report saying that she would have no authority.

[40] Ms. Schuyler obtained a note from her oncologist on May 15th, and met with the Chief. The note suggested that she was in the best position to determine what an appropriate work-load would be, and she advised him that she wanted to be consulted, in determining her duties. This would appear to be a natural part of any reasonable process of accommodation.

[41] The Report went to Band Council on June 12, which agreed to employ her. She would be supervised by Holly Elijah, the Acting Executive Administrator. Ms. Elijah had been Ms. Schuyler's assistant when Ms. Schuyler was first hired. Council took the position, as did Chief Doxtator, that the Executive Administrator position could not be staffed on a part-time basis. Nor could it be filled by two people.

[42] On the same day, Ms. Elijah replied on behalf of the Band, sending Ms. Schuyler an employment agreement, describing a part-time position with modified duties. The position that was offered to Ms. Schuyler was "Special Projects Administrator". This position did not enjoy the same responsibilities or authority over staff. The new contract for the position also stated that there was a three month probationary period.

[43] The agreement stated that Ms. Schuyler was to report to the Acting Executive Administrator, Chief and Council, and Department Heads. The Department Heads were Program Managers. This was a demotion of sorts, since they had been under her supervision. It is evident that she wanted to retain some element of her authority.

[44] Ms. Schuyler testified that she would have been happy to help Ms. Elijah on a part-time basis, but she wanted some say in deciding what work she would be given. The most troubling aspect of the offer was that there was a three month term of probation. I think Ms. Schuyler is within her rights in saying that this was unacceptable. She was worried, moreover, that this would put them in a position to let her go.

[45] Ms. Schuyler went to a lawyer, Adrian Cameron. After discussing the offer of part-time employment with him, she decided to reject it. She wasn't prepared to go back, on the terms that they were offering. She thought it was better to walk away until she could return full-time. She indicated to the Insurance Company that she would not be going back to work until her chemotherapy was completed.

[46] Ms. Elijah felt that the Band followed the personnel policy, in good faith. Chief Doxtator seemed to back her up. They took the position that Ms. Schuyler simply refused to participate in the process. There may be some defensiveness in this: I think the matter is a good deal more nuanced and the Band was not particularly interested in accommodating her.

[47] Ms. Schuyler's lawyer advised Council on June 19, 2002 that she was unable to return to work and would be receiving full-time disability. His letter referred to "multiple

breaches" of the *Canadian Human Rights Act* and stated that she would be asking for accommodation when she returned.

[48] At the beginning of July, when a new Band Council was elected, Ms. Schuyler gave Ms. Elijah a chapter from a book, When Life Becomes Precious: A Guide for Loved Ones and Friends of Cancer Patients, by Elise Needell Babcock. It contains guidelines for employers, in dealing with situations where an employee has cancer. This was apparently distributed to the new council, since Rolanda Elijah and Luke Nicholas, two of the new councilors, came by her home to speak to her about it.

[49] The first complaint with the Canadian Human Rights Commission was filed the following month. Ms. Schuyler also filed a complaint with Labour Canada on August 26, 2002, stating that she was constructively dismissed. I gather that the later complaint was later withdrawn.

D. Return to work: October 15, 2002

[50] Ms. Schuyler received a full-time disability allowance until October 15, 2002. She received Employment Insurance from the end of January to May 2002. She received welfare for one month, during June of the same year. She eventually finished her chemotherapy and received traditional counseling.

[51] Ms. Schuyler did a lot of soul searching. She says that she forgave everyone for the problems in the past and let go of her bitterness. She decided to "let bygones be bygones". She maintains that she returned to full-time work in October, 2002 with good feelings.

[52] This was transitory. Ms. Schuyler had difficulties with the new Council and was terminated eleven months later. She felt that her problems lay with the Chief. She said it was as if he didn't want to be close to her, physically. There was a lack of communication. She complained of nepotism and explained: "I wasn't related to him."

[53] On October 15th, Ms. Schuyler met with Chief Doxtator. He wanted a medical note, signed by her oncologist. She felt that she was already running into road-blocks. Ms. Schuyler nevertheless drove to the hospital, obtained a note, and returned to the Band office. She couldn't find Chief Doxtator and felt that he was ignoring her.

[54] Ms. Schuyler drafted a motion and asked the Council Recorder to put it on the agenda for the next meeting. The motion stated that Council accepted "the medical documentation" that she provided and recognized that she was "medically fit" to return to her position as Executive Administrator. It also directed all employees to co-operate in her return to work. She says that Council removed a paragraph welcoming her back.

[55] The meeting was uncomfortable. Ms. Schuyler testified that there was a strange feeling in the room. People shuffled papers and looked away. "Everybody seemed to look at the floor." The motion was nevertheless passed. She was informed later that Holly Elijah would keep her position as Acting Executive Administrator for the rest of the year. So there were two Executive Administrators.

[56] This was never properly explained, and seems to run against the position that the Band had taken with respect to part-time work. Ms. Schuyler feels that they kept Ms. Elijah in the position because they had no confidence in her ability to carry out her duties. I think that there was probably a measure of truth in her perceptions. She nevertheless accepted the situation. She didn't want to create any animosity.

[57] Chief Doxtator took a different view than Ms. Schuyler. He testified that the relationship between Council and Ms. Schuyler when she returned was "welcome back".

This evaporated over time, but only because Council became increasingly aware that Ms. Schuyler lacked the personal skills to deal with the interpersonal aspects of her job.

[58] Ms. Schuyler spent most of November doing the performance evaluations of the program managers. They were self-evaluations. She didn't have much contact with the Chief. Ms. Elijah was primarily occupied with catching up on the Council minutes. There was a staff retreat in early November. They discussed the need to separate the political and administrative functions of the band.

[59] The old animosities were still there, however. Somewhere along the way, she was asked to withdraw the complaint. At some point, probably at the beginning of 2003, Ms. Schuyler says that someone put a post-it note reading "Enter at your own risk" on her office door. The level of mistrust in the office was high enough that Ms. Elijah testified that the note was in Ms. Schuyler's handwriting.

[60] Ms. Schuyler felt that people did not want her back. She attributed it to the fact that she had filed the human rights complaint in July, 2001. She said that Council does not like being sued. She had seen their attitude to litigants in other cases. "They didn't like the fact that anyone would challenge them." No one said this, but the feeling was there.

[61] There were increasing problems. There was a special meeting of Council in December, 2002, to separate the political and administrative functions of the Band. This included separating the political staff from the administration. It appears that there was a struggle with Ms. Schuyler over the issue, since it would remove some of Ms. Schuyler's staff from her supervision.

[62] There was a Council meeting on January 7th, 2003, which dealt with personnel problems at the healing lodge. Ms. Schuyler thought that the issue had been resolved in 2001. Chief Doxtator did not know why it took so long for the issue to come to the attention of Council. The Council issued Ms. Schuyler a verbal warning to her for the way she dealt with the issue. She received a letter two weeks later.

[63] It is obvious that there were deeper problems. Some of it was personality; but there was more to it than this. The Respondent takes the position that Ms. Schuyler wasn't capable of doing her job. Ms. Schuyler felt that they were looking for excuses to reprimand her. She was blamed for everything. She was a non-person. It was the beginning of beating her down.

(i) The occupation: March 7, 2003

[64] Then there was the occupation. The provincial police had obtained permission to carry out a homicide investigation on the reserve. They arrived on March 7, 2003, with a dozen or more police officers. This upset many people. There was a flurry of phone calls to the administration. The traditional chief at the administration building found it impossible to deal with all of the calls and left the building in exasperation.

[65] It was territorial. People were angry that there were OPP vehicles on the reserve. Chief Doxtator testified that four or five members of the Band eventually came into the Administration Building and wanted everyone to go home. They "suggested" that staff needed time off. One of them had a six foot cane, two inches thick. He was banging it on the floor.

[66] Holly Elijah had a similar recollection. She testified that four men brought in a heavy staff of some sort, possibly a "condolence cane", and started pounding it on the floor. They had been drinking; they were yelling; and they threatened the staff and told them to leave the administration building. They wanted the police off the reserve.

[67] Chief Doxtator refused to leave. Ms. Elijah felt that this was dangerous. There were discussions and a decision was made to vacate the building. Most of the staff were gone by 4:30. Chief Doxtator did a round of the offices, to see that everyone had left. He was the last person in the building. He wanted to close it. The men had come back, however, and announced that they were staying in the building.

[68] The crisis escalated and eventually dozens of protesters occupied the main administration office. They then took over the entire plant. This was on a Friday. It took until Tuesday or Wednesday to resolve the situation. There were about one hundred and seventy five employees locked out. Ms. Elijah testified that the staff was traumatized. They felt physically threatened.

[69] Ms. Elijah still feels traumatized. She feels that the problem was that no one was in charge and blames this on Ms. Schuyler, who did not come into the office that day. Ms. Elijah is suspicious of this: she said that Ms. Schuyler had never told anyone that she wouldn't be there. The assistant was also away.

[70] After the occupation, there were many meetings to deal with the concerns of staff. Ms. Elijah testified that Ms. Schuyler was unsympathetic, even scornful. She called them "victims" and said they should all simply go back to work. Ms. Elijah says that this was the beginning of the end. The staff resented Ms. Schuyler for failing to support or protect them.

[71] There was a staff meeting in Council chambers, some days after the occupation. Ms. Schuyler and Mr. Phillips spoke in private before the meeting. Mr. Phillips stated that Ms. Schuyler said people were acting like "victims". There are two versions of what happened at the meeting. Mr. Phillips said that Ms. Schuyler then repeated these remarks in the meeting. This upset some of the individuals who were there. Ms. Schuyler said that Mr. Phillips made the remark.

[72] There was some personal counseling offered to employees after the occupation. There was also a traditional healing circle, though Ms. Elijah feels that it was nothing more than an opportunity to vent. This still rankles: she didn't want to go and "spill her guts out" in front of everyone. She wanted a plan in place, to deal with the kind of situation that led to the occupation.

[73] There was also an issue concerning the staff who participated in the occupation. Ms. Elijah wanted them disciplined. Ms. Schuyler felt that it was a more complex situation and wanted Council to deal with it. The evidence is unclear. One witness stated that Council had to instruct Ms. Schuyler to deal with the matter.

[74] Ms. Schuyler, on the other hand, testified that Council dealt with the disciplinary issue without consulting her. This led some of her staff to believe that she was part of the occupation. In any event, the occupation and the recriminations that followed led to a further deterioration in Ms. Schuyler's working relationships. Ms. Schuyler felt that members of her staff had gone to Council behind her back.

E. Termination

[75] It is hard to disentangle what was happening from what Ms. Schuyler perceived, but the situation was deteriorating on both sides. There was something in the background that no one was really saying. She felt invisible. Her recommendations were not taken seriously. People would smile to her face, but then something else would come up.

[76] Ms. Schuyler is convinced that Council didn't want her there because she filed the human rights complaint. They were looking for ways to get rid of her. The staff sensed

that Council didn't trust her. They lost confidence in her as a result. There were allegations that she didn't support them.

[77] Ms. Schuyler listed thirty incidents of retaliatory conduct. There was, for example, a conflict of interest with one of the managers. She had difficulty dealing with it. Her word didn't carry any authority any more. There is a measure of truth in all this, but it is tempered by the fact that the Chief and Council had real issues with Ms. Schuyler's job performance.

[78] There was a Council meeting on May 6, 2003, to deal with the plan to separate the political and administrative functions of the Band. The first step in that plan, taken at the same meeting, was to ask the Executive Administrator, i.e. Ms. Schuyler, to attend Council meetings on the first and third Tuesday of the month. Ms. Schuyler says that this was merely to keep her out of meetings.

[79] Ms. Schuyler felt that she was laughed at when she asked questions at Council. She was called insubordinate. Ms. Schuyler felt that it was part of the Executive Administrator's responsibility to attend meetings. Council took the position that it had the authority to change her responsibilities, however, and were within their rights to ask her not to attend meetings.

[80] Randy Phillips testified that Ms. Schuyler was asked to report only to the last meeting of the month. This led to a flare-up with a councilor, Faye Antone, who was laughing. Ms. Schuyler asked her not to laugh at her. Ms. Antone replied by telling her that the Council was her employer and that she was to do as she was told. There was also an incident with Ms. Elijah.

[81] Ms. Schuyler complained that Band Council removed Holly Elijah and Randy Phillips from her supervision. Mr. Phillips said that this was part of an ongoing process. As a policy analyst, he had proposed a policy secretariat, which would report directly to the Chief and Council. This was on the basis that its responsibilities were on the political side of the political/administrative divide and was not related to the delivery of programs and services.

[82] It is hard to keep the lines of the narrative clear. There were battles everywhere. There was an issue, for example, between Ms. Schuyler and Mr. Stacey Phillips, a staff member and Councilor. There were loud arguments between the two of them. Mr. Phillips did not accept Ms. Schuyler's authority as his supervisor and kept going over her head, to Council.

[83] Ms. Schuyler maintains that Council continued to deal with administrative matters, in spite of all the talk about separating the functions of the Band. Some of the problem was undoubtedly that it was open to staff to sit on Council, which made their supervision extremely problematic. Issues between the Executive Administrator and individual staff members must have affected Council business.

[84] Ms. Schuyler wanted to change the personnel policy to prevent councilors from being employed by the Band. The Respondent says that section 5.8 of the Election Code prevented this. She says that the Election Code has not been passed in a referendum. The provisions of the *Indian Act* accordingly apply.

[85] There is a draft Customs Election Code, which was periodically discussed by Council. Holly Elijah said that the Band has been trying to finalize the Code for twelve years. One provision, 5.8, says that any employees who are elected Chief or Councilors

must leave the Band's employment. The Election Code has not been passed, however, and at the time in question, staff members had a right to run for council.

[86] The relations between many of the different individuals in the story were edged with personal rancor. It is clear from Chief Doxtator's testimony that there was a rivalry of sorts between Randy Phillips and Ms. Schuyler. Council was not a part of this. Ms. Schuyler alleges that Mr. Phillips gave funding information directly to the program managers, bypassing her office. They seem to have been competing for the loyalties of the managers.

[87] There appear to have been similar issues between Ms. Schuyler and Ms. Elijah. This was evident in the tone of voice and body language used by Ms. Elijah on the witness stand. At one point in the cross-examination, she refused to look at Ms. Schuyler and referred to her in the third person.

[88] In any event, it was all very personal. Ms. Schuyler has complained, for example, that Randy Phillips had been allowed to do some of his work at home for a number of weeks, so that he could care for his father. Ms. Schuyler said the Band failed to accommodate her in the same way.

[89] The level of detail is numbing. There was an issue between Ms. Schuyler and a councilor with respect to funding for the Casino-Rama. There were disputes concerning honoraria for attending Council meetings, the awarding of jobs, and a variety of other issues.

[90] Everything was entangled. Ms. Schuyler's daughter was the employment and training administrator. Council understandably saw this as a conflict of interest and did not want her reporting to her mother. She was accordingly placed under the supervision of Mr. Phillips, who was now under Council's supervision rather Ms. Schuyler's.

[91] There was a dispute regarding the disclosure of letters complaining about Verna Brown. There were issues between Cyndi White, the Human Resource Coordinator, and Ms. Schuyler. They didn't trust each other. Ms. White thought that Ms. Schuyler, her supervisor, was editing her reports to counsel. So she went over Ms. Schuyler's head and spoke directly to Council.

[92] Matters continued to get worse. Ms. Schuyler wasn't kept informed of what was happening in Council. The minute book was no longer available to her. The Council Recorder--Ms. Elijah, who had also been removed from Ms. Schuyler's supervision--would not let her see it. Ms. Elijah said that she was following the instructions of Council. The *in camera* minutes were never to leave the building.

[93] Chief Doxtator does not recall any disputes about the *in camera* minutes book. He did not see the direction that Ms. Schuyler only appear at Council meetings to provide her report as an attempt to exclude her. She would still be required to appear at meetings where issues arose that needed her input. Nor did he see the change in the reporting requirements of Holly Elijah and Randy Phillips as an attempt to undermine her authority.

[94] Ms. Schuyler decided to go to the meetings as a member of the community. This strategy didn't go over well. There was a general break-down in her relations with Council. In July, she complained about the situation in her monthly report. She had discussed the situation with her lawyer and advised Council that its conduct was tantamount to constructive dismissal. Council disagreed.

[95] The evidence is that the politics were intense. Everyone seems to agree, however, that the continuing conflicts and ongoing litigation had poisoned what was left of the relationship between Ms. Schuyler and Band Council. The evidence does not support the allegation that this was done in retribution for filing the complaint.

[96] There was an elder sit-in in August, 2003, at the Health Department office across the road from the administration office. The person who was the long-term care coordinator was suspended. As a result, a number of senior citizens and others occupied the building. Ms. Schuyler did not handle the situation well. The police were called.

[97] Ms. Schuyler responded with a letter from her lawyer to Mr. Peters, counsel for the Band, on August 21, 2003. The letter alleged that that the Band's treatment of the Complainant was retaliation for the human rights complaint.

[98] There was some issue as to whether Ms. Schuyler was getting her work done, as a result of the issue over Council meetings. The matter was serious enough that the Chief wrote a letter to Ms. Schuyler on behalf of Council on July 9, 2003 directing her that she was to attend Council as required. The letter gave her a second "warning".

[99] There was a meeting of Council on August 28, 2003 to deal with Ms. Schuyler's performance. There was a motion to dismiss her from the position of Executive Administrator. The minutes list eleven items of "misconduct". The language is strong. The first two items refer to "acts of insolence". The next item refers to "acts of insubordination". There is another reference to her breach of her "duty of loyalty and good faith" to Council, and references to her manner with staff.

[100] Then there were substantive complaints, the most serious being an allegation that Ms. Schuyler failed to implement "over 100 items designated to her by Council" over the previous five years. There is a separate list of forty-one outstanding "Administrative Action Items" from 2002 to 2003, thirty-eight of which required action from the Executive Administrator that was provided to Council members before the meeting. The requests range from the implementation of the mosquito program to a proposal to purchase a new fire truck, to the provision of committee lists.

[101] Chief Doxtator chaired the meeting on August 28th. He feels that the concerns expressed at the meeting were valid. They reflect the rather desperate situation that existed at that time. Ms. Schuyler was argumentative and contrary, in her dealings with Council. There was none of the trust that was necessary to maintain a proper working relationship. There was insubordination. There was a failure of co-operation. There were problems with staff morale.

[102] Chief Doxtator agreed that there was "a poisonous scenario" at the office. He attributed this to Ms. Schuyler, however. There was no attempt to force her to quit. There were a number of confrontations at Council table but he did not feel that Council treated her badly. Council had never received so many complaints about an Executive Administrator. There was no discussion of Ms. Schuyler's illness or the complaint to the human rights Commission.

[103] The minutes of the meeting were not signed by Council. This appears to be inadvertence. Ms. Elijah, who took the minutes, says the language used in the minutes was appropriate. It was all about Ms. Schuyler's attitude. She testified that the dismissal had nothing to do with Ms. Schuyler's illness. Mr. Phillips took the same position.

[104] On September 4th, after the labour day weekend, Ms. Schuyler returned to work. She was given a letter from Chief Doxtator, stating that she was dismissed. The letter

cited a number of reasons for her dismissal. The Chief said it was not up for discussion and she was escorted out the door. This brought Ms. Schuyler's troubled relationship with Council to an end.

[105] The letter of dismissal is dated September 2, 2003. It is very stern and alleges eleven forms of "misconduct". This includes "continued acts of insolence" and breaches of her "duty of loyalty and good faith". Ms. Schulyer rejects all of these allegations. The letter offered her seven months severance pay. She was required to sign a release, however, which stated that any complaints that she had filed under the *Canadian Human Rights Act* or the *Canada Labour Code* were frivolous, vexatious, and an abuse of process.

[106] It is a sad story. Ms. Schuyler's lawyer suggested that she accept the settlement. She refused. The issue was not the money. She felt the allegations were unfair. She had been 'silently' discriminated against. She refused to sign the release. Afterwards, she felt isolated. Some of the staff and community members wouldn't talk to her.

[107] In the fall of 2003, Ms. Schuyler filed another complaint under the *Canada Labour Code*. The second human rights complaint, alleging retaliation, was filed on January 20, 2004.

III. LEGAL ISSUES

A. Retaliation

[108] The second complaint was filed under section 14.1 of the *Canadian Human Rights Act*, which states:

14.1 It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

There is a legal issue with respect to the requirements of retaliation.

[109] The case law goes two ways. I prefer the position adopted by Member Deschamps in *Virk v. Bell Canada (Ontario, 2005 CHRT 2 (2005/01/20)*, at para. 156:

[156] Retaliation implies some form of willful conduct meant to harm or hurt the person who filed a human rights complaint for having filed the complaint. This view departs in part from those expressed in previous decisions of this Tribunal on the issue of retaliation (*Wong v. Royal Bank of Canada*, [2001] CHRT 11; *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 40).

[157] In *Wong* and *Bressette*, the views expressed are to the effect that a complainant does not have to prove an intention to retaliate and that if a complainant *reasonably perceived* the impugned conduct by the respondent to be in retaliation to the human rights complaint, this could amount to retaliation quite apart from any proven intention of the respondent. (Italics added)

It might be possible to find some support for the latter view in the fact that discrimination is not an intentional wrong.

[110] With all respect to other views, I think M. Deschamps' interpretation is the right one:

[158] The burden of proving retaliation rests with the complainant who must prove, on a balance of probabilities, that the person against whom he or she alleges retaliation knew of the existence of the complaint, that the person acted in an inopportune way and that the person's misbehaviour was motivated by the filing of a human rights complaint by the complainant.

I would add that the word "retaliation" must be given its ordinary meaning. One has to worry about the credibility of a process that departs too far from the understanding of ordinary people.

[111] Although M. Deschamps goes on to find that retaliation is a form of discrimination, it is a particular species, with its own requirements. My only observation is that the rules of statutory construction must be followed, here as elsewhere. The section refers to someone who is "retaliating" in the ordinary sense of the word. The definition in the Webster's-Merriam online dictionary emphasizes the notion of "paying back." I think this is enough for the purposes of the present case.

IV. ANALYSIS

A. THE FIRST COMPLAINT

[112] The first issue is whether the Respondent discriminated against Ms. Schuyler in May of 2002, by failing to accommodate her? There is no need to enter into an analysis of the *prima facie* case, which is easily made out.

(i) Whether Ms. Schuyler failed to facilitate the process

[113] The Respondent raises two defenses. The first is merely that it acted fairly and responsibly, and in keeping with the law.

[114] Ms. Schuyler says that she was only looking to come back on a half-time basis. She was willing to take on individual projects and had no desire to change the interim administrative arrangements. The band says that they offered her this. They say that Ms. Schuyler then stopped communicating.

[115] Mr. Peters says that the letter from Oneida on June 12, 2002 meets Ms. Schuyler's conditions. It gives her a flexible schedule. It provides a job description `for her perusal'. This was a first step. There was room for further negotiation. Mr. Peters relied on the decision in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, where the Supreme Court stated that the complainant has a duty to participate in the search for accommodation and facilitate the process. The process of accommodation is "a multi-party inquiry".

[116] The Respondent says that Ms. Schuyler had an obligation to respond to the letter from the Band. Instead of doing this, she retained a lawyer, who advised the Band, in writing, that she was fully disabled. I think this is too simplistic: in my view, Ms. Schuyler felt rebuffed, and reasonably so. The Respondent's rendition of the facts leaves out the most important factor in the process, which was the clear message that the Band sent: they didn't want Ms. Schuyler back.

[117] It is simply wrong to put the blame for the failed negotiations on Ms. Schuyler. Legally, the primary duty was on the Respondent, to try and find a way to bring her back. The negotiations with the personnel committee and the proposed contract failed to honor this fact. The contract did not recognize Ms. Schuyler's seniority and the probationary clause was completely unwarranted. Aside from the natural vulnerabilities that anyone would feel, after such a serious medical intervention, the process was disrespectful to someone in such a senior position.

[118] I agree with Ms. Schuyler: the Band did not really want her back, and communicated that to her, in a variety of ways. An employer who sincerely wanted to accommodate her would have gone much further, in trying to work out some solution that was satisfactory to both sides. I realize that it was a difficult situation for both sides: Ms.

Schuyler was suspicious and adversarial, and wanted things her way. I am nevertheless satisfied that the Band failed in its duty to accommodate her.

[119] Here, as elsewhere, the employment dispute was uppermost. It is abundantly clear that the Band was unhappy with Ms. Schuyler's performance as the Executive Administrator. The performance review had been interrupted and was never satisfactorily concluded. Rather than deal with these aspects of the matter-fairly, responsibly and openly-the Respondent was content to let her go on disability. It was an easy way out of the situation.

(ii) Estoppel

[120] Mr. Peters makes another argument, however. He says that Ms. Schuyler was totally disabled. The Respondent accordingly had no obligation to accommodate her. I suppose it is a form of estoppel by conduct. Ms. Schuyler received full-time disability benefits. Mr. Peters says that she cannot accept these payments and claim that she was partially disabled and capable of coming back on a part-time basis.

[121] There is no need to go into the technicalities of the matter. Ms. Schuyler only applied for full-time disability after the negotiations had broken down. By that point, Ms. Schuyler was alienated and suspicious, and didn't have the heart to pursue any further discussions. She had her health to worry about, and the psychological stress of dealing with the Band was too much.

[122] I do not want to overstate the case, and I accept that some of the individuals involved in the process felt genuine concern for Ms. Schuyler's well-being. This was outweighed, however, by indifference and ill-will. The reality is that the actions of the Band contributed to the set of circumstances that left Ms. Schuyler totally disabled. It would be wrong to let the Respondent use this fact against her, in order to escape its obligations.

(iii) Conclusions

[123] I agree with Mr. Peters' submission that there are real limits on the duty to accommodate: "it is not the duty of the Respondent", he submits, to help Ms. Schuyler "in her recovery from cancer." This only goes so far, however, and in most cases, at least, the process of accommodation and the recovery process go hand in hand. I am not prepared to say that an employer has a legal obligation to be considerate, but it has an obligation to be fair and reasonable and, in many cases, I suspect that this amounts to the same thing.

[124] There is a practical side to this: I would also suggest that a certain degree of empathy is an indispensable part of the process of accommodation. The upshot of this is that a Respondent is obliged to take the complainant's circumstances and condition into account in searching for an appropriate form of accommodation. An employer who adopts an adversarial approach to a person who has gone through a major medical or psychological crisis, and sends a clear message that the person is not welcome back, is probably in breach of its duty to accommodate people with disabilities.

[125] The situation that presented itself in the present case was difficult for both sides, who came out of the interrupted performance review *in medias res* and had not sorted out their affairs. The Respondent was nevertheless obliged to sincerely enter the process of accommodation and search earnestly for an arrangement that would meet her needs. The Respondent was not negotiating in full good faith. This constitutes discrimination and is a breach of the *Canadian Human Rights Act*. The first complaint is substantiated.

B. THE SECOND COMPLAINT

[126] The second issue is whether the Respondent retaliated? I am not sure what to say about the *prima facie* case in this context, since I have discussed it at so much length elsewhere. Was there a *prima facie* case of retaliation? Perhaps. Would this shift the burden of proof to the Respondent? Decidedly not. The only question on the evidence is accordingly whether the complainant has proven on a balance of probabilities that she was retaliated against?

[127] Ms. Schuyler made some thirty allegations, most of which follow the long series of events that culminated in the termination. Ms. Schuyler apparently attributes all of these events, and the termination, to the fact that she filed the original complaint. It is true that she retreated somewhat during the course of her submissions, and took the position that it was a factor in the decision. The result is the same: if it hadn't been for the human rights complaint, she says, she would have been able to sit down with the Chief and Council, and work out the other problems.

[128] I find this view of the situation rather naive. Ms. Schuyler has been denying the obvious. There was a break-down in the relationship between Ms. Schuyler and the Band Council from the "get-go", in the words of Mr. Peters. The first evaluation was symptomatic. The band's concerns were never properly addressed. Things were headed in a bad way when Ms. Schuyler discovered that she had cancer and were only going to get worse. The relationship continued to deteriorate when she returned.

[129] The testimony of Chief Doxtator, whose evidence I accept, is enough to establish that the employment issues between the two parties were real. Those issues have been raised elsewhere and need to be separated from the allegations under the *Canadian Human Rights Act*. There was a larger set of circumstances, which was full of rancour, and there is very little to suggest that the human rights complaint had much to do with it. There is no real evidence of retaliation, outside of Ms. Schuyler's testimony.

[130] The first allegation is that Ms. Schuyler didn't get her full authority back when she returned as the Executive Administrator. This is a reference to the fact that she shared the job with Holly Elijah for two months. The Band Council has a reasonable response: it says that Ms. Elijah was left in the position for her benefit and to provide a proper transition. I understand Ms. Schuyler's suspicions, but there is nothing to link this to the original complaint.

[131] The second allegation had to do with the disciplinary action with respect to the situation at the healing lodge. This matter was left over from Ms. Schuyler's original term as Executive Administrator. It is true that Ms. Schuyler had an increasingly antagonistic relationship with Council, which was not improved by the complaint. But there is nothing in these kinds of specific instances that can be linked to the complaint.

[132] There is little point in going through the thirty allegations in the complaint of retaliation, all of which reveal a deeply troubled relationship. There was an ongoing dispute, for example, about the appropriateness of the Executive Administrator attending Council meetings. One might think it strange that Council would exclude her. But the Chief and Council had a different view: it was really that Ms. Schuyler had become obsessed with the issue, and needed to focus on her own work.

[133] The only question before me is whether this constituted retaliation. Although it is difficult for an outsider to understand either the breadth or the intensity of the conflict between Ms. Schuyler and Council, I accept the evidence that Council felt that she had overstepped her bounds. If nothing else, the decision to direct Ms. Schuyler not to attend

the meetings of Council was a reflection of the increasingly hostile relationship between them. They simply couldn't work together.

[134] It does not really matter how much one waters down the concept of retaliation. The simple question before me on the second complaint is whether the actions that the Band had taken against Ms. Schuyler, including the termination, were some form of retaliation. The evidence indicates otherwise. The idea that Council was paying her back when it dealt with personnel issues, complaints from staff, electoral issues, the healing lodge, the events surrounding the occupation and sit-in, and a host of other matters, is simply not credible.

[135] I accordingly accept the position that the Respondent has put forward in its written submissions:

A breakdown in the relationship between the Complainant and the Respondent is evident through the evidence of both parties. As a result of the deteriorating relationship, the Complainant's employment was terminated for cause.

And elsewhere:

The Complainant was ultimately terminated from her employment for failing to meet the ongoing requirements of her position and for a clear breakdown in the relationship between the Complainant and the Respondent.

I say this without deciding any of the employment issues, which are out of my reach.

V. REMEDIES

[136] There are a number of issues relating to remedy. Two are exceptional.

A. Preliminary issues

(i) Offer of settlement

[137] Mr. Peters says the hearing was unnecessary. He says this because there was an offer of settlement, which in his eyes was sufficient to resolve the matter. The submission is that this should be taken into account, in determining the amount of any compensation. This presumably includes the expenses of the hearing.

[138] The evidence relating to the offer is fragmentary and really covers the employment claim. It is contained in a letter dated September 2nd, 2003, which offers Ms. Schuyler eleven months severance, in addition to statutory payments, in spite of the fact that she had been terminated for cause. I know very little if anything about the circumstances of the offer and the evidence was entered into evidence essentially by mistake. Ms. Schuyler did not have a lawyer.

[139] Ms. Schuyler apparently rejected the offer. Mr. Peters nevertheless argues that the attached release refers specifically to any complaints under the *Canadian Human Rights Act*. It accordingly constitutes an offer to settle--or includes an offer to settle--the human rights complaint. I think this is stretching.

[140] There is a mechanism for settling complaints under the *Canadian Human Rights Act*, however, which requires the approval of the Canadian Human Rights Commission. It seems to me that it would be wrong to give effect to an attempt to settle a related employment matter, on a contractual basis, outside the *Act*, at least in the present circumstances, where the terms of the offer do not explicitly address the issue of discrimination.

[141] It seems clear that the offer is primarily for loss of wages, rather than pain and suffering. The offer might be relevant, if Ms. Schuyler was seeking lost wages. She has relinquished that claim, however. I am also satisfied that the offer does not meet the

requirements of the law of costs, which requires a very explicit communication that the offer will be relied upon, in dealing with costs. Having considered the matter, I do not think that it would be fair or appropriate to consider the offer of settlement, in dealing with the issue of remedy.

(ii) The Respondent's request for costs

[142] There is another exceptional matter that needs consideration: the Respondent has also asked for costs against the CHRC. The Tribunal is a statutory body, however, with the powers granted to it by statute, and it is not clear to me that I have the jurisdiction to award these costs.

[143] The policy factors that come into play in the case of Complainants do not apply to Respondents. I think it is apparent in the caselaw that the *Canadian Human Rights Act* contemplates a process in which Complainants can pursue their complaints without fear of being penalized by costs. The purpose of the *Act* is to encourage complainants to come forward.

[144] Although I think that it is unfair to deny a Respondent costs, in a case where the complaint is vexatious and without any merit, the power to award costs is a statutory power. I think it is generally agreed that Parliament consciously decided, in passing the *Canadian Human Rights Act*, not to give Respondents the right to costs. This would therefore require an amendment to the *Act*.

[145] The situation is compounded by the fact that the CHRC did not appear before the Tribunal and has not had an opportunity to respond to the Respondent's request. Perhaps it is sufficient if I say that I do not see anything in the facts before me that would justify such an extraordinary award, even if they were available under the *Act*. I have no view as to whether these kinds of costs might be recovered in other ways.

B. Ms. Schuyler's claims

(i) Lost wages

[146] Ms. Schuyler originally claimed her income from the day that she lost the job to the day that the decision was made. She also wanted some form of compensation for loss of opportunity. She has now found work with the Union of Ontario Indians, however, and abandoned these claims at the end of the hearing.

(ii) Pain and Suffering

[147] The major claim is for pain and suffering. I accept that Ms. Schuyler has suffered, and keenly, from the discrimination.

[148] There is a personal and a social side to the pain and suffering that Ms. Schuyler experienced. The initial actions of the Respondent were inconsiderate and did not exhibit the tact and understanding that the situation required. Ms. Schuyler had gone through a life and death experience. She was also entitled to a certain deference, on the employment side, as the Chief Administrator. The experience was that much harder, given Ms. Schuyler's age and the physical tribulations that went with the cancer.

[149] In her written submissions, she mentions the fact that the stress she experienced in May, 2002 had an adverse effect on the chemotherapy she was receiving. I have no doubt that it did: it clearly had an adverse effect on everything that she experienced. I also think that she is entitled to some form of compensation for her loss of dignity, which was palpable. She described the process as 'peeling off her skin piece by piece', which left her feeling completely vulnerable.

[150] There were the family issues that went with this. There was a real loss of social status. She discovered later that other people in the Band thought that she had done something wrong and was fired. She still feels uncomfortable going out because she thinks people look at her sideways, or walk the other way when she comes near them. Counsel for the Respondent pointed out that there is no objective evidence of this, but I do not think he meant to question Ms. Schuyler's feelings.

a) Contributory conduct

[151] All of this comes with two qualifications. The first is that the emotions that arose out of the employment issues are another matter. I can only estimate, in some rough manner, what she experienced as a result of the discrimination.

[152] The second qualification is that there was an element of antagonism in Ms. Schuyler's conduct. There is no way out of this: she must bear some of the responsibility for the hostile relationship that developed between herself and the Band. The attitude on both sides was antagonistic. Ms. Schuyler was quick to retain a lawyer and threaten legal action.

[153] There are political issues that Ms. Schuyler raised with respect to first nations. There is no doubt that she found herself caught up in a political struggle of some sort, within the Oneida Nation. The parties took a fundamentally different view of the responsibilities of the Chief Administrator and Band Council. This was exacerbated by personal enmity on both sides. These antipathies exhibited themselves, by all accounts, in indifference, political intrigue and even contempt.

[154] It is hard to find dignity and understanding on either side. I am at a loss to find any real excuse for this. I was impressed by the testimony of Chief Doxtator, who I am sure understands the situation better than I do. It seems to me that the parties failed to respect the fact that our dignity rests, ultimately, on the recognition that every person has value and deserves an equal measure of esteem, whatever disagreements may arise. This idea is enshrined in the *Canadian Human Rights Act*.

b) CHRC

[155] There is another issue that arises in the context of pain and suffering. The most troubling fact is that Ms. Schuyler blamed the Canadian Human Rights Commission for much of her experience. She apparently feels betrayed by the CHRC and feels that it should not have left her to fight the litigation on her own. She testified that she had to relive her ordeal on nights and weekends, in preparing for the case. This was extremely difficult, she said. "It is just as bad as going through the cancer. In many ways, I think it's worse. I survived the cancer. It will take a lot longer to survive this."

[156] There is very little I can say about this aspect of the matter. I have not heard from the CHRC, and the Tribunal has no authority, as far as I am aware, to require that the CHRC appear. The more important observation, as Mr. Peters submitted, is that the Respondent cannot be held responsible for Ms. Schuyler's experience in preparing for the hearing. The Respondent was entitled to defend itself; and Ms. Schuyler acknowledged that it did so, in a difficult set of circumstances, without further injuring her dignity.

c) Conclusion

[157] In all the circumstances, having taken everything into consideration, Ms. Schuyler is awarded four thousand dollars for pain and suffering. This amount has been discounted, to reflect the contributory element in her conduct.

(iii) Willful and reckless conduct

[158] Ms. Schuyler has also asked for damages under s. 53(3) of the *Canadian Human Rights Act*, which allows the Tribunal to award additional compensation if the member finds that the person engaging in the discriminatory practice did so "willfully and recklessly". Ms. Schuyler is asking for the maximum award of twenty thousand dollars.

[159] The discrimination that occurred in the present case was regretful. It was not, however, of the magnitude that is regularly seen in many cases. The Band at least went through the exercise contemplated by the *Act*. It also seems to me that the claim for compensation under s. 53(3) comes primarily out of the allegation of retaliation, which has been dismissed.

[160] The present case was an employment matter that boiled over, into other issues. The hostilities between the parties had an extravagant side, but I am satisfied that any egregious conduct can be ascribed to the ongoing employment dispute. This is not what the *Act* covers. Section 53(3) contemplates a situation in which the willful and reckless conduct is found in the discrimination, rather than a collateral dispute.

(iv) Posting the decision

[161] Ms. Schuyler has asked that my decision be posted in some prominent place. The Respondent says that the Tribunal has no power to order such a posting.

[162] Mr. Peters submits that the Canadian Human Rights Tribunal is a creature of statute. Any authority that it enjoys in this regard must therefore be found in the *Canadian Human Rights Act*. The only relevant provision appears to be s. 53(2)(a), which states that the Tribunal can order that "the person found to have engaged in the discriminatory practice":

... cease the discriminatory practice and take measures, in consultation with the Commission on the general purposes of the measures, to redress the practice or to prevent the same or a similar practice from occurring in future ...

Mr. Peters says that there is nothing in this that gives the Tribunal the authority to order that a decision be posted in a prominent place.

[163] The authority to order that the Respondent post the decision must be found, if it is found anywhere, in the first part of this provision, which states that the Tribunal may order that the Respondent "cease the discriminatory practice". The question of statutory interpretation accordingly reduces itself to the question whether a direction that the decision be posted comes within the scope of an order to cease the discriminatory practice.

[164] I think it does. The *Canadian Human Rights Act* is remedial. It deals with matters of fundamental importance and should be interpreted in a large and liberal manner. It is usually said that the purpose of the remedies provided under the *Act* are to make the victim whole. I think this applies as much to the emotional and psychological state of the victim, as anything else. The posting of the decision will help to alleviate some of the isolation and exclusion that Ms. Schuyler has experienced as a result of the discrimination.

[165] There is another side to this: the evidence before me clearly indicates that the events surrounding Ms. Schuyler's complaint and subsequent dismissal were of public

interest within the Band. I think Ms. Schuyler has every right to be concerned for her reputation and want to set the record straight. The decision has not come out entirely in her favour, but an order to post the decision will at least provide everyone with an impartial account of the issues that have arisen between Ms. Schuyler and the Band.

[166] Then there is the fact that the public posting of the decision serves an educational purpose. I draw support for this conclusion from *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, where La Forest J. stated that the *Canadian Human Rights Act* embodies educational objectives. I note that he then states, at para. 15, that one of the purposes of the *Act* is to educate people in specific workplaces:

More importantly, the interpretation I have proposed makes education begin in the workplace, in the micro-democracy of the work environment, rather than in society at large.

This holds true, in the immediate case, both with respect to band administration and with respect to the larger democratic process on the reserve.

[167] There is also the decision of the Supreme Court in *CN v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114, often cited as *Action Travail des Femmes*. There, Chief Justice Dickson wrote, at p. 1134, that the *Canadian Human Rights Act* should be interpreted in a way that gives the rights enunciated in the *Act*:

...their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

I believe that *Robichaud* and *Action Travail des Femmes* can be read together in the immediate context.

[168] It is notable that the decision in *Action Travail des Femmes* speaks of the "impact" of the rights enshrined in the *Canadian Human Rights Act*. I think the word "impact" includes the social impact of a decision. The complaints in the present case arose in a specific community, which has a collective interest in the decision and needs to be advised of the situation. There is nothing one-sided in this: both parties have had a measure of success in the litigation and I do not see what the Respondent has to fear from such a direction.

[169] I have found one decision that might seem to go in a different direction. In *Chopra v. Health Canada* 2004 CHRT 27 (which was reviewed in the Federal Court and is now on appeal, but on other grounds), the Tribunal rejected a request for an order that the Respondent post its decision, at para. 62, "across the country via electronic mail to all employees of the department." I think the situation before me is quite different, however. Ms. Schuyler is not asking for a mass e-mailing to a host of strangers, scattered across the entire country.

[170] At the same time, I do not think it is practical to post the entire decision. I accordingly order the Respondent to post an announcement in reasonably large letters on the main bulletin board in the Administration Building, or some equally prominent place, advising Band members that a decision has been rendered by the Tribunal. The notice shall state that copies of the decision are available at the front counter or some convenient place. There shall be no charge for the copies.

(v) Policy review

[171] Ms. Schuyler also wants the Canadian Human Rights Commission to do a policy review and negotiate a Memorandum of Understanding with the Band to set up a process

to resolve any human rights issues. She wants a human rights advocate appointed. And an independent appeal process.

[172] I note that Chairperson Mactavish dealt with a similar situation in *Nkwazi v. Correctional Service Canada* T.D. 1/01 2001/02/05, at paras. 274-275, where she wrote:

[274] Ms. Nkwazi seeks an order that [Correctional Service Canada] take measures, in consultation with the Canadian Human Rights Commission, to prevent such discriminatory practices from occurring in the future. While CSC does have policies and procedures in place which are designed to address workplace discrimination and harassment, it is evident from the way in which Ms. Nkwazi's complaints were dealt with by [Regional Psychiatric Centre] management that there is work to be done in this area. As a result, I order CSC to consult with the Commission with respect to its anti-discrimination and harassment policies, procedures and employee education programs, and to take measures to prevent the same or similar practices from occurring in the future.

[173] The situation before me is notably different, however, since the evidence suggests that the discrimination against Ms. Schuyler was a product of the specific circumstances relating to Ms. Schuyler. There is no real evidence of systemic discrimination or larger issues.

[174] There is the additional problem, as Madam Mactavish notes, that the Tribunal does not appear to have the authority to order the Commission to participate in such a process. There is still a mechanism in the *Canadian Human Rights Act* that the Respondent may avail itself of, if it wishes to consult with the CHRC. It would certainly be commendable if the Respondent did so. I am not, however, prepared to grant the kind of order that Ms. Schuyler is requesting.

(vi) Costs and expenses

[175] Ms. Schuyler has also asked for costs. This is complicated by two facts. The first is that she retained a lawyer to deal with the employment aspects of the matter, which were handled separately. She has discounted her request, in order to reflect this. The second fact, however, is that she is claiming costs for services that were rendered before the Commission. I do not think that she is entitled to these costs.

[176] In *Brooks v. Department of Fisheries and Oceans*, 2005 CHRT 26 (2005/07/12), at para. 39, I held that any power that the Tribunal enjoys in awarding costs must be restricted to the Tribunal process. That decision has since been reviewed, without dealing with this precise issue. I also discussed the case law in *Brown v. Royal Canadian Mounted Police*, 2004 CHRT 30 (2004/09/01). I do not see anything in the circumstances before me that would justify revisiting the issue. In the circumstances, there is no need to deal with the more fundamental question whether the Tribunal has the power to award costs, which is apparently on its way to the Court of Appeal.

[177] There are still the fees that Ms. Schuyler incurred in consulting a lawyer, in 2002, when she was seeking accommodation. This comes within a recognized exception in the law of costs and can be characterized as expenses under s. 53(1)(d) of the *Canadian Human Rights Act*. She is also entitled to disbursements, for transportation, copying, etc., related to the complaint. Rather than open the door to a further dispute between the parties, I think it is better to award a lump sum of six hundred dollars, which in my view constitutes a reasonable amount for these expenses.

(vii) Remaining matters

[178] It is for the parties to decide whether they wish to submit a written order. If that is the case, I would suggest that it may be more convenient for the Respondent to draft the order, since Ms. Schuyler is not represented by a lawyer. She would naturally be welcome to review the draft of any order with a lawyer of her choice.

[179] The compensation and expenses that I have awarded shall be paid within thirty days of the expiry of any period of review or appeal. I will retain jurisdiction to deal with any outstanding matters.

"Signed by"

Dr. Paul Groarke

OTTAWA, Ontario
August 18, 2006

PARTIES OF RECORD

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|---------------------------------|---|
| TRIBUNAL FILES: | T980/10004 and T1014/13404 |
| STYLE OF CAUSE: | Karen Schuyler v. Oneida Nation of the Thames |
| DATE AND PLACE OF HEARING: | May 2 to 6, 2005 September 26 to 30, 2005 December 6, 2005 London, Ontario |
| DECISION OF THE TRIBUNAL DATED: | August 18, 2006 |
| APPEARANCES: | |
| Karen Schuyler | On her own behalf |
| Daniel Pagowski | For the Canadian Human Rights Commission |
| John C. Peters | For the Respondent |