

CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA
PERSONNE

ROXANNE NAISTUS

Complainant

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

PHILIP L. CHIEF

- and -

ONION LAKE FIRST NATION

Respondents

DECISION

MEMBER: Wallace Gilby Craig 2009 CHRT 4
2009/01/27

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I. SYNOPSIS OF DECISION

[1] On September 22 and 23, 2008, in Lloydminster, Alberta, I conducted an inquiry into Roxanne Naistus' complaint of sexual harassment in 2003, 2004 and 2005, alleged to have been committed by Philip Lloyd Chief (Mr. Chief), commonly known as Duke, while both were employees of the Onion Lake First Nation (OLFN).

[2] Though appropriately notified of the complaint and the inquiry, and notified again during the course of the inquiry, Mr. Chief did not attend to answer the complaint.

[3] OLFN asserted that it did not consent, expressly or by implication, to Mr. Chief's conduct, and that it exercised all due diligence (a) to prevent such discriminatory practice from being committed, and (b) had subsequently exercised all due diligence to mitigate or avoid the effect thereof.

[4] Having considered the credibility of all witnesses and the cogency of their testimony, the documentary evidence and the submissions of counsel, I make the following determinations:

- (1) Mr. Chief subjected Ms. Naistus to a course of conduct that was a discriminatory practice, namely sexual harassment, in 2003, 2004 and 2005, while both were employees of OLFN.
- (2) OLFN did not consent to the sexual harassment committed by Mr. Chief.
- (3) Intercession by OLFN in Mr. Chief's sexual harassment of Ms. Naistus did not constitute an exercise of all due diligence to prevent the sexual harassment from being committed and, subsequently, to mitigate or avoid its effect, within the meaning of s. 65(2) of the *Canadian Human Rights Act (CHRA)*.

[5] Accordingly, I find that Ms. Naistus has substantiated her complaint against Mr. Chief and OLFN.

[6] As a victim of sexual harassment, Ms. Naistus is to be compensated in accordance with the provisions of Section 53(2) and 53(3) of the *CHRA*.

II. ONION LAKE FIRST NATION

[7] OLFN is an independent band situated 50 kilometers north of Lloydminster, straddling the border between Saskatchewan and Alberta.

[8] OLFN is self-governed by a council of nine members, comprised of a Chief and eight councillors who hold office for a term of two years. Each councillor is assigned a portfolio giving him/her a supervisory responsibility over a particular community or business activity.

III. WITNESSES PRESENTED BY MS. NAISTUS

A. Roxanne Naistus

[9] In August 2000, Ms. Naistus was hired by OLFN to work as a receptionist in the band's office for economic development. Her duties included picking up supplies for several band companies and attending to travel arrangements when called upon. From time to time, she was called upon to record minutes of meetings of the board of directors in charge of economic development and, on occasion, meetings of the Chief and Council.

[10] In October 2002, Glenn Soloy, a non-band member, was appointed project-manager and supervisor of the office of economic development. In a relatively short time, Mr. Soloy made Ms. Naistus his executive assistant.

[11] In the spring of 2003, Mr. Chief joined the office as a trainee under Mr. Soloy.

[12] At this time, band councillor Darrel Carter was responsible for the economic development portfolio. According to Ms. Naistus, they had monthly meetings with Mr. Carter and reported to him, and he, in turn, would report to the Chief and Council.

[13] Ms. Naistus testified that she first met Mr. Chief when they were in grade nine in high school, that he always bothered her and had a crush on her, that they were never boyfriend/girlfriend, but did, on one occasion, go to a dance together. In cross-examination, Ms. Naistus was asked if she had engaged in sex with Mr. Chief when they were first adults. She testified, "When we met at Amigo's on one occasion as adults we had sexual relations." She unequivocally denied counsel's follow-up suggestions that she had a flirtatious sexual relationship with Mr. Chief. She testified that they were not in contact during the five years before he began to work in the office.

[14] Ms. Naistus testified that approximately two months after Mr. Chief joined the office, he began making frequent comments of a sexual nature to her. She described one instance when he walked into her office and asked what colour were her panties and told her that he wasn't wearing any underwear. Mr. Chief would make comments about what Ms. Naistus was wearing, such as "Mmmm that looks good on you. Mmmm I want to touch those."

[15] Ms. Naistus testified that Mr. Chief's comments about the colour of her panties, her breasts and buttocks occurred almost daily. She testified that she always told him to quit because it was making it impossible for her to work and recalled one instance when she broke down and told him to stop and that he shrugged it off as if it was a joke.

[16] When Ms. Naistus' counsel asked her if Mr. Chief ever made comments about sexual activity, she paused, and then recounted an occasion when Mr. Chief phoned her at the office and asked what sexual position was her favourite. When she told him he was sick, he laughed and hung up.

[17] Ms. Naistus testified about another occasion at the office, while she was working at a photocopier. Mr. Chief called to her, and when she turned around, she saw him at his desk with his pants open, exposing his genitals. He started laughing, at which point she ran over to the receptionist. Ms. Naistus complained about this to Mr. Soloy, and recalled giving him a written account which she believed he took to Chief and Council.

[18] Ms. Naistus testified that Mr. Chief's conduct caused her such anxiety that she stayed away from work. After five days, Mr. Soloy came to her home and told her that he had spoken to the Chief and Council and that Mr. Chief was going to be moved from the economic development office.

[19] Sixteen days after being moved to another office, Mr. Chief resumed his harassment of Ms. Naistus. Mr. Chief walked into her office and boasted about demanding a change in the minutes of a July 26, 2004 meeting of Chief and Council, a change that removed comments about his

behaviour. Ms. Naistus testified that Mr. Chief walked through her office, asking, "What colour are they today?" and then, as a newly elected member of Chief and Council, Mr. Chief said that he was now her boss.

[20] Ms. Naistus testified that Mr. Chief's conduct caused her such anxiety that in August 2004 she was granted stress leave from work.

[21] In March 2005, Mr. Soloy was replaced by Wallace Fox. Ms. Naistus testified that she talked with Mr. Fox at length about Mr. Chief's conduct, telling him that she couldn't take it any longer and was going to go on stress leave. She testified that he was unsympathetic towards her.

[22] In August 2005, Ms. Naistus began a second stress leave and testified that Mr. Chief phoned her at home repeatedly or text messaged her, and that it was worse when he was drunk. She testified that she told Mr. Carter and another councillor, Clement Cardinal, about this, and that each of them simply told her to keep on with her complaint to Human Rights. This left her feeling that Chief and Council had done nothing to stop Mr. Chief from harassing her.

[23] Excerpts from text messages, Exhibits C-9 and C-10, speak for themselves:

Exhibit C- 9 - undated

Ms.Naistus: "Hey can I use u as a reference on my resume?"

Mr. Chief: "Yeah, if u suck me off."

Exhibit C-10 - November 25, 2005

Mr. Chief: "I wanna fuck you real bad. I just want you so bad."

Ms. Naistus: "...I really need you to please quit ... e-mailing me and phoning ...I've tried to be just your friend ...just please leave me alone."

[24] In the context of Exhibit C-9, OLFN's counsel suggested to Ms. Naistus that she was in a flirtatious relationship with Mr. Chief and was playing along with him. In response, Ms. Naistus explained that she was applying for another job in the band and that Mr. Chief was superior to her in the office. In the face of persistent cross-examination, Ms. Naistus testified that she always rejected Mr. Chief's advances and treatment of her, and that he was harassing her because of their one night stand years ago.

[25] When asked by OLFN's counsel why she took a second stress leave, Ms. Naistus responded that it occurred after she received a phone call from Mr. Chief, who she believed was with another person and using a speaker phone, asking her favourite sexual position. She testified that it was a short call, and that they were making a joke of her. She went on to explain that this phone call wasn't the only reason that she took a second stress leave, and that it was because of the many things Mr. Chief was doing on a daily basis, such as leering at her and treating her like a piece of meat. She asserted that Mr. Chief was making a fool of her in the community with his comments, phone calls and text messaging, and that it was very stressful for her.

[26] OLFN's counsel suggested in cross-examination that Mr. Fox had made life difficult for her, and that this added to her stress. Ms. Naistus agreed, testifying that Mr. Fox insisted that she

work with Mr. Chief in preparing an INAC report for Indian Affairs, even though this wasn't part of her job, and that Mr. Fox was pushing her to work on the report with Mr. Chief because Mr. Fox lacked the ability to do the report himself.

[27] In cross-examination, a number of questions were put to Ms. Naistus suggesting that she had improperly used a Staples credit card which had been entrusted to her to make sundry purchases for various companies managed by the office of economic development. Exhibit 8 consists of nineteen pages of Staples accounts which, taken together, reflect a variety of things that might be used in an office, including pencils, pens, paperclips, Pringles Snack Stacks and toilet paper. Certain items were put to Ms. Naistus as purchases for her personal use and not paid for. After acknowledging some items might have been for her personal use, Ms. Naistus testified that she had intended to have a deduction from her payroll cheque but never got a chance to do so.

[28] This line of questioning gave rise to a suggestion by OLFN'S counsel that Ms. Naistus' dismissal from employment was for misuse of band funds. She denied this and testified that alleged misuse of band funds was never discussed with her. She also testified that people in the community were talking about her dismissal and that it was for standing up against the band. She pointed out that the band had rehired employees who had stolen thousands of dollars from the band.

[29] Ms. Naistus was challenged in cross-examination that she had failed to follow the procedures in Exhibit C-6, the OLFN Personnel Policies and Procedures Manual, by not providing a written complaint about Mr. Chief's harassment of her to Julie Whitstone at Human Resources. The combined evidence of Ms. Naistus and Mr. Soloy is that Ms. Naistus went to Mr. Soloy as her supervisor and complained of sexual harassment by Mr. Chief, and Mr. Soloy took the matter directly to Chief and Council.

B. Glenn Soloy

[30] In October 2002, OLFN hired Mr. Soloy to manage its department for economic development. Mr. Soloy was not a member of OLFN. He continued as manager until March 2005, when OLFN appointed Mr. Fox to replace him. At this point, Mr. Soloy ceased to be an employee of OLFN.

[31] Ms. Naistus, who was already working in the office when Mr. Soloy became manager, was kept on as a secretary. As more business ventures were undertaken, Mr. Soloy made Ms. Naistus his executive assistant. In April 2003, Mr. Chief was appointed a trainee under Mr. Soloy.

[32] Mr. Soloy testified that within a few months of Mr. Chief's appointment, Ms. Naistus told him that Mr. Chief was bothering her verbally at work and at home. Mr. Soloy characterized the described behaviour as "hitting on her", and that it was unacceptable.

[33] Mr. Soloy testified that he tried to put a stop to it, and that he told Mr. Chief it was behaviour that would not be tolerated under his management of the office. Mr. Soloy then talked to Mr. Carter, and told him of Mr. Chief's behaviour, that it had to stop, and if it didn't, Mr. Soloy would recommend that Mr. Chief be fired. Mr. Soloy recalled Mr. Carter telling him that when Mr. Chief's father walked into a meeting, people listened, and that "he swings a big hammer".

[34] When Mr. Chief's behaviour continued, Mr. Soloy interceded on behalf of Ms. Naistus by speaking to the Chief and some councillors, telling them that Ms. Naistus was a needed employee and something had to be done. Mr. Soloy explained that he talked to them because, in his opinion, Ms. Naistus had reached a breaking point where she could no longer work and needed a stress leave.

[35] Mr. Soloy testified that the problem with Mr. Chief escalated in the summer of 2004, when Mr. Soloy was on holidays in Medicine Hat. He testified that he received a phone call from Ms. Naistus, saying that Mr. Chief had exposed himself to her. Mr. Soloy immediately phoned and left a message with Mr. Carter about the incident, and then left for home. He recalled getting back on a Monday and discussing the problem with Mr. Carter, Chief Lewis and councillors Joe Dillon and Clement Cardinal. Mr. Soloy testified that they were all back and forth to his office, and that he told them that Mr. Chief had to be fired.

[36] Mr. Soloy testified that when the Chief and Council wanted to do something out of sight, they would go to the Tropical Inn in Lloydminster. In July 2004, when he heard that the Chief and Council were meeting in Lloydminster, he got in his truck and drove into town to attend the meeting. On his arrival, Mr. Soloy testified that he had a conversation with Mr. Carter, who informed him that Mr. Chief would be moved from the office of economic development to the band office, and was to have no contact with Ms. Naistus, and that Mr. Chief was not going to be fired. Mr. Soloy told Mr. Carter that he totally disagreed with this decision. The meeting referred to by Mr. Soloy is reflected in Exhibit R-3, the minutes of a meeting of the Chief and Council held July 26, 2004. It records Mr. Soloy's participation late in the meeting. (Exhibit R-3 is dated July 26, 2003, but the evidence is that this was a typographical error.)

[37] Mr. Soloy testified that no one ever told him that Ms. Naistus' complaint had to be in writing before the Chief and Council would deal with it. He explained how he had gone to Ms. Whitstone, the human resources employee, and that she made notes of what he told her about Mr. Chief's harassment of Ms. Naistus. In part, her response to Mr. Soloy was, "This isn't your work Glenn, it's got to go to Chief and Council." Mr. Soloy testified that he put in writing what Ms. Naistus had related to him and turned it over to Mr. Carter and Mr. Fox, telling them, "You are the employer, you have to take sexual harassment seriously."

[38] When Mr. Soloy was asked whether moving Mr. Chief to another office resolved the problem, he testified that it hadn't, and that when Mr. Chief came by the economic development office, he'd have to shut the door to Ms. Naistus' office. Mr. Soloy testified that Mr. Chief was a bright young man, but that he had problems, and if Mr. Soloy hadn't gone to the Chief and Council regarding his harassment of Ms. Naistus, it would have been a bad thing.

C. Joey Hill

[39] Joey Hill is Ms. Naistus' husband. He testified that harassment by Mr. Chief caused Ms. Naistus to suffer migraine headaches and disrupted their personal life. He testified that the incidents with Mr. Chief affected their ability to be part of the Onion Lake community because of the importance of the Chief family.

D. Randall Naistus

[40] Randall Naistus is Ms. Naistus' 17-year-old son. He testified that he was aware of problems with Mr. Chief, and that he had been present on one occasion, without attributing it to a specific

date, place or context, when Mr. Chief told his mother that he "wanted to touch her ass and wouldn't mind feeling her up," and that his mother had ignored the comment.

E. Medical Reports/Records of Drs. Sayeed and Warburton

[41] Exhibit C-1 is a medical record kept by Dr. Sayeed, Ms. Naistus' physician. Exhibit C-2 is a medical report prepared by Dr. Warburton, to whom Ms. Naistus had been referred. The doctors were not required to attend and testify at the inquiry. Both counsel consented, without qualification, to their records/report being admitted into evidence.

[42] Exhibit C-1 consists of eight pages of handwritten notes made by Dr. Sayeed, recording many visits to him by Ms. Naistus between January 21, 2005 and August 21, 2008. They are cryptic and largely indecipherable except for an entry on August 15, 2005: "Sexual harassment at work. Unable to work in the same dept as her supervisor. Frequent headaches."

[43] Exhibit C-2 is Dr. Warburton's report dated September 11, 2008 to Ms. Naistus' counsel. The report confirms that Ms. Naistus first saw Dr. Warburton on August 18, 2004, and again on August 3 and 29, 2005. Amongst other things, the report summarizes what Ms. Naistus told Dr. Warburton, and his observations of her:

"The patient alleged 'long term sexual abuse' at her place of work by her 'superior'. The patient alleged that these events escalated from comments made, to physical contact, to genital exposure. The above made her anxious and very emotional. The patient presented in acute situational anxiety on August 18, 2004. The patient was referred to the Onion Lake Employee Assistance Plan (Julie Whitstone, director) and to the Onion Lake RCMP, and was given immediate leave of absence (six months). Also, the patient was advised to attend "labour relations" or the "Human Rights," by the Employee Assistance Plan."

"August 3, 2005: The patient indicated that she had returned to work 'after much pressure' from whom? The date of her return is not known. The patient alleged that she was now subject to the same harassment by the same individual but that it was less intense and less frequent."

"Diagnosis: The patient presented with acute situational anxiety initially and post traumatic stress disorder latterly."

IV. WITNESSES PRESENTED BY OLFN

A. Darrell Carter

[44] Mr. Carter was presented as a last-minute witness for OLFN, after I expressed surprise and concern about OLFN's apparent intention to call no one to testify on behalf of the band. Mr. Carter testified that he had some notes relating to the issues before the inquiry, but had not had a chance to review them before testifying, and therefore was relying strictly on memory.

[45] Mr. Carter was a band councillor from June 1996 to June 2000 and from June 2002 to June 2008. Throughout his terms as a councillor, Mr. Carter was responsible for the economic development portfolio, either directly or as an alternate, and was regularly in and out of the office. Though he is no longer a councillor, Mr. Carter is still involved in the management of band businesses.

[46] Mr. Carter has known Ms. Naistus and Mr. Chief for many years. He testified that Ms. Naistus came to him in July 2004 and told him about sexual harassment and inappropriate

comments by Mr. Chief. Mr. Carter testified that he was sure that he would have told her of the band's policy and procedures, and that he probably told her to speak to her immediate supervisor and the OLFN office for human resources.

[47] Mr. Carter recalled raising Mr. Chief's activities, as related by Ms. Naistus, at a meeting of Chief and Council in July 2004, and that it was discussed generally, including the possibility that the band may be looking at a case of sexual harassment. Mr. Carter testified that most Council members had some idea of what was happening.

[48] When asked why Council didn't do anything, he testified that the band business is a \$40 million operation, that the Chief and Council don't have the ability to deal with grievances, that there is a structure designed to deal with these kinds of grievances, and avenues to follow in policy manuals.

[49] When asked what was done concerning Mr. Chief by the Chief and Council at their meeting on July 26, 2004, Mr. Carter testified that much of the discussion was about Mr. Chief's lack of professionalism, his inability to be punctual and carry out his duties, his problem with alcohol, and his failure to be a good role model, something that was expected of First Nation councillors. Mr. Carter recalled that he raised the possibility because of Mr. Chief's conduct, that the band might be looking at a sexual harassment case but did not get into details of what Ms. Naistus had related to him because there were reporters and others present. He remembered that there was a decision by Chief and Council to suspend Mr. Chief as councillor for a certain amount of time, and either strip him of his portfolio or demote him to alternate.

[50] In cross-examination, Mr. Carter agreed that he became aware of the nature of Ms. Naistus' complaint from a conversation with her and through the community rumour mill. In particular, he testified that he was aware that Mr. Chief had made frequent indecent comments to Ms. Naistus, had touched her breasts, had been drunk and disorderly outside her home in the night, had made sexual comments in text messages to her, and, on one occasion at the office, had exposed his genitals to her.

[51] Mr. Carter was asked whether, at the time of the July 26, 2004 meeting of Chief and Council, he was aware of the incident of Mr. Chief exposing himself to Ms. Naistus. He testified that he was, and that it was a serious allegation with possible criminal implications and so he took it up with Council. When asked by Ms. Naistus' counsel what happened at the meeting Mr. Carter testified that he told Chief and Council that there was a sexual harassment complaint pending but did not mention Ms. Naistus. When asked if there was any discussion about this, Mr. Carter testified that he believed the other councillors had an idea of what was involved. Mr. Carter explained that there were many concerns about Mr. Chief's behaviour, but because of his potential, a decision was made to try to rehabilitate and help him.

[52] In further cross-examination, Mr. Carter agreed that Ms. Naistus had complained to Mr. Soloy who told Mr. Carter that he wanted something done about Mr. Chief. However Mr. Carter testified that he couldn't recall Mr. Soloy actually saying that Mr. Chief should be fired.

[53] When asked why Chief and Council didn't have the same concern for Ms. Naistus' need for help and rehabilitation that it had for Mr. Chief, Mr. Carter, after a long pause, answered that at that point, there was no formal complaint.

[54] Mr. Carter agreed that OLFN was obligated to provide employees with a harassment-free workplace. When asked by Ms. Naistus' counsel whether OLFN had provided a harassment-free workplace for her after her first stress leave, Mr. Carter testified that Mr. Chief was moved to another office, and that he would have pointed Ms. Naistus in the right direction to deal with her grievances. He went on to testify that he didn't know if any elders had talked to Mr. Chief and that everybody was aware of it and walking on egg shells.

[55] With respect to employees purchasing items for their own personal use, in cross-examination, Mr. Carter agreed that payment could be made by deduction from wages, and that generally a request was made beforehand.

B. Henry Lewis

[56] Mr. Lewis was also a last-minute witness on behalf of OLFN. Mr. Lewis was the elected Chief of the OLFN from June 2000 to June 2008. Mr. Lewis testified that Mr. Chief was his assistant from 2000 until June 2004 when Mr. Chief was elected as a councillor.

[57] Mr. Lewis testified he heard rumours about Mr. Chief and Ms. Naistus, but that he had too much to do to chase down rumours. It was his opinion that Mr. Chief's main problem was alcoholism.

[58] When asked why Chief and Council didn't do anything in response to Ms. Naistus' complaint, he answered, "We have a process in place", referring to OLFN's policy and procedures manual, Exhibit C-6. When asked in cross-examination to describe OLFN's policy on harassment, Mr. Lewis responded, "I wouldn't even know." When asked about the Council meeting of July 26, 2004, and whether there was any mention of Ms. Naistus in the discussion about Mr. Chief's conduct, Mr. Lewis initially testified that he had no memory of this, but in subsequent testimony he recalled mention of a potential harassment suit, and Mr. Carter speaking about a problem with Mr. Chief and Ms. Naistus.

C. Julie Whitstone

[59] Ms. Whitstone was employed by OLFN from 1997 to April 2008. Her job was to assist all employees with family problems, alcohol abuse and other problems including harassment.

[60] She read into evidence item 222 in Exhibit C-6, the policy and procedures manual:

"Harassment - All employees of the OLFN are entitled to a working and learning environment that is pleasant, professional, and free of harassment. Harassment in the workplace is unacceptable and against the law. OLFN endeavours at all times to provide a work environment which recognizes that each employee has the right to be treated fairly, with respect, and without harassment. OLFN falls under the Federal Labour Standards regarding harassment in the workplace."

[61] Ms. Whitstone recalled Ms. Naistus coming to her and talking at length, that she was quite upset, and had already spoken to Mr. Soloy, her supervisor. Ms. Whitstone testified that Ms. Naistus was making quite a strong allegation and, even though it was not in writing, that it

should be dealt with. As a result Ms. Whitstone spoke about it to her supervisor and Tom Chief and Mr. Soloy.

[62] In cross-examination, Ms. Whitstone agreed that sexual harassment would be quite stressful and that Ms. Naistus had complained to her about Mr. Chief making gestures and exposing himself. When asked about the role of Chief and Council in OLFN's human resources process, she described them as the court of last resort.

D. Audrey Park

[63] Audrey Park was employed by OLFN from 2003 to 2007. On July 26 and 27, 2004, she recorded minutes of meetings of the Chief and Council. Ms. Park remembered that Mr. Soloy attended the meeting on July 26, 2004.

[64] Ms. Park recalled Mr. Soloy explaining to Council that Ms. Naistus had complained to him about incidents with Mr. Chief, and that Council's response was that it was a matter to be dealt with administratively and not by Chief and Council. She recalled Council engaging in a major discussion about Mr. Chief and his excessive drinking.

[65] In cross-examination, Ms. Park testified that Mr. Carter spoke about Mr. Chief and Ms. Naistus, but not in detail.

[66] Exhibit R-3 is the original version of the minutes of the July 26, 2004 meeting of the Chief and Council, a portion of which reads:

"Minute 2.0 Councillor Conduct: It has been brought to the attention of the Chief and Council that one member of Council, namely **Philip Chief has been absent for three consecutive council meetings and his behaviour and reported activities are of grave concern. Councillor Philip Chief has to be reprimanded for his behaviour and lack of concern for his duties as Councillor. Extensive discussion took place where each councillor spoke on the issue and it was decided that Philip would have to be made responsible for his activities.**

Moved by Clement Cardinal, Seconded by Darrell Carter - That effective immediately, Philip Chief will be deducted one week's salary, his lead Councillor Portfolios will be withheld and that he would be placed as an alternate portfolio until Council decide to reinstate his portfolio positions. **Also that Philip is to seek alcohol treatment on his own.** All Directors to be notified of the motion and they are to utilize the alternate portfolio for future meetings." (emphasis added)

[67] At a meeting on August 10, 2004, Chief and Council amended the July 26 minutes:

"Motion made by Joe Dillon, seconded by Pat Dillon, to correct the motion to read that Philip Chief be deducted one week's salary, and further that the minutes be corrected to state roundtable discussion on this matter."

[68] The motion carried, four in favour, none abstaining, and three opposed.

[69] When asked to comment on the amendment of the July 26, 2004 minutes, Ms. Park testified that everything she had originally transcribed in article 2.0 was taken out, and she didn't think it was right to change the minutes.

[70] The evidence is not clear why the minutes were amended. However, Ms. Naistus testified that Mr. Chief, who attended the August 10, 2004 meeting as a councillor, bragged to her about having had the comments about his behaviour removed from the minutes.

V. STANDARD OF PROOF

[71] In the recent case of *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada clarified the law with respect to the standard of proof in civil cases: nothing more, nothing less than a balance of probabilities.

[72] Evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test.

[73] The Court also affirmed that a trial judge must not consider a witness' evidence in isolation, but should consider the totality of the evidence in the case, and assess the impact of any inconsistencies on questions of credibility and reliability pertaining to the core issues in the case.

[74] The remarks of the Supreme Court of Canada in the *McDougall* case are consistent with what has already been detailed in the context of human rights law. *Discrimination and the Law* (W. Tarnopolsky, Thomson Carswell 2006) refers to the example of *Van Berkel v. MPI Security Ltd.* (1997) 28 C.H.R.R. D/504 (B.C.H.R.C.), in which Member Designate Kenneth Attafuah states:

"In accordance with these judicial guidelines, the testimony of each witness has been examined for consistency with the preponderance of probabilities which surrounded the existing circumstances of the complainant's employment with [the corporate respondent] and her interactions with [the individual respondent]. I have also scrutinized the evidence for plausibility under the circumstances and weighed the witnesses' motives. In addition, I have paid attention to their powers of observation, memory and recall, as well as their attitude and demeanour under oath, and the manner in which they testified. Finally, I have checked their testimony for lack of internal coherence or any significant inconsistencies and contradictions." (at p. 15-57)

[75] *Discrimination and the Law*, referring to *Zarankin v. Johnstone* (1984), 5 C.H.R.R. D 2274 (B.C.Bc. Inq.) at D/2280, sets out the standard of proof in sexual harassment cases:

"The Complainant must prove, on a balance of probabilities that there was a contravention...of the Human Rights Code. This involves two parts: (1) proof that the alleged conduct by the Respondent occurred; [and] (2) proof that it constituted sexual harassment in the circumstances (for example, that it took place without the complainant's willing consent). If the Complainant leads evidence which could satisfy these requirements, then the Respondent has an evidentiary burden to respond with some evidence that the acts did not occur or that they did not constitute sexual harassment." (at p. 15-57)

[76] Once the complainant in a sexual harassment case makes out a *prima facie* case, the evidentiary burden shifts to the respondent, but the overall burden of proving the allegations on a balance of probabilities remains that of the complainant.

[77] Section 14 of the *CHRA* provides:

14 (1) It is a discriminatory practice,

- (a) in the provision of goods, services, facilities or accommodation customarily available to the general public,
 - (b) in the provision of commercial premises or residential accommodation, or
 - (c) in matters related to employment,
- to harass an individual on a prohibited ground of discrimination.
- (2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

[78] Sexual harassment in the workplace has been broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victim of the harassment: *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1284 (S.C.C.) The first element to be established is that the conduct was unwelcome. An assessment of the complainant's reaction at the time of the incident or incidents will determine whether the conduct was welcome or unwelcome. If the complainant, either expressly or through her behaviour, demonstrates that the conduct was unwelcome, the first element is established. If the evidence shows that the complainant welcomed the conduct, however, the complaint will fail. The second element of sexual harassment requires that the conduct be sexual in nature. Both the Supreme Court of Canada in *Janzen, supra*, and human rights tribunals have recognized that a broad range of conduct, including gender-based insults, sexist remarks, comments about a person's looks, dress, appearance or sexual habits, will fall within the ambit of "sexual in nature, and should be determined on a case-by-case basis, based on the test of the reasonable person in the circumstances.: *Canada (Canadian Human Rights Commission) v. Canada (Canadian Armed Forces) (re Franke)* [1999] F.C.J. No. 757 at paras. 32 to 40 (F.C.)

[79] In certain circumstances, a single incident may be enough to create a hostile work environment, but harassment often requires that an element of persistence or repetition be established. In assessing whether the conduct is sufficiently severe or persistent to create a poisoned workplace, the objective "reasonable person standard" applies: *Franke, supra* at paragraphs 43 - 46.

[80] In circumstances where an employer has a comprehensive effective sexual harassment policy in place, the employee should notify the employer of the alleged offensive conduct in order to give the employer the opportunity to remedy it: *Franke supra*, at paragraphs 47-50.

[81] In circumstances where the alleged discriminatory practice has been committed by an employee, section 65 of the *CHRA* is also pertinent:

(1) Subject to subsection (2), any act or omission committed by an officer, a director, an employee or an agent of any person, association or organization in the course of the employment of the officer, director, employee or agent shall, for the purposes of this Act, be deemed to be an act or omission committed by that person, association or organization.

(2) An act or omission shall not, by virtue of subsection (1) be deemed to be an act or omission committed by a person, association or organization if it is established that the person, association or organization did not consent to the commission of the act or omission and exercised all due

diligence to prevent the act or omission from being committed and, subsequently, to mitigate or avoid the effect thereof.

[82] In order to avail itself of the exculpation provisions in section 65(2), an employer must establish on a balance of probabilities that it did not consent to the acts of its employee, and that it exercised all due diligence to prevent the acts from being committed and, subsequently, to mitigate or avoid their effects.

VI. ASSESSING CREDIBILITY

[83] In *R. v. R.E.M.*, 2008 SCC 51, released at the same time as *McDougall*, supra, Chief Justice McLachlin commented that findings of fact on credibility may involve factors that are difficult to explain:

"While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness' evidence is rejected may involve the judge in saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence in convicting him, but adding negative comments about his demeanour. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization." (paragraph 49)

"In the end, believing the testimony of one witness and not the other is a matter of judgment. (paragraph 76 - McDougall)

[84] The principal witnesses in this inquiry were Ms. Naistus, Mr. Soloy and Mr. Carter.

A. Ms. Naistus

[85] I find that Ms. Naistus testified before this inquiry as a credible witness. Her testimony, when considered within the totality of the evidence presented during the inquiry, is cogent and consistent testimony on the issue of sexual harassment.

[86] Ms. Naistus' evidence in chief produced a compelling narrative of repeated questions, statements, phone calls and text messages, of a sexual nature, made to her by Mr. Chief in 2004 and 2005, along with Mr. Chief's unwanted touching of her breasts and buttocks, and his exposure of his genitals.

[87] I find that Ms. Naistus' evidence remained intact and reliable during an intense and aggressive cross-examination by OLFN's counsel. Any inconsistencies in her evidence were slight and related to collateral issues.

[88] Ms. Naistus' evidence stands as cogent and probative when considered in the context of the totality of the evidence in this case, including the records and report of Doctors Sayeed and Warburton, the minutes of the meetings of OLFN Chief and Council, and her complaints to Mr. Soloy, Ms. Whitstone and Mr. Carter.

B. Mr. Soloy

[89] Mr. Soloy presented himself as a man with considerable experience in business management. He was pointed and direct in his testimony and opinions, and consistent in his answers in cross-examination. Considering his evidence in the context of the totality of the evidence before the inquiry, I judge Mr. Soloy to be a credible witness who has presented cogent and reliable evidence.

C. Mr. Carter

[90] Mr. Carter is a member of the OLFN. He was actively engaged in the business activities of the band and was personally acquainted with Ms. Naistus and Mr. Chief during the period when the alleged harassment occurred.

[91] While I am generally satisfied that Mr. Carter was a credible witness, I have some concerns about its reliability. In the circumstances of his being a last-minute witness Mr. Carter testified without the assistance of notes. He testified concerning certain things that he would have done or probably did, rather than definitive evidence of what actually occurred. Also, I find that Mr. Carter tended to nuance his evidence to shed a favourable light on the actions taken by Chief and Council in dealing with Mr. Chief and his conduct toward Ms. Naistus.

D. Secondary witnesses

[92] I find the remaining witnesses to be credible, namely Joey Hill, Randall Naistus, Mr. Lewis, Ms. Whitstone and Ms. Park. Their evidence contributed to the totality of the evidence, adding dimension to the circumstances surrounding the allegations against Mr. Chief, and the steps taken by OLFN to deal with Mr. Chief. Their evidence was not determinative of the issue of sexual harassment, or the question of whether actions taken by OLFN amounted to an exercise of all due diligence.

VII. FINDINGS

[93] I am satisfied that the conduct of Mr. Chief, which Ms. Naistus described in her testimony, took place. It included persistent questions about the colour of her panties, comments about her breasts and buttocks, leering, touching, crude comments, phone calls and text messages, and the exposing of his genitals to her. The conduct occurred while Ms. Naistus and Mr. Chief were employees of OLFN, and began a few months after Mr. Chief started as a trainee under Mr. Soloy in the economic development office in April 2003. It continued into mid-2004, when Mr. Chief was moved to another office after exposing his genitals to Ms. Naistus at the economic development office, and resumed soon thereafter, continuing into 2005.

[94] Ms. Naistus did not consent to Mr. Chief's conduct, and it was rejected by her. While Ms. Naistus acknowledged that she and Mr. Chief had had a consensual "one night stand" when they were younger, there had been no contact between them at all for five years prior to Mr. Chief's appointment as Mr. Soloy's trainee. Ms. Naistus' reaction to Mr. Chief's conduct, as described in her uncontradicted evidence, establishes that she made it clear to Mr. Chief that his comments and actions were unwelcome. She complained of the conduct to her immediate supervisor, Mr. Soloy, to Mr. Carter and to Ms. Whitstone. The evidence of both Mr. Soloy and Ms. Whitstone was that Ms. Naistus was very distressed over Mr. Chief's conduct. Dr. Warburton's report notes that she attended to see him on August 18, 2004 in "acute situational anxiety", and that she was suffering from post traumatic stress disorder when she saw him again in August 2005. Ms. Naistus stayed away from work for several days after Mr. Chief exposed his genitals to her at the office, and her reaction to Mr. Chief's conduct was such that Dr.

Warburton recommend an immediate six month stress leave in August 2004, and a second leave in August 2005.

[95] Mr. Chief's conduct towards Ms. Naistus was sexual in nature, and was both persistent and serious. It included questions or comments about the colour of her panties, the attractiveness of her breasts and buttocks, unwanted touching, his desire to engage in sex with her, phone calls and text messages about sexual positions and activity, and the exposing of his genitals to Ms. Naistus in June or July 2004.

[96] Ms. Naistus initially complained to her immediate superior, Mr. Soloy, about Mr. Chief's sexual comments and questions, and Mr. Soloy told Mr. Chief that he would not tolerate this sort of behaviour. The behaviour continued, however. When Mr. Chief exposed his genitals to Ms. Naistus in mid 2004, she immediately called Mr. Soloy, who was on holidays in Medicine Hat. Mr. Soloy then telephoned Mr. Carter and left a message regarding the incident and returned to Onion Lake. Upon his return, Mr. Soloy discussed Mr. Chief's conduct with Mr. Carter, Chief Lewis and councillors Joe Dillon and Clement Cardinal. Mr. Soloy told them that he wanted Mr. Chief fired.

[97] Ms. Naistus and Mr. Soloy also complained about Mr. Chief's conduct to Ms. Whitstone, who told Mr. Soloy that the matter should go to Chief and Council.

[98] On July 26, 2004, a meeting of the Chief and Council took place at the Tropicana Inn in Lloydminster. Ms. Park recorded the proceedings and made minutes of the meeting, which reflect, among other things, that Council expressed grave concern about Mr. Chief's behaviour. Each councillor spoke on the issue, and they agreed to make Mr. Chief responsible for his activities. They stripped Mr. Chief of his portfolio responsibilities and deducted one week's salary. Mr. Chief was to seek alcohol treatment on his own.

[99] When Mr. Soloy heard that the Chief and Council were meeting at the Tropicana Inn, he immediately drove to Lloydminster. When he arrived, Mr. Carter told him that Mr. Chief would be moved to another office, and was not to have any contact with Ms. Naistus, but would not be fired.

[100] While the July 26, 2004 minutes, which are marked as Exhibit R-3, are not detailed, I am satisfied that Mr. Chief's conduct towards Ms. Naistus had earlier been brought to the attention of the Chief and several councillors, as well as Ms. Whitstone, and that it was the subject of some discussion by Chief and Council at the meeting. Mr. Carter testified that he raised the issue, but did not go into detail, believing that most of the councillors knew what was going on. Mr. Lewis had some recollection of the mention of a harassment case, as did Ms. Park. Although it is clear that the Chief and Council had other concerns regarding Mr. Chief, including his alcoholism and absence from Council meetings, I am satisfied that the decision related by Mr. Carter to Mr. Soloy, that Mr. Chief was being moved to another office where he was to have no contact with Ms. Naistus, was directly related to Mr. Chief's conduct towards Ms. Naistus.

[101] I accept Ms. Naistus testimony that 16 days after Mr. Chief was moved to band office, he returned to the economic development office and resumed his harassment of her. He walked through her office asking, "What colour are they today?" and then, as a newly elected councillor

stated to her that he was now her boss. He bragged to Ms. Naistus over his success in having the comments about his behaviour removed from the July 26, 2004 minutes.

[102] Ms. Naistus went on a 6 month stress leave in August 2004. In March 2005, Mr. Fox replaced Mr. Soloy. Ms. Naistus' uncontradicted evidence is that she talked at length with Mr. Fox about the problems she was having with Mr. Chief, but that he was unsympathetic. Mr. Fox insisted, over Ms. Naistus' objection, that she work with Mr. Chief in the preparation of a report for Indian Affairs, a report that was Mr. Fox's own responsibility, and not part of Ms. Naistus' job. Mr. Chief's harassment of Ms. Naistus continued in 2005, as described in her evidence, the records and report of Drs. Sayeed and Warburton, marked Exhibits C-1 and C-2, and the transcribed text messages marked as Exhibits C-9 and C-10.

[103] During the inquiry, much evidence and argument was made of the fact that the band had in place policies and procedures to deal with grievances, including harassment. Mr. Carter and Mr. Lewis testified that Chief and Council were very busy, and that Ms. Naistus' complaint was one that would have been dealt with administratively upon receipt of a formal written complaint.

[104] I am satisfied that there is no substance to this line of defence by OLFN. The facts are that Ms. Naistus reported the sexual harassment to her supervisor, Mr. Soloy, who brought the matter to the attention of Chief and Council. Chief and Council, characterized by Ms. Whitstone as "the court of last resort" in these matters, took action by moving Mr. Chief to another office. This action neither discontinued nor mitigated the harassment, as Mr. Chief resumed it sixteen days later and continued on into 2005, during which there was no further intervention by the Chief and Council.

[105] To suggest that this inaction is justified because Ms. Naistus did not make a formal written complaint is absurd. Chief and Council had been made aware of Mr. Chief's conduct by Mr. Soloy in mid-2004. OLFN had an affirmative duty, as set out in section 222 of its policies and procedures, marked as Exhibit 6, to provide a harassment-free workplace. In addition to a complaints procedure, OLFN's policies and procedures provided for a disciplinary process, including the possibility of termination, when the work of one employee was disrupted by another, as was clearly the situation in this case. Chief and Council's decision to move Mr. Chief to another office failed to end Mr. Chief's harassment of Ms. Naistus, and no further steps were taken by OLFN to stop or mitigate the harassment after it resumed, despite Ms. Naistus' complaints to Mr. Fox in 2005 that she couldn't take Mr. Chief's conduct anymore, and her subsequent second stress leave in August 2005.

[106] The goal of a sexual harassment policy is to achieve a healthy workplace, and the sooner action is taken to eliminate harassing conduct, the less likely it is that any such conduct will become detrimental to the work environment: *Franke, supra*, at para. 50. I find that by July 26, 2004, at the latest, OLFN was aware of Mr. Chief's conduct towards Ms. Naistus, and the negative effect it was having on her ability to work. I find that OLFN did not exercise all due diligence to prevent the sexual harassment from being committed, and to subsequently mitigate and avoid its effect on Ms. Naistus. OLFN's decision to move Mr. Chief to another office was ineffective, and Mr. Chief's harassment of Ms. Naistus resumed and continued into mid-2005, when she took a second stress leave, without any further steps being taken by OLFN to effectively deal with Mr. Chief's conduct. OLFN is not entitled to rely on the exculpation provision in section 65(2) of the *CHRA*.

VIII. DECISION

[107] I find that Ms. Naistus, was subjected to a course of conduct that was a discriminatory practice, namely sexual harassment, by the respondent, Mr. Chief.

[108] The discriminatory practice began in 2003 and ended in 2005.

[109] At all relevant times during the sexual harassment, Ms Naistus and Mr. Chief were employees of OLFN.

[110] I find that OLFN did not consent to sexual harassment committed by Mr. Chief.

[111] I determine that intervention by OLFN on July 26, 2004 - moving Mr. Chief to a nearby office, and ordering him to have no contact with Ms. Naistus - failed to end the sexual harassment and mitigate or avoid its continuing effect. I further determine that at no time, during the course of the sexual harassment, did OLFN exercise all due diligence within the requirement of section 65(2) of the *CHRA*.

IX. REMEDIES SOUGHT BY MS. NAISTUS

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

[112] Section 53(2)(c) of the *CHRA* provides that a victim may be compensated for any and all wages of which she was deprived as a result of the discriminatory practice.

[113] Ms. Naistus testified that she went on stress leave in August 2005 on her doctor's orders. Exhibit C-7 is a letter from Ms. Naistus to Wallace Fox, her supervisor, confirming this. The letter also stated that she was emotionally, physically and mentally unfit, at that date, to fulfil her work responsibilities and hoped to return to work as soon as possible. During this stress leave of six months, OLFN terminated her employment on November 15, 2005.

[114] In the aftermath of her termination, Ms. Naistus was unable to find employment in Onion Lake other than one month at a primary school. She said the principal informed her that he had received a phone call from the band office to the effect that Ms. Naistus was not to be kept on.

[115] Ms. Naistus testified that many band members were against her for making a human rights claim and, with no job prospects and community acceptance, she moved, with her family, to Lloydminster and found employment there in July 2006.

[116] Ms. Naistus testified that she lost wages during a one year period as a result of the discriminatory practice. In her testimony Ms. Naistus provided particulars of her pay scale, other income, and employment insurance benefits.

Wage loss, 12 months, commencing August 2005 \$33,973.94

Less:

Salary, one month at a primary school \$1,400

Employment benefits, 48 weeks \$17,760

\$19,160.00

Net wage loss \$14,813.94

[117] I order that OLFN pay Ms. Naistus the sum of \$14,813.94 as compensation for lost wages.

B. Special Compensation (s. 53(3))

[118] Section 53(3) of the CHRA provides that the tribunal may order a respondent to pay up to \$20,000 in compensation to the victim if the respondent is found to have engaged in the discriminatory practice wilfully or recklessly.

[119] The respondent, Mr. Chief, can fairly be said to have had a sexual obsession over Ms. Naistus, and openly stated his desire to have sexual intercourse with her. Ms. Naistus had no interest in this, and made it clear that his attention was not welcome and was distressing to her but Mr. Chief persisted in a 2-year campaign of sexual harassment that poisoned the workplace he shared with Ms. Naistus at Onion Lake. He repeatedly offended her, humiliated her in the eyes of the community, brought her to high levels of anxiety and depression, and ultimately to an emotional breaking point that required her to take stress-leave on two occasions. I draw an inference on these facts and the totality of the evidence, that Mr. Chief relished his conduct toward her despite her obvious distress.

[120] Mr. Chief destroyed the pleasure and happiness Ms. Naistus enjoyed as an employee working in the economic development office of OLFN. He caused her health to deteriorate significantly, and ultimately caused her to leave Onion Lake with her family and make a new life in Lloydminster.

[121] In my assessment, the conduct of Mr. Chief toward Ms. Naistus was more than wilful and reckless.

[122] In the circumstances, I order that Mr. Chief pay \$18,000 to Ms. Naistus in special compensation pursuant to s. 53(3) of the *CHRA*.

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

[123] Section 53(2)(e) of the *CHRA* provides that a complainant may be compensated up to \$20,000 for any pain and suffering that she experienced as a victim of a discriminatory practice.

[124] Although the respondent, OLFN, did not consent to the sexual harassment of Ms. Naistus by Mr. Chief, it failed to deal with it effectively. When it came to the attention of Chief and Council in July 2004, they dealt with it so ineffectually that Mr. Chief was emboldened to continue his sexual harassment of Ms. Naistus and he did so for a further year, without an further intervention of any kind by OLFN.

[125] As an employer, OLFN had a paramount duty to exercise all due diligence to deal promptly and effectively with Mr. Chief's sexual harassment of Ms. Naistus. By failing to do so OLFN exacerbated Ms. Naistus' suffering and her health problems, and ultimately led to her being treated as an outsider in her own community of Onion Lake.

[126] In these circumstances I order OLFN to pay \$16,000 to Ms. Naistus as compensation for pain and suffering.

D. Interest

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

the Bank Rate (monthly series) set by the Bank of Canada. Interest is to be calculated from the date of the complaint with respect to the compensation for lost wages, pain and suffering, and special compensation.

"Signed by"

Wallace Gilby Craig

OTTAWA, Ontario

January

27,

2009

PARTIES OF RECORD

TRIBUNAL FILE:	T1296/2608 and T1297/2708
STYLE OF CAUSE:	Roxanne Naistus v. Philip L. Chief and Onion Lake First Nation
DATE AND PLACE OF HEARING:	September 22 to 24, 2008 Lloydminster, Alberta
DECISION OF THE TRIBUNAL DATED:	January 27, 2009
APPEARANCES:	
Michael Hall	For the Complainant
(No one appearing)	For the Canadian Human Rights Commission
(No one appearing)	For the Respondent, Philip L. Chief
David Clements	For the Respondent, Onion Lake First Nation