

T.D. 6/97  
Decision rendered July 11, 1997

CANADIAN HUMAN RIGHTS ACT  
R.S.C., 1985, c.H-6 (as amended)

HUMAN RIGHTS TRIBUNAL

BETWEEN:

CHERYL SENIOR WALL

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

KITIGAN ZIBI EDUCATION COUNCIL

Respondent

TRIBUNAL DECISION

TRIBUNAL:

Anne L. Mactavish Chair  
Monique Bourgon Member  
Gerald T. Rayner Member

APPEARANCES:

Odette Lalumière  
Counsel for the Canadian Human Rights Commission

Agnès Laporte  
Counsel for the Kitigan Zibi Education Council

Cheryl Senior Wall  
On her own Behalf

DATES AND LOCATION OF HEARING:

May 21 and 22, and June 5, 1997  
Ottawa, Ontario

## TABLE OF CONTENTS

I THE COMPLAINT .....	3
II PRELIMINARY MATTERS .....	5
i) Absence of Jurisdiction .....	5
ii) Chose Jugée and Lis Pendens .....	6
III FACTS .....	8
Cheryl Senior Wall .....	8
Robert Wall .....	14
Chief Jean-Guy Whiteduck .....	15
Hanney Panik .....	16
Lucille Tenasco .....	17
Debbie Whiteduck .....	18
Gilbert Whiteduck .....	19
IV LAW .....	21
V ANALYSIS .....	23
VI ORDER .....	25

### I THE COMPLAINT

This case originally involved allegations of discrimination on the basis of sex (pregnancy) and family status, contrary to the provisions of section 7 of the Canadian Human Rights Act (the "CHRA"). On November 24, 1993, the complainant Cheryl Senior Wall filed a complaint with the Canadian Human Rights Commission (the "Commission"), the particulars of which are as follows:

The Kitigan Zibi Education Council discriminated against me in employment on the grounds of sex and family status by refusing to continue to employ me in contravention of section 7 of the Canadian Human Rights Act.

I was employed by the respondent as a high school teacher for the 1992-1993 school year. Around the end of March 1993, the Director of

Education told me that he was very pleased with my work performance and asked me to return for the 1993-1994 year. I advised him that I

3

was pregnant and that I would require maternity leave from September 1993 to February 1994.

The Director told me that I could not take maternity leave because it would be impossible to replace me for such a short period of time. I asked if I could return for the school year 1994-1995 and he advised me that I should reapply at that time and I would be considered if there were any openings.

When I applied for Unemployment Insurance benefits, I was advised that I do not qualify because the Director indicated on my record of employment that I had quit my job. He denied to the Unemployment Insurance Commission that I had ever asked for maternity leave and told them that I had simply quit.

My position was filled by a relative of the Director who just recently graduated from University. I believe that the Director of Education could have accommodated my request for maternity leave. As well, I believe that he took advantage of the situation to replace me with a relative.

Counsel for the Commission advised the Tribunal at the commencement of the hearing that the Commission would not be pursuing the complaint on the ground of family status and would only be proceeding with the complaint insofar as it related to the ground of sex. In response to questions from the Tribunal, Ms. Lalumière advised the Tribunal that the decision to abandon the family status complaint had been made the previous day, but that she had been instructed not to advise counsel for the respondent until the commencement of the hearing.

At the pre-hearing conference, counsel for the respondent advised the Tribunal that she would be making a preliminary motion at the hearing relating to the conduct of the Commission prior to the referral of this complaint to Tribunal. In this context, Ms. Laporte noted that a Commission report dated November 12, 1996 stated that the Commission's investigation had revealed no evidence that the complainant's contract was not renewed on the basis of family status.

Counsel for the respondent expressed dismay at the conduct of the Commission in this regard, noting that she had expended considerable time

preparing to deal with both complaints, at considerable cost to her clients.

While the Tribunal is mindful of the constraints under which the Commission must operate, it is indeed regrettable that the Commission did not see fit to advise the respondent until the opening of the hearing that

4

it was not proceeding with the family status complaint. It must have been obvious to the Commission as of November, 1996, when it received the report, that there were serious problems with the family status complaint. Even if the Commission was only able to reach a decision the day before the hearing, if indeed, as was suggested by counsel for the Commission, a conscious decision was made to delay advising the respondent's counsel of the abandonment of the family status complaint until the opening of the hearing, this is inexcusable.

The litigation process is expensive enough for all concerned without unnecessary costs being incurred.

## II PRELIMINARY MATTERS

At the commencement of the hearing counsel for the respondent brought two preliminary motions:

### i) Absence of Jurisdiction

Counsel for the respondent submitted that the Tribunal lacked jurisdiction to hear this complaint on the basis that certain preliminary steps, necessary to give the Tribunal jurisdiction, had not been taken by the Commission. That is, the Commission had not specifically addressed the issue of whether the complainant should be required to exhaust the internal appeal mechanism provided for in the respondent's Human Resources Policy Manual. Counsel for the respondent contends that such a step is required under the provisions of ss. 41 (a) of the Act. In addition, counsel for the respondent submitted that the Commission had relied on inaccurate information, and had improperly relied on information relating to the conciliation process, in particular, the Conciliation Report, in reaching the decision to send this matter on to Tribunal. Counsel for the respondent indicated that she wished to call two employees of the Commission to testify to facts she was relying upon in support of her preliminary motion.

Prior to hearing such evidence, the Tribunal asked the parties to provide the Tribunal with submissions as to the nature and extent of the Tribunal's power, if any, to review the actions or inactions of the Commission while the complaint was before it.

Following the receipt of those submissions, the Tribunal ruled that it did not have the power to examine the conduct of the Commission or to review decisions that the Commission had taken, or indeed the fact that decisions may not have been taken. As was noted in cases such as *Spurrell v. Canadian Armed Forces* (1991), 14 C.H.R.R. D/130 and *Dhanjal v. Air Canada* (unreported, January 30, 1995) the Tribunal's jurisdiction is a limited one, based upon the authority conferred upon it by the CHRA, and in particular, by ss. 50 (1), which states:

A Tribunal shall...inquire into the complaint in respect of which it was appointed...

Questions as to the conduct of the Commission during the investigatory and conciliatory phases of the complaint process must be determined by the Trial Division of the Federal Court.

5

The Tribunal therefore declined to hear the Commission employees' evidence, and the respondent's first preliminary motion was accordingly dismissed.

ii) *Chose Jugée* and *Lis Pendens*

In her second preliminary motion, counsel for the respondent asked that the Tribunal dismiss the complaint on the basis of the legal doctrines of *chose jugée* (or *res judicata*) and *lis pendens*. Counsel contends that the rejection of the unjust dismissal complaint filed by Ms. Senior Wall with Labour Canada constitutes a previous decision between the same parties dealing with the same facts. In support of her argument, counsel relied upon the decisions of the Supreme Court of Canada in *Rocois Construction Inc. V. Dominion Ready Mix Inc. et al.*, [1990] 2 S.C.R. 440, and *Béliveau St-Jacques v. FEESP*, [1996] 2 S.C.R. 345.

A review of the documentation filed by the respondent reveals that the complainant did file a complaint of unjust dismissal with Labour Canada, pursuant to the provisions of section 240 of the Canada Labour Code. By letter dated December 10, 1993, Ms. Senior Wall was advised by Labour Canada that her complaint:

does not meet the requirement of section 240 (1) which states that:

"...any person...may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust"

Ms. Senior Wall was also advised that unless she provided further information to substantiate her claim, her complaint would not be considered further.

It appears that Ms. Senior Wall's complaint did not meet the technical requirements of section 240 of the Canada Labour Code, in that she was employed pursuant to a term contract, which contract came to an end and was not renewed. As such, there was no "dismissal" within the meaning of the Code. At no time was her complaint under the Code adjudicated on its merits.

As was noted by Gonthier J. in *Rocois Construction*, supra., at p. 448, the concepts of both *res judicata* and *lis pendens* are intended to avoid a multiplicity of proceedings and the possibility of contradictory results.

There is no other action now pending in another forum, and accordingly, the concept of *lis pendens* has no application in this case. Similarly, the concern as to double recovery addressed in the *Béliveau St-Jacques* decision is not relevant here.

The Tribunal further notes that there has been no prior adjudication of Ms. Senior Wall's complaint on its merits, and no risk of contradictory results.

To constitute either *res judicata* or *lis pendens* an identity of parties, object and cause is required.

The parties in the two cases are not identical. The Canada Labour Code complaint was a private dispute between the complainant and her former employer. The Canadian Human Rights Commission, which is responsible for representing the public interest, was not a party to the Canada Labour Code complaint, whereas it is a party in the present case.

As one of the three elements required to establish that the matter is *res judicata* is not present, it is unnecessary to consider whether the object or cause in the two cases was the same.

The respondent's second preliminary motion was accordingly dismissed.

### III FACTS

This case ultimately required the determination of questions of credibility, and accordingly it is necessary to review the evidence of the various witnesses in some detail.

#### Cheryl Senior Wall

Ms. Senior Wall was hired by the Kitigan Zibi Education Council as a high school teacher for the Band school on the Kitigan Zibi Anishinabeg Reserve. The school had approximately one hundred students in the high school and a comparable number in the elementary school. There were approximately twenty teachers.

Ms. Senior Wall was employed pursuant to a written contract of employment for a one-year term, which contract ran from August 24, 1992 to August 20, 1993. It was common ground that Ms. Senior Wall would only be required to provide teaching services during the school year, that is, to late June. Ms. Senior Wall's contract of employment incorporated by reference the terms of the respondent's Human Resources Policy Manual.

Prior to starting work with the respondent, Ms. Senior Wall had been working as a supply teacher in Brockville, Ontario, which was her home town.

Ms. Senior Wall's husband, Robert, had been employed in Brockville on a part-time basis as a bus driver. Mr. Wall left his employment in Brockville in order to follow his wife to her new job near Maniwaki, Quebec. Mr. Wall was unfortunately unable to obtain employment in Maniwaki, at least in part because he did not speak French. According to Ms. Senior Wall, soon after arriving in Maniwaki, Mr. Wall realized that he was not going to be able to find employment in that area and as a result, he started looking farther afield.

In the spring of 1993, Ms. Senior Wall discovered that she was pregnant. According to Ms. Senior Wall's testimony, she and her husband had various discussions as to their plans for the baby. She testified that they decided that she would ask for a six month maternity leave, and that after the leave was over, she would probably leave the baby in Brockville with her mother and Mr. Wall, while she resumed her teaching responsibilities.

Ms. Senior Wall testified that she advised two colleagues of her plans, namely Theana Papadopoulos and Bob McCooey.

In late March or early April, Gilbert Whiteduck, the Director of Education for the respondent, met with each of the school's teachers in order to ascertain their plans for the next school year. Ms. Senior Wall testified that her relationship with Mr. Whiteduck had been fine. They had had limited contact, but he had been very pleasant. According to Ms. Senior Wall, Mr. Whiteduck told her that he was very pleased with her performance, and indicated that he wanted her to return to the school for the following school year. Ms. Senior Wall then advised Mr. Whiteduck that she was pregnant and would require a maternity leave from September to the end of February. According to Ms. Senior Wall, Mr. Whiteduck leaned back in his chair and said no, because it was too difficult to bring a teacher to the reserve for such a short period of time. Ms. Senior Wall then asked if she could have her job back for the following school year. Mr. Whiteduck said that if there were positions open, she could send in an application at that time.

Ms. Senior Wall testified that she believed that Mr. Whiteduck was aware of her pregnancy before she told him in the course of the meeting.

Ms. Senior Wall stated that she was disappointed by Mr. Whiteduck's actions, but felt that there was little that she could do as she was on a one-year contract.

Ms. Senior Wall confirmed that she had been provided with a copy of the Band Human Resources Policy Manual when she started working for the respondent. Section 13.3 of the Manual provides:

#### Maternity Leave

Employees shall, on application, be granted maternity leave without pay, on the condition that the application for leave is made at least six weeks prior to the expected leave commencement. The total period of maternity leave will be determined by the Canadian Employment and Immigration Commission (C.E.I.C.)

The employee granted maternity leave is entitled to return to her duties as follows:



1) Within six weeks of delivery or before such date as recommended by her attending physician. The employee must give notice to their immediate supervisor of her intention to return to her duties

2) The employee may return to her duties on any date arranged by mutual agreement between the employee and the

8

immediate supervisor.

3) Once the employee leaves on maternity leave, the immediate supervisor must let the employee return to the position held by her prior to leaving.

The Manual further establishes an appeal procedure to be followed in the event that an employee is dissatisfied with a decision. The manual provides that:

... An appeal shall be transmitted, in writing, no later than five (5) working days after the decision or action being appealed, to the responsible Director, Elected Body, Band Manager or Kitigan Zibi Anishinabeg Council.

b) The appeal committee will be made up of three people who have experience in the related field of work of the employee requesting the appeal...

Ms. Senior Wall testified that she did not discuss her request for a maternity leave again with Mr. Whiteduck, nor did she attempt to appeal Mr. Whiteduck's decision to refuse her request for a maternity leave. Ms. Senior Wall testified initially that she had not appealed Mr. Whiteduck's decision as it was Mr. Whiteduck who was responsible for education on the Reserve. In cross-examination, Ms. Senior Wall was asked to clarify why it was that she had not appealed. She then testified that she felt the Whiteduck family controlled the Reserve, and she did not feel that she would be able to obtain justice on the Reserve. In a form filled out for the Unemployment Insurance authorities on August 23, 1993, Ms. Senior Wall wrote that she had not appealed because:

Teachers on the Reserve are not members of the Federation, [therefore] forcing the Educational Authority to grant a leave of absence would only serve to have dire consequences for me as an employee.

Ms. Senior Wall did not contact a lawyer at this time, nor did she contact any outside agencies in an effort to protect her job.

Ms. Senior Wall was aware of the fact that two other employees of the school were pregnant at this time - Lisa Whiteduck and the Principal of the school, Lucille Tenasco.

Ms. Senior Wall did not speak to either Ms. Tenasco or Ms. Whiteduck about the fact that her request for a maternity leave had been turned down. Ms. Senior Wall testified that she did tell one school employee that her leave request had been refused. According to Ms. Senior Wall, this conversation took place when she and her husband went out to brunch with Marilyn Tolley. Ms. Tolley was the school secretary.

Ms. Senior Wall noted that at no time did she provide the respondent with a letter of resignation, although the Human Resources Policy Manual requires written notice where an employee terminates their employment of their own accord. Ms. Senior Wall testified that while she had previously

9

provided employers with such a letter, she did not do so here, because she did not voluntarily resign.

Ms. Senior Wall continued working until June 28, 1993. On that day she was provided with a Record of Employment for unemployment insurance purposes. The Record of Employment noted that the reason for the form being issued was because the employee had quit.

Ms. Senior Wall testified that when she saw the notation that she had quit on the form, she concluded that a mistake had been made and went to speak to Gilbert Whiteduck. Mr. Whiteduck was not in his office at the time. Mr. and Mrs. Wall were about to move back to Brockville, and Ms. Senior Wall testified that she decided that she would have the form rectified when she got to Brockville. She indicated that she was not worried about the inaccuracy of the form at that time.

Ms. Senior Wall contacted the Unemployment Insurance office once she was settled in Brockville. It appears from the documentation that this initial contact took place on July 30, 1993. For the first time, Ms. Senior Wall became aware that there might be a problem with her eligibility for Unemployment Insurance benefits as a result of the notation that she had quit on her Record of Employment. On August 3, 1993, she completed an application for Unemployment Insurance benefits. On the application form Ms. Senior Wall noted that she had not quit her job, but had been dismissed

when she advised her employer of her pregnancy. On the advice of an Unemployment Insurance Officer, Ms. Senior Wall contacted Gilbert Whiteduck in order to have the Record of Employment corrected. In a letter to the Unemployment Insurance authorities written in late September or early October, 1993, Ms. Senior Wall stated:

During the second week of September, I spoke to Gilbert Whiteduck concerning our last conversation. He stated that he had no recollection of my request for maternity leave. He also stated that he could not have denied my request for leave because it is against school policy. He said that I walked into his office and told him that I was quitting my job.

At some point, on the advice of Unemployment Insurance officials, Ms. Senior Wall contacted Labour Canada and a Human Rights Commission. The date of these contacts is not clear, but it appears that they would have occurred in the late summer or early fall of 1993. Whatever the date, they occurred after August 23, 1993, which was the date on which Ms. Senior Wall completed a form for Unemployment Insurance, wherein she answered "No" to the question: "Did you contact any departments to protect your job - ie: Human Rights, Department of Labour?" Ms. Senior Wall subsequently consulted a lawyer in Brockville, who directed her to the Canadian Human Rights Commission, which contact ultimately resulted in this complaint being filed.

10

Ms. Senior Wall's application for Unemployment Insurance benefits was initially disallowed on September 2, 1993, on the basis that she had voluntarily quit her job. Ms. Senior Wall ultimately was successful in getting Unemployment Insurance benefits, following an appeal to a Board of Referees, which found that she had not quit her job, but rather had been denied a leave. This decision was handed down on October 20, 1993. A further appeal was taken by the respondent to an Umpire. The Umpire concluded that as Ms. Senior Wall's contract of employment terminated on August 20, 1993 she was entitled to benefits. It was not, therefore, necessary to determine the issue of whether a maternity leave had been refused.

Ms. Senior Wall's son was born on November 4, 1993. She was unemployed for the next two school years, during which time she had a second child. Ms. Senior Wall ultimately obtained new employment in the fall of 1995, as a teacher in Pawitik, Ontario.

Robert Wall

Mr. Wall's testimony was largely confirmatory of Ms. Senior Wall's evidence. He stated that he had been unemployed while the couple lived in Maniwaki. Mr. Wall had been collecting unemployment insurance until his benefits ran out in February or March of 1993.

Mr. Wall confirmed the difficulties that he had encountered in his job search in Maniwaki. In cross-examination, Mr. Wall was asked about his intentions with respect to remaining in Maniwaki. He testified:

Q. Am I to understand that you were decided not to stay in Maniwaki?

A. That had been the situation from the time that we moved there...

...

Q. And a short time after you arrived, you seem convinced that you have to go elsewhere to earn a living.

A. I was convinced of that before we moved, because I phoned the local bus companies, I talked to several employers, possible employers in the Maniwaki area, and I knew it would be very difficult finding a job there.

In an effort to secure new employment, Mr. Wall made numerous job applications in the Maniwaki area, as well as in Ottawa and south of Ottawa. Mr. Wall produced rejection letters that he had received during the 1992-1993 school year. The Tribunal noted that these letters gave a Brockville address as a return address and asked for an explanation. Mr. Wall explained that this address was the apartment that he and Ms. Senior Wall had shared when they lived in Brockville, immediately before moving to Maniwaki. The apartment was over a store owned by Ms. Senior Wall's parents. This was a mailing address that he continued to use as some of the applications had been sent out before they moved to Maniwaki, and the responses were accordingly sent to Brockville, often some time later.

Mr. Wall confirmed the couple's plans to have Ms. Senior Wall take a maternity leave, following which time Mr. Wall and his mother-in-law would look after the baby in Brockville.

Mr. Wall noted that Brockville is three hours from Maniwaki.

According to Mr. Wall, after Gilbert Whiteduck refused to grant Ms. Senior Wall a maternity leave, the couple decided to return to Brockville, where Ms. Senior Wall's parents lived, as they had no where else to go. They then made the decision that Mr. Wall would return to school, which he did in September, 1993. Mr. Wall subsequently secured employment in Ottawa.

Chief Jean-Guy Whiteduck

Chief Whiteduck testified that he has been the Chief of the Kitigan Zibi Anishinabeg community since 1976. Chief Whiteduck testified primarily with respect to the Band structure, including the structure of the Education Council. In addition, Chief Whiteduck explained the policies of the Band, particularly as they related to maternity leaves and the availability and functioning of the appeal process.

Chief Whiteduck also testified that the concept of maternity leave was highly regarded in his community, and that the Band made efforts to accommodate the needs of its employees.

Hanney Panik

In her evidence in chief, Ms. Panik stated that she has been employed by the respondent as a teacher for 16 years. She testified that she is not a Band member.

According to Ms. Panik, when she learned that Ms. Senior Wall was pregnant she asked her if she would be returning to the school. Ms. Panik stated that Ms. Senior Wall said that she was not coming back, that she wanted to move closer to her parents, and that her husband had been unable to obtain employment on the Reserve or in Maniwaki.

Ms. Panik also testified that in the course of her employment with the respondent, she gave birth to two children. With her first child, she took a three-month maternity leave. With her second, she took a year off, although she indicated that she received no guaranty that she would be rehired after the year off, and that it was necessary for her to re-apply for a new contract.

Ms. Panik testified that her leaves had been negotiated with Gilbert Whiteduck, and that she had not experienced any difficulties in her dealings with him.

Ms. Panik also explained that after she returned from her three-month leave, she left her baby with a family on the Reserve, and that she would nurse the child every four hours, throughout the school day. This was done

with the approval of the school authorities, who Ms. Panik found to be very accommodating.

Ms. Panik testified that when her daughter was ill this past year, and was hospitalized for two months, the school gave her the necessary time to

12

be with her daughter, and did not require that she take the time as sick leave.

Counsel for the Commission elected not to cross-examine Ms. Panik.

Lucille Tenasco

Ms. Tenasco testified in her examination-in-chief that she is a member of Kitigan Zibi Anishinabeg, and was employed as the Principal of the Band school starting in 1992. As such she was Ms. Senior Wall's direct supervisor.

According to Ms. Tenasco, she had a discussion with Ms. Senior Wall in May or June of 1993 concerning Ms. Senior Wall's plans for the 1993-1994 school year. During the course of the conversation, they discussed the fact that they were both pregnant, and Ms. Tenasco asked Ms. Senior Wall what her plans were for the following year. Ms. Tenasco testified that Ms. Senior Wall told her that she was going to move "with her mom", and would probably move in to her mother's house.

Ms. Senior Wall went on to say that this might be better for her husband, who had been unable to obtain employment in the Maniwaki area, and that he would have a better chance of obtaining new employment back home.

Ms. Tenasco also testified to her own experiences with maternity leaves as an employee of the Kitigan Zibi Education Council. Ms. Tenasco explained that she had two children while working for the school. With the first child, she took a twelve-week leave. She explained that the length of her leave was her choice, and was dictated by her personal financial circumstances, and that she could have taken a longer leave had she wanted to. This was the child that she was expecting in 1993. With the second child, Ms. Tenasco took "the full time", which she estimated to have been twenty weeks.

After she returned from each leave, Ms. Tenasco testified that she was permitted to leave the school twice a day to nurse her children.

Counsel for the Commission did cross-examine Ms. Tenasco briefly, but did not question her about the discussion that Ms. Tenasco described having with Ms. Senior Wall about her plans for the following school year.

Debbie Whiteduck

Ms. Whiteduck, who is a second cousin of both Chief Whiteduck and Gilbert Whiteduck, was employed by the respondent as a school teacher for the 1993-1994 school year. Ms. Whiteduck had obtained her teaching certification in the Spring of 1993. Ms. Whiteduck explained that neither of her second cousins were involved in her interview so as to avoid a perception of conflict of interest, having regard to the familial relationship. She testified as to the courses that she taught, and it appears that she assumed at least some of Ms. Senior Wall's teaching responsibilities.

13

Ms. Whiteduck described the assistance that she received from both Ms. Senior Wall and Theana Papadopoulos in applying for a teaching position at the school. According to Ms. Whiteduck, they explained to her the types of questions that she could anticipate in the interview process, based upon their own experiences. This allowed her to prepare considered responses in advance of the interview.

Gilbert Whiteduck

Mr. Whiteduck testified that he had been employed as the Director of Education for the Kitigan Zibi Education Council since 1980. As such, he reports to the Kitigan Zibi Education Council, which is an elected body responsible for the development of policy and the delivery of education services to the 500 community members. The Education Council oversees the delivery of pre-school, elementary, secondary, post-secondary and adult education services.

According to Mr. Whiteduck, all of the school's teachers were employed on one-year contracts, which would ordinarily be renewed from year to year.

Mr. Whiteduck stated that he met with all of the teachers in the Spring of each year in order to determine whether or not they would be returning to the school, so as to allow the Education Council to advertise early to fill any vacancies. He met with Ms. Senior Wall on April 22, 1993. He confirmed that at the beginning of the meeting he had advised Ms. Senior Wall that things had

gone fairly well, and that there was the possibility of a contract for the following year. Mr. Whiteduck stated that Ms. Senior Wall then advised him that she was pregnant, and would not be returning to the school the following year. She also mentioned that her husband would be returning to school the following year. She did ask if it would be possible for her to return the year after that. Mr. Whiteduck testified that he told Ms. Senior Wall that she would have to apply at that time.

Mr. Whiteduck stated that had Ms. Senior Wall been interested in returning to the school, she would have been given a new contract.

Mr. Whiteduck stated that Ms. Senior Wall did not request a maternity leave during the course of the meeting. Had such a leave been requested, he would have granted it. Quite apart from his personal belief in the value of such leaves, Mr. Whiteduck pointed out that the Human Resources Policy Manual dictates that employees are entitled to take maternity leaves. Had he overridden the policy, he could have been sanctioned by the Band and his position would have been on the line.

Mr. Whiteduck did acknowledge that he had heard rumours of Ms. Senior Wall's pregnancy before meeting with her on April 22, but had not previously been formally advised that she was pregnant.

14

Mr. Whiteduck explained that Ms. Senior Wall's Record of Employment was filled out based upon his understanding that if someone did not accept a new contract, he was legally required to note that they had quit. In retrospect he conceded that perhaps the Record of Employment should have specified "end of contract".

Mr. Whiteduck testified that over the years, the Education Council has granted various employee requests, including those for maternity leaves, as well as accommodated employees with sick children or those wishing to breastfeed. This is consistent with the Anishinabeg belief in the central role that motherhood plays in life, which beliefs he has incorporated into his own value system.

Mr. Whiteduck confirmed that two other teachers (Ms. Tenasco and Lisa Whiteduck) took maternity leaves in 1993-1994. When teachers went on maternity leave, the school would either try to rearrange internal scheduling to allow the existing staff to cover the absent teacher's duties, or a replacement would be hired. Mr. Whiteduck testified that every year, the Education Council receives a large number of applications



from teachers, particularly young teachers, looking for employment, and that he has not had any difficulty filling temporary positions.

Mr. Whiteduck testified that at no time during or at the end of his meeting with Ms. Senior Wall did he sense any animosity or anger on her part. Equally, he did not feel there was any animosity between them during the remainder of the school year, at staff meetings or in casual encounters at the school.

Mr. Whiteduck testified that on September 17, 1993, he received a telephone call from Ms. Senior Wall with respect to her Record of Employment. Mr. Whiteduck had evidently noted the conversation in his diary. He confirmed that he had advised Ms. Senior Wall that he did not recall her asking for a maternity leave.

#### IV LAW

Section 7 of the CHRA provides, in part, that:

It is a discriminatory practice, directly or indirectly ...

a) to refuse to employ or continue to employ any individual ...

on a prohibited ground of discrimination.

Discrimination on the basis of pregnancy is deemed to be discrimination on the basis of sex, which is a prohibited ground of discrimination.

In a case of this nature, the burden of proof is on the complainant to establish a prima facie case of discrimination. Once that is done, the burden then shifts to the respondent to provide a reasonable explanation for the conduct in issue. (*Ontario Human Rights Commission v. Etobicoke*,

[1982], 1 S.C.R. 202 at 208 and *Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited*, [1985], 2 S.C.R. 536 at 558).

A prima facie case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent (*O'Malley*, supra, p. 558).

If the respondent does provide a reasonable explanation for the otherwise discriminatory behaviour, the complainant then has the burden of demonstrating that the explanation was pretextual, and that the true motivation behind the employer's actions was, in fact, discriminatory. (Israeli v. Canadian Human Rights Commission 4 C.H.R.R. D/1616 at p. 1617, (aff'd 5 C.H.R.R. D/2147), (Basi v. Canadian National Railway Company (1988), 9 C.H.R.R. D/5029)

The jurisprudence recognizes the difficulty, in cases of discrimination, of proving the allegations by way of direct evidence. As was noted in Basi:

Discrimination is not a practice which one would expect to see displayed overtly, in fact, there are rarely cases where one can show by direct evidence that discrimination is purposely practised. (at p. D/5038)

Rather, it is the task of the Tribunal to view all of the circumstances to determine if there exists what was described in the Basi case as the "subtle scent of discrimination".

The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. In cases of circumstantial evidence, the test may be formulated as follows:

"An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses. (B. Vizkelety, Proving Discrimination in Canada (Toronto), Carswell, 1987 at p. 142.)

## V ANALYSIS

Ms. Senior Wall and Gilbert Whiteduck told fundamentally different stories as to what was said in the meeting of April 22, 1993. Having had the opportunity of considering the evidence as a whole, the Tribunal prefers the evidence of Mr. Whiteduck for the following reasons:

1. Mr. Whiteduck's evidence was presented in a clear and forthright manner. We note that Commission counsel did not cross-examine Mr. Whiteduck on the events of April 22. Having regard to our statutory mandate to "inquire into the complaint" (section 50 of the CHRA), the Tribunal did question Mr. Whiteduck about the meeting of April 22. Mr. Whiteduck's responses to the Tribunal's questions were straightforward and candid.

2. Mr. Whiteduck's testimony that Ms. Senior Wall advised him that she did not wish to return to teach for the 1993-1994 school year was corroborated by the evidence of Lucille Tenasco and Hanney Panik, whose evidence was essentially unchallenged. Neither Ms. Tenasco nor Ms. Panik mentioned

Ms. Senior Wall giving the fact that she had been refused a maternity leave as a reason for her not returning to the school for the following year.

3. Ms. Senior Wall's actions after the meeting of April 22 are more consistent with the conclusion that she had voluntarily decided not to return to her teaching duties for the next school year. In reaching this conclusion, the Tribunal has considered the fact that Ms. Senior Wall did not attempt to appeal Mr. Whiteduck's decision through the Band's internal appeal process, nor did she speak to Ms. Tenasco about the fact that her request for maternity leave had allegedly been denied. Ms. Senior Wall's explanations as to why she did not utilize the internal appeal process varied, and were not satisfactory. Similarly, Ms. Senior Wall did not consult a lawyer or contact any outside agencies until such time as she was encouraged to do so by the Unemployment Insurance authorities, when she also became aware that by leaving voluntarily, her entitlement to Unemployment Insurance benefits might be in jeopardy. Indeed, it was only in August of 1993, almost four months after Ms. Senior Wall's meeting with Mr. Whiteduck, that Ms. Senior Wall first alleged that she had been denied a maternity leave.

4. Despite Ms. Senior Wall's testimony as to her consternation about the notation on her Record of Employment (received on June 28, 1993), that she had quit her job, she did not actually speak to Mr. Whiteduck in an effort to have the Record changed until September 17, 1993, and then only after her initial claim for Unemployment Insurance benefits had been refused.

5. The evidence of Gilbert Whiteduck, Hanney Panik and Lucille Tenasco establishes that the respondent has generally exhibited considerable flexibility in accommodating the parenting needs of its employees, both band members and non-band members alike. No explanation has been offered as to why Ms. Senior Wall would be singled out for discriminatory treatment. Indeed, according to Ms. Senior Wall's testimony, at all times during her employment with the respondent, she enjoyed a cordial working relationship with Gilbert Whiteduck. Further, Ms. Senior Wall's own evidence establishes that, even though Mr. Whiteduck was aware that Ms. Senior Wall was pregnant, on April 22, 1993, he told Ms.

Senior Wall that he was pleased with her performance and wanted her back at the school.

6. Gilbert Whiteduck's version of events is consistent with Mr. and Ms. Wall's evident unhappiness with Mr. Wall's inability to find new employment in the Maniwaki area.

7. Although Ms. Senior Wall testified that

17

Ms. Papadopoulos, Mr. McCooey and Ms. Tolley were all aware of her desire to take a maternity leave, none of these individuals testified before this Tribunal.

8. Given that Ms. Senior Wall's contract with the respondent came to an end, the Tribunal does not attach any significance to the fact that Ms. Senior Wall did not provide the respondent with a letter of resignation.

The Tribunal therefore finds that the respondent has offered a reasonable, non-discriminatory explanation for the events in question, and that the Commission and Ms. Senior Wall have not established that this explanation is pretextual.

18

## VI ORDER

For the foregoing reasons this complaint is dismissed.

Dated this 26th day of June, 1997.

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Anne L. Mactavish

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Monique Bourgon

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Gerald T. Rayner