

T.D. 2/99

Decision rendered on June 11, 1999

CANADIAN HUMAN RIGHTS ACT

R.S.C., 1985, c.H-6 (as amended)

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

(MARY) JANET BERNARD

Complainant

and

CANADIAN HUMAN RIGHTS COMMISSION

Commission

and

WAYCOBAH BOARD OF EDUCATION

Respondent

DECISION

TRIBUNAL: Guy A. Chicoine Chairperson

APPEARANCES: Hugh MacIsaac
Counsel for Janet Bernard

Odette Lalumiere
Counsel for the Canadian Human Rights Commission

Jamie S. Campbell
Counsel for Waycobah Board of Education

DATES AND PLACE OF HEARING: January 11 - 14, 1999
Sydney, Nova Scotia

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I. INTRODUCTION:

On October 27, 1995 Mary Janet Bernard was terminated from employment as a secretary for the Waycobah Board of Education. Ms. Bernard filed a complaint with the Canadian Human Rights Commission alleging that her employer discriminated against her in relation to her employment on the basis of a perceived mental disability, contrary to Section 7 of the *Canadian Human Rights Act* (the CHRA). Her employer counters that the termination resulted from an incident of inappropriate behaviour that had occurred on October 26, 1995 which was prejudicial to the best interest of the employer and which constituted just cause for her summary dismissal. The employer denies that perceived mental disability played any part in the decision to terminate her employment.

II. BACKGROUND:

Mary Janet Bernard is a member of the Waycobah First Nation located in Inverness County on Cape Breton Island about 160 kilometres west of Sydney. This is a Mi'kmaq First Nation with a population of just over 600 people. Ms. Bernard was born and raised in Waycobah, and completed her grade 12 at Mabou High School in Mabou, Nova Scotia. She attended Cape Breton Business College where she obtained certification as a clerk/typist in 1977. She then went to Halifax where she worked as a secretary for a private insurance firm, and also worked for the Department of Indian Affairs and for Parks Canada. While in Halifax, Ms. Bernard also did a year of studies in the Transition Year Program in preparation for entry into university. One of the courses that she took was on Native spirituality.

Ms. Bernard attended St. Mary's University for the fall semester in 1980 but withdrew from the course when her father died in January of 1981. Later she enrolled at the University College of Cape Breton where she took theology courses for two years. Some time later she also took a modeling course at the John Robert Powers Modeling School in Sydney, Nova Scotia.

Ms. Bernard's interest in modeling led to appearances in movies and documentaries. She has also attended many cultural events throughout North America over the years where she participated as a traditional woman dancer. Ms. Bernard claims to have a very good knowledge of Native spirituality as a result of her formal studies as well as her participation in various Native powwows and events such as a Sun Dance Ceremony in the State of South Dakota. She considers herself to be a Spiritual leader among the Native people. Among her other accomplishments, Ms. Bernard has obtained a first degree Black Belt in Tae Kwon Do, and is able to teach this martial art.

Prior to her return to Waycobah in March of 1993, Ms. Bernard had worked with the Department of Supply and Services for six years as a secretary and word processor operator. She claims that she was one of the top secretaries there.

In March of 1993, Ms. Bernard was hired by the Waycobah Board of Education as secretary to the Director of Education, Mr. Brian Arbuthnot. At that time, the Waycobah First Nation was just beginning the process of establishing its own school system. Up until that time, children from Waycobah reservation attended the school in the village of Waycocomaugh operated by the Inverness County School Board. One of the stated purposes of establishing their own school was to ensure that the Mi'Kmaq language and culture would be transmitted to children of the Waycobah First Nation. Prior to leaving the position of Director, Mr. Arbuthnot re-assigned Ms. Bernard to the position as secretary at the elementary school which is the position she held until October 27, 1995. Subsequent to the termination of her employment, Ms. Bernard received a generic letter of recommendation from Mr. Arbuthnot wherein he attests to her abilities as a secretary and her abiding support of the Waycobah community controlled school.

During the years that Ms. Bernard was employed by the Waycobah Board of Education, the Board of Education was for all intents and purposes a committee composed of the Chief of the Waycobah First Nation, the six Band Councilors, and two or three people elected from the community at large. One witness described the Board of Education as an entity within the Band Council, under authority of the Chief and Council. Since it was their creation, they could add people to the Board or remove them at their discretion.

It had been anticipated, initially, that control of the school system would some day be turned over to a Board consisting mostly of members elected from the community. However, by 1997 the idea of having community elected representatives on the School Board was dropped and today the administration of the community school is solely the responsibility of the Chief and the Band Council. At all times, the Chief acted as chairperson of the School Board.

In February of 1995, Mr. Angus Daniel MacIntyre was hired as the Director of Education. At this time, the Waycobah Board of Education was operating its school system from two separate facilities. The Waycobah Elementary School housed grades one to six, and about a half kilometre down the road was Waycobah Junior/Senior High School for grades 7 to 12. Mr. Gordon MacIver was principal for grades 1 to 12 although his office was located in the elementary school. Mr. John Hendsbee was vice-principal and he was located at the Junior/Senior High School. Mr. MacIver was Ms. Bernard's supervisor as they both worked at the elementary school. The secondary school students would also use the elementary school for the gym, for home-ec and for industrial arts. There were approximately 60 students at the elementary school and 30 or more at the secondary school.

Mr. MacIver was generally satisfied with Ms. Bernard's abilities as the school secretary. He refers to her as being very competent. Her duties consisted of being a receptionist, doing typing for the principal and other teachers, photocopying, and attending to the

needs of individual students who might come to the office for photocopies, to make phone calls or to deliver information from teachers. During the summer of 1995, however, there was an incident which occurred involving Ms. Bernard, Allan Bernard, who was a student counselor at the Junior/Senior High School, and Julianna Bernard, who was the wife of Allan Bernard and also the secretary at the school board office. While none of the witnesses described the nature of the incident, Mr. MacIver did state that a restraining order had been imposed upon Allan Bernard.

As student counselor, Allan Bernard occasionally entered the elementary school where Ms. Bernard worked. According to Mr. MacIver, Ms. Bernard would get upset whenever Allan Bernard came around. The conflict made the staff uncomfortable, with the result that Mr. MacIver decided to have a meeting with Ms. Bernard to try to defuse the situation. This meeting took place in early October, after school, in a classroom at the elementary school, in the presence of Mr. MacIver and Mr. MacIntyre, the Director of Education. The concern of her superiors was that Ms. Bernard's conflict with Allan Bernard was becoming disruptive and that it was affecting the morale at the school. Mr. MacIntyre also expressed concerns about Ms. Bernard not doing her job, not carrying messages, being in a teachers' room when she should not have been, and saying things about other teachers. He said that the purpose of the meeting, as it would be with any employee, was to sit and talk and see if you could see what the issue was and what the problem was.

During the meeting with Mr. MacIntyre and Mr. MacIver, Ms. Bernard showed them approximately six bottles of medication that she was taking. Mr. MacIntyre describes her as being very distraught at the time. He also says that Ms. Bernard described the medication as "uppers and downers," something to help with tension, nerves and anxiety and those kinds of things. He also states that Ms. Bernard said she was not taking her medication, and that this concerned both he and Mr. MacIver greatly. In fact, he claims that they were so concerned about her health that they suggested that she take some time off. Ms. Bernard apparently refused to take their advice in this regard. According to Mr. MacIver, however, the meeting did have the desired effect and the situation improved.

Some time in late September or early October, 1995 Ms. Bernard attended a meeting of the School Board to make a presentation requesting a pay increase. The school principal, Gordon MacIver and the Director of Education, Angus MacIntyre were present at the meeting. Mr. MacIver recalls Ms. Bernard mentioning that Julianna Bernard had just received a large wage increase. She was not able to convince the Chief and Councilors, however, that she was also deserving of a pay increase. Ms. Bernard suggested that she was insulted by the Chief, Morley Googoo, at that meeting because he insinuated that all she could do was answer the phone. Mr. MacIver recalls that when Ms. Bernard left the meeting she was upset and possibly even crying. Ms. Bernard was quite obviously in a distressed and emotional state.

III. THE OCTOBER 26 INCIDENT:

October is Mi'Kmaq History Month in the Waycobah schools and it is a custom to invite speakers to make presentations to the students on various aspects of Mi'Kmaq heritage. Ms. Bernard either offered or was asked to make a presentation to the students of the Junior/Senior High School as part of a panel of guest speakers on October 26, 1995. Ms. Bernard did have discussions with the principal, Gordon MacIver, about the subject of her presentation, however there is conflict in the evidence as to whether the presentation was to be on Mi'Kmaq singing, and more specifically about a particular drum group, or whether the presentation would be about Mi'Kmaq culture in general. As it turned out, Ms. Bernard chose the broader topic, which included a presentation on aspects of Native spirituality.

On the day of the presentation, Ms. Bernard reported to the elementary school where she normally worked, and then went over to the Junior/Senior High School at around 9:00 o'clock. Upon approaching the secondary school entrance Ms. Bernard saw a group of older boys who were pushing and shoving each other around. While passing by them, she too was pushed. This, quite understandably, upset her. One of the boys in the group was Terry Googoo. About a week or so earlier, Ms. Bernard had called the principal, Mr. MacIver, to remove a male and a female student who had locked themselves in the staff washroom at the elementary school. The male student was Terry Googoo, and according to Ms. Bernard, he was angry that she had gotten him into trouble.

Once inside the school, Ms. Bernard went to the classroom where the presentations were to be made. Her evidence is that the students would not settle down and they were being loud and disruptive. There were at least four teachers present, being Mike Stewart, Phyllis Googoo, Victoria MacEachern and Lisa Lunney. She says that Mike Stewart removed four or five students from the classroom before the presentation started. Ms. Bernard commenced her presentation on Native culture, explaining the use of the sacred drum and the process of becoming a drummer. She spoke about the four colors of Native spirituality and the four directions. She also talked about the gifts that some spiritual leaders have, including the gift of telepathy. She also compared prayer in the Roman Catholic tradition to communicating with the spirit world. She says that when she told the students that people who use alcohol or drugs should not be drummers, some of the students, including Terry Googoo, became upset and walked out. After this, the rest of the students remained quiet while she played the Honour Song on a tape recorder.

While the Honour Song was being played, Ms. Bernard testified that the Director of Education, Angus MacIntyre came rushing into the classroom with Gordon MacIver and John Hendsbee in a very disruptive manner and interrupted her presentation. According to Ms. Bernard, Mr. MacIntyre demanded that she turn off the song or she would be fired. She says she felt torn between obeying Mr. MacIntyre and disrespecting the Creator by turning off the song. She became upset and started crying. She says that Mr.

MacIntyre asked her if she was taking her medication. Margaret Pelletier, a nurse who was also at the school to make a presentation, was asked to take her home.

Ms. Bernard's recollection of the presentation she made to the Junior/Senior High School students differs in some respects from the description of events provided by other witnesses. Phyllis Googoo testified that Ms. Bernard appeared upset even before she began her presentation, partly because the children were excited and would not quiet down. She said that one boy, Terry Googoo, looked at her in the eye and Ms. Bernard did not like it. She told the students that she was not afraid of anybody in the classroom, that she was not intimidated. This could have been interpreted by some of those present as a threat because Ms. Bernard has a black belt in Tae Kwon Do. Phyllis Googoo says that Ms. Bernard explained to the students the significance of the "O Great Spirit" song, and she talked to the students about respect. Phyllis Googoo testified that at some point Ms. Bernard approached Terry Googoo's girlfriend, Debbie Googoo, and told her: "I know your mother." Debbie replied that her mother died. Ms. Bernard then told her words to the effect: "I know your mother is dead. I can communicate with her." This upset Debbie and she left the room along with a group of her relatives and friends. Phyllis Googoo also went out of the room to check on these students. She says she later returned to pick up her granddaughter, Cassandra, age 13 or 14, "because she was terrified by what was going on". She says that she then called the School Board office to request that Angus MacIntyre come to the school, as she was having a hard time handling the situation. She also called the principal, Gordon MacIver, to come over.

Margaret Pelletier, a nurse working out of the Baddeck Hospital who does outreach for Waycobah community, also testified at the hearing. She said she had been asked by Mr. MacIver to do a presentation about nursing, but at the last moment the subject of her talk changed to residential school survivors. She recalls that while Ms. Bernard was making her presentation there was one group of students that were not settling down. Ms. Bernard went over to them, and she told Debbie Googoo that her mother would not be very happy with her. She also told her that she could speak to her mother on occasion, even though her mother is dead. Debbie started to cry and she walked out. About 4 or 5 students walked out with her. Ms. Pelletier also walked out and tried to calm her down. She says that she, too, was upset, "because I feel that this little girl didn't have to hear something like that".

Ms. Pelletier testified that Mr. MacIver asked her to accompany Ms. Bernard in order to keep an eye on her because she was upset. She went with Ms. Bernard to the elementary school, and then to her home. She says that Ms. Bernard told her about a letter on a disk at the school which "would explain to Mr. MacIver why she quit".

Angus MacIntyre, the Director of Education, testified he was at a meeting at a restaurant with the principal, the vice-principal and a consultant when he received a call and was told that there was a problem at the school. Mr. MacIntyre was advised upon entering the school that Ms. Bernard had upset Debbie Googoo by talking about her deceased mother. On entering the classroom he observed Ms. Bernard sitting cross-

legged and playing music on a tape recorder. He recalls that one of the first things Ms. Bernard told him was that the students were being disrespectful. He suggested to her that she turn off the recorder and allow the next speaker to carry on. She, however, wanted to continue playing the tape. It took about 5 or 10 minutes of coaxing before she agreed to go out into the corridor. He asked her to go back to her office but she insisted on going back into the classroom. She then told Mr. MacIntyre that she was no longer going to be employed with the School Board. He asked Margaret Pelletier to go with her and see that she got home safely. In cross-examination, Mr. MacIntyre stated that he did not raise his voice or shout at Ms. Bernard, but only spoke to her firmly. He also recalled asking her if she was taking her medication. He also advised Ms. Bernard not to return to the school until she had heard from him.

Gordon MacIver testified that he received a call from Phyllis Googoo who requested that he come to the school right away. When he entered the classroom, Angus MacIntyre was speaking to Ms. Bernard. The "Honour Song" was playing on the tape recorder. Mr. MacIver introduced the next guest speaker and then left the room with Ms. Bernard and Mr. MacIntyre. He requested Ms. Bernard to return to the elementary school but she insisted on returning to the classroom to play another song. When she was escorted out of the classroom the second time, he again requested that she go back to the elementary school, but Ms. Bernard replied: "I don't care, I quit". Ms. Bernard did eventually return to the elementary school where she stayed for only a few minutes, and then Ms. Pelletier took Ms. Bernard home. Later that afternoon, Ms. Pelletier returned to the elementary school and informed Mr. MacIver that Ms. Bernard wanted him to read a letter that was on a certain disk in her office. Mr. MacIver inserted the disk into the computer and printed the letter which was dated October 17, 1995.

IV. THE SCHOOL OFFICIALS' REACTION:

The letter dated October 17, 1995 was addressed to "Gordan", meaning Mr. MacIver. The letter contained phrases such as: "If at any time I am not with you any more..."; "...I know I won't be here very long."; and, "I have served my purpose here". Mr. MacIver was concerned that some of the statements may be referring to contemplated suicide. The letter caused him to be alarmed and suspicious. He took the letter to Mr. MacIntyre and told him he was worried about it. Mr. MacIntyre immediately called Mi'Kmaq Family Services to suggest that they send a counselor to talk to Ms. Bernard. They also called the Tribal Police in Eskasoni and read the letter to them. In his report on the incident, Mr. MacIver writes that the call was made "...with a concern that she was thinking of committing suicide". Mr. MacIntyre also called Ms. Bernard's brother, Robert to tell him what had happened and to express to him that he and Mr. MacIver were concerned about her health and safety. He asked Robert to check on her.

Mr. MacIntyre also called the Catholic Priest, Reverend Dan MacLennan to inform him of the incident at the Junior/Senior High School and to request that he come to speak to the students to explain what had happened.

The Band Councilors and others on the School Board were also called and informed about the incident. Mr. MacIntyre began gathering reports from the teachers and principal. He also states that people from the community were calling to request immediate action or they were going to start hauling their children out of the school, meaning transferring them to the village school in Waycocomah. He claims that he pleaded with these people to give this some time, but they said if Ms. Bernard ever came back into the school, their kids would be out of there. They wanted immediate action.

Mr. MacIntyre prepared a written report of his investigation which was presented to the School Board the evening of October 27, 1995. In his report, Mr. MacIntyre repeated statements made to him by Father McLennan to the effect that late in the evening of October 26th, Ms. Bernard was still in the same frame of mind as she had been at the school during the day. He also says that Father McLennan spoke to Ms. Bernard on the morning of the 27th and that Ms. Bernard "was still repeating many of the things she had said the previous day about God speaking and working through her, etc.". The report states: "He was/is concerned about her mental health although he felt we had done everything we could under the circumstances".

During the afternoon of October 27, 1995, Mr. MacIntyre drafted a letter to Ms. Bernard advising her that her employment with the Waycobah School board would be terminated effective Monday, October 30, 1995 at 9:00 a.m. The letter makes reference to her Record of Employment which was attached. The draft letter was faxed to the solicitor for the School Board whose advice was not to change one word of it.

The Record of Employment (the "ROE") was completed by the Business Manager for the School Board who, at the request of Mr. MacIntyre entered code "D" as the reason for issuing the ROE, which means "illness or injury". The draft termination letter was included in the package of documents presented to the Chief and Councilors, and Mr. MacIntyre's report concluded: "With the concurrence of Council I will [send it out on Monday] unless I am given orders to the contrary".

A meeting of the Chief and Council was held after 8:00 o'clock on Friday, October 27, 1995. Mr. MacIntyre testified that other options besides termination were presented at the meeting but no such options were referred to in his written report. Mr. MacIntyre acknowledged that even before the meeting had concluded that the consensus was for immediate termination. When the Chief, Morley Googoo was asked whether what happened at the meeting was a rubber stamping of the report that Angus MacIntyre gave he replied, "Yes". He was also asked whether options other than termination were discussed and he replied: "not at that time, I don't believe".

The letter of termination and ROE were delivered to Ms. Bernard.

V. LAW:

Section 7 of the CHRA provides, in part as follows:

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.

Disability is one of the prohibited grounds of discrimination.

The CHRA does not expressly state that a perceived disability is sufficient to establish a ground for discrimination. Other human rights legislation, such as the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214 as amended by S.N.S. 1991, c. 12, Section 4, does make reference to perceived handicaps. Our Courts have dictated, however, that human rights legislation should be given a large and liberal interpretation sufficient to attain the goals of eliminating discrimination. This principle has allowed various courts and tribunals to include diverse medical ailments such as congenital defect, obesity, nervous depression and acquired immune deficiency syndrome (AIDS) in the definition of disability. Similarly, this approach to human rights legislation has resulted in a recognition that intention is not a factor in determining whether discrimination had in fact occurred, and that the actual existence of a characteristic which is the subject of discrimination is not required if there is a subjective and even erroneous perception of the existence of that characteristic. See: Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Montreal (Ville) [1998] A.Q. No. 369 at paragraphs 90 to 93.

In cases of discrimination relating to employment, the burden of proof is on the complainant to establish a *prima facie* case. 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 SCR 202 at 208 and Ontario Human Rights Commission and O'Malley v. Simpson Sears Limited [1985] 2 S.C.R. 536 at 558).

Section 15 of the CHRA provides, in part, that:

It is not a discriminatory practice if

a. any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;

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). The allegations made by the complainant must be credible in order to support the conclusion that a *prima facie* case

has been established (Dhanjal v. Air Canada, [1997] F.C.J. No. 1599, (1997) 139 F.T.R. 37).

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) and Basi v. Canadian National Railway Company (1988), 9 C.H.R.R. D/5029).

It is often difficult to find direct evidence of discrimination. As was noted in Basi (supra at D/5038):

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 practiced.

The Basi decision states that it is the task of the Tribunal to view all of the circumstances to determine if there exists a "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 is formulated in this manner

"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)."

Basi (supra at D/5040) adopts the following further qualification:

The Respondent does not sufficiently refute any inference of discrimination by being able to suggest any rational alternative explanation; it must offer an explanation which is credible on all the evidence; see Fuller v. Candur Plastics Ltd. (1981) 2 C.H.R.R. D/419.

It is sufficient to prove discrimination if that was one of the factors that influenced the respondent to commit the act in issue; it does not have to be the sole or primary reason for that decision. See Basi v. Canadian National Railways Co. (1988), 9 C.H.R.R. d/5029 (H.R.T.), at paragraphs 38496, 38497 and 38498; Holden v. Canadian National Railway (1990), 14 C.H.R.R. D/12 (F.C.A.) at page D/15; Canada (Attorney General v. Uzoaba (1995) 26 C.H.R.R. D/428 at page D/431; and Canada (Canadian Human Rights Commission) v. Canada (Department of National Health and Welfare) (re Chopra) [1998] F.C.J. No. 432, affirmed in the Federal Court of Appeal, [1997] F.C.J. No. 40.

VI. ANALYSIS:

Ms. Bernard alleges that Waycobah Board of Education has discriminated against her in employment by terminating her employment because of a perceived mental disability, contrary to Section 7 of the CHRA. I am satisfied that the complainant has in fact established a strong *prima facie* case of discrimination.

Perceived mental illness, in my view, was one of the factors that influenced her employer to terminate her employment. The Band Chief, the Director and the Principal, all of whom attended the meeting of the School Board on the evening of October 27, 1995, maintain that the sole reason for removing Ms. Bernard from her position as secretary of the elementary school was the threat of parents to remove their children from the community school if she was not immediately terminated. There is much uncontradicted evidence, on the other hand, that the people who were responsible for either recommending or making the decision to terminate Ms. Bernard's employment were influenced by the perception, if not an actual belief, that Ms. Bernard was suffering from mental illness. Some of the actions and events which lead me to this conclusion are:

1. The meeting with the Director, Mr. MacIntyre, and the Principal, Mr. MacIver, in early October during which Ms. Bernard revealed that she was taking medication for tension, nerves and anxiety. Ms. Bernard is described as being distraught and in need of time off from work.
2. The meeting with the School Board in late September or early October where Ms. Bernard requested but was refused a wage increase. She apparently left the meeting very emotional and in a distressed state.
3. Mr. MacIntyre asked Ms. Bernard whether she was still taking her medication shortly after interrupting her presentation to the Junior/Senior High School students.
4. Ms. Pelletier, the nurse, says she was requested to accompany Ms. Bernard when she left the Junior/Senior High School "to keep an eye on her". Ms. Pelletier went with her to the elementary school and also to her home and she did spend a considerable amount of time with her following the incident.
5. Upon retrieving the letter dated October 17th from the computer and reading it, Mr. MacIver was so concerned that the letter may be a suicide note that he immediately took it to the Director, Mr. MacIntyre.
6. Mr. MacIntyre called Ms. Bernard's brother, Robert, to inform him about the incident, and to suggest that he should visit her "to ensure her health and safety".
7. Mr. MacIntyre called Mi'Kmaq Family Services to request that they have a counselor attend upon Ms. Bernard "to make sure she was okay".
8. Mr. MacIntyre called the Tribal Police in Eskasoni to advise them that the letter of October 17th may be a suicide note and that he was "concerned for her safety".

9. Mr. MacIntyre called the Parish Priest, Father MacLennan who visited Ms. Bernard that evening and then reported to Mr. MacIntyre the next day that he was "concerned about Ms. Bernard's mental health".
10. Mr. MacIntyre's report in writing to the School Board on October 27th refers to his asking Janet if she was taking her medication; to arranging for Ms. Pelletier to take Janet home; to the letter of October 17th which was attached to his report for all members of the School Board to read; to the call to Robert Bernard with the request that he visit her to ensure her health and safety; to the emergency calls to Mi'Kmaq Family Services, the Parish Priest and the Tribal Police; to Father Dan meeting with Janet on the morning of the 27th and finding her to be still upset; to Father Dan being concerned about Ms. Bernard's mental health; and to the fact that the School Board's lawyer had reviewed the letter of termination prior to the School Board meeting.
11. The Record of Employment indicates that the reason for issuing the ROE is "illness". The Director of Education chose this description even though other reasons such as "quit", "dismissal", and "other" were available options.

While the Board of Education may have been influenced to some extent to terminate Ms. Bernard's employment as the elementary secretary because of the threats of members of the Waycobah community to withdraw their children from the community school, I find that the Board of Education and its advisor, Mr. MacIntyre, were convinced that Ms. Bernard suffered from mental illness. The haste with which the Board of Education acted and their failure to give Ms. Bernard an opportunity to explain her conduct at the Junior/Senior High School is also consistent with a judgment call on the part of the Board of Education and its advisors that Ms. Bernard was mentally ill and, therefore, it would serve no useful purpose to discuss the issue of the incident with her.

Even though the threats of parents to withdraw their children from the community school may have been real, if these threats were themselves based on a discriminatory ground, then the Board of Education cannot justify its own conduct by blaming the parents for causing them to take a course of action which is discriminatory. In Vizkelety, Proving Discrimination in Canada (Toronto: Carswell, 1987) at page 137, the author states:

It happens that respondents will try to justify unequal treatment by blaming "others" for their actions but, where they do, the discrimination is no less real and apparent. Moreover, the objections of these "others" ñ assuming they are real ñ may themselves be founded upon prejudice or stereotypes.

It appears that within hours of the incident at the Junior/Senior High School, word was out amongst the students and the community of Waycobah that Ms. Bernard was "crazy". Ms. Bernard testified that on the day of the incident she took her eight year old son to see Father MacLennan because he was very upset that other students were telling him that "your mother is crazy". This perception, which emanated from or was cultivated within the community at large, cannot excuse the conduct of Ms. Bernard's employer. The summary manner in which the Board of Education reacted to calls for

Ms. Bernard's immediate termination is summarized in this exchange in the examination-in-chief of Chief Morley Googoo (at pages 713-714 of the transcript):

Q. Would you describe what happened as a rubber-stamping of the report that Angus MacIntyre gave?

A. Yes.

Q. What did Angus MacIntyre recommend?

A. Angus MacIntyre recommended more dismissal. A lot of parents said they were going to not allow their children coming back to school. They were going to withdraw them if this situation wasn't handled. In our community ñ it is a small community. These things really disturbed and bothered a lot of people, the situation. It bothered us too when we heard about everything that had happened. We made a decision because of the actions that were taking place. We felt they were improper and we decided to terminate her position.

Q. Were options other than termination discussed?

A. Not at that time, I don't believe (...).

Having taken the position at the hearing that perceived mental disability played no part in the decision to terminate Ms. Bernard, the employer made no attempt to establish a defence that the discriminatory practice was based on a bona fide occupational requirement. Instead, the Respondent Board of Education defended its decision to terminate Ms. Bernard as secretary at the elementary school solely on the outcry from some in the community who were demanding that Ms. Bernard be fired or their children would be moved to another school.

The evidence establishes, however, that perceived mental illness, or a belief that Ms. Bernard was "crazy", was very much at the core of the community's reaction to the incident. The employer was not entitled to use this as an excuse to terminate Ms. Bernard as the public outcry was itself based on the collective belief that Ms. Bernard must be mentally disturbed to have done what she did. In other words, the public outcry was itself a call to discriminate on a prohibited ground. I am also of the view, in any event, that the Board of Education acted on the recommendation of the Director of Education and that his report to the Board of Education was tainted, if not totally imbued, with a perception that Ms. Bernard was mentally ill. I therefore find that Waycobah Board of Education has committed a discriminatory practice by refusing to continue to

employ Ms. Bernard on a prohibited ground of discrimination, namely, perceived mental disability.

VII. REMEDY:

Having found that the Waycobah Board of Education committed a discriminatory practice, it is now incumbent upon me to determine which remedies should be granted to Ms. Bernard. In this regard I am governed by Section 53 of the *Act*, as well as jurisprudence which has established that in cases of discrimination, the goal of compensation is to make whole the victim of the discriminatory practice, taking into account principles of reasonable foreseeability and remoteness. (See Canada (Attorney General v. McAlpine [1989] 3 F.C. 530).

i. Lost Wages

Section 53 (2)(c) of the *Act* states that when a complaint is substantiated, a Tribunal may make an order that the person found to have engaged in the discriminatory practice compensate the victim for any or all wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice.

The Commission and Ms. Bernard ask that Ms. Bernard receive an award for lost income from October 27, 1995 to the date of this decision, less the amount that she received in weekly welfare from the Waycobah Band Council for part of this period. The Respondent, Waycobah Board of Education, suggests that in awarding lost wages, I should take into account the Employment Insurance benefits received by Ms. Bernard during the 52 week period following her termination, and also limit the loss to February 14, 1997, the date when the Board of Education was disbanded and the likely date upon which Ms. Bernard would have been terminated on account of the reorganization of the school governance system.

Dealing firstly with the issue of Employment Benefits received by the victim following termination, I am of the opinion that Section 45 of the Employment Insurance Act, S.C. 1996, c. 23, requires the employee to repay to the Receiver General any employment insurance benefits upon receipt of a damage award referable to the same period of time as benefits have been received. In addition, Section 46 of the Employment Insurance Act requires any employer ordered to compensate a victim for lost wages to enquire what amount is repayable to the Receiver General and to deduct that amount from the earnings payable and to remit it to the Receiver General as repayment of an overpayment of benefits. I will therefore refrain from making any deduction from an award for lost wages and will leave it to the parties to determine who will remit the required amount to the Receiver General as required by law.

With regard to the issue of length of time for which lost wages should be calculated, I am of the view that the evidence of the Respondent, Waycobah Board of Education, to the effect that Ms. Bernard's employment would have been terminated as at February 14, 1997 is speculative at best. According to the testimony of Chief Morley Googoo, when the Band Council restructured the school administration and dismantled the School Board, the person who was acting as financial clerk to the School Board, namely Julianna Bernard, was "bumped back" to secretary at the school, a position that she had held for perhaps 12 years prior to her move to the School Board office position.

While no evidence was led by the parties as to the salary paid to Julianna Bernard in her position as financial clerk, we are aware that the fact that Julianna Bernard had received a large increase in salary was one of the reasons why Ms. Bernard met with the School Board in late September or early October, 1995 to request a salary increase for herself. There was no evidence led to the effect that Julianna Bernard was willing to take over the position of school secretary for the same wage as had been paid to Ms. Bernard. There is also no evidence which suggests that Julianna Bernard had a right to "bump" the school secretary when the position of financial clerk was eliminated because of seniority or otherwise. On the other hand, the evidence indicates that Ms. Bernard was a very competent secretary and except for the personal conflict involving Allan Bernard which had made the staff uncomfortable for a short period of time in September or October of 1995, Ms. Bernard's performance as the school secretary was not in question. I am not convinced that Ms. Bernard would have lost her position as school secretary on February 14, 1997 as a result of the restructuring that came into effect on that date. The claim for lost wages therefore continues to the date of this decision.

Following the 52 week period during which Employment Insurance Benefits were paid, Ms. Bernard received a welfare payment directly from Waycobah Band Council in the amount of \$119.00 per week. This was in addition to other benefits which she received as a member of the Waycobah community, such as housing and utilities. These latter benefits she would have received whether she was employed by the School Board or not. Since the School Board and the Waycobah Band Council were throughout, for all intents and purposes, one and the same entity, it is suggested by all parties that I am to deduct from the award for lost wages, the amount received as welfare from the Band Council. I agree with this submission.

Ms. Bernard is entitled to compensation for wages lost from the date of her dismissal on October 27, 1995 to the date of this decision, a period of 187 weeks, at the rate of \$325.00 per week, less welfare payments received at the rate of \$119.00 per week for 135 weeks, which calculates as follows:

Loss of Income for 187 weeks \$60,775.00

Less : Welfare payments for 135 weeks - 16,065.00

Net Wage Loss: \$44,710.00

In awarding compensation for loss of wages, whether in a civil case or under Human Rights law, the court or tribunal must consider whether the plaintiff or complainant has made any attempt to mitigate his or her loss of wages by seeking other employment and remuneration. Ms. Bernard testified that she had applied for other jobs with the Waycobah First Nation Reserve Council and for jobs off the reserve, but had been unsuccessful. While evidence of her efforts in this regard was limited, I am also mindful that the onus of proof lies with the defendant in wrongful dismissal cases to satisfy the court that the plaintiff has failed to take reasonable steps to mitigate his or her loss. Levitt in The Law of Dismissal in Canada (Aurora: Canada Law Book, 1985) at page 234, states as follows:

"The onus is on the employer to prove, first, failure to mitigate on the employee's part and, secondly, that the employee would have found another comparable position if one had been searched for."

Two of the witnesses, Robert Bernard and Chief Morley Googoo, testified that the rate of unemployment on the Waycobah First Nation Reserve was generally over 80%, and that a large number of persons who are employed are employees of the Waycobah Band Council. It is not too surprising, therefore, that the employer did not call any evidence to the effect that jobs similar to the one which Ms. Bernard had been dismissed from were available either in the community or within commuting distance.

In determining whether Ms. Bernard made an effort to mitigate her loss, I am also mindful of the special circumstances which Ms. Bernard finds herself to be in as a member of a First Nation community. Ms. Bernard was born and raised on the Waycobah First Nation Reserve, and while she did live off the reserve for a period of time to pursue educational and career interests, she did purposely return to her home community to live close to family and to be with her own people. This is the community where she wants to raise her son. Her support of the community school system, where native language and culture were also taught and lived, was resolute. Waycobah is her home, and she is entitled to housing and other benefits which she would not receive if she lived off the reserve. Short of moving herself and her son away from Waycobah First Nation Reserve, Ms Bernard has had and still has little chance of finding similar employment to what she had as school secretary. I am satisfied that Ms. Bernard has, in the circumstances, attempted to mitigate her loss but that she has been, through no fault of her own, unable to find other employment.

ii. Re-instatement

The Commission and Ms. Bernard request re-instatement as a secretary doing work comparable to the work she was doing before her dismissal. It appears that counsel for the Commission and the complainant are mindful that Section 54(2) of the C.H.R. Act does not permit the removal of an individual from a position if that individual accepted employment in that position in good faith. There is only

one position as school secretary on the Waycobah First Nation Reserve and that position is occupied by Julianna Bernard. There is no evidence to suggest that Julianna Bernard did not accept that position in good faith. That being the case, then the question is whether Waycobah Band Council could accommodate an order that Ms. Bernard be reinstated to a similar position.

Waycobah Band Council is the major employer on the Waycobah First Nation Reserve. Ms. Bernard has applied for employment on the reserve on various occasions since her dismissal as school secretary but the positions were always given to others. I am of the opinion that Waycobah Band Council could find a comparable secretarial position for Ms. Bernard if given sufficient incentive, namely, that Ms. Bernard be continued to be paid a wage of \$325.00 per week from the date of this decision up to the date that an offer of employment is made to Ms. Bernard. This offer must be to a position which is commensurate with Ms. Bernard's skill, experience and training, and at a salary level not less than that which she received as school secretary.

With respect to reinstatement, I order that Waycobah Band Council provide to Ms. Bernard, at the first reasonable opportunity, a position as secretary similar in scope and responsibility to the one that she held as school secretary. Until commencement of such employment, Waycobah Band Council shall continue to pay to Ms. Bernard, from the date of this decision, a salary of \$325.00 per week. In the event that a reasonable offer of employment is not forthcoming within a reasonable period of time, or should any dispute arise concerning the terms of such an offer, I hereby retain jurisdiction to hear more evidence and to deal with the matter upon request of any or all of the parties.

iii. Special Compensation

Section 53(3) of the CHRA, prior to being amended in 1998, stated that if the Tribunal found that a person had engaged in a discriminatory practice willfully or recklessly, or if the victim of the discriminatory practice had suffered in respect of feelings or self-respect as a result of the practice, the Tribunal could order the person to pay compensation up to a maximum of \$5,000.00.

In this case, the manner in which the Board of Education proceeded to terminate Ms. Bernard from her employment because of perceived mental disability was, in my view, reckless. The incident which caused the Board to consider Ms. Bernard's dismissal was not one which arose in connection with her employment as the secretary at the elementary school. The haste with which reports of the incident were prepared, the numerous contacts made with outside agencies and individuals concerning the matter of Ms. Bernard's health, the failure to grant Ms. Bernard any kind of hearing prior to her dismissal and the speed with which the

decision to terminate her employment was made, all lead to the conclusion that her employer's conduct was reckless.

The issue of whether or not Ms. Bernard has suffered in respect of feelings or self-respect as a result of her dismissal on discriminatory grounds is even more clear. Ms. Bernard was an accomplished and respected member of this Mi'Kmaq community. She considered herself to be a Spiritual Leader, although not all members of the community viewed her as such. The fact that Ms. Bernard was dismissed on account of illness quickly became public knowledge. Ms. Bernard testified that her eight-year old son was taunted with statements like, "Your mother is crazy", and she eventually had to enroll him in the Waycobah village school. The fact that Ms. Bernard was questioned by Employment Insurance representatives about her alleged illness, and that she was requested to provide medical proof of her illness, or the lack of it, from her doctor, also caused her embarrassment.

Ms. Bernard said that the experience of losing her employment on the alleged ground of illness damaged her self-esteem and her self-respect. She has found it difficult to continue to practice Native Spirituality. The refusal of the Band Council to offer her any other employment underscores her feeling that certain people in this community consider her to be not well enough to hold a job. She no longer enjoys participating in Native Culture to the extent that she did before being labeled as mentally ill by her employer.

Taking into consideration both the recklessness of the employer's actions, the hurt feelings and the loss of self-respect suffered by Ms. Bernard, I order Waycobah Band Council to pay to Ms. Bernard \$5,000.00 as special compensation.

iv. Interest

It has been held in Canada (Armed Forces) v. Morgan (1991) 21 C.H.R.R. D/87 (F.C.A.) that tribunals were right in considering that their power to assure the victim adequate compensation entitled them to award interest. Interest is to be awarded only if it can be seen to be necessary to cover the loss (paragraph 18, at page D/94). I am of the opinion that Ms. Bernard should receive interest on the net wage loss from the time of her dismissal to the date of this decision. Since there is no evidence that Ms. Bernard was required to borrow funds to replace her net wage loss, it would appear that compensation could be satisfied by awarding interest at the rate which she might have received from time to time if the monies had been available for investment. In this regard, the interest rate shall be calculated using the Canada Savings Bond rate.

I have already pointed out that an amount will have to be remitted to the Receiver General by either Ms. Bernard or the Respondent as repayment for an overpayment of benefits. Since there does not appear to be any requirement to pay interest to the Receiver General, I direct that simple interest be paid to Ms. Bernard only on the difference between the salary she would have received, being \$325.00 per week, and the amount that she did receive as employment benefits from Employment Insurance, in respect of the 52 weeks following her termination. Thereafter, simple interest shall be payable on her net wage loss, being the difference between the salary she would have received, being \$325.00 per week, and the amount that she received as a welfare payment, being \$119.00 per week, until the date of this decision.

Having regard to the fluctuations in interest rates since October of 1995 and the fact that the wage loss was accumulated by weekly increments, I suggest that a fair method of calculating the interest accrued to date will be as follows:

For the wage loss during the 52 week period that Employment Insurance benefits were received, being from October 27, 1995 to October 25, 1996 (the E.I. period):

Net wage loss (E.I. period)	x	Average C.S.B. rate during the 52 week period	x	52 weeks
2				52

PLUS

Net wage loss (E.I. period)	x	Average C.S.B. rate during the last 135 weeks	x	135 weeks
				52

For the wage loss after the initial 52 week period being from October 26, 1996 to May 28, 1999 (the Welfare period):

Net wage loss (Welfare period)	x	Average C.S.B. rate during the last 135 weeks	x	135 weeks
2				52

No interest is awarded on the special compensation as the award cannot total more than \$5,000.00 in any event, including interest. See Canada (Attorney General) v. Morgan (1991), 21 C.H.R.R. D/87 and Canada (Attorney General) v. Hebert [1996] F.C.J. 1457.

v. *Apology*

Ms. Bernard has asked the Tribunal to order that Waycobah Board of Education provide her with an apology.

In cases where the conduct of the Respondent has been marked by insensitivity, Tribunals have ordered that apologies be provided. See Uzoaba v. Canada (Correctional Services) (1994), 26 C.H.R.R. D/361, Aff'd. [1995], 2 F.C. 569 and Swan v. Canada (Armed Forces) (1994), 25 C.H.R.R. D/312, varied (1995), 25 C.H.R.R. D/333 (F.C.T.D.)

I have previously canvassed the aggravating factors surrounding the dismissal of Ms. Bernard on the prohibited ground of discrimination under the heading of Special Compensation. I am of the view that Ms. Bernard's employer, now represented by the Chief and Council of the Waycobah First Nation, should provide Ms. Bernard with a written apology within 30 days of this decision, and I so order.

vi. *Rectification of the ROE*

Ms. Bernard has also requested rectification of the ROE for the reason that some future employer may request a copy of it. The copy of the ROE filed at the hearing specifically states that it is protected under the provisions of the *Privacy Act* and the *Access to Information Act*. I am of the opinion that it is not necessary to order rectification of this document. I do order, however, that a copy of this decision and of the written apology be placed on Ms. Bernard's personnel file in the Waycobah First Nation Band Office. Human Resources Development Canada will receive notice of the error in designation of the reason for issuing the

ROE when the overpayment of Employment Insurance benefits is remitted to the Receiver General.

vii. Legal Costs

Mr. Maclsaac represented the Complainant, Ms. Bernard at the hearing. The Commission was represented by Ms. Lalumiere. Mr. Maclsaac did a commendable job of presenting the evidence for his client. While Mr. Maclsaac and Ms. Lalumiere shared the duties of examination of the witnesses for the Complainant and the Commission, it was Mr. Maclsaac who cross-examined the witnesses for the Respondent. Mr. Maclsaac was instrumental in the presentation of the Complainant's case, including a well presented final argument. It is also well established that in connection with Human Rights Complaints, the interests represented by the Commission are not always the same as the interests of the Complainant. The Complainant, pursuant to Section 50(1) of the CHRA, has a right to be represented by his or her own counsel, and in cases where the Complainant succeeds costs should be awarded so as to not reduce the remedial effect of the monetary award granted.

I adopt the reasoning in Grover v. Canada (National Research Council) (1992), 18 C.H.R.R. D/1 at page D/55:

If the purpose of remedies is to fully and adequately compensate a complainant for the discriminatory practices, then surely the consequence of costs is part and parcel of a meaningful remedy for a successful complainant. We consider the representation by Mr. Bennett of Dr. Grover, to be totally necessary, and an extremely helpful part of the presentation of this total case. We are not in any way suggesting that the Commission case was not handled in a totally satisfactory manner represented throughout by its counsel, Mr. Engleman. Indeed, his presentation was equally of assistance to the Tribunal. We would accordingly, therefore, award Mr. Grover's counsel his costs of this proceeding to be assessed on the Federal Court Scale.

The Respondent shall pay to Ms. Bernard the costs of her counsel on the Federal Court Scale.

VIII. OTHER ISSUES

i) Jurisdiction

The Respondent raised the issue in its Statement of Particulars and Pre-Hearing Memorandum of Law that the Canadian Human Rights Tribunal lacks jurisdiction to

adjudicate this matter because Section 67 of the *Canadian Human Rights Act* states: "Nothing in this Act affects any provision of the Indian Act or a provision made under or pursuant to that Act."

The application of Section 67 to decisions made by a Band Council was canvassed in Shubenacadie Indian Band v. Canadian Human Rights Commission F.C.T.D. T-2358-95, October 30, 1997, which was a case where a Canadian Human Rights Tribunal found that the Chief and Band Council had discriminated against the complainants on account of race and marital status by denying them social assistance payments because they were non-Indian spouses of Indian band members. The Court states, at page 17:

I do not think that the decision in this case is one contemplated by section 67 of the *Canadian Human Rights Act*. While there is no doubt that a decision was made by the Band Council, and it may well have been made under the *Indian Band Council Procedure Regulations*, there is no evidence to suggest that the decision was made pursuant to a provision of the *Indian Act*. While undoubtedly section 67 recognizes that certain provisions of the *Indian Act* and Regulations may conflict with the *Canadian Human Rights Act* and in such cases the *Indian Act* and regulations will prevail, I do not think section 67 is to be interpreted as taking out of the scope of the *Canadian Human Rights Act* all decisions of Indian Band Councils provided they are made under the *Indian Band Council Procedure Regulations*. If it was Parliament's intention to immunize all decisions of Indian band councils from overview by the Human Rights Commission, Parliament would have expressly so provided rather than enacting section 67. Section 67 immunizes decisions authorized by the *Indian Act* and Regulations, but not all decisions made by Indian band councils. I think that this conclusion is consistent with the dicta in *Re Desjarlais*. Section 67 therefore does not assist the applicant in this case.

While Section 114(2) of the *Indian Act* authorizes the Minister to establish, operate and maintain schools for Indian children, I find it difficult to draw any substantive connection between this section of the *Indian Act* and the decision of the Waycobah Board of Education to terminate the employment of Ms. Bernard as school secretary. This was not a decision made "under or pursuant to the *Indian Act*". The Respondent's objection on the issue of jurisdiction is rejected.

ii) Just Cause

The Respondent took the position at the hearing of this complaint that perceived mental illness played no part in its decision to terminate Ms. Bernard's employment as school secretary. Instead, the Respondent argued that Ms. Bernard's conduct at the Waycobah

Junior/Senior High School, which I have referred to as the October 26 incident, provided just cause for her immediate termination. The Respondent claimed that Ms. Bernard's conduct during this "religious experience" frightened the students and jeopardized the school system. The Respondent says it had no choice but to terminate her employment.

In view of the fact that I have already determined that perceived mental illness played a significant role in the decision of the Waycobah Board of Education to terminate Ms. Bernard, an act of discrimination in relation to her employment, it is not necessary for me to decide whether or not the employee's actions were sufficient to justify her dismissal for just cause. However, it was quite apparent that the parties considered this to be an important issue and the evidence presented at the hearing reflected the concerns of both the Complainant and the Respondent with regard to the propriety of the presentation made by Ms. Bernard to the Junior/Senior High School students.

While there is some conflict in the evidence as to what exactly transpired during the course of the presentation in terms of what was said by Ms. Bernard, what she did, and the reaction of the students, it is clear that the effect of her presentation was quite traumatic for at least some of the students and upsetting even to the adults who were present. In defence of her presentation, the Complainant called as a witness, Noel Raymond Knockwood, who is an expert in Mi'Kmaq history, native spirituality and native culture. Mr. Knockwood was present when the Complainant testified about the content of her presentation to the students, and he was generally in agreement that Ms. Bernard had correctly described and explained many interesting aspects of native spirituality and culture. However, Mr. Knockwood was also of the opinion that the students were not properly prepared for the kind of experience they were going to be going through. The result was inappropriate behaviour by the students and possibly an over-reaction by Ms. Bernard. Ms. Bernard was not in control of the students and their conduct put her on the defensive. This was not a good experience for either the presenter or her audience.

I am of the opinion that the school principal and the planners of this event did not adequately prepare either the presenters or the students and it was therefore unfair to put the blame solely on Ms. Bernard for the failure of her presentation. For these reasons, I would have concluded that immediate termination would not have been justified, especially in view of the fact that Ms. Bernard was not acting in her capacity as school secretary when the inappropriate conduct was alleged to have taken place. While a reprimand of some sort might have been in order, I do not consider it necessary at this point, considering what subsequently transpired, to impose any kind of penalty or punishment upon Ms. Bernard, or to make any definitive statement as to what course of action might have been appropriate. Ms. Bernard has, quite obviously, suffered enough as a result of any indiscretions committed by her in relation to the presentation which she made to the students of the Waycobah Junior/Senior High School on October 26, 1995.

iii) Successor Employer

The Respondent in this case is "Waycobah Board of Education". The evidence presented at the hearing established that Waycobah Board of Education was a creation of the Waycobah Band Council. The Board of Education consisted of the Chief, the six Band councillors and two or three people elected from the community at large. The documentary evidence submitted during the course of the hearing refers to the employer as "Waycobah Board of Education", including the ROE issued to Ms. Bernard upon her termination.

During the hearing, it was also revealed that the Waycobah Board of Education no longer exists as such since 1997 but that the administration of the community school has been assumed by the Chief and six Band councillors, without any representatives from the community at large.

Neither the Complainant nor the Commission have requested that the Complaint be amended to name the Chief and Band Council of Waycobah First Nation as Respondent. Had such an application been made, I would have granted it. However, I am also satisfied that the participation by the Chief and Band Council of Waycobah First Nation estops them from raising the issue of the disestablishment of the former employer at the end of the hearing process.

In Bouvier v. Metro Express (1992), 17 C.H.R.R. D/313, the respondent employer, against whom the complaint was lodged, was subsequently sold to another company. The Tribunal found that it was without jurisdiction to make a successor employer liable for discriminatory acts committed by the previous employer. The Tribunal also went on to say, however, that this did not mean that a successor employer would never be liable for the discriminatory acts committed by the employees of the previous employer. For example, if the sale of the business was a sham transaction between two closely related companies, such as companies with common directors or shareholders, the use of such subterfuge, designed to avoid the effect of the *Canadian Human Rights Act*, would not exempt a successor employer from liability.

The change in the governance of the Waycobah First Nation school system in 1997 was not related in any way to this Complaint and I would not suggest anything but legitimate reasons for the change in the governance structure. However, the only difference between the Waycobah Board of Education that existed until 1997 and the current administration of the Waycobah education system, namely the Chief and Band Council of Waycobah First Nation, is the two or three persons who were elected at large. Waycobah Board of Education was, for all intents and purposes, a committee of the Chief and Band Council administration. The disbanding of this committee does not absolve the Chief and Band Council from responsibility for its actions, and I therefore find that all remedies which are ordered hereunder to be binding upon the present Chief and Band Council of Waycobah First Nation.

IX. ORDER:

For the reasons stated, I declare that Ms. Bernard's rights under the *Canadian Human Rights Act* have been contravened by the Respondent, and order:

- i. that Waycobah Board of Education or its successor, the Chief and Band Council of Waycobah First Nation, pay to Ms. Bernard the sum of \$44,710.00, being her net wage loss to May 28, 1999;
- ii. that Waycobah Board of Education or its successor, the Chief and Band Council of Waycobah first Nation, provide to Ms. Bernard, at the first reasonable opportunity, a position as secretary similar in scope and responsibility to the one she held as school secretary, and in the interim, pay to Ms. Bernard the sum of \$325.00 per week; and for the purpose of ensuring compliance with this provision the Tribunal shall continue to be seized of this matter;
- iii. that Waycobah Board of Education or its successor, the Chief and Band Council of Waycobah First Nation, pay to Ms. Bernard the sum of \$5,000.00 as special compensation;
- iv. that interest be paid on the net lost wages at the Canada Savings Bond rate in accordance with the formula described in this decision;
- v. that Waycobah Board of Education or its successor, the Chief and Band Council of Waycobah First Nation provide Ms. Bernard with a written apology within 30 days of this decision;
- vi. that a copy of this decision be placed in Ms. Bernard's personnel file in the Waycobah First Nation Band Office;
- vii. that Waycobah Board of Education or its successor, the Chief and Band Council of Waycobah First Nation, pay the costs of Ms. Bernard's legal counsel on the Federal Court Scale.

DATED at Estevan, Saskatchewan, this 28th day of May, 1999.

**GUY
A.
CHIC
OINE**