

Canadian Human  
Rights Tribunal



Tribunal canadien  
des droits de la personne

**Between:**

**Marlo Nastiuk**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Couchiching First Nation**

**- and -**

**Thomas Sinclair**

**Respondents**

**Decision**

**Member:** Wallace G. Craig

**Date:** June 8, 2012

**Citation:** 2012 CHRT 12

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## **I. Background**

[1] This case involves three complaints of Marlo Nastiuk (Ms. Nastiuk), a residential worker employed by the Respondent Couchiching First Nation (CFN) at its Giizhikaandag Healing Centre (GHC) in Fort Frances, Ontario, under the supervision and direction of the Respondent Thomas Sinclair (Mr. Sinclair), Executive Director of GHC.

[2] On May 1, 2009, in accordance with the provisions of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) (*CHRA*), the Canadian Human Rights Commission (Commission) requested that the Canadian Human Rights Tribunal (Tribunal) institute an inquiry into complaint 20060869, received July 25, 2006, of Ms. Nastiuk against CFN and complaint 20061038 against Mr. Sinclair, alleging discrimination relating to sexual harassment in the workplace pursuant to s. 14 of the *CHRA* said to have occurred between March 2005 and July 2006.

[3] On September 15, 2009, the Commission made a second request for inquiry into a third complaint (20080128), received March 31, 2008, of Ms. Nastiuk against CFN of retaliation under s. 14.1 of the *CHRA*, alleged to have occurred “August, 16, 2006 and ongoing”.

### **A. Scope of the Inquiry**

[4] On March 1, 2010, Member Kerry Lynne D. Findlay Q.C. commenced an inquiry into the three complaints filed by Ms. Nastiuk. The inquiry continued March 2-5, May 31-June 4, and June 14-18 in Fort Frances, Ontario.

[5] In discussions at the beginning of the hearing Member Findlay explained the scope of the inquiry:

The Chairperson: Now one further thing Ms. Nastiuk, are you clear that we're here to deal with the complaints to do with sexual harassment and retaliation and we're not dealing with disability?

Ms. Nastiuk: Yes, I guess. I understand, although to me, those – that perceived disability, perceived orientation are part of it, but, yeah, I understand.

The Chairperson: Okay, because there's already been a ruling of the Tribunal before today that that's what we're confining ourselves to all right?

Ms. Nastiuk: Yes.

Transcript: page 28, lines 18-25; page 29, lines 1-6.

[6] Ms. Nastiuk and Mr. Sinclair were without counsel during the inquiry, CFN was represented by Counsel Chantelle Bryson (Ms. Bryson). The parties' final submissions and Ms. Nastiuk's reply to the Respondents' final submissions were all received by the Tribunal by August 11, 2010.

## **B. Recusal of Adjudicator**

[7] On July 6, 2011, following her resignation from the Tribunal due to her recent election as a Member of Parliament, Member Findlay recused herself from the case, without rendering a decision. The case was therefore reassigned to the Tribunal's Vice-Chairperson, Susheel Gupta.

[8] Following his assignment, the Vice-Chairperson presented the parties with two options for proceeding with the file:

- i. To set dates for the holding of an entirely new hearing with the recalling of witnesses, submission of documentary evidence and presentation of both oral and written arguments. And then, to allow the Tribunal's process to proceed to a final decision. Such a Hearing would be presided over by the Vice-Chairperson.

- ii. If the parties consent, without delay, to allow the Vice-Chairperson and Full-Time Member of the Tribunal to listen to all of the Hearing recordings and thoroughly review all documentary material submitted to the Tribunal that is part of the Hearing's Record of the Case and allow the Tribunal to render a final decision.

[9] By November 15, 2011, the Tribunal had received a response from all parties who, for reasons of efficiency and cost, selected option ii. However, due to additional responsibilities at the Tribunal and personal matters at home, the Vice-Chairperson decided that for reasons of efficiency and expediency, it would be in the best interests of the parties if he resigned from the case. The Vice-Chairperson resigned from the case on March 9, 2012, and remitted the matter back to Chairperson Shirish Chotalia for reassignment. On March 13, 2012, Chairperson Shirish Chotalia assigned the case to Member Wallace Gilby Craig.

### **C. Tribunal Member Wallace Gilby Craig**

[10] On March 13, 2012, I received a transcript of all the evidence given by all witnesses who appeared either in person or by teleconference before Member Findlay. In addition, I received copies of all exhibits that had been received into evidence, and the written arguments tendered by the parties in the aftermath of the Inquiry.

[11] Between March 13 and April 30, 2012, I read the 3500-page transcript of the proceedings, scrutinized the relevant documentary evidence that had been received by Member Findlay, considered the written arguments submitted by the parties, and rendered this decision.

## **II. *Prima Facie* Evidence of the Complainant**

[12] I refer first to the evidence of Ms. Gail Roach-Leforte, a witness for the Complainant, because her testimony describes the workplace at the GHC and the circumstances surrounding the Complainant's allegations of discrimination and retaliation by the Respondents.

[13] Ms. Roach-Leforte testified that she had worked in child welfare for 16 years in a variety of positions with several organizations: as a case aid, residential care worker, case manager with sexually exploited youths, specialized foster care, college instructor, and that she is currently a social worker. Ms. Roach-Leforte began work at GHC (CFN's residential treatment centre) in late 2004 as an on-call casual employee doing one-on-one work with youths in residence at the treatment centre.

[14] Douglas Broman was also called as a witness by Ms. Nastiuk, and testified that in 2005 he worked at CFN's treatment centre dealing with difficult youths on a one-to-one basis and that in early 2006 he was appointed acting case manager.

#### **A. The GHC Program**

[15] The Giizhikaandag Healing Centre (GHC) is operated by CFN, it is a residential treatment centre for adolescent sexual offenders. It provides or arranges for therapy, psychiatric treatment, medical services, educational training and referrals to community services.

[16] In December 2004, GHC's interim executive director, Estelle Simard, informed Ms. Roach-Leforte that the treatment program was failing and that she was resigning. Having just become aware of Ms. Roach-Leforte's resume, she suggested that Ms. Roach-Leforte ask CFN's Chief to employ Ms. Roach-Leforte as manager of the programs at GHC.

[17] When asked by Ms. Bryson, CFN's counsel, to provide details that would explain why GHC's program was on the verge of collapse in 2004 Ms. Roach-Leforte stated that the provincial ministry had cited 33 violations relating to recordkeeping, issues of health, safety, food not in accord with menus, and broken lights. With respect to work-intensive violations or non-compliance, she testified that the ministry was dissatisfied with case management, reports not being signed or with content appearing to have been cut and pasted, and that they wanted a service delivery manual developed.



[18] Ms. Roach-Leforte and three others therefore went to the Chief and Council with the proposal that she take over the program. The Chief and Council agreed to give her a number of months to try and redevelop and turn the program around. Ms. Roach-Leforte informed them that she did not have executive director experience and would need guidance regarding the financial and executive duties of her new post.

[19] A few weeks later, in either late December 2004, or early January 2005, Chief McPherson called Ms. Roach-Leforte and told her that she would be employed to manage the program, and that CFN had obtained the services of a consultant, Mr. Sinclair, who would work with her for six weeks to possibly three months. Ms. Roach-Leforte accepted the appointment, expecting that she would receive assistance in learning finance and executive duties. In her discussions with the Chief concerning the consultant and her role, it was agreed that Ms. Roach-Leforte would be GHC's program manager. It was her expectation that in time she would be appointed Executive Director. However, by the spring of 2005, Mr. Sinclair's role as a consultant had ended and it became apparent to all GHC employees, including Ms. Roach-Leforte and Ms. Nastiuk, that he had become the Executive Director of GHC, in charge of the entire operation and answerable only to the Band Manager, and through the Band Manager to the Chief and Council.

[20] When asked by CFN's counsel to explain her duties and those of Mr. Sinclair, Ms. Roach-Leforte stated they were both involved in clearly defining the duties of workers at GHC, including the program manager, case manager, and team leaders. However, it is apparent that Ms. Roach-Leforte had to salvage and manage the existing program, while at the same time working with Mr. Sinclair to reorganize the program in a way that would satisfy CFN, provincial authorities and a federal funding agency.

## **B. Hiring Ms. Nastiuk as a Full-Time Employee**

[21] On September 10<sup>th</sup>, 2004, one month after graduating from the University of Manitoba, Ms. Nastiuk began working at GHC. Ms. Nastiuk's Bachelor of Arts degree, for a minor in

psychology and major in sociology and criminology, was the hard-earned result of an eight-year struggle complicated with health problems, debilitating effects fibromyalgia, narcolepsy, and a prolapsed disk. Ms. Nastiuk worked as a casual relief counselor at GHC until February 2005.

[22] In early January 2005, Ms. Roach-Leforte called a meeting of GHC staff. As she put it, she gave them a pep-talk to boost their morale. She told them that the ministerial review was behind them, she didn't want them to lose their jobs, they were a team which needed to recommit itself, and that a consultant was coming and this would assist them in becoming a more professional organization.

[23] Ms. Roach-Leforte suggested to Mr. Sinclair that Ms. Nastiuk be assigned to work with them in redeveloping a new program:

...Tom and I ... the first week ... we spent many hours, probably 10, 12-hour days ...I understood residential care, I have done that work for several years, but – and I knew how to operate a computer and I knew how to ... do documents, but I wasn't very good at it, and I knew that you were, meaning the complainant, and so I had suggested to Tom that I really needed help there and I thought it was a -- misuse of your skill and your education, and I thought we should have you come over and assist me with a lot of those redevelopment pieces.

Transcript: page 976, lines 12-25; page 977, line 1.

...I don't recall an interview, other than to have you (Ms. Nastiuk) come over. I think they just called you over to the building and talked to you about, you know, do you think you could do this, and you agreed that you could and I was relieved. All I remember is that I was going to get some help in a big, big task.

Transcript: page 979, lines 3-10, 24-25; page 980, lines 1-10.

[24] Ms. Nastiuk's full-time employment was accepted by Mr. Sinclair and Ms. Nastiuk's described it in her evidence as intense work for the first few weeks. It was Ms. Nastiuk's first social services job with a First Nation. Ms. Roach-Leforte also testified that the working hours were extremely long for the three of them.

Ms. Bryson: So what were you doing together, all of you?

Ms. Roach-Leforte: A lot of discussion. I mean, I wasn't there the long hours that I was working, I wasn't always in that building. I did have other duties.

I had to be at the other program – like, right on site, and we met lots with the staff as well. I mean morale was just the lowest you could ever get, so I know a big part of what we did was to try to have a lot of team meetings and try to reassure them that – you know, the program was done, there's no doubt about it.

But I think we were trying to instill in them a hope that it was being resurrected because I think it was.

Ms. Bryson: And the program still exists, right?

Ms. Roach-Leforte: It still exists.

Transcript: page 1119, lines 1-23.

[25] Ms. Roach-Leforte described in particular the chaos of this early time, working 10 to 12-hour days in a boardroom:

Throughout that period we didn't have an office, we spent most of our time -- well, we had papers all across the board table and in Mr. Sinclair's office and we - - just kept spreading out our papers and our piles of different tasks.

Transcript: page 981, lines 14-19.

### **C. Office Relocation**

[26] In late March 2005, after discussing the impracticability of their situation with Ms. Nastiuk, Ms. Roach-Leforte suggested to Mr. Sinclair, and claims he agreed, that she and Ms. Nastiuk be moved from the GHC's "east" building to a vacant office in the "middle" building. Ms. Roach-Leforte set up an office expecting Ms. Nastiuk to be moved so they might

continue to work together on the redevelopment of the GHC program. However, Ms. Nastiuk was not moved with her, but rather was assigned to Mr. Sinclair's office, where he had a table and a computer set up for her. In his testimony, Mr. Sinclair asserted that he had no computer skills and that it was critical that he have someone working with him who was skilled.

Ms. Nastiuk asked Ms. Roach-Leforte: Where did I end up located?

You didn't get to move over, and – but I noticed – I just noticed, you know, patterns happening for you. At one point you had come to my office and you kind of flopped on the chair and said, oh, I just need to get away from the craziness for a while or his craziness for a while. And it was really hard for us because we were – we just weren't being able to get the work done that we needed to do together.

Transcript: page 987, lines 11-20.

[27] Ms. Nastiuk testified that in those first weeks she began to feel uncomfortable with Mr. Sinclair because of his queries into her background:

But then he started making comments, like, oh, I dated his wife, when were standing outside having a cigarette, and men would pull up, or talking about different people or, oh, I dated his partner.

And then he was talking about how women liked him, and it just always struck me, as I didn't really know him, I was only an on-call staff, part-time staff, and it just kind of seemed inappropriate to me. And I didn't engage – or I didn't really comment to it. I just kind of cringed back.

Transcript: page 150, lines 5-16.

[28] When Ms. Nastiuk described her frustration with being assigned to Mr. Sinclair's office:

Other staff were coming and going and doing what they wanted, and I just always seemed to have to be right there and answerable most of the time during the day. Which, I mean, in any workplace, I guess that – you know, it's kind of standard, but the way everybody else could have more freedoms and not have to answer to him the same way kind of bothered me.

...

And then one night he asked me to work late, and we were in the office until 10:00 that night. Now, I'm thinking that was between March or April. ...but I'm not absolutely certain about that because there were so many long days that you couldn't really look back and figure out exactly what day that was. Around 7 – between 7 and 8 in the evening ...I went to put a document on his desk ... As I'm sitting down, he said, oh, I can smell your hair. And as I was sitting down, I was just like, what was that? And I was already uncomfortable enough. And it wasn't like ...typical ...like someone trying to touch you or talk about details of their sexual life – like intimate details of their sexual life. It wasn't that kind of thing it was just – I really don't know what to make of that and how to term that.

But then it went on, and I just – I sat down and started working. And about 20 minutes later, it had been really quiet and I was just trying to work, and then all of a sudden he took his pen and he pitched it on the table and he said something to the effect, you know, Marlo, I've been in this business for 20 years or so, ...and I've never not been able to figure anyone out and I can't figure you out.

...I know I commented something like, well, I'm pretty much -- well you can pretty much take me at face value ...

Transcript: page 153, line 25; page 154, lines 1-7, 17-25; page 156, lines 14-25; page 157, lines 1-16.

#### **D. The “Miss Me?” Incident**

[29] Ms. Roach-Leforte recalled another occasion after moving to the middle building when Ms. Nastiuk had come to speak with her, and then Mr. Sinclair “barged” into her office without knocking, startling Ms. Nastiuk, who asked Mr. Sinclair “Miss me?”. Shortly afterwards Ms. Nastiuk left to return to her office. Ms. Roach-Leforte testified that she was concerned that Ms. Nastiuk appeared anxious and disturbed.

[30] Ms. Nastiuk also testified about the “Miss me?” incident. She explained that some time later, when Mr. Sinclair had taken her for a drive outside the town limits, he started to talk about the “Miss me?” comment. Ms. Nastiuk testified:

...immediately in my head, I knew where he might be going with that, or thought that I knew where he might be going with that. And I just, no, you know, it meant nothing. It's just I say that, you know to my parent's dogs, it's just something – or the girls at work. We just say that if we haven't seen each other for a while. And, you know, if you work in isolation, quite often because of separation and the location of the different office and buildings.

The Chairperson: Was he suggesting that it did mean something?

Well, he referred to the miss me comment, and I'm like, yeah, but it didn't mean anything. Like, from when I was in Gail's office in June.

And he kept, like, no, but you're not listening to me, and I'm like, it didn't mean anything and somewhere in there, he threw in a comment that he had an interest – he found me attractive and he had an interest in me as a woman or a female. But I – I really – I think – I just know I shut that down. I didn't want to hear it, I didn't want to have to deal with that, I didn't want to have to tell him directly. I am just – don't do that because I was really worried about my income.

I believe I was still -- I wasn't a salary staff yet. ...

...it just felt really horrible. It was very horrible.

Transcript: page 179, lines 23-25; page 180, lines 1-25; page 181, lines 1-4, 15-16.

## **E. Promoting Ms. Nastiuk**

[31] Ms. Roach-Leforte testified that case management duties at GHC had been carried out by a variety of staff, that at one time the duties were assigned to all care workers, another time they were given to team leaders. Within the redevelopment of GHC's program, the case manager was tasked with described duties. Ms. Roach-Leforte said it was her hope that GHC would have one case manager for all the youths in treatment:

... those duties would be more of a social work type responsibility. The residential care workers would work with the kids, they would document things. They would discuss with the case manager concerns, whether they were every day concerns, whether they were behaviour concerns, the clinician should be

consulting with the case manager about things that were happening in terms of the clinical work that was being done with their kids.”

Transcript: page 1010, lines 6-15.

[32] Ms. Nastiuk and another staff member applied for the new position of Case Manager, they were interviewed by Mr. Sinclair and Barbara Delsig. Ms. Nastiuk was selected and appointed Case Manager on July 20, 2005.

[33] Ms. Nastiuk described the nature of her work when she was formally appointed GHC’s Case Manager:

So I just started doing a lot of research on the internet and putting the pieces together. ... Mr. Sinclair asked me to develop an accountable case-management system. I met with Paula Isler (ph). She was the resident with the Ministry of Community and Social Services. She came in for a review about that time. She gave me what she called her Bible, her pieces from the Child and Family Services Act and she said this is my Bible. This is what guides what I do, this is what will guide what you do, and we had quite a discussion about that.

Transcript: page 186, lines 13-25.

So based on that, that helped me develop the system that I had, and I think that Mr. Broman felt that there was a – system of case management that you could – someone else should be able to step into and follow.

So I struggled –well, I can’t say, well, I really struggled. It was exciting work, but it took a lot of time, a lot of energy. You’ve got the regular case management duties, you’ve got a lot of time spent with Mr. Sinclair, and Gail, bless her heart, she’s a real talker too. So it was a lot of time spent listening to other people talk about work accomplishments. Or what – Gail particularly, something that she was really proud of that she dealt with during the day or issues, and so – yeah, my day was a long day, and the work was – it just seemed like I was accountable for a lot of the treatment planning also at the time.

So while I was having to do all the administrative, I was also having to spend enough time with the boys to kind of gauge what was going on with them, and I think I did a pretty fair job juggling all of these different tasks. And no training on

case management, but I believe I learned, but there was still pieces for me that were missing that I couldn't get the help with or assistance or guidance.

I guess a comment to make is, like, this was – it was all encompassing. I had my job and it just seemed when I went home, I still had my – something related to work. There was a lot – I felt a lot of expectation and pressure put on me. I wanted to do a good job, but basically I'm pretty much a self-starter. I work along independently very well.

Transcript: page 187, lines 1-19; page 188, lines 5-22.

[34] Ms. Nastiuk asked Ms. Roach-Leforte what her transition “looked like within the whole of GHC.”

Ms. Roach-Leforte: ...from an administrative perspective your transition was very positive in that you had the skills to develop things like that, we were getting feedback from the ministry that that piece was coming along really well, she liked the design. She liked a lot of the changes that we were making. ... In terms of the team though – there was some negative feelings about you being given the position. You were the more qualified, you had a degree, Joe had a diploma, but she had been at the program longer, so I think there was just – there was a lot of bitterness I think initially about that. But, like a lot of things, I know from my perspective I really always tried to work on building bridges and so wherever there were negative comments I would try to bring team – you know, team members together and sort through problems. One of the other problems though was because of the change to the case management style, people were really upset about that.

Transcript: page 1013, lines 11-25; page 1014, lines 1-11.

[35] Ms. Roach-Leforte described the work environment as being more positive during the early days of working on the development of the new program. When asked by CFN's counsel how long the staff lasted, however, she stated that by the summer of 2005, things had already begun to deteriorate.

And it lasted for – well, it was just kind of up and down because I'm not saying it's Mr. Sinclair's fault, but when Mr. Sinclair came that added a whole other mix, it became a change to the program, and then when Ms. Nastiuk was brought over to the case management – or to the management part, that brought another



change. And just – I mean, changes started happening, but there started to be in the summertime, just this suspicion that was creeping in with people. Promises were being made about little – you know, pieces of the program and then they wouldn't happen, or they would get started and then get kiboshed or – you know, the role was, you know, really, really (inaudible) and scheduling, oh my God, what a nightmare, so things started to go downhill towards summer I think.

Transcript: page 1136, lines 12-25; page 1137, lines 1-5.

#### **F. Interactions Between Ms. Nastiuk and Mr. Sinclair During the Summer of 2005**

[36] Ms. Nastiuk testified to some of the tension that arose between herself and the other staff. This led Mr. Sinclair to act as an intermediary, a situation Ms. Nastiuk said she found particularly frustrating.

Oh, yes. Yeah, that – that was pretty much at the inception of case management. I was aware that there were issues with staff, but my understanding, and I don't feel like I'm -- my assessment skills are pretty good, Mr. Sinclair used to say that, and my current boss says that. And my feeling was with staff – some of the issues with staff, there was a lot of resentment that some of the old staff like Brian, Nicky, they were resentful that some of us on-call, part-time staff was moving up and they were down on the floor. And they had kind of hoped that Jill would get the case manager job and there was just – or Krista, Brian's sister, she was really resentful that I was working upstairs with Mr. Sinclair and Gail.

So there – that's, to me, how a lot of that got started, and somewhere in there, I don't know how that got turned around. There might have been some thoughts on my own. I remember I used to make the comment, because it – it used to bother them so much, so I would try to say, well, it's basically a good fit because I've gained a lot of skill and knowledge through my education.

It turned out that was absolutely the worst thing I could have said because it put up even more of a barrier. And between, you know, all of that that came up, that I couldn't go to front line staff, that I couldn't go to the shifter – shift supervisor or team supervisor, whatever. I had to go directly to him for reports I should have got from front line staff, from the shift supervisor or team leaders or whatever they were called at the time.

Information on how the progress of the boys, how the groups were doing, anything like that it had to be passed through Mr. Sinclair. Oh, another reason to have to go to his office, and it was very frustrating. ...That would have been the first few days in July when I was told the position was mine, July '05.

Transcript: page 190, lines 24-25; page 191, lines 1-25; page 192, lines 1-13, 22-24.

[37] Ms. Nastiuk testified with a great deal of intensity concerning her work at GHC, particularly the difficulties she experienced with Mr. Sinclair resulting from what she perceived as his infatuation with her:

And the type of attention and intensity of Mr. Sinclair's focus, I had to deal with that and I -- I just knew. Like, at some point, okay, you have to take the blinders off, you have to stop minimizing, you have to stop denying, deflecting, rationalizing -- well, I can't say denying but rationalizing.

I had to do something because I started getting concerned based on the behaviours that I saw of Mr. Sinclair that he was the one in control, he was used to getting what he wanted.

How do I deal with that and maintain my employment and try to put up -- try to get it to stop, so finally -- it took me a little while. I was pretty anxious, but I finally approached Gail Roach-Laforte about it, and she was the program manager for Giizhikaandag. And, you know, I -- I told her that -- I told her how he just seemed to think that there was a bond of friendship, and I didn't really get where that was coming from (Inaudible) because I didn't feel it, and I just -- he's stopping at my house and it -- I did not want it.

Like, it just seemed like I can't -- I couldn't escape work, at home, than it was -- if felt -- I'm not sure what's the right word for it. It was frightening. It was really frightening because -- and also to say -- just prior to that, I had just gotten off of several years of Ontario Disability Support. I had left (Inaudible) to income housing. I felt very, very, vulnerable.

And I kind of just said to Gail, like, I believe that he's interested in me -- as more than an employee, and that when he realizes that that's not what I want and I -- like I wasn't giving him any indication that that was what I wanted, nothing. For me that personal space -- how to say it -- I was afraid that if I had to tell him straight out, because it didn't seem like he was getting it otherwise that that would put my employment in jeopardy.

So I – you know, I just continued to put up that – cringe, try to avoid, put up the cold wall, not engage, not be emotional, respond, that he’s eventually just get over it and move on.

Transcript: page 188, lines 22-25; page 189, lines 1-25; page 190, lines 1-19.

[38] When Ms. Nastiuk recalled the date of July 20, 2005 as the date she “technically” became a full-salaried Case Manager, she immediately made a garbled statement which may be attributed to stress and confusion on her part in giving evidence without the assistance and guidance of a competent barrister:

It just seemed like all of a sudden – like, I mean, it was kind of just – it just seemed like all of a sudden it was like he just – I guess the way to explain it is, like, he swooped and it was like I said this to him and not to the – just to the position.

[39] Ms. Nastiuk then testified:

And I don’t mean he was asking me for sexual favours, or sexual favours or else, that type of thing, it was just like all of a sudden he just thought we were, like – like just there was a bond or – it was more than like an executive director/supervisor/case manager relationship.

Transcript: page 183, lines 6-18.

[40] During her examination of Ms. Roach-Leforte, Ms. Nastiuk asked whether she had expressed concerns to her, Ms. Roach-Leforte replied:

...Yes, you did. That was my role. I was your supervisor, or I thought I was your supervisor, and that’s how I think I worked with all of the team. The team came to me all the time with concerns. ...Yes you did... but I expected that. I was seeing things as I stated earlier, about the incident in my office ...there were things that I was seeing. You see it and you kind of put it on the back burner, but then when you came to me with your concerns I did expect it. ... I didn’t expect necessarily the content of what you complained to me about.

Transcript: page 1015, lines 5-24.

The Chairperson: And what was that content?

Well, I know that Ms. Nastiuk was very uncomfortable even bringing this up to me and she – she really hemmed and hawed and she hinted at things at first. She kind of had asked me questions. I think she was sort of gauging maybe number one, if I was – if I was actually going to listen to her. Number two, if -- if this was just a natural thing this happened to everybody.

For instance she had asked if Mr. Sinclair ever asked me personal questions about things that I experienced and I said to her, yeah, and I shared things. I mean, they're nothing so personal, I would only share something with him that I would publish anyway.

And, you know, those questions kind of came at me, I said why, what's going on? And again, with some hemming and hawing she talked about how uncomfortable she felt. I don't recall every little detail, but the gist of it was there were things happening to you that you were very uncomfortable with, you didn't like, you felt you didn't know what to do about. And as I hear, you know some of the details, I remember just saying to you, you know, you need to do something about this you were, I guess you were coming to me but I had suggested, I think, that you go to the Chief or Chief and Council about it.

The Chairperson: When was that conversation?

That was in the summer. In July or August of '05.

There were several discussions that took place over – we sometimes discussed them at work, we sometimes – I know that we – you and I had gone out to the lake one time to be away from the program and you had talked about some concerns ...

The Chairperson: Did she give you any specifics at that time?

Yeah, she talked about Mr. Sinclair, you know, coming to her house, she talked about, you know, the late hours. I saw a lot of things that I wasn't comfortable with.

The Chairperson: Like what?

We were having a staff meeting one day and I was in the middle building, it was in the summer, and – and Mr. Sinclair had called me over to the – to his building

to review agenda notes before a staff meeting, and so when I went over, Ms. Nastiuk was in his office and she was on her knees fixing the hem on his pants and – oh man I can still see that. It was disturbing to me to see that, and –

The Chairperson: What do you mean by “fixing”?

She was on her knees adjusting the hem, and then he kind of turned to me and laughed and said, you know, they didn’t feel comfortable, they felt like they were too long. And then he made her do that again because he said, oh, now I think they’re too short or something.

And I didn’t – I didn’t say anything at the time, I just – it was very disturbing. And when I asked Marlo later, Ms. Nastiuk later, what was that? Why were you doing that? Why did you do that? And she just said I felt like I had to. So I said – I think I told her that it fits into a pattern that she’s been talking about, and it was just more, you know, part of a discussion that – several discussions that we had had. And in different way I had suggested to her, you know, go to Chief and Council, this is harassment, you know, maybe you should complain to the Human Rights Commission, this isn’t right, maybe you should go to the Labour Board.

But I also say that she was – she felt intimidated. I guess, you know, personally, I would never fudge reports and I would never get on my hands and knees to fix somebody’s hem so that to me is ...it just wasn’t okay.

Transcript: pages 1016 to 1020.

[41] When asked by Ms. Nastiuk about Mr. Sinclair’s behaviour away from GHC, Ms. Roach-Leforte testified:

A lot of (your) concerns were around him coming to your home unannounced in the evening for non-work related reasons. In fact, I remember driving by your home, not right by it, but on Crow Avenue and seeing his truck there, and I had asked you about it the next day, and you told me that he showed up and Tiffany, your daughter, was there and you said to her or whispered to her, you know, stay here.

Again, though every time you talked about things like that I said – I’d ask you, you know, to do something about it, you need to do something about this. Tell him that, you know, that you don’t want this happening or that it’s not professional, but you were scared to do that.

The Chairperson: Do you remember when that was approximately?

...in the late in the summertime ... of '05.

Transcript: page 1027, lines 12-25; page 1028, lines 1-13.

[42] According to Ms. Nastiuk, she asked Ms. Roach-Leforte to keep these confidences as she did not yet know how to 'coin' Mr. Sinclair's conduct towards her. She testified that she started to do research on the Internet on sexual harassment.

I guess about that time, I was just like, what the heck is going on, because It wasn't like – you know, I started going to the website – the human rights website, what's the definition, what is this? Because it's not from the blatant examples of sexual harassment or those kind of behaviours on those sites, it didn't quite fit that, but it just felt – it was almost harder to deal with and more – I don't know how to – it was very intrusive. I felt very violated.

But you'd go to the website and find out the information. It wasn't – like, other than, you know, the leering, the weight loss comments, that sort of thing, it wasn't like touching or saying you have to have sex with me or else, you have to go out for dinner with me or else, it wasn't those kinds of behaviour that you see listed on the site.

So what the heck is this, and it just – it wasn't – it didn't feel right. I knew it was wrong. It made me feel really bad, but by law, it didn't seem to fit that criteria that you see posted as – there were examples.”

Transcript: page 193, lines 1-25.

[43] Ms. Nastiuk then recounted that other things started to happen, small matters: she brought an umbrella to work, then Mr. Sinclair purchased one; he knew she was a roller blade skater, he went and purchased a pair. She testified that this was a type of symbiosis and it made her feel horrible. She said that about this time, in July/August, 2005, she developed a bald spot. She claimed that Mr. Sinclair was phoning a lot and stopping by her home frequently, always about work, but inevitably turning to personal queries that Ms. Nastiuk likened to psychoanalysis; she

felt that the things he was saying didn't make sense, they weren't a reason for him to show up at her home.

[44] During her direct testimony, Ms. Nastiuk made some very broad allegations, prompting the Chairperson to ask her to give specific examples:

And I know it was about August 23<sup>rd</sup> when – he was phoning me a lot, giving me a lot of information, still stopping by frequently. It was always about work. It would turn into queries about me, but even that wasn't – that became more intense. That part of that became more intense in the fall.

The Chairperson: More intense, you mean more personal or more often?

Ms. Nastiuk: I wouldn't say more often but it was just like he was trying to drive his point home and it was like it kind of changed and it was more like a psychoanalysis, but that psychoanalysis is like – and he'd always approach with work and then it would turn into that and I was like, what are you doing? I'd be thinking, why are you doing this?

And everything he was saying just didn't make sense. To me, it did not fit. I'd never heard anyone say those things to me before, and it just – it did not fit.

The Chairperson: And when you say those things, what are those things?

Ms. Nastiuk: Those things – I don't recall exactly what those things were because they didn't fit, they infuriated me. They didn't have any place in my life for our conversations. They weren't a reason for him to show up at my house. It just – I wasn't going – it was just off the wall. Why would I retain it?

After in the end, when I started finally fitting it together and just taking the blinders off and facing it, calling it more the way it was it was more like projecting. That's how it felt.

The Chairperson: Can you give me an example?

Ms. Nastiuk: Not really. Not – I can't really – and I know I've tried to think about that, but, to me, they were just so off the wall, I couldn't – I couldn't retain it. ...

The Chairperson: ... but I'm meaning what things he said to you that – you're using strong words like horrible and inappropriate. ...psychoanalysis and this, but you're not giving any specific ...

Ms. Nastiuk: I just remember exactly the way it made me feel, and it made me mad. It made me mad that he was showing up at my house doing that. I don't even know if – after a while, like, it would just – I was just too furious and scared and the only -- like, there's one conversation the I recall or comments that he made because the others just did not fit.”

Transcript: page 196, lines 7-25; page 197, lines 1-23; page 198, lines 8-22.

[45] Despite repeatedly testifying that she suffered in silence, and was unable to confront Mr. Sinclair and demand that he stop when he was making personal comments that she found offensive to her, Ms. Nastiuk also testified that there were occasions when she and Mr. Sinclair engaged in normal personal conversations and other occasions when she challenged him.

#### **G. Events Taking Place in the Fall of 2005**

[46] According to Ms. Roach-Leforte, the working environment continued to deteriorate and her relationship with Ms. Nastiuk during the period of August to October 2005 suffered as a consequence.

In my opinion? The work environment as a whole just seemed to become very negative again. Which was – I mean, in hindsight I think I can explain it, but at the time, you know, people were getting – you know, becoming really positive about the program, we were doing things in the program that were making the work environment a good place to be, but it was becoming more negative.

I know that Mr. Sinclair was suddenly, you know, suggesting other things to you (to Ms. Nastiuk). He was going to send you to, you know, training for this, and you had commented about how – I'm not sure what it – what specific program or part of the program it was, but that he was going to have you travelling more, and on the other hand he would tell you, you know, that I was complaining about you and complaining about your work. And you would challenge me and ask, you know, did I do something wrong, and I would say no, or, you know, nothing I was aware of.



So I think our –like, I didn't – I wasn't – I wasn't – I started becoming very suspicious about what was the truth, who was saying what? And you and I continued to discuss things, but it was – I didn't know if Mr. Sinclair, he would tell me things, and you would say no, to those things. And he would tell you things and I would say no, so we were becoming very – I don't know, poisoned I guess, just the work environment.

Transcript: page 1029, lines 13-25; page 1030, lines 1-19.

[47] In October 2005, Ms. Roach-Leforte and Ms. Nastiuk went to Madison, Wisconsin to participate in a week-long conference on sexual abuse and during this time were able to restore some of their relationship:

(Ms. Roach-Leforte) ... and I think just being away like that allowed you to talk more about your concerns with me. ... that you felt, you know, suffocated by the demands that he was making, the pressure of, you know, different work being assigned to you. You ... told me about a number of those incidents where he came to your home ... and again ... I just said to you, you need to become more assertive, you need to put your foot down and say, you know, this is not okay.

Transcript: page 1034, lines 20-25; page 1035, lines 1-8.

[48] Ms. Roach-Leforte testified that Mr. Sinclair had driven them to the airport at International Falls and was there to pick them up when they returned, driving Ms. Nastiuk's car:

When he picked us up I was quite impressed because Ms. Nastiuk took the keys to put our luggage in the trunk and said I'm driving, and after we got over the border Mr. Sinclair said well, you can drop Gail off first, and she said no I'll drive to my house and you guys can go in your truck.

And when we went to your house, put my luggage in his truck and ...when he got in the driver's seat he slammed the door and as we were driving away he said: what the hell is the matter with that lady?

Transcript: page 1036, lines 6-18.

[49] In an instance in the fall of 2005, Mr. Sinclair came to Ms. Nastiuk's home unexpectedly. Not wanting to invite him in, she immediately went outside where they spent an hour in

conversation. Toward the end of this conversation, Mr. Sinclair started talking about Ms. Nastiuk's clan, and when she said it was indigenous to North America, he became insistent that she needed to do something about it:

Anyway, so we – it was a real struggle, and I was really frustrated and I was really – I was livid. And then he finally just – he finally drove away. That evening ... there was a knock on the door ... I knew it was him ... He ended up – he just basically approached and said that he needed to apologize for the discussion that we had earlier and for his – he apologized for his behaviour.

There was no further conversation between him and I about that. The fall was just all about that type of – I don't know, him – well, him showing up. ... Not every day. I would say at – probably at least a couple times a week.

Transcript: page 200, lines 1-7, 15-19; page 203, lines 1-4, 9-11.

At that very few – he did just stop by a small number of times related to a vehicle that I had. He said that he was interested in purchasing it, and I was having trouble with the other vehicle. And at some point, we had talked about him doing a little bit of work on that and I would give him a good deal on the white vehicle. But overall, like, he never – he never ended up purchasing the vehicle, but - yeah. A couple times a week average.

Transcript: page 203, lines 18-25; page 204, lines 1-2.

[50] Ms. Nastiuk also testified of long meetings in Mr. Sinclair's office during this period of time, often not related to work, and that he continued to show up at her home, all of which she claimed made her feel that he was attempting to manipulate her. By way of example, she recalled being at a conference in Dryden, Ontario, with others from GHC. She had arranged to get a ride back to Fort Frances with a co-worker, Mary Elder, to whom she had confided that Mr. Sinclair's behaviour toward her had made her feel uncomfortable. When Ms. Nastiuk and Ms. Elder arrived at the parking lot, Mr. Sinclair and Chief McPherson were there, and asked Ms. Nastiuk if she wanted a ride to Fort Frances. Ms. Nastiuk declined:

I handled that in the best way that I could and I just let them know that I'd already promised Mary that I would drive home with her.

And Mary was somewhat aware that I was uncomfortable, but I didn't really give her a whole lot of details, because I was really unsure of how to term what was going on.

I knew it wasn't – it wasn't appropriate, but it was still really hard to say what it was at that point ...

Transcript: page 206, lines 9-21.

[51] Ms. Nastiuk recalled another incident in the summer or fall of 2005, when she and Mr. Sinclair engaged in a conversation. Mr. Sinclair, who was from Fort Frances, began speaking about her grandmother, saying that she had a reputation for being the life of the party. Ms. Nastiuk became very angry because she found his comments to be humiliating and offensive to her:

And I immediately responded. Some things I could immediately respond to and just say, you know, just that – you know, the conversation pretty much ended. I would respond like that. I responded pretty much that – that the discussion wasn't going to happen, the end of it, those things were never brought up again.

Transcript: page 207, lines 7-13.

[52] Ms. Nastiuk then testified about a third incident that occurred when she and Mr. Sinclair were in his truck driving towards the healing centre when he began telling her of a group training that he had participated in which they sat in a circle and everybody had to say every slang word they knew for penis and vagina:

That was another one I got very angry about and put the – just I – I dealt with my issues. I wouldn't deserve my bachelor of arts if I hadn't been open with that kind of stuff, and that – that was the end of that conversation. I was just like, this is so inappropriate, and it just really made me angry. And, you know, its building on to all the other things I'm already feeling.

Transcript: page 208, lines 18-25; page 209, lines 1-2.

[53] Then Ms. Nastiuk summed up the summer/fall of 2005, that she was having much less contact with Mr. Sinclair, that he might have lost interest in her, but this was a short-lived respite because she was told by her daughter of rumours that she was involved in a personal relationship with Mr. Sinclair. Ms. Nastiuk immediately approached Mr. Sinclair and told him about the rumours and he said he would deal with it at a staff meeting, but that he didn't want her to attend the meeting, which Ms. Nastiuk felt was wrong:

So I don't know really know what was said at that meeting. Nobody has ever really told me what was said at that meeting, and I just – okay, and move on.

Transcript: page 213, lines 7-10.

#### **H. Events Taking Place in Winter 2005-2006**

[54] Ms. Nastiuk's relationship with other staff did not improve and in December 2005, a conflict with another employee resulted in Mr. Sinclair stepping in.

And then in about mid-December '05, Brian - Bryan Yerxa – I was working at home trying to catch up on reports because there was too many phone calls and interruptions at work, so Mr. Sinclair approved me working at home, and Brian Yerxa called me at home, and he just started kind of bellowing at me. He was angry that my office was locked and he didn't have access to a computer...

Transcript: page 213, lines 11-19.

[55] Mr. Yerxa spoke to Mr. Sinclair who suggested that he would mediate the matter. Ms. Nastiuk told Mr. Sinclair she didn't trust that he would be able to mediate in a good way, nevertheless she reluctantly agreed to proceed. From her perspective it was a fiasco.

I felt that I was the one that was in the wrong with those two, and I just could feel it wasn't going in a good direction. I was really angry. I was upset. I got tearful and I said, you know, I went to bed feeling totally defeated last night. It's like with the two of them combined, it just wasn't going to be good for me, and I would really hope that that portion of – that Mr. Sinclair – you know, I wasn't an issue for him anymore, and I just had the feeling that that probably wasn't the

case. ...I said I couldn't continue. I left and – quite upset, and that was the end of that. That's usually the way everything ended.

Transcript: page 213, lines 11-19; page 215, lines 5-15; page 217, lines 8-11.

[56] Ms. Nastiuk testified that after the failed mediation a series of things transpired between her, Brian Yerxa, and another staff member, all similar interactions culminating in Mr. Sinclair saying the staff didn't want to work with her.

But I know – like, I commented to him (Mr. Sinclair) on a number of occasions that those kinds of behaviours and interactions aren't a result of me or anything that I've got on the go with them. It's them, like, something is going on. And I think it was basically understood and probably said a number of times that those two were resentful. They wanted offices and they wanted titles and I think pretty much everybody at the centre understood that.

Transcript: page 224, lines 7-16.

[57] Ms. Nastiuk remembered comments by Mr. Sinclair that were disturbing to her: one relating to her differences with co-worker Brian Yerxa, whether she was an asset or too much trouble; another, whether she needed anger management; and queries about her health:

Yeah, in another telephone conversation, he – he asked me about my health issues or health concerns – health issues, and so I was like, what? I'm like – I just really felt awful because after having dealt with that, having gotten past that, and going forward with life and to have that thrown at you, it was just like – I kind of responded really hotly too that I don't think it's an issue. I'm working, like 50, 60 hours a week. I don't think there's any concern. And he said, no, I meant the stress. In my head, the only stress I really have is you.

Transcript: page 230, line 4-17.

[58] Douglas Broman, who was appointed acting case manager in early 2006, testified to the tension that existed at GHC during this period:

To be honest, the tension was pretty great. First of all, residential care settings are highly explosive places at times. We are working with a population of extremely

angry, agitated children, so there's a lot of pressure on staff, okay. And staff cannot take it out on the children, so sometimes staff tends to – take it out on each other. I don't know any other way to say it. It's a pretty tough place to work and – there was a lot of tension, not just – there was a lot of in-fighting on the floor, you know, people with their own points of view about how a resident should be treated, and that sort of thing. So that contributed to a level of tension that made it very uncomfortable sometimes. We have to distinguish between presenting behaviours and what's really going on in a kid, and that's what the professional staff are there for, whereas on the floor itself, they're dealing with the actual behaviours of the kid as time goes on. ...and there was a lot of, what I would call, I guess, back stabbing, a lot of insults with just about everybody there. You know it was kind of like I would go home quite frustrated at time thinking about the atmosphere.

Transcript: page 60, line 25; page 61, lines 1-22 and 24-25; page 62, lines 1-4.

[59] Mr. Broman testified that he sensed between Ms. Nastiuk and the rest of the staff and with Mr. Sinclair. Mr. Broman recalled that on one occasion while he was at Ms. Nastiuk's home Mr. Sinclair arrived, unannounced, and that Ms. Nastiuk became very uncomfortable:

You got up, you paced, you looked for this you looked for that. You were just agitated.

Transcript: page 52, lines 11-13.

[60] Mr. Broman was asked whether Mr. Sinclair had commented to him regarding Ms. Nastiuk's sexual orientation and said that he had wracked his brain to remember specific instances, that there were several, half a dozen, when Sinclair had wondered whether Ms. Nastiuk was a lesbian and could Broman check it out.

[61] Mr. Broman testified that during casual conversation Mr. Sinclair asked him whether Ms. Nastiuk might suffer from depression or have mental health problems, and that Mr. Sinclair appeared sympathetic. Mr. Broman expressed his good opinion of Mr. Sinclair and described Ms. Nastiuk as:

a person who dots the Is and crosses the Ts, a real, real good case manager because there is just so much to handle with a kid. So I learned a lot from her too,

just how to be—how to, you know, just handle the details with the job and create the training plans that I worked on.

Transcript: page 66, lines 16 -24.

## **I. Working on the Suicide Prevention Program**

[62] In early January 2006, Mr. Sinclair informed Ms. Nastiuk that funding had been approved for a suicide prevention initiative – referred to in testimony as the STAT – and that he wanted her to do research and planning for it. Ms. Nastiuk viewed Mr. Sinclair’s ideas as problematic, but despite her misgivings, Ms. Nastiuk finally did agree to undertake the work and on January 21, 2006 was temporarily assigned to the program. It was a contract position, with her wages topped up for February and March. After much discussion over where she might do her work it was agreed that she would have an office in her home:

We purchased everything to set me up to do the work. We arranged for a fax machine, and that’s how I would pass documents to him, or if we had to meet, I would go to Giizhikaandag and we’d meet there to do updates on the work.

Transcript: page 239, line 14-19.

[63] In the last week of January Ms. Nastiuk travelled to Winnipeg to gather material for the project and also some materials for Mr. Sinclair that he needed for a ceramic program. She recalled starting work on the project in early February, that she was feeling better, less stressed, but her hopes diminished when she began asking Mr. Sinclair for program specifics and he didn’t provide any. As a result Ms. Nastiuk relied on information garnered from what she referred to as the Treaty 3 description of what they required in a suicide initiative. In this period the only significant contact with Mr. Sinclair occurred on Valentine’s Day when he arrived at her home with a deer feeder, some bags of deer feed and hay, and a rose from a bunch of roses that he was taking to the GHC for other staff, and then he just drove away:

The Chairperson: So during this time when you're working at home in February, up until Valentine's Day, did he come to your house or was he phoning you regularly or not?

Ms. Nastiuk: There really wasn't a whole lot of contact at that point that I recall specifically.

Transcript: page 242, line 5-12.

[64] In subsequent discussions Mr. Sinclair asked Ms. Nastiuk to become the program manager of the STAT unit. She resisted his offer on the basis of inexperience but later, in the middle of March, she felt it might be workable:

So, I mean there were a couple – there's first one thing. I thought it was a way that he might be using to get me to work closer with him, and I didn't want that. The other thing, on the other hand, I've seen him before phase out jobs, and one way would be kind of – I thought that may be one way of trying to get rid of me is I accept that, the program doesn't go through, he's promised case management to someone else, I don't have a job.

And, to me, any of it was likely. But just the way he was pressuring me, and you heard lot of – he just seemed to be – really be building up my confidence in myself and my competence and, I don't know something just didn't feel right about it.

So anyway, when he made that – I made that comment about the accountability of the staff and their ability to be honest, he turned around and he said, people lie, Marlo, that's what they do. And I was kind of, huh? My comeback was like um at work?

And another comment that we had discussed, that our working – there was some tension in our working relationship, and it was me.

When we're in staff meeting like, how can I work with you and you don't validate anything I say and I have to raise my voice and it's like you're ignoring me. And he said, well you know when you're involved in relationships with women, you just learn to ignore them.

Transcript: page 244, lines 1-25; page 245, lines 1-6.



[65] Ms. Nastiuk attended a suicide assist program in Winnipeg on March 17 to 20, 2006. During the session she was told by other attendees that they saw qualities in her that validated why Mr. Sinclair had chosen her to be the program manager. As a result Ms. Nastiuk made a note of things that she intended to discuss with Mr. Sinclair:

Just – I was trying to word them in a way to be as gentle and non-confrontational as possible but still get my point across. Number 1, respect my space, home; Number 2, respect boundaries; Number 3, when I sense you trying to provoke me it creates ambivalence coming from you, and it makes me think you're – I can't even ...

The Chairperson: Wanting to get rid of me?

Wanting to get rid of me. Just the unprofessionalism with that. Time limited meetings, a written job description, which I kept asking for, clear leadership backing, and support of the PM (Program Manager) role.

Transcript: page 247, lines 7-21.

## **J. Confronting Mr. Sinclair**

Ms. Nastiuk: So when I got back to Fort Frances, we had a meeting shortly after, and I did tell Mr. Sinclair directly that I suspected his interest in me was as more than an employee/employer should be, that he was interested in me as a female, a relationship, and I didn't want that, that I only wanted him as a boss, someone that I could go to for guidance and support.

The Chairperson: Did he respond?

Ms Nastiuk: Yeah, he did. There, he said – he admitted that he did have an interest in me.

The Chairperson: Anything else?

Ms. Nastiuk: He talked a little bit about his – his attraction to me, his interest. And that was pretty much the end of – right at the end of the meeting. I wanted to be able to talk further about it, but I wanted to be able to talk about it with a feather in my hand and there wasn't one available that I saw, so it got left there.

...It would be kind of like akin to swearing – like, a Bible. It's very sacred and you wouldn't – speaking dishonestly while you have a feather in your hand would be, I guess, a term could be sacrilegious. You could speak truthfully.

Transcript: page 248, lines 6-21; page 249, lines 2-19.

[66] Ms. Nastiuk referred to notes of a phone call from Mr. Sinclair on April 1, 2006, during which he said that he wanted to talk to her in the next week about their working relationship and that she should be very open and that it would have no impact on her work at GHC.

[67] Then Ms. Nastiuk testified that she received a phone call from Mr. Sinclair on April 6, 2006, which he began by stating that he wanted to meet in order to discuss their relationship:

He started that meeting on April 6<sup>th</sup> stating that I had wanted to meet in order to discuss our working relationship that adversely – was adversely affected by the personal relationship, and I'm just like, what is he talking about? He just keeps referring to a personal relationship, but I have to let that go. And then I put it back on him, no, it was you.

And then he went on to say, Marlo, I believe that I represent everything that you hate about men and that, yes, he had an interest in me as a woman but, no, he wouldn't have gone out with me. And – oh, yeah, that he never found himself in this position before, and I kind of stopped and – what – what position were you talking about?

And he says, having an interest in a – woman that he worked with, a female that he worked with or in the workplace – I think it was – and I don't think too much more was said on that piece at the time.

Then, of course, he continued to say that the work relationship was my fault. He kept pushing – trying to push it on to me. I kept putting the shield up, trying to push it back on him. No, that's yours. And, again, I told him about – that it was his interest in me that was at the bottom of all of this.

He started talking about how it was difficult for me to talk about my personal life, and he started talking about how other staff go to him, so why can't I? And I let him know that because I believe that personal things don't belong in the workplace and I'm thinking because I really don't – you know, I don't want to talk to you about my personal life. Why do I need to?

And then he let me know that he wasn't sure that he was still interested in having me as the program manager of the STAT unit because I was not enthusiastic enough. He told me that he – what was that comment that day? ... Yeah, I let him know that it was not easy to tell him directly that I suspect his interest in me was of a personal nature, because what if I was wrong, particularly given the types of behaviours.

Transcript: page 256, lines 21-25; page 257, lines 1-25; page 258, lines 1-19.

[68] The following day, Ms. Nastiuk and Mr. Sinclair had another discussion about their relationship. Ms. Nastiuk alleges that during this conversation, Mr. Sinclair told her that he believed that she had a 'deep rooted fear of and abhorrence for' admitting that she was a lesbian and that she fought against it. Ms. Nastiuk stated that she was outraged by the discussion and afterwards, could not concentrate or focus on her work.

[69] On April 14, 2006, Mr. Sinclair called Ms. Nastiuk and made, what Ms. Nastiuk described as 'an attempt at an apology' for his previous comments. According to Ms. Nastiuk, Mr. Sinclair also informed Ms. Nastiuk that he had discussed, in broad terms, some of the issues in their relationship with his friend Chief McPherson.

#### **K. Events Leading up to the Complaint**

[70] Ms. Nastiuk testified that after April 14, 2006, she made a number of anonymous telephone calls to obtain advice on how she might deal with Mr. Sinclair:

...because I know that First Nations people do not like to go to outside agencies to help deal with issues. I made a number of calls ...to Grand Council Treaty 3 for this treaty area – anonymously. Didn't tell them, other than what was kind of going on, to see if they had any suggestions. They didn't, other than that I call the female chief that has this portfolio.

Transcript: page 270, lines 2-12.

[71] Ms. Nastiuk had a one-hour telephone conversation with Chief Pamela Johnson who informed her that they had no resources and no real suggestions other than talking circles:

So I just wanted that on the record and that I'd gone through a series of conversations with other people to try to keep this stuff in before it was brought here.

Transcript: page 271, lines 2-6.

[72] On April 20, 2006, Mr. Sinclair met with Ms. Nastiuk to discuss her work on the STAT unit. Ms. Nastiuk told Mr. Sinclair that she was struggling with the work and was having trouble staying focused and concentrating. According to Ms. Nastiuk, Mr. Sinclair suggested that she take some time off, and that she could even take a short-term disability leave, for up to a year if need be.

[73] Following this conversation, Ms. Nastiuk took some time off, during which she consulted a counselor to help deal with her anxiety which she felt was the direct result of her conflict with Mr. Sinclair. On April 24<sup>th</sup>, 2006, she also consulted a lawyer who said to her: "Marlo: It seems to me that you are not disabled but the victim of abusive behavior. Do not let anyone tell you that you are sick or require medical attention, if that is not the case".

[74] Ms. Nastiuk therefore returned to work in May as Case Manager but claims that she continued to be distracted and was unable to stay focused. She suffered from major headaches and diarrhea, particularly when in proximity or contact with Mr. Sinclair.

[75] On May 31<sup>st</sup> a written reprimand was placed in Ms. Nastiuk's personnel file:

I went to a job interview the morning of May 30<sup>th</sup>. I was supposed to speak at a staff meeting about case management. The week before, I told Brian Yerxa a couple of times that they shouldn't put me on the agenda until after 11am that morning. I believe that was a Tuesday. So Monday – it would have been the day before I talked to Rick Adams, the other team leader, I'm thinking just in case Brian didn't remember, to not put me on the agenda until after 11am on the May 30<sup>th</sup> staff meeting.

The Chairperson: But you didn't tell Mr. Sinclair and he was your immediate supervisor?

Ms. Nastiuk: Yes.

The Chairperson: And is that the personnel policy? Was that at the time?

Ms. Nastiuk: (Inaudible) this would be a double standard. Staff seems to come and go as they please. It didn't matter whether they were on-call or management they had freedoms and didn't have that kind of reporting requirement on them that I did. Under normal circumstances, but, yeah.

The Chairperson: And at this time May 30<sup>th</sup>, May 31<sup>st</sup>, were you working from home mostly or from an office?

Ms. Nastiuk: I ended up going back to the healing centre May – the beginning of May after a call I had with lawyers through the lawyer referral service, and he said to me – he read a letter, I did not read my documentation. He said, Marlo, I just get the sense that this man cares about you. Maybe he's going about it inappropriately, so I felt because of that, okay, he's not defining it. I have to go back – try to go back to the workplace. ... So I was there.

Transcript: page 272, lines 17-25; page 273, lines 1-25; page 274, lines 1-6.

#### **L. Meeting with Chief McPherson**

[76] On June 14, 2006, Ms. Nastiuk met with Chief McPherson and made a complaint against Mr. Sinclair stating that Mr. Sinclair had abused his position of authority and power over her and discriminated against her in the course of her employment. Ms. Nastiuk claimed that Mr. Sinclair, as her supervisor and the Executive Director of GHC, had engaged in:

persistent and demeaning conduct towards myself based on sex; made demeaning comments related to my disability; spoke of and wanted to speak further regarding my sexual orientation. Mr. Sinclair's conduct has included a range of violations that were unwelcome and extended beyond the workplace that have been demeaning, persistent and abusive in nature. The result has been the creation of a negative and unacceptable psychological and emotional environment for work.

[77] Following a number of conversations between Ms. Nastiuk and Chief McPherson, a mediation meeting was scheduled for June 22, 2006:

After a number of conversations between Chief McPherson and I, this was the culmination of that, and I prepared this list of certain things that I wanted addressed at the informal mediation that he had talked to me about.

And actually how that came about, we had a number of calls. We decided to go with an informal mediation. He wanted me to just go into a meeting with just him and Mr. Sinclair and myself, and I said I couldn't do that, that I would need a support person. ...So there were the four of us. We went through this. The underlying portions are basically what I typed up (ahead of time and took to the meeting). ...I got to speak a little bit, but Mr. Sinclair did most of the speaking. And he had an issue with things in here.

...At the end of the meeting, Chief McPherson told me that I had a job to go to, but that no changes would be made because that would be admitting to Tom being guilty and he wasn't prepared to do that, and he made a comment about, for example, say if I gave you \$5000, that would be admitting he's guilty and I can't do that.

One of the last comments was I was to get back to him with what I wanted. But I walked out of there thinking, well, he just told me he's not going to do anything, so I went to the Commission.

Transcript: page 274, lines 13-25; page 275, lines 1-25; page 276, lines 1-9.

[78] According to Ms. Roach-Leforte, Ms. Nastiuk's complaint was not the first complaint CFN had received against Mr. Sinclair. In her testimony, Ms. Roach-Leforte stated that in May, 2006, shortly before Ms. Nastiuk met with Chief McPherson, she had filed a complaint with CFN against Mr. Sinclair pertaining to what she perceived as Mr. Sinclair's unprofessional behavior towards herself and the staff.

[79] When asked why she had complained to Dale Morrisseau, CFN's Manager, Ms. Roach-Leforte testified that the alleged behavior was not of the same degree or as ongoing as experienced by Ms. Nastiuk, and that the complaints made by other members of the staff were

not of sexual harassment but related to the power and control that Mr. Sinclair had over the GHC program.

[80] She also stated that the reason she had not gone to Chief McPherson on the behalf of Ms. Nastiuk was that she, too, was scared for her job. (Transcript: Page 1127, line 5-25; page 1128, line 1-24).

### **M. The Complaints**

[81] On July 25, 2006, Ms. Nastiuk filed complaint 20060869 against CFN and complaint 20061038 against Mr. Sinclair alleging sexual harassment in the workplace between March 2005 and July 2006.

[82] Ms. Nastiuk went on sick leave from June 1, 2006 until June 4, 2006, then took three weeks of vacation time, and remained off work until January 28, 2007. In October 2006, Ms. Nastiuk met with Chief and council and produced written requests that she said weren't demands but were to serve as a basis to negotiate or mediate her complaint. Included in her request was, as a compromise, a statement that she would accept a new job with CFN, but not at GHC.

[83] While this was transpiring, Ms. Nastiuk made a claim for employment insurance benefits on the basis that she had been constructively dismissed, which she termed as "disguised" dismissal:

Ms. Bryson: So are you telling us you were constructively dismissed by Mr. Sinclair at that time?

Ms. Nastiuk: The circumstances, it was a constructive dismissal.

Ms. Bryson: By who?

Ms. Nastiuk: There were reasons why I could not go back to the healing centre, and Mr. Sinclair was a big part of that. The way the program was set up to run, it was all part of it. It was –

Ms. Bryson: But I'm asking you, who terminated you? That's what I'm asking you?

Ms. Nastiuk: It was a constructive dismissal. I left.

Ms. Bryson: But by whom? Mr. Sinclair or Chief and Council ...?

Ms. Nastiuk: Well, it would be both because Couchiching was not around to practice due diligence. Mr. Sinclair was allowed to run the program, hire and fire as he saw fit.

Transcript: page 628, lines 4-25; page 629, line 1.

[84] Throughout this period Ms. Nastiuk made several attempts to secure other employment. On October 24, 2006, she interviewed for a position as Probation Officer at the Manitoba Department of Justice. Ms. Nastiuk was told that she had done well in the interview. However, the contact person in charge of the hiring process, Rose Bear, subsequently informed Ms. Nastiuk that she had been unable to obtain a reference from Mr. Sinclair and that this was essential to the process as he was the executive director of GHC. Ms. Nastiuk also unsuccessfully applied to the positions of Post-secondary Education Counselor, Housing Administrator, Family Service Worker and Special Education Assistant, all positions with CFN.

[85] In December 2006, Ms. Nastiuk presented CFN's manager, Dale Morrisseau with a list of terms and conditions being the basis on which she would return to work at GHC as case manager, particularly including no direct contact with Mr. Sinclair.

Ms. Bryson: Okay. So I want to be clear. From the time in June 2006 that you brought this to Couchiching First Nation's attention, Mr. Sinclair never had independent contact with you again at your home or on your home phone, did he?

Ms. Nastiuk: During June, I believe there was –



Ms. Bryson: No, I'm saying after the meeting with the chief in June – late June 2006?

Ms. Nastiuk: No, I can't recall.

Ms. Bryson: So the only contact you would have had with Mr. Sinclair after that point would have been when you were back in the GHC workplace, correct?

Ms. Nastiuk: Yes.

Ms. Bryson: And that was under the terms and conditions you agreed upon with Mr. Morrisseau and Mr. Sinclair, correct?

Ms. Nastiuk: Mr. Morrisseau agreed with the terms and conditions that I drafted up at the direction of Commission or with their recommendation.

Transcript: page 641, lines 3-25; page 642, lines 1-2.

[86] Ms. Nastiuk then returned to work at GHC, an experience she described as traumatic. According to Ms. Nastiuk, despite the terms of the agreement for her return to work, Mr. Sinclair persisted in his invasion of her personal boundaries and CFN did nothing effective to change his actions and omissions from occurring:

Ms. Nastiuk: The reason why I left was the way that Mr. Sinclair was belittling me and totally changed the responsibilities of my – job description and I could see over the prior couple of weeks that it was escalating again and I knew I – I did not feel safe, particularly with the mediation coming up. And I figured it was just going to get worse – I knew it was going to get worse, so that is why I left.

Ms. Bryson: And how did you know that?

Ms. Nastiuk: Because it was obvious. There was a pattern. Every – when he was – it was like – when I was back during 2007, once in a while I would go outside my office and he would be sitting right – in a chair right outside my office and I thought, well, jeez, that's really totally against this agreement, and then I'd later get a phone call from Krista Dezaso and find out that she had actually talked with Mr. Sinclair earlier that day. So to me, that was intimidation.

Ms. Bryson: You didn't file a grievance about that with CFN, did you?

Ms. Nastiuk: I could not file a grievance about everything, but I am sure that I discussed those kind of things, not every single time, there was so much and I couldn't always stop and call Dale and say, Dale.

But I quite often let Dale know, whether it was in writing or phone calls. And after a while, it was probably easier just to call than do all the documentation.

Ms. Bryson: But you didn't call –

Ms. Nastiuk: Where was it going? It was going nowhere, no matter what I let Dale know about. It wasn't getting better, it was getting worse.

Transcript: page 663, lines 14-25; page 664, 1-25; page 665, lines 102.

[87] In August 2007, acting under his authority as band manager, Mr. Morrisseau authorized Ms. Nastiuk to be off work until a previously arranged Human Rights Commission mediation occurred. Both Mr. Morrisseau and Ms. Nastiuk had hoped to use a Commission mediation to resolve her entire complaint.

[88] On or about August 15, 2007, Mr. Morrisseau delivered mediated terms of settlement to Chief and Council, however, to his and Ms. Nastiuk's dismay, the settlement was rejected. In the same period and coincidentally, Mr. Sinclair terminated his employment with CFN, having found more suitable employment with another First Nation.

[89] Ms. Nastiuk did not return to the workplace and filed a constructive dismissal complaint with Human Resources Services Development Canada in November 2007.

## **N. The Retaliation Complaint**

[90] On March 31, 2008, Ms. Nastiuk filed a complaint of retaliation against CFN under s. 14.1 of the *CHRA*, alleging it had occurred "August, 16, 2006 and ongoing".

[91] Ms. Nastiuk argues that CFN was obligated to provide a healthy and safe workplace and failed to do so. She also argues that CFN failed to prevent, or respond appropriately to her complaint even though it had knowledge of the specific details. According to Ms. Nastiuk, CFN provided no preventive measures and failed to take effective remedial action and decrease the consequences and harms to her.

### **III. Response of Mr. Sinclair**

[92] Mr. Sinclair is an Ojibwa, born and raised in Fort Frances, the seventh of nine children. He grew up in a family with a very good mother and an abusive father. Mr. Sinclair worked in construction for a masonry contractor, learned the trade and started his own business while still working for the contractor. By this time he was in his mid-20s, a married man, the father of two children. With physical labour wearing him down Mr. Sinclair began searching for a way to become a counsellor and succeeded:

And so for the past 30 years, I've committed my life to working with First Nations people, children and families, and to develop healing services for my people. And I've developed many programs and services over the years.

Transcript: page 2079, lines 22-25; page 2080, line 1.

[93] In late 2005, Mr. Sinclair received a call from Chief McPherson's requesting his assistance in resolving a management crisis at the Band's Giizhikaandag Healing Centre in Fort Frances. Within a week Mr. Sinclair had reviewed GHC's program, its results and financial information, and developed a restructuring plan.

[94] The restructuring plan was presented to the provincial ministry, with Chief McPherson and Ms. Roach-Leforte in attendance. GHC was given a provisional licence to continue to operate for three months, but restricted to four youths in treatment rather than its normal maximum of eight youths.

### A. Working with Ms. Nastiuk

[95] Mr. Sinclair described the situation he was faced with and how he worked with Ms. Roach-Leforte and Ms. Nastiuk:

...My primary contact was Gail Roach-Leforte. ...So in the early days, there was Gail and myself looking at work that had to be done to improve the service to make changes to the service at Giizhikaadag Healing Centre.

Now, I needed a person to do the word processing, typing. Now there was developmental work I had to do, but we had four boys in care and I decided that the best way to do that, to allow me to do my work, is to have Gail look after the treatment component, primarily focus on the treatment component, the existing program, and I would attend to the work, developmental work to improve the service. And that's what happened.

A part of that is the word processing. Now, I'm terrible at the computer and typing. I've always had staff that did that work. And I informed Gail that I needed somebody, I needed to bring somebody in that can do that and do it well. She recommended Marlo Nastiuk, who was – worked at Giizhikaandag as a relief worker.

Now, Gail and Marlo had met some time previously ... Gail said she knew that Marlo would, you know, like to get more hours in, had excellent typing skills, and so I arranged to have Marlo come in to meet with myself. That happened. Talked about the work that had to be done. And – and you know, like – like, a service manual and other documents and so on that had to be improved. And that was – we – we had worked things out and she agreed that she would do that work.

Transcript: page 2097, lines 8-25; page 2098, lines 1-7, 12-20.

[96] Mr. Sinclair testified that there was a large room outside his office in which there was a table commonly used for staff meetings and conferencing. He said Ms. Nastiuk's first workstation was in that room at a separate table in the corner where she had her computer and other office equipment:

... meetings would still happen in that outer area, and with her trying to do her work in the corner of that same room while some meetings were going on, she came to me and said this is impossible. This is not working. And Ms. Nastiuk

suggested that in my office, if I moved a couple of pieces of the furniture, she could move her equipment into my office, in the corner of my office, and that was a suggestion of Ms. Nastiuk.

...it was a very unusual situation. I was leery of it. She talked more about it and it's actually the way my wife and I work when I am doing, from my home, developmental work. ...

I agreed that her desk would come into the corner of my office and it would get her out of that place where meetings were going on and – and that's what happened.

...Marlo's office ended up being in that other building after a period of time ...

Transcript: page 2108, lines 5-17; page 2109, lines 2-5, 22-23.

[97] Mr. Sinclair testified about his working arrangement with Ms. Nastiuk in the initial three-month restructuring of GHC's program:

...I would go over the pages, make changes for this new program, give them to her, she would make the changes on the computer. And the timeframe to restructure this program was three months ...a tremendous amount of work had to happen because it's not just the service manual. There were changes taking place in other areas of the program.

There were reports, and there had not been a director for a period of time. There were reports that had to get done, that were behind. So there was catch-up work in areas; there was new development work happening at the same time ...it was real busy...

But in addition to that, there was other work that was happening. There was documents that we were behind, so sometimes we'd leave that work on the service manual and do some other work that had to get done. So it was catch-up work also. ...

Transcript: page 2110, lines 19-25; page 2111, lines 1-7, 21-25; page 2112, line 1.

[98] Mr. Sinclair testified that he had personal conversations with Ms. Nastiuk during the first three months of restructuring of GHC's program:

You know, there were times when we'd stop work, have a coffee, and chitchat, talk. And you know, it wasn't long – it didn't take long to realize that Ms. Nastiuk ...had some very good skills. ...She was committed to the work that had to get done.

Working all day on this stuff and having a break at supper or having a break with the boys or whatever it was for supper, going out and getting some chicken or something and bringing it back to have as supper, things like that happened and the work would continue into the – into evening. Take a break, have a coffee, and – and at times talk.

It didn't take long to realize that this – individual, you know, with this new degree, she was – had been seeking employment, but had not been – and she shared this with me that she had not been successful ...But it was evident that she had skills, and ...that she learned quickly.

During our breaks, most of the talk was about work. Work that was being done, work that had been done, but there was times we'd talk about a TV show or whatever, you know? Our coffee breaks would be ten minutes, 15 minutes, and we'd get back to work. Most of the time, the work would go till 6:30 seven o'clock on this manual or other documents that had to be done - completed.

Transcript: page 2113, lines 10-25; page 2114, lines 1-17.

[99] Mr. Sinclair returned to the subject of personal talk a little later in his direct evidence:

During the coffee breaks, after a period of time – I think when Ms. Nastiuk and I got to know each other a little bit after working together for a period of time, some of the conversation could change from work-related to personal. She talked about – you know, she had a daughter and we'd be able to talk about her daughter. And there was my wife and my son in Thunder Bay, and my children and my grandchildren in Sault Ste. Marie. So I think that as we, you know, worked together, there was a comfort level of getting to know each other that happened over a period of time.

There's times when, you know, other than taking a break for supper – run down to the gas bar and they – they had chicken meals and that you could prepare. And, you know, I'd run down and get that and bring it back and supper would be right there. After supper, the work would continue for an hour or so and things like that. ...This arrangement went on for – geez let's see. It was into February when we hired Ms. Nastiuk. March, April – a couple of months probably I would say.

The Chairperson: By this arrangement you mean with her desk being in your office?

Mr. Sinclair: In my office, that's correct.

Transcript: page 2120, lines 11-25; page 2121, lines 1-4, 9-18.

[100] Mr. Sinclair testified that during this hectic three-month period, he would, from time to time, provide updates to a restructuring committee consisting of the Chief, Councillor Dick Bird, Ms. Roach-Leforte, and a staff member compiling minutes of the meeting.

[101] In his evidence Mr. Sinclair described how he had reorganized the staff and their roles, filled vacancies, and arranged for professional consultants to be available, that he created a new position of Case Manager because GHC's practice of using frontline workers to create reports resulted in inconsistencies that he attributed to their differing writing skills. It is likely that he accepted the advice of Ms. Roach-Leforte in this regard. Ultimately, Ms. Nastiuk became the first case manager at GHC. Mr. Sinclair was a member of the selection committee:

#### **B. Ms. Nastiuk's Relations with GHC Staff**

[102] In response to Ms. Nastiuk's allegations that the work environment at GHC was hostile, both CFN counsel and Mr. Sinclair questioned Ms. Nastiuk about her part in this problem.

Mr. Sinclair: Ms. Nastiuk, how many times did you think you may have – you know, you come to me about issues related to your co-workers.

Ms. Nastiuk: I don't know, quite a few.

Mr. Sinclair: Okay. And were you aware that your co-workers also came to me with issues related to you?

Ms. Nastiuk: I was aware of two or three of them.

Mr. Sinclair: Okay. So you're then aware that I had to meet with your co-workers who came forward to me with issues related to yourself in the workplace?

Ms. Nastiuk: You had told me that you had met with two or three of them, yes.

Mr. Sinclair: Okay. Did you enjoy your work as a case manager at Giizhikaandag?

Ms. Nastiuk: Yes.

Mr. Sinclair: Did you enjoy your contact with the boys at Giizhikaandag?

Ms. Nastiuk: Yes, I did.

### **C. MS. Nastiuk's Health Issues - testimony of Mr. Sinclair**

Mr. Sinclair: During those early months of working, after hiring Ms. Nastiuk, she informed me of some medical health issues that – that she had that could affect her work. That was appreciated.

I – I – she informed me that she had fibromyalgia, and I was not that familiar with it and she educated me as to what fibromyalgia was. And the reason I bring it up is that Ms. Gail Roach-Leforte and I were both concerned that Ms. Nastiuk – was working too much and taking too much work home and not getting proper rest, and that would further affect her health. And so we stopped her. When we'd see her coming out of her building with a big armful of work for the night, and let her know that this was not a thing we wanted her to do. And that even at work, because of the fibromyalgia, she worked through lunch hours. A very committed person, for sure, to the work that had to get done, but to the point of – of neglecting her – her own health.

And so, you know, we had to – I had to talk to her about not staying at the office at lunch hour, but if you – she wanted to stay at the office, it wasn't to be working. She should take a walk, and exercise is required for people with fibromyalgia. You should take – go for a walk, relax, get away from the workplace and so on.

So as - as her supervisor, I think that special attention had been paid to assist this employee to – and to help her to remain in the workplace by reminding her of



what she was supposed to be doing to look after her health. And that happened – I know, that is at – those things happened a number of times.

Transcript: page 2159, lines 22-25; page 2160, lines 1-25; page 2161, lines 1-6.

#### **D. Mr. Sinclair's Response to Particular Allegations of Harassment**

##### **(i) Humiliation**

[103] In cross examination Mr. Sinclair posed very appropriate questions to the Complainant, putting to her a version of interactions between them which differed with her direct evidence. By doing this he afforded Ms. Nastiuk an opportunity in the course of her own testimony to agree or disagree with his version.

[104] A significant point in Mr. Sinclair's cross examination occurred when he directed Ms. Nastiuk's attention to Exhibit C-2, tab 71, under the section titled "humiliation", and he read a portion to her.

'Mr. Sinclair made every attempt to mentally, emotionally, spiritually and physically subjugate me by creating a dependency on him because he had succeeded in getting other staff to dislike me and to marginalize me.' Quite serious. How did I go about doing this Ms. Nastiuk?

Ms. Nastiuk: Which piece? This isn't very –

Mr. Sinclair: Because he had succeeded in getting other staff to dislike me, that portion of that section. This is in relation to –

...

Ms. Nastiuk: Okay. Where do I start with that? We've moved upstairs to work with you and Gail, staff perceived I was getting special treatment that other staff would – should have been more likely the choice, as they had been there longer. Special treatment? Bringing me coffee and cookies, keeping me in your office for long hours, and you knew that on the floor, staff were having a lot of issues with

it, these types of things. When I asked you to address some of these you refused to. And later on, as time went on there was a type of – I don't know whether triangulation is the right word, pitting us against each other.

The Chairperson: Who is "us"?

Ms. Nastiuk: Various staff. I mean, that – that didn't happen that to just me, it happened to other staff, and that staff would be ticked off and you would go through that process, but in this case, I guess pointing to just me, Mr. Sinclair pointed out that staff did not like me, so therefore when I started case management he directed me to go directly to him for reports, information that I needed for the boys for my plan of cares to him. I couldn't go directly to staff. There were – an example would be one day I went to work and my case management – case manager file cabinet was gone. Like I didn't know where it was, the record cabinet, which is supposed to be locked at all times.

The Chairperson: Is it like a file cabinet?

Ms. Nastiuk: Like a metal cabinet. Like, there was two drawers (inaudible) a couple of shelves that the boys kept records and underneath there was some drawers. I was looking around, trying to figure out where the case records were. Diane Bart (ph) came out and she talked to me about that and asked me how that made me feel? And I told her that – I guess at that point I said, okay, just another – another slam against me.

Mr. Sinclair: Where was the cabinet?

Ms. Nastiuk: Well, once I went downstairs I saw that it was in front staff office. Diane and – Diane Morrison and Georgina (inaudible) at the time, and Mike Henderson was present also, and I asked who had moved the case record cabinet. And they didn't really say a whole lot, but as I was walking away they made a – or Georgina made a comment about why would we have to bother getting her permission or something to that effect, who is she to decide whether or not we take the case record cabinet. And I turned around, walked back in, Mike was right there and I said since when does staff just go into – an office building and remove furniture? And that was never addressed and there were a number of things like that that never addressed.

Staff got to see that I could be disrespected, it was never addressed. Even when you'd ask Mr. Sinclair directly, that never happened. His answer to that was just get me a new case record cabinet. I'm not saying that my difficulties with staff were all Mr. Sinclair's doing, and I talked about that yesterday, I believe, or in the

last couple of days when I referred to talking about my education, trying to – thinking it would be helpful and realized it wasn't it was harmful.

Mr. Sinclair: The example that you provided doesn't go very far in answering the question, the file cabinet scenario.

The Chairperson: That's fair.

Ms. Nastiuk: Well, I don't know what was going on behind the scene, but they're definitely problems. I mean, I can't speak to those because nobody ever – like, all of them – I can speak to –

The Chairperson: Well, I'm not -- I'm trying to help the flow of this, not get in the way, but when you were asked the question –

Ms Nastiuk: Okay.

The Chairperson: - you gave some examples. You said when you were moved upstairs or you moved upstairs it was perceived as special treatment, you were kept in the office long hours, he would bring you coffee or tea and cookies. When you asked that he deal with these things, then other things like the cabinet, he refused or it just did not happen, that he engaged in triangulation, pitting you against other staff members, and this happened with staff members other than yourself as well. Do you have anything to add to that?

Ms. Nastiuk: Um –

The Chairperson: And you also said your problems with staff were not all his doing, but you're saying he did those things?

Ms. Nastiuk: Yes. I don't know, like, I can't say for sure, but I know that there was the effect after contact with Mr. Sinclair, particularly Brian, Diane and Ida, it was like they all thought that they could have my job, and they all treated me – they were very rude, disrespectful. Their behaviour went unhampered, in fact over time it got worse, until Dale intervened with at least Ida and he would dismiss me and Barb from meetings. It was like the disrespect just got bigger and bigger and bigger. Treat us disrespectful, without dignity, humiliate us, and that was okay.

Transcript: page 920, lines 15-25; page 921, lines 1-3, 8-25; page 922, lines 1-25; page 923, lines 1-25; page 924, lines 1-25; page 925, lines 1-25.

## (ii) Sexual Comments

[105] Toward the end of his cross examination of Ms. Nastiuk, Mr. Sinclair became very specific and dealt with Ms. Nastiuk's allegations that he had made a number of sexual comments to her.

Mr. Sinclair: Throughout your documentation, Ms. Nastiuk, you refer to sexual comments made by myself. Can you give me an example of that?

Ms. Nastiuk: Sexual comments? Oh, I dated his wife, I dated his partner, women like me, the non-native women.

Mr. Sinclair: What does that have to do with sex?

Ms. Nastiuk: Well, like, it wasn't appropriate. To me it was like you were kind of telling something about yourself then, it just didn't feel right. It –

Mr. Sinclair: In what –

Ms. Nastiuk: -- made me uncomfortable.

Mr. Sinclair: Okay. In what context, those things that you mentioned, in what context and where did this happen?

Ms. Nastiuk: I happened typically in your office while we were standing outside.

Mr. Sinclair: No, those comments you just made is what I'm referring to. Where did that happen? Where did that take place?

Ms. Nastiuk: Oh, I dated his wife, oh, I dated his partner, women like me, those comments?

Mr. Sinclair: In a conversation you and I had? The context is important, Ms Nastiuk.

Ms. Nastiuk: The context?

Mr. Sinclair: To say something like that is a harmful thing, okay, can be a very harmful thing. So it's clear, in what conversation and where did the conversation take place that that is crystal clear?

Ms. Nastiuk: When we were standing outside your office at the top of the stairs. You had made that comment I remember at least one guy coming into the centre that had a kid there, saying, oh, I dated his wife. I don't recall any context.

Mr. Sinclair: Who was that individual, do you know that?

Ms. Nastiuk: Dick Spencer. Dick Spencer.

Mr. Sinclair: And what was my response as to when I dated his wife?

Ms. Nastiuk: That's what you said.

Mr. Sinclair: Was he married? Was she married?

Ms. Nastiuk: I have no idea.

Mr. Sinclair: Were we teenagers?

Ms. Nastiuk: I have no idea. All you said was I dated his wife.

Mr. Sinclair: You don't recall a response on my part to that?

Ms. Nastiuk: A response to what? You made the comment, why would you respond? I didn't respond. I kind of just stepped back.

Mr. Sinclair: Are you saying everything about that comment, or are you omitting something Ms. Nastiuk? Are you leaving some out of what I said?

Ms. Nastiuk: Those comments about I dated his wife, or oh, I dated his partner, those kind of just came out of the blue as far as I recall. Sometimes you might have been talking about when you were younger and enjoying the (inaudible).

Mr. Sinclair: In this particular time is that what I was talking about?

...

Ms. Nastiuk: The context of the overall – or not conversations, because it was just you talking and telling me, you were referring to I think the '60s, so when you were younger, with some of those comments. And you really enjoyed the freedom from the '60s. I didn't ask you to clarify, I didn't comment back you just talked and told me that.

Mr. Sinclair: Ms. Nastiuk, you're talking about the truth there, okay. And where did that conversation take place? Your memory is coming back, where did that conversation –

Ms. Nastiuk: Your office.

Mr. Sinclair: - take place?

Ms. Nastiuk: Your office or sometimes the comments – it's mostly your office, but, like, the oh, I dated his wife partner, I remember those more – it happened in your office, but more outside, when we were standing having a cigarette at the top of the stairs. And then one time you had made the comment that women like you, non-native women too, when we were in your vehicle on April 7, 2006, in front of my house. That was at the end of telling me all about my lesbianism and relationships with men, sexual activity with men.

Mr. Sinclair: April 7<sup>th</sup>, what year?

Ms. Nastiuk: April 7<sup>th</sup>, it was a Friday, 2006. That was the day that you told STAT unit (inaudible) people were going to be there. That was the day I had an appointment with the eye specialist at Dr. Ludke's. That date can be verified. That (inaudible) but you made that comment prior.

Mr. Sinclair: And I gave you a ride home that day, did I?

Ms. Nastiuk: You did.

Mr. Sinclair: And how did that come out? Were you – you had a vehicle?

Ms. Nastiuk: I had told you at least a month prior that I had an appointment with an eye specialist or – it was at least a couple weeks prior I had let you know that I had an appointment with the eye specialist because you said there would be a –

maybe it was just a couple of days prior, but I knew that you knew before that day that I had an appointment with the eye specialist, and then the day or two before you told me that you were meeting Treaty 3 April 7<sup>th</sup> to present the STAT unit, so I had to e-mail everything to you on the 6<sup>th</sup>. And I was kind of surprised at that because I knew that I was going to have drops in my eyes so I wouldn't be able to drive, so Tiffany drove me to the centre because I said, well, I could make myself available to fill in any information or gaps of information that you don't have while presenting.

So I got there, there were no Treaty 3 people there, you were in a case conference I believe, and I didn't know what to do because Tiffany was, it was (inaudible) and Tiff had my vehicle, I did not know how to get ahold of her, you volunteered to drive me home.

Mr. Sinclair: You were there for a meeting – is this right, you –

Ms. Nastiuk: I kind of invited myself to that STAT unit presentation. You agreed that I could show up.

...

Mr. Sinclair: Okay. Throughout what you have written you talk and refer to sexualized comments on numerous occasions. You didn't talk about the context though of which – and where that happened: is that correct?

Ms. Nastiuk: I don't recall what's specifically in my documentation. I don't know why I would have. I don't recall any real discussion, I just remember you always telling me.

...

Mr. Sinclair: (to the Chairperson) Her response, you heard it, and it didn't clarify in what context that was –that was made or what conversation – where the conversation took place, she didn't respond to that.

Ms. Nastiuk: Yes, I did; your office, or outside at the top of the stairs, outside your –upstairs in your building.

Mr. Sinclair: Well, there were conversations that took there – certainly place there, certainly, Ms. Nastiuk, but this particular conversation is the one that we're dealing with.

Ms. Nastiuk: Which conversation, sorry?

Mr. Sinclair: About in your mind comments that were made by myself that were sexualized comments. And to get out on the table where this took place and what kind of conversation this took place is very important. So we worked in a facility that treated sex offenders; is that correct?

Ms. Nastiuk: That treated youth with inappropriate sexual behaviours or who had been charged.

Mr. Sinclair: For inappropriate –

Ms. Nastiuk: Sexual – inappropriate sexual behaviours.

Mr. Sinclair: Okay. So it was common around this workplace to talk about sex and sex offending; is that correct?

Ms. Nastiuk: Not sex.

Mr. Sinclair: That these young men were having – or had, pardon me, or had, prior to attending the treatment centre?

Ms. Nastiuk: It would be typical during the interview phase, somewhat through the process of the treatment planning, basically through those two processes. It might not always have been right at intake, but, like, that phase, when, you know, we're trying to gather the information to see what had occurred, to get the background information on what was going on with them.

Mr. Sinclair: Ms. Nastiuk, as case manager you are often the first contact in terms of social workers and/or family members; is that not correct?

Ms. Nastiuk: It's correct.

Mr. Sinclair: And you're often the first one hearing this from these individuals and the sex offences that were committed?

Ms. Nastiuk: Not always. Like, I remember you and I being in Canora and you met with the boy and I met with the worker, and you came back with some of that information or that information from the boy on his behaviours, what he had told you.



Mr. Sinclair: So this kind of conversation was very common around this workplace was it not, Ms Nastiuk?

Ms. Nastiuk: Regarding boys, I mean, like, in certain context. It wasn't something I just went around and – or even recall talking to other staff about just randomly. There's usually a place and setting for that.

Mr. Sinclair: Do you recall a conversation that took place on an evening when I was invited to your hours, Ms. Nastiuk, and to fix your furnace, and after – your furnace was out of oil, and after I came in you had a pot of coffee on and invited me to stay? Do you recall that, Ms. Nastiuk?

Ms. Nastiuk: No.

Mr. Sinclair: You don't recall this at all, Ms. Nastiuk?

Ms. Nastiuk: No. ...

Mr. Sinclair: Look at me Ms. Nastiuk, if you would, please? The particular evening that I'm referring to, Ms. Nastiuk, and going back to a previous comment about sexual discussion, that evening is so important that you can recall at this point in time because the context of the conversation is clear once that is dealt with.

Ms. Nastiuk: We never had discussions about any type of sexualized comments while in my house, and I don't even really remember that occurring outside of my house other than April 7<sup>th</sup> when you started talking about me being a lesbian and my sexual activities with men and relationships with men. ...

Mr. Sinclair: Ms. Nastiuk, if a person makes a comment and the whole picture is not given, and that comment that was made, could that be a harmful thing? ...Harmful to me...in this particular case?

Ms. Nastiuk: I don't know how to answer that. In other – in other situations, other people, I mean – variables, depending on a lot of different variables.

Mr. Sinclair: Well in this particular case I'm (inaudible) here charged with sexual harassment, and to me it's very important that these issues are made clear. The context in which the comments were made, just stating that this was what was said relating to sexual comments or sexual talk, without giving other information

to clarify that, don't you believe that would be harmful – that could be harmful, Ms. Nastiuk?

Ms. Nastiuk: I guess I would go back to when I was sitting alone in your office and you would start talking and – talking about yourself and making these comments, and totally disregarding how uncomfortable I was and how inappropriate it was for you to be making those comments to me, and the whole thing of just totally ignoring my reaction or lack of reaction.

Mr. Sinclair: Did you ever say, Tom, don't say that? Don't talk about that? Did you ever say that to myself, Ms. Nastiuk?

Ms. Nastiuk: Not until – I did say that to you but not until late summer, fall.

Mr. Sinclair: Of what year would that be Ms. Nastiuk?

Ms. Nastiuk: 2005.

Mr. Sinclair: And how many times did I say that – did I go ahead and say something where you never said anything to me? ... Was that a common occurrence?

Ms. Nastiuk: I think that was common, that staff – that they – knew that look on your face and they knew not to react, respond, speak up. That was common.

Mr. Sinclair: The look on my face? Well, Ms. Nastiuk, you know attempts are being made to try to clarify in what context you have made comments about me stating sexualized or making sexualized remarks.

Ms. Nastiuk: I think I stated that. That we were in your office and you would make those kinds of comments. Or we would be standing outside at the top of the stairs of your building and you would make comments. I don't - and then other than April 7<sup>th</sup>, and there was the drive, I think we were heading back to the centre and you quickly changed – I don't know what was – what was being said, just – I don't think there's any real context for you all of a sudden starting – you said to me that you had participated in a training group somewhere and you all had to sit in a circle and say every slang word you knew for penis and vagina, and I got very mad instantly. That was inappropriate. Someone that's been in Social Services for 20, 25 years, if you think that supervision, training, one-to-one in a vehicle after forcing your attentions on me all that time, I – there's no context for that. Talking about my grandmother having a reputation, where is the context for that?

Mr. Sinclair: You mentioned that this was something where I had attended training, is that not correct? Is that not your comment just now, Ms. Nastiuk? ...You mentioned just now that – that it was in context, you put that in context, you see, that I had attended training, and in the training it was on professionals helping people who have been sexually abused, you left that out, but you put part of that in context when you said I was in training when that happened, when – you see what I mean?

Ms. Nastiuk: I recall saying that, yes.

Mr. Sinclair: You see what I mean?

Ms. Nastiuk: And that came out of the blue. Like, there was – that's the context you want, but my context was I was alone in the vehicle with you and you made that comment. It was inappropriate. We weren't discussing sexual issues. I never talked sexual issues with you and all of a sudden you start making that kind of comment, especially with everything else. Like yeah, I was very – I was very pissed about it.

Mr. Sinclair: Okay, Ms. Nastiuk. Did you and I ever share any information as two native First Nation people that have had, you know, harmful things happen in childhood? Did you and I ever share information like that with each other openly and voluntarily?

Ms. Nastiuk: I did not openly and voluntarily share that stuff with you. It was always you asking about my family background or fibromyalgia. You would openly share – I think I have already kind of covered what you had talked about, that women liked you and you liked the '60s, the freedom of the '60s, you talked about your – you tried to talk about your relationships and it wasn't a voluntary thing, it was me having to sit and listen to you or you pulling the information out of me to the point where I would just to get you to stop I'd get mad and just give you something and then pull back. There might have been some conversations that – when things were more amicable, but, I mean, not getting to – any history of abuse or personal information.

Mr. Sinclair: Is it common for First Nation people to sit down these days, with all the healing that is taking place in our First Nations and our communities, to talk about healing issues? Is that a common thing, fairly common thing these days, Ms. Nastiuk?

Ms. Nastiuk: In groups I hear it's common, sharing circles.

Mr. Sinclair: Do you believe that's the only place that stuff happens? That sharing?

Ms. Nastiuk: Sweat lodges. It has – I mean, I was involved – I mean present at a couple of talking circles, sharing circles that Nicky and Marty had been in with the boys, but you weren't present. ...

Mr. Sinclair: Did you ever share information about your family and your childhood with yourself, Ms. Nastiuk?

Ms. Nastiuk: Yes, we were driving – I think I talked about this drive out to the elk farm, et cetera, and you kept pushing and I finally gave you one comment. And there was another time you were talking about, oh, yeah, I remember seeing parents – (inaudible) parents with five little children in tow. And days I saw you years ago and – and – oh, what else? I – somewhere in there when it was amicable, and it could have been that same conversation, you were asking me about my relationships with my parents, I'd tell you it was better with my father than with my mother.

The Chairperson: I can't hear you.

Ms Nastiuk: I did tell Mr. Sinclair that my relationship with my father was better than with my mother, but I never volunteered that. That was just a constant attempt to get me to talk about myself.

Mr. Sinclair: Ms. Nastiuk, the context of where conversations took place is so important otherwise it can sound like just sexual talk. It it's talked about in the context of healing of First nation people, then – did those, a conversation like that happen with you and I. Do you recall that, Ms. Nastiuk, where information was shared?

Ms. Nastiuk: No.

Transcript: page 1276, lines 12-25; page 1277, lines 1-25; page 1278, lines 1-25, page 1279, lines 1-12, 21-25; page 1280, lines 1-25; page 1281, lines 1-25; page 1282, lines 1-16; page 1284, lines 4-14, page 1285, lines 4-25; page 1286, line 1-25; page 1287, lines 1-25; page 1288, lines 1-5, 9-23; page 1289, lines 18-21; page 1290, lines 10-11, 14-25; page 1291, lines 1-25; page 1292, lines 2-25; page 1293, lines 1-13, 15-25; page 1294, lines 1-25; page 1295, lines 1-18, 23-25; page 1296, lines 1-5, 17-25; page 1297, lines 1-23.

(iii) Phone calls:

[106] Mr. Sinclair testified that on matters related to GHC, he had telephoned Ms. Nastiuk many times and that she had called him somewhat regularly; that Ms. Nastiuk's calls would begin with work-related matters but would, on occasion, turn to personal matters. Some of the calls were to him at his home in Thunder Bay, but most were when he was living at his mother's house in Fort Frances.

The Chairperson: Okay. And are you saying these calls happened right from when she first started working with you or ... when she became more comfortable later.

Mr. Sinclair: Not the beginning. After – after she became more comfortable, you know, and we had time to just talk about – she'd talk about her daughter and I'd talk about my kids. And I think there was a comfort level in – in talking that – that had to be there first for both of us.

Transcript: page 2135, lines 10-12, 15-22.

(iv) Visits to Ms. Nastiuk's home:

Mr. Sinclair: And that evening, after looking at the furnace, when I came upstairs Ms. Nastiuk had a pot of coffee on and invited me to stay for coffee. And so I went to her living room and just – there was a couch and there was a chair across from the couch and there was a television and a coffee table in-between the chair and the couch. And – and I'm not sure what other furniture was there, but I sat on the edge of the couch, on the corner of the couch, and Ms. Nastiuk brought the coffee and sat on the chair across. And I think there was a coffee table in-between. And I sat down in the wrong spot on that couch because she had this cat that was very hefty, overweight cat, and I ended up sitting in the spot where the cat laid down and the cat came around and let me know that I shouldn't be sitting – sitting there. And it was humorous and ...I think I may have moved for the cat. Anyway, that evening was when it was, like it was only from the workplace. There had been a reason why I had been at her – at her home. Coffee was offered. We sat and we talked and we talked like two First Nation people, and – because of things that were talked – talked about. It was personal and personal sharing of some of the – of what it was like to grow up in my home and she shared what it was like to grow up in her – her home.

Transcript: page 2151, lines 8-24; page 2152, lines 2-3, 5-13.

So what I want to do is—is to refer to that and to put that into context. Information shared by myself of – of childhood abuses that – that I experienced. And – and the reason I wanted to do that is that throughout information submitted by Ms. Nastiuk, she refers to talk of – of a sexual nature. Well, when that is put into the proper context, like – like I’m attempting to do here – that offers an explanation of two people sitting down and talking. It’s not – it is not myself making sexualized comments that are derogatory or – or aimed at – at her, okay.

Transcript: page 2152, lines 24-25; page 2153, lines 1-10.

(v) Repairing Ms. Nastiuk’s automobile:

Mr. Sinclair: “In working at Giizhikaandag, I would be away from my family for two weeks at time for the most part. And there were a number of staff members, female staff members, with vehicles and I – I offered to fix the vehicles of three staff members. Ms. Nastiuk was one, Ms. Gail Roach-Leforte was the second, and Ms. Barb Dalsig was the third.

And to fix Ms. Nastiuk’s car, it was at her property. The car sat on the road, main road in front of her house. And I looked at it and tried to fix it and I couldn’t fix it. Parts were needed. And with Ms. Gail Roach-Leforte, her vehicle, I left my vehicle with her. I took her vehicle and I went to my nephew’s place, and I had her vehicle for the full day. She was travelling back, apparently, from Winnipeg, stopped to service her vehicle in Winnipeg, put – it needed oil, but instead of oil in the engine, she put oil in – where the radiator fluid goes and it was all through the engine. And I – it took me a day to take it apart and flood it out and – and get her car back to her. With Ms. Dalsig, her vehicle was just in the parking lot. There was a light that had to be changed and those are my recollections of that.

So it’s not just Ms. Nastiuk’s vehicle. I offered help and assistance to other staff members – female staff members.

Transcript: page 2158, lines 18-25; page 2159, lines 1-20.

(vi) Assisting Ms. Nastiuk with her purchase of an automobile:

Mr. Sinclair: “She was off that particular day. And she phoned me ...She said, where are you? And I told her I was in the west end of town. And I asked, why? She said, well, I’m at the Ford dealership. I found a vehicle and I would like you to take a look at it and try it out. And I said, okay.

Went to the Ford dealership, was introduced to the salesman. Put the plates on the vehicle and I was behind the wheel and the three of us took the vehicle for a drive ...turned around and came back to the garage.

And I told Ms. Nastiuk that I thought it was a good vehicle. It was a small SUV. And she ended up purchasing it.

And I used that as one example that she felt, you know, free to call and ask for some help...

Transcript: page 2902, lines 1-20.

(vii) The alleged sexual “lesbian” comment:

Mr. Sinclair: It was an afternoon in – late in the fall. It was an afternoon where there was a mixture of rain and snow. Ms. Nastiuk had to go to the Health Access Centre, which is on the reserve where people can receive medical services.

It’s also a place where boys from our program would be taken for their – their medicals and so on.

And that afternoon, Ms. Nastiuk went to Health Access Centre. She returned about three o’clock in the afternoon, and that afternoon, when she returned, Fern and I had gone outside to have a cigarette. And it was at that time that - that - we were just finishing the cigarette ... when Marlo arrived ...and asked if she could speak with me. And so Fern left, went back into the building, and Ms. Nastiuk and I remained outside on the top of the landing of the stairs there. She stood against the inside of the stairs and I was against – standing against the other side.... And she looked very meek and she just came out and asked, and what she asked me is what would I do if she was a lesbian? Just – those are the exact words. And I stood there and – and I really didn’t say anything at first. And then I went onto – I didn’t question her. I didn’t question the statement she had just made. It certainly took me by surprise and I needed a little bit of time to collect my thoughts and give a response. And my response was that there is legislation that protects individuals against discrimination based on sexual orientation, and that their employment cannot be terminated because of sexual orientation. And that was my response to her question.

Transcript: page 2171, lines 3-25; page 2172, lines 1-13.

[107] Mr. Sinclair testified that Ms. Nastiuk repeated the comment on two occasions when she came into his office and stated that Doug (Mr. Broman) had been over to her house and tried to convince her she was a lesbian.

(viii) The alleged sexual comment about Ms. Nastiuk's hair fragrance:

Mr. Sinclair: And one time she came in – my wife had bought me – we all went and got our hair done in Thunder Bay. We go to the same salon, so Delores, Cote and I all got our hair done at the same time. One after the other, and she bought me new – I had problems with dandruff in the spring and my hair was (inaudible), so she bought me this new shampoo.

And I was using this new shampoo. Ms. Nastiuk walked into the office one morning. I was at my desk. Her hair was still damp and she came in and I could smell the shampoo. And I said I could smell your hair. Well, I just said more than that. Okay. She commented on hair smelling. I said I could smell your hair. It smells like the shampoo that I'm using. That was the full text of my comment.

Transcript: page 2900, lines 4-19.

## **E. Meeting with Chief McPherson**

[108] In response to questions by Ms. Bryson, counsel for CFN, Mr. Sinclair explained that he was called to attend a meeting at GHC with Chief McPherson, Ms. Nastiuk and George Emes on June 14, 2006.

Ms. Bryson: ...There seems to be a lot of dispute about what Chief McPherson said. Do you recall him ever saying to Ms. Nastiuk that there will be no accommodations put in place for you (Ms. Nastiuk) regarding the workplace, full stop?

Mr. Sinclair: Not at all. ...

Transcript: page 3068, lines 12-17.



Mr. Sinclair: ...And so the chief asked the – her what – how she wanted to proceed with things. And she stated that she wanted her concerns and letters addressed.

I know that as time was nearing the end of the meeting, Chief McPherson asked her what could be done to resolve the matter and she was about to leave and he asked that she get back to him with how she wanted to continue to, you know, get the matter resolved internally. And her and Mr. Emes left the room.

Ms. Bryson: Do you recall if she put any suggestions forward at that meeting.

Mr. Sinclair: No, I don't recall her putting any suggestions forward. ...Oh, I do recall one comment she made. She wanted me removed as the director of the centre.

Transcript: page 3070, lines 7-20, 23-25.

...

And so I think Chief McPherson gave Ms. Nastiuk the opportunity to talk about her letter and she did. I was given the opportunity to speak after she concluded with the comments that she wanted to make and there were things that she had said and or written that I disagreed with. And I – I did that , so it was clear from the beginning that what she was saying and what I was saying were very different.

Transcript: page 3069, lines 8-15.

## **F. Ms. Nastiuk's Medical Treatment**

[109] With respect to the symptoms or effects that Ms. Nastiuk claimed she suffered as a result of Mr. Sinclair's conduct, that is the alleged harassment during the period stated in her Complaints, Counsel and Ms. Nastiuk engaged in a merry-go-round of questions and uncertain answers that ended with Ms. Nastiuk saying: "I do not recall at the moment exactly what treatment I got when." Transcript: page 683, lines 20-21.

[110] Later in cross examination, Ms. Bryson returned the subject of medical treatment.

Ms. Bryson: So in this paragraph, you say you have trouble sleeping, that you began to suffer lower – low back pain, headaches, and gastrointestinal disorders, a bald spot developed and on (your) scalp because of the stress and several situations that were created by Tom Sinclair. (You) experienced panic and anxiety.

Is it fair to say the time period for this would be 2005, 2006.

Ms. Nastiuk: Not all of 2005.

Ms. Bryson: Okay. Isn't it true that you didn't receive any treatment for any of those items during that time?

Ms. Nastiuk: There were medications.

Ms. Bryson: And what were those for?

Ms. Nastiuk: The headaches, the gastrointestinal. Those two in 2006. But, I mean, I have those, but they're typically more under control, and I go for long periods of time, months, over a year length of time without requiring that stuff, sometimes longer, but stressors will flare all of that up, but not – stresses will flare that up.

Ms. Bryson: So are you telling me that these conditions predate the time period of your complaints, and that they flare up from time to time thereafter?

Ms. Nastiuk: They can be under control for great lengths of period.

Transcript: page 716, lines 11-24.

The Chairperson: Sorry, what you're being asked, and it's really just a yes or no answer, did you experience any of these thing before the problems with Mr. Sinclair that you've talked about?

Ms. Nastiuk: Yes.

The Chairperson: Okay, that's what she means by predate. So you experienced them before, and then I believe your evidence is that they flare up with stress, even though you go for long periods where they don't bother you; is that right?

Ms. Nastiuk: Yes.

Transcript: page 718, lines 5-16.

[111] This leads to an inference of fact that other than the medical leave authorized by her physician, Ms. Nastiuk did not seek or receive any extenuating medical treatment during the period March 2005 to March 2008 for negative physical and mental difficulties that she attributed to Mr. Sinclair.

#### **G. Remarks by Mr. Sinclair at the End of his Direct Evidence**

[112] I have selected several portions to Mr. Sinclair's soliloquy to illustrate his emotions.

These binders – binder after binder after binder and you're flipping through and looking at this section, looking at that section, and I get all mixed up looking at sections. No lawyer. I don't have the support people helping me. I have a wife that helped me a bit. I didn't produce all kinds of documents. I seen other people producing it. I seen what Ms. Nastiuk produced and she took a couple of hours to do that. She produced a lot. She put a lot of effort into this. She did a lot of work. I had nobody with me, no lawyer, no court people. I'm here by myself. I'm here by myself representing myself.

I learned as a little boy, don't lie. My mom taught me that. Be truthful. Lies hurt people. All I can do is come here and don't lie.

It's all I can do. I don't know if I'm going to win or I'm going to lose. I don't know if I did a good job of representing myself or not. I know at times I didn't know what the hell to do.

Transcript: page 2188, lines 10-25; page 2189, lines 1-3.

You know, yesterday Mr. Yerxa sat in this chair and said, “Why didn’t you do things – why didn’t you people do things the Indian way?” I knew exactly what he was saying.

It’s four o’clock. I’ve got to drive to Thunder Bay tonight. You’d asked that I be done by quarter after; well, I’m going to be done by four o’clock. And it’s been – it’s been a long week and I’m looking forward to going home.”

Transcript: page 2190, lines 14-22.

#### **IV. Response of CN**

[113] Chief McPherson explained that CFN has approximately 2000 members, about 750 of them live on reserve along with a number of members from other communities. In general terms he said that, depending on the time of the year, CFN employs between 130 and 150 members.

[114] Chief McPherson then testified that he had known Mr. Sinclair for a long time, probably 40 years, and in all that time he had never been made aware of any allegations of a sexual impropriety against Mr. Sinclair. He further explained that when CFN’s healing centre was in a management crisis that would require CFN to either to close it down, to have another agency run it, or redesign it.

#### **A. Knowledge of Ms. Nastiuk’s Complaint**

[115] Ms. Bryson, counsel for CFN, asked when Ms. Nastiuk’s complaints first came to his attention.

Chief McPherson: Initially I got a phone call from her requesting a – if I had time to see her in June of 2006 I believe it was. And she came to my office to meet with me. ...I think it was, you know, a day or two later. ...She asked me to read some papers that she had written up. She presented them and asked me if I would take the time to read them then and there.

Ms. Bryson: And did you read them.

Chief McPherson: Yes. They were about, I guess, some inferred allegations regarding Mr. Sinclair, but primarily focused on her feelings. Every page alluded to her feelings. How she felt at a specific time. How she felt because of this, how she felt because of that, so forth.

And like I said, it – that was the primary output of the documentation was how she felt at different times. ...It was against - against Mr. Sinclair. There was an inference that there was some improprieties promoted by himself against her.

Ms. Bryson: Of what nature?

Chief McPherson: Sexual.

...

Ms. Bryson: Do you recall what happened – like, how did that meeting end after you read the documentation?

Chief McPherson: Well, I think I was being placed in a position where I was being asked to be somewhat of a judge and I said why don't we sit down, air the allegations? Try and get some responses to it and come to a resolution and that triggered a meeting with Mr. Sinclair, Ms. Nastiuk, myself and I believe a gentleman by the name of George Emes, a former town police officer.

...

Chief McPherson: And we approached Tom with those (options) to see if (he) could make a determination or recommendation as to the best use of the facility.

Transcript: page 2926, line 25; page 2927, lines 1-3, 6-7, 10-25; page 2928, lines 1, 7-11; page 2930, lines 14-24; page 2933, lines 10-12.

## **B. Meeting with Ms. Nastiuk, Mr. Emes and Mr. Sinclair**

Ms. Bryson: Okay. Now, jumping back, I want to go to the meeting between you, Ms. Nastiuk, Mr. Emes and Mr. Sinclair.

Chief McPherson: Well, we met at the Healing Centre up I – I believe it was Tom's office. A roundtable discussion and I think I spoke first. You know, just citing the reason we were there and tried to come to some – you know, if there

was a conflict, how do we resolve that conflict? And air the allegations, air any concerns, comments, you know.

...

Ms. Bryson: Did Ms. Nastiuk and Mr. Sinclair agree on any version of events or -

Chief McPherson: No, there was no solution to it. They had to – varying thoughts as to what had transpired.

...

Ms. Bryson: Yeah. So, yeah, my question was, do you recall stating that, that to give you \$5000 would admit Mr. Sinclair's wrongdoing?

Chief McPherson: I don't recall specifying \$5000, but that position is consistent with the way I operate, offering money to Ms. Nastiuk would be making an admission of guilt from me on Mr. Sinclair and I wasn't prepared to do that.

Ms. Bryson: Do you recall if Ms. Nastiuk requested anything from you in that meeting?

Chief McPherson: No, she was going to get back to me."

Transcript: page 2933, lines 13-24; page 2936, lines 21-25; page 2937, lines 1-7.

[116] In her cross-examination of Chief McPherson, Ms. Nastiuk asked a series of questions and I have selected several pertaining to the first meeting arranged by Chief McPherson, attended by Ms. Nastiuk, Mr. Emes and Mr. Sinclair.

Ms. Nastiuk: Okay. I'll put it to you the way I recall it. Is that at the end of that after making the statement about the \$5000, you – and the other comments that to – I had a job to go back to and that no accommodations or changes in the workplace would be made because to do so would be admitting that Mr. Sinclair was guilty and that you were not prepared to do that. And then you commented to get back to you with what I wanted. Do you recall that?

Chief McPherson: I recall asking you what it would take to resolve this issue and you were going to get back to me on that. ...

Ms. Nastiuk: I don't recall "What it would take to resolve" because you had already told me that no accommodations or changes would be made because to do so would be admitting Tom was guilty and you were not prepared to do that.

The Chairperson: You can't just throw statements out there. Did you say that no accommodation or change to the workplace would be made because that would be an admission of Tom Sinclair's guilt and you weren't prepared to do that? Did you make that statement in that meeting?

Chief McPherson: I recall saying I wasn't prepared to be the judge, okay. The judge and jury on this particular issue and I did ask you to get back to me on what you thought was a palatable resolution to this matter.

...

Ms. Nastiuk: Do you recall me saying anything that did not indicate that I did not want to go back to work, but I wanted to go back to work and all I got from that meeting was that Mr. Sinclair still had a job and you weren't going to do anything to assist me getting back into the workplace safely and addressing any of these at that time, so—

The Chairperson: Is that correct? Was her take on the meeting correct, that you did not view it just as her trying to get back to work in a safe environment?

Chief McPherson: No, like I said, I can just reiterate that I had asked Ms. Nastiuk what she saw as a palatable resolution to this problem? And please get back to me as soon as possible.

Ms. Nastiuk: Okay, with the comment that I recall that no changes would be made, there would be no accommodations because to do so would be admitting that Tom was guilty and then stating that I was to get back – you wanted me to get back to you with what I wanted. Can you see how that would create a really difficult situation for me? Like, what could I ask for?

Chief McPherson: Well, if, in fact, the allegations were true, I could see how it would be – create a situation for you, but at that point and to this day we don't know if the allegations are true, so it would be a hypothetical answer on my part. ... You'd be asking me to speculate and I can't do that.

Ms. Nastiuk: Okay. As the employer, did you not see that there was a duty to take me seriously?

Chief McPherson: If I reconvened the meeting – that’s why I asked you, what a resolution to the situation would be from your perspective. I thought I was taking you seriously by agreeing to a meeting to try and flesh out a resolution to it and asking you to get back to me.

...

Ms. Nastiuk: Okay. After that meeting, Mr. Sinclair testified that you two remained there and had some discussion. Do you recall what that discussion was?

Chief McPherson: I posed the same question to him, how do we resolve this? What do you see as a resolution?

Ms. Nastiuk: Do you recall what his response was?

Chief McPherson: He said that he was innocent of all allegations and he wanted to – you know, the air cleared.”

Transcript: Page 2998, lines 21-25; page 2999, lines 1-12, 15-25; page 3000, lines 12-25 ; page 3001, lines 1-16, 18-25; page 3002, lines 1-3, 8-19.

### **C. Hiring Dale Morrisseau**

[117] Chief McPherson took Ms. Nastiuk’s complaint to the Band Council, and shortly afterward Dale Morrisseau was hired as band manager and given the task of investigating Ms. Nastiuk’s complaints. It was Chief McPherson’s belief that at the time Ms. Nastiuk made her complaint CFN had a personnel policy which included provisions relating to sexual harassment.

Ms. Bryson: Do you recall Dale Morrisseau coming to chief and council and say that Ms. Nastiuk wanted to come back to work at GHC around this time of the fall ’06?

Chief McPherson: Well, she had some concerns, like I said, about it being unsafe. And, like I said, at that period of time there was a number of things going on at



Couchiching. And I think Mr. Morrisseau granted Ms. Nastiuk just about every concession possible to – provide her with employment.

Ms. Bryson: And did chief and council approve that he do that?

Chief McPherson: Well, like I said, we wanted to be aware of it. We gave him a lot of latitude and subsequently with her a lot of latitude.”

Transcript: page 2943, lines 2-17.

#### **D. Dale Morrisseau’s Investigation**

[118] In early August 2006 Dale Morrisseau received a copy of Ms. Nastiuk’s complaint against Mr. Sinclair. He had no prior acquaintance or dealings with either of them and considered himself to be a neutral and objective person with respect to the complaint.

[119] Mr. Morrisseau explained that Chief McPherson told him that he had already had a meeting with Ms. Nastiuk and Mr. Sinclair and he requested that Mr. Morrisseau investigate the matter.

Mr. Morrisseau: Well, to start the investigation, I endeavoured to speak with Marlo Nastiuk and Tom Sinclair – separately, of course – to try to get to the issue of the complaint.

Ms. Bryson: And did you speak to them?

Mr. Morrisseau: Yes.

...

Ms. Bryson: Okay. Do you recall what Ms. Nastiuk said to you?

Mr. Morrisseau: She went over the details of the complaint, indicating that she was sexually harassed by Tom Sinclair ...we spoke at length.

...

Ms. Bryson: And did you put Ms. Nastiuk' allegations to him for a response?

Mr. Morrisseau: I'm sure we discussed the details of the allegations, and he was adamant in stating that they were not true.

Transcript: page 2520, lines 15-21; page 2521, lines 3-7, 13-14; page 2522, lines 5-9.

[120] When asked by counsel if any specific allegations concerned him more than others, Mr. Morrisseau said that there seemed to be no specific incident of sexual harassment, rather what Ms. Nastiuk had indicated to him was an overall occurrence, recurring in one form or other. He went on to say that he interviewed other persons and that, in further meetings with Ms. Nastiuk and Mr. Sinclair, he never divulged to either of them the results of any interviews but rather condensed interviews into a written document and submitted it to the Chief and Council. In due course he was instructed to let the complaint "play out through the proper legal channels."

[121] Ms. Nastiuk's cross examination of Mr. Morrisseau yielded more of these same conclusions.

Ms. Nastiuk: You have several female staff making comments about how Mr. Sinclair made them uncomfortable; a couple of comments about viewing his view toward me as inappropriate. And did you see that as being based on being female, which – and as – okay, based on being female?

Mr. Morrisseau: ...I don't understand her question.

The Chairperson: The question you're trying to get at that – are you asking him if he felt from his interviews and discussions with staff that Mr. Sinclair treated female staff differently than male staff?

Ms. Nastiuk: Yes. ...

The Chairperson: Did you feel that?

Mr. Morrisseau: I didn't come out of those interviews with that. I mean I – I mean even the male staff had some issues of his management style, so I don't think it was just wholly indicative of female perception of the staff – at the healing centre.

Ms. Nastiuk: So the males' comment about his management style, but the female's commented about feeling uncomfortable and it being inappropriate sexual behaviour?

Mr. Morrisseau: She never specified anything about inappropriate sexual behaviour in this interview here.

Ms. Nastiuk: Inappropriate behaviour based on they're being female.

Mr. Morrisseau: And the question is?

Ms. Nastiuk: Was there a difference – did you –

Mr. Morrisseau: I think I answered that, I didn't believe there was."

Transcript: page 2823, lines 7-12, 18-25; page 2824, lines 4-25.

[122] Ms. Nastiuk also pressed Mr. Morrisseau regarding what she described as a hostile work environment the responsibility of which she imputed to Mr. Sinclair and CFN.

Ms. Nastiuk: Do you recall us discussing the hostile work environment?

Mr. Morrisseau: I remember you referring to it as a hostile work environment and I looked into it and it seemed from the investigation that you were just as responsible as everybody else for creating the hostile work environment.

...

Ms Nastiuk: You testified that staff said their interactions – or my interactions with them were strictly professional, but I was difficult to deal with. Can you explain what 'difficult to deal with' was?

Mr. Morrisseau: You kept to yourself according to them. You were very demanding. ... Not a very pleasant person.

Transcript: page 2756, lines 12-18; page 2757, lines 9-15, 17-18.

[123] Toward the end of Ms. Nastiuk's cross examination of Mr. Morrisseau she naively asked for his opinion on the validity of her complaints.

Ms. Nastiuk: Did you get any indication during your staff interviews at the end of October into November, December 2006 that there were – oh, God, there were possible – there were – there might be some validity to my complaints, enough – okay, stop there.

Mr. Morrisseau: So did I get any indication there might be some validity to your complaints?

Ms. Nastiuk: Yes.

Mr. Morrisseau: Is that the question?

Ms. Nastiuk: Yes

Mr. Morrisseau: It was still unclear.

Ms. Nastiuk It was unclear?

Mr. Morrisseau: Because no one had given me any kind of specific instance where they witnessed an instance of sexual harassment towards you.

Transcript: page 2837, lines 8-25; page 2838, lines 1-2.

#### **E. Alleged Prior Knowledge of Allegations Against Mr. Sinclair**

[124] A contentious issue in this inquiry was whether Ms. Roach-Leforte told Chief McPherson about Ms. Nastiuk's allegations in December 2005 at a meeting with him and Mr. Sinclair. When asked if he recalled being told that by Ms. Roach-Leforte, Mr. Morrison had no recollection of being told but said that if he had been told so he would not have forgotten to write it down.

[125] In the same line of questioning Counsel asked Mr. Morrisseau about his interview with Barb Smith:

M. Bryson: During your interview with Ms. Smith, if she had told you, 'Tom Sinclair told me he was interested in Ms. Nastiuk in a romantic or sexual way,' would you have written that down?

Mr. Morrisseau: Yes

Ms. Bryson: Okay. Do you recall her saying anything like that to you?

Mr. Morrisseau: No.

Ms. Bryson: And would that stand out in your memory in the context of this complaint?

Mr. Morrisseau: If she said something like that, I would have put a dot beside it. I would've (inaudible) it, I would've underlined it in my notes.

Transcript: page 2548, lines 4-17.

#### **F. Ms. Nastiuk's Return to Work**

[126] With respect to Ms. Nastiuk speaking to him in October 2006 about returning to work at GHC, Mr. Morrisseau stated that the only time he remembered was in the period December 2006 / January 2007, that she wanted to return to work on express conditions and gave him a letter with back to work stipulations.

Ms. Bryson: So we're still – we talked about number one and number two. We're at tab18 of C-1 on the letter to you from Ms. Nastiuk on page 1 of 4. ...So let's turn to the next page, terms and conditions for return to work. Did you agree that Mr. Sinclair and Ms. Nastiuk would communicate in writing only? That's how I'm interpreting the first one.

Mr. Morrisseau: Yes.

Mrs. Bryson: Did you have any concerns about that?

Mr.: Morrisseau: No. I preferred it, actually, because everything would be in writing.

Mr. Bryson: Did Mr. Sinclair have any concerns about that that he raised to you?

Mr. Morrisseau: No, not at that moment.

Ms. Bryson: Okay. Did you have any issue with Ms. Nastiuk not going over to the other building where Mr. Sinclair's office was except for staff or GHC meetings.

Mr. Morrisseau: No issues with that. Her office was in the other building and she was capable of performing her duties in her office.

Ms. Bryson: And did Mr. Sinclair have any issues that he – with that that he raised to you?

Mr. Morrisseau: No.

Ms. Bryson: Just to clarify, did you go over these terms and conditions with Mr. Sinclair at some point?

Mr. Morrisseau: Yes.

Ms. Bryson: Yeah, okay. Okay. And did everyone – and by everyone, I mean you, Ms. Nastiuk, and Mr. Sinclair agree – or agree no same out of town trips?

Mr. Morrisseau: Yes.

Ms. Bryson: Yes, okay. That Mr. Sinclair was to avoid Ms. Nastiuk and not wilfully seek her out?

Mr. Morrisseau: With that one, I think we just keep the interactions professional according to the terms that we were trying to establish here.

Ms. Bryson: And by professional, do you mean any interaction or that they were only to interact on business?

Mr. Morrisseau: Yes. Business related, and encouraged to having a third party present if there was such interaction.

Transcript: page 2581, lines 5-25; page2582, lines 1-25; page 2583, lines 1-2.

[127] In the foregoing process of working out return to work conditions Mr. Sinclair was opposed to Ms. Nastiuk having contact with the provincial ministry and Mr. Morrisseau agreed because Mr. Sinclair was the spokesman for GHC in dealings with the Ministry of Community and Social Services. Finally, Mr. Morrisseau stated that the conditions that were put in place for Ms. Nastiuk's return to work were not signed by the parties, but rather only verbal.

### **G. Alleged Failure of CFN to Protect Ms. Nastiuk**

[128] Mr. Morrisseau rejected Ms. Nastiuk's claim that CFN had failed to provide her a healthy and safe workplace and failed to respond appropriately to her complaint with effective remedial action all of which she claimed would have decreased the consequences and harms she claimed to have suffered.

Ms. Bryson: Do you feel you took appropriate action ...once this matter was in your hands?

Mr. Morrisseau: Oh, Yes. ...In all the documentation, I have never seen one instance of sexual harassment.

Transcript: page 2685, lines 9-13, 21-23.

...

Ms. Bryson: And are the matters, the grievances she brought to you or wrote to you between January 2007 and August 2007 or the one we went through yesterday, were those the only grievances she brought to your attention during that time?

Mr. Morrisseau: Yes.

Ms. Bryson: And do you feel that you responded to each of those appropriately?

Mr. Morrisseau: I thought I did. I mean – again, I mean – I think Marlo should have taken a lot of the responsibility for the interactions of staff that is there. I mean, it's a two-way street when you're dealing in a work environment and – and I mean seeing from the documentation that I received from some of the other staffers, it was their opinion that she was a difficult person to work with. I mean if I have 90 percent of the staffers saying that over there and one person she isn't who am I to believe?

Transcript: page 2686, lines 10-25; page 2687, lines 1-4.

[129] In her cross examination, Ms. Bryson also questioned Ms. Nastiuk about (Document 71) as well as other documents that she had affirmed as being indicative that CFN "...took absolutely no preventive measures to prevent Mr. Sinclair from harassing you or from continuing to harass you."

Ms. Nastiuk: Preventive measures the first time, I didn't see any, and the second time, Dale was assigned, but it wasn't effective.

Ms. Bryson: Okay, But didn't you testify earlier today that you had no independent contact with Mr. Sinclair from the time you brought this to the notice of CFN forward, right, that he didn't come by your home, and that aside from some phone calls you participated in when you were back at work, that you had no one-on-one contact with him whatsoever. Isn't that correct?

Ms. Nastiuk: We did talk once a month, yes, we did.

Ms. Bryson: And you did that voluntarily, correct?

Ms. Nastiuk: There was so much going on at work that you couldn't just stop and yank someone all the time. We tried to minimize it, so it was a forced situation. ...But it wasn't me going to his office.

Ms. Bryson: No, I didn't say that, I'm just saying that the terms of your return to work were that you did not have to have any one-on-one contact with Mr. Sinclair, that things were to be in writing isn't that correct?

Ms. Nastiuk: Yes.

Ms. Bryson: Or in the presence of a third party, right?



Ms. Nastiuk: Yes.

Ms. Bryson: You were located in a different building from Mr. Sinclair, weren't you?

Ms. Nastiuk: I always was located in a different building ...after June '05.

Ms. Bryson: Right. And we already established today, you said that he didn't come by your home, he didn't call you after you brought notice of this complaint to CFN in June 2006, right?

Ms. Nastiuk: Other than a couple of calls for meetings in June '06.

Ms. Bryson: No, I'm saying after you brought this to the attention of the Band, they you're gone from work, you're not at work, right, from that June '06 to January '07.

Ms. Nastiuk: There would have been no contact between us.

Ms. Bryson: Right. Then you're back at work and you testified this morning that he didn't come to your home or have any contact with you outside of work; isn't that correct?

Ms. Nastiuk: Yes somewhat.

Ms. Bryson: Okay. And now we've established that you did not have to have any one-on-one contact with him at work, right, and if you did, you did that voluntarily, didn't you?

Ms. Nastiuk: There were times when I had to call about something, yes. ...Work related in the office.

Ms. Bryson: That you did call? Because wasn't it a term of your return to work that you did not have to have any one-on-one contact with him except in writing?

Ms. Nastiuk: Mr. Sinclair had already been making one-on-one contact with me in the – in the workplace moment by moment and, yeah, some of that barrier got kind of crumbled.

Ms. Bryson: And you didn't issue any grievances to Couchiching First Nation about that did you?

Ms. Nastiuk: I know Dale and I had discussed it.

Ms. Bryson: But you didn't put anything in writing and say, I don't want – this isn't supposed to happen, I don't want this to happen, did you?

Ms. Nastiuk: I didn't. I brought it to Dale's attention that this was occurring, so, no, I didn't do anything with it and he didn't either.

...

The Chairperson: But he didn't come around your home and he didn't phone your home; is that right?

Ms. Nastiuk: That's right.

Transcript: page 746, lines 18-25; page 747, lines 1-3, 16-25; page 748, lines 1-6, 8-16, 22-25; page 749, lines 1-15, 17-25; page 750, lines 1-14; page 751, lines 9-12.

## **H. Ms. Nastiuk's Retaliation Complaint**

[130] That Ms. Nastiuk's return to work was fraught with difficulties for her, her co-workers, Mr. Sinclair and Mr. Morrisseau, is evidenced by a GHC staff meeting that Mr. Morrisseau was called to assist on March 28, 2007.

Mr. Morrisseau: When I got there, the people in attendance were already sitting around the conference table. I kind of said, what's going on? You want to have a session about issues relating to the healing centre.

Ms. Bryson: And who said that?

Mr. Morrisseau: Tom

...

Ms. Bryson: And did this – staff members express concerns to you?

...

Mr. Morrisseau: I mean, they just had concerns about their professional interactions with Marlo. ... Brian keeps his distance from her. Rick, when she wants him, she wants him right now. Very demanding. Very unapproachable.

Transcript: page 2617, lines 11-17, 23-25; page 2618, lines 4-6, 12-14.

...

Ms. Bryson: So what did you do following that meeting about their concerns?

Mr. Morrisseau: ...I didn't do anything proactively outside of the meeting. I basically indicated that, you know, work-related issues, performance issues are Tom's concern; that we'd all do better to try to be civil and more professional in our interactions with other staffers. Basically saying you don't have to like them, just have to work with them.

Transcript: page 2623, lines 23-24; page 2624, lines 2-9.

...

Ms. Bryson: On or about – did Ms. Nastiuk contact you in early August '07 about leaving the staff meeting.

Mr. Morrisseau: Yes. ...She indicated to me that she felt that she was being retaliated against in her complaint – for lodging a complaint, and she would be lodging a second complaint for retaliation.

Ms. Bryson: And – and who did she allege was doing the retaliation.

Mr. Morrisseau: Tom Sinclair.

Transcript: page 2629, lines 6-9, 12-18.

## **I. The Underwear Incident**

[131] Ms. Nastiuk testified to the fact that, on the same day that she left the workplace after the staff meeting, she was going to take a youth to a court attendance and that Mr. Sinclair had approved her purchase of female underwear for a client in treatment for sexual dysfunction issues. Mr. Sinclair however, testified that he approved Ms. Nastiuk to purchase male underwear for the above-mentioned youth, which were of a material that he may like. Ms. Bryson questioned Mr. Morrisseau regarding this incident:

Ms. Bryson: And during your conversation with Ms. Nastiuk about her leaving the workplace, did she discuss an issue of purchasing female underwear for a male youth in care and – and a dispute about that?

Mr. Morrisseau: There – that was a contentious dispute. She said she had the authority of Tom Sinclair to go and purchase these panties for the youth in question. I talked to Tom about this because I thought, well, this seems wholly inappropriate. These are sexual offenders. And I talked to Tom about it and he said that he absolutely did not give her authority to go out and do this. And I certainly did not give her authority to do this.

...

She understood that it was an ongoing concern, not only for her but for the healing centre. The issue of who was responsible for – for authorizing those – the purchase of the female underwear for the client.

Ms. Bryson: So did you reach any conclusion on – on this underwear issue.

Mr. Morrisseau: Well, only my own decisions. I can't – I mean, based on – I mean, it was – It's another he said/she said issue ... Tom vehemently saying that he did not authorize this, and Marlo saying that she was given authority by Tom to do this. To me, personally, I just don't see how this could benefit a person that's a sexual offender.

Ms. Bryson: Did you talk to anyone else, any of the other GHC staff about that particular issue?

Mr. Morrisseau: I think I talked to Nicky Morrisseau about it because she'd sent me the letter of – basically it was a letter of complaint. She was concerned about this – that Marlo had went out and did this, and she didn't know if it was beneficial to the client and (inaudible). My only comments to Nicky were that I would – I would investigate this issue.

Transcript: page 2632, lines 8-21; page 2633, lines 11-15; page 2634, lines 2-22.

#### **J. Abandonment of Position by Ms. Nastiuk**

[132] On August 17<sup>th</sup>, 2007, Mr. Sinclair left GHC for another opportunity in a different community. Despite Mr. Sinclair's departure, Ms. Nastiuk did not return to work. Mr. Morrisseau's testified that he saw no reason for her absence, nor had he authorized her absence after Chief and Council had rejected the Commission-mediated proposal for settlement of her complaint.

[133] Mr. Morrisseau testified that Chief and Council dealt with Ms. Nastiuk's absence from GHC in October or November 2007 by concluding that she had abandoned her post. This left Mr. Morrisseau in a state of confusion because "...it was a difficult position to be in, being in the middle of this fight. I had no vested interest in it at all." Transcript: page 2678, lines 11-14.

[134] However Mr. Morrisseau stated that once Chief and Council had decided that Ms. Nastiuk had abandoned her position he had no authority to tell Ms. Nastiuk that she still had a job to go back to.

[135] Ms. Bryson asked a number of questions concerning the chief-and-council decision that Ms. Nastiuk had abandoned her employment with GHC.

Ms. Bryson: And if an employee was off for a long period of time ... would that require chief and council's approval or just Dale's?

Chief McPherson: He would approve it, but we could be cognizant of it.

Ms. Bryson: Do you recall after – or do you recall Dale Morrisseau coming to chief and council after they had considered that she abandoned her position and saying Ms. Nastiuk wanted to come back to work again? It would have been about November 2007.

Chief McPherson: I can't recall because at this time, like I said, our position was that she had abandoned her employment. ... Well, the – like I said, (inaudible) issues are in the realm of the Band manager. The position of abandoning the position, we concurred with Mr. Morrisseau that she just wasn't there, so that the position wasn't being filled, so in respect to the abandonment, we were all in agreement there that she had to have abandoned it. If you don't show up for work, you don't show up for work.

Transcript: page 2947, lines 12-25; page 2948, lines 1, 9-16.

[136] In cross-examination of the complainant, CFN's counsel pressed Ms. Nastiuk to provide any evidence, not just an unsubstantiated belief, that Mr. Sinclair or CFN had interfered in her attempts to gain alternative employment, her answer was "I was told otherwise". When asked "By whom?" Ms. Nastiuk asked "Do I have to answer that?" the Chairperson said "Yes". This simple question and answer exchange at page 687 of the transcript began a series of some 35 questions most of which resulted in unresponsive answers or simple evasions of the questions. It culminated at page 695:

Ms. Bryson: Well, you alleged that you could not obtain employment in the entire Treaty 3 area because of rumours spread by Couchiching First Nation about you, Isn't that true.

Ms. Nastiuk: Yes.

Ms. Bryson: And you've said you had to go and take a job where you now have to pay employment taxes because of that. Isn't that true?

Ms. Nastiuk: Yeah.

Ms. Bryson: So don't you think it's reasonable to bring evidence that this in fact happened?

Ms. Nastiuk: I don't know how I would bring evidence – people have said it and I'm not going to bring those people into court.

Ms. Bryson: Okay. So you're asking us to accept these things are true without anyone coming and testifying under oath that they're true, and you want to receive \$160,000 for that, correct.

Ms. Nastiuk: Yes.

Transcript: page 695, lines 11-25; page 696, lines 1-7.

[137] Then Ms. Bryson and Ms. Nastiuk continued to wrestle through another series of at least 50 questions concerning Ms. Nastiuk's allegation that the Respondent CFN spread rumours that negated her opportunity to gain employment, and that she perceived it to be a pattern traceable back to the "people in power".

Ms. Nastiuk: I'm not really raising the issue, I'm not making an issue, it's a general overall issue that goes back to the people in power at Couchiching. I don't think you can point the finger at one person because the people in power – it's an accepted norm that you don't – I mean, what's going to get done? Who's going to – like, what – I don't know. I feel like I've raised the issue. Specifying Dan and Chuck, I wasn't going to make an absolute allegation against two individuals. I was raising an allegation against Couchiching, the people in power, because the people in power that weren't doing this should have and could have taken the responsibility and stood up against this and said enough.

Transcript: page 710, lines 8-25.

Ms. Bryson: Okay. I don't want to belabour this much longer, so I'm just going to summarize here. So from our discussion, isn't it correct that you have no direct evidence of anyone on Chief and Council saying anything negative about you that you heard directly or that you have any witnesses to say that precluded you from getting alternative employment? Isn't that true?

The Chairperson: I think she's answered that several times. She has no direct evidence.

Transcript: page 712, lines 18-25; page 713, lines 1-4.

## V. Standard of Proof

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

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

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

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

In accordance with these judicial guidelines, the testimony of each witness has been examined for consistency with the preponderance of probabilities which surround the existing circumstances of the complainant's employment with [the corporate respondent] and her interactions with [the individual respondent]. I have also scrutinized the evidence for plausibility under the circumstances and weighed also the witnesses' motives. In addition, I have paid attention to their powers of observation, memory and recall, as well as their attitude and demeanour under oath, and the manner in which they testified. Finally, I have checked their testimony for lack of internal coherence or any significant inconsistencies and contradictions. (at p. 15-17)

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

The Complainant must prove, on a balance of probabilities that there was a contravention...of the Human Rights Code. This involves two parts: (1) proof that



the alleged conduct by the Respondent occurred; [and] (2) proof that it constituted sexual harassment in the circumstances (for example, that it took place without the complainant's willing consent). If the Complainant leads evidence which could satisfy these requirements, then the Respondent has an evidentiary burden to respond with some evidence that the acts did not occur or that they did not constitute sexual harassment. (at p. 15-57)

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

[144] Section 14 and 14.1 of the *CHRA* provide:

14 (1) It is a discriminatory practice,

- a) in the provision of goods, services, facilities or accommodation customarily available to the general public,
- b) in the provision of commercial premises or residential accommodation, or
- c) in matters related to employment,
- d) to harass an individual on a prohibited ground of discrimination.

(2) Without limiting the generality of sub-section (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

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

[145] Sexual harassment in the workplace has been broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victim of the harassment: *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1285 (S.C.C.). The first element to be established is that the conduct was unwelcome. An

assessment of the complainant's reaction at the time of the incident or incidents will determine whether the conduct was unwelcome. If the complainant, either expressly or through her behaviour, demonstrates that the conduct was unwelcome, the first element is established. If the evidence shows that the complainant welcomed the conduct, however, the complaint will fail. The second element of sexual harassment requires that the conduct be sexual in nature. Both the Supreme Court of Canada in *Janzen, supra*, and human rights tribunals have recognized that a broad range of conduct, including gender-based insults, sexist remarks, comments about a person's looks, dress, appearance or sexual habits, will fall within the ambit of "sexual in nature", and should be determined on a case-by-case basis, based on the test of the reasonable person in the circumstances.: *Canada (Canadian Human Rights Commission) v. Canada (Canadian Armed Forces) (re Franke)* [1999] F.C.J. No. 757 at paragraphs 32 to 40 (F.C.)

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

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

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

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

An act or omission shall not, by virtue of subsection (1) be deemed to be an act or omission committed by a person, association or organization if it is established

that the person, association or organization did not consent to the commission of the act or omission and exercised all due diligence to prevent the act or omission from being committed and subsequently, to mitigate or avoid the effect thereof.

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

## **VI. Assessing Credibility**

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

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

### **A. Credibility of Ms. Nastiuk**

[151] In assessing the credibility of the Complainant, Ms. Nastiuk, I have analyzed and scrutinized her testimony for its plausibility, I have considered whether her testimony contains any significant inconsistencies and contradictions, I have weighed her testimony against the preponderance of probabilities and surrounding circumstances in existence at the workplace of the GHC during the time she worked there, and, in particular, I have considered her relationship

with GHC's Executive Director, the Respondent, Mr. Sinclair, her dealings with band manager, Dale Morrissette, and her interactions with other GHC employees.

[152] Mr. Broman, a former employee at GHC, was called as a witness by the complainant and testified that there was tension in the workplace at GHC: "First of all, residential care settings are highly explosive places at times. We are working with ... extremely angry, agitated children, so there's a lot of pressure on staff. And staff cannot take it out on the children, so sometimes staff tend to take it out on each other...It's a pretty tough place to work ...there was a lot of in-fighting on the floor...people with their own points of view about how a resident should be treated .. (and) that contributed to the level of tension and made it very uncomfortable sometimes. ... there was a lot of back-stabbing, a lot of insults with just about everybody there. You know it was kind of like I would go home quite frustrated at times thinking about the atmosphere."

[153] Another significant circumstance surrounding the Complainant's allegations of sexual harassment is the breakdown of a working relationship between the Complainant and the Respondent, Mr. Sinclair, culminating in her deep-seated aversion to him. From Ms. Nastiuk's perspective, the deterioration in their relationship started soon after she began to work with Mr. Sinclair in developing a new program for GHC, and had its origin in things said to Ms. Nastiuk in casual conversation between them, comments that made her feel "uncomfortable". I conclude that this aversion toward Mr. Sinclair distorted her objectivity and ability to testify factually each time she described incidents of perceived "inappropriate" behaviour as sexual harassment.

[154] In the beginning, Ms. Nastiuk worked in close proximity to Mr. Sinclair and for a time shared his office. I conclude that this created a serious emotional problem for her, leading her to believe that she was at his beck and call to the extent that it denied her the normal work-place freedoms enjoyed by all her co-workers. She also began to feel her work was all-encompassing, driven by the pressure of high expectations and compounded by "the type of attention and intensity of Mr. Sinclair's focus ...I had to do something because I started getting concerned

based on the behaviours that I saw of Mr. Sinclair that he was the one in control, he was used to getting what he wanted.”

[155] Ms. Nastiuk did not tell Mr. Sinclair to stop his anecdotal comments about himself or his inquiries into her private life, and claimed that if she had done so it might have jeopardized her employment. Even when she was officially employed as case manager at GHC and working in a different building, Ms. Nastiuk still felt he was infatuated with her: “And I don’t mean he was asking me for sexual favours, or sexual favours or else, that type of thing, it was just like all of a sudden he just thought we were, like – like just there was a bond or – it was more than like an executive director /supervisor/case manager relationship.”

[156] In the course of her testimony, and somewhat repeatedly, Ms. Nastiuk revealed a propensity to view herself as blameless, not with respect to her allegations of discrimination, but in the matter of the workplace and interactions with other staff. When questioned about the staff not liking her she answered:

...some of the issues with staff, there was a lot of resentment that some of the old staff ...they were resentful that some of us on-call, part-time staff was moving up and they were down on the floor....So there – that’s to me how a lot of that got started, and somewhere in there, I don’t know how that got turned around. There might have been some thoughts on my own. I remember I used to make the comment, because I – it used to bother them so much, so I would say, well, it’s basically a good fit because I gained a lot of skill and knowledge through my education. It turned out that was absolutely the worst thing I could have said because it put up even more of a barrier.

[157] Later in her testimony concerning Mr. Sinclair telling her that the staff didn’t want to work with her, Ms. Nastiuk said “...those kinds of behaviours and interactions aren’t the result of me or anything that I’ve got on the go with them. It’s them, like, something is going on ... two were resentful. They wanted offices and they wanted titles and I think pretty much everybody at the centre understood that.”

[158] Ms. Nastiuk's poor relations with staff resulted in an arrangement whereby information she required from workers dealing with youths had to be being transmitted to her through Mr. Sinclair, a fact she lamented as "another reason to have to go to his office, and it was very frustrating."

[159] At this stage in her employment with GHC, Ms. Nastiuk began searching human rights websites to determine how to define what she was experiencing. "Because it's not from the blatant examples of sexual harassment or those kind of behaviours on those sites, it didn't quite fit that, but it just felt – it was almost harder to deal with and more – I don't know how to – it was very intrusive . I felt very violated... So what the heck is this ... it just – it wasn't – it didn't feel right. I knew it was wrong. It made me feel bad, but by law, it didn't seem to fit that criteria that you see posted as – there were examples."

[160] In some instances during her direct testimony, Ms. Nastiuk made very broad allegations, prompting the Chairperson to ask her to give specific examples:

Ms. Nastiuk: ... I'd never heard anyone say those things to me before, and it just – it did not fit.

The Chairperson: And when you say those things, what are those things?

Ms. Nastiuk: Those things – I don't recall exactly what those things were because they didn't fit, they infuriated me. ...Why should I retain it? After in the end, when I started finally fitting it together and just taking the blinders off and facing it, calling it more the way it was it was more like projecting. That's how it felt.

The Chairperson: Can you give me an example?

Ms. Nastiuk: Not really. Not – I can't really – and I know I've tried to think about that, but, to me, they were just so off the wall, I couldn't – I couldn't retain it. ...

The Chairperson: ...but I'm meaning what things he said to you that – you're using strong words like horrible and inappropriate. ...psychoanalysis and this, but you're not giving any specific ...

Ms. Nastiuk: I just remember exactly the way it made me feel, and it made me mad.

Transcript: page 196, line 25; page 197, lines 1-7, 11-23; page 198, lines 8-10, 13-17.

[161] Despite repeatedly testifying that she suffered in silence, unable to confront Mr. Sinclair and demand he stop making personal comments to her that she found offensive, Ms. Nastiuk acknowledged occasions when she did engage in normal personal conversations with him, and other occasions when she challenged him. These included an incident in the fall of 2005, outside her home, when Mr. Sinclair started talking about her clan, and after Ms. Nastiuk became angry and stopped him, he drove away and later returned and apologized for his behaviour. Ms. Nastiuk also agreed that she engaged in discussions with Mr. Sinclair concerning a possible purchase of one of her automobiles. Ms. Nastiuk related another conversation with Mr. Sinclair in the fall of 2005 when he began talking about her grandmother's reputation as being the life of the party. She immediately responded and stopped the conversation.

[162] Early in Ms. Bryson's cross-examination of Ms. Nastiuk, it was established that after the unsuccessful meeting with Chief McPherson in June 2006, Ms. Nastiuk went on sick leave from June 19, 2006 until October 4, 2006. During that period Ms. Nastiuk provided written requests to the Respondents, intended to serve as a basis to negotiate or mediate her complaints. Contemporaneously, Ms. Nastiuk made a claim for employment insurance benefits on the basis of constructive dismissal that she referred to as "disguised" dismissal. When questioned by Ms. Bryson to identify the circumstances of her constructive dismissal, Ms. Nastiuk said "there were reasons why I could not go back to the healing centre, and Mr. Sinclair was a big part of that. The way the program was set up to run it was all part of it." When pressed by Ms. Bryson to disclose whether it was Mr. Sinclair or the Chief and Council that had terminated her employment, Ms. Nastiuk answered, "it would be both because Couchiching was not around to practice due diligence, Mr. Sinclair was allowed to run the program, hire and fire as he saw fit."

[163] At another point in cross-examination, Ms. Nastiuk asserted that she began feeling uncomfortable with Mr. Sinclair in March 2005, right after he started at GHC. Counsel then

asked whether during that period Ms. Nastiuk had gone for multiple car rides with Mr. Sinclair, whether he had been to her house for dinner and lunch, whether she had given him the keys to her car and had discussed selling a car to him, whether she kept gifts she received from him (as had all other staff, simultaneously), and whether she let him fix her car, her oil furnace and air conditioner:

Ms. Bryson: And was that because he was your boss or because you wanted him to do those things for you?

Ms. Nastiuk: I did not want him to do those things for me. He volunteered to do those things for me and that – those things were right at a point I hadn't been at GHC for part of April – or part of April, part of May and things weren't totally - they weren't real bad at that point.

Transcript: page 660, lines 2-11.

#### **B. Cross-Examination of Ms. Nastiuk by Mr. Sinclair**

[164] Mr. Sinclair posed a number of questions to Ms. Nastiuk, putting to her a version of interactions between them which differed from her direct evidence. Mr. Sinclair ended his cross-examination of Ms. Nastiuk with a lengthy series of precise questions including the following exchange:

Mr. Sinclair: Well in this particular case I'm here charged with sexual harassment, and to me it's very important that these issues are made clear. The context in which comments were made, (not) just stating that this was what was said relating to sexual comments or sexual talk, without giving other information to clarify that, don't you believe that would be harmful – that could be harmful, Ms. Nastiuk?

Ms. Nastiuk: I guess I would go back to when I was sitting alone in your office and you would start talking and – talking about yourself and making these comment, and totally disregarding how uncomfortable I was and how inappropriate it was for you to be making those comments to me and the whole thing of just totally ignoring my reaction or lack of reaction.



Mr. Sinclair: Did you ever say, Tom, don't say that? Don't talk about that? Did you ever say that to myself Ms. Nastiuk?

Ms. Nastiuk: Not until – I did say that to you but not until late summer, fall.

Mr. Sinclair: Of what year would that be Ms. Nastiuk?

Ms Nastiuk: 2005.

Mr. Sinclair: And how many times did I say that – did I go ahead and say something where you never said anything to me? ...Was that a common occurrence?

Ms. Nastiuk: I think it was common, that staff – that the – knew that look on your face and they knew not to react, respond, speak up. That was common.

Transcript: page 1290, lines 20-25; page 1291, lines 1-25; page 1292, lines 2-7.

## **VII. Complainant Must Establish a Prima Facie Case**

### **A. Determination: Credibility of Ms. Nastiuk**

[165] Once the Tribunal Inquiry commenced, it became the responsibility of the Complainant to present testimony worthy of belief which would establish a prima facie case of sexual harassment against Mr. Sinclair, and retaliation on the part of CFN. She was obliged to prove, on a balance of probabilities, through clear, convincing and cogent evidence, that she had been sexually harassed by the Respondent, Mr. Sinclair, and that CFN had denied her employment opportunities by way of retaliation, after she made her human rights complaints with the Commission.

[166] This initial evidentiary burden required the Complainant to introduce credible evidence on each constituent element of the alleged discriminatory practice which, if believed, would be sufficient to justify a verdict in the Complainant's favour; absent an answer from the Respondent.

[167] When a prima face case is established, the evidentiary burden shifts to the Respondent to present evidence constituting a reasonable explanation.

[168] However, before a determination is made whether or not the Complainant has established a prima facie case, it is absolutely essential that the adjudicator begin with a finding of fact on the primary issue of the credibility of the Complainant. This finding of fact is fundamental to all other findings of fact on the adduced evidence.

[169] Ms. Nastiuk's assertion that Mr. Sinclair's conduct was ongoing and increasing in intensity is belied by her evidence of the many interactions between them that were normal activities that she willingly engaged in, such as Mr. Sinclair repairing her car, fixing her air conditioning, and her furnace.

[170] Ms. Nastiuk's assertion that it was Mr. Sinclair who created a hostile work place in which she worked was shown to be untrue, as she revealed in her own direct evidence and answers in cross-examination, and also by the information that band manager, Dale Morrisseau, received from her co-workers. It was Ms. Nastiuk's irascibility with and condescension to co-workers that created hostility towards her.

[171] Ms. Nastiuk testified that she searched human rights websites to determine whether what she described as Mr. Sinclair's unwelcome and inappropriate behaviour towards her constituted sexual harassment. Despite testifying that Mr. Sinclair's behaviour did not fit any of the descriptions of sexual harassment that she found while researching the websites, Ms. Nastiuk continues to allege that a pattern of inappropriate behaviour by Mr. Sinclair equates to sexual harassment.

[172] Having analyzed and scrutinized the testimony of Ms. Nastiuk, I conclude that she was not a believable witness. First, she failed to inform Mr. Sinclair in a timely way that his non-work related contact with her and his personal queries were unwelcome, and second, she failed to establish that such matters were sexual in nature and therefore constituted sexual harassment.

Ms. Nastiuk's testimony was inconsistent and often suppositional rather than objective. Most importantly, her direct testimony failed the test of cross-examination.

[173] When Ms. Nastiuk was asked in cross-examination by counsel for CFN and Mr. Sinclair, and in questions from the Chairperson, to provide details and examples of the alleged sexual harassment by Mr. Sinclair, she was unable to describe a single example.

[174] I adopt the submission of counsel for the Respondent CFN concerning Ms. Nastiuk's complaint of retaliation, as it is an accurate characterization of her evidence:

Despite repeated attempts in cross examination, CFN could not elucidate one example from Ms. Nastiuk as to how it failed to protect her in the workplace from the alleged effects of Mr. Sinclair's alleged harassment. Ms. Nastiuk's issues with CFN focused on her perceived problems with the administration of GHC, which must be viewed in light of her recent education and limited experience in the field as well as the recent resurrection of the GHC program. Ms. Nastiuk's subsequent retaliation and HRSDC Complaints against CFN inaccurately claim that CFN totally failed to address her concerns and to protect her from effects of harassment by Mr. Sinclair. She does not provide the CHRT with one example of this alleged failure and her statement is at odds with the steps taken by CFN to return her to work after an authorized absence. GHC was not willing to either discipline Mr. Sinclair or to compensate Ms. Nastiuk without definitive evidence of probabilities. Mr. Morrisseau testified that he was confused and uncertain as to the nature of the relationship between the Complainant and Respondent Sinclair and as to the truth of the allegations, so he accommodated and monitored the situation.

[175] I find as a fact that Ms. Nastiuk was not a credible witness, and that her testimony in support of her allegations of sexual harassment and retaliation is not believable.

#### **B. Determination: Credibility of Mr. Sinclair**

[176] The Respondent's assertions in direct testimony were tested in cross-examination and remained largely intact. I have considered his testimony against the unique surrounding circumstances and stressful atmosphere of CFN's GHC, and conclude that he is a credible witness who provided believable testimony. Mr. Sinclair denied, or gave reasonable explanations

for all of Ms. Nastiuk's accusations and allegations of inappropriate behaviour and emphatically denied having sexually harassed the Complainant.

**C. Determination: Credibility of Dale Morrisseau**

[177] Mr. Morrisseau stands apart from all other witnesses in this case. Neutral, objective and dispassionate, he provided cogent and pertinent testimony. He felt that neither Ms. Nastiuk or Mr. Sinclair had revealed to him the full extent of their working/personal relationship, leaving him with a "she said/ he said" conundrum that he could not resolve.

**VIII. Decision**

[178] On the basis of the foregoing determinations, I dismiss all allegations of discriminatory practices and retaliation made by the Complainant, Ms. Nastiuk, against the Respondent, Mr. Sinclair, and the Respondent, CFN.

*Signed by*

Wallace G. Craig  
Tribunal Chairperson

OTTAWA, Ontario  
June 8, 2012

**Canadian Human Rights Tribunal**

**Parties of Record**

**Tribunal File:** T1406/3209 & T1407/3309

**Style of Cause:** Marlo Nastiuk v. Couchiching First Nation and Thomas Sinclair

**Decision of the Tribunal Dated:** June 8, 2012

**Place of Hearing:** March 1 to 5, 2010  
May 31 to June 4, 2010  
June 14 to 18, 2010

Fort Frances, Ontario

**Appearances:**

Marlo Nastiuk, for herself

No one appearing, for the Canadian Human Rights Commission

Chantelle Bryson, for Couchiching First Nation

Thomas Sinclair, for himself