NOVA SCOTIA COURT OF APPEAL

Citation: Nova Scotia (Human Rights Commission) v. Play It Again Sports Ltd., 2004 NSCA 132

Date: 20041029
Docket: CA 217567
Registry: Halifax

Between:

The Nova Scotia Human Rights Commission and
Dorothy Kateri Moore

Appellants

v.

Play It Again Sports Ltd., Trevor Muller
and Ronald Muller

Respondents

Judges:	Glube, C.J.N.S.; Chipman and Hamilton, JJ.A.
Appeal Heard:	October 6, 2004, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Chipman, J.A.; Glube, C.J.N.S. and Hamilton, J.A. concurring.
Counsel:	Michael Wood, Q.C. and Ann E. Smith, for the appellant, Nova Scotia Human Rights Commission Elizabeth Cusack, Q.C., for the appellant, Dorothy Kateri Moore Respondent, Trevor Muller, for the respondents

Reasons for judgment:

[1] This is an appeal by Dorothy Kateri Moore and the Nova Scotia Human Rights Commission from the decision of a Board of inquiry (David J. MacDonald) dismissing Ms. Moore's complaint against the respondents under the **Human Rights Act**, R.S.N.S. 1989, c. 214.

[2] Ms. Moore is a Mi'kmaq living in Membertou, Nova Scotia. She was employed as a sales clerk at the respondent company, Play It Again Sports Limited in Sydney commencing on September 12, 1998. The respondent, Trevor Muller, is part owner and general manager of the company's retail sporting goods operation. The respondent Ronald Muller, Trevor's father, although not employed there, spent considerable time at the premises helping out in whatever way he felt needed. Ms. Moore had approached Ronald Muller, who introduced her to Trevor Muller, who in turn offered her a job with the company in a sales capacity.

[3] Ms. Moore's formal complaint states that on a number of occasions while she was working at the store she was greeted or referred to as "kemosabe" by Trevor and Ronald Muller. This greeting is a reference to an expression used by The Lone Ranger and Tonto in the television series and movies of the 1940's and 1950's. When Ms. Moore asked Trevor Muller what the word meant he said "my friend". Ms. Moore's complaint was that she was offended by the term and found it demeaning and insulting to her aboriginal origin. In her complaint she stated that she informed Trevor Muller and Ronald Muller that the Mi'kmaq word for friend was "nitap" and that they could so address her, but not by the term kemosabe. However, they ignored her request and continued to call her kemosabe. Ms. Moore further complained that during the time of her employment she was the only female employee in the store, and Trevor Muller subjected her to incidents of sex discrimination, assigned her menial work and was, she alleged, seeking ways to terminate her employment so that he could rehire a friend. She further alleged that on October 15th, 1999, Trevor Muller accused her of not providing service and refused to listen to her explanation whereupon she left her employment.

[4] Ms. Moore alleged in her complaint that she was discriminated against because of her sex and because of her aboriginal origin, such discrimination being violations of s. 5(1)(d), (m) and (q) of the **Act**.

[5] Prior to the commencement of the hearing before the Board, the allegation of discrimination because of sex was withdrawn and the hearing, confined to the issue of discrimination because of Ms. Moore's aboriginal origin, took

place over a period of seven days between July 2nd and November 20th, 2003. Ms. Moore was represented at the hearing by counsel as was the Commission. The respondents were represented by Trevor Muller.

[6] The Board's written decision was filed on February 17th, 2004. The Board reviewed relevant sections of the **Act**, case law and the evidence.

[7] The Board first turned to the incident on October 15th or October 16th, 1999, which led to Ms. Moore's leaving her employment. This was a busy day at the store. According to Ms. Moore she was waiting on a family who wished to trade in old skates for new, and being unable to agree on the trade-in allowance, she led them over to Trevor Muller. Ms. Moore then claims that she went to tidy up a bag of knee pads towards the rear of the main customer part of the store. Trevor Muller suddenly appeared and repeatedly yelled at her "What are you doing?" He also accused her of losing a sale as the customers she had been waiting on left the store complaining about the service. Although she tried to explain the circumstances, he would not listen to her. Trevor Muller asked her to go outside. Again he wouldn't listen to her explanations. She became extremely upset and when he told her to go back to work, she began crying, got her coat and left.

[8] Trevor Muller offered a different account of Ms. Moore's departure. On the day in question the store was extremely busy and he had been helping several customers. He noticed that customers being serviced by Ms. Moore picked up their skates and left the store complaining about the service. He then looked for Ms. Moore in the customer area but found her putting knee pads in a bag out in the back room. He asked her what she was doing, and about the customers who had left. She stated it was not her fault. She was extremely annoyed, so Trevor Muller took her outside where they could not be heard by the customers. Muller stated that Ms. Moore appeared to be experiencing some sort of a breakdown. When they got outside this apparent breakdown escalated. She was getting too upset to talk. She could not take it any longer, said she was quitting, went back to the store to get her jacket and left. Whereas Ms. Moore recalled that this event took place late in the afternoon, Muller's recollection was that it was just before lunch, between 11:30 a.m. and noon.

[9] Lois and Darryl Cullen testified that in October of 1999 they attended at the respondents' store to trade some skates. They approached Ms. Moore and asked if she could reach some skates which were high up on a shelf. According to them, she told them she did not have time to do that. They considered her to be very rude, and left the store. Mrs. Cullen testified that

Ms. Moore seemed to be “angry or upset, frazzled”. On the following Monday, Mrs. Cullen encountered Rhoda Muller, Trevor Muller’s wife, and related the incident.

[10] The Board, after referring to case law on the process of making credibility findings, concluded that Trevor Muller’s version of what took place at the time of Ms. Moore’s departure was the more probable. The Board referred to the evidence of Mr. and Mrs. Cullen as well as that of Ronald Muller. The Board was unable to find anything that was said or done by Trevor Muller to indicate that his interaction with Ms. Moore throughout the entire incident had anything to do with her aboriginal origin. She was not fired that day, she quit. The Board thought it more probable that Ms. Moore was suffering some form of break down prior to the altercation with Trevor Muller rather than as a result of it. She grossly overreacted to the situation. Whether or not Trevor Muller could have better handled the situation was not the issue, the inquiry was concerned with discrimination, not professionalism.

[11] The Board then addressed other aspects of Ms. Moore’s complaint which amounted to an allegation of a poisoned work environment at the place of business of the respondents. There were a number of incidents referred to by Ms. Moore addressed by the Board.

[12] Ms. Moore related that at the initial point of her hiring Ronald Muller said to Trevor Muller words to the effect “We could use a person like her. She’d be a benefit because of her Mi’kmaq background.” Both of the Mullers denied that this was said or that her heritage had anything to do with her hiring. The Board did not make an express finding of credibility on this issue other than to state there was no doubt that if not at the time of hiring, then very shortly thereafter the Mullers were aware that Ms. Moore was a Mi’kmaq person.

[13] Ms. Moore then stated that in the first few months of her employment she found that some of the employees’ behaviour was immature, and that all of the employees were not very professional. The Board assigned no weight to this point of view as contributing to a poisoned work environment.

[14] Ms. Moore next alleged that she was not given an opportunity to do all the tasks of the other male employees and that others were continually taking over her work. The Board stated that the evidence did not support this allegation but rather she was given as broad a range of duties as most other employees.

[15] Next, Ms. Moore referred to an occasion when Trevor Muller and several friends, some of whom worked at the respondents' place of business, came to her home late one evening from a bachelor party. Trevor Muller asked her if she could get some booze from a bootlegger which she did, while Ms. Moore's boyfriend talked with Mr. Muller. The next day a fellow employee, referred to in her evidence as Jamie, said to Ms. Moore that she could have made $200.00 the night before. When she asked how he said that they were looking for a stripper. Trevor Muller testified that Ms. Moore told him on a previous occasion that she knew a person close to her home who sold beer at $2.00 a bottle. There was no suggestion that because Ms. Moore was of Mi'kmaq heritage she must know a bootlegger. The Board observed that the incident happened away from the workplace outside of working hours, was isolated and unrelated to her employment. If Ms. Moore thought there was anything improper in the circumstance she did not mention it to Trevor Muller. The comment from the fellow employee was, the Board found, a one time casual comment which, although inappropriate, was part of a normal discussion between employees. Ms. Moore did not raise this issue with Trevor Muller and there was no evidence that he was ever aware of it.

[16] The Board found that the evidence did not support Ms. Moore's testimony that she was forced out of her employment to make room for a friend of Trevor Muller.

[17] The next incident relied on by Ms. Moore occurred when Ronald Muller was driving her home after work. They stopped at a gas station in Membertou and Ronald Muller asked the service station attendant, a member of the Mi'kmaq community, if he knew of anyone who was trying to sell some gloves. Gloves had been stolen from the store, and Ms. Moore took this as an insult to her community. It was, the Board found, simply an inquiry and not an accusation, an isolated incident that happened away from the workplace.

[18] Ms. Moore next stated that at about six months into her employment, Trevor Muller told her that an Indian woman had tried to pick him up at a local bar. It was her impression that he was trying to say that Indian women were easy. In her rebuttal evidence she changed her testimony to claim that Trevor Muller had asked her on different occasions why Mi'kmaq women were so easy. The Board had trouble accepting this testimony, since it was quite contrary to the surrounding evidence relating to Trevor Muller's opinion of Mi'kmaqs. Even were the Board to accept that Trevor Muller posed the

question on occasion, it was, though misguided, not something that could be categorized as frequent and persistent taunting.

[19] The Board was unable to conclude from these circumstances that an inference of discrimination was more probable than not. The incidents, the Board found, were simply insufficiently compelling, both individually and in the aggregate, to conclude that Ms. Moore was treated with a lack of respect and dignity on account of her aboriginal origin. The other circumstances did not support such an inference. To the contrary, the evidence showed that she was not only treated the same way as other employees but was considered a friend, and accommodated beyond the expectations of a strict employment relationship. She was often driven home by the Mullers and another employee, Scott MacKay. She was never asked by Ronald Muller to clean toilets, although he did this work himself, and there were times when duties would be switched to accommodate her preferences. The testimony of all of the people who worked at the respondents' place of business indicated that everybody got along well, nobody was treated any differently and indications were that there was a sense of camaraderie throughout the staff which included Ms. Moore. Without exception, the feeling among the employees who testified was that Ms. Moore was a friend and treated no differently than anyone else.

[20] The final matter alleged by Ms. Moore to support the conclusion that there was a poisoned workplace related to the use of the word "kemosabe". This, the Board characterized as "the crux of the matter", noting that the vast majority of evidence and time spent in the inquiry was directed at the meaning and implications of that expression.

[21] Ms. Moore's position before the Board was that the word "kemosabe" denoted a racial slur and its frequent use both around and directed at Ms. Moore created a poisoned work environment.

[22] The Board observed that the term "kemosabe" came into semi-popular slang through an early (1940's and 1950's) television show and movies entitled The Lone Ranger. The theme of the show was that the Lone Ranger and his partner Tonto, a native American, riding together throughout the Old West helped good people against bad, fought lawlessness and generally brought bad people to justice. When they first met, the Lone Ranger was the sole survivor of a group of Texas Rangers which had been ambushed by an outlaw gang. Tonto happens across the injured Ranger and aids his recovery. Tonto had recognized him as the same person who, years earlier, had saved his own life after his family had been massacred. During the

course of their conversation, Tonto refers to the young ranger as kemosabe. When asked what it meant Tonto responded “trusty friend”. From that point on, the appellation is used by one towards the other - predominantly by Tonto - throughout future shows and movies.

[23] The Board spent one entire sitting day watching episodes from The Lone Ranger series. In its decision the Board made the following observations:

(a) The Lone Ranger is definitely the star. He is the lead character who gets accolades in both the opening and closing of each show. He is the one who formulates the plans to catch bad people and gives the orders.

(b) Tonto is the Lone Ranger’s partner and friend. He is clean cut and well groomed and although he speaks a form of broken English, he is neither dumb nor stupid. To the contrary, his role is to uncover many of the clues upon which the Lone Ranger’s strategy is developed.

(c) Both the Lone Ranger and Tonto treat each other with respect. While it is true that the Lone Ranger gives orders to Tonto, he does the same with mayors, sheriffs and anyone else in a given episode.

(d) For the most part, other native Americans in the series are treated in a demeaning and disrespectful manner. While Tonto is sometimes so treated by others, he is never so treated by the Lone Ranger.

(e) At no time during the episodes is the term kemosabe ever used in a demeaning or derogatory manner or in any way that might be construed as a racial slur.

[24] The Board observed that the Mullers freely admitted using the term kemosabe to greet Ms. Moore. The evidence was that the term was used with regularity both among the staff and towards customers in the store. According to Scott MacKay it was a form of greeting that was used by the Mullers and himself to anybody, including customers.

[25] The Board then stated two “unavoidable” conclusions to be drawn from the evidence relating to the use of the term kemosabe. First, the Mullers never intended any meaning other than friend, trusted friend or some similar designation. It was an expression that they had used throughout their mutual lives in the home, the neighbourhood and at the store. It was never their

intention to use it in a derogatory or demeaning fashion nor in any way as a racial slur. Second, while Ms. Moore was greeted on occasion as kemosabe, she was not the only one. Everyone who worked there was at times greeted that way. In that sense she most certainly was not singled out or treated differently.

[26] However, the Board pointed out that s. 4 of the **Act** does not require that a discriminatory distinction be intended. Of all the employees in the store Ms. Moore was the only one of aboriginal origin, and thus the only one who may have been adversely affected by the term. Referring to case law, the Board noted that an employee has a right to work in an environment free of discrimination, and indirect comments made against the very fabric of self identity should not have to be tolerated. This comment was pertinent to the consideration of this issue.

[27] The Board reviewed the evidence of witnesses who spoke of the use of the appellation kemosabe and its meaning.

[28] Bernie Francis, a Mi'kmaq person with a Masters Degree from Memorial University and an Honorary Doctorate Degree from Dalhousie University works as a linguistic consultant for a number of Bands throughout the Atlantic provinces and Quebec. He prepared a report on the word "giimoosaabe". It was this spelling of the word that appears throughout the transcript. Following a morphological analysis of the word he concluded that it probably originated in the Ojibwa or Potowatmi language and means somebody looking on the sly, sly looking or sneaky. Mr. Francis maintained that it was a derogatory term to a person of aboriginal origin.

[29] Daniel Christmas is a high school graduate with two years of university education. He served as Band manager for Membertou and is presently a senior advisor with the Membertou Band Council. He stated that The Lone Ranger series is generally perceived within the Membertou community as being one of master/servant with the Lone Ranger as master and Tonto the servant. He said that if someone were to address him as kemosabe he would find it very offensive and mocking his aboriginal origin. These feelings result from childhood memories when he was taunted by white children in school. While the use of the word kemosabe in early TV shows may have been well intended, over the years it had become an expression of mockery. He did, however, concede that in the right context it would obviously not be offensive.

[30] Jane Meader is a member of the Membertou Band. She occupies a spiritual role within her community as a ceremonial leader. She said that the term

kemosabe is a racial slur because in the old TV series native people were portrayed as being stupid while the Lone Ranger, because he was white, was intelligent. Tonto was only a follower. She could not envisage a situation where the term would not be offensive to aboriginals.

[31] Daniel Paul is a member of the Membertou community and a customer of the respondents on numerous occasions. He had been greeted by Trevor Muller by the appellation kemosabe. He was not offended because he understood the word to mean friend and recognized that Trevor Muller was not using it in a derogatory manner. However, he recalled times in high school where a teacher would use the term to make him the object of a joke and he found this offensive. He had heard the term from others, aboriginal and non-aboriginal. How he takes it depends on the context, and after a lifetime of dealing with racism he maintained that he could tell the difference when somebody was racist or not.

[32] Nicholas Isaac, age 19, is a member of the Membertou community. He had for the past two years played on a minor hockey team coached by Trevor Muller. He had never heard the term kemosabe before.

[33] Nash Paul is a member of the Eskasoni community. He has known Trevor Muller since high school days. He had been called kemosabe by Trevor Muller on several occasions but was never offended by it. He had no idea what the term meant until he checked it on the internet several weeks before his testimony and found it to mean “faithful friend”. He had never been offended by anything Trevor Muller had said. Indeed, he is rarely if ever offended by what anybody says.

[34] Ms. Moore testified that when she was first addressed by the Mullers as kemosabe she asked what the word meant and was told by Trevor Muller that it meant “my friend”. She says that she then advised the Mullers that if they wished to call her friend they could use the Mi’kmaq word nitap. In her testimony she said that she just said it in a discreet way because she did not want to offend the Mullers. She said that she did not believe the word kemosabe meant friend, was uncomfortable with its use, but she did not make any outside inquiries as to its meaning prior to her leaving her employment with the respondent Play It Again Sports. The Board observed that it would have been easy enough to ask any member of her community about the word were she uncomfortable with it.

[35] Rhoda Muller, Trevor Muller’s wife, had heard the term kemosabe used in the Membertou community with no indication that anyone was offended by it.

[36] The Board concluded that the evidence before it was clearly contradictory on whether the use of the appellation kemosabe was in and of itself considered a racial slur by members of the Mi'kmaq nation. It, therefore, did not accept that if the word kemosabe had the capacity to hold a meaning which was offensive to Ms. Moore as an aboriginal person, then that is sufficient to support an allegation of discrimination. The Board did, however, state that it accepted that if that word had the capacity to be offensive as a result of Ms. Moore's aboriginal heritage and if Ms. Moore was, in fact, offended then those circumstances would support her allegation. The Board referred to the decision of the Tribunal in **Canadian Armed Forces v. Swan**, [1994] 25 C.H.R.R. D/312 (Can. Trib.) where it was stated:

> The Tribunal, however, does not find that the context or intention of the perpetrator is the issue - the issue is the perception of the individual who is victimized.

[37] The Board then observed that the perception of the individual victimized is the other half of the equation that makes the perpetrator's intention irrelevant to the determination of discrimination. The onus of proving discrimination is not satisfied simply because a word such as kemosabe is capable of being taken offensively by a member of the aboriginal community. The onus requires that the person so affected be, in fact, offended thereby creating an atmosphere which could be considered poisoned. This is clearly reflected in s. 4 of the **Act** which states that a person discriminates by making a distinction "that has the <u>effect</u> of imposing burdens ...". Thus, the fact that the Mullers did not intend any offence was not relevant, nor was the fact that Jane Meader would have been offended or Nash Paul would not. The issue was whether, in fact, Ms. Moore was offended. If she considered the word to have negative implications on the very fabric of her self identity as a Mi'kmaq person, then on the basis of its random and persistent use around the workplace, it would seem reasonable, the Board stated, to conclude that she was, indeed, subjected to the burden of a poisoned work environment.

[38] The Board then examined Ms. Moore's assertions that she was offended by the term kemosabe. She referred to her request to be called nitap as putting her foot down. Trevor Muller denied that conversation ever took place. Ronald Muller had no recollection of it. Ms. Moore testified that she had spoken in a very discreet manner, and without making a credibility finding on whether she made the statement, the Board observed that it was possible that the Mullers did not hear the request "if in fact, it was given." Even

accepting that it was, the Board had difficulty in categorizing this as putting a foot down type of exchange. They had told her that to them the term meant friend. By her own testimony, she never told them she was offended by the word or that she considered it in any way an insult to her heritage. Nor did she tell them not to call her by that word. Her evidence was that she simply advised that she preferred to be called nitap. The Board then stated that given the Mullers longstanding use and understanding of the term as meaning "friend" and its acceptance by some of their Mi'kmaq acquaintances as such, they could not be aware that Ms. Moore considered it a racial slur absent " some clear and unequivocal indication thereof."

[39] The second exchange relied on by Ms. Moore was when Ronald Muller was driving her home from work. He stopped at the Membertou Gas Bar to buy cigarettes and greeted the clerk with "Hey kemosabe". When they got outside Ms. Moore testified that she told Ronald Muller not to say that word around there. When Ronald Muller replied there was nothing wrong with the word she told him that someone might be offended.

[40] The Board stated that it could not ascribe more to this exchange than is apparent from Ms. Moore's own retelling. She did not say that she was personally offended by the word, only that somebody in the Membertou community might be. The exchange, the Board noted, was completely outside the workplace environment and Ronald Muller was not an officer of the company, but rather, an associate from work. "Even if this exchange did take place," to use the words of the Board, it observed that it was never communicated to Trevor Muller.

[41] The Board then referred to a number of circumstances favouring the conclusion that Ms. Moore was not, in fact, offended by the use of the term kemosabe in the workplace, including that she had never heard the term before and upon being informed that it meant friend, never checked this out in her community and never complained to Scott MacKay, in whom she had confided with another problem respecting her employment. Nor did she give any clear indication to anybody in the workplace during her entire term of employment that she considered the term was demeaning or a racial slur.

[42] The Board said it was convinced by the weight of the evidence that Trevor Muller and Play It Again Sports had no knowledge that Ms. Moore was, during the term of her employment, offended by the term kemosabe and it was the Board's <u>further conclusion</u> that she was not, <u>in fact</u>, offended by that term during the course of her employment.

[43] The Board reiterated the testimony of all the witnesses who worked at the respondent business that there was a good working relationship among employees. The Board referred to the evidence that at no time had Trevor Muller ever shown racist tendencies or treated natives disrespectfully. The Board was therefore inclined to accept his assertion that he would not disrespect Ms. Moore, and had she told him she was offended by the term kemosabe he would not have used it further. The Board referred to the numerous occasions when Ms. Moore was driven home by the Mullers at her own request. While these general circumstances are not of themselves conclusive of the issue of poisoned work environment they were more favourable to the credibility of the Mullers than to that of Ms. Moore. The Board's finding was that her assertion that she considered the term kemosabe an insult to her aboriginal origin, and was exposed to a poisoned work environment, was simply not consistent with the probabilities surrounding the circumstances. In fact, the Board found it out of harmony with the preponderance of probabilities that a practical and informed person would recognize as reasonable in the circumstances.

[44] The Board concluded that it had weighed the entire matter very carefully and that there was little of substance in Ms. Moore's actions during her term of employment that could be considered consistent with her post employment perspective. Her leaving the employment was entirely related to the incident of October 15th or October 16th and had nothing to do with discrimination or a poisoned work environment. The complaint was dismissed.

[45] I have reviewed the evidence and the findings of the Board extensively, because the appellants have submitted that the Board erred in law in a number of ways in reaching its factual conclusions. The number of grounds of appeal advanced can be conveniently restated:

1. The Board erred in law by placing an inappropriate burden on Ms. Moore to convey to the respondents that she objected to being called kemosabe and in failing to find they ought to have known that it was unwelcome to her.

2. The Board erred in law by treating certain incidents as isolated which, when considered together, constituted discrimination.

3. The Board erred in law by treating incidents occurring after hours as being outside the workplace.

4. The Board erred in law by failing to put any or sufficient weight to the evidence relating to the modern discriminatory meaning of the word kemosabe.

5. The Board erred in law in failing to place any or sufficient weight on the evidence of Ms. Moore and her witnesses without reasonable or any explanation.

6. The Board erred in law by failing to place any or sufficient weight on the expert evidence adduced.

Standard of Appellate Review:

[46] This appeal is brought pursuant to s. 36(1) of the **Act**:

> **36(1)** Any party to a hearing before a board of inquiry may appeal from the decision or order of the board to the Appeal Division of the Supreme Court on a question of law in accordance with the rules of court.

[47] This standard was recently considered by this Court in **Nova Scotia (Human Rights Commission) v. Dural** (2003), 219 N.S.R. (2d) 91 where the court held that the applicable standard of review in this context is correctness. The **Act** does not contain a privative clause but rather provides this right of appeal on questions of law and this suggests that a searching review, rather than deference, is applicable.

[48] However, the searching review must relate to questions of law only, because such questions are the only ones that can be raised on this appeal.

[49] Traditionally, appeal courts have taken a hands off attitude towards interfering with findings of fact and inferences drawn therefrom by a trier of fact. This approach has been expressed differently by courts over time, depending often upon the context in which the finding is challenged and the precise standard of review being considered. See **Toneguzzo-Norvell (Guardian *ad litem of)* v. Burnaby Hospital**, [1994] 1 S.C.R. 114 at paras. 13-15; **Housen v. Nikolaisen** , [2002] 2 S.C.R. 235 at paras. 10-15, 19-37; **Canadian Lift Truck Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise** (1955), 1 D.L.R. (2d) 497 at p. 498; **Fox v. Registered Nurses Association of Nova Scotia** (2002), 209 N.S.R. (2d) 342; [2002] N.S.J. No. 486 (Q.L.) at paras. 65 - 66; **Dhanjal v. Air Canada** (1997), 139 F.T.R 37 (T.D.) at para. 3; **Midland v. Big Wheels**

(1986), 63 Nfld. & P.E.I.R. 350 at para. 3; **Sunbury Transport Ltd. v. Brookville Transport Ltd.** (1991), 113 N.B.R. (2d) 318 at para. 6; **Imperial Oil Ltd. v. Board of Commissioners of Public Utilities** (1974), 10 N.S.R. (2d) 415; [1974] N.S.J. No. 273 (Q.L.) (N.S.S.C.A.D) at para. 46; **Nova Scotia (Director of Assessment) v. Gatsby's Bar and Eatery Ltd.** (2004), 223 N.S.R. (2d) 70; [2004] N.S.J. No. 145 (Q.L.) (N.S.C.A.) at paras. 8 and 9.

[50] Where an appeal is limited to questions of law, a finding of fact or an inference drawn therefrom may only be overturned if there was an overriding error in the process so egregious as to amount to an error of law. Such an error might, for example, be a finding based on no evidence, a finding reached by a process of misdirection in the law, a finding reached by disregarding material evidence, a finding reached by a breach of natural justice, or a finding that a tribunal properly instructed, and acting judicially, could not have reached. See **Fox v. Registered Nurses' Association, supra** at paras. 65 - 66; **Potter v. Korn**, [1996] B.C.J. No. 692 (Q.L.)(B.C.S.C.), paras. 25 - 27; **Can Lift Truck Co. Ltd., supra** at p. 498.

[51] We must keep the foregoing in mind when we examine the appellants' submissions, many of which are challenges to the Board's findings of fact couched in language suggesting that the Board erred in law in so doing.

Nature of Relief Sought by Ms. Moore:

[52] Section 34(8) of the **Act** provides:

> **(8)** A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor.

[53] The relief sought by Ms. Moore falls in two broad categories: first, for damages for lost income resulting from discriminatory conduct amounting to a constructive dismissal; second, for damages for hurt feelings and emotional suffering as a result of her being subjected to a poisoned work environment, together with an order that Trevor Muller participate in a customized education program on human rights and be prohibited from using the word kemosabe and, for costs.

Constructive Dismissal on the Basis of Discrimination:

[54] This aspect of the appellant's case can be disposed of quickly. The Board reviewed the evidence in detail and, after accepting Trevor Muller's version of the events of October 15th or October 16th in preference to that of Ms. Moore, found that they did not in any way involve discrimination, had nothing to do whatsoever with her aboriginal origin and clearly indicated that she was not fired, but quit her employment. I see no error of law in the Board's process of making this key credibility finding, and it must stand.

Poisoned Work Environment:

[55] The appellant's submissions relating to this aspect of the case require extensive consideration.

[56] The **Act**, in Part I, prohibits discrimination. Discrimination is defined in s. 4:

> **4** For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.

[57] Discrimination in respect of employment on account of ethnic, national or aboriginal origin is prohibited by s. 5:

> **5(1)** No person shall in respect of
>
> ...
>
> (d) employment
>
> ...
>
> discriminate against an individual or class of individuals on account of
>
> ...
>
> (q) ethnic, national or aboriginal origin;

[58] In reaching the conclusion that the respondents did not discriminate against Ms. Moore by exposing her to a poisoned work environment, the Board took four steps:

A as to the number of incidents relied on by Ms. Moore apart from the appellation kemosabe, it reviewed the evidence relating to each, made some credibility findings adverse to Ms. Moore, and made an evaluation of each alleged incident together with an overall evaluation of them in total in coming to the conclusion that an inference of discrimination was not more probable in the circumstances;

B as to the use of the word kemosabe, the Board, having previously noted that it was important to assess the perception of the alleged harassment from that of a reasonable person belonging to the racial minority, reviewed the evidence to see whether the appellation kemosabe was in and of itself considered a racial slur by members of the Mi'kmaq nation. The Board concluded merely that the evidence was contradictory on this issue. The word was not, therefore, found to be in and of itself a slur, but it did have the capacity to be offensive to Ms. Moore. It was necessary for her then to show that she was, in fact, offended by the word during her term of employment and that she gave sufficient indication to the respondents that their conduct was not acceptable to her as constituting discrimination.

C the Board determined that no clear and equivocal indication that the word kemosabe was offensive to Ms. Moore was ever conveyed by her to the respondents.

D the Board determined that Ms. Moore was not, in fact, offended by the appellation kemosabe during her term of employment.

[59] Although the results reached by the Board are challenged, it was not contended that this process of approaching the claim was not a correct one to adopt in the circumstances here. See **Janzen v. Platy Enterprises**, [1989] 1 S.C.R. 1252; **Dhanji v. Air Canada** (1996), 26 C.H.R.Q. 367 (C.H.R.T.), aff'd [1997] No. 1599 (Q.L.); **Canada (Human Rights Commission) v. Canada (Armed Forces)**, [1999] 3 F.C. 653 (F.C.T.D.) at paras. 32-36, 47-50.

[60] I propose to review the steps taken by the Board to see if it made any error of law in relation to its ultimate conclusions, addressing the grounds of appeal advanced by the appellant in the process.

Step A:

[61] The appellants' grounds of appeal relating to this step are that the Board erred in treating these incidents as being outside the workplace and, therefore, not arising in the context of Ms. Moore's employment. The appellants also say that the Board erred in treating these in isolation rather than cumulatively, and that the Board erred in placing insufficient weight or any weight to Ms. Moore's testimony. These submissions are all couched in terms of errors of law but in examining the Board's reasoning it is necessary to consider whether, in fact, if they are errors, they constitute errors of law.

[62] The appellants state that the Board erred in holding the bootlegger incident, the glove incident and gas bar incident were unrelated to the complainant's employment because they were incidents that happened away from the workplace and outside of working hours. The appellants refer to the Canadian Human Rights Tribunal decision in **Bushey v. Sharma**, 2003 CarswellNat 2461 (Can. Trib.) which held that the alleged acts of sexual harassment were in the circumstances subject to the Canadian **Human Rights Act** even though they occurred outside the workplace. The tribunal stated at para. 109:

> [109] ... the interaction between the Complainant and the Respondent would never have taken place, but for their status as Canada Post employees that led to their union involvement. It seems to me that it is not essential for the facts giving rise to an employment-related harassment complaint to physically take place at the federally-regulated workplace. Any conduct, wherever it may occur, arising somehow in the context of federally-regulated employment is subject to the *Act*.

[63] I agree that it is not essential for the facts giving rise to an employment-related harassment complaint or discrimination complaint to physically take place at the workplace. If the Board found these three incidents to be racial harassment, but excluded them by reason merely that they were off the employer's workplace, I would be concerned. As to the bootlegger incident, the Board also found, however, that there was no suggestion or inference that because Ms. Moore was of Mi'kmaq heritage she must know a bootlegger. She had previously indicated to Trevor Muller that she knew a

bootlegger. The mere fact that the Board observed that the incident was isolated and unrelated to the employment is not, in these circumstances, an error. The same reasoning applies to the incident with respect to the gloves which the Board characterized as not an accusation, but merely an inquiry. As to the gas bar incident, the Board found that Ms. Moore did not tell Ronald Muller that she was offended by the word, only that somebody in the Membertou community might get offended by it. The Board did not find that this incident was an instance of racism, and the additional comment that it was outside of the workplace and that Ronald Muller was not an employee of the respondent Play It Again were not grounds on which the Board was excluding what was otherwise an offensive occurrence.

[64] I also reject the submission of the appellants that the Board erred in law by treating these incidents as isolated which, when considered together, constituted discrimination. As to all of these incidents, the Board, having reviewed them individually and having found them not to involve offensive behaviour on the part of any of the respondents, concluded:

> I do not find that an inference of discrimination is the more probable in these circumstances. The incidents are simply insufficiently compelling, both individually and in the aggregate, from which to conclude that Ms. Moore was treated with a lack of respect and dignity on account of her aboriginal origin. There is nothing in the other circumstances to support any such inference. To the contrary, the evidence shows that Ms. Moore was not only treated the same way as any other employee but considered a friend and accommodated beyond the expectations of a strict employment relationship. ...

[65] The foregoing conclusion by the fact-finding tribunal is one which, on the record that I have carefully reviewed, is clearly open to it. There was no error of law in this respect.

[66] Finally, as for the suggestion that the Board erred in law in failing to place any or sufficient weight on the evidence of Ms. Moore, it is not disputed that the Board made a number of adverse credibility findings with respect to her testimony.

[67] Before entering upon various credibility findings the Board instructed itself on credibility issues referring to the following passage in **Farnya v. Chorny**, [1952] 2 D.L.R. 354 (B.C.C.A.) at p. 356-58:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the persona demeanor of a particular witness carried conviction of the truth. The test must reasonably

> subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ...

[68] The Board also referred to the following from Chair David Bright in **McLellan v. Mentor Investments Ltd.** (1991), 15 C.H.R.R. D/134, para. 20:

> There is no machine that an adjudicator can use to discover if a witness is being truthful or less than candid. Therefore, an adjudicator, including myself, is left with our own personal background, and reaction to evidence given. ...

[69] It is apparent to me that upon review of the record it was clearly open to the Board to make the findings of credibility that it did. The Board made specific reference to all the material evidence before it. We must be mindful of the tremendous advantage that the Board had over one who merely reads the printed record, to observe and hear Ms. Moore and the other witnesses as they testified. I am unable to find any error, either in law or otherwise, in the credibility resolutions of the Board in this case.

Step B:

[70] The Board was dealing, in this connection, with an allegation of "racial harassment" or the creation of a "poisoned workplace" provided by the respondents. These terms are not defined in the **Act**, but the cases where the concept has been dealt with have turned for direction to the statute and case law dealing with sexual harassment. Sexual harassment is defined in s. 3(o) of the **Act** as meaning, inter alia, (I) vexatious sexual conduct or a course of comment that is known or ought reasonably to be known as unwelcome. (emphasis added)

[71] In some jurisdictions harassment is prohibited generally with respect to any of the characteristics regarding which discrimination is prohibited.

[72] In *Mendes, Racial Discrimination: Law and Practice* at p. 3-67, the authors describe the development of principles derived from sexual harassment cases being applied to situations of racial harassment. They point to **Janzen v. Platy Enterprises Ltd.**, [1989] 1 S.C.R. 1252 as the sexual harassment case most often cited in racial harassment cases. In **Mohammed v. Maraposa Stores Ltd.** , 14 C.H.R.R. D/15, the British Columbia Council of Human Rights at para. 25 noted that **Janzen, supra**, served to illustrate the commonality in reasoning between cases of sexual and racial harassment.

[73] Zinn and Brethour, *The Law of Human Rights in Canada* (Canada Law Book Inc.) comment in connection with sexual harassment at p. 11-12 on the question of unwelcomeness of conduct or behaviour at issue:

> All the definitions of harassment, under legislation or developed in the case law, include the requirement that the conduct or behaviour be "unwelcome" or "ought reasonably be known to be unwelcome". ....

They referred to **Noffke v. McClaskin Hot House** (1989), 11 C.H.R.R. d/407 where the board stated:

> ... "known or ought reasonably to be known" is more difficult to define. As Chairperson Bayefsky asks in [*Cuff v. Gypsy Restaurant* (1987), 8 C.H.R.R.D./3972 (Ont. Bd. Inq.)], whose perspective governs? Victims are normally women in positions of relative weakness, while perpetrators are generally males in positions of relative power. Because of an ingrained history of gender oppression in the workplace, a certain level of oppression may be acceptable to those in control, and perhaps as well, to those who must acclimatize to it. While the precise nature of the test is not clear, it is certainly met if the victim makes it clear to the perpetrator that the behaviour is not welcome. In *Cuff*, Chairperson Bayefsky says at D/3981:
>
> > "Comment or conduct 'that is known or ought reasonably to be known to be unwelcome' imports an objective element into the definition of harassment. The fact that this particular complainant found the behaviour vexatious is not sufficient. Respondents either must have known, or they ought reasonably to have known, the behaviour to be unwelcome . . .
> >
> > "A complainant who clearly indicates to the respondent that his actions were unwelcome will more likely be able to satisfy the condition that the respondent knew the behaviour was unwelcome.
>
> ...

[74] The Board was not dealing with an appellation which was clearly on its face notoriously offensive. The Board was unable to conclude more than that the evidence respecting the meaning of the appellation kemosabe was contradictory, the word being offensive to some aboriginals, but not to others. The Board's characterization of the word as having no more than the capacity to hold a meaning offensive to Ms. Moore as an aboriginal person

is a fair conclusion from this evidence and from the view that the Board took of it. In the face of such a conclusion from the evidence, I believe the Board was correct when it quoted and applied the following passage from **Swan v. Canada (Armed Forces)** (1994), 25 C.H.R.R. D/312 (Can. Trib.) at para. 44:

> [44] The question the Tribunal is then left with is what obligation is there on the CAF to proscribe behaviour when they do not know what is or is not acceptable to the individual. We think that this places an unreasonable burden upon an employer. There must be some indication from the individual that the conduct, etc. is not acceptable when the *Act* places the onus on the employer to provide a workplace free from harassment or discrimination and places no onus on the victim to do anything but lay a complaint under the *Act*.

[75] The foregoing is applicable where the conduct at issue is not plainly and obviously offensive, but capable of being either offensive or inoffensive depending on each individual's sensibilities. Where the quality of the utterance lies in the eye of the beholder, it is not unreasonable to require that the beholder make known that the conduct was offensive to him or her.

Step C:

[76] I wish, in any event, to deal with the contention at the forefront of the appellants' argument, namely, that the Board erred in saying the following when considering whether Ms. Moore made known that the appellation kemosabe was offensive to her:

> Given the Mullers' long standing use and understanding of the term as meaning "friend", and its acceptance by some of their Mi'kmaq acquaintances as such, they could not be aware that Ms. Moore considered it a racial slur absent some clear and unequivocal indication thereof. I do not accept that any such implication was conveyed by Ms. Moore.

[77] The appellants say that in this passage the Board erred in law by placing an inappropriate burden on Ms. Moore to convey to the respondents that she objected to being called kemosabe. They say that the Board did not adopt an objective test which focused either on a reasonable employer or a reasonable victim. They say the Board applied a completely subjective standard which focused on the respondents, and considered whether the Mullers themselves found the word kemosabe to be offensive. The result, they say, of applying the "subjective respondent" standard was that the Board concluded that Ms. Moore had an onus to clearly and unequivocally tell the respondents that she

objected to the word. Moreover, they say that the "clear and unequivocal standard" was too high a standard given the case authority that indicates that a complainant who is subjected to a poisoned work environment either in the context of sex discrimination or racial discrimination need not expressly object to the harassing behaviour in order for a respondent employer to be held liable for harassment. They quote the following from **Tarnopolsky and Pentney** , *Discrimination and The Law* (Carswell) at p. 8-104 where the authors discuss **Swan v. Canada, supra**:

> The Tribunal found that the complainant in that case, a native Indian military policeman, did not object to, and in fact participated in the use of, racial slurs. The Tribunal acknowledged that such conduct on the part of a complainant "creates an extremely difficult situation for an employer". Nevertheless, the Tribunal observed as follows:
>
> > The Canadian Human Rights Act does not take into consideration the conduct of the Complainant and even though Complainants may participate in or instigate objectionable conduct they may still file a complaint and succeed in their claim. (at p. 145,021)
>
> In the *Swan* case, the Tribunal accepted expert evidence which it summarized as follows:
>
> > The essence of Dr. Cross's testimony was that individuals may acquiesce, and participate, in activities that they find objectionable and demeaning because they feel powerless to stop it and as an ego defence mechanism.

[78] The appellants also refer to **Tarnopolsky and Pentney, supra**, at p. 8-111 where they continue:

> ... The complainant in *Garrow v. Vanton* (1992), 18 C.H.R.R.D/148 was found to have sufficiently indicated the unwelcomeness of conduct by simply walking away from the respondent. Similarly, the complainant in *Bouvier v. Metro Express* (1992), 17 C.H.R.R.D./313 (Cdn. Human Rights Trib.) was found to have given her boss a reasonable indication of the unwelcomeness of his advances by "remaining cool or not responding to [his] comments or invitations."It was suggested *obiter* in the *Franke* case *supra* [*Canada Human Rights Commission) v. Canada (Armed Forces) and Franke* (1999), 34 C.H.R.R.D./140], that unwelcomeness could also be shown by a complainant's "repetitive failure to respond to suggestive comments."

And at p. 8-112:

> As the above decisions suggest, there is general consensus that individual complainants may show (or try to show) the unwelcomeness of harassing conduct in different ways, and in some cases, they may be excused from signalling unwelcomeness in any externally verifiable way at all. As was pointed out by a Nova Scotia Board of Inquiry in *Miller v. Sam's Pizza House* (1995), 23 C.H.R.R.D./433:
>
> > [g]enerally it is recognized that the signals of unwelcome conduct vary from individual to individual and may vary in strength depending on the incident, the comment or the behaviour. A sexual advance may incite a strong refusal and outrage or may be met by stony silence and evasion. Both responses signal unwanted or unwelcome behaviour. (at p. D/447)

[79] Finally, they refer to the decision of the British Columbia Council of Human Rights **Dupuis v. British Columbia (Ministry of Forests)** (1994), 20 C.H.R.R.D/87 (B.C.C.H.R.) at paras. 52 and 53:

> Evidence that the complainant explicitly put the alleged harasser on notice that the conduct was unwelcome will be very persuasive. However, indications of unwelcomeness may be implicit; an overt refusal may not be necessary. In *Potapczyk v. MacBain* (1984), 5 C.H.R.R. D/2284 (Can. Trib.), the complainant was subjected to sexual remarks and offensive physical closeness. She did not explicitly inform the harasser that his conduct was offensive. The Tribunal found that body language can suffice to demonstrate objection.
>
> Though a protest is strong evidence, it is not a necessary element in a claim of sexual harassment. Fear of repercussions may prevent a person in a position of weakness from protesting. A victim of harassment need not confront the harasser directly so long as her conduct demonstrates explicitly or implicitly that the sexual conduct is unwelcome. For example, in *Anderson v. Guyettt* (1990), 11 C.H.R.R. D./415 (B.C.C.H.R.), the complainant was subjected to suggestive remarks from her employer. She ignored the remarks and did not complain about them because she was afraid of losing her job. The Chairperson did not find her failure to rebuff the advances to be unusual in the circumstances.

[80] These authorities that indicate that less than a clear and unequivocal rejection may be all that is required when dealing with racial slurs and sexual advances, on their face, improper, are distinguishable from the situation here where there is the use of a word found by the Board to have no more than the capacity to hold an offensive meaning.

[81] I reject at the outset any suggestion that the Board applied a "subjective respondent" test. The Board repeatedly stated that the motives or intention of the respondents to discriminate or not discriminate were irrelevant. The test was what effect their conduct had on the complainant.

[82] I reject also the appellants' suggestion that by the use of the words "clear and unequivocal", the Board set the burden of proof resting on Ms. Moore at too high a standard. The Board had previously, in its decision, taken care to point out that the appropriate burden of proof was a civil burden or preponderance of evidence, or proof of a fact on a balance of probabilities, referring to case law in so doing. The Board, in effect, found that the use of the word was not one that ought reasonably to be known to be unwelcome absent some notice being given.

[83] The next step was then to determine whether the appellation was in fact known by the respondents to be unwelcome. This requirement, in the context of harassment, is not to be taken as diminishing in any way the basic principle that the intention of the person complained of is irrelevant. It simply is a requirement that in some circumstances, the person must be fixed with certain knowledge before the relevant principles are applied. If the knowledge or deemed knowledge exists, intention is irrelevant.

[84] In the face of Ms. Moore's knowledge as to what the respondents understood by the term kemosabe, is it any wonder that the Board considered that the civil burden of proof required her to give some clear and unequivocal indication of her rejection of the appellation? Having regard to the context in which the Board was addressing the burden that rested on Ms. Moore, I am unable to conclude that it set too high a standard by stating that she should clearly and unequivocally show her disapproval, if in fact she disapproved.

Step D:

[85] If I am wrong in my conclusion with respect to the previous step taken by the Board, Ms. Moore's case must fail for another reason. The issue of whether Ms. Moore signalled her disapproval, and what evidence was needed to show this is trumped by the Board's further finding of fact that Ms. Moore was not in fact offended by the term kemosabe during the term of her employment. This finding, reached by the Board as a credibility finding in the face of all of the evidence, was not shown to be erroneous in law. Ms. Moore was not offended. She bore no burdens, obligations or disadvantages not imposed on others. She was not denied access to

opportunities, benefits or advantages available to others. See s. 4 of the **Act**, ante para. 56.

[86] In this context I reject the appellants' submissions that the Board erred in any way by failing to put sufficient weight to the evidence relating to the discriminatory meaning of the word kemosabe or that it erred in failing to place sufficient or any weight on Ms. Moore's evidence or that of her witnesses without reasonable or any explanation. Likewise, the failure to place more weight on the expert, though not disinterested evidence, was not an error. The Board referred to that evidence, but simply was not prepared to find that it provided the only meaning to the word kemosabe in the Membertou community or the Sydney area.

[87] In short, throughout its decision it is clear to me that the Board's fact-finding processes were not tainted by any of the kinds of error which would be required to characterize them as errors of law. On the contrary, they were conclusions which the Board could reasonably arrive at on the basis of the evidence before it.

Conclusion:

[88] The findings of the Board clearly support the conclusion that the respondents did not, in Ms. Moore's workplace, discriminate against her by making a distinction based on her aboriginal heritage or status which had the effect of imposing on her any burdens, obligations or disadvantages not imposed on others or which withheld or limited her access to opportunities, benefits or advantages available to others in the workplace.

Disposition:

[89] I would dismiss the appeal of the appellants and would make no order as to costs.

Chipman, J.A.

Concurred in:

Glube, C.J.N.S.

Hamilton, J.A.