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	June 23, 2023 23 juin 2023
	Tanya Smith
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Court File No.

FEDERAL COURT

BETWEEN:

MIAWPUKEK BAND
(Also known as Miawpukek First Nation)

APPLICANT

AND

TRACY HOWSE

RESPONDENT

NOTICE OF APPLICATION

APPLICATION UNDER section 18 and 18.1 of the *Federal Courts Act*, RSC 1985, and Rule 301 of the *Federal Court Rules*, SOR/98-106.

TO THE RESPONDENT

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicant. The relief claimed by the Applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant request that this application be heard at St. John's, in the province in Newfoundland and Labrador.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this court at Ottawa (telephone 613-992-4238) or any or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGEMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU

June 23, 2023

Issued by: _____
Registry Officer

Address of Local Office: Federal Court
354 Water Street, Suite 209
St. John's, NL
A1C 1C4

TO: Tracy Howse
General Delivery
Conne River, NL
A0H 1J0

APPLICATION

This is an application for judicial review in respect of a decision by the Employment and Social Development Canada appointed adjudicator, Elwin J. MacNeil, KC (the “**Adjudicator**”), dated May 24, 2023, which ordered the reinstatement of the Respondent, Tracy Howse (hereinafter the “**Respondent**” or “**Howse**”) to the position of Director of the Training and Economic Development Department (“**TEDD**”) of the Applicant, Miawpukek Band (hereinafter the “**Applicant**” or “**MFN**”) on the following conditions:

- I. That Ms. Howse expressly and in writing acknowledges and agrees that she understands and accept the terms of this re-instatement. Without such agreement, there shall be no re-instatement to employment with the band.
- II. That Ms. Howse can return to work with Respondent Band after she presents written medical, and psychological opinions from appropriately certified professionals, attesting to her physical and mental fitness to return.
- III. That Ms. Howse’ shall, upon her return to the position of TEDD Director, be compensated at the then compensation rate for the position.
- IV. That Ms. Howse be provided with, and attend, appropriate and reasonable supervisory training, and refresher courses as determined by the GM.
- V. That the Complainant’s claim for payment during her disability, from the date of termination to the date of reinstatement, of the differential between her disability payments and what she would have been paid if healthily employed in her former position, is dismissed.
- VI. That any claim in the nature of general damages in respect of the unjust termination, is dismissed.
- VII. That this Adjudicator shall remain seized in respect of the matter of costs to either party.

PART I – RELIEF SOUGHT

The Applicant makes application for:

- a) A declaration that the Adjudicator’s exercise of his discretion to conditionally reinstate the Respondent to the position of Director of TEDD with the Applicant is unreasonable;
- b) A declaration that the Respondent’s employment as Director of TEDD with the Applicant is no longer viable;

- c) A declaration that the Respondent's employment as Director of TEDD with the Applicant has been frustrated;
- d) Costs; and
- e) Such further and other relief as this Honourable Court deems just.

PART II – GROUNDS FOR APPLICATION

Background Facts

1. The Applicant is a Mi'kmaq indigenous community located on the south coast of the Province of Newfoundland and Labrador. MFN consists of an elected and administrative body representing approximately 1,000 on-reserve individuals and 2,000 off-reserve individuals. MFN is governed by an elected body consisting of a Chief and six-member Council. MFN's administrative body is divided into the following eight departments reporting to the General Manager: Training and Economic Development ("**TEDD**"); Intergovernmental Secretariat; Justice and legal Affairs; Natural Resources; Public Works; Capital Lands and Housing; Education; and Conne River Health and Social Services.
2. Howse is a band member and held the position of Director of TEDD from on or about January 4, 2011, until the termination of her employment on April 4, 2019.
3. On December 13, 2018, MFN engaged Kelly McMillan of the law firm Nijhawan McMillan Petrunia (the "**Investigator**") to act as a competent person within the meaning of the *Canada Occupational Health and Safety Regulations*, SOR/86-306, to investigate several complaints of workplace harassment and bullying, including a complaint of Tracy Howse dated 25 July 2018, received by MFN (the "**Investigation**"). Following the Investigation, the Investigator provided MFN with a Workplace Investigation Report dated February 17, 2019 (the "**Workplace Investigation Report**").

4. The Workplace Investigation Report was conducted in respect of the following complaints, as noted at page 4 of the Workplace Investigation Report:
 - 1) Six allegations of workplace harassment and/or bullying filed by Ms. Tracy Howse, Director of TEDD, against Ms. Theresa O’Keefe, General Manager of Miawpukek First Nation (MFN);
 - 2) Four allegations of workplace harassment and/or bullying file by Ms. Howse against Mr. Shayne McDonald, Director of Justice and Legal Counsel for MFN;
 - 3) Numerous allegations of workplace harassment and/or bullying filed by Ashley Hinks, Siobhan Jeddore, David Joe, Olivia Joe, Phoebe Keeping, Colleen Lambert and Cyrus Lambert (collectively, the TEDD Complainants”) against Ms. Howse; and
 - 4) Numerous allegations of workplace harassment and/or bullying filed by Ashley Hinks, Siobhan Jeddore, David Joe, Olivia Joe, Phoebe Keeping, Colleen Lambert and Cyrus Lambert (collectively, the TEDD Complainants”) against Mr. David McDonald, Manager of Conne River Outfitting (CRO).
- 5) The Investigator was also asked to assess whether there was a toxic work environment within TEDD.
- 6) Following the Investigation, the Investigator reached the following conclusions on a balance of probabilities, as noted at page 115 of the Workplace Investigation Report:
 1. Tracy Howse engaged in workplace harassment against Ashley Hinks, by failing to take seriously her disclosure of sexual harassment, and making unwelcome comments that revictimized her;
 2. Tracy Howse engaged in workplace harassment against David Joe, by engaging in a pattern of unwelcome conduct that was isolating, unsupportive, and demeaning;
 3. Tracy Howse engaged in workplace harassment against Olivia Joe and Colleen Lambert, by engaging in a pattern of unwelcome conduct that exclude them from core job responsibilities;
 4. Tracy Howse did not engage in workplace harassment against Siobhan Jeddore, Cyrus Lambert, or Phoebe Keeping;

5. David McDonald engaged in isolated acts of sexual harassment against Ashley Hinks, Siobhan Jeddore, and Phoebe Keeping;
 6. David McDonald engaged in workplace harassment of David Joe by repeatedly using a derogatory nickname in the workplace, and accusing him of theft in a staff meeting;
 7. David McDonald did not engage in workplace harassment against Olivia Joe, Colleen Lambert, or Cyrus Lambert;
 8. Shayne McDonald did not engage in workplace harassment against Tracy Howse; and
 9. Theresa O'Keefe did not engage in workplace harassment against Tracy Howse.
- 7) The Investigator also concluded at page 109 and 115 of the Workplace Investigation Report that Howse contributed significantly to a toxic work environment within TEDD and that a toxic work environment did prevail within TEDD during the period from November 2017 to May 2018, and to a lesser extent thereafter.
- 8) Following receipt of the Workplace Investigation Report, MFN decided to terminate the employment of Howse and by correspondence dated April 4, 2019, from Chief Misel Joe to Howse, Howse was advised that her employment with MFN as Director of Training and Economic Development Department was terminated effectively immediately with cause (the “**Notice of Termination**”).
- 9) Following her receipt of the Notice of Termination, Howse filed a complaint of unjust dismissal against MFN pursuant to the *Canada Labour Code*, R.S.C., 1985, c. L-2 (the “**Code**”) dated 25 April 2019 (the “**Unjust Dismissal Complaint**”). By correspondence dated 2 March 2020, the Director General of Federal Mediation and Conciliation Services advised the Adjudicator, that he had been appointed by the Minister of Labour as an adjudicator pursuant to the Code in respect of the Unjust Dismissal Complaint.

- 10) A hearing in respect of the Unjust Dismissal Complaint was held in Grand Falls, Newfoundland and Labrador from September 21-24, 2020 (the “**Hearing**”) at which time the following individuals were called to give evidence: Theresa O’Keefe, General Manager of MFN; Shayne McDonald, MFN Director of Justice and Vice-Chief; Misel Joe, MFN Band Chief; Colleen Lambert, Manager within TEDD; David Joe, Manager within TEDD; Kelly McMillan of the law firm Nijhawan McMillan Petrunia; and Tracy Howse, Director of TEDD. Final submissions of the parties were delivered to the Adjudicator on 13 October 2020.
- 11) By decision of the Adjudicator dated 3 November 2020 (the “**2020 Adjudication Decision**”), the Adjudicator allowed the Unjust Dismissal Complaint and ordered that Howse’s termination be set aside and replaced by a conditional order of reinstatement, without costs to either party.
- 12) Following receipt of the 2020 Adjudication Decision, MFN filed a Notice of Application with the Federal Court dated 3 December 2020 (the “**2020 Application**”), seeking judicial review of the 2020 Adjudication Decision.
- 13) A hearing was held before the Honourable Madam Justice Furlanetto of the Federal Court of Canada on May 10, 2022, and in its decision dated November 11, 2022 (the “**Federal Court Decision**”), the Federal Court allowed the 2020 Application in part and set aside the decision of the Adjudicator to reinstate Howse to a different position within MFN. The matter was remitted back to the Adjudicator to redetermine the issue of remedy in relation to the unjust dismissal of Howse.
- 14) In the Federal Court Decision, the Federal Court stated at paragraph 2 as follows:

“While I consider the Adjudicator’s finding that Ms. Howse was unjustly dismissed to be reasonable, I will remit the matter back to the Adjudicator to redetermine the issue of remedy as it is my view that the Adjudicator acted beyond his jurisdiction in reinstating the Applicant to a different position within MFN.”

- 15) Following written submissions by the Applicant and the Respondent and a hearing in respect of the redetermination of the issue of remedy before the Adjudicator on April 25, 2023, the Adjudicator rendered a decision dated May 24, 2023, ordering the conditional reinstatement of the Respondent to her former position of Director of the Training and Economic Development Department of the Applicant (the “**2023 Adjudication Decision**”).

Grounds for Application

- 16) Unlike the available remedies for a wrongful dismissal action, if unjust dismissal is found, the adjudicator or board has the power to order reinstatement of the employee to their prior employment position. Reinstatement is not an absolute right for an employee who has been unjustly dismissed, and an adjudicator has full discretion to order monetary compensation in lieu of reinstatement.
- 17) It is respectfully submitted that the Adjudicator erred in fact and/or in law in finding that a remedy that does not include reinstatement would not in any real sense make the Respondent “whole”.
- 18) In considering the Investigation and Workplace Investigation Report, it is respectfully submitted that the Adjudicator based his decision or order on an erroneous finding of fact without regard for the material before him in stating that “*Ms. Howse, due to personal and health reasons had little active personal involvement in Ms. MacMillan’s investigation processes*”, when in fact on January 25, 2019, Ms. MacMillan interviewed Ms. Howse in person for approximately three hours and following that interview, between February 9 and 15, 2019, Ms. Howse provided written response to questions provided by Ms. MacMillan totalling nearly 50 pages of material and also provided hundreds of text messages and other documentation in support of her position.

- 19) MFN respectfully submits that the Adjudicator's decision to reinstate Howse to the position of Director of TEDD was unreasonable and further, that Howse should not have been reinstated to the position of Director of TEDD for the following reasons:
 - i) The employment relationship is no longer viable as the trust and confidence required for the continuation of Howse' employment in the position of Director of TEDD no longer exists; and/or
 - ii) Howse employment with MFN has been frustrated.

- 20) Generally speaking, reinstatement requires determining whether the employment relationship remains viable. This depends on the context and circumstances and an assessment of whether the employee can be put back into their position with the reasonable assurance and expectation that the reasonable organizational, business goals, and lawful obligations can be obtained. The analysis has a forward looking character, and must answer the question of whether the employer could ever have confidence in the employee's judgment again, such that it should be prepared to run the risk of further misconduct.

- 21) The generally accepted circumstances which would justify a decision not to reinstate an employee are:
 - a) Deterioration of personal relations between the employee and management or other employees.
 - b) Disappearance of the relationship of trust between the employer and the employee (particularly where the employee is relatively high up in the corporate hierarchy).
 - c) Contributory fault on the part of the employee (even though the fault did not justify the dismissal).
 - d) An attitude by the complainant which would lead to the belief that reinstatement would not lead to improvement.
 - e) The complainant's physical inability to immediately start work again.

- f) Other events subsequent to the dismissal that make reinstatement impossible (for example, the employer's bankruptcy or layoffs that would have affected the employee).
- 22) It is respectfully submitted that the Adjudicator failed apply the generally accepted circumstances that would justify a decision not to reinstate the Respondent and/or failed to consider all the factors weighing for or against reinstatement when deciding whether to order reinstatement and that the Adjudicator erred in fact and/or in law in finding that the employment relationship remained viable.
- 23) Further, it is respectfully submitted that the Adjudicator failed to make his decision using the civil standard of proof (on a balance of probabilities).
- 24) The question of whether a relationship of trust can be restored should be resolved objectively, rather than on the subjective feelings of one party, however, the Adjudicator failed to objectively assess whether the relationship of trust could be restored and whether the employment relationship remained viable.
- 25) It is respectfully submitted that the Adjudicator based his decision or order on an erroneous finding of fact without regard for the material before him in finding that *"Concerns arising from any assumed or imagined obstacle arising in respect of future interactions between the Complainant and Ms. O'Keefe have been allayed, since she is no longer in the position of General Manager"*, ignoring the fact that the Investigator determined that Ms. Howse had engaged in workplace harassment against four other co-workers and had contributed to a toxic work environment within TEDD.
- 26) MFN respectfully submits that Howse's actions or conduct, although not rising to the level of just cause termination, establish, on the balance of probabilities, that the employment relationship is no longer sufficiently viable to support reinstatement. MFN respectfully submits that there is no reasonable assurance

and expectation that the reasonable organizational, business goals, and lawful obligations of the employer can be obtained.

- 27) In addition, MFN says that when you consider the generally accepted circumstances which would justify a decision not to reinstate an employee, Howse should not be reinstated for the following reasons:
- a) The deterioration of personal relations between Howse and management and Howse and the other employees within TEDD;
 - b) The disappearance of the relationship of trust between MFN and Howse (particularly where Howse held a relatively senior management position);
 - c) The contributory fault on the part of Howse (even though the fault did not justify the dismissal);
 - d) The attitude of Howse, in particular, her failure to acknowledge or accept any responsibility for her behaviour, which would lead to the belief that reinstatement would not lead to improvement; and
 - e) Howse' medical inability to immediately start work again or to start work in the reasonably foreseeable future.
- 28) MFN respectfully submits that the Adjudicator based his decision or order on an erroneous finding of fact without regard for the material before him in finding that the *“medical assistance that Ms. Howse is undergoing, if successful, should result in better coping mechanisms and prevent recurrence of those bad behaviours”*, when no such evidence was before the Adjudicator. Such determination was based upon the subjective belief of the Adjudicator and not on any objective medical evidence.
- 29) MFN repeats the foregoing and says that considering all of the factors weighing for or against reinstatement, there is no reasonable assurance and expectation that the reasonable organizational, business goals, and lawful obligations can be obtained if Howse was reinstated to the position of Director of TEDD and therefore, it was unreasonable to reinstate Howse to the position of Director of TEDD.

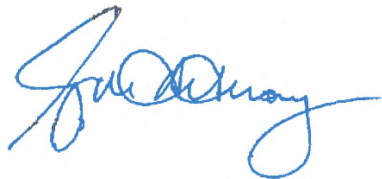
- 30) In addition to the fact that the employment relationship is not sufficiently viable to support an order of reinstatement, MFN respectfully submits that Howse should not have been reinstated to the position of Director of TEDD because the employment contract has been frustrated as a result of the lengthy absence and continuing disability of Howse.
- 31) It is submitted that an employment contract may end through frustration where an employee's illness or injury prevents the employee from working, and there is no reasonable prospect that the employee will be able to return to work. Whether frustration has occurred depends on the anticipated duration of incapacity, the duration of employment and the nature of the work to be performed.
- 32) Howse has been on disability leave since May 16, 2018, with no indication of when or if she will be able to return to work. The medical reports provided by the Respondent dated January 31, 2021 and February 14, 2023, provide that the Respondent has not been cleared to return to work and there is no indication in any of the medical evidence that she will be able to return to work in the reasonably foreseeable future. In fact, the Respondent stated in its written submission to the Adjudicator, prior to the redetermination hearing of the issue of remedy held on April 25, 2023, that "*No return to work is predicted for the foreseeable future...*". Further, there was no medical evidence provided to the Adjudicator to support a finding that the Respondent would be able to return to the Director of TEDD position in the foreseeable future or at all.
- 33) MFN respectfully submits that the Adjudicator based his decision or order on an erroneous finding of fact without regard for the material before him in finding that "*there seems to be optimism both from Ms. Howse and her clinician that time and treatment will allow for her return to work*", when no such evidence was before the Adjudicator.

- 34) MFN respectfully submits that the Adjudicator erred in fact and/or in law in applying the “thin skull doctrine” to a determination of frustration of contract.
- 35) MFN respectfully submits that in light of Howse’s lengthy absence from the workplace, the nature of her disability, the lack of medical evidence to support any finding that Howse would be able to return to work in the position of Director of TEDD in the reasonably foreseeable future and the Respondent’s own position that no return to work is predicted for the foreseeable future, that the Adjudicator’s order of conditional reinstatement is unreasonable.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

- i. Affidavit of Theresa O’Keefe dated November 19, 2019 including the 54 Exhibits attached thereto;
- ii. Affidavit of Andrew John, General Manager, Miawpukek First Nation, to be sworn;
- iii. Medical Report of Dr. Krista Barney dated January 31, 2021;
- iv. Medical Report of Dr. Krista Barney dated February 14, 2023;
- v. Such further and other affidavits and materials as may be filed; and
- vi. Pursuant to Rule 317, the Applicant requests that the Adjudicator, Mr. Elwin MacNeil, K.C., produce all records in his possession relevant to the decision and issues raised in this judicial review application that are not in possession of the Applicant. This request includes, but is not limited to, any documents on which the Adjudicator relied for the purposes of his decision dated May 24, 2023.

Dated at the City of St. John’s, in the Province of Newfoundland and Labrador, this 23rd day of June, 2023.



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