

Canadian Human  
Rights Tribunal



Tribunal canadien  
des droits de la personne

**BETWEEN:**

**MELANIE GILMAR**

**Complainant**

**- and -**

**CANADIAN HUMAN RIGHTS COMMISSION**

**Commission**

**- and -**

**ALEXIS NAKOTA SIOUX NATION BOARD OF EDUCATION**

**Respondent**

**DECISION**

**MEMBER:** Kerry-Lynne D. Findlay, Q.C.

2009 CHRT 34  
2009/10/28

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## I. COMPLAINT

[1] Melanie Gilmar's complaint against the Alexis Nakota Sioux Nation Board of Education is dated November 1, 2006, and brought pursuant to section 7 of the *Canadian Human Rights Act* ("the *Act*"). The relevant prohibited ground is sex (pregnancy) pursuant to sections 3(1) and 3(2) of the *Act*.

[2] Section 7 of the *Act* reads:

"It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. [1976-77, c.33, s.7.]

[3] The practices complained of include termination of employment, failure to accommodate, adverse differential treatment, and refusal to hire. It should be noted that "failure to accommodate" is not a discriminatory practice under the *Act*. The Tribunal found in *Moore v. Canada Post Corporation*, 2007 CHRT 31, at para. 86 that "failure to accommodate is neither a prohibited ground of discrimination nor a discriminatory practise under the *CHRA*. There is no free-standing right to accommodation under the *CHRA*."

[4] The alleged conduct arose between the dates of January 31, 2006 to September 2006, but is also alleged to be ongoing.

[5] Both the Complainant and the Respondent were represented by legal counsel at the hearing. The CHRC was not represented.

## II. BACKGROUND

[6] The Complainant, Melanie Gilmar (“Ms. Gilmar”) is a 33 year old teacher who now holds a Permanent Teaching Certification in the province of Alberta. At the time of the hearing, she was employed by Pembina Hills Regional Division No. 7, teaching grades 9 and 10, in her third year there.

[7] At the time the complaint arose, Ms. Gilmar was teaching in Alberta pursuant to a renewable Interim Teaching Certification.

[8] Ms. Gilmar received her post-secondary education in British Columbia from the University of Victoria. She received her Bachelor of Arts degree in 1998 with program emphasis in European and North American History, and Russian Language and Literature. She followed this with a Post-Degree Professional Program Certification in 1999 with program emphasis in Secondary Education – Social Studies and Language Arts Major.

[9] After her University of Victoria studies, Ms. Gilmar taught or substitute taught in a variety of settings in both British Columbia and Alberta, prior to applying for employment with the Respondent.

[10] During that same time period, Ms. Gilmar commenced study toward receiving a Children’s Mental Health Certificate through Mt. Royal College in Calgary which she has since obtained.

[11] Additionally in 2000, she completed various short-term training and certifications, mostly offered through Professional Development, including a two day seminar course entitled “Later Literacy for Aboriginal Students”.

[12] Among her completed workshops were courses in Special Needs & Mainstreaming and First Nations Issues.

[13] In her teaching experience prior to working for the Respondent, Ms. Gilmar taught various subjects at the grades 5, 6, 7, 8, 9, 10 and 11 level, as well as Law 12. Some of these courses were modified for students with special needs.

[14] During an 8 month teaching assignment in 2000, Ms. Gilmar gained additional First Nations Support experience.

[15] The various subjects Ms. Gilmar has taught include Language Arts, Math, Physical Education, English, French, Drama, Science, Computers, Career and Personal Planning, Outdoor Education, Study Skills. She has also carried out some administrative duties.

[16] Of some particular relevance to these proceedings, Ms. Gilmar had prior teaching experience in Social Studies in grades 7, 9 (IOP), 9 (regular classes), and 11. The IOP designation again indicates teaching of special needs children.

[17] Alexis Nakota Sioux First Nation is located approximately 85 kilometres west of Edmonton, near the town of Glenevis, Alberta. The Respondent (“Alexis”) is the Board of Education for the Alexis Nakota Sioux First Nation. I will use the name Alexis to refer to both the Board of Education and the school, as both bear that name as does the First Nation itself.

[18] Alexis governs and operates on-reserve the Alexis Elementary and Junior/Senior High School, providing instruction in grades one through twelve. It is an accredited school, offering grade twelve matriculation upon completion. Alexis also governs and operates an on-reserve Adult Academic Upgrading Program.

[19] The number of students in the grade school varies, but currently totals approximately 230 students. There are currently 18 support staff and 14 teaching staff members. None of the non-aboriginal teaching staff live on reserve.

[20] Alexis also funds some Band member students that live on reserve to attend Onoway elementary school and Onoway Junior/Senior high school through a tuition agreement. These are

off-reserve public education facilities under the jurisdiction of the Northern Gateway Regional Division No. 10.

[21] Ms. Gilmar was employed as a teacher for Alexis for a one year term commencing September 1, 2004 through to August 31, 2005. She was then offered a second one year contract in June 2005, commencing September 1, 2005 which should have ended therefore on August 31, 2006.

[22] Based on her first year of teaching at Alexis, and with a new contract offer, she commenced teaching for the second consecutive year on August 30, 2005, at or about which time Ms. Gilmar informed the Alexis School Principal, Mr. Wolf Kolb, that she was pregnant and would be commencing a seven month maternity leave as of January 31, 2006.

[23] The second contract when presented to Ms. Gilmar in September 2005, had been altered by the Director of Education, Liz Letendre, to a term of September 2005 through to January 31, 2006.

[24] Liz Letendre was employed by Alexis as the Director of Education throughout the relevant dates of this complaint, and remains in that position.

[25] Wolf Kolb was first a teacher, and later Principal, of the Alexis Elementary and Junior/Senior High School for several years including at the time that this complaint first arose. At the time of the hearing, Mr. Kolb was no longer an employee of Alexis.

[26] Alexis did not offer Ms. Gilmar another teaching contract after her departure for maternity leave on January 31, 2006.

### **III. DECISION**

[27] The Tribunal, for the reasons that follow, finds that Ms. Gilmar has made out a prima facie case of discrimination against Alexis within the meaning of section 7 of the *Act*, on the basis of sex (pregnancy). The Tribunal further finds that Alexis has failed to establish a bona fide occupational requirement to discharge the onus upon it. As a result, Ms. Gilmar's complaint is substantiated.

### **IV. COMPLAINANT'S CASE**

#### **A. Evidence of Melanie Gilmar**

[28] Ms. Gilmar testified that she kept a written record of her interactions with Alexis as it is common practice in the teaching profession to do so about employment matters, and also she was advised to do so by her pre-natal care professionals. Most of her testimony was from independent recall; at some points she relied partly on her written records kept contemporaneously, which were exhibited. I found Ms. Gilmar's evidence to be detailed, consistent under cross-examination, and credible in all respects.

[29] As to her introduction to Alexis, Ms. Gilmar testified that she originally interviewed to teach Grade 7, but was ultimately hired to teach Grade 6.

[30] Ms. Gilmar had worked as a First Nations academic support teacher in Chilliwack, British Columbia for 7 months. She testified that she had thoroughly enjoyed learning about First Nations culture at that time, and helping her students adapt to a learning environment. Some of those First Nations children had mild to moderate learning difficulties that required special goal-setting and accommodation.

[31] Further, Ms. Gilmar was taking a Children's Mental Health certification at the time of her application to teach for Alexis (completed in 2006). From this background and experience she

was looking for a teaching position with First Nations students, desiring to help them with their special needs. At Alexis, all students are First Nations children.

[32] Commencing September 1, 2004, Ms. Gilmar was offered a one year contract with Alexis. This offer was first based on her written application that included her educational credentials, her transcripts, a child welfare check, and a criminal record check. This was followed by an interview with a panel of three: Liz Letendre, Director of Education, Wolf Kolb, School Principal, and Shane Allan, School Vice-Principal. The class she taught averaged about 25 students in size.

[33] Alexis paid their teachers based on a pay grid outlined in the contract, which in turn was based on the teacher's experience in Alberta. Ms. Gilmar had previous experience in British Columbia but this did not form part of the pay grid recognition.

[34] The relevant employment contract contains a Personal Leave provision, which allows a teacher to request up to 3 days leave for personal reasons per one year term, with pay less the cost of Alexis hiring a substitute teacher. There are other terms concerning unpaid leave as well.

[35] Ms. Gilmar took time away in October 2004 under the above provisions to attend a family reunion and see her dying mother-in-law. Her request, which she was told is within the discretion of the Principal, was originally denied but later granted. There was some disagreement between Ms. Gilmar and Mr. Kolb as to how she would be paid during her time away, and how the substitute teacher would be recompensed, but this was resolved. To Ms. Gilmar, this was a minor professional matter which was dealt with and removed as a concern.

[36] During the year, Mr. Kolb would generally do two teacher evaluations when he would visit a classroom, sit in on the instructions long enough to form performance opinions, and prepare a written report. That report would be seen by the teacher, and discussed with her.

[37] Ms. Gilmar's first evaluation took place on November 15, 2004. Generally, Mr. Kolb would see more than one class to assess the teacher, but in Ms. Gilmar's case he only observed one class because, he advised, of his busy schedule.

[38] Ms. Gilmar enjoyed her time teaching at Alexis and wanted to continue. As to any difficulties in her classroom, she testified that some students were very defiant toward authority, used coarse language and spoke inappropriately threatening her with Chief and Counsel sanctions because of their families' position in the Band. She had some frustrations about this, as she observed that these children were treated more leniently and she was unable to get the school or school board administration to take any real action against this behavior. She testified that she did not accept this behavior, but tried to work with it and improve the situation.

[39] Among her teaching methods, Ms. Gilmar created some individual programs for the children, and engaged their parents. She instituted birthday celebrations with the classroom, so that each child could feel special even if they weren't as academically ahead as others. She found that this successfully mitigated against the need for disciplinary practices. Ms. Gilmar testified that it is 'standard procedure' for a teacher to recommend which students would fit a special needs program, for example a child with oppositional defiance behavior, and she did so.

[40] Ms. Gilmar testified that Mr. Kolb did review her first evaluation with her, one that she was well pleased with. There were two question marks at Item #5 and Item #6 on the evaluation, but these were not issues of serious concern. Ms. Gilmar testified that she used various tools to evaluate learning, such as tests and worksheets. The need to utilize these evaluations does not arise every day, however, and did not happen to coincide with the Principal's attendance for one class to observe. The question mark at Item #5 simply related to Mr. Kolb not being able to assess her use of that methodology at that time.

[41] The question mark at item #6 of the evaluation pertained to Ms. Gilmar not yet having filed a Professional Growth Plan. Ms. Gilmar knew she was expected to develop a written Plan, but at the time of the evaluation did not know that it was to be filed through the Principal. When she realized this, she quickly filed one to comply.

[42] Ms. Gilmar's second evaluation in her first year with Alexis took place on March 11, 2005. She again was very pleased with the indications that she had met all professional

standards. This evaluation was taken after her first Personal Leave. The evaluation indicated no cause for concern.

[43] In June, 2005, Ms. Gilmar testified that Mr. Kolb advised her that he was going to recommend her for a second year of teaching from September, 2005 through to August, 2006. She responded that she was very pleased she would be in the same school and the same grade, and she accepted the offer so made.

[44] Ms. Gilmar's first day of her second year of teaching was August 30, 2005, as classes began the next day. After a staff meeting on that day, Ms. Gilmar advised Mr. Kolb that she had discovered in July that she was pregnant. She advised him that she had planned the pregnancy so that she could take 7 months off for maternity leave, and return to teach in September, 2006.

[45] Mr. Kolb congratulated her, but commented that he thought that once she was home with a new baby she might want to take a whole year off for maternity leave. He agreed with her that her leaving at the end of January 2006 would be ideal because it coincided with the mid-year school break. He further advised that Alexis had interviewed a Georgeann Jones to teach grade 3, but that Alexis had not yet hired her, and encouraged Ms. Gilmar to use Ms. Jones as a substitute prior to her leave for purposes such as doctor appointments or sick days. There was no indication from Mr. Kolb at this time that Ms. Gilmar's expectations of returning to teach as of Fall 2006 was unfounded, unwelcome, or unlikely. To the contrary, comments such as discussing the length of her maternity leave, led Ms. Gilmar to reasonably believe that her request and suggestion found favour with Mr. Kolb.

[46] Ms. Gilmar testified that Mr. Kolb's positive response pleased her, and made her feel confident about her plans and the timing of them. She advised Mr. Kolb that she and her spouse had agreed that he would stay home to care for the new baby upon her return to work, as he was employed in customer service at a bank and earned less than she did.

[47] Pursuant to Mr. Kolb's suggestion, Ms. Gilmar did then use Ms. Jones for all her substitution needs including doctor appointments and a second Personal Leave in October 2005.

[48] Three weeks into the new school year, on or about September 22, 2005, Ms. Gilmar was handed her new contract by Mr. Kolb, but there had been a date change showing it ended on January 31, 2006 instead of the end of August as discussed and agreed. She questioned Mr. Kolb about this. He advised her that it had been prepared by Liz Letendre, the Alexis Superintendent, who drew up all the teaching contracts.

[49] Upon reflection, it also concerned Ms. Gilmar that the contract was silent concerning any change of date or expectation, should the pregnancy terminate for whatever reason making the maternity leave unnecessary.

[50] In or about this time, Ms. Gilmar spoke to two other teachers who had returned to teaching after maternity leaves without problem, which gave her comfort that she would be treated fairly. She also had already been teaching for almost a month, and felt that if she did not sign the contract as presented that this would cause problems and perhaps threaten her position.

[51] At the time, Mr. Kolb explained to Ms. Gilmar that he really didn't understand why the change was made, but that he assumed it was simply done to coincide with her maternity leave, and that the Superintendent would follow appropriate procedures. Given all the circumstances, Ms. Gilmar was uncertain, but ultimately this seemed reasonable and she relied on Mr. Kolb's assurances.

[52] The new contract showed her salary based on the grid now at \$46,624.00 per year, with the same leave provisions. She signed it on September 24, 2005.

[53] Ms. Gilmar testified that although she is aware that all schools have a policy manual, the Alexis one was not referred to during staff meetings she attended, nor did Mr. Kolb tell her to refer to it. She claimed the first time she had seen it was when it was presented through these proceedings, after her complaint was filed. She noted that the manual calls for there to be two evaluations per year done, but she only received these in her first year of teaching.

[54] Mr. Kolb did not do an evaluation of Ms. Gilmar's teaching in her second year with Alexis, September 2005 to January 2006. Ms. Gilmar assumed at the time that his schedule was simply too busy to allow it. At the time she was unconcerned as she had no reason to believe that her teaching was not accepted by Mr. Kolb and Alexis.

[55] Ms. Gilmar was asked about her stated desire to obtain her Permanent Teaching certificate. She had become eligible to apply as of October 19, 2005.

[56] She testified that starting in September 2005 and over several conversations, she approached Mr. Kolb to ask if he would assist her in the certification process. He advised her at the time that it was a three part process, and her supervision would have to be done by an outside agency. Alexis usually made such arrangements, therefore he said he would look into what could be organized and get back to her.

[57] In October 2005, she and Mr. Kolb had a further conversation about Ms. Gilmar's certification. At that time, Mr. Kolb advised her that it could be done before she left on her maternity leave, but it would be very rushed as ideally it should be done over the course of a whole school year. He suggested to her that she wait until she returned and had a full school year to complete it, because she might find it a stressful process.

[58] Ms. Gilmar testified that at first she felt she had a good class, was teaching even better than the year before when she was new to the environment, and that it would not be a problem to complete the process within the present term. On the other hand, she felt that Mr. Kolb was trying to look out for her, and that his was a thoughtful recommendation that she should listen to.

[59] Additionally, and most significantly as events unfolded, Ms. Gilmar thought at that time that she would be returning to teach at Alexis after her maternity leave, and was unaware of any reason that she would not be. As a result, she did not proceed through the certification process at that time, and she was professionally disadvantaged by the delay.

[60] Ms. Gilmar testified that she was never notified by Mr. Kolb, any other Alexis representative, or in writing from any source that there were deficiencies in her teaching, or that there were concerns as to her commitment to the Alexis students.

[61] During the first term of her second year at Alexis, Ms. Gilmar did take a second Personal Leave to attend a family wedding where she and her husband were part of the wedding party. Again, Ms. Gilmar felt the request was handled professionally, and that she and Mr. Kolb continued their collegial relationship before and after that Leave.

[62] As to her own assessment of her teaching in her second year at Alexis, Ms. Gilmar testified that she felt she was doing well: she felt even more pleased to be at Alexis; she had built a rapport and respect over time; there was continuity now; and she had been able to refine and build upon her teaching experience the year before.

[63] Evidence was given as to a Record of Employment "ROE" given to Ms. Gilmar upon her taking maternity leave. She testified that she requested her ROE from Ms. Letendre so that she could apply for Employment Insurance maternity benefits. There was no "top up" given through Alexis. The reason for her leaving on the ROE is cited as "F", which is the code for "maternity".

[64] At the time of her leaving, Ms. Gilmar testified that she e-mailed Ms. Letendre for her ROE, and indicated to her at that time she would be returning in September as she had told Mr. Kolb earlier. Also, Mr. Kolb had told her to write a letter of intent to return, and he would follow up with that for her. On her last day she asked him as to the timing on that letter, and he indicated he would like it from her before May, 2006.

[65] Ms. Gilmar was very specific that she had no indication from anyone representing Alexis that she would not be returning. Mr. Kolb and staff organized a surprise baby shower for her, Mr. Kolb gave her a personal gift in addition to the group gift(s) that were given, and Mr. Kolb's participation led her to believe that they were still on amiable and collegial terms. She felt her working relationship with Mr. Kolb was consistently positive. Mr. Kolb and others encouraged

her to return and bring her baby in for a visit when she could. Her overall sense was that she would be returning to teach in September 2006.

[66] Ms. Gilmar's child was born on February 27, 2006. As she was invited to do, Ms. Gilmar brought her new baby to Alexis in mid-March, 2006. She testified that her former students came running up to her with excitement. Some of them, and Mr. Kolb, held the baby. At that visit, Ms. Gilmar took the opportunity to ask Mr. Kolb the date the new school year was starting, and he reminded her to give him her letter of intent by April.

[67] Ms. Gilmar sent the letter of intent to both Mr. Kolb and Ms. Letendre on April 27, 2006.

[68] On May 2, 2006 Ms. Gilmar received an e-mail from Mr. Kolb stating that she would not be offered a teaching position at Alexis for the 2006 -2007 school year. Ms. Gilmar testified that she was shocked and concerned, and did not accept the reasons initially given by Mr. Kolb that Alexis was downscaling the teaching staff.

[69] Over time, Ms. Gilmar came to understand that Ms. Georgeann Jones, who had been hired to substitute for her while she was on maternity leave, was given a full-time teaching position with the grade 6 class that she had taught the year before. She also came to understand that there were other teachers hired for the 2006 – 2007 year, at least some of whom were less qualified than she. She believed that Ms. Jones' academic qualifications were no greater than her own, and that before Ms. Jones substituted for her, Ms. Jones had not taught in many years.

[70] The day after Ms. Gilmar received the May 2, 2006 e-mail, she telephoned Mr. Kolb to question him on his reasoning for not renewing her position, and he advised her that Alexis was looking for a "different skill set...of more benefit to the school" than what she possessed. When she pressed him on what he meant by "skill set", his response was unclear and inadequate. When she asked him about the grade 6 instruction, he responded that the school was "restructuring", and then he told her that he and the Alexis board had thought she would be taking a whole school year off. He also told her that the Alexis Board felt she wasn't happy there, which also shocked her. In

other words, Ms. Gilmar felt that Mr. Kolb's responses kept changing when she pressed him to be more specific or back up the reasons he was giving her.

[71] Ms. Gilmar testified that she advised Mr. Kolb that she was happy at the school, and that any conflicts that had occurred she felt were minor and had been dealt with. She was very shocked and concerned, and very confused as to the reasons Mr. Kolb was giving her.

[72] Ms. Gilmar further testified that even at this juncture, Mr. Kolb alluded for the first time to professional issues, but did not present any of the reasons or specifics, rather saying that other teachers brought other experiences to the table.

[73] Ms. Gilmar stated that she reiterated her special needs experience, and that she was happy to offer those skills to the school. She emphasized that she wanted to work with the students who really needed her.

[74] Between May 5 and 10, 2006, Ms. Gilmar called Ms. Letendre about a pay error, and brought up her dismissal. Ms. Letendre stated that she did not know of it, but proffered that she prefers if teachers take a full year off for maternity leave. She suggested she would speak to Mr. Kolb about the matter.

[75] Ms. Gilmar then contacted Mr. Kolb again, as she now understood that she would have to start looking for employment elsewhere. As a result of her request, Mr. Kolb provided her with a strong letter of reference dated May 16, 2006.

[76] Ms. Gilmar felt that the letter of reference was a fair assessment, and believed in part because of the letter's contents that she had done a good job and that Mr. Kolb would have hired her back but could not because of the re-structuring he had talked to her about. Nevertheless, as she continued with her job search she remained concerned about whether Alexis had followed a legitimate procedure in the way they had ultimately treated her.

[77] These doubts led Ms. Gilmar to file a Canada Labour Code complaint at the end of May, 2006.

[78] Exhibited in the proceedings was a letter dated July 17, 2006 from Mr. Kolb to a representative of HRSDC (Human Resources and Skills Development Canada) in response to Ms. Gilmar's complaint. Once again, she testified as to her surprise that in this letter he expressed that she did not possess the skills to fill any positions available at Alexis. Ms. Gilmar also learned for the first time that Alexis was taking the position that her second contract ended her employment as of the end of January, 2006.

[79] Ultimately, the Labour Code complaint was dismissed on the basis that Ms. Gilmar had a fixed term contract that had ended January 31, 2006.

[80] Subsequently, in mid-July, Ms. Gilmar came across two job postings published in the Edmonton Journal for teaching positions at Alexis for the 2006-2007 school year, which she felt qualified for. When she contacted Mr. Kolb about these postings, he indicated that Alexis was looking for teachers with different skill sets than she possessed. He told her she could apply anyway, but she felt she had a "standing application" with Alexis as all of her information was on file and Alexis knew of her continuing interest in a post there. In any event, on cross-examination she pointed out that this conversation took place on a Friday, with the job postings closing on the following Monday. There was neither time to put in a separate application, nor time to prepare new hard copies of relevant materials and have them couriered.

[81] An issue arose in the course of the hearing as to what degree of extra-curricular time and interest Ms. Gilmar put in as a teacher at Alexis. In Mr. Kolb's letter of reference he praises her for volunteering to create a cross-country running team that grew from 3 to 20 students and competed in a First Nations meet, noting that she continued to coach it when she was pregnant. He also noted that she helped out with the Christmas concert, pursued professional development, and attended social events.

[82] Another issue that arose during the course of the hearing was the Alexis practice concerning the offering of one year or multi-year teaching contracts. It was Ms. Gilmar's observation, and her understanding from other teaching staff, that Alexis routinely offered new teachers a one year contract. After that first year, if all went well, the teacher was normally offered a further one year contract or more probably a three year contract. Because of this, Ms. Gilmar did not question being offered a second one year contract, as she thought a three year contract would follow the following year.

[83] Ms. Gilmar was questioned as to whether her second contract of employment with Alexis had been given to her conditionally, contingent on her improving her teaching performance. Ms. Gilmar testified that she was totally unaware that this might be the case, and made the point that if it was, why did Mr. Kolb not evaluate her in the September 2005 – January 2006 term. I accept that this contract was offered for a one year term and that it was not contingent on her performance.

[84] She maintained that she was never criticized for her direct teaching skills, nor told that she did not have enough First Nations content or interest in First Nations culture, nor that she did not participate sufficiently in extra-curricular or reserve activities. The first she heard of such comments and criticisms of her performance was post her Labour Code complaint.

[85] Ms. Gilmar was also unaware of any internal appeal process from the decision not to extend her a teaching contract, nor was such a process highlighted or pointed out to her by Mr. Kolb or anyone else on behalf of Alexis.

[86] In the summer of 2006, after she was advised that she would no longer be given a teaching position at Alexis, Ms. Gilmar was given a second ROE issued by Ms. Letendre. This ROE states that the reason for her leaving the employ of Alexis was no longer "F" as code for "maternity", but now "K" as code for "other".

[87] On July 18, 2006 during a conversation with Ms. Letendre, she accused Ms. Gilmar of having not told Alexis at the time her second contract was offered that she was pregnant, and had

Ms. Letendre known, she would not have offered her the contract but would have found someone to take the position for the full year. Ms. Gilmar told Ms. Letendre that she did not believe she could be discriminated against because of her pregnancy. Ms. Letendre then re-directed the conversation back to performance issues, to which Ms. Gilmar replied that she felt she was being personally attacked and her professional reputation damaged. She also told Ms. Letendre that she felt she had been blind-sided by Mr. Kolb, and that it would appear that he was telling Ms. Letendre one thing and her another. She also brought up Mr. Kolb misleading her as to going forward with her permanent certification process, and Ms. Letendre said that she was unaware of her request in this regard. She remembered this conversation clearly as she was shocked by what Ms. Letendre said. Ms. Letendre left her with the strong impression that what had transpired had been Mr. Kolb's decision.

[88] When questioned about a May 11, 2006 internal report prepared by Mr. Kolb of Ms. Gilmar's and other teacher's performances, titled Teacher Recommendations, Ms. Gilmar testified that she was shocked by the content. The report recommends that no further contract be offered to Ms. Gilmar. Mr. Kolb detailed when Ms. Gilmar taught, and that she had left for maternity leave. He stated that "she is hoping to return in September", that she had been "open to his suggestions and made considerable progress", but he felt that her "attitude toward the school" had been negative and improvements in her teaching had been "slow". He summarized that he felt the school "would be better served by a stronger more committed teacher."

[89] At the same time that he wrote this internal May 11, 2006 report, Mr. Kolb was telling Ms. Gilmar that the reason she was not being offered a further contract was because the school was downscaling. This document came to Ms. Gilmar's attention through the hearing discovery process, allegedly derived from her personnel file with Alexis, and was unknown to her previously. The substance of Mr. Kolb's assessment reflected in that report was never discussed with Ms. Gilmar by Mr. Kolb or any other Alexis representative.

[90] Of note, the report recommends that Georgeann Jones (Ms. Gilmar's substitute) be given a one year contract, and Mr. Kolb recommended that another teacher who had taught for one year at the school in grade three be given a three year contract.

[91] In the Fall of 2006, when Ms. Gilmar learned that she had been replaced by Georgeann Jones, it was open knowledge that Ms. Jones had been married to a band member and that her children of that marriage were living on the Alexis reserve. In the complaint process Ms. Gilmar had great difficulty obtaining information about Ms. Jones' teaching qualifications or her personnel file at Alexis. The Respondent refused to make any real effort to provide this information, claiming privacy, despite a pre-hearing direction from the Tribunal to produce it. In addition, counsel for Ms. Gilmar was unable to serve a subpoena on Ms. Jones to have her attend at the hearing.

[92] Ms. Gilmar was taken through the documents pertaining to Ms. Jones' educational and professional background that were available at the time of her testimony, and it was evident that their qualifications were roughly equivalent, but that Ms. Gilmar had far more recent experience, including in First Nations teaching and support.

[93] Ms. Gilmar testified that she was aware of the importance of keeping her students engaged, and that she took measures to effect this. In grade 6, all subjects are taught all through the day, so she would use learning games, interaction, models, videos and other teaching aids to keep the children interested in learning.

[94] Under cross-examination, the issue of disrespect by students in her classroom was raised with Ms. Gilmar, who testified to one girl's behaviour in particular that Ms. Gilmar had problems managing. She stated that the girl used vulgar language toward her, and challenged her authority by saying that because her parents /grandparents were band members that there was nothing she could do about it. Ms. Gilmar advised that she had to refer this student numerous times to the School Office and give her detentions, but that her bad behavior continued unchecked by Alexis. At one point, the girl's father came in to speak with Ms. Gilmar, but he was largely unhelpful.

[95] Ms. Gilmar testified that generally swearing at a teacher is considered a major offence. Her reaction would normally be to first try to re-direct the student, second to give them a warning, and third and finally send them to the school office and/or a detention. It is considered an administrative issue once that referral to the school office is made.

[96] Ms. Gilmar also testified that it was a fairly frequent occurrence for parents to drop by the classroom during and outside of class. In addition, she had interaction with parents through the Parent Teacher conferences. Some parents were more involved than others, some only attending at the time of the Christmas concert for example.

[97] When asked if she had initiated any home visits with parents, Ms. Gilmar testified that this had never been brought to her attention, she was not given much guidance on it, and that she did not. She lived a one hour drive away from the Alexis reserve and school, and there was no school time to accommodate home visits. She did however tour the reserve on numerous occasions and did walkabouts.

[98] She also testified that she did attend community functions including one funeral, Christmas masses, creating a competitive running program, and assisting at workshops at school.

[99] Ms. Gilmar was taken through the terms of her employment contracts and she admitted awareness of the 30 day termination and leaves of absence provisions. She acknowledged that she was aware that she would be evaluated through two formal evaluations per year by the Principal, Mr. Kolb, and she expected to be. She reiterated her satisfaction with the evaluation results she had been given and the discussions with Mr. Kolb concerning them. Ms. Gilmar saw it all as appropriate, and part of her professional growth and learning. She maintained that she was shocked to learn that there was anything negative about her performance in Mr. Kolb's later May 11, 2006 report.

[100] Ms. Gilmar also outlined that the routine at Alexis was that you would be given your contract to sign in September after the school year starts. When she first discussed going on maternity leave, all responses to her were positive. She admitted that she received both her teaching contracts a few days in advance to look them over.

[101] Ms. Gilmar also stated that she understood that Mr. Kolb's recommendations on teachers were strongly followed by the Alexis Board, and that he was the most instrumental in the decision-making.

[102] When asked if she integrated First Nations culture into her teaching, Ms. Gilmar testified that she was very enthusiastic about doing this. She gave several specific examples such as using a medicine wheel to illustrate geometry, math, science, and environmental instruction. She spoke of using First Nations medicine cards, and focusing the students on spirit perspective with animals. She would take the students outside at times, and walk out comparative distances between the planets, integrated Stoney language words into her lesson planning, and used the burning of sweet grass. Two of her students were tribal dancers, and one of them a “fancy dancer”, so she had them showcase their talents in the classroom. She also incorporated First Nations images into her art lessons. I found her demeanour to be very sincere in recounting her desire while at Alexis to incorporate First Nations culture into her lessons, and it was obvious that she made real efforts in this regard. There was no suggestion that she was advised during her teaching that she was not doing enough in this regard in the opinion of Alexis or Mr. Kolb.

[103] On Re-Direct, Ms. Gilmar testified in more detail about the job postings she discovered in the Edmonton Journal during Summer 2006. They were for teaching positions for grade 9 and Outreach for students with special needs like life skills, hunting trips, etc. She made it clear she would have taken any position that Alexis might offer to her.

## **B. Evidence of Richard Svekla**

[104] Mr. Svekla is a teacher who taught at Alexis for six years, ending in July 2006. He taught grade 8 Social Studies and elementary classes, and IT (online learning by satellite). He knew Ms. Gilmar from their time both teaching at Alexis.

[105] When he started at Alexis, all teachers were offered one year contracts, but as time went on they were able to get multi-year contracts. His last contract was for three years from 2004-2007, but he decided to leave before it ended. With multi-year contracts, Alexis would update the contracts annually with an update in pay.

[106] Mr. Svekla testified that at the time Ms. Gilmar was teaching there, Alexis would normally offer a one year contract to start and thereafter a three year contract if Alexis was satisfied with

your performance. The May 11, 2006 report and recommendations prepared by Mr. Kolb evidence this as stated earlier.

[107] From discussions over time, Mr. Svekla was aware that Ms. Gilmar intended to return to teaching at Alexis after her maternity leave in September 2006. He testified that this was common knowledge.

[108] He further testified that he had observed Ms. Gilmar's interactions with Mr. Kolb over time, and that there appeared to be no difficulties between them. He testified that Mr. Kolb was usually very upfront with the teachers on his view of their performance.

[109] Mr. Svekla also testified that he had observed Ms. Georgeann Jones in her role as a teacher, and from those observations had thought she did not have any teaching background. He understood that she was or had been married to a Band member on the reserve, and that this was also common knowledge.

[110] Mr. Svekla observed over the years he taught at Alexis that other non-aboriginal teachers were fired and replaced by someone married to a Band member. He gave some specific examples of this.

[111] In one instance, Mr. Kolb told Mr. Svekla that a teacher was fired because he lacked classroom management skills. However, Mr. Svekla noted that this teacher's replacement is married to a Band member and still teaching at Alexis, despite the fact that she had such serious management problems in her classroom that she was twice hit with stereo speakers by her students.

[112] Another example of Band member influence or interference, testified to by Mr. Svekla, was an incident when a father complained to Ms. Letendre about a teacher with 12 or 13 years experience on the grounds that the teacher had assaulted his child. The teacher was suspended without inquiry. At a conference later, the parent said he would not have pursued the matter if he had realized it was that particular teacher, so she was re-instated.

[113] Mr. Svekla recalled when Ms. Gilmar and her husband brought her baby to visit at the school when she was on maternity leave as a good occasion. His recollection was that all the staff and students thought Ms. Gilmar was returning in September 2006 to teach. He knew that she met with Mr. Kolb about it the day of her visit with the baby, because her husband looked after the baby while she and Mr. Kolb spoke.

[114] Mr. Svekla stated that he was surprised when he learned in or about June 2006 that Ms. Gilmar would not be returning as he thought, from his own observations, that she was a good teacher.

[115] When asked if he employed special teaching strategies for First Nations children, he advised that he treated them “like any other kids”. He commented that sometimes you would have 15 instead of 5 special needs students in a class, but otherwise they were like any other children.

[116] When asked under cross-examination about the practice of offering one year as opposed to three year contracts, Mr. Svekla reiterated that most teachers started on one year contracts, and then were offered three year contracts on their return after having been evaluated by Mr. Kolb in their first year. He was aware of the termination clauses in the contracts.

[117] When asked about the evaluation process, his recollection was that Mr. Kolb usually did them once or twice per year, or even three times in year one. Afterward, he testified that evaluations were usually done as per need, or if prompted by a complaint. If there was a complaint, Mr. Kolb would come into the teacher’s classroom to assess the merit of the complaint. He was not evaluated for any concerns personally, but knew Mr. Kolb evaluated teachers if there was a concern or a complaint expressed. This testimony supports Ms. Gilmar’s contention that if there had been any concerns about her performance in her second year of teaching, or any complaints expressed, it would have been reasonable to expect that Mr. Kolb would have evaluated her but he did not.

**C. Witness Issue**

[118] During the cross-examination of Ms. Gilmar, counsel for the Respondent advised that she had been in telephone contact with Ms. Letendre on behalf of Alexis, and learned that had by chance Ms. Letendre had run into Ms. Georgeann Jones early in the hearing week.

[119] As stated earlier, initially the Respondent refused on privacy grounds to provide information from Ms. Jones' personnel file sought by the Complainant. Later, the Respondent did not provide the information despite direction from the Tribunal that it do so, because it said that her personnel file had gone missing from the Board's offices. Complainant's counsel had been unable to serve a subpoena on Ms. Jones, who would have consequently been called as part of the Complainant's case. The Respondent did not make any real effort to locate Ms. Jones, who was no longer in the employ of Alexis, although Ms. Letendre had ways of making contact with her.

[120] With the information that Ms. Letendre had spoken with Ms. Jones, Respondent's counsel also conveyed that the Respondent was now in possession of Ms. Jones' employment file, which Ms. Jones had retained in her personal possession.

[121] This led to a direction by the Tribunal that Respondent's counsel assist Complainant's counsel in locating Ms. Jones so that the subpoena could be served, and/or to ask Ms. Jones to attend at the hearing voluntarily.

[122] Finally, after telephone conversations with both counsel, Ms. Jones did testify in the hearing, but now as part of the Respondent's case. Ms. Jones did bring in copies in her possession of her Alexis personnel file which had not been disclosed or introduced previously.

**D. *Prima Facie* Case**

[123] As to whether the Complainant has established a *prima facie* case at this stage of the proceedings, both counsel relied on the tests set out in *Martin v. Sauteaux Band Government* (2002) CanLII 23560 (C.H.R.T.), a decision by then Chairperson Mactavish. The circumstances

of the *Martin* case are similar to this matter. The pertinent paragraphs of that decision are 24 through 31 that read:

“[24] A *prima facie* case is one which covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in Ms. Martin's favour, in the absence of an answer from the respondent.

[25] In the employment context, a *prima facie* case has been described as requiring proof of the following elements:

- a) *that the complainant was qualified for the particular employment;*
- b) *that the complainant was not hired; and*
- c) *that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (i.e. race, colour etc.) subsequently obtained the position*

[26] This multi-part test has been modified to address situations where the complainant is not hired and the respondent continues to look for suitable candidates. In such cases, the establishment of a *prima facie* case requires proof:

- a) *that the complainant belongs to one of the groups which are subject to discrimination under the Act, eg: religious, handicapped or racial groups;*
- b) *that the complainant applied and was qualified for a job that the employer wished to fill:*
- c) *that, although qualified, the complainant was rejected; and*
- d) *that, thereafter, the employer continued to seek applicants with the complainant's qualifications.*

[27] While both the *Shakes* and the *Israeli* tests serve as useful guides, neither test should be automatically applied in a rigid or arbitrary fashion in every case: rather the circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether Ms. Martin has satisfied the *O'Malley* test, that is: if believed, is

the evidence before me complete and sufficient to justify a verdict in Ms. Martin's favour, in the absence of an answer from the respondent?

[28] If the respondent does provide a reasonable explanation for the otherwise discriminatory behavior, Ms. Martin then has the burden of demonstrating that the explanation was pretextual, and that the true motivation behind the respondent's actions was, in fact, discriminatory.

[29] The jurisprudence recognizes the difficulty in proving allegations of discrimination by way of direct evidence. As was noted in *Basi*:

*Discrimination is not a practice which one would expect to see displayed overtly, in fact, there are rarely cases where one can show by direct evidence that discrimination is purposely practiced.*

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

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

*An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.*

[31] It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient if Ms. Martin's pregnancy was a *factor* in the decision not to renew her contract.”

[124] The Tribunal finds that the Complainant has established that she was qualified for the teaching position at issue, that she was not hired, and that the person who was hired in her stead was no better qualified and lacked the distinguishing feature of pregnancy similarly to the illustration in *Shakes v. Rex Pak Limited* (1982), 3 CHRR D/1001 at D/1002.

[125] Following the reasoning in *Israeli v. Canadian Human Rights Commission* (1983), 4. C.H.R.R. D/1616 (C.H.R.T.), affirmed (1984) 5 C.H.R.R. D/2147 (C.H.R.T. – Rev. Trib.), the

Complainant belongs to one of the groups which are subject to discrimination under the *Act*, she applied and was qualified for the job the Respondent wanted to fill and was rejected; and thereafter the Respondent continued to seek applications and hired other teachers with Ms. Gilmar's qualifications.

[126] Ultimately, further to the test set out in *Ontario Human Rights Commission v. Simpson Sears Limited, (O'Malley)*, [1985] 2 S.C.R. 536, at paragraph 28, the Tribunal finds that the Complainant at the close of her case in this proceeding had presented sufficient evidence that, if believed, was complete and sufficient to justify a verdict in the Complainant's favour in the absence of an answer from the Respondent.

[127] It is the finding of this Tribunal that Ms. Gilmar's pregnancy was a factor, if not the primary reason, behind the Respondent's decision to:

- a) shorten the term of her second contract with Alexis;
- b) refuse to hire Ms. Gilmar again despite her obvious interest in the position and desire to remain in the employ of Alexis;
- c) refuse or neglect to assist Ms. Gilmar in obtaining a permanent teaching certification; and
- d) not perform the required formal evaluation of her teaching in the September 2005 through January 2006 period;
- e) not discuss with Ms. Gilmar any concerns or complaints about her teaching abilities or her commitment to the Alexis community.

[128] The performance evaluations that Ms. Gilmar was made privy to were positive, and the only negative documentation surfaced after these proceedings commenced. She did not receive any prior notice that Alexis had issues or concerns with her overall teaching ability or style. If

such concerns existed prior to her leaving on maternity leave, Ms. Gilmar was given no insight or opportunity to correct or progress past those concerns. I find that the reasons given by both Mr. Kolb and Ms. Letendre at the hearing on behalf of the Respondent are pretextual.

[129] Ms. Gilmar was a competent, committed teacher even within the somewhat specialized description of what the Respondent was seeking in a teacher. She had First Nations teaching experience, and a desire to give of her talents in a First Nations educational setting. She felt she had something positive to offer those students with special needs, and the ratio of those students at Alexis was comparatively high. She embraced First Nations culture and actively integrated it into her classroom plans and teaching methods.

[130] Mr. Svekla's testimony was helpful in that he gave a colleague's point of view and observations of Ms. Gilmar's abilities. He was not challenged in those observations under cross-examination. He also testified that he had a sense of Ms. Jones' abilities from the same perspective, and he found Ms. Jones noticeably lacking in teaching and behavior management skills, and uncertain in her demeanour. He had been at the Alexis school for a considerable time, and had worked under both one year and three year term contracts. His observations of Ms. Jones were also unchallenged.

[131] Alexis hired 5 new teachers in the school year that they denied employment to Ms. Gilmar. There was evidence indicating that she had the teaching experience and qualifications to take on at least 4 of those 5 positions, and probably would have been able to fit the needs of the Outreach teacher. She had made it clear to Alexis through Mr. Kolb that she wanted to be considered for any of those positions.

[132] The teacher who was hired to replace Ms. Gilmar in the 2006 – 2007 year had a similar educational background to Ms. Gilmar, but did not have the distinguishing feature of pregnancy. She also had completed one First Nations oriented diploma course that Ms. Gilmar had not taken, but did not have the recent First Nations support and teaching experience that Ms. Gilmar had, nor some of the relevant course certifications that Ms. Gilmar had. In the context of the above legal tests, Ms. Jones' qualifications were equal to, or no better than, the qualifications of Ms. Gilmar.

## **V. RESPONDENT'S CASE**

### **A. Evidence of Wolf Kolb**

[133] Mr. Kolb was Principal of Alexis school for 8 years from 1999 – 2007, with 6 years before that as a teacher. He was responsible for recruiting and assisting in recruiting of new teachers. Interviews for new teachers were conducted by himself, the Director of Education (Liz Letendre), and the Portfolio Holder for the Alexis Board of Education who was generally a Board member or an Elder. The Alexis Board of Education is comprised of the Alexis Chief and Council.

[134] The policy of Alexis was to find the best teachers available, regardless of whether they are Band members or not.

[135] As per Board policy Mr. Kolb conducted the teacher evaluations. Those on one year contracts were routinely evaluated twice per school year.

[136] There is an evaluation policy and procedures set out in the Alexis Policy Manual. Mr. Kolb testified that the key expectations of teachers are set out in the Manual as well, and that the guidelines he followed in those evaluations are made available to all teachers. He admitted under cross-examination to using a standard template in his evaluations, which led at times to duplications and his inadvertent transferring of comments or evaluations from one form to the next, which required later correction to be accurate. This explained the transference of question marks onto Ms. Gilmar's second evaluation, which were there by mistake.

[137] Mr. Kolb also testified that he performed informal evaluations as well as formal ones, that part of his role was to make informal visits into the classrooms and have discussions with the teachers about those visits as issues arose.

[138] Also, it was possible as stated in the Policy Manual, for a teacher to ask for an evaluation of his/her performance to be done. Some teachers availed themselves of this in order to get informal feedback.

[139] A request by a teacher to have support for the purpose of obtaining a permanent teaching certification was referred by Mr. Kolb to Ms. Letendre as Director of Education. This was not expressly part of his role.

[140] It is the policy that the person doing the evaluation for purpose of certification be arms-length from Alexis, and therefore it could not be done by him.

[141] When asked why Ms. Gilmar was initially offered a one year contract, Mr. Kolb stated that this was standard practice by Alexis, and that all new teachers were offered one year contracts, or shorter contracts if the teacher was filling in for someone who was on leave or left early.

[142] Mr. Kolb testified that the first of two evaluations done in a teacher's first year of teaching is really an interim evaluation. Therefore, any areas of concern identified in the first evaluation of the year are seen as interim areas needing some attention or work by the teacher, and made for purposes of assisting the teacher to understand the work she/he needs to do. The expectation is to observe progress in the areas identified in the interim evaluation.

[143] Mr. Kolb agreed that he only observed one class to complete Ms. Gilmar's first evaluation, rather than several classes which is optimum. There were therefore, some areas marked where he simply did not have enough data to properly evaluate her. He conceded that in approximately 95% of teaching areas, she was meeting expected professional standards.

[144] Mr. Kolb stated that he recalled discussing with Ms. Gilmar around the time of this first evaluation that she needed to work on relationship building with the students and the greater community, and gave her ideas on how she might do so.

[145] Mr. Kolb's recollection of his discussions with Ms. Gilmar arising out of his first evaluation was that he encouraged her in classroom management strategies, and made suggestions regarding putting time in building relationships and interacting with students, their parents, and Elders. His suggestions included embracing their cultural background, phoning their homes,

visiting parents, and attending upcoming community events. He stated that all teachers were encouraged to attend community events.

[146] As to Ms. Gilmar's particular grade 6 class, there were a number of special needs students in her teaching assignment including FASD (Fetal Alcohol Spectrum Disorder) in the mild category and children with attention deficits. All were First Nations students, and the majority lived on the reserve. In addition, Band Elders would come into the school every day to support the teachers and talk to students about the importance of learning.

[147] Mr. Kolb testified that in the case of Ms. Gilmar, he did see progress in a few of the areas highlighted for her in the interim evaluation in assessment and record keeping, and in her relationships with her students, but not a great deal.

[148] When questioned on the issues relevant to her relationship with her students, Mr. Kolb stated that the students showed disrespect in her classroom by talking through instruction, swearing, being disorderly, and that students were frequently sent out from her class for misbehavior, defiance, and non-compliance.

[149] He agreed that Ms. Gilmar was proactive about these issues and that she did not send students out of her class for minor misbehaviours. He stated that the two of them discussed strategies for engaging the students in lessons, building trust and relationships, and the development of student behavior plans for chronic misbehavior. He described Ms. Gilmar as receptive, but that this was an area in which she continued to struggle despite his support.

[150] Mr. Kolb further testified that these issues were faced by all the teachers at Alexis, and most teachers in the province from time to time.

[151] After the second evaluation, Mr. Kolb stated that he found significant growth in Ms. Gilmar's teaching practice, and that she was now meeting the professional standards expected. He conceded that all teachers are expected to grow in their positions, and that

Ms. Gilmar had made significant progress. He felt, as a result, that she should be given a further opportunity, and therefore offered her a second one year contract.

[152] This second offer was first discussed with Ms. Gilmar at the time he discussed her second evaluation with her on March 23, 2005. He testified that he told Ms. Gilmar at that time that he had seen significant growth, that he would still like to see continued growth in areas of class management and student engagement, and he would be recommending to Alexis that it extend to her a further one year contract.

[153] Mr. Kolb affirmed that it is the Director of Education who actually drafts the teachers' contracts and tenders them to the individual teachers. He also affirmed that when Ms. Gilmar received her next contract in September 2005 he noticed it was for a 5 month term only. He did not know why this change had occurred at the time, but speculated it was because her pregnancy meant she would not be there in the second term. He had no involvement as to the change of term. When he asked Ms. Letendre about it, she advised him that she had discussed it with Ms. Gilmar and it simply reflected the setting of a fixed date when she would be leaving on maternity leave.

[154] Mr. Kolb recollected that Ms. Gilmar had told him of her pregnancy in August 2005, and that she intended to teach to the end of January as her due date was in early February 2006.

[155] When questioned as to the Alexis maternity policy, Mr. Kolb responded that they had never had a teacher on maternity leave want to return before the expiry of a current contract. Therefore, any teacher who was pregnant had taught until they no longer could, and when they were ready to teach again, they would apply for a new contract. A maternity leave had never arisen for a teacher within a three year contract.

[156] When asked as to why he didn't perform an evaluation of Ms. Gilmar's teaching in the 2005-2006 school year, he stated that his schedule and time commitments had not permitted it. He also stated that "none was asked for, and nothing was required".

[157] Initially Mr. Kolb stated that he did not need to do a performance evaluation for Ms. Gilmar in her second year because she had a shortened contract. Later, however, he agreed that there should be an evaluation done for a teacher even with a shortened contract, and that he did not follow through on this with Ms. Gilmar.

[158] In general terms, under cross-examination, Mr. Kolb stated that a positive evaluation generally led to a re-hiring but not necessarily. He agreed that the Alexis policies called for 2 performance evaluations per teacher per year, and he followed these policies “to the best of [his] ability”.

[159] Similarly in regard to Mr. Svekla, Mr. Kolb stated that he routinely did 2 teacher performance evaluations per year, but that he might have just done one in Mr. Svekla’s case and that he could have done them less frequently than two per year. He agreed that it was an Alexis policy that two evaluations per year be done, and that the policy exists to ensure fairness.

[160] In reference to the female student who was aggressive and abusive toward Ms. Gilmar in class, Mr. Kolb knew the student by name and knew her family. She is a member of the Alexis family, one of the prominent and influential families on the reserve. He said he supported Ms. Gilmar in regard to this student’s misbehavior, and that he had met with her parents a number of times with respect to her misconduct.

[161] Mr. Kolb was aware that this student used vulgar language and threatened to have Ms. Gilmar fired. He said that, “it [was] a threat I have known [this student] to make.”

[162] Mr. Kolb also conceded that despite the many meetings with the student’s parents, and numerous conversations with her in his office, that he was unable to positively affect her behavior and conceded that “some children are difficult”.

[163] Mr. Kolb further testified that evaluations were continuing informally and that he would go into the classroom in a supportive manner. He stated that Ms. Gilmar continued to have a lot of class management issues. He addressed with her ways to engage the children and improve

their focus, including bringing parents into the classroom so that the first contact with them was not around a discipline issue. He stated that parents wanted to be involved sooner in the discipline issues, but gave no specifics.

[164] Rather than improvement in this area, Mr. Kolb testified that he saw a decline in her second year of teaching when she was pregnant. He also stated that he observed Ms. Gilmar had less energy going into her teaching, less involvement in relationship building with her students, no involvement in the community or with parents, and less one-on-one interaction with the students.

[165] He acknowledged that community attendance was more difficult when a teacher is expecting a child, and that living a distance from the reserve made it difficult to attend evening functions.

[166] Mr. Kolb further testified that he knew Ms. Gilmar brought to her position experience with First Nations and special needs children. He also knew she had a specialization in Social Studies, but although she had the education he did not feel she had the requisite strength in the classroom to recommend her as a high school teacher. He never discussed this with her because she was not teaching high school when she was there.

[167] Although Mr. Kolb was aware that Ms. Gilmar had both Junior High and High School teaching experience in Social Studies, he knew it to be only as a student teacher. This indicated to him that she had taught the subject, but not necessarily that she was competent. He also dismissed her high school Social Studies experience because it took place out of province. He admitted that she had expressed an interest in teaching this subject at this level.

[168] With respect to the two job postings that Ms. Gilmar saw in the Edmonton Journal, Mr. Kolb stated that he did not hire Ms. Gilmar for either of these positions based on his own experience of her, and did not go back and familiarize himself with her credentials.

[169] In terms of Ms. Gilmar's performance overall, a reference letter was put to Mr. Kolb that had accompanied Ms. Gilmar's original application to Alexis. It was written by a former

Principal she worked with. Going through each item in the letter, Mr. Kolb was asked if he agreed with the various observations of Ms. Gilmar and her teaching as set out in the letter. He agreed that during her time at Alexis she demonstrated skill as an effective teacher, and skill in classroom management, instruction and communication, contrary to his earlier testimony. He stated that he was aware of her use of: the medicine wheel and other visuals; the morning circle (his suggestion that she adopted); bringing Elders into the classroom; using Stoney language; sweet grass burning; dancer demonstrations; as well as taking the students outside to learn about planetary distances.

[170] When asked about these culturally-based techniques, Mr. Kolb responded that these were only helpful if the parents knew about them. He then conceded that Ms. Gilmar did contact some parents.

[171] Mr. Kolb also stated that Ms. Gilmar was not sufficiently encouraging and supportive of her students, as evidenced by the student referenced before with severe behavioural misconduct. In other words, he used as an example of Ms. Gilmar's lack of ability and rapport, the situation with a student whom he admitted he could not himself affect positively despite targeted efforts.

[172] Although Mr. Kolb also agreed that Ms. Gilmar was conscientious and did her best, it was not good enough for him.

[173] When he was asked about Ms. Gilmar visiting the school with her baby, and the students running up to her, acting delighted to see her and asking questions, his reply was "not all".

[174] With respect to her First Nations teaching experience when she arrived at Alexis, Mr. Kolb referred to it as "some" and distinguished it from "significant" as it was over an 8 month period. However, under cross-examination he agreed that 8 months First Nations experience for a new teacher was more than most teachers have when applying for an entry level teaching position.

[175] Mr. Kolb stated that he had no recollection of Ms. Gilmar speaking of her intentions to continue teaching at Alexis prior to receiving her letter of intent. He also said that he had no

recollection of having any discussions with Ms. Gilmar as to her wishing to obtain a permanent teaching certificate, but later said that it could have happened. Despite having said that he did not remember Ms. Gilmar seeking to obtain her certification, he later said that he was aware that Ms. Gilmar wanted to attain this certification.

[176] Further, Mr. Kolb said that he had no recollection of discussing with Ms. Gilmar the shortening of her second year contract from one year to five months by Ms. Letendre. Yet, when asked if it concerned him that he offered a teacher a one year contract and she only received one for five months, he stated that he took it up with Ms. Letendre and she explained that it was better to offer her the position to that date. He said the concern over the end date was his own and he expressed this to Ms. Letendre.

[177] Initially he said that he did not recall Ms. Gilmar telling him that she only intended to take a 7 month maternity leave, but then stated that he did recall her saying she intended to return to work in September 2006. In contrast, he admitted that he told her when she inquired about teaching in September, 2006 that he thought she was going to take a one year maternity leave. There were many instances when he was questioned on issues relevant to this hearing, but he had no independent recollection and could not respond, or he contradicted himself between the first and second time that a question was put to him.

[178] For example, Mr. Kolb indicated that one of the main reasons for not offering Ms. Gilmar continued employment was because of her lack of community involvement. However, he later said that she may have attended a few events, but he was no longer sure. He recalled her attending one funeral but he could not recall whether she attended Christmas Mass both years she taught at Alexis as she had said she did.

[179] Given his own statements, I do not accept Mr. Kolb's evidence that his understanding was that Ms. Gilmar's contract had ended on January 31, 2006 and if she wanted to come back, she would later re-apply. He had made her a second one year contract offer. The term was changed only after he and Ms. Letendre became aware of her pregnancy. He professed to not understand himself why her contract had been shortened. Given the evidence as a whole, and his own

evidence in its entirety, I do not accept that he felt it was a simple matter of her having a contract ending January 31. There were active conversations between Ms. Gilmar and him about her coming back and resuming teaching, and he at no point discouraged her, or discussed any concerns with her, but only asked her to put her intentions as to her date of return in writing. I find his stated reliance on a contract ending January 31, 2006 only arose after Ms. Gilmar filed her Labour Code complaint.

[180] With respect to the permanent certification process, Mr. Kolb confirmed that there would have to be an outside evaluator and that the Director of Education made such arrangements. He forwarded all such requests from teachers to the Director, Ms. Letendre.

[181] Mr. Kolb testified that he recalled the letter of intent dated April 27, 2006 from Ms. Gilmar stating that she wished to return to teaching as of September 2006. He testified that the circumstances were that when Ms. Gilmar came to the school to show her baby, she asked about returning in the Fall, and he told her that he didn't perceive Alexis would have an opening. This is when he received this letter of intent. He stated that he told her that Alexis was reducing the number of teachers in the elementary division and that there was no opening for her.

[182] Mr. Kolb went on to state that this reduction was due to a decline in enrollment. The size of the grade one class had gone down significantly, and therefore they were reducing the overall complement of 7 teachers to 6.

[183] He further testified that during that discussion he remembered Ms. Gilmar asking about grade 6 and he advised her that Ms. Jones, who had replaced Ms. Gilmar once she left on maternity leave, would not be returning either.

[184] Later in this testimony, Mr. Kolb contradicted himself again stating that he did not tell Ms. Gilmar on the day of that visit that she would not be re-hired, instead asking her to send a letter of intent that she was interested in returning. He now stated that it would not have been appropriate for him to tell her on that day that he didn't intend to find a placement for her the following school year.

[185] Speaking to his May 16, 2006 letter of reference for Ms. Gilmar, Mr. Kolb stated that he prepared it himself upon her request, to support her in applying for other positions. He stated very specifically that he would “stand by this letter today”. He testified that he focused on her positive attributes and did not mention areas of significant challenges, being class management, rapport with students, and rapport with parents. It was a strong, endorsing letter of reference praising both Ms. Gilmar’s teaching abilities as well as her commitment to her students and her creation of, and participation in, extra-curricular activities.

[186] As to the Edmonton Journal job postings, Mr. Kolb stated that one was for a grade 9 teacher with a strong computer science and socials background. The second position was for Outreach, which meant working with children unable to attend school. He did not feel that Ms. Gilmar was a suitable candidate for either position.

[187] The grade 9 teacher would require strong class management skills and a depth of Social Studies teaching experience, neither of which he felt Ms. Gilmar had, but the main criterion was the ability to establish a rapport with the students. These children were at high risk of dropping out, and they needed a teacher they would attend school for. The Outreach required a great deal of community rapport, drawing on parents for support and going into their homes to get it. He did not feel Ms. Gilmar could fulfill this role.

[188] When asked about an e-mail written by Ms. Gilmar to him in the summer complaining of the position Alexis had taken, Mr. Kolb stated that he found it offensive as she was quoting “professionalism” and saying that she was considering laying a complaint, and yet she had already filed one under the Labour Code. He had championed an internal appeal procedure with Alexis for the purpose of reducing animosity, but Ms. Gilmar did not avail herself of it. He was not aware initially that Ms. Gilmar had made a mistake and copied a paragraph from an earlier e-mail into this one, a mistake she testified to and had contemporaneously apologized to him for.

[189] When asked if the teachers were aware of this appeals policy, Mr. Kolb testified that reference to the Alexis policies and procedures was a strong component of the early orientation

given to teachers each year. During that orientation the policies and appeals process are discussed, and full copies are made available in the staff lounge to be further copied or borrowed.

[190] These had been brought in the year before Ms. Gilmar started teaching, therefore in her first year of teaching and subsequently they were merely orally summarized to the teaching staff. Any decision of the Principal, the Director of Education or the Alexis Board of Education could be appealed.

[191] Ms. Gilmar had testified that the policies had never been mentioned to her, nor brought to her attention with any specificity. She had not seen them until post-complaint and she was unaware of the internal Appeal provisions. Mr. Kolb was not asked if he specifically ever talked to Ms. Gilmar about them, or showed them to her. As he did not proffer this when asked about their availability in the normal course, and based on Ms. Gilmar's testimony, I find that he did not specifically talk to Ms. Gilmar about them, show them to her, or direct her to review them so that she would be familiar with their contents.

[192] Mr. Kolb stated that when Ms. Gilmar sent an e-mail to him calling her treatment by Alexis unprofessional, he felt that he personally and Alexis had been disrespected, their procedures had not been adhered to, and that he had been lied to through her referencing an intention to file a complaint that was already submitted. This coloured his attitude going forward.

[193] Mr. Kolb also stated that Ms. Gilmar did not apply for either of the two positions that were posted in the summer about which she inquired, yet her application remained on file at Alexis and when she did inquire he discouraged her. I find it unreasonable for Mr. Kolb to suggest that Ms. Gilmar should have sent in a new application, as he had access to all her current information. I accept Ms. Gilmar's testimony that she made it clear to Mr. Kolb that she wanted to be considered for either of these two positions.

[194] The May 11, 2006 Teacher Recommendations report was put to Mr. Kolb. He testified that he prepared such a report annually for all teachers whose contracts were expiring, so that the

Alexis Hiring Committee would know his recommendations. He affirmed that his recommendations were generally followed, and that he had a significant say in who was hired.

[195] When asked about the offering of 3 year contracts, Mr. Kolb testified that typically the contracts offered were for one year and shorter if the person started mid-school year. He did state that at one point Alexis offered 3 year contracts to a group of teachers who had taught at Alexis for several years, as a means to strongly encourage them to make teaching at Alexis a career. This evidence is at odds with the May 11, 2006 report that he prepared where he recommended offering a teacher a three year contract after one year of teaching grade 3.

[196] When asked to confirm that he hired 5 new teachers at Alexis in the 2006-2007 school year as set out in documents filed as exhibits in the proceeding, Mr. Kolb could not recall. Initially, he only remembered Ms. Jones, and the two positions that had been posted for Grade 9 and Outreach.

[197] Mr. Kolb further testified that there was no accommodation made for teachers that were pregnant in either the contracts of employment or the Alexis school policies. In other words, nothing special was done for teachers who left due to pregnancy. If a teacher returned from a maternity leave during the term of her contract of employment, she would have been returned to her same or a similar position. However, if her contract expired during her maternity leave, there was no accommodation made.

[198] Further, Mr. Kolb admitted that although quite a few teachers had taken maternity leave, generally they were allowed to take time off for medical appointments and the like, but once they left on maternity leave their contracts generally ran out and were "considered expired". Afterward, that teacher was expected to apply for a new contract. He also conceded that such a request was generally looked on favourably if they had taught at the school before and had some community experience.

[199] In regard to Ms. Georgeann Jones, Mr. Kolb testified that the decision to hire her to teach the grade 6 class at Alexis starting September 2006 (the grade she had substituted for Ms. Gilmar

for) came about only in August 2006. However, I note that the May 11, 2006 report he prepared recommended she be granted a one year contract.

[200] He stated that the person that Alexis had hired for the grade 6 position had taught the grade 5 class the year before. She advised in August that she had taken another Band position and he therefore had to hire a teacher quickly.

[201] Mr. Kolb stated that he discussed a number of names with Ms. Letendre and decided on Ms. Jones from those options. He did not consider offering the position to Ms. Gilmar because by that time “all this had transpired” indicating that Ms. Gilmar had already filed the Labour Code complaint.

[202] Mr. Kolb was asked whether he had any concerns with Ms. Jones’ teaching performance. He responded that he was concerned with her class management abilities also, and in her case that she draw some boundaries with certain parents. She was in the community a great deal, and was being asked by Band members for rides and other favours. He stated that she took community involvement to the other extreme from Ms. Gilmar.

[203] The written evaluations of Ms. Jones that were put in evidence before she testified were confirmed by Mr. Kolb and showed several areas that met expectations and several that he wanted to see progress on. Her own children are First Nations, but she was living off reserve, and was no longer living with the Band member she had been married to.

[204] Mr. Kolb could not say whether a criminal records and background checks had been submitted by Ms. Jones, but that it should have been done if it wasn’t.

[205] Mr. Kolb did not now recollect many of his conversations with Ms. Gilmar that she testified to in detail and had contemporaneous notes concerning. I found her to be most credible, and her notes and details given by her support her version of events. Where Ms. Gilmar’s testimony and Mr. Svekla’s testimony differed from Mr. Kolb, I accept the evidence of Ms. Gilmar and Mr. Svekla. I also found Mr. Svekla to be a straightforward, credible witness

whose testimony went significantly unchallenged. He had good recollect after many years of teaching at the Alexis school.

[206] Mr. Kolb admitted under cross-examination that he never communicated his concerns about Ms. Gilmar to her orally or in writing, did not do an informal or formal evaluation of her between September 2005 through January 2006, and did not communicate to her what was in his May 11, 2006 report.

[207] Also under cross-examination Mr. Kolb conceded that several of the teachers he hired for the 2006 – 2007 school year had less teaching experience than Ms. Gilmar, including the teacher hired to teach grade 2, grade 5, and another teacher with the first initial of “K”. He remembered telling Ms. Gilmar in a conversation with her during the Summer of 2006 that these teachers had more skill sets than she did.

[208] Mr. Kolb’s basic position at the hearing was that Ms. Gilmar’s contract had expired and he had no ongoing obligation to hire her for the next school year. He had a number of teachers with different skill sets, he felt hers no longer matched what he was looking for at Alexis, and his recommendations were not based on length of teaching experience.

[209] Mr. Kolb also conceded under cross-examination that Ms. Gilmar challenged his remark to her that he thought she was not happy teaching at Alexis, that he knew she wanted to come back and that she asked him to keep her in mind if there were any resignations. He verified that there were two resignations at Alexis during the 2006 – 2007 school year, and that he did not contact her when those resignations occurred.

[210] Mr. Kolb confirmed that he viewed Ms. Gilmar as a competent teacher, and he saw no difficulty in her teaching at another First Nations school or another school in another district, but not at Alexis.

[211] Mr. Kolb also agreed that it was unusual for a teacher to be given two different ROEs. He also agreed that if she had not been pregnant, her second contract would have ended in August of 2006, not January of 2006.

[212] In comparing Ms. Jones teaching performance with that of Ms. Gilmar, Mr. Kolb stated that Ms. Jones did admirably in the Spring of 2006, but ran into difficulties in the following school year. He made 3 visits to evaluate her that year. He said that Ms. Jones struggled that year with personal problems that affected her performance, and agreed that her last evaluation was poorer than Ms. Gilmar's. He said that looking back on it, it was a possibility that Alexis would have been better served by Ms. Gilmar in that school year.

[213] Also under cross-examination, Mr. Kolb was questioned about the extent to which Band politics interfered with decision-making by him and the Alexis Board. Upon being presented with an example where a parent/Band Council member complaint led to a suspension of a teacher, he said that it was the Board's decision to suspend her, he only was mandated to investigate the incident. He then admitted that there were not many, but there were some incidents when the Board intervened in an area that was supposed to be his jurisdiction.

[214] When asked about the normal routine for the keeping of teacher personnel files, Mr. Kolb stated that it was not usual practice for a teacher to take her/his personnel file upon leaving. He believed those files were kept in a locked cabinet in the Board offices, and that the Director (Liz Letendre) had her own set. Teachers can request a copy and he had only been aware of teachers asking for copies, not their actual files.

[215] Under re-direct, Mr. Kolb stated that time at Alexis or seniority was not a factor in retention of a teacher, but First Nations experience generally was an important consideration. He also confirmed that he gave Ms. Gilmar the letter of reference he did because he felt she was a competent teacher who might do well in another setting, and he wanted to support her in doing well in the future.

[216] Finally, Mr. Kolb admitted that Ms. Letendre never observed Ms. Gilmar's teaching, and he never communicated suggestions that she was not connecting with parents and her students to Ms. Gilmar.

**B. Evidence of Liz Letendre**

[217] Ms. Letendre has served as the Director of Education for Alexis since 1998, and as its Assistant Director from 1994-1998. She testified as the Alexis Board of Education's representative.

[218] She is responsible for the schools' operations, oversees programs including supervision of the Principal, the Adult Learning Centre, and the Language Department. She is part of the Management Team operating for the benefit of the students.

[219] The elementary program comprises 60% of Alexis students. The Alexis Band has a population of approximately 1500, with 900 of those living off reserve. 55% of Band members on reserve are 20 years of age and younger. There are no non-native students at the school.

[220] Ms. Letendre testified that the highest priority for Alexis is the aboriginal culture. Academics are important, but First Nations cultural identity comes first.

[221] Alexis school operates as an Alberta private school under a government curriculum outline with required hours of instructions, and then the First Nations program is fit on top of that.

[222] Alexis Elders have an active role in education, in that they are part of discipline and support. The Elders will "offer the smudge to [the children]", pray with them, and discuss school and behaviours with them. There is a room adjacent to the staff room kept for this purpose.

[223] Ms. Letendre identified that many children come from homes where the values may not be consistent with school discipline, and the Elders help with children who defy authority.

[224] As to parental involvement, Ms. Letendre stated that this occurs through discussions around report cards, school functions like concerts, Mother's Day teas, etc. It is up to the teacher to introduce himself/herself to the parents and invite them to participate in their class. This is always emphasized.

[225] Ms. Letendre has little day-to-day involvement in the school activities. Her duties are mostly dealing with or through the Principal, attending functions, and parent contact. Most of what she knows of the individual classrooms and teachers is through receipt of the Principal's monthly reports and periodic evaluations.

[226] The parents critique the school often, and often directly to Ms. Letendre. The Principal is her direct link to the school.

[227] When she evaluates learning outcomes for teachers, she looks at whether the teacher is enticing the children to learn, whether the teacher is using different methods that work, and if the teacher has a rapport with her students. Sometimes the curriculum does not allow for First Nations emphasis, so it is the teacher who has to be adaptable and pull what she/he needs from a community resource.

[228] In hiring interviews Alexis emphasizes that the teachers are coming to a First Nations school, to bring community resources into their teaching methods, and that they are not going to have peace in their classrooms and are therefore challenged to bring knowledge to the students. She stated that it is a tough place to work, because the children's home environments are difficult and often have more than one family in a home.

[229] It is the goal of Alexis that the students be proud to be First Nations and strong citizens of the First Nations community.

[230] The Band hierarchy is that the Elders are first, Chief and Council are second, the Parents are regarded as next, followed by the families. There are 7 members of the Board of Education which is currently comprised of the Chief and Council.

[231] Another expectation of teachers is that they use the Stoney language as there are concerns that the language is dying out. There are two language instructors in the school, and one of them is an artist. They try to get teachers to incorporate the language into displays and artwork.

[232] The vast majority of the teachers are non-aboriginal, and none of those live on reserve. Currently, Alexis has only one First Nations elementary teacher who teaches grade one and has been there a long time. She is from the United States but married a Band member.

[233] They were noticing that their students were struggling with reading and writing, so there has been more emphasis placed on teaching English skills in grade 8. There is a high dropout rate around ages 12 and 13.

[234] The children used to attend Onaway, a nearby public school, but only one was graduating out of grade 12 every 4 or 5 years. This led to Alexis taking over the education of their Band member children. Originally, they taught grades 1 -9, but eventually expanded to all grades. This year they had 12 graduates, 4 living on the reserve and 8 from off reserve. A majority of graduates go on to some post-graduate studies, but usually have to upgrade in college to earn University entrance. One girl has achieved a Bachelor of Education degree.

[235] Ms. Letendre was led through considerable evidence on the way the school is funded and her budget considerations and restraints. The government gives the school a set amount per student regardless of where they attend. Funds are allocated for those going to Onaway as well as those attending Alexis. These payments to the outside school system use up a lot of the budget Alexis has to work with.

[236] Ms. Letendre confirmed that she is one of three on the hiring panel for new teachers, and their recommendations are generally adopted by the Board (Chief and Council). The Principal first receives and vets the resumes and applications with a view to noting First Nations experience. They do not want to hire teachers who just want a job, and do not have First Nations interest or commitment.

[237] As a result of budget constraints, the Alexis teachers are paid well in the beginning, but comparatively not so much as time goes by. Many teachers express that they do not teach for the money necessarily, but more so because they love the vibrant, welcoming community. Sometimes teachers are “named”, such as Mr. Wolf who was named “Shitosia” or “Wolf” in recognition of his special interest in the community.

[238] After the screening by the Principal, a prospective teacher is interviewed. The teachers are told then that they have to go ‘above and beyond’ to research Alexis’ cultural history and customs in order to instill in the students that they are part of a beautiful culture.

[239] Ms. Letendre stated that Alexis is very choosy in making offers to teachers, and has a high retention rate. Continuity and community are very important, and the Board gives the final approval.

[240] Once offers are made and accepted, Ms. Letendre draws the employment contracts. She initially stated that Alexis never gives long term contracts as some teachers may just come for the pay, not to help the children. However, this is contradicted by the May 11, 2006 report recommendations, Mr. Svetkla’s testimony, and the testimonies of both Ms. Gilmar and Mr. Kolb.

[241] Later, she agreed that in the last few years Alexis started to offer teachers 3 year contracts if they were doing well, or a further 1 year if they weren’t doing as well.

[242] Any re-hiring or retention is based on the Principal’s recommendations made at the end of each year who is supposed to base his recommendations on the whole year’s outcomes. This annual assessment is usually done by April 30<sup>th</sup>, but can go into May because of busy schedules.

[243] Ideally, offers of new employment or retention go out by the end of May. Typically, the teacher will receive this offer by letter, and then receive her/his contract in September. Usually, contracts contemplate a September to June teaching term but are given for a 12 month period.

[244] Ms. Letendre testified that the second contract given to Ms. Gilmar ended January 31<sup>st</sup> because she was only teaching to January due to her maternity leave, and her first ROE reflected that as well. The second ROE was given to Ms. Gilmar because she was not being renewed.

[245] At Ms. Gilmar's initial interview Mr. Kolb asked her how she would entice First Nations children to become learners. She appeared confident that she could help them, and had an understanding of First Nations culture. She was their second choice, but their first choice did not accept the position. Unaware of Ms. Gilmar's qualities as a teacher, she relied on Mr. Kolb's prior screening.

[246] Ms. Letendre also stated that Ms. Gilmar was told then that she would be receiving a one year contract, and there would be evaluations done during the year to determine if she might be offered a long term contract. She stated that she was later given a further one year contract to determine if there would be a later long term contract.

[247] In the 2004 – 2005 school year, Ms. Letendre's interactions with Ms. Gilmar were limited to the orientation at the beginning of the year, a Christmas concert, and some school events. There were lines of protocol to be observed so most of her knowledge of Ms. Gilmar was through Mr. Kolb as Principal. She confirmed the contents of the Alexis Policy Manual that showed the Education System Chart confirming that she would have no direct dealings with Ms. Gilmar.

[248] As to usual practices, Ms. Letendre testified that contracts are routinely given to the teachers in September after they have started the teaching year. They are paid their 10 month salary over a 12 month period.

[249] As to evaluations, the Principal prepared them and she received a copy. Usually the Principal would make her aware of any problem areas and advise how he intended to address those issues with the teacher.

[250] Her recollections regarding Ms. Gilmar specifically were that Mr. Kolb had asked her to put more First Nations content into her lesson delivery, that she had spoken to Ms. Gilmar about

showing respect for his authority, and that she was not fulfilling her contractual obligation to do 100 extra-curricular hours over and above her 9 am to 4 pm teaching assignments. She believed that Ms. Gilmar was not supportive of this expectation. Ms. Gilmar was expected to attend community events such as a pow-wow or a memorial rain dance, to get a feel for the whole community, not just school events outside of school hours. She stated that it was good for the students to see their teachers taking an interest in this way.

[251] When asked whether she saw Ms. Gilmar attend some events, she replied that she did not think that Ms. Gilmar really cared. In fact, she stated that she felt Ms. Gilmar “despised” the community.

[252] She stated that she got the feeling that Ms. Gilmar was putting Mr. Kolb in a difficult position all the time, but Mr. Kolb wanted to give her a further opportunity so she was offered a second contract. Because of Mr. Kolb’s recommendation, Ms. Letendre stated that the Board decided to trust his judgement, with a little bit of reluctance. However, she stated that nothing had been said about Ms. Gilmar by Board members.

[253] Ms. Letendre confirmed that she ended Ms. Gilmar’s second contract early because of her pregnancy, and that the change was okay because she would be done as of that date, and the ROE reflected that. She agreed that the number of months a teacher had at Alexis was a factor in offering her a further contract. The Alexis maternity policy is that the teacher has to go on Employment Insurance, and there is no ‘top up’.

[254] In recalling the conversation with Ms. Gilmar when she brought up the change of the end date in the contract, Ms. Letendre confirmed that she responded by saying that she “was only working for them until January 31<sup>st</sup> so why would I make it any longer?”

[255] As to general policy on teacher contracts, Ms. Letendre testified that she could not recall a teacher on a longer contract who had gone on maternity leave and returned within the term of her contract. She mentioned several teachers who did go on maternity leave and were offered further contracts upon re-applying.

[256] When speaking of longer contracts, Ms. Letendre advised that if a teacher was on a 3 year contract, the teacher would be called back based on the Principal's recommendation, and a longstanding relationship with good work ethics.

[257] In Ms. Gilmar's particular case, Ms. Letendre said that when Ms. Gilmar informed her about her intentions, the latter told her that she was coming back and that her husband would be taking parental leave. She referred Ms. Gilmar to Mr. Kolb, and the later decision was based on his recommendation not to bring her back.

[258] Ms. Letendre testified that at the time that Alexis decided not to hire back Ms. Gilmar, Alexis was aware of its staffing requirements for the coming year and that there were positions that needed to be filled.

[259] Ms. Letendre emphasized that the Board reposes trust in the Principal, as the Board members are not involved in the day-to-day operations of the school. All information about the teachers generally flows from the Principal.

[260] She recalled Ms. Gilmar contacting her to say she wanted to return to work, and that Ms. Letendre was surprised as "most mothers want to stay home with their babies". She commented that, "as a First Nations person, that is the way I see it." On hearing this from Ms. Gilmar, she referred her to Mr. Kolb as the person who makes those decisions.

[261] Ms. Letendre had no involvement in the posting of jobs and recruiting of teachers, but knew of the Principal's activities in this regard.

[262] When asked as to why she gave Ms. Gilmar a second ROE, Ms. Letendre replied that she felt Alexis had a continuing responsibility to Ms. Gilmar through to the end of August 2006 despite the fact that she had changed her contract to reflect a January end date. As her contract was not being renewed, and now that the time period of responsibility was over, she thought she would give her a new, amended ROE.

[263] Ms. Letendre confirmed that Alexis hired 5 new teachers in the 2006-2007 school year for Grades K, 6, 9, Senior High and Outreach/Special Education and that Ms. Gilmar was not considered for any of these positions due to her lack of “suitability”.

[264] In this context, Ms. Letendre stated that Alexis wanted teachers who help the children, not just go to the supervisor for everything. She stated that you have to want to work with First Nations children to help them grow, clearly implying that Ms. Gilmar did not. She stated that [Alexis] had given Ms. Gilmar an opportunity, but did not see anything that would allow for a further contract to be given to her.

[265] Ms. Letendre stated that most of the information regarding Ms. Gilmar’s lack of suitability came from the Principal, her co-workers (unidentified) and Elders (also unidentified). She stated that “from what [she] understood [Ms. Gilmar] didn’t like teaching in [the Alexis First Nations] community”. She stated that it was observed by these unidentified Elders that Ms. Gilmar did not seem to want to be there when she attended community events.

[266] When asked whether parents come to her with their complaints, Ms. Letendre testified that sometimes they do but she tries to protect staff from this, so she makes Mr. Kolb aware of this and asks him to make it better. She stated that sometimes the parents “can’t be nice with their words” so she relays the information through to Mr. Kolb. She did not recall any specific incidents regarding Ms. Gilmar that any parent brought to her attention.

[267] Regarding the teacher certification process, Ms. Letendre confirmed that when a teacher asks for their support, Alexis hires an independent evaluator and pays the expense of between \$1500 and \$2000. Such a request is initiated by the teacher through Mr. Kolb and then she would contact the evaluator. She could not remember any such request for Ms. Gilmar.

[268] When questioned about Ms. Jones, Ms. Letendre stated that she had lived on reserve over 20 years before when her Band member children were young, but not since her marital separation. Ms. Jones did not live on the reserve when she taught in the time relevant to this proceeding. She

knew the community Ms. Jones lives in now, as it is not too far a distance from the Alexis community.

[269] When asked whether she knew of this Tribunal's procedural rulings and conference calls, she answered in the affirmative. She knew of this Tribunal's direction to produce documents relevant to Ms. Jones hiring and teaching and her personnel file, but resisted because she felt that this was private information and she should get Ms. Jones' permission first. However, initially she did not have her phone number and did not know how to contact her. When she did obtain her cellular number, Ms. Jones did not return her call.

[270] When this Tribunal's direction came to her attention after being first served through the Principal, and Ms. Letendre went to get Ms. Jones' personnel file, it was missing. She could only find her employment contracts and evaluations.

[271] Ms. Letendre then testified that she happened to run into Ms. Jones in Glenevis, a neighbouring town, the Monday previous and asked her if she could provide her personnel file and Ms. Jones agreed. She claimed that Ms. Jones informed her that she had asked for all her documents from Mr. Kolb at the time she left, and he did not retain copies. Ms. Jones went home after this chance meeting, and brought back a copy of the documents and left them at Ms. Letendre's office. She also left a note with her cellular number on it.

[272] Ms. Letendre advised that she told Ms. Jones she needed her information, educational background, certification information, etc. because of a hearing that Alexis was having with another teacher, and "they feel [you weren't] certified or qualified for the teaching position [you] had". She claimed that Ms. Jones was baffled by why her personal/professional information was relevant. She further claimed that Ms. Jones phoned her to complain that she had now been contacted by Ms. Gilmar's lawyer and she considered it harassment. She called Ms. Letendre back and said she would cooperate with the Tribunal and make her whole file available. Ms. Letendre did not tell Ms. Jones that there was a subpoena issued by Ms. Gilmar's counsel, nor that she was required to attend at this hearing.

[273] Under cross-examination, Ms. Letendre confirmed that it was Mr. Kolb who interacted with the teachers, not her, and he would come to her if something that arose was beyond his authority. Her office is across the street from the school and she never visits classrooms; her information about teachers comes exclusively through Mr. Kolb.

[274] It is part of Ms. Letendre's job to assess which teachers can be trusted with the Alexis First Nations children.

[275] Ms. Letendre stated that she had no independent notes of events that took place in relation to Ms. Gilmar's complaint, and nothing more in her possession other than what has already been produced.

[276] The Alexis community has about 800 people in it. Usually about 80 – 90 people would attend community events. If they are ceremonial events attendance is between 100 – 200. For graduation ceremonies attendance is about 150. She could not always attend events because of her busy schedule.

[277] Ms. Letendre attends the Christmas mass and graduation ceremonies every year, and she confirmed that Ms. Gilmar attended at Christmas both years she was there, but could not recall if she was at the graduation ceremonies. She might have not observed Ms. Gilmar at various events. She did remember Ms. Gilmar participating in the Thanksgiving walks to remember community members who have died of alcohol and drugs. She did not remember her assisting the music teacher at the Christmas mass.

[278] Ms. Letendre was not aware of the running club that Ms. Gilmar initiated and grew, nor her active role in the cross-country First Nations meet, as outlined in Mr. Kolb's letter of reference. In fact, she challenged whether the running club even existed, and if it did whether she was the teacher who ran it. She also did not know that Ms. Gilmar participated in a Maradra Draw, only that it was headed up by a First Nations teacher for a long time. She minimized the events and activities that she knew Ms. Gilmar participated in.

[279] Ms. Letendre admitted that she did not know all the matters Ms. Gilmar participated in, nor did she know of Ms. Gilmar's efforts to incorporate First Nations elements into her teaching. Mr. Kolb did not advise her of Ms. Gilmar's various initiatives in this regard, and Ms. Letendre was generally unaware of the daily instruction. The First Nations language instructor did not tell her that Ms. Gilmar took Stoney language instruction.

[280] Ms. Letendre was very resistant to hearing that Ms. Gilmar did incorporate First Nations elements into her instructions, suggesting that Mr. Kolb would have put these particulars in his evaluations and because he did not so, she did not believe it.

[281] Ms. Letendre agreed that if a teacher was doing these things, that teacher might be well-suited for teaching at Alexis, but to really be suitable, the teacher would have to carry this in her/his heart. She admitted that incorporating First Nations culture into the classroom instructions would be part of a good evaluation. If the teacher embraced the culture sincerely, that would be an exceptional teacher.

[282] As to Ms. Gilmar's resume and original application, Ms. Letendre minimized Ms. Gilmar's previous First Nations teaching experience. She would not agree with any positive statements about Ms. Gilmar's attitude or ability.

[283] Ms. Letendre had little recollection of Ms. Gilmar advising of her intention to return to teach in September 2006, her visiting while on maternity leave with her baby, or her April 2006 e-mail or letter of intent. When pressed on whether she received this April e-mail, Ms. Letendre said she did not and suggested it might be because the internet access at her offices had a virus at the time, and was overloaded.

[284] Ms. Letendre had no real recall of seeing Mr. Kolb's May 2, 2006 e-mail response either, nor had she seen the letter of reference he provided, nor could she remember Ms. Gilmar saying from the beginning of the year that she intended to return in September. She openly questioned why a mother with a baby would want to return to work before one year and indicated that this is not her preference. After Mr. Kolb did not recommend her for a further contract in his

May 11, 2006 report, she referred Ms. Gilmar to him when Ms. Gilmar contacted her to discuss the matter.

[285] Ms Letendre denied that the Labour Code complaint prompted her to issue the second ROE, but she did make the change after she knew of that complaint. It is the position of Alexis that Ms. Gilmar's contract had expired and they were within their rights to not renew it.

[286] Ms. Letendre denied any recall of conversations with Ms. Gilmar in or about May and mid-July, 2006, yet she denied making various statements put to her. She admitted that she changed the length of Ms. Gilmar's contract term because she was pregnant.

[287] Ms. Letendre confirmed that she expects the Principal to treat and assess teachers fairly, and that she would expect that the Principal would communicate any concerns to a teacher. When confronted with Mr. Kolb's testimony that he did not communicate his concerns to Ms. Gilmar, Ms. Letendre agreed that this is not fair conduct. She went on to state that if she had seen a good report from Mr. Kolb and had seen her as part of the community, she would have returned her to teach at Alexis.

[288] Ms. Letendre essentially admitted that she had heard from Elders at the school in Ms. Gilmar's first year that she did not really fit, and she did not seem to want to be there. When asked to identify these elders or give specifics of their comments, she would or could not.

[289] Because of Ms. Letendre's insistence that there were negative comments made to her by Elders and parents in the community about Ms. Gilmar the Tribunal asked Ms. Letendre to bring in to the hearing notations about these complaints she claimed to possess in her office. She was given overnight to find those notes, however the next day she said she had none, and could not remember any of the names of these people, nor any specific comment or objection they had made about Ms. Gilmar.

[290] Ms. Letendre was aware of the behavioural difficulties Ms. Gilmar had with the Alexis female student in her class, and that she was a particularly difficult child. She had had

conversations with the child's father who explained that his daughter was struggling and had a relationship with an older boy/man. She commented that the parent came in not to support his child but just to explain her acting out.

[291] Ms. Letendre was adamant that she did not agree that Ms. Gilmar respected the Alexis community. She felt her strong desire to teach at Alexis probably arose from her not having a chance to teach elsewhere, rather than her real interest in the Alexis students.

### **C. Evidence of Georgeann Jones**

[292] Ms. Georgeann Jones was the teacher who substituted for Ms. Gilmar at Mr. Kolb's suggestion when she was pregnant, and then took over her grade 6 class when she went on maternity leave from February through June 2006. Ms. Jones was then hired to teach the grade 6 class for the following September 2006 through June 2007 school year.

[293] Ms. Jones' education credentials were similar to Ms. Gilmar's, but the former had an extra 6 course diploma on aboriginal issues. However, she had not taught for several years. She had taught many years ago when her children were born, then afterwards ran a home-based business while she was raising her two children. Her application to Alexis was for the grade 3 teaching position and was part of her attempt to re-enter the teaching profession.

[294] Ms. Jones testified that Ms. Gilmar's status was never discussed with her. She did not have a contract for the February through June 2006 period as it was treated more like a substituting hire. She would not have been responsible for planning, for instance, and could have been replaced.

[295] At the end of the 2006 school term, Mr. Kolb advised her that he would be recommending her for a further position at Alexis, but he made it clear that the ultimate decision rested with Band Council. She would be contacted later if there was a position to offer.

[296] Ms. Jones was contacted in late August/early September 2006 to fill the position for grade 6 again (new group of students) after the previous grade 5 teacher now assigned to the class quit to run for Band Council. One cannot hold another job and be on Band Council.

[297] Ms. Jones testified that she participated in many community events which she listed, and had existing ties with the Band, not the whole community, but certain people in it.

[298] Ms. Jones confirmed that Ms. Letendre had tried to get hold of her, but she was told it was for a possible upcoming job that she was not interested in so she did not return the contact made. The contact was not direct, and Ms. Letendre would not have had her number to contact her directly. Contact was through mutual contacts.

[299] She also confirmed that she had run into Ms. Letendre, as the latter had testified, on Monday or Tuesday of the hearing week, i.e. June 8<sup>th</sup> or 9<sup>th</sup>. Neither seemed to know which of the two days it was. She confirmed the place that Ms. Letendre had stated as where they had encountered each other, and what was asked of her.

[300] Ms. Jones also confirmed that when she left the employ of Alexis, she did not take her personnel file with her, but asked for copies of its contents through the office clerk, which she was provided. This is her practice when leaving a place of employment.

[301] Ms. Jones confirmed that the class she was teaching in the 2006 – 2007 school year had 4 particularly difficult students. They were extremely disruptive during class, with low concentration levels. She stated that at the end of the year, Mr. Kolb asked her if she would return at a future date but no further contract was offered.

[302] As to her documents, Ms. Jones confirmed that Ms. Letendre indicated that Alexis had lost her file, and asked her to bring in her file in regard to another job coming up. She also asked her for copies of her degrees for a complaint that Alexis was dealing with. Tuesday, June 9<sup>th</sup> was the first time she heard about the present proceeding, and the first time she was asked to attend.

[303] Ms. Jones testified that she obtained her B.A. Degree and her B.Ed. Degree and a diploma for extra courses over a 6 year period. The extra courses she took within the Faculty of Education included aboriginal people, ESL, and the psychology of under-privileged children.

[304] In 2005, she interviewed with Alexis to teach grade 3 and inquired as to any substituting opportunities. She was told Alexis was looking for coverage in grade 6 because the teacher was going on maternity leave. After she commenced teaching, no one discussed Ms. Gilmar's plans with her.

[305] During her term substituting for Ms. Gilmar, Ms. Jones confirmed that the classroom structure was set up and organized. The unit plans were in place for the balance of the year. Some teacher guides were missing from the classroom but she described that as typical. She agreed that the class had been well-organized and well-run by Ms. Gilmar. She commented that she wanted to improve on the students' ambition and initiative. As a substitute teacher, you do not do any course planning, and she understood throughout that this was not a permanent position for her.

[306] Ms. Jones' children are Band members and have full Band status, so she had maintained some of her ties to the community over the years.

## **VI. ANALYSIS/CONCLUSION**

[307] Having found that the Complainant has presented a *prima facie* case, as set out above, the burden of proof then shifts to the Respondent. What constitutes a *prima facie* case has been recently set out in the Federal Court decision of *Vilven v. Air Canada* 2009 FC 367, at para. 34, where the Court states:

“According to the Supreme Court, a *prima facie* case of discrimination is one that covers the allegations made, and which, if believed, is complete and sufficient for a decision in favour of the complainant, in the absence of a reasonable answer from the respondent. Once a *prima facie* case of discrimination has been

established by a complainant, the burden then shifts to the respondent to provide a reasonable explanation for the conduct in issue.”

[308] In closing argument, Respondent’s counsel essentially relied on the terms of Ms. Gilmar’s shortened second contract. Counsel pointed out that although she questioned it, Ms. Gilmar did sign it. Counsel offered no response to the systemic arguments or nature of the complaint.

[309] As to criteria, Respondent’s counsel argued that it is not a matter of Ms. Gilmar’s competence which she concedes, but rather that Ms. Jones was not really hired as her replacement because Gilmar’s contract (the second one) had expired. She further argued that regardless of any finding on this point, Ms. Jones had greater qualifications than Ms. Gilmar including her Intercultural Education Diploma.

[310] Respondent’s counsel summarized the Respondent’s reason for refusing to re-hire Ms. Gilmar as really coming down to “suitability and fit”. She argued that the Employer always has the right to decide, as its prerogative, who is “suitable and fit”. She did not address the refusal to look at Ms. Gilmar as a candidate for the 5 positions filled in the 2006 – 2007 school year.

[311] Respondent’s counsel did not address the lack of disclosure to Ms. Gilmar of criticisms in her performance, nor the issuing of two different ROEs. Undue Hardship was not argued.

[312] Respondent’s counsel agreed that should her case be made out, Ms. Gilmar’s claims for historic wage loss (mitigated by wages earned), solicitors fees, and wages lost due to attendance at the hearing are all reasonable as presented. She argued that Ms. Gilmar’s claim for pain and suffering, and special compensation for the Respondent’s conduct should not be at the high end of the range as she had not proven sufficient foundation for that end of the range.

[313] It is clear in weighing all the evidence presented in this proceeding that Alexis has no viable maternity policies in place, and has not put its organizational mind to developing such policies. I found Ms. Letendre, who testified on behalf of Alexis, to be hostile toward the proceedings and overboard in her personal condemnation of Ms. Gilmar with no notes, specifics,

or details to back up that hostility and condemnation. She conceded several times that she was not in a position to make personal observations about Ms. Gilmar's teaching, and yet she had formed strong negative opinions.

[314] Throughout Mr. Kolb's testimony he wavered between trying to appear fair and objective with respect to Ms. Gilmar's performance and teaching abilities, and wanting to be in synch with Alexis and its ultimate decisions. His influence in terms of hiring, retention and not renewing teachers was profound, and largely unchallenged. Yet, Mr. Kolb was clearly sensitive to being in alignment with the Alexis Board and Hiring Committee, both of which included Ms. Letendre.

[315] The main criticism of Ms. Gilmar ultimately levied by Mr. Kolb, and taken up by Ms. Letendre, was that she did not have good class management skills. This seemed to center on her difficulties with one particular student who had relatives on Band Council, and was unafraid of using foul language and threatening retaliation by those relatives.

[316] Both Mr. Kolb and Ms. Letendre were aware of this student's behavioural problems, and neither of them were able to bring her under control despite direct efforts. This criticism of Ms. Gilmar is unfair and maligned her teaching abilities unnecessarily.

[317] Mr. Kolb's May 11, 2006 report and his testimony at this hearing also centered on Ms. Gilmar's lack of energy in her second year of teaching when she was pregnant, and that she did not attend as many community events even though he conceded that this did not surprise him because of her pregnancy and her long commute each day. I find these reasons to be pretextual, and something that arose not out of any real observation or evaluation, but for other unknown or unspecified reasons. Mr. Kolb took advantage of the fact that Ms. Gilmar was pregnant and I find deliberately did not evaluate her during her term at school, purposefully talked her out of proceeding with her certification process using her pregnancy and the added stress it would cause as a convenient excuse.

[318] The main criticism of Ms. Gilmar by Ms. Letendre, who conceded that she had no independent knowledge of her teaching abilities, methods or attitude, was that she despised the

Alexis community and did not want to teach there. This was the suitability and fit that counsel argued. There is no exemption under the *Act* for suitability and fit. Again, without any context and given her complete failure to give specifics, I find that this view of Ms. Gilmar came about specifically because she was pregnant and not as able during the brief period from September through to January 2006 to be as physically active and present. Also, Ms. Letendre appeared to have a personal bias against the way that Ms. Gilmar was handling her pregnancy and the parenting of her baby.

[319] Ms. Letendre could give no specifics, no firsthand observation, no identification of Elders and other teachers who apparently gave her this impression, and had no notes of any complaints by any person. She stated that she received no complaints from any parents.

[320] Ms. Letendre was largely unaware of Ms. Gilmar's participation in community events, and relied on Mr. Kolb. The absence of his comments in this regard led her to believe, incorrectly, that Ms. Gilmar did not participate in community events that she did participate in.

[321] When Ms. Letendre was given several examples, she either minimized Ms. Gilmar's participation by saying the event was organized by someone else or was held during the school day or in the first hour after school, or she had no knowledge of it such as the running club and First Nations meet. I do not accept Ms. Letendre's characterization of Ms. Gilmar, and there was no foundation presented for it. Although she said the Alexis Board generally adopted Mr. Kolb's recommendations, I find that the Board also exerted influence on Mr. Kolb either openly or through a process of letting him know what they wanted. I find that Mr. Kolb's May 11, 2006 report, although it appears to be a document that he created to present to the Board, was already influenced by the Board's attitude toward Ms. Gilmar.

[322] As to employment contracts given at Alexis, all teachers were on one year contracts to start. Some were on one year contracts in their second year and afterward. The chances of a teacher becoming pregnant, going on maternity leave, and returning within her contract term were slim. Mr. Kolb's assertion that if a teacher returned from maternity leave during her contract

period she would be returned to her position, was disingenuous because it was unlikely to happen. He could not think of a time it had.

[323] Mr. Kolb differed from Mr. Svekla on job offers. Mr. Svekla stated that the process had changed during his time at Alexis, and that now typically you are offered an initial one year contract, followed by a 3 year contract if they intend to keep you on.

[324] Mr. Kolb said the contracts are typically for one year or shorter if someone comes in mid-year, and that there was a group of teachers with history at the Band that were offered 3 year contracts because he recognized their value and wanted them to make a career there. The 3 year contracts were intended to foster and build loyalty.

[325] Contrary to Mr. Kolb's testimony was his recommendation in the May 11, 2006 Teacher Recommendations report in which he was recommending that a 3 year contract be given to a teacher who had been there one year.

[326] It was clear on the evidence that it was a policy of Alexis to use short contract terms to limit its obligation to its teaching staff in general. By forcing teachers to re-apply year after year, Alexis felt it had no ongoing responsibility to them. It had moved to offering some 3 year contracts in order to entice greater loyalty from its teaching staff. This prerogative to dictate contractual terms, however, does not allow Alexis to escape its obligations under the *Act*. I find that Alexis discriminated against Ms. Gilmar because of her pregnancy and because of the way she handled her pregnancy. Her keenness to return to work actually appears to have worked against her in terms of their opinion of her. Ms. Gilmar's shorter time teaching that second year because of her pregnancy along with her absence during maternity leave, gave Alexis an opportunity to put their plans into action with little regard for her. Mr. Kolb was firm that if she had not been pregnant she would have been there teaching for the full school year.

[327] As Mr. Kolb's evidence unfolded, it was evident that either there had been a remarkable lack of candour shown by him to Ms. Gilmar when she was teaching at Alexis, or that his criticisms were formulated after she was no longer at the school and he had a teacher he saw as

adequate to fill her position, or after this matter entered the complaint process through the Labour Code and then the Human Rights complaint process. He agreed that it is correct procedure to put any concerns to a teacher to allow her to respond, and he conceded that he did not do this.

[328] Mr. Kolb stated that throughout her time teaching there, he did not document his verbal comments to Ms. Gilmar. He agreed ultimately, that he never conveyed the kind of concerns to Ms. Gilmar directly that he expressed in his internal recommendations that he provided to Alexis on May 11 2006, nor that he expressed at this hearing. He specifically did not discuss with her the contents of his May 11, 2006 report. I do not accept his evidence that he was too busy to evaluate her in her second year of teaching. I find that he deliberately did not evaluate Ms. Gilmar because she was pregnant and would be gone from the school soon allowing him to deal with her in whatever manner he wanted without her being present to question it.

[329] When Mr. Kolb was questioned by Ms. Gilmar as to why she was not being considered for further employment, his reasons changed several times. When Ms. Gilmar questioned Ms. Letendre as to why she was not being considered, she either referred her to Mr. Kolb or gave reasons that overtly offend the provisions of the *Act*. Ms. Letendre's personal opinions on how long a maternity leave a mother should take are irrelevant, but influenced how Alexis treated Ms. Gilmar ultimately.

[330] On the whole of the evidence and given the demeanour of Ms. Letendre on the stand, it was apparent that Alexis does not have substantive maternity policies and is neither aware nor amenable to its obligations as an employer under federal human rights legislation. In addition, I find that Alexis deliberately offers one year contracts in part as a way to contractually get around its obligations under the *Act* to employees who become pregnancy, contrary to Section 10 of the *Act*.

[331] Section 10 of the *Act* states:

“It is a discriminatory practice for an employer, employee organization or employer organization

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[332] Analogous to the circumstances of the *Martin case (supra) at para. 75*, the Respondent asserts that the decision not to renew Ms. Gilmar's contract was based not in her pregnancy, but on concerns relating to her performance. Just as the Tribunal did in that case, I find that it is therefore necessary to examine the evidence regarding Ms. Gilmar's alleged performance problems in order to determine whether her pregnancy was a factor in the decision not to offer her a new contract. I find that the reasons advanced by the Respondent are pretextual. During the relevant times, Ms. Gilmar's performance as evaluated by the Respondent was either adequate or better. She was qualified, and she showed commitment within the job descriptions she was given. Mr. Kolb stated clearly that he felt she had a good future as a teacher, and even as a teacher at another First Nations school. He gave her an excellent letter of reference. I find the criticisms of Ms. Gilmar's teaching performance to either be unfounded, or based in her pregnancy such as her lower energy at times, or her inability to stay late at community events in the evenings when also facing an hour's drive home after a full day's work and the long commute to work in the morning.

## **VII. REMEDY**

### **A. Systemic Remedy**

[333] I order the Respondent to cease its discriminatory practices against pregnant employees, and to consult with the Canadian Human Rights Commission, in accordance with the provisions of Section 53 (2)(a) of the *Act*, to develop a plan to prevent further incidents of pregnancy-based discrimination in the future.

**B. Lost Wages and Lost Pay Due to Hearing Attendance**

[334] The Respondent conceded the reasonableness of the quantum of the Complainant's claims under this heading. I therefore order that Ms. Gilmar be compensated by Alexis for her lost wages (presented after taking into account mitigating wages and Employment Insurance earned) as presented and capped at \$15,506.64. She based her calculations on the likelihood that she would still be working for Alexis had her pregnancy not become a factor. She would have finished out her second one year contract, and at that point, September 2007, most likely would have been given a further 3 year contract.

[335] With respect to the claim for loss of pay due to attendance at this hearing, the authorities are mixed as to whether this is an appropriate exercise of the Tribunal's jurisdiction. However, Respondent's counsel conceded the reasonableness of this claim, and Ms. Gilmar has been successful in these proceedings. Following the reasoning in *Milano v. Triple K Transport*, 2003 CHRT 30 at page 70, Ms. Gilmar's attendance would not have been required save for the discrimination she suffered. Therefore, I also order that Ms. Gilmar be compensated by Alexis for her loss of pay due to attendance at this hearing as presented in the amount of \$2212.44.

**C. General Damages for Pain and Suffering**

[336] It was evident in Ms. Gilmar's testimony that she suffered injury to her person, her personal and professional confidence, and her professional reputation resulting from the discrimination that gave rise to this complaint.

[337] Ms. Gilmar's treatment by Alexis shocked her and caused her a great deal of distress. She felt unfairly treated from the beginning and was left bewildered by the changing reasons, or lack of reasons, she was given for the refusal of Alexis to offer her a further contract, or consider her for open teaching positions.

[338] Ms. Gilmar spoke to her loss of confidence and the negative impact on her as a teacher, as well as her anguish and stress over the delay in her professional progress by denying her the opportunity to obtain her permanent teachers certificate.

[339] As the complaint process unfolded, first under the Canada Labour Code, and then through this process, documents and statements criticizing her teaching methods, her commitment, her classroom management, and her desire to be at Alexis to teach all surfaced. This caused Ms. Gilmar further distress, discouragement, and loss of confidence.

[340] I award Ms Gilmar \$14,000. under this heading pursuant to Section 53 (2)(e) of the *Act*.

#### **D. Special Compensation**

[341] Section 53 (3) of the *Act* provides for awards of "Special Compensation" for willful and reckless conduct, to a maximum of \$20,000. Although heard before the 1998 *Act* amendments when the quantum allowed for damages under the headings of pain and suffering and special compensation were lower, I am still guided by the reasonableness of the *Martin* case (supra) that followed the reasoning in *Premakumar v. Air Canada*, T.D. 03/02 and *Canada (Attorney General) v. Morgan*, [1991] 2 F.C. 401 (F.C.A.), that the maximum award must be reserved for the very worst cases.

[342] I find that the Respondent has, for the most part, acted in a hostile, high-handed and repudiating manner toward Ms. Gilmar. Knowing that she was the main income earner in her family, and that her husband intended to stay home with their baby, the Respondent did not hesitate to use her pregnancy against her and devise criticisms of her performance which did not appear to exist before she advised that she was pregnant. Once the Respondent knew she was pregnant, she was substantively ignored and marginalized through lack of support: no evaluations, active discouragement of her completing the teaching certification process, no consideration of her after her maternity leave for open positions that she was qualified for, overt questioning of her parenting choices, and several different and changing reasons were given to her as justification for the decision not to hire her again.

[343] Given all the circumstances of this case, I award Ms. Gilmar \$10,000.00 under this heading.

**E. Interest**

[344] Pursuant to Section 53(4) of the *Act*, I order that interest be paid on the monies awarded pursuant to this decision under the headings of Special Compensation and Lost Wages, from September 1, 2006, being the date that Ms. Gilmar's next contract of employment should have begun, to the first date of the hearing being June 9, 2009.

**F. Solicitor Client Costs**

[345] Ms. Gilmar retained counsel as of January 2009 after having handled matters in this proceeding on her own up until that time. She testified that she only engaged counsel when the complexities of the case, and the requirements of preparing for a hearing were upon her. Her claim for fees, disbursements, and taxes totaling \$25,982.25 were presented and filed as Exhibit C-6 during the proceedings. Counsel for the Respondent agreed the fees were reasonable.

[346] Ms. Chotalia is a senior counsel, with expertise in the human rights field. She charged \$400.00 per hour for her time, and charged for 10 hours of a paralegal at \$50.00 per hour. The CHRC was not present at the hearing, and I consider this to have been a necessary expense incurred by Ms. Gilmar. Given Ms. Chotalia's seniority and experience, time spent, and the results achieved I order that Ms. Gilmar be compensated in the full amount claimed of \$25,982.25.

**G. Retention of Jurisdiction**

[347] I will retain jurisdiction for six months after the filing of this Decision, in the event that the parties are unable to agree with respect to the implementation of any of the remedies awarded.

*“Signed by”*

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Kerry-Lynne D. Findlay, Q.C.

OTTAWA, Ontario  
October 28, 2009

**CANADIAN HUMAN RIGHTS TRIBUNAL**

**PARTIES OF RECORD**

TRIBUNAL FILE: T1327/5708

STYLE OF CAUSE: Melanie Gilmar v. Alexis Nakota Sioux Nation  
Board of Education

DATE AND PLACE OF HEARING: June 9 to 12, 2009  
Edmonton, Alberta

DECISION OF THE TRIBUNAL DATED: October 28, 2009

APPEARANCES:

Shirish P. Chotalia, Q.C. For the Complainant

No one appearing For the Canadian Human Rights Commission

Suzanne Thomas For the Respondent