

IN THE MATTER OF:

Complaint of Alleged Unjust Dismissal – Adjudication Under  
Division XIV – Part III of the *Canada Labour Code*

BETWEEN:

**PETER VERMETTE,** *YM2707-9345*

Employee,

- and -

**GAMBLER FIRST NATION,**  
Binscarth, Manitoba

Employer,

AND BETWEEN:

**DONNA MCGILLIVARY,** *YM2707-9431*

Employee

- and -

**GAMBLER FIRST NATION,**  
Binscarth, Manitoba,

Employer

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**A W A R D**

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Adjudicator:

Bryan P. Schwartz  
Pitblado LLP  
2500 – 360 Main Street  
Winnipeg, Manitoba  
R3C 4H6

RHDCC, TRAVAIL  
HRSDC, LABOUR

APR 29 2013

SFMC-SRCT  
FMCS-DRS

Employee:

Peter Vermette (Self-Represented)  
P.O. Box 215  
Binscarth, Manitoba  
R0J 0G0

Dates of Hearing:

February 11, 2013 and March 14, 2013

Human Resources and Skills Development Canada File No. YM2707-9345

Employer: GAMBLER FIRST NATION  
Represented by Chief David A. Ledoux  
P.O. Box 250  
Binscarth, Manitoba  
R0J 0G0

Employee: DONNA MCGILLIVARY (Self-Represented)  
P.O. Box 365  
Binscarth, Manitoba  
R0J 0G0

Date of Hearing: March 14, 2013

Human Resources and Skills Development Canada File No. YM2707-9431

Place of Hearing: Pitblado LLP  
2500 – 360 Main Street  
Winnipeg, Manitoba  
R3C 4H6

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**GAMBLER FIRST NATION,  
Binscarth, Manitoba,**

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### **AWARD**

#### **Introduction**

This case concerns the alleged unjust dismissal complaints of Peter Vermette ("Mr. Vermette") and Donna McGillivary ("Ms. McGillivary"), against their Employer, Gambler First Nation. Mr. Vermette and Ms. McGillivary were dismissed from their senior management positions in the Gambler First Nation. Mr. Vermette had been serving as Band Manager, since April 6, 2009, and Ms. McGillivary as Finance Director since January 9, 2011.

I have concluded that both employees were unjustly dismissed.

#### **Procedural History**

I was initially appointed to hear Mr. Vermette's case. A hearing was held on February 11, 2013. No evidence was introduced at that time. The parties instead attempted to reach a settlement,

and with the agreement of both parties, I played a mediating role. It was agreed in advance that nothing said during the settlement discussions would be carried forward into a hearing if a hearing was in fact required. Ultimately, the parties were unable to settle the matter and a further hearing was held on March 14, 2013.

In the meantime, I was appointed to adjudicate Ms. McGillivary's case. With the consent of the Employer, Gambler First Nation, and both employees, Mr. Vermette and Ms. McGillivary, I consolidated the hearing of the two cases. The facts and issues overlapped considerably and consolidating the cases was consistent with the nature of proceedings such as these, which is to provide expeditious and efficient dispute resolution.

At the hearing, Chief David LeDoux ("Chief LeDoux") represented Gambler First Nation. Ms. Rose LeDoux ("Ms. LeDoux"), Chief LeDoux's wife and volunteer personal assist, also appeared and testified.

Mr. Vermette and Ms. McGillivary represented themselves and testified. Doreen Mitchell ("Ms. Mitchell"), who was a former band manager as well as a key figure in the events leading to the dismissal also testified.

While no party to the proceedings were represented by legal counsel, all participants acted with exemplary courtesy to each other and to me. All witnesses testified honestly and to the best of their recollection. Each presented their arguments in a clear and organized manner. Ms. LeDoux organized all the key documents into a single binder, which has greatly facilitated me in reviewing the evidence and in writing this award.

I informed each party at the outset of their right of cross-examination although, they chose to exercise this right only sparingly as the hearing unfolded. I asked a number of questions myself in order to obtain clarification and elaboration on various points. As well, given the fact that neither side was represented, I gave all of the parties considerable latitude to revisit points they had not addressed in their original testimony or which they wished to make in response to evidence from other parties.

I took detailed notes and have reviewed them extensively. I will not, however, provide a recap of all the evidence. Much of the evidence was common ground, or uncontested, and I will focus on the oral testimony primarily where the parties differed in their recollections or interpretation of events.

## **Background**

Gambler First Nation has only a small number of members and on-reserve residents. It is currently advancing a number of specific claims against the federal government in an effort to obtain compensation for what it considers past injustices by the Crown. In the meantime, it is in serious financial distress.

In the months preceding the dismissal of the two Employees in this case, Chief LeDoux assumed office to finish out the term of a Chief who had resigned for health reasons. Chief LeDoux stepped into a situation where the band was under great financial stress and where there was not a history of carefully and consistently applying known procedures with respect to many aspects of government, such as passing band council resolutions, ensuring that tenancy agreements for band housing were complete and up to date in identifying who was residing on the reserve, or organizing staff meetings. Chief LeDoux took on the job to try to do what was right for the band, regardless of the inevitable difficulties for him personally in pursuing these objectives. He wanted administrative and governmental practices to be defined and followed properly and he was anxious to address the band's severe fiscal problems.

Under previous band administrations, the band had run up very substantial debts. Gambler First Nation was faced with the prospect of being put under third party management if it could not manage its debts and ongoing costs prudently. It has little or no private economy from which to derive revenues for the band government or the living expenses of its members. Federal grants, the documents show, are not sufficient to permit the band to continue funding the number of staff positions it had in earlier years. After Mr. Vermette and Ms. McGillivray were dismissed, their functions were re-assigned in various ways. Chief LeDoux is now assuming responsibility for representing the band at various meetings, which previously had to be done by the band manager. One band official is spending two days a week on finance and two days as office manager.

Mr. Vermette recognized the inevitability of some changes in light of the financial distress, in the hours and remuneration for the band manager position he held. He was willing to consider working with reduced wages or part-time if that was a possibility. He felt, however, that the new Chief and he were not establishing a solid working relationship. There was little communication. In Mr. Vermette's own mind, this made him especially vulnerable to a reduction or discontinuation of his responsibilities and remuneration.

Mr. Vermette felt that it would be appropriate to resolve the situation by proposing that he be laid-off. That way, he would leave with no stain on his record associated with being fired outright. He would also receive several weeks' severance and be eligible for Employment Insurance. Mr. Vermette hoped that eventually he might again work for the band in some capacity.

Mr. Vermette drafted a document, dated April 30, 2012, proposing to resign due to lack of funding, but stating a preference that he be officially laid-off. It will be referred in the rest of this award as the "proposed resignation/layoff document". It stated that Mr. Vermette wished to step down from his position effective May 11, 2012, as the position of band manager is "not a funded position"; and that Mr. Vermette was requesting that Chief and Council "lay me off from my position due to lack of funding so that I may collect Employment Insurance". At the bottom of the document there were signature lines under the statement "In Agreement" for signature by Chief David LeDoux, Councillor Roy Vermette and Councillor Ronnie Ducharme. Mr. Vermette presented this letter to Chief LeDoux on April 30, 2012.

Mr. Vermette arranged to have it signed by Councillor Ducharme. While the document is not labelled "Band Council Resolution", Mr. Vermette seems to have intended it to function as such. He brought it to Chief LeDoux for further signature. Chief LeDoux testified, and I accept, that he had not previously decided what to do about the band manager position or Mr. Vermette. He had only been in office a short time and had a large number of pressing and difficult situations to deal with. When presented with Mr. Vermette's "proposed resignation/layoff document", he thought it was "good idea" in light of the band's financial situation. Chief LeDoux was not comfortable with the process associated with the proposed disposition of the matter. He recognized that it was "common practice" in the past for band council resolutions to be enacted without anyone attending a meeting and by simply having a document signed by a quorum of Chief and Council. He believed that proper constitutional procedures, however, require that notice of a proposed resolution first be given and that there should be consultation with the band membership as a whole, meeting as the Members in Assembly.

Chief LeDoux asked Mr. Vermette to sign a letter confirming he was resigning of his own free will. Mr. Vermette declined. The evidence suggests a number of reasons for his refusal. He wanted to be laid-off, rather than resign. He also testified at the hearing that he was feeling "pressured" into leaving his job. It may be that he also wanted some assurance from Chief LeDoux that the band leadership would at least consider him for employment at some

point in the future. In his mind, Mr. Vermette was assisting the band by resolving his own employment situation.

Mr. Vermette's employment situation was then suddenly addressed in another manner.

The day after Mr. Vermette brought the "proposed resignation/layoff document" to Chief LeDoux, someone brought some documents to the attention of Chief LeDoux. Ms. LeDoux stated that she did not wish to identify the person, and I did not consider it necessary to direct her to do so. These three "Doreen Mitchell residence documents" consisted of:

- A draft letter to Revenue Canada Taxation, on Gambler First Nation letterhead, dated June 3, 2011, with signature lines (never filled in) for the signatures of Mr. Gordon LeDoux - Chief (former Chief), Mr. Roy Vermette - Councillor and Mr. Peter Vermette - Band Manager. The draft letter states that Ms. Doreen Mitchell resides at a stated address on the reserve;
- A letter addressed "To Whom It May Concern" dated June 3, 2011, signed by Mr. Peter Vermette - Band Manager, on Gambler First Nation letterhead, stating that Doreen Mitchell has lived at the stated address since September 2010 and is employed by Statistics Canada;
- A photocopy of an e-mail document sent June 5, 2011 that has a horizontal line in the middle. The top half of the page consists of an email sent "on behalf of Doreen Mitchell" to Donna McGillivray. The bottom half of the page is mostly blank. There are then several lines saying that the email includes an attachment: "Gambler-Tax letter". The attachment is not reproduced. Below the horizontal line on the page there is a hand printed note which reads "Peter, This is the letter I was talking about." with the subject line saying "Gambler-Tax letter".

Chief LeDoux worked with Ms. LeDoux to investigate the situation. The Chief was, in all good faith, concerned that Mr. Vermette and Ms. McGillivray had been involved in serious misconduct. They might both have been involved, thought Chief LeDoux, in using band letterhead to send false information to the Canada Revenue Agency. This would be unethical and unlawful behaviour, considered Chief LeDoux, and could expose the band itself to adverse repercussions. Chief LeDoux, with Ms. LeDoux's assistance, scoured through the Gambler

First Nation Constitution, Code of Ethics Policy and Finance Policy, and concluded that it would be a very serious breach of an employee's duties to use the band's name to mislead federal government officials.

Chief LeDoux believed that Ms. Mitchell was working outside of the reserve, and therefore could have no legitimate reasons to claim a tax deduction based on her claimed status as a reserve resident.

Chief LeDoux convened an urgent meeting of the Chief and Council and Elders. The meeting notice entitled "Re: Urgent Council Meeting", dated May 4, 2012, does not list any agenda items only the time, date and location of the meeting. The meeting was to take place on May 7, 2012. The Minutes of the meeting which took place on May 7, 2012, notes that the Chief presented the "Doreen Mitchell residence documents" and made the following points:

- Doreen Mitchell was not resident at the stated address;
- False information was sent out on Gambler First Nation letterhead, thereby potentially implicating the band as supporting the said information;
- Advice should be sought from the Elders with regard to disciplinary action.

The majority at the meeting voted to dismiss Ms. McGillivray and Mr. Vermette, but it was decided not to present them with a letter of dismissal until the issue was discussed at a meeting of the band membership on May 9, 2012.

Chief LeDoux testified that he believed that Ms. McGillivray and Mr. Vermette would have known about the discussions and outcome of the May 7, 2012 meeting held pursuant to the May 4, 2012 notice. His reasoning was that one of the persons who attended the meeting was a member of their family. There is no documentary evidence or oral testimony, however, confirming that the senior family member actually spoke to Ms. McGillivray or Mr. Vermette about these issues. Ms. McGillivray and Mr. Vermette testified credibly, under oath, that neither had notice of the controversy concerning them prior to suddenly being confronted with a proposed dismissal at the May 9<sup>th</sup> meeting of the band.

At a meeting of the members of the band on May 9<sup>th</sup>, the Chief brought up the issue of the alleged misuse of band letterhead, and a majority of those participating agreed that a letter of dismissal should be sent to Mr. Vermette and Ms. McGillivray.



I have no doubt that Chief LeDoux acted in good faith with a view to protecting the best interests of the Gambler First Nation and to ensure that it acted in an honest manner with respect to the Canada Revenue Agency.

If there was in fact use of band letterhead to send information to the Canada Revenue Agency that band employees knew was false that would indeed be a very serious matter, likely warranting disciplinary measures.

The burden of proof is on Gambler First Nation, however, to prove that the dismissal was just. In this case, Gambler First Nation was required to prove, among other things, that misconduct on the part of Mr. Vermette and Ms. McGillivray actually occurred.

There was strong evidence at the hearing, however, that rebuts the conclusion that the employees engaged in misconduct. After considering all the evidence from both sides, I concluded that it has not been shown that either Mr. Vermette or Ms. McGillivray engaged in any misconduct at all.

Ms. Doreen Mitchell testified at the hearing. She is a sister of Mr. Vermette and Ms. McGillivray. She explained that she was asked by her employer, Statistics Canada, to provide evidence that she was resident on a reserve. As I understand her testimony, her work at Statistics Canada involved working with First Nations' reserves and therefore Statistics Canada considered that some or all of her income might be tax exempt if she was resident on a reserve. Ms. Mitchell testified that she in fact was residing at the address at the reserve mentioned in Mr. Vermette's letter. She was resident part of the time as well as at the off-reserve location of her former spouse, with whom she remained friends. There was nothing wrong, she stated, in having more than one residence.

While working at Statistics Canada, Doreen Mitchell stayed some of the time at her former husband's residence, who helped her with her insulin shots. But she considered Gambler First Nation to be her home, intended to be there permanently after her job was finished, stayed there some of the time, and reported Gambler First Nation as her residence for voting and census purposes. She was open and transparent, she testified, about her Gambler First Nation location in other contexts. She wrote to Gambler First Nation in 2011 indicating she wanted her own house on the reserve, rather than continuing to live at her current on-reserve location. She frankly discussed her residence arrangements with Canada Revenue Agency in connection with clarifying a policy that apparently did not address the situation of former spouses living together.

Ms. Mitchell testified that no one at the band asked her about her arrangements prior to the dismissal letters being sent to her siblings. She was not invited to the band meeting on May 7, 2012, that discussed the matter.

Ms. Mitchell further explained that she did not have firsthand knowledge of how the tenancy agreement was signed and revised, but that the listing of residents did not affect the rent paid. Rental was based on the number of bedrooms, not the precise number of persons living in them at any given point in time.

I found Ms. Mitchell to be a credible witness. I accept the honesty of her testimony on all points.

I should make it clear that I did not have precise evidence from any witness as to how many days a month Ms. Mitchell was on the reserve as opposed to her off-reserve residence, or what tests Canada Revenue Agency uses to determine residence in respect of its tax exemption programs for federal public servants who are First Nations' citizens. For the purposes of these proceedings, I find it sufficient to conclude that Ms. Mitchell was acting throughout in an honest, open and good faith manner. Her request to her brother, Mr. Vermette, to provide the relevant form was not motivated by any desire to mislead the Canada Revenue Agency or claim an inappropriate tax deduction. Ms. Mitchell was proceeding on the basis of her understanding of the facts and the concept of residence, in response to a request from her employer.

Ms. McGillivary testified that she did not know anything about the email document or documents that were part of the "Doreen Mitchell residence documents". She was not sure if the photocopy with the email purportedly sent on behalf of Doreen Mitchell to Ms. McGillivary's email address was a copy of one document or of two joined together. As I have noted earlier, there is a horizontal line in the middle of the page. She had no recollection of the material on the page. She acknowledged that the printing at the bottom of the page - "Peter, this is the document I was talking about" was hers. In any event, Ms. McGillivary testified she had no difficulty with the idea that Mr. Vermette would send a letter confirming that Ms. Mitchell was resident on the reserve. Ms. Mitchell, testified Ms. McGillivary, had been living in the house as well as off the reserve, and it was routine practiced for a band manager to sign statements about residence for various purposes.

Ms. McGillivary stated that she had no notice about the "Doreen Mitchell residence documents" controversy before she came to the band meeting. She was in "shock" when it arose. She left. At first she did not believe the letter of dismissal she was presented with at the meeting was

legally binding as it had not been passed by Chief and Council, as opposed to a band membership meeting.

Ms. McGillivray testified that she had been ready to work with the band to address its financial exigencies. In fact, she offered to the Chief that if he wanted to replace her she would help train her incoming replacement. She was devastated, however, by the demeaning and humiliating and untrue allegations brought against her. Even with the passage of time, she remains extremely upset about the experience and lingering stigma it has created in her community.

Mr. Vermette testified that he was asked by his sister, Ms. Mitchell, to send a letter to Canada Revenue Agency. He knew that Ms. Mitchell lived there at times as well as with her former husband. He considered it was his job as band manager to sign letters confirming that people lived in a location. He did not see any conflict of interest in signing the letter. He noted that on his small reserve everyone is related to everyone else and that he could not simply ask another senior official to sign the letter, as they tended to be entirely unavailable.

Mr. Vermette further testified that he was never notified about the "Doreen Mitchell residence documents" controversy prior to attending the band meeting on May 9, 2012. He was "shocked" when the item came up and left. He stated that he was never given any advance warning by anyone, including by his family member Roger Vermette. I accept the honesty of his testimony on all key points.

Chief Ledoux at the hearing submitted that he did not accept that Ms. Mitchell was still living on the reserve after she started work at Statistics Canada. He indicated that several witnesses could come forward to testify that she was not, but that it was difficult to get people to come forward. I can only decide this case on the basis of the documents and testimony presented at the hearing.

At the hearing, Ms. LeDoux reviewed in detail the relevant band policies and constitutional documents. She presented, in an impressively organized and thoughtful manner, how the various documents were considered by Chief LeDoux and how in her view they supported the decision to dismiss Mr. Vermette and Ms. McGillivray.

She also argued that it was lawful and appropriate procedure for the band membership to consider and make the final decision on the issue of dismissal.

Gambler First Nation provides that Administration (which I interpret as supervisory employees) may recommend dismissal of an employee, but final action must be taken by the Executive Committee. Ms. LeDoux pointed out that it would be problematic to actually use the Executive Committee in this case, because it consisted of a member of the band Council, the Band Manager and Program Head. In this case, the Band Manager and a Program Head were involved. But it seems to me that if it is assumed that the Executive Committee process was not available, the appeal should probably have been to Chief and Council, not the band membership generally. It appears to me that the Gambler First Nation Constitution vests executive authority in the Chief and Council, not the members-in-assembly; the latter have a role in approving laws, not administering them.

Ms. LeDoux argued, under the Constitution of the band, "The Gambler First Nation may engage an existing First Nation Tribunal Board that will deal with internal disputes arising from the application of this Constitution, laws and policies of the Gambler First Nation". Ms. LeDoux submitted that a band membership meeting qualified as a "Designated First Nations Tribunal Board". There is no evidence before me, however, that a meeting of band members – the Members in Assembly - has ever been considered, in official documents or in practice, as constituting a "Tribunal Board".

A potential objection to the fairness of referring employment disputes to the Members in Assembly is that sensitive personnel matters will inevitably be brought to the attention of the entire community and that decisions will tend to be made in light of the popular will of the majority, rather than by exercising judgment in the application of established laws.

All that said, I am not an expert on the band's Constitution and I heard no evidence or argument on the matter other than Ms. LeDoux's reasoned and thorough review of them, and my reading of the official documents. Accordingly, I wish to make it very clear that my decision in this case would be the same even if the Members in Assembly actually did have the authority under the band's internal laws to consider the matter of the dismissal of employees.

#### **Political Motivations connected with an Election Appeal**

It was suggested by Mr. Vermette that he overheard Chief LeDoux say something like "yes" on a speakerphone when a former band leader suggested that the employees were in trouble because one of them was involved in a legal challenge to the last band election. Chief LeDoux explained, and I accept, that disputes over the latest election were of no real concern to him.

He was trying to do his best for the band, and was confident that his base of political support would sustain him through any further elections in which he might choose to run. Chief LeDoux explained that he said "yes" merely to terminate that part of the conversation with the former leader and move on to other issues. He had found from experience that any disagreement on his part with the former leader would just lead to the latter's continuing to argue the matter with increased intensity. I have found Chief LeDoux to be an impressively honest witness throughout the hearing, and I accept his testimony on this point.

More generally, I have concluded that some mistakes were made in handling this matter. I believe that Chief LeDoux acted with good intentions throughout. Steps should have been taken to notify Mr. Vermette and Ms. McGillivray about concerns and they should have been given a chance to respond before any disciplinary action was officially recommended or adopted. Had such procedures been followed the Employer's decision might have been very different. But as noted, Chief LeDoux stepped into a difficult overall situation in which there had not been regular adherence to best practices in governance, including the processing of legislation, executive decision making, and documenting arrangements with government, including regularly updating tenancy agreements. He had a good faith and praiseworthy concern about ensuring that his First Nation was not involved in any dishonesty its dealings with the Canada Revenue Agency and that employees acted in an honourable manner. I have no evidence about the perspectives or motives of others involved, but Chief LeDoux and Ms. LeDoux both impressed me – as did Mr. Vermette and Ms. McGillivray – as individuals who were trying to do their sincere best to promote the best interests of their community.

## **Conclusions**

### **Mr. Vermette**

With respect to Mr. Vermette, I conclude that he had not resigned and that no final decision to lay him off had been made prior to May 9, 2012 when he was presented with a letter of dismissal.

The "resignation/lay-off document" prepared by Mr. Vermette and signed by the Chief LeDoux and Councillor Ducharme on April 30, 2012, was probably not approved by band council in a manner consistent with the band's constitution. In any event, Chief LeDoux sought a letter of resignation from Mr. Vermette shortly after signing the "resignation/lay-off document", thereby indicating that Chief LeDoux did not regard the document as amounting to either a binding

decision by the band council to lay him off or a binding decision by Mr. Vermette to resign. Mr. Vermette in turn refused to sign the requested letter of resignation.

Mr. Vermette was not provided with fair notice, indeed any notice, about the "Doreen Mitchell residence documents" controversy prior to being terminated. He did not have an opportunity to present his side of the story.

Mr. Vermette believed reasonably and in good faith that it was appropriate to say that Ms. Mitchell was a resident on the reserve at the stated address, and that it was his duty as band manager to assist residents in providing confirmations about residence to various authorities. It has not been proved that he acted improperly in proceeding as he did.

In arriving at a remedy I have to immediately rule out reinstatement. There is no longer a band manager position.

With respect to financial compensation, a question to be considered is this: what amount of money would put Mr. Vermette in the same financial position as if he had not been unjustly dismissed?

Mr. Vermette's position would have been restructured in the months ahead in any event. His position would have been converted to a part-time position or eliminated altogether. The financial realities dictated such a result.

Mr. Vermette might also have definitively resigned, or secured a binding band resolution to lay him off, in any event. This might have occurred in a matter of days, weeks, or several months.

Looking at various scenarios and estimating their probabilities, my estimate is that Mr. Vermette would likely have continued as band manager for approximately another ten weeks. He has been compensated with close to three weeks of severance pay so far. I find he is owed an additional seven weeks to compensate him for the premature termination of his employment in the band manager position.

Accordingly, I award that Mr. Vermette be paid for approximately seven weeks' salary (\$6,050.00), plus \$500.00 for his costs of attending the hearing, for a total award of \$6,550.00.

I realize this outcome is far from ideal from Mr. Vermette's perspective. He is in difficult financial circumstances himself and very anxious to be of service to his community again because of his

spirit of public service as well as his own financial circumstances. But in fashioning a just remedy I must take into account that Mr. Vermette's position was, one way or another, not going to continue for very long in any event.

### **Order**

It is hereby ordered that the Employer, Gambler First Nation, pay \$6,550.00 to Mr. Vermette.

### **Ms. McGillivray**

Only one of the "Doreen Mitchell residence documents" involved Ms. McGillivray in any way. As noted earlier, the top half of a single photocopy page reproduces an email purporting to be from Doreen Mitchell to Ms. McGillivray. The email refers to an attachment: "Gambler-Tax letter". The actual content of the attachment has not been introduced into evidence. It has not even been proved that Ms. Mitchell received the email or read it. Below the horizontal line on the page, Ms. McGillivray's hand printing says "Peter – this is the letter I was talking about". But it has not been proved that the hand printed note refers to the material above the horizontal line; the single photocopy page might consist of two different pages that were pasted or copied together.

With respect to the other two "Doreen Mitchell residence documents", it has not been proved that Ms. McGillivray had anything to do with preparing either the draft letter to Revenue Canada Taxation or to the "Whom It May Concern" letter. At the hearing, Ms. LeDoux indicated that at the time of the dismissal, she thought that one of the two sisters, Ms. McGillivray or Doreen Mitchell, had prepared one of the letters but she did not know which of the two sisters.

Perhaps those involved with dismissing Ms. McGillivray considered that she had at least passed a draft letter prepared by Ms. Mitchell to Mr. Vermette. This has not actually been proved. But even if it had been demonstrated that Ms. Mitchell passed on a draft letter it would not show that Ms. McGillivray made any recommendations or decisions, rather than merely passing on a request from her sister.

In any event, it has not been proved that it would have been improper for band officials to send out letters along the lines requested by Ms. Mitchell in response to a request from her own employer.

I will risk being somewhat repetitive here, as this part of my award specifically concerns Ms. McGillivray and she is understandably anxious to clear her name.

As I have already noted Ms. Mitchell was asked to provide her employer, Statistics Canada, with a letter concerning her residency status. Ms. Mitchell cooperated in doing so. Her view that she was resident on the reserve was an honest opinion. She regarded Gambler First Nation as her permanent home, she listed it as her residence for voting and census purposes, she was physically present at times. She openly discussed her residence arrangements with the Canada Revenue Agency in other contexts.

Ms. Mitchell sought the assistance of Mr. Vermette, in his capacity as band manager, in providing an official statement about residence which Ms. Mitchell, Mr. Vermette and Ms. McGillivray reasonably and honestly considered to be fully appropriate. There was no intent on anyone's part to obtain a tax deduction by means of fraud or to misrepresent Ms. Mitchell's situation.

Ms. McGillivray, like Mr. Vermette, was not dealt with in a procedurally fair manner. When a question arose about the "Doreen Mitchell residence documents" she should have been confidentially asked about it and given a chance to respond. Instead, with no prior notice, she was suddenly in the middle of a community meeting finding herself charged, and effectively convicted, of serious misconduct.

Ms. McGillivray deserves to emerge from this proceeding with her reputation fully vindicated. My impression of her from these hearings is that she is an intelligent and honest individual who was anxious to act in the best interests of her band with respect to band government. She was even prepared to train her own replacement if that would assist the band. From the evidence at this hearing, Ms. McGillivray was a dedicated civil servant of her community who deserved to be treated fairly and respectfully rather than suddenly confronted, in front of her entire band, with unsubstantiated and humiliating allegations of dishonesty and misuse of authority.

Due to the financial exigencies, I must take into account, as with Mr. Vermette, the probability that her job would have been scaled down or eliminated in any event due to the severe financial challenges facing the band. I would therefore award her approximately ten weeks' salary. The band made a final payment to Ms. McGillivray of \$3,423.87, but did not explain whether it was severance or vacation pay or some combination of both. I infer, from the approximately three weeks' severance paid to Mr. Vermette, that it did about the same for Ms. McGillivray.



Accordingly, after deducting the three weeks' salary I award that Ms. McGillivary be paid for approximately seven weeks' salary (\$6,050.00) plus \$500.00 for her costs of attending the hearing, for a total award of \$6,550.00.

I have reflected upon the question of whether I should award "Wallace damages", to Ms. McGillivary based on the insensitive manner in which she was dismissed. Ms. McGillivary was devastated by the public and demeaning way she was terminated, it was wholly unexpected, making the shock especially severe, and she had no chance to defend herself. Ms. McGillivary was in tears at the hearing when she recalled the meeting and the lasting impact on her standing in her community.

An adjudicator in proceedings such as these can award compensation for the insensitive or humiliating manner in which an employee has been dismissed. But Ms. McGillivary indicated at the hearing that she did not want money as solace for her hurt and humiliation, but rather a decision from an impartial adjudicator that clears her name in the eyes of her community. Awarding her "manner of dismissal" damages when she has not asked for them would not be appropriate. I can understand why Ms. McGillivary might not want a dollar award for her hurt and humiliation. It would come at the expense of a distressed community that she cares about. An award of dollars for her hurt might also be viewed as distracting from her real concern: to have her reputation restored in the eyes of her community by the determination of an impartial adjudicator that she had done no wrong. From the evidence at the hearing, I have been impressed with Ms. McGillivary's sincere dedication to finding ways to be of service to her band. To be very clear, it has not been shown that she was involved in any wrongdoing in any way whatsoever and I have found that she was dismissed unjustly.

#### **Order in respect of Ms. McGillivary**

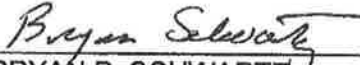
Accordingly, I hereby order that the Employer, Gambler First Nation, pay to Ms. McGillivary \$6,550.00.

#### **Closing Comments**

I wish to thank the main presenters and witnesses at this hearing for their very cooperative approach to procedural matters and their courtesy to each other under stressful circumstances. Many witnesses came to the hearing although only one was actually called, and he testified only

briefly, on a matter that proved to be peripheral. I wish to thank all of the witnesses, however, for their cooperation in making themselves available.

DATED at the City of Winnipeg, in Manitoba, this 24<sup>th</sup> day of April, 2013.

  
BRYAN P. SCHWARTZ - Adjudicator