

2008-NSHRC-2

BOARD OF INQUIRY

**In the matter of: The *Human Rights Act*, R.S.N.S., 1989, C. 214
as Amended by 1991, c.12**

-and-

**In the Matter of: A Complaint Under the *Human Rights Act* by
Joan MacAulay**

Complainant

-and-

**The Town of Port Hawkesbury and/or Tom
Fiander and/or Campbell MacLean**

Respondent

Before Board of Inquiry Chair: David J. MacDonald

Date of Decision: April 21, 2008

[1] This Board of Inquiry was appointed by the Nova Scotia Human Rights Commission pursuant to Section 32 A(1) of the Nova Scotia Human Rights Act R.S.N.S., 1989, c. 214 as amended to inquire into the formal complaint of Joan MacAulay dated February 3, 2004, against the Town of Port Hawkesbury and/or Tom Fiander and/or Campbell MacLean.

[2] The parties to the proceedings were the Nova Scotia Human Rights Commission represented by Ann E. Smith; Joan MacAulay; and the Town of Port Hawkesbury, Tom Fiander and Campbell MacLean, represented by Wayne J. MacMillan.

[3] The Board held hearings into the matter on October 23, 24, 25, 26 of 2007, January 28, 29, 30, 31 and March 23, 24 of 2008. A total of eleven witnesses were called to give sworn testimony before this Board.

[4] Joan MacAulay grew up in a family of carpenters and states that carpentry work always came easy for her. From 1978-88 she worked with her father doing small jobs during the spring and summer. In 1988 and 1989 she continued doing small jobs and maintenance work in a business that included herself, her sister and her brother-in-law. From 1990 to 1998 she worked with her father's company doing residential retrofits and related work. She then worked from 1998 to 2001 for Springhurst Apartments as a maintenance person.

[5] In August of 2001 Ms. MacAulay completed an eight week three hundred and twenty (320) hour course and passed the required test entitling her to Red Seal certification. In so doing she had successfully met the requirements under the provisions of the Apprenticeship and Trade Qualifications Act to qualify in the designated occupation of Carpenter. In March of 2002 she also completed a thirty (30) hour comprehensive program in Print Reading for Residential and Light Commercial Construction. Throughout 2001 and 2002 she also completed several OH & S Training courses including Traffic Control Person and Construction Safety Supervisor.

[6] Ms. MacAulay joined Local 1588 of the United Brotherhood of Carpenters and Joiners of America (the Union) in the summer of 2001. At the time she was the only female member.

[7] In June of 2003 construction began on a new civic centre in the Town of Port Hawkesbury. A Building Committee, with Mayor Billy Joe MacLean (Billy Joe) as Chairman, was established to deal with the project and the Town itself would be the general contractor. Tom Fiander was hired as Construction Manager and Campbell MacLean as Site Superintendent. The projected cost of this project was in the fourteen million (\$14,000,000.00) dollar range. This would be a union work site and the Town obtained agreement from the Union that it would be designated as a commercial project.

JOAN MacAULAY'S ACCOUNT OF EVENTS:

[8] According to Ms. MacAulay she went to the trailer shack on the civic centre construction site sometime after lunch on July 22, 2003, to apply for a job. There she met Tom Fiander, introduced herself, told him why she was there, and gave him her resume. After perusing it he stated "Oh! You're a carpenter. I've never met one of those before." When he saw that she also had a safety supervisor designation he said they were not hiring any carpenters but were looking for a safety supervisor and asked if she'd be interested. When asked what pay she would expect for the safety supervisors job Ms. MacAulay stated that she would want more than the carpenter rate (which was then in the \$22.00 per hour range). When Mr. Fiander stated that the job paid \$10.00 per hour Ms. MacAulay was no longer interested. Mr. Fiander informed her that they did not need any carpenters at that time but that she should see Mr. MacLean who did the actual hiring.

[9] Ms. MacAulay then went out into the work site and spoke to Campbell MacLean. She told him she was very interested in working there and had just left her resume with Mr. Fiander. He said he'd never met a woman carpenter before and Ms. MacAulay replied that he was meeting one now. (Ms. MacAulay had never met either Mr. MacLean or Mr. Fiander previous to this occasion.) Mr. MacLean then told her they were not hiring any more carpenters. With that Ms. MacAulay left the construction site with the idea that she would come back at a later date because she knew they would be hiring more carpenters.

[10] A few weeks later Ms. MacAulay learned that there had been more carpenters hired for the job so she went back to the trailer shack and once again spoke to Tom Fiander. According to Ms. MacAulay Tom Fiander told her that they were now using a company called Carpenters-For-Hire to hire their carpenters. John Bower was in charge of Carpenters-For-Hire and Tom Fiander told her to call Mr. Bower. This she did but Mr. Bower told her he just did the payroll and everybody that went to that job had to go through Billy Joe.

[11] In October of 2003 Ms. MacAulay phoned Billy Joe who told her he'd have a meeting to see how things were for carpenters. Next day he returned her call and reported that "there's no hope of you working there so do what you have to do."

[12] Ms. MacAulay states she went back to the trailer shack one more time. She is unclear about when. She states they were just finishing a meeting when she arrived and Tom Fiander said "You better lock that door because everything from the street is coming in here today." This upset Ms. MacAulay and she responded that she was not anything from the street, just a carpenter looking for a job. Mr. Fiander seemed to calm down and told her they were over budget. She responded that it was because of the carpenters they were hiring and laying off. Ms. MacAulay had been told by one of the iron workers that Alvin McInnis had been hired, laid off and hired again. Mr. Fiander informed her that he expected another movement in carpenters the following week and maybe then there would be a change. When she asked if they were really laying off carpenters or just moving them around Mr. Fiander responded that they were just moving them around.

[13] Ms. MacAulay then began hearing that the word was out about a woman trying to get work at the civic centre construction site but they were not going to hire her because she was trouble.

[14] Ms. MacAulay kept after the Union about two or three times per week to put in a word for her at the civic centre job but was told by the business agent, Colin Campbell, that he wasn't going to help anyone get a job there because that was not how things were done on commercial jobs. Ms. MacAulay states that she knew the real reason was because she was a woman.

[15] Ms. MacAulay claims that when she first went to the trailer shack looking for a job on July 22, 2003 there were four carpenters working there of which at least two did not hold certification as a carpenter. Some of these men were laid off and others hired who did not hold certification. This process was repeated and according to Ms. MacAulay on every occasion she was passed over, not because of her qualifications, but because of her gender.

[16] Ms. MacAulay was of the understanding that they were supposed to hire people who lived within a thirty km radius of the Town of Port Hawkesbury before hiring from outside that area. Although she lived approximately eight km from the job site, Edward Chisholm and Joe Gillis who live outside that thirty km zone were hired after she had submitted her resume.

[17] Ms. MacAulay states that at least four of the carpenters hired for the civic centre job were not even certified. Those included Michael Goodich, Eddie Malcolm, Stuart MacLean and Alex Hatcher.

THE ISSUE:

[18] Ms. MacAulay states that she has been discriminated against in the matter of her employment because of her sex contrary to s.s. (1)(d)(m) of the Act which states:

5(1) No person shall in respect of

(a) employment;

**Discriminate against an individual or class of individuals on
account of**

(m) sex

“Person” is broadly defined in s. 3(k) of the Act:

**3(k) “person” includes employer, employers’ organization,
employees’ organization, professional association, business or trade
association, whether acting directly or indirectly, alone or with
another, or by the interposition of another**

Discrimination is defined at s.4 of the Act:

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

STANDARD OF PROOF:

[19] The burden of proof that must be met by a complainant in matters of this nature was summed up by Board Chair David Bright in *McLellan v. Mentor Investments Ltd.* (1991), 15 C.H.R.R. D/134 para. [15] (N.S. Bd. Inq.):

- (a) ...
- (b) **The civil burden or “preponderance of evidence”, or proof of a fact on a balance of probabilities has been described as, It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If this evidence is such that the tribunal can say, “we think it more probable than not,” the burden is discharged, but, if the probabilities are equal, it is not.**

[20] The standard of assessing the evidence before a Board of Inquiry is on the civil balance of probabilities. If the board is satisfied on balance that the complainant has proved the discrimination alleged and there is no justification or defence available to the respondent, then the board may uphold the complaint and fashion a remedy. If the board is not so satisfied then it may dismiss the complaint.

[21] It is the complainant who bears the initial onus of establishing a *prima facie* case as stated by the Supreme Court of Canada in *O'Malley v. Simpson-Sears Ltd.* (1985) 7 C.H.R.R. D/3102 (s.c.c.) at para. 24782:

- (a) ...
- (b) **The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the**

- (a) **complainant's favour in the absence of an answer from the respondent-employer. ...**

[23] But what exactly does this include? Some adjudicators have applied the analytical framework employed by the Supreme Court of Canada in *Law v. Canada* [1999] 1 S.C.R.497 that requires injury to ones dignity. This Commission recommends the more relaxed approach in the text set forth in *Shakes v. Rex Pak Limited* (1981), 3

[24] C.H.R.R. D/o110 (Ont. Bd. Of Inq.) at para. 8918:

- (a) **Proof of discrimination is almost invariably by circumstantial evidence. Only rarely at a Board of Inquiry will there be an admission by the respondent or other direct evidence. In an employment complaint, the Commission usually establishes a *prima facie* case by proving (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. If these elements are proved, there is an evidentiary onus on the respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation for what occurred. If the respondent does proffer an equally consistent explanation, the complaint of discrimination must fail for the onus of proving discrimination ultimately rests on the Commission.**

- (b) ...

[25] I find the Shakes test to be incomplete. It requires a presumption that the reason a person possessing a distinguishing characteristic protected in sections 5(1)(h) to

[26] 5(1)(v) does not get a job before someone else who has equal or lesser qualifications, must have had something to do with that distinguishing characteristic. This is an unacceptable presumption for not only does it fail to consider the multitude

[27] of other considerations that may impact the hiring process, but it negates the

[28] requirement to prove one of the main ingredients in a finding of discrimination – that

[29] the protected characteristic played some role in the adverse treatment. The simple

[30] fact that the complainant did not get the job does not equate to adverse treatment.

[31] It is my opinion that if we are to accept that in establishing a *prima facie* case in employment complaints one has only to show that a person without the protected characteristic got hired ahead of another person of equal qualification who does possess the protected characteristic, the bar has not left the ground. In essence, the allegation becomes the proof. Consequently accepting such a presumption is tantamount to negating altogether the onus of proving a *prima facie* case.

[32] There must be some further ingredient to support a reasonable inference that the complainant suffered adverse treatment because of the protected characteristic.

[33] This is better stated by Tribunal member Lindsey Lyster in *Preiss v. British Columbia*, 206 B.C.H.R.T. 587 who sets forth the test in the following terms:

- (a) **... in general, the complainant must establish three things: first, that he is, or is perceived to be, a member of a group possessing a characteristic or characteristics protected under the Code; second, that he suffered some adverse treatment; and third that it is reasonable to infer that the protected characteristic played some role in the adverse treatment. This is what is known as the traditional *prima facie* approach.**

[35] I prefer the *Preiss* test as it is more in harmony with the *O'Malley* definitions and more reflective of the realities that normally surround a hiring process.

[36] In the present circumstances, gender, by its mere presence, cannot automatically be accepted as playing a role in the decision not to hire Ms. MacAulay. A *prima facie* case has not been proven until there is some evidence that supports a finding that her sex had something to do with the decision.

[37] A number of Boards of Inquiry in Nova Scotia have accepted the position that the complainant need not show that discrimination was the sole reason for the decision not to hire. Rather they have adopted the conclusion in ***Basi v. Canadian National Railway Co.*** (No 1) (1988), 9 C.H.R.R. D/5029 (Can.Trib.) at para. 38497:

- (a) ... it is sufficient for a complainant to establish that the prohibited ground of discrimination constituted only one among a number of factors leading to the decisions which are the subject matter of the complaint ...
- (b) Although the prohibited ground of decision making must have some causal role or influence in the decision made, it need not be the exclusive cause of or influence on the decision. Indeed, as suggested in *Bushnell* itself, it is not necessary to establish that the prohibited ground was the main reason for the decision in question.

[38] The Commission points out that often there is little direct evidence of discrimination and therefore the complainant may have to rely on circumstantial evidence. Such was the case in *Fortune v. Annapolis District School Board* (1992) 20 C.H.R.R. D/100 (N.S. Bd. Of Inq.) and more recently in *Daniels v. Annapolis Valley Regional School*

[39] *Board* (2002), 43 C.H.R.R. D/162 (N.S. Bd. Of Inq.) In both these cases the Boards

[40] took cognizance of the following conclusion from the text by Beatrice Vizkelely,

[41] *Proving Discrimination in Canada* (Toronto: Carswell, 1987) at p. 142:

- (a) **The appropriate test in matters involving circumstantial evidence ... may therefore be formulated in this manner: an inference of discrimination may be drawn where the evidence in support of it renders such an inference more probable than the other possible inferences or hypotheses.**

[42] In order to establish a *prima facie* case the Commission must provide evidence to support the allegations of Ms. MacAulay, either in whole or in part sufficient to support an inference that Ms. MacAulay has been discriminated against because she is a female.

[43] It is imperative that the s.4 definition of discrimination remain the focus. Accordingly it must be shown that the respondents made a distinction on the basis of Ms. MacAulay's gender that had the effect of imposing a burden, obligation or disadvantage on her not imposed on the other male applicants, or denied her access to opportunities available to the others.

[44] Ms. MacAulay, a female, was a qualified carpenter and member of Local 1588 of the

[45] United Brotherhood of Carpenters & Joiners of America (the Union). She had completed the requirements under the Apprenticeship and Trades Qualifications Act to qualify for and receive a Certificate in the Designated Occupation of Carpenter (The Red Seal Certificate). She had successfully completed a number of related programs through the Cape Breton Carpenters Education Company Ltd., and held several certificates relating to workplace and construction safety.

[46] In her rebuttal letter dated February 26, 2004 to Mr. Gordon Hayes at the Human Rights Commission, Mr. MacAulay states:

- (a) **“...The slight directed to me by Mr. Fiander and Mr. MacLean was taken as sexist and discriminatory because they also put with it that there was absoitly (sic) no chance of me obtaining work on this site. After I left they hired more male carpenters as they applied for work. These people had less qualifications than me and a lot with no certificates.”**

[47] This was a constant theme throughout Ms. MacAulay's testimony. Taken at face value, and without regard to the further evidence it is reasonable to infer therefrom that Ms. MacAulay was treated adversely because of her gender. If what Ms. MacAulay asserts is believed it is sufficient to support a *prima facie* case.

[48] However the objective evidence does not support Ms. MacAulay's assertions: the objective evidence, time-lines and circumstances do not line up with her interpretation.

THE RESPONDENTS ACTIONS:

[49] According to Ms. MacAulay, male carpenters were hired subsequent to her application as they applied. Furthermore, some of the male carpenters hired after her application were inferior to her and/or were not certified.

[50] The first issue that must be addressed is the time-frame in which subsequent hires may be relevant to this complaint. Certainly the first few weeks after July 22, 2003 would be the most relevant period of consideration. Ms. MacAulay contacted the Human Rights Commission sometime prior to mid-December of 2003 and completed the Intake Questionnaire on December 19, 2003. In the Resolution section of that document she states:

- (a) **“...If I was offered the job now I couldn't take it after filing with Human Rights because I wouldn't get a fair deal on the job site nor would I feel very comfortable or safe. ...”**

[51] By her own acknowledgement Ms. MacAulay had given up any hope of getting hired long before this particular time. While there is nothing to indicate that the Respondents would have been aware that Ms. MacAulay was no longer interested, they would certainly have been alerted when notified in early February 2004 of her formal complaint. Any uncertainty as to her availability would have been answered later that month when she failed to respond to a newspaper ad calling for unionized installers of metal studs, gypsum board and t-bar ceilings.

[52] So it is only the period between July 22 and December 18 of 2003 that is relevant for consideration of the Respondents hiring practice as it may reflect on the Complainant's allegations.

[53] There is no evidence whatever to support the assertion that subsequent to Ms. MacAulay's application, male members were hired as they applied. Nor does Ms. MacAulay offer any reasonable explanation for her impression that such was the case. Although she states that there were two or perhaps three carpenters working on the site the day she applied, she assumed this was so as she did not actually see any carpenters that day.

[54] There was only one carpenter who worked at the Civic Centre during the period of reference that gave testimony at this Inquiry. Alex Hatcher was a journeyman carpenter and a member of the Union for thirty-nine years. The first time he went to the site he was told by Mr. MacLean that work was coming up and he'd be kept in mind. He continued to go back to see Mr. MacLean who he had previously worked with - but not for - and eventually he was hired in July of 2003. He worked there for twelve weeks and then retired as he had reached the age of sixty.

[55] Ms. MacAulay states that Walter Hatcher (son of Alex) was only in the Union six months and yet he got hired at the site while she did not. In fact, this Mr. Hatcher, who also gave evidence at the Inquiry, was a journeyman carpenter for three to four years before he was hired at that site. According to Mr. Hatcher, when he applied he was told they had a full staff of carpenters. Subsequently - July 2004 - he was hired to do drywalling, an area of work in which he had previous experience.

[56] This was a multi-million dollar construction project wherein the number of trades people required at any given time depended on what stage of development the project had reached. Invariably there was a need to either hire, lay-off, or re-hire carpenters: it depended on the circumstances at the time.

[57] As to Ms. MacAulay's assertion that subsequent male hires were inferior carpenters there is no evidence whatever to support this. Her opinion is a reflexion of the importance she places on the Red Seal Certificate, augmented by a comment attributed to Colin Campbell, Business Agent for the Union, that she had one of the best resumes in the Local.

[58] In regard to qualifications it was explained by Colin Campbell that, in Nova Scotia, carpentry is a designated trade, not a compulsory one. According to Mr. Campbell, once you become a member of the Union you are deemed to be a qualified carpenter. Some members obtain journeyman status through time and experience, and some obtain Red Seal Certification through the Provincial Apprenticeship Training Division program.

[59] But certification is not a prerequisite for getting a job as a carpenter: nor is seniority, as that term is generally understood, a consideration. On the other hand having a particular set of skills or experience in certain types of work such as concrete or sheetrock, is a more relevant consideration in the hiring process depending on what type of work is being done at that particular time.

[60] There is no evidence of the qualifications of the carpenters hired with the exception of what was expressed earlier by Alex Hatcher that he was a journeyman

carpenter with thirty-nine years in the Union. Nor was any evidence offered to support the assertion that these hires were inferior carpenters in some way to Ms. MacAulay.

THE COMMENTS ATTRIBUTED TO MR. FIANDER AND MR. MacLEAN:

[61] It is asserted by Ms. MacAulay that when she first presented herself to the job site looking for work as a female carpenter both Mr. Fiander and Mr. MacLean made comments that she took to be sexist and discriminatory. While there was some inconsistency as to exactly what was said it basically took the following form:

(a) By Mr. Fiander – “I’ve never seen one of those (female carpenter) before.”

(b) By Mr. MacLean – “I’ve never met a female carpenter before.”

[62] While there is nothing innately discriminatory about these comments Ms. MacAulay took them to be such. However, she also asserts that coupled with these comments she was also told that there was no chance of her getting work at that job site.

[63] Taken together, these comments would raise an inference of discrimination.

[64] At this point the issue of credibility becomes paramount. In regard to that matter I am directed to the following quote from the British Columbia Court of Appeal in

[65] *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at paragraph 10:

(a) The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd person adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say “I believe him because I duge him to be telling the truth,” is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a

dangerous kind.

[66] The following text for witness credibility can be found in *Leach v. Canadian Blood Services* (2001) A.B.Q.B. 54 at para. 70:

- (a) **“I adopt the test for assessing credibility set out by Foster J. in**
- (b) ***Sylvan Lake Golf & Tennis Club Ltd. V. Performance Industries Ltd.***
- (c) **(1996), 190 A.R. 321 (Alta. Q.3) at para. 27:**
- (d) **The witness’s evidence should first be considered on a “stand alone” basis. In this regard, [the trier of fact should consider] factors such as firmness, memory, accuracy, evasiveness, and whether the witness’s story is inherently believable.**
- (e) **If the witness’s evidence survives the first test above, the assessment moves on to a comparison of that witness’s evidence with the evidence of others and documentary evidence.**
- (f) **Finally, the court must determine which version of events, if conflicting versions exist, is most consistent with “the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”**

[67] Additional factors, cited by the Tribunal in *Hadzic v. Pizza Hut Canada* (1999), 37 C.H.R.R. D/252 (B.C.H.R.T.) at para. 36:

- (a) ...
- (b) **Other factors that must be weighed include the witnesses’ motives, their powers of observation, their relationship to the parties, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses’ evidence.**

[68] In assessing the evidence before me I have serious difficulties with the complainant’s reliability. Her memory was at times poor and sometimes lapsed completely; her testimony was often evasive or convoluted; and her inconsistency was such that at times she completely contradicted herself. I will reference but a few examples in regard to this point.

[69] There was a considerable amount of time spent addressing the complainant's work experience, particularly that portion which occurred after she became a member of the Union. At various times during her testimony she was asked about the circumstances surrounding her departure from the garage job she was doing for Walker Electric. Her responses:

- (a) that she did not get to finish this job because she had to go back to work at the Causeway job for Van Zutphens Construction;
- (b) that she was forced to leave because the Union had gotten involved with her overtime;
- (c) that she was working at the Causeway job when she got laid off from the
- (d) Walker job; and finally
- (e) that she was fired from both jobs on the same day.

[70] 5. In her official complaint the respondent asserts that both Mr. Fiander and Mr. MacLean told her that there was no chance of her getting work at the site. In her oral testimony she stated that she 'realized' after that first meeting she was not going to get work there. However, she also stated that when she left that day she had planned to come back because she knew Mr. MacLean would need more carpenters in a few weeks. She also states that by early November she had given up hope of ever getting work at that site. She goes further and at one point asserts that she had given up hope of getting a job on that very first meeting. But when Mr. MacMillan suggested the reason she had phoned Mr. MacLean the night before completing her Intake Questionnaire for this complaint (December 18, 2003), was to gather information, she denied such was the case, and stated that she did so because she still had hope of getting a job there. When later asked to explain this dichotomy, she offered that although she had given up hope of getting a job, she still had hope that Mr. Gordon Hayes at the Human Rights Commission could get her a job. Such explanation is highly questionable, particularly in view of her thoughts in the Resolution section of that questionnaire wherein she states:

- (a) **"...If I was offered the job now I couldn't take it after filing with Human Rights because I wouldn't get a fair deal on the job site nor would I feel very comfortable or safe. ..."**

[71] The complainant was not above misrepresentation or suppression of the truth. She infers in her intake questionnaire that certification is a prerequisite to employment at this job site and while she was certified, there were male carpenters hired who were not. When asked by counsel for the Commission if she thought certification was necessary to obtain work at that job site she replied in the affirmative. However, when subsequently asked the same question by the Board Chair she replied that it was not what she thought when she first sought work there. As stated earlier, the evidence is that certification meant nothing in the hiring process.

[72] The complainant continuously conveyed the impression that unlike male applicants, she was required to provide a resume when she first applied for a job at that site.

[73] This simply was not the case. Ms. MacAulay offered her resume to Mr. Fiander and it was accepted. Only when pressed did she subsequently acknowledge that she was not required to produce a resume.

[74] The complainant relates that one Stuart Edwards, while working as a labourer at the Justice Centre project would call the Carpenters Union hall and request they refer workers for that job site. She states that the business agent never referred her despite her keen desire to work at that site. Mr. Edwards testified that he only called the Carpenters Union office to make sure they could recall someone who had worked on the project already and had been laid off. He did not speak to the business agent nor did he request any referrals.

The complainant recounts that while on the Walker Electric job she received a call from the Union advising that she had to claim overtime. As a result of her attempts to comply with this instruction she was fired from that job. According to Lawrence Shebib, the business agent for the Union at that time, the Union made a settlement with Mr. Walker for all the hours owed to Ms. MacAulay and Dougie MacDonald. It was only after this settlement that she contacted him about unpaid overtime. Mr. Shebib refused to deal with the issue any further and the matter wound up before the Union Executive where the issue became one of 'trustworthiness' in regard to Ms. MacAulay.

[75] These are but a few of many occasions wherein the complainant expressed an interpretation of circumstances that, while seeming to support her contention, were not supported by facts. It is not necessary to cite further examples.

[76] There is however another area where the complainant's assertions are left open to question. Specifically it is in regard to statements she attributes to others. This is a critical area because it goes to the core of the respondent's allegations – that Mr. Fiander and Mr. MacLean made remarks that reflect a discriminatory assessment of her suitability for work on that project. The following examples leave the respondent's credibility open to question in this regard:

- (a) She relates that Lawrence Shebib told her the only way he could get her hired at the Causeway job was to threaten Leonard Van Zutphen with discrimination. When asked about this Mr. Shebib responded in almost an irreverent tone "I certainly didn't threaten Leonard Van Zutphen."
- (b) She further stated that Mr. Shebib told her she was on probation for the first two days of the Causeway job. Mr. Shebib does not recall that.
- (c) The complainant states that when she asked Mayor Billy Joe how she would get work at the Civic Centre, he replied that 'she would have to blow the place up'. Mayor Billy Joe 'unequivocally' denies that any such conversation ever took place.

[77] She also states that Mayor Billy Joe told her to go see John Bower at Faejon Construction about getting a job at the Civic Centre. Mayor Billy Joe 'absolutely'

denies ever telling her to go to John Bower.

[78] She states that Mayor Billy Joe told her to go see Tom Fiander about getting work at the Civic Centre. Mayor Billy Joe states he never referred her to Tom Fiander but rather to Cammie MacLean because he was the only one with authority to hire carpenters. He explains that a lot of people came to him asking about getting hired at the Civic Centre work site and his standard response was to refer them to Cammie MacLean. He offers that Ms. MacAulay bothered him the most about this so he finally asked Mr. MacLean about the possibility of her being hired and was told that there were a number of experienced carpenters ahead of her waiting to be hired and with her lack of experience it was not likely she would be hired. So he called her and told her it was impossible.

[79] She states that Colin Campbell told her she had the best resume in the Union. Mr. Campbell does not recall that although he does not doubt she has a good resume.

[80] She states that Allie MacEachern, a member of the Union Executive, told her that anybody claiming overtime does not work Union. Although we did not hear from Mr. MacEachern, both Mr. Shebib and Mr. Campbell, who have worked with Mr. MacEachern on Union matters – for over twenty-three years – refused to believe that he would make such a statement when just the opposite is true.

[81] In regard to the comment ‘close the door everything from the street is coming in here today’, Mr. Fiander adamantly denies ever directing such a comment to Ms. MacAulay.

[82] Mr. Fiander and Mr. MacLean both deny that when she first applied for a job they told her there was absolutely no chance of her obtaining work on that site. The person who did tell her there was no possibility of her getting work there was Mayor Billy Joe who phoned Mr. MacLean about her chances after she had contacted him a number of times. But this was well after her initial application for work.

[83] According to Ms. MacAulay herself, Mr. Fiander did offer her a job as a safety supervisor during their meeting on July 22, 2003. It is Mr. Fiander’s recollection that, while he did not offer her that job, he was sufficiently impressed with her credentials in regard thereto that he inquired as to whether or not she would be interested in the safety supervisor’s position. She was not. What Mr. Fiander and Mr. MacLean did tell Ms. MacAulay that day – and she acknowledges this – was that they were fully staffed with carpenters and not hiring at that particular time. Indeed Ms. MacAulay further acknowledges that she left the work site that day intending to return at some future time because she knew they would require more carpenters. I would not expect this to be the intention of someone who had been told that there was no chance of getting work at that site.

[84] 11. It is clear from the testimony of Mayor Billy Joe, Chief Financial Officer Colin MacDonald, Mr. Fiander and Mr. MacLean, supported by the minutes of the Building Committee meetings that Campbell MacLean, the Site Superintendent, had sole and autonomous authority in the hiring of trades people for the construction of the Civic Centre. The only requisite to his mandate was that he hire the best people possible based on his knowledge and experience. Furthermore, it was specifically addressed and understood that members of Council, including the Mayor, or members of the Building Committee were not to interfere or get involved in the hiring process. With but one exception, that I am satisfied from the evidence was a compassionate case, this hiring protocol was strictly adhered to.

[85] Campbell MacLean was hired as the Site Superintendent for the Civic Centre project. He has been in the carpentry construction industry for almost forty (40) years. He has been in a position of hiring carpenters for thirty (30) years, and approximately 80% of those jobs have been commercial jobs. Over the years he has worked extensively in Port Hawkesbury and surrounding area including the AECL plant as carpenter/foreman, Stora Enzo as general foreman, the Keddy's Motel in Port Hastings and more recently the Eskasoni School project and the Port Hood Arena.

[86] Mr. MacLean's responsibilities included overseeing the project outside and hiring. He walked on site June 2, 2003 and immediately carpenters started showing up looking for work. That Mr. MacLean was the sole person with authority to hire carpenters is irrefutable. This was confirmed by the Mayor, the Construction Manager, the Chief Financial Officer and the Building Committee minutes of July 7, It is clearly indicated in those minutes that Mr. MacLean was mandated to hire the best with a ratio of one person from within town and one person from outside town. It was also made clear that council or committee members were not to interfere in the hiring.

[87] Mr. MacLean explains that he was familiar with what had to be done and, as the need arose, he hired from the people who applied, those whose work he was familiar with. He also kept a list of those carpenters who showed up looking for work. While the names were placed on this list in chronological order of their 'application', Mr. MacLean did not necessarily follow the chronology in hiring. He kept the list so he would know who was available but felt under no obligation to hire anybody not of his own choosing.

[88] Following is a list of those hired with his brief comments:

Name & No. on list	Hired	Comments	Stewart MacLean #3	July 28, 2003
Eddie Malcolm #2	July 16, 2003	Local, know him, there in morning	Dan MacGee n/a	July 30, 2003
Michael Goodich #6	July 21, 2003	known, there every morning	Hubert Matthews #12	Aug. 12, 2003
Alex Hatcher #11	July 22, 2003 10am	known	Rodney Morgan #9	Aug. 19, 2003

Joe Gillis n/a	Nov. 19, 2003	there in morning, D.W. McGee related came to site early, great recommendation
Gerard Campbell #13	Nov. 18, 2003	had knowledge of his expertise and had precision work I knew he could do
Edmund Chisholm #8	Dec. 1, 2003	knew him, he & Joe Gillis had worked a lot together
Alvin MacInnis #1	Dec. 2, 2003	knew him, did great technique work knew he was desperate for work, had some I thought he could do

[89] Mr. MacLean felt it was his mandate to hire the best people for the job. As he puts it, "I hired from whom I knew was qualified for what had to be done." When asked what he meant by 'qualified' Mr. MacLean responded "that they knew what we need for the particular job that's required at that stage of the project".

[90] As he explains, structural steel comes pre-drilled so it is imperative that the positioning of anchor bolts be precise. Also, this project involved curved walls so he was looking for carpenters with expertise in that area.

[91] With but one exception the people hired by Mr. MacLean and listed above were known to him or recommended by someone whose work he respected, and he had reason to be confident in their work. He hired only those that he knew or was confident that they had the necessary ability to do the work required at that stage. These were the best people available at that time. As to the one exception, the circumstances were explained and I am satisfied it bears no reflection whatever on Ms. MacAulay's claim.

[92] In regard to Ms. MacAulay, Mr. MacLean disputes that she first appeared on site on July 22, 2003. His recollection is that both Stewart MacLean and Dan McGee were on site the day she came in and they did not start until July 28 and July 30 respectively. Mr. MacLean received a call from Tom Fiander that there was a lady looking for work so he went to the office. Ms. MacAulay met him on the way and explained she was a carpenter looking for work. Mr. MacLean acknowledges that he made a comment that he had never seen a female carpenter before. He explains this was a fact; up to that point he hadn't. He told her he did not have any work for her at that time because he was basically filled up. She replied that she had looked at his carpenters and she had more certificates than they did so why didn't he lay one off and hire her. Mr. MacLean replied that there was not much chance of that.

[93] Several days later he again met her on site and she asked about work to which he replied there was none at that time. He went into the office and reviewed her resume. It was his impression that she had a lot of courses but very little experience. It did not show the type of experience he needed for measuring anchor bolts and doing curved walls. She did not return and he had no further occasion to consider her for work.

[94] According to Mr. MacLean, when Ms. MacAulay contacted him about a carpenter's position he had hired all the carpenters that were necessary for the job site at that time. While there were a number of carpenters hired after that, these were people who had been in contact with him earlier and whose commercial construction abilities and experience he was familiar with or came highly recommended. In some cases he had already made a commitment to hire them when work was available.

[95] I accept Mr. MacLean's version of events and the *bona fides* of his decision in regard to the non-hiring of Ms. MacAulay. His evidence is consistent with that given by the Union, its members, and the Project Manager Mr. Fiander. Ms.

MacAulay's failure to get a job as a carpenter on the Civic Centre site was due to her lack of experience on commercial projects and specifically her inexperience in placing anchor bolts and working on curved concrete. Such proven experience was a bona fide qualification to Mr. MacLean.

[96] According to Lawrence Shebib and Colin Campbell the Union would hold regular meetings with its members advising them what work was coming up and when it was expected to start. On commercial projects members had to seek their own employment. This meant presenting yourself at the work site to apply and show you were available. It was the general consensus of these gentlemen and Alex and Walter Hatcher that going to the site looking for work was an ongoing thing. The more often you went the more chance you had of being there when someone was needed. It was suggested that even if she had come when he needed somebody he would not have hired her. Mr. MacLean responded that he had looked at her resume and did not see the experience needed to get the job done that was required. He was asked if it would have made any difference had she shown up looking for work every day. He responded that it would have shown earnestness, and if they were doing something he thought she could do then she'd be considered.

[97] Work for a carpenter is an ongoing quest. Even when hired one's employment will only last for the life of that particular project. Carpenters must be continuously looking for the next job. Generally speaking they do not have the luxury of sitting at home after they have applied somewhere. If they do not get on at one project they must seek and hopefully get hired somewhere else. Consequently their availability is day to day. By showing up at a job site every morning they convey to a potential employer that they are still available. This is the way it works.

[98] Mr. Fiander has over forty years experience in the construction industry. It's his experience that any young carpenter or someone coming into the trade will have a problem getting work because they are not known and have little experience. One has to go from job to job until work is found. Meanwhile, even if in the Union, one is required to 'moonlight' until there's a shortage of carpenters and they can get a job.

[99] He stated that they had a bunch of carpenters with years of experience waiting to be hired. Based on experience you take the known entity who's capabilities and experience are familiar to you.

Whether Ms. MacAulay first applied on July 22, as she states, or after July 30th as

[100] Mr. MacLean recalls, the project had already been underway for approximately two (2) months and carpenters had been showing up looking for work since June 2.

[101] It is suggested that Ms. MacAulay did not want to pay her dues as all carpenters who are new to the Union and relatively unknown on commercial sites must do.

[102] Indeed there is some evidence to support such an opinion. Ms. MacAulay went to the site only twice to see Mr. MacLean about work. However, she – to use their expression – ‘hounded’ the Mayor and the Union to try to get her work at the Civic Centre. Ms. MacAulay wanted to be exempt from the process of attending job sites looking for work because she felt that once the prospective employer knew she was a woman they would not hire her. She acknowledges contacting the Premier’s office, women’s groups, the Justice Department and the Human Rights Commission in the hope they could intervene in getting her work at the Civic Centre.

[103] It was her belief that she had been subject to gender discrimination throughout her entire career as a carpenter. That she is predisposed to this sensitivity is evident by the following comments made by her at various times in these proceedings:

- (a) **When asked if she felt Richard Jamieson got a better hourly rate at her first full-time carpentry position – doing maintenance at Springhurst Apartments – because he had his carpentry papers she replied “No it was because I was a girl.” When asked how she knew that, replied “Everybody knows that.”**

Intake questionnaire, referring to Civic Centre job:

- (b) **“I was passed over on this job just like every other job I apply for because I am a woman. It doesn’t matter what certificate you have you cannot break through the ‘old boy’s club’.”**

Why she took the Red Seal Course:

- (c) **“Guy’s get hired papers or not. Girls have to have proof they can do the work.”**

Applied to a lot of Union sites always got the same response:

- (d) **“Not hiring a secretary. Guys won’t work with you because you’re too good looking.”**

States Billy Joe told her she had no hope of getting a job at the Civic Centre. When asked if she inquired as to what he meant by ‘no hope’ she replied “No. I knew why and he knew that I knew why; they just weren’t going to hire a female.”

Called union hall two or three times a week to help her get a job at the Civic Centre, Colin Campbell said he was not going to help anybody get a job there.

(e) “But I knew it was because I was a woman.”

Intake questionnaire – resolution dated December 19, 2003:

(f) “I feel I have wasted my time and money getting certified in my favourite field of work because they are hiring people who are not certified and are all men. No company in Cape Breton will hire women as carpenters without being threatened with legal action.”

(g) “Always needed outside help with my EI because I am a girl and I am a carpenter.”

(h) When asked by Wayne McMillan if she had been a victim of discrimination for a long time she replied “A long time. My whole carpentry life.”

(i) When asked by Mr. McMillan if it was fair to say that when she did not get a job she felt it was because of gender replied, “Pretty much. Because of the remarks.”

[104] This predisposition does not automatically compel a conclusion that Ms. MacAulay’s complaint has no merit. It was stated by the Board of Inquiry in *Kennedy v. Mohawk College* (1973) and referenced in the *Shakes* case (supra) at p. 4:

... It should also be added that the Board must view the conduct complained of in an objective manner and not from the subjective viewpoint of the person alleging discrimination whose interpretation of the impudent conduct may well be distorted because of innate personality characteristics, such as a high degree of sensitivity or defensiveness.

[105] Ms. MacAulay’s perception of events may well be influenced by her high degree of sensitivity in this regard but the preponderance of evidence that surrounds this matter supports a different conclusion.

[106] It is difficult to ignore Ms. MacAulay’s heightened sensitivity in regard to gender discrimination affecting her work and employment. At the very least it compels circumspection when examining her version of events.

[107] Considering the inordinate number of times Ms. MacAulay has misstated

events, been inconsistent and shown poor memory, I am more inclined to accept the evidence of the other key players in this matter who`s testimony is more in harmony with the preponderance of other evidence made available to this inquiry. That is not to say that the respondents` testimony was entirely free of discrepancies, but these were not in areas that impacted the central issue of this inquiry, nor were they sufficient enough in either content or frequency to raise an inference that their explanations may have been pretextual. For instance the Mayor recalls that it was he and Councillor Hughie MacDonald who intervened to help Alvin McInnis get hired. Campbell MacLean recalls only that the Union beseeched him to hire Mr. McInnis. Similarly, Mr. Campbell states it was the second time Ms. MacAulay came on site that she brought her resume. Mr. Fiander states she presented it to him the first time she came on site seeking employment.

[108] Ms. MacAulay states in her rebuttal letter dated February 26, 2004 to the Human Rights Commission that:

[109] **“... The slight directed to me by Mr. Fiander and Mr. MacLean was taken as sexist and discriminatory because they also put with it that there was absolutely no chance of me obtaining work on this site. ...”**

[110] It is this allegation more than any other that is the backbone of Ms. MacAulay`s claim. If believed it supports an inference that indeed Ms. MacAulay may very well have been discriminated against because of her gender. But the evidence does not support that assertion.

[111] Mr. Fiander denies that he made any comment in regard to it being the first time he had seen a female carpenter. In fact it wasn`t and when he received a copy of Colin MacDonald`s letter to the Human Rights Commission he took issue with the impression that he had expressed incredulity at the prospect of a female carpenter. In fact Mr. Fiander was sufficiently impressed with Ms. MacAulay`s resume that he enquired as to her interest in taking a job as safety inspector which was a position he was considering as being beneficial to the overall project. That this is so was confirmed by Ms. MacAulay who left the trailer site that day under the impression that Mr. Fiander had offered her the position and she had turned it down. Although this was not a carpentry job it completely undermines Ms. MacAulay`s assertion that she was told there was absolutely no chance of her obtaining work on this site. By her own admission, she understood that she had been offered work. It would certainly appear inconsistent for Mr. Fiander to tell her there was absolutely no chance of her getting work on the site when he was actively seeking to hire her for the safety supervisor`s position.

[112] Mr. MacLean does acknowledge that he remarked to Ms. MacAulay that she was the first female carpenter he had ever met. This was simply a fact. As to him commenting that there was no chance of her ever getting work on the site, Mr. MacLean states he made no such statement. However, when she suggested that he

lay-off one of the employed carpenters and hire her, his response was that there was no chance of that happening. This was the only 'no chance' reference he made. That Ms. MacAulay would make such a suggestion is entirely consistent with her unabashed feeling of superiority as a carpenter. Moreover there are simply too many instances where Ms. MacAulay has attributed comments to other people that they denied for me to accept, without support, her allegation that Mr. MacLean made the 'no chance' comment in regard to her ever getting work on the site.

[113] Finally in regard to this particular point, Mr. Fiander and Mr. MacLean were not together when Ms. MacAulay spoke to them on that first day. I think it much less likely that they would, independently, express surprise at meeting a female carpenter and tell her that there was absolutely no chance of her working on that site.

[114] Counsel for the Commission has asked me to consider the approach and conclusions in a decision by a Board of Inquiry in *Daniels v. Annapolis Valley Regional School Board* (2002) 45 C.H.R.R. D/162 (N.S. Bd. Inq.). That Board found that the respondent had discriminated against a complainant because of her sex when it failed to consider her application for employment as a Maintenance Foreman. The facts of that case were quite different in that it was a competition for one position. Pivotal to the Board's conclusion was the fact that the respondent did not set the final criteria until after the applications were received. They then added two requirements which automatically excluded female applicants.

[115] That was not the situation here. Mr. MacLean had wide latitude in deciding who to hire as carpenters. And while 'locals' were expected to account for at least half that workforce, his mandate was basically to hire the best people for the job. Indeed there is an inference that his knowledge of who the best people were may have been a contributing factor in his getting the site superintendent's position in the first place. Basically Mr. MacLean hired carpenters he knew from experience could do the job that was required, or carpenters who came strongly recommended by other carpenters whose abilities and work ethic he respected.

[116] The Commission raises the question of whether or not this may be a form of unintentional discrimination because it automatically excludes females who, being new to the trade, would not have the experience or access to the network of respected personnel as their male counterparts. That is to say that the criteria used by Mr. MacLean would automatically eliminate the only female applicant, Ms. MacAulay. It is argued that Ms. MacAulay was not given a fair opportunity to compete.

[117] In the *Daniels* case, *supra*, the Board concluded that the complainant did have the qualifications sought in the advertisement and should have been given an interview, particularly since other applicants with equal or less qualifications were interviewed. That is not the situation here. Ms. MacAulay was given the same opportunity to apply as everyone else – show up at the job site and express your availability and desire for work. She spoke to Mr. MacLean and made available her resume . Mr.

[118] MacLean did go over this resume – and concluded that Ms. MacAulay did not have the experience he was looking for in that particular job site. The evidence supports his conclusion.

[119] In summary I find the evidence to be conclusive that there was no disadvantage imposed on Ms. MacAulay nor was she denied access to any opportunity available because of her gender. Her claim of discrimination is dismissed.

[120] By way of comment I would reiterate the observation by the Board of Inquiry in *Fortune V. Annapolis District School Board* (1992), 20 C.H.R.R. D/100 (N.S. Bd. Inq.) at para. 47:

- (a) **...Under the Human Rights Act (Nova Scotia) no employer is obliged to hire women; similarly no employer is obliged to adopt and implement an affirmative action program or to give a preference to women in respect of hiring. ...**

[121] Had there been such an affirmative action program in regard to the trades, Ms. MacAulay may well have gotten what she sought – a job as a carpenter. She readily acknowledges that she did not want to set off the chain of events that would lead to this inquiry. When she contacted the Commission all she wanted was for them to get her a job.

[122] And finally, I am somewhat perplexed as to why Mr. Fiander was named a respondent in this matter. Other than the uncorroborated assertion of Ms. MacAulay that some people told her to see him, the evidence is overwhelming that Mr. MacLean had the sole authority to hire carpenters.

April 21, 2008

David J. MacDonald – Chair
Human Rights Board of Inquiry