2014-NSHRC No.____________

IN THE MATTER OF:	The *Human Rights Act*, R.S.N.S., 1989, c. 214, as amended
AND	
IN THE MATTER OF:	A Nova Scotia Human Rights Board of Inquiry
BETWEEN:	

Garnetta Cromwell

(the "Complainant")

-and-

Leon's Furniture Limited

(the "Respondent")

-and-

The Nova Scotia Human Rights Commission

(the "Commission")

DECISION

Nova Scotia Human Rights Board of Inquiry:	Kathryn A. Raymond, Chair
Appearances:	Garnetta Cromwell, Complainant Lisa Gallivan, Counsel on behalf of the Respondent Lisa Teryl, Counsel on behalf of the Commission
Date of Decision:	April 8, 2014

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INTRODUCTION

Confirmation of Jurisdiction

1. This case involves a complaint of discrimination based on race pursuant to the Nova Scotia *Human Rights Act*, RSNS 1989, c 214 (the "*Act*"), as amended. A formal complaint for purposes of the *Act* was filed with the Human Rights Commission (the "Commission") by Garnetta Cromwell (the "Complainant") against her former employer, Leon's Furniture Limited, (the "Respondent" or "Leon's") on November 10, 2009. My jurisdiction to determine this complaint arises from my appointment as a Board of Inquiry in this matter by the Chief Judge of the Provincial Court, of which I was advised on May 8, 2012. It should be noted that no objection was taken to my jurisdiction to hear and determine this matter by any party.

History of Proceedings

2. Before outlining the nature of the complaint, a brief account of the history of this matter is in order.

3. Following my appointment, case management conferences were held on September 13, 2012 and on November 13, 2012. The latter case management conference was held to discuss the format for the inquiry and resulted in a decision being issued by this Board on November 19, 2012 respecting the Commission's request that the hearing proceed on the basis of an Inquisitorial Model, against the objection of the Respondent.

4. Hearing dates were set for November 27, 28 & 29, 2013. However, those dates were adjourned upon the request of the Commission on behalf of the Complainant for personal reasons without objection by the other parties.

5. Given issues respecting the availability of counsel, a further case management conference was held on January 31, 2013 at which dates for hearing were set for April 30, 2013 and May 2, 2013. In anticipation of the hearing, the parties agreed that they wished to attempt to mediate the complaint with my assistance on April 29, 2013. The mediation proceeded on the basis of a written agreement between the parties, which included a specific agreement that my jurisdiction as a Board of Inquiry would not be impacted as a result of attempting to assist the parties to resolve the matter through mediation. The mediation assisted in clarifying the issues for the parties but did not result in settlement. The hearing convened on May 2, 2013 and continued on May 21 and 23, 2013.

6. On July 27, 2013, a case management conference was held at the request of Counsel for the Commission and Counsel for the Respondent. The hearing was set to continue on July 29, 30 & 31, 2013. However, at the request of counsel, the hearing did not fully proceed on all those dates due to the unavailability of certain witnesses. Consequently, I convened a case management conference with the parties on August 31, 2013 to ensure that hearing dates were set to secure the conclusion of the hearing within the following weeks.

7. The hearing continued on September 4, 5, 6, 11, 12 and 13, 2013. The remainder of the hearing was adjourned on the basis that the parties preferred to provide closing submissions and authorities in writing. Consequently, written submissions were received

from the parties on September 16, 2013, September 26, 2013, October 1, 2013, October 4, 2013, October 6, 2013, October 8, 2013 and November 4, 2013.

Overview of the Allegations of the Complainant

8. The Complainant alleges that, while she was employed as a Sales Associate with the Respondent, she was subjected to discrimination through racial comments made to her by her direct supervisor and the store manager's husband. She also alleges that she was subjected to unusually harsh disciplinary measures by her direct supervisor and other members of management. She alleges that her career progression into management was stymied and that a customer complaint and disputes with another employee over allocations of sales commissions were not handled fairly, resulting in the unfair denial of commissions. In summary, she alleges that she received differential treatment from the Respondent and that her race was a factor in these events.

Overview of Respondent's Answer to the Complaint

9. As indicated previously, the Respondent raised a preliminary issue objecting to the role taken by the Commission at the hearing, which it alleges impacted the fairness of the hearing. At the core of this objection is the issue of whether and to what extent the Commission has a responsibility to present evidence at the hearing of a complaint. The Respondent submits that the Commission is obliged to put forward all material, relevant evidence. It says that this includes both evidence which tends to support the complaint of discrimination and evidence which favours the dismissal of the complaint, and that the Commission failed to do so in this case.

10. The Respondent further submits that neither the Complainant nor the Commission offered sufficient evidence to establish a *prima facie* case. The Respondent denies that members of management made discriminatory comments or treated the Complainant differently because of her race.

11. In response to the allegations concerning discipline, career progression and disputes over sales commissions, the Respondent alleges that there were problems with the Complainant's performance at work. It says that the discipline that occurred in Ms. Cromwell's case was due to legitimate performance issues and that its actions were a *bona fide* attempt to manage Ms. Cromwell. The Respondent alleges that the Complainant had poor attendance, failed to follow store policies and demonstrated an overall lack of commitment to her job. The Respondent denies that that Complainant's career was stymied on the basis of race, or that she was treated unfairly with respect to sales commissions.

12. The Respondent alleges that it has an anti-discrimination policy and complaint process in place and had engaged its employees in training with respect to discrimination. In short, the Respondent says that Leon's provides a healthy workplace and that Ms. Cromwell's workplace environment was free of harassment or discriminatory practices.

13. In the alternative, the Respondent states that it had no knowledge of and could not be reasonably taken to have known that the Complainant believed that she was treated differently because of race. It submits that it only learned about the allegations of discrimination after the Complainant resigned her employment in May, 2008.

14. The Respondent further explains that, if there was discrimination in this case, it reacted appropriately once it learned that there could be a problem by conducting an investigation within the workplace. It says the investigation showed that there was no evidence to support the Complainant's allegations and that the investigation unearthed other motives, which appeared to explain the Complainant's behaviour.

15. The Respondent claims that the Complainant failed to access the policy and complaint process it had in place and failed to participate in the investigation. The Respondent asserts that, had she done so, she could have returned to work. The Respondent takes the position that it did the best it could without the Complainant's participation and that the investigation resulted in a warning letter being given to the Complainant's direct supervisor. As a result, the Respondent submits that the complaint should be dismissed and it should not be required to provide any compensation to the Complainant.

Guide to Reasons

16. For the reasons which follow, I have concluded that the Complainant and Commission have established a *prima facie* complaint of discrimination. I have further determined that the evidence offered by the Respondent does not justify the conduct in question completely on non-discriminatory grounds. Accordingly, I have concluded on a balance of probabilities that the Complainant was discriminated against and that the Respondent is liable for that discrimination. I have also concluded that the Respondent's response to the complaint of discrimination that it received from the Complainant was not reasonable.

17. In these reasons, I will set out the facts necessary to understand the complaint, to explain the basis for my factual findings and to explain my decision. There are a number of factual disputes and issues to be addressed. I have been required to make a number of findings respecting credibility. Accordingly, I have not referred to all of the evidence. However, before addressing the merits of this matter, I will address the preliminary issue raised by the Respondent concerning the role of the Commission.

PRELIMINARY ISSUE RESPECTING ROLE OF COMMISSION

Respondent's Position

18. The Respondent submits that the Commission has carriage of the complaint and failed to meet its duty to present all material relevant evidence, as required by the Nova Scotia Court of Appeal in *IMP Group Ltd. v. Dillman [1995] N.S.J. No. 326* ("IMP"). The Respondent also relies upon the decision of the Nova Scotia Human Rights Board of Inquiry in *Bankier v. Dalhousie University et. al,* 2012 NSHRC (NS Bd. Inq.) ("*Bankier*") at p. 32 where the Board of Inquiry held that the Commission has carriage of the complaint and is required to present *all* material evidence when it appears before a Board of Inquiry. The Respondent alleges that the Commission failed to do so in this case. As a result, the Respondent alleges that the Commission failed to present a fair and balanced case, in an objective manner, to the Board of Inquiry.

19. The factual basis of the Respondent's objection is that the Commission failed to call the Complainant's direct supervisor, Brent Hopkins, as a witness. Mr. Hopkins is alleged to have made many of the alleged discriminatory comments and to have subjected the Complainant to differential treatment on account of her race. The Respondent submits that this witness would have been in possession of material, relevant evidence to the

complaint. The Commission also failed to call David MacLeod as a witness. Mr. MacLeod conducted the investigation into Ms. Cromwell's allegations. The Commission presented evidence in support of the complaint based on only the oral testimony of the Complainant and one additional witness, who the Respondent says was called to corroborate one point in evidence. The Respondent draws a comparison with other cases in Nova Scotia where many more witnesses were called by the Commission.

20. The Respondent alleges that more than the Complainant's uncorroborated allegations are required to establish that discrimination occurred. Primarily, it submits that the failure of the Commission to present any other evidence beyond that supporting the complaint could be considered misleading, as the Commission focused on telling only one side of the story.

21. The Respondent states that introduction of Mr. Hopkins' testimony would have ensured that the evidence was not misleading by representing only the evidence of the Complainant. The Respondent submits that the failure by the Commission to present an objective, balanced and fair case calls into question the procedural fairness of the hearing.

22. The Respondent asks the Board to draw an adverse inference from the failure of the Commission to present relevant evidence from Mr. Hopkins and Mr. MacLeod.

<u>Commission's Position</u>

23. Commission counsel submits that the Commission is an independent party before a Board of Inquiry and is entitled to call evidence and be heard respecting its position: *McKenzie Forest Products Inc. v. Tilberg*, 1999 CanLII 15057 (ON SC) ("*McKenzie*"); *Snow v. Honda of Canada Manufacturing* 2007 HRTO 45 (CanLII) ("*Snow"); and *Losenno v. Ontario Human Rights Commission* 2005 CanLII 36441 (ON CA) *("Losenno").* As a party to the proceedings, the Commission submits that it represents the interest of the state and community, as held in *IMP*.

24. Commission counsel submits that, consistent with *IMP*, it has a duty to present all material evidence relating to the complaint. In this regard, it submits that the Commission's role is similar to that of Crown counsel. The Commission must be, as stated in *IMP*, "objective, balanced and fair." The Commission submits that the comments of the Supreme Court of Canada in *Boucher v. The Queen* (1954), 110 C.C.C. 263 (S.C.C.) ("*Boucher")* in relation to the role of Crown counsel are applicable, acknowledging that in the *IMP* case the Nova Scotia Court of Appeal applied the same duty to the Commission as that ascribed to Crown counsel in *Boucher*.

25. While the parties agree that *IMP* is applicable law, the Commission disagrees with the Respondent's interpretation of *IMP* with respect to the nature and extent of its role. Commission counsel submits that the Commission's role is to represent the public interest: *Premakumar v. Air Canada* 2002 CHRT 61836 (CanLII). The Commission submits that it determines what the public interest is and how it should be presented to the Board Chair at the Inquiry, relying on *Bankier* as authority in this respect. Counsel submits that, in effect, the Respondent is asking the Board of Inquiry to define the Commission's understanding of what the public interest is in the presentation of its case.

26. In response to the Respondent's submission that the Commission has carriage of the complaint, the Commission acknowledges that the *Bankier* decision is authority for this

proposition. However, the Commission submits that *Bankier* is no longer good law in this respect, citing the decision of the Ontario Supreme Court in *McKenzie*, specifically the minority decision of Justice Ferrier. This dissent was commented upon favourably by the Ontario Court of Appeal when the decision was appealed in *McKenzie Forest Products Inc. v. Ontario Human Rights Commission,* 2000 CanLII 5702 (ON CA). Commission counsel relies, as well, upon the *Snow* and *Losenno* decisions in this regard. It submits that higher courts have rejected the view that the Commission has carriage of the complaint.

27. The Commission disputes the Respondent's position that, as the Commission has carriage of the matter, it is under a duty to present all material evidence gathered during the investigation or in preparation for the hearing. The Commission submits that it may decide to take no role in presenting evidence to a Board of Inquiry. It emphasizes that it is under no obligation to advance the case for the Complainant and does not represent the Complainant. Commission counsel suggests that the Commission has significant discretion respecting the nature and degree of its participation.

28. The Commission submits that it may determine that the public interest, in part, is to allow the Complainant and Respondent to present their own cases. It offered an example where both the Respondent and Complainant were represented by experienced counsel: *Quilty-MacAskill v Community Justice Society*, 2013 CanLII 33709 (NS HRC) (*"Quilty-MacAskill").* Commission counsel submits that the public interest includes advancing a case in a fair and just manner, taking into account factors such as the availability of legal counsel. The Commission's interest is to ensure the correct presentation of the law concerning human rights. In summary, the Commission submits that, while its role is to present the public interest, its role is not necessarily to advance the complaint, although it may decide to take on that function.

29. In further support of its position, the Commission points out that the interests of the Complainant and the Commission may diverge. It submits that the Complainant may take a position that is not aligned with the public interest, citing the *McKenzie* decision and *Canadian Museum of Civilization Corporation v. Public Service Alliance of Canada (Local 70396)* 2006 FC 703 at 67 (CanLII) (Fed. Crt.) (*"Canadian Museum").* It submits that it has no obligation to submit evidence that is not aligned with its public policy mandate to represent the public interest before the Board of Inquiry.

30. Commission counsel identified specific aspects of the role of Commission counsel in the Commission's submissions. This role, counsel submits, includes advising the Board of Inquiry about procedure and the law.

<u>Reasons Respecting the Objection of the Respondent to the Commission's Role & Duty to Present Evidence</u>

31. It is not in dispute that the *Act* entitles the Commission to be a party to a proceeding before a Board of Inquiry. The Commission's status as a party in proceeding before a Board of Inquiry is confirmed by section 33 of the *Act*.

32. There is no express provision in the *Act* specifying the role to be taken by the Commission once it becomes a party to a complaint before a Board of Inquiry. Prior to referral of a complaint to a Board of Inquiry, the Commission's role was described by the Supreme Court of Canada in *Bell v. Canada (Human Rights Commission),* 1996 CanLII 152 S.C.C.,

[1996] 3 S.C.R. 854. To set the stage, I refer to the Court's comments at para. 53 as follows:

> *The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it....*

33. The Commission appears as a party only after it concludes its role as decision-maker at the stage of screening a potential complaint to determine whether it should proceed to an independent Inquiry. In making this decision, it has broad powers to dismiss a complaint based on criteria prescribed in s. 29(4) of the *Act*.

34. Once a human rights complaint is forwarded to a Board of Inquiry and the Board of Inquiry is properly appointed to "inquire into the complaint", the Board of Inquiry assumes adjudicative jurisdiction over the complaint. The Commission no longer acts as a decision-maker with respect to the complaint but rather becomes a party to the Inquiry, as does the Complainant and the person against whom the complaint is made, pursuant to s. 33 of the *Act*.

35. I have determined that certain issues arise as a result of the positions taken by the Respondent and the Commission. Those issues are as follows:

    (a) Does the Commission have carriage of the complaint?
    (b) Is the Commission under a duty to produce all available evidence relevant to the complaint and, if so, to what extent? What meaning is to be given to "all available evidence relevant to the complaint"?
    (c) Does the Commission represent and determine the public interest in a complaint before a Board of Inquiry?
    (d) What is the role of Commission counsel?

(a) Does the Commission have Carriage of the Complaint?

36. Commission counsel suggests that it is within the role of the Commission to take no role in presenting evidence to a Board of Inquiry. Counsel cites the decision of *Quilty-MacAskill*, where the Commission chose to take no role in presenting the evidence, and submits that the Commission had determined that the public interest, in part, was to allow the Complainant and Respondent to present their own cases. In *Quilty-MacAskill*, both the Respondent and Complainant were represented by counsel. Commission counsel asked a limited number of questions of witnesses and made submissions. No objection was taken by the Complainant or the Respondent to the role assumed by the Commission. As no issue was raised by the parties respecting the Commission's role, the Board of Inquiry made no determination respecting this issue in that case. Accordingly, I cannot agree that *Quilty-MacAskill* stands as authority to the effect that the Commission is able to unilaterally determine that it will take no role in presenting evidence to a Board of Inquiry. The issue was simply not addressed.

37. The Commission submits that the *Bankier* decision, in which the Nova Scotia Board of Inquiry held that the Commission does have carriage of the complaint, is no longer good law. In *Bankier*, the Nova Scotia Board of Inquiry held at para. 36:

> *Based on Section 33 and Section 2(e) of the Act, I find it is a reasonable implication of the remedial nature of the Human Rights Act, that if a decision is made by the Commission to refer a complaint to a Board of Inquiry, Commission counsel should be responsible for the carriage of the complaint and to ensure that whatever relevant evidence has been gathered, either by an investigation if one has occurred, or the Complainant, is presented to the Board of Inquiry in the public interest*

38. As indicated, Commission counsel relies on the dissenting reasons of Ferrier, J. of the Ontario Supreme Court in *McKenzie* in support of its position on the basis that the Ontario Court of Appeal subsequently approved his comments to the effect that the Commission does not have carriage of the complaint.

39. In *McKenzie*, the issue was whether the withdrawal of the Commission from the complaint at the hearing stage meant that the Board of Inquiry lost its jurisdiction to continue the hearing into the complaint. The applicable legislation in Ontario specifically stated that the Commission had carriage of the complaint. At paragraphs 25 and 26 of its decision, the Court of Appeal stated:

> *Ferrier J. also drew the following distinction between the role of the Commission and the status of a complaint after referral to the Board:*
>
> > *Upon referral, the Commission in effect passes the wand of decision-making authority to the Board. The Board must and does have independent authority to consider the interests of the Commission, complainant and respondents, all of whom are accorded independent party status. Pursuant to the Statutory Powers Procedures Act, the Board has a duty to hold a hearing once the matter has been referred to it, unless all parties consent to a disposition without a hearing. The dispute may remain alive even after the Commission withdraws, for the complainant is a separate party and the Commission's carriage of a complaint is only a procedural, not a substantive, matter.*
>
> *Ferrier, J. concluded that the phrase "carriage of the complaint" in s. 39(2) refers to "procedural leadership" on the part of the Commission and not total effective control of the Commission over the complainant's rights.*
>
> ...
>
> *[46] This purposive approach of interpretation was enunciated again in Action Travail des Femmes v. Canadian National Railway Co., 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114, 40 D.L.R (4th) 193, by Dickson C.J.C. at p. 1134 S.C.R., p. 206 D.L.R.:*

Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

[47] In my opinion, the narrow interpretation given to s. 39(2)(a) of the Code by the majority of the Divisional Court that would require the presence of the Commission for the complaint to proceed would unduly frustrate the fundamental policy goals of the Code. I therefore agree with the minority opinion of Ferrier J. who stated that "[t]o hold that carriage gives the Commission what would amount to total effective control over the complainant's Code given substantive rights, would offend the object and scheme of the Code and abrogate the SPPA".

[48] The word "carriage" is not defined in the Code. To give it a restrictive and narrow interpretation would indeed to violence to the overall scheme of the Code. It is therefore essential to interpret the word "carriage" in a manner that best relates to the statutory context.

[49] I therefore conclude that the proper interpretation of s. 39(2)(a) of the Code with respect to the Commission having "carriage of the complaint" should relate to procedure and not to substantive rights. I agree with the appellant that the s. 39(2)(a) provision should be interpreted as instructing the Board of Inquiry that, as between the Commission and a complainant or complainants, carriage is to be assigned to the Commission. It is therefore my view that the Divisional Court erred in finding that the Board of Inquiry lost its jurisdiction to continue with the hearing of the complaint when the Commission decided not to participate further in the proceedings. [Emphasis added]

40. The Ontario Court of Appeal in *McKenzie* held that the Commission cannot withdraw the complaint either through withdrawal of its participation or by other means, as the Complainant also has independent party status. In my view, the Court of Appeal did not go so far as to convey that carriage of a human rights complaint ordinarily rests upon the Complainant; to the contrary, the Court of Appeal held that the statutory requirement in Ontario that the Commission have "carriage of the complaint" is to be interpreted as meaning that carriage of the complaint is normally to be assigned to the Commission as a matter of procedure. That assignment cannot derogate from the substantive rights of the Complainant to be heard. If the Commission withdraws, that does not end the Complainant's right to be heard.

41. I was referred by the Commission to para. 34 of the *McKenzie* decision, as well, which states:

The Commission does, of course, have a responsibility to advocate its view of the public interest and in so doing, may also advocate the interest

of the individual Complainant. However, the Commission's role as a party to the proceeding cannot derogate from the independent status of an individual Complainant.

42. Significant reliance appears to be placed by the Commission upon the words "may also advocate for the interest of the individual Complainant. I do not read this statement as permissive, in the sense that it enables the Commission to take no role in presenting a case where it believes that a complaint is valid, but rather as recognition by the court that certain of the "interests of the individual Complainant" will likely overlap with the public interest, while others may not. I interpret the Court's comment as meaning that in the course of meeting its responsibility to advocate its view of the public interest, the Commission will also, to some extent, advocate for the interest of the individual Complainant. That is, in my view, a reflection of the fact that to advance the public interest, the Commission needs to ensure that there is a factual basis to the position that it takes. It also reflects the intertwining of the public interest within a Complainant's interests. There is a significant public interest in ensuring that the rights of an individual, who alleges that he or she has been discriminated against, are aired before a Board of Inquiry. If proven, there is a significant public interest in ensuring that the effects of the discrimination are made subject to the Board's remedial powers in the *Act*. That there is a public interest in the proper resolution of private rights was recognized in *IMP*:

> *While the proceedings are not criminal in nature, human rights complaints are more than a mere matter of compensation between subjects. As with the criminal law, the state has an interest in the proper conduct of such matters.*

43. I infer from this comment that our Court of Appeal does not perceive the rights of individual complainants in human rights cases as consisting of only private interests.

44. For these reasons, I conclude that the position of the Commission and its counsel is analogous to that of the Crown and its counsel in criminal proceedings with respect to the presentation of evidence.

45. Furthermore, I do not interpret *McKenzie* as creating a procedural rule that the Commission has no obligation to advance the complaint; to the contrary the Commission ordinarily has such an obligation, as advancing the complaint is aligned with the public interest.

46. Commission counsel also relies upon the decision of the Ontario Court of Appeal in *Losenno*. *Losenno* considered the issue of whether the Commission could decide not to refer a complaint to the Board for a hearing in the first place, at a time when the Commission is clearly the decision-maker and not a party. It is distinguishable on that basis.

47. I have considered the decision of the Federal Court in *Canadian Museum,* which supports the Commission's position that its role is to represent the public interest, not to advance the complaint. That case arises within the Federal jurisdiction. This is a provincial matter arising under the Nova Scotia *Human Rights Act.*

48. Commission counsel also relies upon the decision in *Snow,* a decision of the Ontario Human Rights Tribunal, for its position that the Commission does not have carriage of the

complaint. That decision is not binding upon me. I cannot agree with its approach, nor the approach taken in obiter in *Losenno*, or in *Canadian Museum*, given the law of this province.

49. I am unable to reconcile the Commission's position, that higher courts have rejected the view that the Commission has carriage of the complaint, with the ruling of the Nova Scotia Court of Appeal in *IMP*. In my view, I am bound by the decision of the Nova Scotia Court of Appeal in *IMP*. Our Court of Appeal has held at paras 48-51 as follows:

> *I agree with counsel for the company that the Commission is a public body established to represent the interest of the state and the community.... Under the Act the Commission, the complainant and the person complained against are all parties to a hearing before the Board. The Commission has the function of enforcing the Act and it has the carriage of the proceedings. It has the power to compel the attendance of witnesses and the production of evidence.*
>
> ....
>
> *I accept the argument of counsel for the company that these attributes impose a duty on the Commission, and hence upon its counsel, to present all material relevant evidence relating to the complaint. We are dealing here with the duty relating to presenting evidence at the Inquiry... The Commission's duty here, I think, similar to that which Courts have recognized rests on Crown counsel in criminal proceedings.*

50. The Court of Appeal has determined that it is the obligation of Commission counsel to put before the Board of Inquiry what Commission counsel considers to be credible evidence relevant to what is alleged. Section 24(1) of the *Act* states that "the Commission shall....administer and enforce the provisions of this Act". After the appointment of a Board of Inquiry, the Commission's statutorily guaranteed status as a party to the hearing pursuant to s. 33 of the *Act* is consistent with an expectation of ongoing participation, barring exceptional circumstances, for the purpose of advocating its view of the proper enforcement of the *Act*.

51. In my view, if there is good reason why the Commission should not assume the procedural role of presenting the evidence relating to the complaint, or, where it wishes to withdraw from participation in a complaint, having requested that a Board of Inquiry be appointed, it should address those issues on the record.

52. The role of the Commission in a typical human rights case should not be overly influenced by what may occur as an exception, namely those situations where the interests of the Commission and the Complainant diverge in a contradictory manner respecting the substance of the complaint.

(b) Is the Commission under a Duty to Produce all Available Evidence Related to the Complaint, and, If So, to What Extent?

53. Both parties agree that *IMP* is applicable law in the context of this issue. The issues in *IMP* included an allegation that the Commission failed to meet its obligation of procedural fairness by not presenting all material evidence at the hearing before the Board of Inquiry,

specifically certain documentary evidence of the Employer and the testimony of two key witnesses who had worked for the employer.

54. The Respondent places reliance upon the Court of Appeal's comments respecting the duty of the Commission to present evidence in *IMP* at paras 48-55:

> *I accept the argument of counsel for the Company that these attributes impose a duty on the Commission, and hence upon its counsel, to present all material relevant evidence relating to the complaint. We are dealing here with the duty relating to presenting evidence at the inquiry, not the duty of pre-inquiry disclosure.*
>
> *The Commission's duty here is, I think, similar to that which courts have recognized rests on Crown counsel in criminal proceedings. Such counsel must, in the presentation of a matter, be objective, balanced and fair. The following statements relating to Crown counsel are appropriate in considering the position of the Commission and counsel representing it.*
>
> *In Boucher v. The Queen (`1954), 110 C.C.C. 263 (S.C.C.) Rand, J. said at p. 270:*
>
> > *It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.*
>
> ....
>
> *Human rights legislation and its enforcement is a very important and sensitive area. The processing of a human rights complaint and the conduct of an inquiry under the Act are public duties of great importance. As I have said, the proceedings can be of great consequence to the parties. The proper execution of these functions vitally affects not only the immediate parties to the dispute, but the public at large who must be secure in the knowledge that such complaints are pressed vigorously, but with scrupulous care and fairness to all....*
>
> *In saying that the Commission has a duty to present all material relevant evidence, it cannot be expected to produce all possible relevant evidence which might be within its grasp. The duty, as I conceive it, is not to knowingly omit any evidence which would make the case presented by it*

misleading. Fairness requires that all material relevant evidence be tendered.

55. *IMP* clearly places a duty on the Commission to present all material evidence to the Board of Inquiry and not to omit evidence which would make the proceeding unfair. However, I do not agree that *IMP* requires the Commission to advance all material evidence favourable to the Respondent. The Court of Appeal clearly limited the Commission's duty in this respect at para. 57, stating:

> *It is not suggested that by imposing a duty on the Commission to present all material relevant evidence that it must make efforts to build a defence for the party complained against. Specifically, I reject the Company's submission that there was in the circumstances a duty on the Commission to call Pettipas.*

56. On the facts in *IMP*, Pettipas was the primary antagonist. It is Pettipas who was alleged to have committed many of the alleged discriminatory acts and it was Pettipas' alleged on-going conduct that formed the foundation of the Complainant's allegation that she was the continuous target of sexual harassment. The Court of Appeal's decision in this respect is applicable here, where the Respondent complains that the Commission did not call the primary antagonist, the Complainant's direct supervisor, as a witness, and the Area Manager who conducted the investigation on behalf of the Respondent.

57. In my view, there are two key points to be drawn from the outcome in *IMP*. First, the Commission is not required to ensure that evidence reasonably anticipated to support the Respondent's case is put before the Board of Inquiry, unless the absence of that evidence would create a misleading picture to the Board. I do not read the *IMP* decision as holding that the Commission must present every piece of evidence in its possession or that it must present the evidence it legitimately anticipates would be presented by the Respondent as part of its defence.

58. The Respondent submits that there was no justification for the Commission's failure to call the Complainant's supervisor or the investigator. In this case, the Respondent was well represented by experienced counsel and it was reasonable for the Commission to assume that Respondent's counsel would present the case for the Respondent. I am not persuaded that the Commission was required to call these witnesses, who, at the relevant time, were both employed by the Respondent. I add that the point is moot as it pertains to the Area Manager, as the Respondent quite properly called him to provide evidence in support of its case.

59. Secondly, the submission that the Commission presented a misleading picture by omitting evidence requires an evidentiary basis respecting the specific relevance of the evidence alleged to be omitted. In *IMP*, the Respondent submitted numerous documents in evidence in support of its position that material evidence had been omitted by the Commission in an attempt to establish that the Commission had created a misleading picture for the Board. The court reviewed this evidence and concluded at para. 76 that:

> *[These documents] .... cast no new light upon the record before the Board. Their non-production by the Commission does not amount to a withholding or failure to produce material relevant evidence, nor does*

their absence from the record render the remaining evidence on the record misleading.

60. The tendering of this evidence permitted an assessment of potential evidence that was available but which was not presented by the Commission. The Court of Appeal in *IMP* based its decision on a careful review of that evidence.

61. The Respondent has not led any evidence in support of its contention that there has been a lack of procedural fairness due to the Commission's failure to lead all relevant material evidence. There is, therefore, no evidentiary basis to sustain the allegation that the Commission created a misleading record before this Board. Specifically, there is no evidence that the Complainant's supervisor, Mr. Hopkins, would have provided evidence to demonstrate that the Commission was misleading the Board of Inquiry. The Board of Inquiry heard from the Area Supervisor, Mr. MacLeod, as he was called as a witness by the Respondent in support of its case. I decline to assume that a misleading record has been presented by the Commission or that there has been procedural unfairness as a result.

62. Commission counsel clearly indicated during the hearing that the Commission did not intend to call Mr. Hopkins as a witness. There is no property in a witness. The Respondent had notice of the Commission's position and had an opportunity to call Mr. Hopkins itself, had it chosen to do so. There was no evidence to suggest that Mr. Hopkins would have resisted a subpoena issued by this Board, had one been requested, nor was this suggested to be a problem. The evidence was that Mr. Hopkins left the employ of the Respondent in 2011 to pursue another opportunity. There is no suggestion that he left on bad terms with his employer.

63. The Respondent suggests that I should draw an adverse inference against the Commission for its failure to call Mr. Hopkins as a witness, and refers to *Hurd v. Hewitt* 1994 CarswellOnt 1024, 28 Admin. L.R. (2d) 165 as authority in this regard. The Respondent acknowledges that the drawing of such an inference is a matter of discretion.

64. It would have been open to the Commission to suggest that the Board of Inquiry ought to draw an adverse inference against the Respondent for failing to produce Mr. Hopkins as a witness. In any event, there is no evidence that Mr. Hopkins' evidence would have assisted the Respondent's case or altered my assessment of the Complainant's case. I decline to draw an adverse inference against the Commission respecting its decision to not call Mr. Hopkins as a witness.

65. With respect to Mr. MacLeod's evidence, his testimony was available to the Board, in any event, as he was called by the Respondent. His evidence was relevant to the Respondent's defence that the complaint had been investigated. It was reasonable for the Commission to expect that the Respondent would call Mr. MacLeod as a witness.

66. A number of the Respondent's submissions respecting the extent of evidence called by the Commission are in support of its point that more than the uncorroborated allegations of the Complainant are required to establish discrimination. The sufficiency of the evidence called by the Commission or the Complainant, in my view, goes to the issue of whether a *prima facie* case of discrimination has been established on the evidence and ultimately whether discrimination has been proven on a balance of probabilities, and is addressed below in these reasons.

(c) Does the Commission Represent and Determine the Public Interest in a Human Rights Complaint before the Board of Inquiry?

67. The Commission submits that the Commission determines what the public interest is and how it should be presented to the Board of Inquiry and references *Bankier* as authority in this regard. Having reviewed the *Bankier* case, it does not appear to stand as authority for this specific proposition. It will be assumed that Commission counsel did not intend to imply that the Commission is the sole determinator of this issue, as it is well-recognized that the Board of Inquiry has an obligation to ensure that the outcome of the Inquiry is in the public interest.

68. In my view, the Commission should take a position respecting the public interest in any case that it forwards to a Board of Inquiry. As a party before the Board of Inquiry, the Commission is entitled to frame its own position with respect to the public interest and it is entitled to be heard in presenting its position. The other parties have an opportunity to disagree and advocate a different position.

(d) What is the Role of Commission Counsel?

69. Commission counsel submits that the role of Commission counsel is to advise the Board of Inquiry respecting procedure and the law, to conduct pre-hearing conferences, to cross-examine witnesses, to lead evidence, to make submissions on the facts and the law and questions of mixed facts and law and to act for the Human Rights Commission in court proceedings.

70. The Commission relies upon MacAulay, Robert W. & James L. H. Sprague's, *Practice and* Procedure *before Administrative Tribunals*, *Vol. 2.* (Toronto: Carswell 2004) at 10-2 as authority for this description of the role of counsel in the context of a matter which has been referred for a hearing before a Board of Inquiry. The Commission points out that there is no provision relating to the role of counsel in a Board of Inquiry hearing in the *Act*.

71. There is no description of the role of Commission counsel in the *Act*, apart from the natural conclusion that Commission counsel represents the Commission as one of the parties at a hearing before a Board of Inquiry. However, there is a description of the role of counsel for a Board of Inquiry. In s. 34(2) of our *Act*, the Board of Inquiry is entitled to "seek legal advice from an adviser independent from the parties and in such case the nature of the advice should be made known to the parties in order that they make submissions as to the law". If the Board of Inquiry were to retain the services of independent legal counsel, the *Act* makes it clear that disclosure of that advice is to occur to the parties so that they have an opportunity to know the case they have to meet. The parties are entitled to notice of legal advice that could possibly influence the considerations of the Board of Inquiry.

72. As a representative of a party, Commission counsel may cross-examine witnesses, lead evidence or make submissions respecting the facts and law on behalf of the Commission. As the Commission is a party to the proceedings, counsel for the Commission cannot advise a Board of Inquiry. That would compromise the appearance of impartiality and the structural independence of the Board of Inquiry.

73. I do not agree that Commission counsel should advise the Board about its procedures and how it should interpret and apply law or that Commission counsel should conduct

prehearing conferences. The former exercise must be conducted impartially by the Board of Inquiry; the latter is the responsibility of the Board of Inquiry to conduct as part of its management of the proceeding.

74. In any event, for these reasons, the Respondent's preliminary motion is denied.

THE MERITS

ONUS

75. The correct test for proving discrimination is as stated in the Supreme Court's decision in *Moore v. British Columbia (Education)*, 2012 S.C.C. 61, 351 D.L.R. (4th) 451 and the decision of the Ontario Court of Appeal in *Shaw v. Phipps*, 2012 (ON CA) 155, 289 O.A.C. 163. As recently affirmed in *Peel Law Association v. Pieters* 2013 ONCA 396 (CanLII), (*"Peel Law Association")*, at para. 56, three elements are required to establish a *prima facie* case of discrimination by a complainant:

1. That he or she is a member of a group protected by the Code;
2. That he or she was subjected to adverse treatment; and
3. That his or her gender, race, colour, or ancestry was a factor in the alleged adverse treatment.

76. As the Ontario Court of Appeal in *Peel Law Association,* noted at para. 66, once a *prima facie* case is established:

> *A respondent may avoid an adverse finding by calling evidence to show its action is not discriminatory...*

77. Further, the Court in *Peel Law Association* succinctly stated at para. 68:

> *In a case in which the respondent's "answer" is to lead further evidence to rebut the inference that its action was discriminatory ....the evidential burden shifts.*

78. The Court of Appeal in *Peel Law Association* at paras. 71 and 72 explained the distinction between the burden of proof which, in this context, rests upon the Commission and Complainant and the shifting of the evidentiary burden to the Respondent after a *prima facie* case has been established, adopting the reasons of Sopinka, J. in *Snell v. Farrell*, [1990] 2 S.C.R. 311, at pp. 329 – 330:

> *... It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden.*

And so it is in discrimination cases. The question of whether a prohibited ground is a factor in the adverse treatment is a difficult one for the applicant. Respondents are uniquely positioned to know why they refused an application for a job or asked a person for identification. In race cases especially, the outcome depends on the respondent's state of mind, which cannot be directly observed and must almost always be inferred from circumstantial evidence. The respondents' evidence is often essential to accurately determining what happened and what the reasons for a decision or action were.

79. In elaborating upon the evidentiary burden upon the party advancing the complaint at the stage of establishing a *prima facie* case, the Court in *Peel Law Association* stated at paras. 73 and 74:

> *In discrimination cases as in medical malpractice cases, the law, while maintaining the burden of proof on the applicant, provides respondents with good reason to call evidence. Relatively "little affirmative evidence" is required before the inference of discrimination is permitted. The standard of proof requires only that the inference be more probable than not. Once there is evidence to support a prima facie case, the respondent faces the tactical choice: explain or risk losing.*
>
> *If the respondent does call evidence providing an explanation, the burden of proof remains on the applicant to establish that the respondent's evidence is false or a pretext.*

80. These rulings have particular relevance in this case with respect to the Respondent's submissions that the Complainant must produce more evidence than the testimony of the Complainant to establish that race was a factor in the alleged adverse treatment. For reasons explained below, I have concluded in the course of consideration of the evidence that the Complainant has established a *prima facie* case.

EVIDENTIAL ISSUES

81. Evidence is admissible before the Board of Inquiry that is not admissible in a court of law. The evidence that a Board of Inquiry may receive is governed by s. 7 of the *Board of Inquiry Regulations*, N.S. Reg. 221-91 which state as follows:

> *7. In relation to a hearing before a Board of Inquiry, a Board of Inquiry may receive and accept such evidence and other information, whether on oath or affidavit or otherwise, as a Board of Inquiry sees fit, whether or not such evidence or other evidence is or would be admissible in a court of law; notwithstanding, however, the Board of Inquiry may not receive or accept as evidence anything that would be inadmissible in a court by reason of any privilege under the law of evidence.*

82. In *Daley v. Fiorio Cumberland Inc.*, 2013 HRTO 1348, (*"Daley"*) the Ontario Human Rights Tribunal confirmed that the burden of proof that a complainant must establish in human rights cases is on a balance of probabilities. The *Daley* decision followed the Supreme Court of Canada decision in *F.H. v. McDougall*, 2008 SCC 53 in para. 43:

> *The applicant has the onus or proving that the respondent violated her Code rights. This must be established on a balance of probabilities meaning that the applicant must be able to show that it is more probable than not that the allegations of racial discrimination or harassment occurred. Clear, convincing and cogent evidence is required to satisfy the balance of probabilities test.*

83. The Respondent submits that the Complainant's uncorroborated allegations cannot establish a *prima facie* case of discrimination. In effect, the Respondent is suggesting that there was not clear, convincing and cogent evidence of discrimination in this case on the basis of its submissions that most of the allegations were supported only by evidence offered by the Complainant.

84. The Respondent suggests that this case is very different from other cases of discrimination in Nova Scotia, such as *Davidson v. Construction Safety Association of Nova Scotia,* 2005 N.S.H.R.C. 4 No. 5, where approximately 18 witnesses gave evidence respecting alleged acts of sexual harassment, discrimination based on sex and retaliation under the *Act*.

85. The Respondent also relies on *Gough v. C.R. Falkenham Backhoe Services*, [2007] N.S.H.R.B.I.D. No. 4, in which the Complainant and Commission called expert evidence on the effects of the allegedly discriminatory treatment and, as well, testimony from a co-worker of the Complainant who was able to corroborate the Complainant's evidence.

86. Leaving aside the issue of the advisability of expert evidence, it is not always possible to have corroborating evidence via the testimony of another witness to an event. The fact that clear, convincing and cogent evidence is required to satisfy the balance of probabilities test does not require the Complainant to always produce corroborating evidence to meet the legal requirements respecting the burden of proof. There is no hard and fast rule to the effect that for evidence to be credible and reliable it must be corroborated by another witness. If that were the case, there would truly be no way to ever resolve the classic situation of the "he said, she said" evidentiary quandary. I do not accept the Respondent's suggestion that the Complainant's own evidence, in theory, cannot be sufficient to establish that she was treated differently because of her race.

87. That said, I do not wish to be interpreted as encouraging a practice whereby a Complainant testifies on the basis that such testimony alone will be sufficient. A party is more likely to be successful if they put forward corroborating evidence, assuming that such evidence is available, be that through the testimony of other witnesses or documentary evidence. In any event, each case must be determined based on its own facts and the evidence submitted by the parties at the hearing.

88. Any evidence submitted will be assessed in terms of its credibility and reliability. If only the Complainant testifies, the Complainant and the Commission run the risk that the Complainant's testimony will not be accepted as credible or reliable and that they will not be able to prove discrimination.

89. In my view, the Respondent's position respecting the approach this Board should take to the evidence requires a particularly stringent interpretation of a *prima facie* case. Such an approach was not taken in *Peel Law Association* where the Ontario Court of Appeal adopted the comments of Sopinka, J. in *Snell v. Farrell* at pp. 328-329, at para. 71:

... very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of a causation in the absence of evidence to the contrary.

90. The Ontario Court of Appeal arrived at a similar conclusion in relation to discrimination cases at para. 73:

> *Relatively "little affirmative evidence" is required before the inference of discrimination is permitted and the standard of proof requires only that the inference be more probable than not.*

91. However, the requirement of "relatively little affirmation evidence" is only at that initial stage and is intended to persuade a Respondent to respond. As the court in *Peel Law Association* stated at para. 82:

> *A prima facie case framework in the discrimination context is no different than that used in many other contexts. Its function is to allocate the legal burden of proof and the tactical obligation to adduce evidence. It governs the outcome in a case where the Respondent declines to call evidence in response to the application.*

92. In this case the Respondent called evidence and the question to be decided is whether the Complainant and the Commission have satisfied the legal burden of proof of establishing, on a balance of probabilities, that the Complainant has been discriminated against. I have determined that ultimate issue based on a review of all the evidence. In doing so, I considered whether a *prima facie* case of discrimination was made out requiring a response. I concluded that it was and, in fact, the Respondent submitted evidence in response. I agree with the Court of Appeal's conclusion at para. 89 that:

> *... It seems to me that respondents' counsel attaches to much consequence to a tribunal concluding that a prima facie case has been established. A prima facie case, by definition, is capable of being answered. If a tribunal using the prima facie case framework as an analytical tool has only considered the evidence supporting the application at that stage, it must consider all the evidence supporting a non-discriminatory basis for the respondents' action in the next stage of its analysis. The only thing that matters is at the end of the day, the tribunal must take into consideration all of the evidence.*

CREDIBILITY

93. Credibility is an important issue in this case. The Respondent submits that, in assessing credibility, this Board should be governed by a consideration of the factors described in *Hadzic v. Pizza Hut Canada* (1999), 37 C.H.R.R. D/252 (B.C.H.R.T.) at p. 7. I agree.

94. I was also referred to *Daley* at paras 46 & 47 and its summary of the law as it pertains to assessing both credibility and the reliability of evidence. The Tribunal in that case applied the principles set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA), pp. 356-357 and took note of the Ontario Court of Appeal's comments in *R. v. Morrissey*, (1995) 97 C.C.C. (3d) 193 at p. 205, regarding assessment of reliability of evidence.

95. The Respondent submits that the Ontario Human Rights Tribunal has expanded on this reasoning and relies upon *Mason v. Peel Heating Service Experts,* 2012 HRTO 1865 (*"Mason")* 5 at paras. 47-49 in this regard. As well, the Supreme Court of Canada in *F.H. v. McDougall* 2008 SCC 53 confirms (at para. 58) that courts have to look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case. This approach was re-confirmed at para. 49 of *Mason.*

96. I agree with the Respondent's submissions respecting the proper principles to be applied in assessing the credibility and reliability of the evidence as referenced in these authorities.

OVERVIEW OF THE ALLEGATIONAS OF DISCRIMINATION

97. The Complainant relies upon the following alleged factual circumstances to establish that she was discriminated against on the basis of race:

(a) An unusually harsh disciplinary outcome imposed on the Complainant as a result of her failure to attend work on January 6, 2008;

(b) Being denied a shift change between the Complainant and a co-worker on the basis the Complainant had failed to swipe out when leaving the store, after the shift change had been by approved by a manager;

(c) Being singled out for disciplinary action for allegedly failing to follow store policy to swipe out when leaving the store and for leaving the store for an extended period of time without permission, while other employees were not disciplined for doing the same thing; the related allegation that the Complainant was disciplined twice for the same incident;

(d) The unfair resolution of two disputes respecting the allocation of commission between the Complainant and another sales associate (on two occasions);

(e) The unfair handling of a customer service issue and the resulting discipline imposed on the Complainant for allegedly not following store policy;

(f) Not being considered for promotion to a managerial position;

(g) The Complainant's integrity being challenged by her supervisor after the Complainant provided an explanation for her whereabouts;

(h) Being referred to as "Contessa" or spoken to in "black lingo" by a person who was not employed at Leon's but who attended certain work-related social events, without appropriate reaction by members of management;

(i) Alleged comments and actions of the Complainant's supervisor, which the Complainant considered discriminatory including:

(i) The use of the word "Sunshine" in greeting the Complainant;

(ii) Referring to the Complainant as "Condoleezza Rice" in front of customers;

(iii) Touching her hair and commenting on its texture being like wool and referencing a sheep missing its wool;

(j) Making the comment, "Clear the room, there's going to be a lynching" at the outset of the Complainant's performance evaluation.

The Complainant's Allegations and Evidence

98. The Complainant worked for the Respondent from October 18, 2004 until she resigned on May 10, 2008. Originally hired as a Customer Service Agent, she was promoted on several occasions to different positions, leading to the position of Sales Associate. Specifically, she was promoted to Merchandiser within approximately a year. She was promoted to Delivery Supervisor in February 2006. The transition to Sales Associate, specifically in the furniture department, occurred in the fall of 2006. By all accounts, she was a very good employee. The Complainant did not have to apply for the Sales Associate position. She says that she was approached by John Papailliados, General Manager and David MacLeod, the Area Supervisor and a Sales Associate position was given to her, although she had no sales experience.

99. At the time of these promotions, she worked under the supervision of John Papailliados. She was interested in progression within the company. She testified that she understood that the training that she received in different departments was to position her to eventually become a successful candidate to become a manager-in-training. The Complainant described having very positive relationships with her co-workers and with her managers during this time. She was invited by senior management to sing the national anthem at the store's grand re-opening celebration in July 2006 and met Terry Leon, the Respondent's CEO and President, on that occasion.

100. Mr. Papailliados subsequently left the store and was replaced as Store Manager by Tammy Bishop. Brent Hopkins became the Complainant's supervisor in late 2007 when he became Sales Manager. In 2008, the Complainant alleges that she began to have difficulties with Brent Hopkins.

101. The Complainant testified to a series of incidents where she perceived that she was treated differently than other employees or subjected to undeservedly harsh disciplinary treatment during the period January - May, 2008. She also says that she was not considered for management positions that became available, for which she expressed interest. However, she says that it was a discriminatory comment made to her in April of 2008 by Mr. Hopkins at her quarterly review, in the presence of other managers, that led her to decide to go to the Nova Scotia Human Rights Commission. Before relaying the Complainant's evidence respecting what was described by her as the culminating event, I will set out the Complainant's evidence about the events that allegedly preceded it.

1. January 6, 2008 Discipline

102. The Complainant testified that her concerns began when she had a dispute with her supervisor, Mr. Hopkins, in January 2008. She testified that she was at work on Saturday, January 5, 2008. She says that it was snowing. As it was shortly after Christmas, she asserts that there were not many customers in the store. There were quite a few sales associates in the sales lounge. She testified that Mr. Hopkins indicated that he would let some sales associates go home early. They drew names to decide who would be allowed

to leave. The Complainant referred to days where business was slow as a "slow day/snow day". She testified that Mr. Hopkins stated that if the next day, Sunday, was a slow day too, he would send sales associates home again.

103. Although the Complainant was scheduled to work on Sunday, she decided upon getting up Sunday morning that it would be a slow day. It was her daughter's birthday. She wanted to be home with her. She testified that she called and left a message for Mr. Hopkins to the effect that she would not be in. She reports indicating in the message that she would come in if she was really needed.

104. She testified that Mr. Hopkins called her back later that morning. According to the Complainant, Mr. Hopkins spoke with a raised voice and chastised her for leaving a message like that. The Complainant testified that she explained to Mr. Hopkins that the message was based on what he had said the day before and the fact that it was her daughter's birthday. According to the Complainant, Mr. Hopkins responded "that was fine", but that when she came into the store, she was to come in and see him because he was going to "write her up".

105. The Complainant met with Mr. Hopkins when she returned to work on Monday, January 7, 2008. Mr. Hopkins showed her a document that he was preparing as a written warning. The Complainant says that Mr. Hopkins had written that she would "rather" stay home than work. She objected and asked him to change the word "rather" to "choose". The Complainant testified that, in addition to being given a written reprimand, she was unexpectedly suspended from work on Monday, February 7, 2008 without pay until Friday, January 11, 2008. The Complainant was scheduled to work two days during this period.

106. The Complainant took issue with being suspended, given her understanding of the store's policy regarding progressive discipline. She says that she had no prior disciplinary history. She believed, based on what was said to her during the telephone call by Mr. Hopkins, that she would receive a written warning.

107. The Respondent has a progressive discipline policy. It was the Complainant's understanding that the progressive discipline policy indicated that an employee would receive a written warning for a first offence. If the employee did the same thing again, he or she would receive a second warning. If the behavior repeated itself, a third warning could be given. The Complainant understood that, depending on the severity of the event, an employee could receive a suspension. However, she was not aware of any policy whereby an employee would receive a two day or even a one day suspension for this type of incident. She did not understand from her conversation with Mr. Hopkins on Sunday morning that she would receive a suspension without pay for not coming into work. The Complainant was upset by what she considered to be an overly harsh disciplinary outcome.

108. The Respondent has a policy known as "AVAC", which stands for "Associates Voicing A Concern". That policy provides that if a sales associate has a concern with a supervisor, the associate has a duty to go to their supervisor's manager to voice his or her concern, and on up the chain of command within management, if he or she remains dissatisfied with the resolution. Under AVAC, the Area Supervisor was required to be made aware of the problem if the Store Manager took no action.

109. At the time, the Complainant was involved in a romantic relationship with the Area Supervisor for the Respondent, David MacLeod. Mr. MacLeod resided in Mississauga but visited the store in Dartmouth in his role as Area Supervisor for Leon's. To put this into context, the managers of the store reported to Mr. MacLeod. Mr. MacLeod was responsible to the Executive Management of the Respondent for the management of the Halifax store and five other stores operated by the Respondent.

110. The Complainant testified that she called Mr. MacLeod to complain about the fact that she had been suspended for two days. According to her testimony, Mr. MacLeod indicated that Mr. Hopkins was "making an example of her". The Complainant says that she stated to Mr. MacLeod that "the punishment was too harsh for the crime". She says that Mr. MacLeod did not respond to this but indicated that she should speak to Tammy Bishop, the Store Manager, if she disagreed.

111. The Complainant says that she approached Tammy Bishop subsequently. Ms. Bishop took the position that the Complainant should have come into work and backed Mr. Hopkins.

112. The Complainant testified that, subsequently, she was ridiculed by other sales associates over this incident with Mr. Hopkins. She referred to an example of a co-worker wondering out loud whether he could get the day off because it was his daughter's birthday. She felt that Mr. Hopkins was discussing her with other employees. She stated that she did not discuss this incident with others in the store.

113. The Board was provided with evidence respecting the Respondent's application of its progressive discipline policy by Kimberly Hennigar, Assistant Store Manager, who was called as a witness by the Commission. Ms. Hennigar testified that there is both criteria and a process for discipline and that the severity of an incident will be weighed by management. She explained that discipline could begin with a verbal warning, which could be recorded, and that an oral warning could be followed by a written warning, which would also be recorded. As the Assistant Store Manager and as the person who was second in command of the store, Ms. Hennigar could only recall one other employee being suspended. This was for a health & safety violation. The employee was suspended for not wearing a harness. Ms. Hennigar noted that the employee could have died if he fell. The Respondent's Safety policy requires the wearing of a safety harness and specifies that failure to use this equipment can lead to suspension or termination. Ms. Hennigar testified that she had not given a suspension without pay over the six years that she had been in a management position. She had spoken to a few employees about being late. In general, she did not hand out disciplines and, if she did, she would discuss it with the General Manager first.

2. *Switched Shifts and Alleged Second Disciplinary Action for Not Swiping*

114. The Complainant testified that the next significant incidents occurred in March, 2008. She was approached by another sales associate who wished to switch Saturday shifts between two weekends with the Complainant. The Complainant says she agreed because that allowed her to have the Saturday off on the Easter weekend, in addition to the Friday and Sunday, which gave her a long weekend. Any switch in shifts had to be approved by management. The Complainant says that the co-worker who wished to switch the shifts obtained approval from Ms. Hennigar. The Complainant testified that she made plans to go away for the weekend.

115. On the Thursday before this long weekend, the Complainant was discovered by Ms. Hennigar to have left the store during work hours, contrary to the Respondent's policies. Store policy requires employees to "swipe out" if they leave the store and to obtain permission from management before leaving the store for lunch or personal reasons. Despite the written policy, the Complainant testified that it was her understanding that, as long the floor was covered, associates could take a break and leave the store to take care of personal errands. She testified that the policy was not strictly enforced.

116. The Complainant testified that on March 22, 2008, a few of the sales associates left the store, one after the other. The first employee left to go to Canadian Tire. This was followed by a second co-worker leaving. When the second co-worker returned, the Complainant says that she went out for lunch. She admits that she did not swipe out. She testified that a third co-worker departed the store after she left, but returned before the Complainant. When the Complainant returned to the store, she found out that Kim Hennigar was looking for her.

117. The Complainant testified that Ms. Hennigar accused her of being gone for "hours", which she says was not the case. She testified that Ms. Hennigar said that she would be taking her switched shift away, meaning that the Complainant would have to work the Saturday over the long weekend. The Complainant says that she objected on the basis that she had already made plans to be away for the long weekend. However, she was required to work the Saturday.

118. In her written complaint of discrimination, the Complainant alleged that she talked to the other employees who left the store without getting permission or swiping out. She says that they were annoyed, as well, that she got into trouble. Kim Hennigar had been looking not only for her, but for her co-worker, David Lewis. The Complainant wrote in her complaint that David Lewis told her that Ms. Hennigar asked him where he went and that was all. During her oral testimony, the Complainant stated that when she spoke to David Lewis, he told her that Ms. Hennigar told him not to leave the building again without swiping. Otherwise, there had been no disciplinary action. The Complainant says that the other employees who left the store were not disciplined because they were back before Ms. Hennigar began to look for anyone. She testified that, although the practice of leaving the store without swiping was more widespread, she was the only employee who was disciplined.

119. Ms. Hennigar testified that she recalls that the Complainant was not on the floor on March 20, 2008. She testified that they were short on the floor and that both the Complainant and David Lewis were gone from the store. Ms. Hennigar indicated that she searched for both of them. She eventually determined that Paul Koutros had given permission to David Lewis to go out. She was not sure of the exact time frame that Ms. Cromwell was gone from the store.

120. Ms. Hennigar testified that the policy was that employees were required to swipe in and out at lunch time but not for smoke breaks. She was not sure if other associates were not in the store that day. She also stated, "We always had to remind people to swipe in and out, especially when we reviewed payroll". She did not suggest in her testimony that other employees had been disciplined for failing to swipe out or failing to obtain permission first before leaving for lunch.

121. Every Saturday morning, before the store is open, a sales meeting is held. At the sales meeting on the Saturday of the long weekend in question, Mr. Hopkins focused on the need for associates to swipe their cards before leaving the building. The Complainant says that during the meeting the other sales associates were all looking at her.

122. After the meeting was over, she was paged to Tammy Bishop's office. When she walked into the office, she recalled that Mr. Hopkins stated, "By the way, that meeting was for you." He then allegedly made the comment, with a raised voice, "What kind of associate switches days to get Saturday off?" The Complainant said that she explained that she switched a Saturday for a Saturday with another employee. From the reaction of Ms. Bishop and Mr. Hopkins, she perceived that she was not believed. She suggested that they check for themselves. According to the Complainant, Tammy Bishop said, "We will."

123. In her written complaint, the Complainant stated that Mr. Hopkins proceeded to write her up and Ms. Bishop said to her, "If you don't like to work here let us know" and left the office. She wrote that she said to Mr. Hopkins, "What does switching shifts have to do with whether or not I like working here?" She said that Mr. Hopkins had no response.

124. The Complainant received a written warning for having left the store without swiping out. She believes that she was disciplined twice for the same conduct, first by Kim Hennigar in making her work the Saturday shift after granting her the day off, and then by Brent Hopkins and Tammy Bishop following the sales meeting, when she was presented with a written warning. She believes that she was treated differently than other employees by being disciplined over a policy that was not evenly enforced and because she was disciplined twice for the same misconduct. The Complainant says that being forced to work on her day off was not an approved form of discipline. She expected that what she did wrong should have led to a warning.

3. *Not Having an Explanation of Whereabouts Believed*

125. The Complainant took issue with another interaction with Mr. Hopkins which occurred after she went out to her car for a cigarette and was questioned about her whereabouts. She sat in her car because it was very windy outside. She observed Mr. Hopkins leave the building and stand outside having a cigarette. She noticed that he was looking around. When she walked back into the building, Mr. Hopkins allegedly stated very loudly, "Where the hell were you?" She said that everyone in the warehouse stopped working to listen.

126. The Complainant testified that she explained to Mr. Hopkins that she was outside. Mr. Hopkins replied to the effect that she was not outside, that he did not see her, and that he was outside having a cigarette. She testified that to get him off her back she replied that she had been outside kissing her boyfriend. She believes that Mr. Hopkins shared this information with other sales associates because she alleges that she was ridiculed by other sales associates about kissing her boyfriend afterwards.

4. *Customer Complaint and Losing Credit for Sale*

127. The Complainant testified that she was unfairly targeted for criticism after a customer became upset over the delayed delivery of their furniture. The customer complained to Kim Hennigar, who "wrote up" the employee in merchandising, who was responsible for notifying the customer. However, the Complainant testified that she was also called to the office to meet with Mr. Hopkins and Ms. Bishop. In her written complaint, the Complainant

indicated that she told them that she had spoken to the customer before the Easter weekend and explained that the delivery would be delayed. During her oral testimony, the Complainant stated that Mr. Hopkins started yelling at her, telling her (not asking her) that she had told the customer the furniture would be available in the store. The Complainant said that she began to raise her voice as well. She says that Tammy Bishop interjected and, in effect, told the Complainant, "If you do not like working at the store, get another job".

128. The Complainant's written statement of complaint differs in recounting these events in that she described a tense conversation with raised voices that ended with her bringing up the fact that she felt it was unfair that she had been disciplined twice for leaving the store. She wrote that Ms. Bishop said, "Dave got a verbal warning. We're not picking on you." The Complainant wrote that she replied, "Well, it feels like it Tammy."

129. The Complainant testified that she did not say anything to the effect that she did not like working at the store. It was apparent from her evidence that it was her perception that she was being blamed unfairly by being presumed to be at fault.

130. The credit assigned to the Complainant's sales statistics for her sale of this furniture was removed by the Respondent resulting in a loss of commission to her. The Complainant believes that this constitutes unreasonable disciplinary action.

131. The Complainant testified that a similar incident happened with another sales associate, Leanne Forrest. The Complainant says that she overheard Mr. Hopkins discussing the same issue with Ms. Forrest on the telephone. The Complainant testified that Mr. Hopkins was very polite in his discussion with Ms. Forrest. She felt that, although the issue was the same, Mr. Hopkins acted very differently toward Ms. Forrest in comparison to how he had treated her.

5. *Disputes with Ron MacKenzie & Losing Credit for Sales*

132. The Complainant testified that she encountered difficulties with one of the sales associates, Ron MacKenzie. She alleges that he would try to bully her on the sales floor by accusing her of trying to take his customers away. She says that the manner in which these issues were resolved by Brent Hopkins was unfair to her, as Mr. MacKenzie received credit for her sales. She testified that the former General Manager, John Papailliados, would "house" a sales commission, so that neither sales associate received credit, if a dispute arose and it could not be clearly identified to whom the commission belonged.

133. In one instance, the customer was looking for a futon for her son. The Complainant says that she waited on the customer and passed along her business card, as the customer decided to consider the purchase further and left the store. A few days later, while she was waiting on another customer, the customer returned and waved at her. The Complainant says she indicated to the customer that it would be a few minutes before she could help her.

134. The store has a policy whereby sales associates are assigned new customers in accordance with a list posted in the sales office, as each new customer enters the store. There is also a recognized category of customers called a "be back" which refers to an

assigned customer who leaves without purchasing but returns later and concludes the sale.

135. The Complainant says that she heard Ron MacKenzie paging her. The Complainant did not respond to the page immediately. She asked the customer whether anyone else was helping her. The customer indicated that another sales associate had said hello. The Complainant says that she asked the customer whether the customer wanted to deal with the other sales associate. She alleges that the customer indicated that she wished to deal with the Complainant. The Complainant says that she proceeded to close the sale and then went to see Ron MacKenzie. He accused her of taking his customer, suggesting he had spent considerable time with the customer. She says that she explained to him that the customer wanted to deal with her. The Complainant testified that Mr. Hopkins become involved in this dispute and gave the credit for the sale to Mr. MacKenzie.

136. The Complainant described a further incident with Mr. MacKenzie. She approached a couple who indicated that no one was helping them. She described Mr. MacKenzie walking up to her while she as helping the customer, claiming that the couple were his customers and starting an argument with her on the floor. She testified that sales associates are not permitted to argue in front of customers. The store's policy is clear on this point. The discussion moved to the sales lounge. She states that Mr. Hopkins interceded, had a private discussion with Mr. MacKenzie and gave the sale to Mr. MacKenzie.

6. *Consideration for Management Positions*

137. The Complainant testified that her goal was to move into a management position. She alleges that after Mr. Hopkins became her supervisor and Ms. Bishop became the Store Manager, her career progression came to a halt, compared to her early years with the company when she had a number of promotions.

138. In the summer of 2007, when she had been a Sales Associate for almost a year, the Complainant applied to Ms. Bishop to be considered for the position of Warehouse Manager. The Complainant states that she was aware at the time that the position involved working weekends, nights and a decrease in pay. She says that she was fine with that. Her evidence was that she was already required to work evenings and weekends as a Sales Associate.

139. The Complainant gave Ms. Bishop a letter expressing interest in the position and then followed up with her. She testified that Ms. Bishop shut her down, telling her that, "With your personality, you belong on the floor."

140. The Complainant says she also expressed interest in the Sales Manager position that ultimately was filled by Mr. Hopkins. The position was not actually posted or advertised to her knowledge. The Complainant did not apply for this position in writing. She testified, however, that she spoke to Ms. Bishop about this position. However, Ms. Bishop's response was to indicate that it was a decrease in pay and the matter was not pursued.

7. *Comments of Bishop – Contessa/Biotch*

141. The Complainant testified that she was the target of racist comments made by Ms. Bishop's husband at company-related social events. She alleges that the comments Mr. Bishop made were overheard by members of management and that no action was taken.

142. The Respondent held a staff Christmas party at an outside location. The year of this event was unclear based on all the evidence. The Complainant testified that she was sitting at a table with colleagues from work, including Tammy Bishop and her husband. She testified that Mr. Bishop repeatedly called her "Contessa". She testified that later that evening, she was at the bar at the same time as Ms. Bishop. Ms. Bishop asked her, "What does that name he keeps calling you mean?" The Complainant testified that she told Ms. Bishop that the name was "Contessa". She says that she asked Ms. Bishop to ask her husband to stop. The Complainant testified that the name Contessa was used in old movies set in the Southern United States and was a term commonly used for slaves who were servants working in a slave master's house.

143. The Complainant alleged there was a further incident involving Mr. Bishop. She said that a number of co-workers went out for drinks, coinciding with a visit by Dave MacLeod to the store in 2006. Everyone was seated at an outside patio. She testified that Ms. Bishop's husband drove up in a motorcycle. He climbed over the fence and sat down with Ms. Bishop. She testified that Mr. Bishop said "hello" to everyone normally and then he looked at her and said, "What's up biotch." She testified the word "biotch" is considered to be black lingo. The Complainant testified that Mr. MacLeod nudged her under the table and that Kim Hennigar said, "Can we just change the subject." The Complainant testified that she speaks proper English.

8. *Comments of Hopkins on the Complainant's Hair*

144. The Complainant testified that in the spring of 2008 she changed her hairstyle by putting dreadlocks in her hair. She described being at work, standing in the sales office in front of a board where sales figures are posted. Mr. Hopkins and Paul Koutros, another manager, were standing there with her. She testified that Mr. Hopkins touched her hair and commented that her "hair felt like wool." She says that he started to laugh. Mr. Koutros was not reported as responding verbally but the Complainant's impression was that Mr. Koutros appeared to feel uncomfortable.

145. The Complainant says that she walked away from the room and went to the sales lounge. She testified that she was standing with a co-worker, Charlene Grose, when Mr. Hopkins came up behind her and touched her hair again. She said that she shrugged her shoulders as in, "don't touch me." She testified that Mr. Hopkins repeated his comment about her hair feeling like wool. She says that he added the comment that "Somewhere a sheep is missing their wool." She believes that Mr. Hopkins said this in an attempt to get Charlene Grose to laugh.

146. The Complainant indicated that she had redone her hair when she returned from vacation. When she returned to the office, a few of her co-workers at the front desk asked if they could touch her hair. She let them do so. She was not offended, because she felt that they were complimenting her. She felt differently about what Mr. Hopkins did, as she believed that he was ridiculing the texture of her hair on the basis that she was African-Canadian.

9. *Being Called "Sunshine"*

147. On another occasion in the spring of 2008, the Complainant's mother came to the store to buy furniture. The Complainant testified that Mr. Hopkins walked up to her while she was with her mother and said, "Hey Sunshine." The Complainant introduced her mother to Mr. Hopkins. She testified that after Mr. Hopkins left, her mother told her not to let Mr. Hopkins call her "Sunshine" again. Her mother told her that the term "Sunshine" means that "you are so black that you shine".

10. *Being Called Condoleezza Rice*

148. The Complainant described an incident where she was in the midst of talking to customers who were buying furniture in the middle of the showroom. She heard Mr. Hopkins say, "Look at my Condoleezza Rice over there." She believes that the customers heard Mr. Hopkins say this.

149. The Complainant testified that she had no previous conversations with Mr. Hopkins before about her looking anything like Condaleezza Rice. She testified that the only thing that she and Condaleezza Rice had in common was that they were both female and black.

11. *Referring to Female Managers as Bitches*

150. The Complainant testified that, while Mr. Hopkins appeared to have a good relationship with Ms. Bishop, he referred to Ms. Bishop and Ms. Hennigar as "bitches". She testified that she assumed that they knew about it because Mr. Hopkins came in one day and told those present that he was not allowed to call Tammy and Kim "bitches" anymore. He then said the word "bitches". The Complainant indicated that the male sales associates laughed at this.

151. The Complainant gave evidence that, at the time, there were two other female sales associates besides herself out of a total of 25-27 associates. She described the fact that the older male associates tried to run the store. In her opinion, they were set in their ways and this created "an old boys club" atmosphere and culture in the workplace. (As the complaint alleges discrimination based on race, I have not considered this evidence to be particularly relevant except as background information.)

12. *Being Told It was Time for a Lynching*

152. The Complainant testified about what was, for her, the culminating event that led to her filing a complaint of discrimination. The Complainant described being paged to the office to have her performance evaluation in April 2008. Tammy Bishop was sitting at one desk and Brandon Hopkins was sitting at the other. She described Mr. Hopkins as sitting with his hands up behind his head. She testified that Paul Koutros was at Mr. Hopkins' computer and that Kim Hennigar was in the doorway, in front of Ms. Bishop's desk. She testified that as she walked into the office, Mr. Hopkins stated very clearly, "Everyone out. There's going to be a lynching."

153. The Complainant testified that Mr. Koutros stood up and turned towards Brent Hopkins. To her it seemed that he looked right at Mr. Hopkins. Mr. Koutros and Ms. Hennigar moved to leave the office. It was her impression that both Mr. Koutros and Ms. Hennigar

heard the comment and reacted. She says that Ms. Bishop remained sitting and did not show any reaction.

154. She alleges that none of these managers reacted appropriately to this comment. She described sitting through her performance evaluation with a lump in her throat, listening as Mr. Hopkins did most of the talking. She stated that she returned to the sales lounge and tried to concentrate on sales but found herself unable to. She testified that she felt that her career at Leon's was over and that she would be leaving. She submitted her resignation approximately three weeks later.

155. The Complainant testified that to her, the lynching comment referred to hanging a person while they were set on fire. To her, this happened to runaway slaves.

156. The Complainant testified that as soon as she got home, she telephoned Dave MacLeod. She told him what had happened. According to the Complainant, Mr. MacLeod said something to the effect that he was surprised that she would sit there and not punch him (Mr. Hopkins) in the face. The Complainant says that Mr. MacLeod told her to tell Ms. Bishop what had happened. She told him that she could not because Ms. Bishop was in the office the whole time.

157. The Complainant testified that she could not go to her immediate supervisor, Mr. Hopkins, in accordance with the AVAC policy, because he was the person who made the comment. She did not bring her concern forward to Tammy Bishop because Ms. Bishop was in the office at the time and did not do anything about what happened. The Complainant testified that she voiced her concern to Mr. MacLeod, the Area Supervisor, in the telephone call. She testified that he did not say that he would handle it. He told her to go to Tammy Bishop. When she told him that Tammy Bishop was present, that was the end of their conversation. The Complainant testified that no one approached her to express concern or to indicate to her that there would be any investigation as a result of the lynching comment.

158. The Complainant testified that she subsequently requested and was granted time off to go to Toronto for personal reasons. Instead of returning to work, the Complainant resigned and took her concerns to the Nova Scotia Human Rights Commission shortly thereafter. The Complainant testified that she felt that she had no choice but to leave the Respondent's employ, even though she had no other job to go to because, when these events happened, they were swept under the rug.

159. Kim Hennigar testified that she heard Mr. Hopkins make the lynching comment at the start of the Complainant's performance review. Ms. Hennigar gave a statement dated May 14, 2008, to the Respondent which is reproduced in full as follows:

> *I was in a sales office April 12, 2008. Brent made a comment to Garnetta "Get in here missy. There is going to be a lynching." Brent was referring to Garnetta's review and he said it in a joking manner with a laugh. Garnetta was in the doorway and turned to leave and walk out. Brent called Garnetta back and said he wanted to do her review. I left the office so Brent/Tammy could proceed. Garnetta did not show/say this comment offended her. Garnetta came in the office and proceeded with her review as normal.*

160. Ms. Hennigar testified that the lynching comment was not really appropriate and that Mr. Hopkins ought not to have said that. She testified that she said nothing and that the other managers said nothing. Ms. Hennigar further testified that subsequently, after the Complaint resigned, she and the other managers were asked if they heard any racist comments. At the time, it did not dawn on her that what Mr. Hopkins said was a racist comment. When she was later prompted with information respecting the incident and the comment by her employer, she confirmed that the comment was made.

The Respondent's Submissions and Evidence

1. January 6, 2008 Discipline

161. The Board heard evidence on behalf of the Respondent from Tammy Bishop with respect to the disciplinary action taken in relation to the Complainant's failure to attend work on January 6, 2008. As Mr. Hopkins was not called by the Respondent to give evidence, the only direct evidence before the Board concerning what was said between the Complainant and Mr. Hopkins is that of the Complainant and certain documentary evidence submitted consisting of documents authored by Mr. Hopkins, originating from the Complainant's personnel file.

162. On the basis of written record, Mr. Hopkins prepared an Associate Warning Notice which he had the Complainant sign when she returned to work, which was admitted as evidence. It stated:

> *Garnetta was scheduled to work Jan 6 at 11am. She left message stating that it was her daughters birthday and would ~~rather~~ chooses be home with her. Would come in if really needed. When I returned her call she stated that she didn't think we would be that busy. I told her that was not her call to make. She is expected to work scheduled shifts unless other arrangements are made.*
>
> *Garnetta's attitude towards her position is of concern to me. She will be suspended from duty till Fri Jan 11, 2008.*

The word "really" was underlined twice on the document.

163. Mr. Hopkins was subsequently asked by Ms. Bishop to prepare a statement after the Complainant had resigned in May, 2008 and she alleged that she had been discriminated against by Mr. Hopkins. In the statement dated May 17, 2008, Mr. Hopkins provided the following explanation of what happened on January 6, 2008:

> *On Sat Jan 6, 2008 Garnetta did not show up for her scheduled shift. When I phoned her to inquire she told me that it was her daughter's birthday and she would be staying home with her. Informed her that she was leaving me short and she replied that it was her decision.*

This statement differs from the Associate Warning Notice. Mr. Hopkins omitted the reference to the Complainant leaving a message for him, added the fact that he informed her that she was leaving him short of sales associates and omitted the Complainant's statement that she would come in if she was really needed.

164. Ms. Bishop's evidence was that Mr. Hopkins told her that the Complainant was disciplined for failing to come into work. She testified that the Respondent does not flood the sales floor with coverage and that they needed floor coverage for customer service. She testified that if several people called in the same day, the Respondent would probably lose out on business. She further testified that generally the two busiest days of the week are Saturday and Sunday.

165. Ms. Bishop referenced documentary evidence showing the net sales for Saturday January 5, 2008 and Sunday January 6, 2008. She testifies that these sales reports showed that these were not slow days. It was her evidence that sales on these days were higher than average.

166. Ms. Bishop testified that there was no general policy to send associates home early. If there was a snowstorm and there was a safety issue, and an associate lived outside the city or driving conditions became poor, Leon's may let associates leave early. This evidence presumably was submitted to impact the credibility of the Complainant's testimony that Mr. Hopkins allowed sales associates to go home early on Saturday, January 5, 2008 and indicated that he might do so again on January 6, 2008.

167. Ms. Bishop described it as "unusual" to discipline an associate who called in last minute to say that they were not coming in. Having spoken to Mr. Hopkins, she agreed that it was appropriate to suspend the Complainant. She understood that the Complainant was aware that there would be some repercussions if she did not come in, based on her discussion with Mr. Hopkins. Her recommendation was that the Complainant should have come into work. She confirmed that the Complainant came to discuss this with her subsequently.

168. Ms. Bishop testified that she did not know of another sales associate who chose not to come in on a scheduled shift. She felt a suspension was appropriate because they had "talked to the Complainant a few times". She believed that in most of the Complainant's performance reviews, the Complainant's commitment to her job was noted, even during her probation. She believed that the Complainant did not have "any regard" for her position.

169. Ms. Bishop testified that the Complainant's performance review as a probationary Sales Associate of January 13, 2007 included a comment to the effect that two weeks were missed due to family matters which had an effect on her overall productivity. Ms. Bishop was not involved in the performance review at the time. The supervisors at the time decided to extend the Complainant's initial three month probationary period by another 3 months.

170. The next review during her probationary period in April 2007 did not mention the Complainant missing time or her attendance. The Complainant was noted as having demonstrated a "huge" improvement in certain sales quotas but was told that her delivered sales must be up to standard by the next review. Her probation was further extended by another three months.

171. At the next review on July 21, 2007, the Complainant passed her probation. However, the performance review noted, "attendance requires improvement". At this time, Ms. Bishop was involved. She testified that it was she who wrote these words.

172. A performance review regarding the Complainant conducted in October 2007 notes that, "We know that Garnetta can produce much higher numbers in general and feel that the vacation time as well as missed time played into her end result for the quarter".

173. It is this documentary evidence that Ms. Bishop based her opinion upon when she testified that in most of the Complainant's performance reviews her commitment to her job was noted. This led her to believe that the Complainant did not value her position. This background is what she says led her to conclude that a suspension was appropriate in January 2008.

174. With respect to other instances of discipline in the workplace, Ms. Bishop gave evidence that another employee had been suspended in the past for coming to work while under the influence of alcohol.

175. Ms. Bishop disagreed with the Complainant's position that the phrase "written up", when used by Mr. Hopkins, meant that she would receive a written warning. Ms. Bishop testified that the phrase "written up" was not limited to a written warning, but rather meant that a sales associate would be disciplined. She testified that "written up" could mean a written warning, or a suspension, or even termination. She says that it did not mean that only a written warning would be provided.

176. The Respondent's position is that the punishment the Complainant expected is not relevant. It submits that what is important is that Ms. Cromwell knew that not showing up for her shift meant that she would be disciplined. The Respondent further submits that Ms. Cromwell was an employee with attendance issues and suggests that she was once again choosing not to come to work as scheduled, such that a suspension was appropriate.

177. Ms. Bishop provided evidence of the weather history for Halifax on both January 5, 2008 and January 6, 2008. The records demonstrate that there was zero precipitation in Halifax on both of those dates. This would contradict the Complainant's testimony that it had been snowing on those days.

178. Mr. MacLeod testified that the Complainant called him after this incident but he did not recall when. He thought it was after she was suspended. He recalls saying something to her to the effect of, "I think they are trying to tell you something".

2. <u>Switched Shifts and Alleged Second Disciplinary Action for Not Swiping</u>

179. With respect to the alleged incident involving the approval and subsequent denial of the switched shift over the Easter weekend in 2008, Ms. Bishop testified that she was not aware of the incident at the time. She indicated that there was a particular form that was supposed to be filled out for a request to switch shifts and that there was no documentation in the Complainant's personnel file about this.

180. Based on her understanding of what occurred, Ms. Bishop offered hearsay evidence that it was one and half to two hours before the managers were able to find the Complainant and speak with her.

181. The Respondent submits that Leon's Associate Handbook makes it clear that an associate is required to swipe in and out when leaving the store during their shift. It says the Complainant knew about this policy.

182. Ms. Bishop testified that the reason for the policy was that the store needed to know who was in and who was out of the store, should there be a need to evacuate the store in an emergency. As well, there was a requirement to have enough sales associates to cover the floor. She indicated that it was the responsibility of each department manager to enforce the policy. She testified that other employees were disciplined for not following the policy. No corroborating evidence or details were provided.

183. The Respondent submitted records respecting the three other employees identified by the Complainant as not having swiped out on March 22, 2008. The documents show that all three of these employees swiped out and back in once during their shift on March 20, 2008. They demonstrate several other instances of these particular employees swiping in and out during their shifts in March.

184. Ms. Bishop testified that she agreed with Mr. Hopkins that the Complainant should receive a warning for not swiping out and for failing to check with the supervisor before leaving the store. In part, this was because the Complainant had a history of attendance issues and because she had received a previous warning.

185. The Respondent submits that the Complainant was not treated any differently than other employees when she was required to follow policy and swipe out when leaving the store during her shift.

186. Charlene Grose testified on behalf of the Respondent. According to her testimony, the policy was enforced more strictly towards the end of her employment, which came to an end after the Complainant had resigned. She indicated the requirement to swipe in and out was more relaxed when she was a sales associate. Ms. Grose testified that she had no recollection of anyone being disciplined for not swiping in or out.

187. Mr. MacLeod testified that he had a discussion with the Complainant about this issue. He confirmed that the Complainant believed that other associates left the store without punching out and had not been disciplined. He stated that he did not do anything as a result as an Area Supervisor, testifying that, "It is really something that can be handled in the store".

3. *Not Having an Explanation of Whereabouts Believed*

188. The Respondent did not submit evidence in respect of this allegation.

189. The Respondent takes the position that there is no evidence to substantiate the allegation made by Ms. Cromwell to the effect that this was another instance of differential treatment. It further submits that there is no evidence that any comments made were as a result of or related to the Complainant's race or colour.

4. *Customer Complaint and Losing Credit for Sales*

190. The Respondent suggests that the Complainant's allegations that customer complaints were not handled appropriately resulted from her failure to provide customers with proper information at the time of a sale. It says that these incidents occurred when Paul Koutros was managing the situation and that there was documentation in Ms. Cromwell's personnel file to substantiate the company's concerns. I note that there is documentary evidence in the Complainant's personnel file respecting a customer complaint in 2007.

The Respondent says that there is no evidence to establish that the handling of the customer complaint was racially motivated.

191. Mr. MacLeod confirmed during his testimony that the Complainant spoke to him about customer complaints not being handled the way she thought they should be handled. He did not recall any particulars.

192. The specific incidents identified by the Complainant in her testimony referred to Mr. Hopkins' management of a customer complaint in 2008, as opposed to those managed by Mr. Koutros. Apart from Mr. MacLeod's evidence, no evidence was offered by the Respondent with respect to the 2008 incident.

5. *Dispute with Ron MacKenzie & Losing Credit for Sales*

193. Tammy Bishop provided general evidence respecting what the normal process was for handling disputes over commission sales. She indicated that it would be the responsibility of the relevant manager to interview the associates and review any other available evidence to make a decision. The manager would then decide how to allocate the commission. She was unable to offer evidence respecting the particular incidences described by the Complainant and could not determine how these particular issues were resolved. Mr. Hopkins and Mr. MacKenzie were not called by the Respondent to give evidence respecting what transpired.

194. Mr. MacLeod recalled that the Complainant discussed this issue with him but he did not recall any particulars.

195. The Respondent submits that there was no evidence in Ms. Cromwell's personnel file to substantiate the Complainant's allegations that she was treated unfairly. The Respondent takes the position that the fact that the Complaint did not like the way these matters were resolved does not establish that the decisions made were racially motivated.

6. *Consideration for Management Positions*

196. With respect to the Complainant's allegation that she was not considered for management positions that became available with the Respondent, Tammy Bishop testified that she did not recall that the Complainant had applied for the position of Sales Manager. She testified that the role of Sales Manager was vacant on one occasion during the Complainant's employment. She testified that Mr. Hopkins was promoted to this position.

197. Ms. Bishop testified that Mr. Hopkins joined the Respondent in July of 2007 and that he started in the management-in-training program. He was assigned to work for short periods of time in different roles until he became Sales Manager in the fall of 2007. There was no posting because his transition into that position resulted from an internal decision by management. Mr. Hopkins' past history of employment included both sales and management in relation to car sales.

198. Ms. Bishop testified that if an employee was currently a sales associate, the employee could be placed on a program as a manager-in-training for six months, on the basis that they would spend a few weeks in every role in the department. Outside hires would be placed in the training program for one year, learning the various departments.

199. Ms. Bishop and Mr. MacLeod both denied that the Complainant had been employed as a manager-in-training. Ms. Bishop testified that, if the Respondent takes on a manager-in-training, a contract is signed to this effect. Ms. Bishop testified that there was no such contract signed with the Complainant. They both testified that they had not had any discussions with the Complainant about her progressing to a management position.

200. Ms. Bishop testified that it was very important for a person to have sales experience in the role of Sales Manager, as that position is responsible for effectively managing the other sales associates. She testified that it would be unusual for the Respondent to hire a Sales Manager who did not have sales experience.

201. The Respondent's position is that the reason that the Complainant was not successful in obtaining the Sales Manager position was not because of her race or colour but because she was not qualified for the position. It also cites its concerns with her performance, including her poor attendance record.

202. Ms. Bishop testified that the Complainant applied for the Assistant Warehouse Management position in the summer of 2007. The Complainant had actually applied for the Warehouse Management position. However, the posting for that position had closed before her letter of application was received. Ms. Bishop said that she discussed the Assistant Warehouse Manager position with the Complainant. She informed the Complainant that the schedule would involve more hours and that the position required working weekends and evenings more often than for sales. She also expressed the view that the salary might be less than what the Complainant expected. Ms. Bishop testified that, in discussing this with the Complainant, they both concluded that she was not interested in the position. Ms. Bishop testified that this is why the Complainant was not the successful applicant for that position.

203. Mr. MacLeod testified that the Complainant wanted to move ahead in the company. Mr. MacLeod did not specifically think that the Complainant was in training for a management role. To his knowledge, no one had told her this. He was aware that she had applied for the Warehouse Manager position and was not successful. He testified that it was his understanding that the position involved "different hours all together" and, in the end, she did not want to pursue it.

7. *Comments of Bishop – Contessa/Biotch*

204. The Respondent's position is that Mr. Bishop does not and has never worked for Leon's. The Respondent did not call Mr. Bishop to give evidence.

205. Ms. Bishop testified that her husband may have called the Complainant "Contessa". She says that in the discussions she had with her husband, he suggested that this was in the context of "Garnetta" versus "Contessa", as they sound similar, and he was not sure of the Complainant's name. Ms. Bishop alleges that the Complainant never raised this as an issue with her at the time.

206. Ms. Bishop also testified that she discussed with her husband the use of "black lingo" after the complaint was filed. She said that he was confused about what it was and what he was supposed to have said that was black lingo. She recalls them attending the social event referred to by the Complainant. She says that she does not recall black lingo being used by her husband and she does not recall him saying the word "biotch".

207. Mr. MacLeod did not recall any discussion with the Complainant about Mr. Bishop calling her "biotch". He recalled the event in question but did not recall there being any uncomfortableness at the time.

8. *Comments of Hopkins on the Complainant's Hair*

208. Mr. Koutros and Mr. Hopkins were not called to provide evidence respecting the incident in which Mr. Hopkins allegedly touched the Complainant's hair and made derogatory comments about its texture.

209. Charlene Grose testified that the Complainant often wore her hair in different styles. Ms. Grose recalls that she and other employees were admiring the Complainant's hair style. She testified that Mr. Hopkins was told by the Complainant that he could touch it. He did and said it felt different then he thought. She testified that he said it felt like "phentex". Ms. Grose says she does not recall the Complainant having a negative reaction to this and that she did not think it was a negative comment, just a description.

210. Mr. MacLeod did not recall having any discussions with the Complainant respecting this issue at the time.

9. *Being Called "Sunshine"*

211. The Respondent says that the use of the word "Sunshine" was used as a greeting or a term of endearment in the store in the nature of "good morning, Sunshine". The Respondent states that this greeting was not uncommon in the store and was used by Mr. Hopkins and others. Both Ms. Bishop and Mr. MacLeod testified that they were not aware that the term "Sunshine" was a racial term. Ms. Bishop testified that she had often used "Sunshine" as a greeting herself. Mr. MacLeod testified that it was a term his mother used towards him.

212. The Respondent submits that the evidence shows that this greeting was not used exclusively with the Complainant but was, in fact, commonly used within the store. It also points to the fact that the Complainant did not bring forward concerns about the use of this term during her employment. The Respondent submits that it would be unreasonable for the Complainant to suggest that Mr. Hopkins or other employees ought to have recognized that "Sunshine" was a racial term when the Complainant herself was unaware of this. Ms. Bishop testified that once she became aware that this was an inappropriate term, the sales associates were advised that this greeting was no longer to be used.

213. Charlene Grose testified that she recalls Mr. Hopkins using the term "Sunshine". She says that he did so in an affectionate manner. She never felt that Mr. Hopkins used this in a negative way. Ms. Grose noted that he used the term more with women. She did not recall Mr. Hopkins using that word in relation to the Complainant. She testified that she did not hear other people use that term.

214. Ms. Grose described Mr. Hopkins as "good-hearted". She said that he may have said things before thinking, but not in malice. She does not recall Mr. Hopkins making any inappropriate comments or saying anything inappropriate to anyone.

10. *Being Called Condoleezza Rice*

215. Mr. MacLeod confirmed that the use of this term came up during the investigation he conducted. He testified that Mr. Hopkins told him that he and the Complainant went back and forth, with him calling her "Condoleezza Rice" and her calling him "George Bush".

216. Charlene Grose recalled an instance where she and other employees were in the sale lounge. She testified that Mr. Hopkins said that somebody looked like an actress on Coronation Street. She said that the Complainant asked him who she reminded him of and that he identified Condoleezza Rice. She said that there were at least four or five people in the sales lounge at the time and that they were joking around. Ms. Grose testified that she thought that this was a compliment, as Condoleezza Rice is a powerful black lady. She expressed the view that the Complainant is like Condoleezza Rice in that she is assertive and confident. She stated that Mr. Hopkins may have called the Complainant Condoleezza Rice after that, but that she could not recall specifics.

217. The Respondent submits that the Complainant and Mr. Hopkins had been talking about movie stars and had compared each other to Condaleezza Rice and George Bush. The Respondent submits that there is no evidence that this was a racially motivated term or conversation. It submits this was simply a response to a question about resemblance and, in Mr. Hopkins' view, Ms. Cromwell resembled Condaleezza Rice. It submits the fact that Ms. Rice is also black does not make this comment inappropriate and cannot form the basis of an allegation of racism in the workplace.

218. No specific evidence was made available by the Respondent respecting Mr. Hopkins' use of the term towards the Complainant on the sales floor in front of customers.

11. *Referring to Female Managers as Bitches*

219. In her testimony, Charlene Grose acknowledged that Mr. Hopkins would call the managers "bitches". She said that he would giggle and sometimes say it in front of them.

220. Ms. Grose indicated that Mr. Hopkins was a warm person, and that while other people could not have gotten away with that, it was his intention behind the comment that mattered. She expressed her belief that the way the person receiving the comment takes the comment did not really impact on whether she thought the comment was sexist. She stated, "You had to know our group". She clarified that they worked in a predominately male group. In her view, Leon's had a very jovial environment. She described it as "not the typical environment".

12. *Being Called Contessa*

221. When Mr. Hopkins was eventually interviewed by Mr. MacLeod, he admitted calling the Complainant "Contessa". He indicated that he thought it meant "princess". Mr. MacLeod indicates that Mr. Hopkins said that he meant it as a positive greeting. He also is reported as indicating to Mr. MacLeod that he had called other associates "Contessa" as well. No further evidence was provided respecting the extent to which this term was applied to other sales associates.

13. Being Told it was Time for a Lynching

222. Ms. Bishop testified that she and Mr. Koutros were in the office having a conversation. She recalls that Brent Hopkins, Kim Hennigar and the Complainant were standing in a group by the door. She testified that she was not paying a lot of attention to them. She denied hearing the lynching comment herself and indicated that no one brought it to her attention. Ms. Bishop testified that she does not recall anything out of the ordinary in the Complainant's reaction upon entering the office for her performance review. She says that the Complainant did not mention the lynching comment to her.

223. Ms. Bishop testified that her understanding was that "lynching" meant hanging by the neck. She said that she looked it up after this whole ordeal. She understood that the word "lynch" may have come from a gentleman's name ("Lynch") but in what context she could not recall. She believes that the term may have evolved.

224. Ms. Bishop stated on direct examination that it was not her understanding that lynching was related to the black community. However, she would not consider the comment to be appropriate. She expressed the belief that, "when you are in a position of supervising another person, if you indicate that your actions are threatening, regardless of your intent, it is not appropriate". She agreed that anyone would find the comment offensive. Ms. Bishop testified that, from her personal standpoint, she could not imagine hearing that comment and not responding to it, especially in the circumstances. She says that she would have asked Mr. Hopkins what he intended.

225. On cross-examination, Ms. Bishop allowed that she could not deny that she was aware that there was a link with black communities.

226. Ms. Bishop testified that Ms. Hennigar initially did not tell her that she had heard the lynching statement made by Mr. Hopkins. She testified that after receiving the Complainant's letter of resignation, she asked Ms. Hennigar "if she had heard anything racial". Ms. Hennigar said that she did not. Ms. Bishop testified that they did not know what the alleged comment was at the time of the Complainant's resignation, as her letter only stated that she was resigning because of a racial comment made by Mr. Hopkins. When Leon's knew what was alleged to have been said, Ms. Hennigar was asked again. Ms. Bishop testified that Ms. Hennigar confirmed that she did hear the comment. This is reflected in the statement Ms. Hennigar prepared for the Respondent.

227. Ms. Bishop pointed out that Ms. Hennigar did not report overhearing the comment to management. She testified that it would have been Ms. Hennigar's responsibility to report it. Ms. Bishop indicated that Ms. Hennigar was not disciplined as a result. She stated that "she did not know that Ms. Hennigar needed to receive some form of harsh discipline". She indicated that Ms. Hennigar truly felt badly about not having the foresight to see what this led too.

228. Ms. Bishop was asked on cross-examination about Ms. Hennigar's statement of May 14, 2008 in which Ms. Hennigar wrote that, after Mr. Hopkins made the lynching comment, she observed that "Garnetta was in the doorway and turned to leave and walk out". Ms. Bishop agreed that if the statement was correct about the Complainant's reaction to the comment, it could suggest that she was unhappy.

229. Although Mr. Hopkins was not made available as a witness, the Respondent submitted a written statement that was prepared by Mr. Hopkins on May 16, 2008. In that statement he denied making any offensive statements at the Complainant's performance review. He challenged the validity of Ms. Hennigar's statement on the basis that she changed her story.

230. In its submissions, the Respondent took the position that Ms. Hennigar's evidence is questionable, as she initially stated that she did not hear the lynching comment and then changed her evidence to say that she did during the course of the investigation of the complaint.

231. Mr. MacLeod recalled the Complainant calling him around the time of her performance review but his recollection was very hazy about when this occurred. He was certain that she did not tell him about the lynching comment because "it would get you off of your chair in a few hours or the next day to look into it".

14. _Summary of the Respondent's Position Respecting Disciplinary Actions_

232. The Respondent submits that the evidence establishes that:

> *(i) Leon's expects its employees to attend work for their regularly scheduled shifts and will discipline employees for failing to do so. Ms. Cromwell was disciplined for failing to come to work when scheduled.*
>
> *(ii) Leon's has established policies for swiping in and out when leaving the building and will discipline employees for failing to do so. Ms. Cromwell was disciplined for leaving the building for over two hours during her shift and not swiping out.*
>
> *(iii) Leon's has policies in place for resolving complaints between employees.*
>
> *(iv) Leon's has policies in place for customer service and considers customer service and accurate delivery date estimates to be important for its business and will discipline employees for failing to follow these policies. Ms. Cromwell was disciplined for failing to follow this policy.*
>
> *(v) Ms. Cromwell had a history of attendance problems and these were noted in her performance reviews. She was disciplined for failing to come to work.*

233. The Respondent submits that the Complainant had serious attendance problems, demonstrated a complete lack of respect for store policies, had performance issues and that there was a real concern about her commitment to work. It alleges that the Complainant had been warned about these issues on several occasions prior to her

resignation in 2008. The Respondent submits that there is no evidence to establish that the Complainant was treated differently because of her race or colour.

Findings Respecting the Allegations

1. *January 6, 2008 Discipline*

234. The significant issue in relation to the January 2008 disciplinary incident is whether Ms. Cromwell was treated differently in terms of disciplinary response, compared to other employees. Very minimal evidence was available to the Board respecting the Respondent's application of its progressive discipline policy. There were no other examples provided of employees failing to follow store policy in requesting time off work or for failing to report for work, or for failing to swipe out. One employee had been suspended for coming to work under the influence. Another suspension was issued when an employee failed to wear a mandatory safety harness. I note that the policy required at least a suspension in that event.

235. The Respondent questions the Complainant's evidence that one or more sales associates were allowed to go home early on January 5, 2008. While it may not be usual for employees to be sent home early, the Respondent offered no evidence from anyone who was present on January 5, 2008 to contradict the Complainant's testimony that Mr. Hopkins allowed one or more sales associates to go home early that day or had indicated he might do the same thing on January 6, 2008. I accept the Complainant's evidence on this point.

236. The Complainant's un-contradicted testimony is that she called Mr. Hopkins on the morning of January 6, 2008 before her shift started and that Mr. Hopkins called her back later that morning. The store opened at twelve noon. I find that the telephone message and the subsequent telephone conversation between the Complainant and Mr. Hopkins occurred during the morning of January 6 prior to the opening of the store at twelve noon and prior to the need for Ms. Cromwell to report to work.

237. I find, as fact, that Mr. Hopkins did not instruct the Complainant to come to work for her shift at twelve noon. He told Ms. Cromwell to report to his office when she came to work for her next shift and that she would be written up. Ms. Cromwell's evidence on this point was credible. It is also consistent with Mr. Hopkins' notes as recorded on the written warning.

238. I also find as fact that it was a slow day in the Respondent's furniture department on January 6, 2008. Ms. Cromwell's evidence in reply was to point out that the documents Ms. Bishop provided, showing store sales on January 5 and 6, 2008, demonstrated that the sales were high in electronic sales, but not home furnishings, which is the department the Complainant worked in. I find that these documents tend to corroborate the Complainant's version of events.

239. I have considered evidence offered by the Respondent that shows a lack of precipitation in Halifax on January 5 & 6, 2008. Having carefully considered the evidence of the Complainant and all of the other contextual evidence that was provided, I have concluded that the Complainant was simply incorrect in recollection on this point given the passage of time. I believe her accounting of a slow day/snow day has become tilted in favour of a snow day as opposed to a slow day, as a snow day would be a more compelling and

legitimate reason for her to wish to stay home. However, whether it was snowing or not, furniture sales were slow on January 5 and 6, 2008. There is no evidence that any effort was made to replace Ms. Cromwell on the sales floor.

240. I was not persuaded by the evidence given by Ms. Bishop respecting what Mr. Hopkins intended when he told Ms. Cromwell that she would be "written up". I accept that Ms. Bishop interprets the phrase "written up" in the manner she does; however, she is not in a position to offer anything other than a theoretical interpretation of what Mr. Hopkins meant by the words he used. I prefer to ascribe a more typical meaning to Mr. Hopkins' reported words. I find, therefore, that the Complainant had a reasonable expectation that, when she returned to work, she would be given a written document that would be intended to serve as a warning to her. That a warning was intended by Mr. Hopkins at the time of the telephone conversation with the Complainant is consistent, as well, with the Respondent's progressive discipline policy and the fact that the Complainant had no prior disciplinary record at this time, only a few notes in her personnel file about having been spoken to about customer/sales related issues.

241. To justify the reasonableness of the Respondent's decision to suspend the Complainant in addition to the written warning, the Respondent relies upon its assertion that the Complainant had a poor attendance record, performance issues and did not have any regard for her job. I cannot accept the Respondent's characterization of Ms. Cromwell as an employee with serious attendance issues, the implication being that she was an employee with a history of regularly making a choice to not come to work. The Respondent did not provide documentary evidence to identify specific lengthy or frequent absences or the reasons for the absences, with one exception, which I will address below. The evidence was that her absences were all approved at the time. There is no documented evidence of any disciplinary record respecting missed days or any chronic absenteeism problem. No comparative information was made available respecting the average attendance of other employees to which Ms. Cromwell's attendance was compared and found to be lacking.

242. The evidence was that the Complainant had three significant bereavement leaves which were granted by the Respondent in 2005 and 2006. She subsequently took sick days due to either her daughter being sick or related to her mother having serious health issues. While the Respondent appeared to doubt the validity of these absences at the hearing, there is no evidence that it did so at the time. There was no evidence that any of the Complainant's absences were a deliberate choice to avoid reporting to work.

243. The Respondent produced a document covering the period January 2007 to May 2008 that showed that the Complainant took 56 hours of sick time, which roughly approximates six days. That does not appear to be excessive over the period in question.

244. The Complainant had recorded 64 hours of personal time, or eight days. Two of those days were the suspension in January and most of the rest would have related to her being granted leave to travel and failing to return to work just before she resigned in May 2008.

245. In my view, the Respondent over-stated the attendance issue. As well, I do not see an evidentiary basis for Ms. Bishop's opinion that the Complainant was not committed to her job prior to the events that occurred between January and May 2008. The fact that her probation was extended most likely reflects her lack of prior sales experiences. It does not, on these facts, equate to a lack of commitment to her position.

246. The Complainant acted presumptively, wrongly and contrary to the applicable policy, in not seeking approval from management in advance. However, she did call Mr. Hopkins in the morning to explain her intentions in an honest manner. She offered to come into work if she was needed.

247. The store did not open until 12:00 pm. It was open to Mr. Hopkins to have told the Complainant to come into work or be disciplined. I find that Mr. Hopkins did not tell her to come into work; he did not tell her that she was leaving him short-staffed. First, he complained about the Complainant leaving a message like that. Then he said, "Fine, come to my office at your next shift because you are going to be written up". I have concluded that Mr. Hopkins was upset by the fact that the Complainant did not check with him first, but that he was not particularly bothered that she did not come into work.

248. Mr. Hopkins' warning notice, written at the time, corroborates the Complainant's reported statement that she stated that she would come in if she were "really" needed. Mr. Hopkins' omission in not telling the Complainant to come into the store, in my view, effected the Complainant's self-assessment of the extent of trouble she was in. Having to some extent let the Complainant "off the hook", so to speak, a reprimand for her transgression would have been a more appropriate disciplinary outcome and would have been consistent with what she was told over the phone.

249. In my view, the two other examples of employee suspensions are not, on their face, similar to this incident and constitute more serious infractions of the rules in the workplace.

250. I conclude that a two day suspension, without pay, for a first time offence in these circumstances is harsh. I also find that the suspension is contrary to what Mr. Hopkins told Ms. Cromwell would occur at the time. I find that the Respondent retroactively changed its decision respecting discipline. There is no evidence of any similar disciplinary approach being taken against any other employee.

251. I conclude that this incident demonstrates that the Complainant was treated differently from other employees. The Respondent, in general, appears to be quick to assume that the Complainant was not committed to her work and has tried to portray the Complainant as a poor employee based on the documentary record of the performance reviews in 2007 during her probation period and the October 2007 review. The Respondent confirmed the Complainant as a permanent Sales Associate in July 2007. I note that the Complainant's testimony and her earlier work history suggest that prior management had great faith in her.

252. The Respondent has not offered any compelling evidence to suggest that there was a valid business reason to impose a harsher than normal discipline in this instance. While the Respondent submitted that the business would fall apart if all the employees decided they could determine when they came to work, this is not a situation where multiple employees made such a decision. This is one instance of bad judgment by Ms. Cromwell, not a generalized problem within the workplace that needed to be addressed with extra vigor, to set an example. As well, the Respondent has not called Mr. Hopkins as a witness to refute the Complainant's evidence that, in hindsight, she believes that race was a factor in her differential treatment. Accordingly, this incident will be considered in the context of determining whether the Respondent discriminated against the Complainant.

2. *Switched Shifts and Alleged Second Disciplinary Action for Not Swiping*

253. The Respondent denies that the Complainant had a switched shift taken from her and that she was required to work on the Saturday of the Easter weekend. In my view, if the Complainant was either not scheduled to work on the Saturday of the long weekend or did not work the Saturday of the long weekend, the Respondent should have been able to produce records to demonstrate that. Accordingly, I accept the Complainant's evidence that she was required to work the Saturday after she had been given approval to have the day off.

254. The fact that there was no form related to a switched shift in the Complainant's personnel file does not lead to the conclusion that this incident did not happen. There are many reasons why a document may not make its way into a personnel file.

255. I also find that Ms. Hennigar's evidence about Leon's need to remind people about swiping in and out tends to corroborate the Complainant's evidence that the swiping in and out policy was not strictly enforced. I have reached a similar conclusion with respect to Ms. Grose's testimony that the policy was not so strictly enforced when she was a sales associate.

256. Ms. Bishop testified that other employees had been disciplined for not swiping out. However, no specific evidence was presented regarding any other employee being disciplined for not swiping out. Ms. Hennigar could not recall any discipline for this. She only recalled speaking to employees who were late.

257. The only evidence presented specifically respecting enforcement of the policy was a memorandum that was written to all employees by Ms. Bishop in September of 2008, which reminded all employees about the importance of swiping out. This document was prepared months after the Complainant's resignation. In the circumstances, I find that the policy, as it applied to sales associates, was not strictly or uniformly enforced.

258. I cannot accept the Complainant's evidence that three other employees did not swipe in and out on March 20, 2008. The Complainant appears to have made an assumption. The time cards confirm that they did swipe out.

259. In my view, taking away a switched shift constituted a disciplinary action. Requiring the Complainant to work on the Saturday, after she had been granted the day off, was an unreasonable form of discipline in the circumstances. There is no evidence to suggest that other employees were forced to work on a day they were pre-approved by management to have off. This constitutes differential treatment of the Complainant by the Respondent and will be considered in the context of ascertaining whether there was discrimination.

260. I conclude that the Complainant was disciplined twice for the same misconduct, first, by having her switched shift taken away and, secondly, by imposition of a written warning. The Respondent provided no satisfactory explanation as to why a doubled discipline was administered. Accordingly, this incident will be considered as an example of the Complainant receiving differential treatment.

3. *Not Having an Explanation of Whereabouts Believed*

261. In my view, the concern expressed by the Complainant as a result of Mr. Hopkins looking for her on a smoke break and not believing her explanation is not evidence of differential treatment. It is clear from the Complainant's evidence that Mr. Hopkins did not see her outside, which likely accounts for his reaction in not accepting her statement that she was outside.

4. *Customer Complaint and Losing Credit for Sales*

262. The Complainant lost credit for this sale and her commission as a disciplinary action on the basis of a customer complaint that was handled by Mr. Hopkins around the Easter weekend in 2008. No specific evidence was offered by the Respondent with respect to this issue. Accordingly, there is no evidence to refute the evidence offered by the Complainant or to account for why the Complainant lost credit for the sale, as opposed to receiving a written warning or some other standard form of discipline.

5. *Dispute with Ron MacKenzie & Losing Credit for Sales*

263. There is no evidence to refute the evidence offered by the Complainant respecting her disputes with Ron MacKenzie and Mr. Hopkins's resolution of those issues. From my review of the provisions in Leon's Sales Associates Training Manual respecting "Floor Rules" and the "Turn System", it appears that the rules with respect to repeat customers allow for the customer to state a preference for the sales associate they wish to have assist them. It is also expressly forbidden for a sales associate to discuss a disagreement with another sales associate on the sales floor.

264. The Complainant discussed her concerns over being treated unfairly over commissions with Mr. MacLeod. Mr. MacLeod testified that the Complainant appeared to understand the turn system rules. I do not have the benefit of Mr. Hopkins' explanation of how he resolved these disputes but it seems clear that he did not clearly explain to the Complainant why he resolved the disputes between the Complainant and Ron MacKenzie in the manner in which he did. The Complainant's concerns seem to have at least some validity as the Respondent's policies contemplate such an explanation being provided to the sales associate. As well, Mr. MacKenzie received credit for a sale after starting an argument with the Complainant on the floor.

6. *Consideration for Management Positions*

265. The Respondent seemed to suggest that the Complainant was somehow not being truthful in her evidence when she testified that her transfers to different positions under the supervision of John Papailliados helped encourage and position her to eventually move into a management position. Mr. Papailliados was not called as a witness with respect to discussions he had with the Complainant about her career progression. The fact that such discussions did not occur with Ms. Bishop or Mr. MacLeod does not mean that the Complainant was not encouraged by Mr. Papailliados.

266. Based on my assessment of all the evidence respecting this allegation, the Complainant was discouraged by Tammy Bishop from applying for both the Sales Manager position and the Assistant Warehouse Manager position. With respect to the latter, the Complainant's application coincided fairly closely with her approval as a permanent Sales

Associate in July 2007. I cannot conclude that her probationary status should have held her back from consideration. Furthermore, she had previously held the position of Delivery Supervisor where she had reported to the Warehouse Manager. By the letter of application, the Complainant knew that the position paid less and was accepting of that fact. She was already working weekends and some evenings as a Sales Associate.

267. The reaction to the Complainant's expression of interest, namely, that, "with her personality, she belonged on the floor", would have been discouraging to a reasonable person. It is understandable that the Complainant let the matter drop. She had her answer. I am not persuaded that there was a sufficient reason for Ms. Bishop to not have at least considered her application. It is reasonable to conclude that applications for positions are normally considered. There was no evidence otherwise. Accordingly, I conclude that the Complainant was treated differently than other applicants.

7. *Comments of Bishop – Contessa/Biotch*

268. The Respondent is under an obligation to provide a healthy work environment and that includes ensuring that its employees are not subjected to discriminatory comments at work-related social functions, whether by other employees or guests. The law is clear in this respect. (See, for example, the *Laskowska* decision referenced at a later point in these reasons).

269. Mr. Bishop was not called to give evidence to refute the Complainant's allegations that he had called her "Contessa" and referred to her as "Biotch". I was provided with hearsay evidence by Ms. Bishop regarding what her husband told her.

270. Ms. Bishop testified that her husband may have called the Complainant "Contessa" because he got her name wrong. Ms. Bishop testified that her husband suggested that "Garnetta" and "Contessa" sounded similar. I find that difficult to accept. The names are not similar.

271. I find the Complainant's evidence to be credible with respect to her having been called "Contessa" and "Biotch" by Mr. Bishop. I draw an adverse inference from the failure of the Respondent to call Mr. Bishop as a witness and assume that his evidence would not have been helpful to the Respondent's case. It is also of concern that both Mr. Bishop and Mr. Hopkins independently, of one and other, called the Complainant "Contessa". The name "Contessa" is not a common name.

272. Referring to the Complainant as "Biotch" in "black lingo" is an overt, albeit indirect reference, to the Complainant's race. It was objectively offensive for the Complainant to have been addressed in this manner by a guest of the Respondent. There is no evidence offered by the Respondent to suggest that any of the managers present responded to address the unacceptability of this with Mr. Bishop.

8. *Comments of Hopkins on the Complainant's Hair*

273. I do not accept Ms. Grose's evidence. I found Ms. Grose to be quite biased in her assessment of Mr. Hopkins. I do not believe that Mr. Hopkins used such a distinctive word as "Phentex". Mr. Hopkins admitted using the word "wool" and touching the Complainant's hair when he was interviewed during the subsequent investigation.

274. There is presumptive over-familiarity in Mr. Hopkins' conduct in touching the Complainant's hair without any prior discussion and consent. This is not conduct typical of an employer-employee relationship. The Complainant is entitled to work in an environment where the integrity of her personal space and physical person is respected by her manager.

275. I accept the Complainant's testimony with respect to her recollection of Mr. Hopkins' likening her hair to wool and referring to "a sheep missing its wool" as being credible. Mr. Hopkins did this once in the sales office and then, although the Complainant walked away from him, he followed her out on the sales floor and repeated his behaviour. Mr. Hopkins was clearly ridiculing the texture of the Complainant's hair, not complimenting her, in stating that "somewhere a sheep is missing its wool". It was reasonable for the Complainant to feel that she was being ridiculed and to have been impacted negatively by this experience. I find that Brent Hopkins' actions and statements in reaction to the Complainant having dreadlocks in her hair was disrespectful of her person in a manner related to her race and was overtly and objectively offensive.

9. <u>Being Called "Sunshine"</u>

276. The term "Sunshine", when used as a greeting, is not commonly known to be a slur or insult. In my view, it is not reasonable to impute knowledge of a word's racial connotation to the Respondent when the Complainant is unaware of the connotation. There is no evidence that the Respondent was aware and I cannot conclude on the basis of the evidence that it ought to have known of the connection to race.

277. The Complainant was not initially negatively impacted by the use of this term. Once she learned of its connotation in history, it was incumbent upon her to educate Mr. Hopkins or other members of management by sharing the information she received from her mother. The Complainant did not do so. In any event, there is no clear evidence that the term was directed at the Complainant subsequent to her mother's visit to the store. I decline to find that the use of this term was discriminatory on these facts.

10. *<u>Being Called Condoleezza Rice</u>*

278. I find as fact that Brent Hopkins called the Complainant Condoleezza Rice and referred to her as such while she was waiting on customers. Being likened to Condoleezza Rice is not, in the right context, disrespectful or uncomplimentary. However, being called Condoleezza Rice by one's manager in the presence of customers is not acceptable. The Complainant is entitled to be treated professionally, particularly when dealing with the public. The only obvious similarities between the Complainant and Condoleezza Rice in that moment were the facts that they are both black and they are both female. The Complainant is entitled to do her job without her manager, in effect, pointing out to her customers that she is a black female. In my view, this is an example of a very subtle but nonetheless corrosive form of disrespect. There is no evidence that other sales associates were addressed by the manager with anything other than their proper name in the course of their interactions with customers. The Complainant is entitled to an equal degree of professionalism.

11. Being Called Contessa

279. The Respondent's investigation disclosed that Mr. Hopkins called the Complainant "Contessa" on a number of occasions. I am not satisfied on the evidence that Mr. Hopkins called other employees this, as well. I conclude that Mr. Hopkins singled out the Complainant for use of this name.

280. The Respondent submits that "Contessa" means "Italian royalty". It would have been helpful to have had expert or additional evidence on the issue of whether "Contessa" is a racial slur or has a connection with race independent of its use in this case. I am hesitant to find that "Contessa" is a *prima facie* racial slur based on the evidence of the Complainant alone, as I was unable to locate confirmatory evidence of the use of this name specifically in the context of house slaves in the southern United States during slavery. It is recognized, however, that it was common practice for slave owners to call slaves by names that they selected for them, rather than by their actual African names. Names were often taken from significant figures in society, in juxtaposition to their reality. The Complainant may be correct. However, in my view, the evidence respecting this name and being a racial slur is insufficient. I conclude that it is not necessary to determine whether the term has the capacity to be a racial slur, as I find it objectionable on other grounds.

281. If one accepts Mr. Hopkins' reported explanation to Mr. MacLeod that he thought the term meant "princess", it was inappropriate for him, as the Complainant's supervisor, to refer to her by that nickname in the workplace. Calling the Complainant "Contessa" would reasonably be perceived by others as an indication that the Complainant was or was acting like a "princess". It could suggest to co-workers that Mr. Hopkins perceived that the Complainant thought that she was entitled to special treatment or that he would give her special treatment. The Complainant was the only female African-Canadian working as a Sales Associate for the Respondent. In this context, the nickname was objectively offensive by undermining respect for her at a time when she worked in a highly competitive environment on the sales floor. In my view, the Complainant's experience in being singled out by her manager in this manner contributed to her growing perception that her working environment was not free of harassment.

12. Being Told it was Time for a Lynching

282. I find as fact that Brent Hopkins paged the Complainant to attend the performance review and greeted her in the presence of three other managers with the statement, "Everybody out. It's time for a lynching." I conclude that this statement was more likely than not heard by the other managers in the room. The room that the performance review was conducted in was not that large. Mr. Hopkin's comment successfully directed two managers in the room to leave immediately, namely Paul Koutros and Kim Hennigar. If they heard the request that they leave, they likely heard the comment that accompanied it.

283. In keeping with the probabilities in the circumstances, I conclude that Ms. Bishop heard Mr. Hopkins' statement. As one of the two people about to commence a performance review, one would expect her to have a heightened awareness of the Complainant's eminent arrival and her actual entrance into the office. There is no evidence of anything occurring in the room that would have been such a distraction that it is reasonable to presume that the comment was not heard by her, when it was heard by the Complainant, Ms. Hennigar and Mr. Koutros. It is more consistent with the circumstances and all of the

evidence that Ms. Bishop does not recall hearing the comment, because she did not perceive the statement as being notable at the time, than it is that the statement was not made.

284. It is unacceptable for a manager to threaten physical violence as a joke in a workplace. In addition, this was no ordinary reference to violence, such as threatening to strike a person. The nature of the violence referred to, namely "lynching", represents the murder of African Americans on the basis of their racial identity. Lynching is widely known to be one of the means by which white southern slave owners exerted control over African-American slaves, who were treated as sub-human and as a commodity. That the comment arose in the context of a performance review underscores the economic and power differences between the managers present and the Complainant as an employee, dependent upon them for her continued employment.

285. While the *Act* is clear that the intention of the person who makes discriminatory or racist statements is irrelevant, as a "joke" it was not without the sting of truth. The Complainant had been suspended and had received several warnings by this point in time. She believed that she had been repeatedly treated unfairly and been subjected to unreasonably harsh disciplinary outcomes by Mr. Hopkins and Ms. Bishop. It was reasonable for her to take the comment seriously, irrespective of the fact that subsequently no significant issues were identified to her at the time of her review. In my view, the statement harmed the Complainant's self-identity at its core on the basis of her race. Its hurtfulness was exacerbated by her recent experiences with Mr. Hopkins and Ms. Bishop. The comment is objectively offensive and constitutes direct discrimination under the *Act*.

286. The Respondent has emphasized the legal burden upon the Complainant to have voiced immediate objection to what she experienced as racial discrimination. I cannot accept the Respondent's submission that the Complainant was under an obligation to voice objection to what was an objectively offensive comment associated with her race. It should have been perceived and understood by the managers present to be objectively offensive and to have a racial connotation.

287. In the event that I am incorrect on this point, the Complainant's body language in reaction to the remark, as observed by Kim Hennigar, suggested offence was taken at the time. That is sufficient expression of objection in the circumstances. That the Complainant proceeded with the performance review does not diminish or erase the offensiveness of Mr. Hopkins' statement.

288. Before leaving this point, I will address the Respondent's submission that the term "lynching" is not objectively and overtly a reference to the lynching of slaves. The Respondent offered as evidence of this that none of the managers present identified the statement as being racial or discriminatory. Both Kim Hennigar and Tammy Bishop testified that "lynching" was associated with lynching in the American West.

289. That such an association would exist in their minds, without including knowledge of its association with slavery in the Southern United States, is not evidence that I can reasonably accept; nor am I persuaded that this "old west" association was in the minds of these managers when the statement was made in their presence to a person who was visibly an African Canadian. The premise that the word "lynching", when used in relation

to a person of African descent, would only be associated with a stereotype from the Wild West, is not credible.

290. Ms. Hennigar was asked during cross-examination by the Commission how she could not know that lynching had this more relevant meaning than that suggested by the Respondent. When it was put to her that way, Ms. Hennigar acknowledged having knowledge of this other context. Ms. Bishop, as well, acknowledged an awareness of the connection with the black community under cross-examination by Commission counsel.

291. The Complainant observed two of the managers react by leaving the room. It was reasonable for the Complainant to conclude that Mr. Hopkins' comment was heard by all the managers and for her to be negatively impacted in that moment by their lack of objection or reaction.

292. I find that the Complainant's reaction, that she felt that her career with the Respondent was over, fell within the range of what is a reasonable reaction to this event, due to the offensiveness of what happened. There was a moment when the lack of reaction by members of management broke the bond in the employment relationship. The Complainant's reaction was to withdraw internally and become focused on concerns about her health, well-being and her economic self-preservation, rather than reporting the event to managers who failed to recognize or to acknowledge it as a racist and threatening comment when it was said in their presence.

13. *Overall Conclusions Respecting Comments Made within the Workplace Concerning the Complainant and Disciplinary Actions*

293. The perception that a person is not on an equal footing with another can be expressed in very subtle ways and perhaps most effectively by the use of sarcasm and negative teasing. When this occurs in the presence of co-workers, other supervisors or clients, this can have the effect of diminishing the person in the eyes of others in a nuanced but effective manner. As was noted the Nova Scotia Board of Inquiry in *Moore v. Play It Again Sports Ltd.*, 2004 NSHRC 2 (CanLII) at para 5, with reference to *Basi v. Canadian National Railway Co.* (No. 1) (1998) 9 C.H.R.A. D15029 (Can. Trib.), attitudes and perceptions respecting race are rarely trumpeted in the workplace. I have considered the evidence to determine whether it is more probable than not that race is to be inferred as the reason or part of the reason for the differential treatment of the Complainant.

294. I infer from Mr. Hopkins' selection of comments, most particularly the "lynching" reference, the "somewhere a sheep must be missing its wool" in reference to the texture of the Complainant's hair and the clearly inaccurate aggrandizement of the Complainant in names such as "Condoleezza Rice" and "Contessa", that his use of these terms reflect a heightened awareness of the racial differences of the Complainant as a Sales Associate. The Complainant is entitled to work in an environment where her race is not a factor. Disrespectful conduct, while not contrary to the *Act* per se, can lead to an inference of discrimination on the basis of race when the Complainant is treated differently than other employees and possesses a characteristic that is a prohibited ground under the *Act*. In these circumstances, where disrespect is accompanied by an overtly racial threat, whether intended as a joke or not, the case for such an inference is clearly more probable than not. I also find that the on-going negative commentary in the workplace constituted a form of discriminatory harassment based on race.

295. I have found that the Complainant was subjected to differential treatment in the context of disciplinary actions by the Respondent. My overall conclusion from the evidence is that disciplinary action was an infrequent occurrence in the workplace. In the Complainant's case, a series of putative actions were taken by the Respondent. There was a rigor to the imposition of discipline that was excessive in the circumstances. This is particularly so given the reported work environment in which these events occurred. The fact the Respondent has policies and is entitled to enforce them does not provide an explanation for the choice of disciplinary reaction. Without such an explanation, I infer that race was a factor, whether intentional or not, in the differential treatment of the Complainant.

<u>Overview of the Respondent's Submissions Respecting its Obligations as an Employer and Related Findings</u>

1. *<u>Overview of the Respondent's Submissions Respecting its Obligations as an Employer</u>*

296. The Respondent submits that it had no knowledge and could not reasonably have known that the Complainant believed that she was being treated differently due to her race and that it only became aware of her concerns after she resigned from her employment. It says that it acted immediately and appropriately when it became aware of these allegations.

297. The Respondent submits that it met its duty to the Complainant by responding with a reasonable investigation of and conclusion to the complaint. The Respondent submits that the criteria to be applied in determining whether an employer's response is reasonable and adequate in the circumstances is set out in *Laskowska v. Marineland of Canada Inc.* 2005 HRTO 30, at paras. 51-53 and *Murchie v. JB's Mongolian Grill,* 2006 HRTO 33, at paras. 165-168. The Respondent submits that its actions meet this criteria and, accordingly, it should not be required to provide further or any compensation to the Complainant: *Pereira v. Humber River Regional Hospital*, 2012 HRTO 1680, at paragraph 32.

298. The Respondent also referenced the fact that there had been evidence during the hearing respecting the personal relationship between the Complainant and Mr. MacLeod. It noted that it was only during the re-examination of the Complainant that this was referenced as an issue. The Respondent submits that this relationship was not relevant to the issues in this hearing, except that Mr. MacLeod did an extensive investigation to provide the Complainant with the full benefit of the doubt that the allegations were accurate. The Respondent also highlights Mr. MacLeod's evidence that he had no knowledge of these issues, despite having a very close relationship with the Complainant and questions why Mr. MacLeod was not told of these issues at the time.

2. *<u>Duty to Bring Complaint to Knowledge of Employer</u>*

299. The Respondent says that none of the matters raised by the Complainant were brought to the attention of the Respondent prior to the Complainant's resignation in May 2008. Both Tammy Bishop and David MacLeod testified that they were not aware of any racial issues in the workplace and were not aware of the specific allegations in Ms. Cromwell's complaint. The Respondent refers to *Naidu v. Whitby Mental Health Centre* 2011 HRTO 1279, at paragraph 19, which provides that the duty of an employer to investigate and to respond to a complaint of discrimination or harassment requires that "the complaint or concern be communicated by the Applicant or otherwise be known to the Respondent in a

manner sufficient to engage this obligation; and that the substance of the complaint or concern be about some potential violation of the Code".

300. The Respondent submits that the duty upon it to investigate the complaint did not arise until the allegations were raised by the Complainant and that it was not possible for the Respondent to know about the issues prior to that time.

3. <u>Finding Respecting Duty to Bring Complaint to Knowledge of Employer</u>

301. The evidence of the Complainant and Mr. MacLeod confirms that a number of the Complainant's concerns were brought to the attention of the Respondent prior to Ms. Cromwell's May 2008 resignation through discussions the Complainant had with Mr. MacLeod. This includes the Complainant's contact with Mr. MacLeod after she was suspended in January 2008 to complain to him that the discipline imposed was too harsh. Mr. MacLeod acknowledged that he was aware from previous discussions he had with the Complainant that she was upset about being suspended.

302. There is a significant factual dispute concerning whether the Complainant contacted Mr. MacLeod after the lynching comment was made. Given my finding that the lynching comment was heard by the managers in the room, this point is not as significant as initially perceived by the parties. However, I will address it in any event given the importance of this point to the Respondent.

303. The Complainant alleges that she informed Mr. MacLeod of the comment and that Mr. MacLeod once again referred her back to Tammy Bishop rather than taking any action to follow up himself. She testified that she explained to Mr. MacLeod that Tammy Bishop had been present and had not reacted to Mr. Hopkins' statement respecting lynching during the outset of her performance review. At that point in time, Mr. MacLeod as Area Supervisor was the person the Complainant was supposed to contact within the Respondent as per the AVAC policy. The AVAC policy stated that if the Store Manager did not take appropriate action, the next recourse was to the Area Supervisor.

304. Mr. MacLeod testified that he did not hear from the Complainant about the lynching comment, specifically, only respecting her performance review. He testified that he thought from his contact with the Complainant she was fairly happy with her evaluation, although she felt picked on in some areas for being late. He testified that he had told her that she needed to talk to Tammy Bishop.

305. Mr. MacLeod confirmed that he and the Complainant spoke by phone one to two times a week and sometimes once every two weeks, in addition to the time they spent together when he visited the Dartmouth store. He confirmed the Complainant's evidence that she told him about being upset about the way that disputes with sales associates were resolved. He confirmed knowing that she was unhappy about the way her customer complaints were handled. Mr. MacLeod was unable to recollect the particulars of these concerns.

306. Mr. MacLeod also was aware that there were issues of banter between employees. Under cross-examination, he denied having described the banter as "brutal" in a telephone discussion with Commission counsel prior to the hearing, responding that he understood that he would not be required to testify or be challenged by Commission counsel on this point. I found his answer to Commission counsel was deflective of her

question. Given the overall evidence about the employee communication style in the workplace and the evidence from Charlene Grose about the environment "not being your typical environment", I believe that there was significant teasing and banter in this workplace and that Mr. MacLeod was aware of this.

307. Mr. MacLeod's evidence also corroborates that when he was informed of the Complainant's concerns about fairness in the workplace on different occasions, he did not intercede on her behalf. Instead, he referred her (without checking the facts himself) back to store management.

308. It was evident from his testimony that he had investigated other employee complaints at the store level. I am not satisfied that he had good reason to not intercede on the Complainant's behalf in relation to these earlier complaints.

309. I conclude that Mr. MacLeod's evidence corroborates the general nature of some of the issues that the Complainant was upset about. Mr. MacLeod's recollection of his telephone conversations with the Complainant was consistently vague. In the circumstances, I find it more probable than not that the Complainant did contact Mr. MacLeod and shared the information about the lynching comment with him. It is difficult to imagine that she would not have told him about the lynching comment when they discussed her performance review, given the nature of their relationship and the overall pattern of their communications respecting work-related matters.

310. One of the reasons why I find the Complainant's testimony respecting her reporting of issues to Mr. MacLeod is credible is because the Complainant tried to maintain their privacy and to avoid disclosing the nature of her personal relationship with Mr. MacLeod. It was to her benefit in proving her case to have placed this relationship front and centre. From my observations, under questioning by the Commission, she realized reluctantly that she was going to have to explain all the circumstances respecting her communications with Mr. MacLeod to explain why she thought that he would have helped her.

311. I am satisfied on the balance of the probabilities that Mr. MacLeod had knowledge that the Complainant was experiencing an accelerating number of negative experiences at the store, that these incidents suggested growing difficulties with management's decisions respecting her, and that he was informed about the lynching comment by the Complainant shortly after it occurred. He did not react appropriately.

312. In any event, I have made a finding that the "lynching" comment either was known to be or should have been known to be objectively offensive and engaged the Respondent's responsibilities under the *Act* when it was said in the presence of several managers. Ms. Bishop acknowledged that Ms. Hennigar should have reported the lynching comment. In my view, Ms. Hennigar should not be singled out. None of the managers in the room when the comment was made recognized that they had an obligation to address the incident. None of them reacted reasonably when Ms. Hennigar later confirmed that the lynching comment had been made, by recognizing it as at least a potentially racial comment and responding on that basis. Instead, its apparent racial context was downplayed or ignored.

313. As managers, they represent the Respondent. Accordingly, when the Respondent asserts that it had no knowledge, in that none of these matters were ever to the brought to Leon's attention prior to the Complainant's resignation, the Respondent, in effect, advocates a

position which would, if it were accepted, separate the Dartmouth store from the Respondent's Head Office, as if there were a legal boundary limiting responsibility. That is not the law, in my view.

314. The Respondent is taken to be in possession of information within the knowledge of its managers. Even if I am incorrect in finding that Ms. Bishop and Mr. Koutros heard the "lynching" comment at the performance review, and in my finding that the Complainant informed Mr. MacLeod of the comment, Ms. Hennigar witnessed the comment. Accordingly, I impute that knowledge to the Respondent.

315. As held in the *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84, the Respondent is responsible for the actions of its employees. In my view, this is all the more clear where the employee is part of management. Accordingly, I conclude that the Respondent had knowledge of a racial threat or joke sufficient to engage its obligations under the *Human Rights Act* to investigate and take appropriate action. In any event, it is not in dispute that the Respondent had notice that the Complainant perceived she was discriminated against on the basis of race in writing via her letter of resignation in May, 2008 and that the Respondent initiated an investigation as a result.

4. Duty of Employer to Have Reasonable Policies and Awareness of Discrimination in the Workplace

316. The Respondent submits that one of the reasons why it should not be held to be liable for any discrimination which occurred in the workplace is because it had discrimination and harassment policies in the workplace. It says it required its employees to demonstrate their knowledge of its policies when they were hired. It points to its educational efforts with its employees, which includes online training quizzes that must be completed by employees. Since this complaint occurred, the Respondent has offered its employees diversity training, which is to be commended.

317. As indicated, the Respondent relies on the case of *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 as authority for the establishment of three criteria to be used to assess the reasonableness and accuracy of a Respondent's response to allegations of discrimination or harassment. The first criteria relates to policies and awareness of discrimination in the workplace. In this regard, *Laskowska* describes the first criteria as follows:

> *1) Awareness of issues of discrimination/harassment, Policy Complaint Mechanism and Training:*
>
> *Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident?*
>
> *Was there a suitable anti-discrimination/harassment policy?*
>
> *Was there a proper complaint mechanism in place?*
>
> *Was adequate training given to management and employees?*

318. The Respondent submits that the policies that it had in place meet this criteria.

319. A significant amount of evidence was submitted by the Respondent in support of its position on this point, including copies of various policies that were in place at the time these events occurred and an updated harassment policy. As well, Ms. Bishop and Mr. MacLeod testified extensively with respect to the manner in which the Respondent is organized internally, including how responsibility for training and education starts at the Head Office and is played out at the store level with the store's employees. The Respondent submits that its managers and staff were aware of issues of discrimination and harassment at the time the allegations arose.

320. The Respondent's Sales Associates Training Manual was reviewed. It includes a paragraph entitled "Workplace Harassment" which states as follows:

> *Every person who is an associate of Leon's has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another associate because of race, ancestry, place or origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offenses, marital status, family status or handicap. The company has a legal and moral obligation to protect all associates. All concerns are taken seriously and investigated thoroughly.*

321. The Sales Manual also contains a section entitled "Leon's Harassment Policy". This section provides a detailed policy respecting sexual harassment, including a detailed definition of sexual harassment.

322. The Respondent submits that there was a suitable anti-discrimination/harassment policy in place with an appropriate complaint mechanism as demonstrated by its investigation of the allegations. It submits that its managers were properly trained.

5. *Findings Respecting the Employer's Duty to Have Reasonable Policies and Awareness of Discrimination in the Workplace*

323. Having reviewed this evidence, I conclude that the Respondent invested significant effort in the development of policies respecting sales and internal operations and with respect to the issue of safety. The Respondent also developed policies respecting harassment, specifically sexual harassment.

324. However, the Respondent's policies, at the time, were lacking sufficient detail and focus in terms of addressing discrimination. The paragraph referenced above in the Respondent's Training Manual respecting workplace harassment does not mention discrimination. The only specifically relevant message to employees is that race is one of the grounds upon which harassment can occur. There is no definition of discrimination and no definition of harassment that pertains to race. There is no evidence that employees were educated respecting what discrimination is, or more particularly, what discrimination based on race is or, specifically, what they should do if they believe they have been discriminated against, including what they should do if they believe discrimination is originating within management within the store. I find that the policy in place at the time was not an effective discrimination and harassment policy with respect to racial discrimination. To be a reasonable policy, it would minimally require a definition of discrimination.

325. Furthermore, it is apparent from the investigation that ensued that, while some managers in the store had discussed racism at a managers' meeting, none of the employees in the

store had training specifically related to racial discrimination at the time. It is also evident that the topic was not being discussed with employees by management. There appears to have been a marked lack of awareness of this as an issue within the Dartmouth store.

326. I conclude that one of the contributing reasons why the "lynching" comment was not recognized by Ms. Hennigar or other managers as being racial was due to the Respondent's focus on sexual harassment and its lack of effective education of its employees on the important issue of racial discrimination or harassment. To the extent there was training of managers, it appears to not have been effective.

327. The *Laskowska* decision also identified the requirement for an employer to have a complaint mechanism in place to provide a means to address allegations of discrimination. The Respondent relies upon the fact that it investigated the complaint once it became aware of it. It also relies upon the existence of its AVAC policy.

328. The AVAC policy applied to legitimate employees' "concerns" and is general in nature. My concern is that employees would consider it to apply to issues such as operational concerns or sales disputes. It does not describe a specific process of investigation by the Respondent, or address important issues in an investigation of discrimination, such as respecting privacy to the extent practicable.

329. The relevant paragraph in the Training Manual states that all concerns are investigated thoroughly. However, the policy does not specify a complaint mechanism in terms of specifying to whom one should make a complaint of discrimination. This contributes to my assessment that the policy in the Respondent's Sales Associates Training Manual was not a suitable anti-discrimination policy. I recognize that the Respondent established a complaint mechanism once the allegations came to the attention of Mr. Cooney, which demonstrates its intent to address the allegations. However, a complaint mechanism should have already been in place to assist employees in navigating what they should do in such a situation.

6. Duty of the Employer Post-Complaint

330. The Respondent also relied upon the second criteria in the *Laskowska* case used to assess the reasonableness and accuracy of a Respondent's response to allegations of discrimination or harassment. The second criteria is as follows:

> *(2) Post Complaint:*
>
> *Seriousness, Promptness, Taking Care of its Employees, Investigation and Action;*
>
> *If an internal complaint is made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act...*

331. The Respondent also referred to the decision of the Ontario Board of Inquiry in *Murchie v. JB's Mongolian Grill*, 2006 HRTO 33, at paragraph 165-168, which lists various factors to be considered in assessing the reasonableness of an employer's response. One of these factors is to the effect that the response must be prompt. The Respondent submitted that Leon's promptly investigated the allegations of the Complainant by conducting a complete

investigation of the matter within two weeks of the receipt of the resignation letter alleging racist comments and that it took action to ensure that the concerns were dealt with.

7. *The Respondent's Evidence Regarding the Investigation*

332. As stated previously, the investigation was conducted by Mr. MacLeod. Mr. MacLeod did not believe that his relationship with the Complainant impacted his investigation. If anything, he felt that he was "a little more ferocious" in his approach. He was "looking to try to get someone to tell him there was racism". He was personally surprised by the allegations, noting the Complainant has his home, cell and office phone number and could call him at any time and that she had good relationships with the management team. He testified that he really wanted to "drill down into it".

333. Mr. MacLeod testified that to the best of his knowledge, management did not know about the relationship he had with the Complainant. He did not tell anyone at Leon's that he was involved with the Complainant. He testified that he thought it would be good to do the investigation because he knew all of the parties and had a good relationship with everyone in the store, so they would be comfortable. He testified, as well, that he "needed to know what was going on".

334. This was his first investigation of a complaint of racial discrimination. He had investigated two or three harassment cases previously, which he described as being more minor, and complaints he had received as Area Manager.

335. Upon learning of the resignation and reviewing the Complainant's letter, he called the managers present at the Complainant's performance review and asked them if they recalled any racist comments being made. He testified that none of the managers did.

336. He then called the Complainant. He said their conversation was not lengthy. He obtained additional particulars from her respecting why she felt she had been discriminated against. He did not offer any evidence of having taken any notes of their conversation or of what her concerns were. He did not give her any advice, other than to ask her to come in to meet with them. He suggested that the Complainant come in to meet with himself and Tammy Bishop. From the evidence, the intent was to eventually have a roundtable which would include Brent Hopkins. He said that the Complainant did not want to come in and meet with them nor did she want to meet with him outside of the store. He commented that he did not know why she did not want to. That was the last conversation he had with the Complainant.

337. Mr. MacLeod also reviewed the statements from the managers that were obtained by Tammy Bishop. This includes the statement of Kim Hennigar of May 14, 2008, in which she confirmed that the lynching comment was made.

338. The Respondent submitted the affidavits of John Cooney, Corporate Counsel and Secretary for Leon's Furniture and of Terry Leon, President and CEO of the Respondent, in support of its case. Mr. Cooney's affidavit indicated that he was provided with the Complainant's letter of resignation on May 16, 2008 and that he subsequently discussed the matter with both David MacLeod and Tammy Bishop. He deposed that he advised that the matter should be investigated in accordance with the company's policies and procedures. During that discussion, David MacLeod offered to carry out the investigation. Mr. Cooney asked Mr. Terry Leon to review the complaint and advised him that David

MacLeod had offered to investigate the matter. He subsequently provided Mr. MacLeod with sample interview questions that he could use in order to conduct the investigation.

339. To summarize, the questions provided asked the employees if management was effective, if harassment had been witnessed, whether they would use AVAC, whether they heard an racist comments within the store that made them feel uncomfortable, whether they took part in racist discussions or thought racist comments were being made in the store and whether management had discussed racism with them.

340. Mr. MacLeod visited the store on May 26 & 27, 2008 and interviewed 27 employees including 11 of the 25 sales associates, 7 managers, several floor and office associates and three people in the warehouse. He testified that he went in to see if there was "a hint of racism whether it be Brent or anyone else in the store".

341. During his testimony, Mr. MacLeod confirmed that by the time he had conducted the investigation, having spoken to the Complainant, he knew about the lynching comment and her allegations that she had been called "Sunshine", "Condoleezza Rice", and that Mr. Hopkins had made a reference to her new hairstyle in a derogatory way. Mr. MacLeod also wrote in his report that, when he spoke to sales associates during his investigation, it came up that Mr. Hopkins would sometimes refer to the Complainant as "Contessa". Mr. MacLeod also referenced the fact that the Complainant thought that her suspension in January 2008 was unfair in his report.

342. While not referenced in the report, as indicated previously, Mr. MacLeod was aware from earlier discussions he had with the Complainant that she was upset about being suspended. He also knew from previous discussions with her that she had concerns about her interactions with other sales associates in the context of disputes over sales and that she was upset with the manner in which customer complaints had been handled by management. He was aware that there were issues of banter between the sales associates, including banter between the Complainant and Mr. Hopkins, but did not consider it to be mean-spirited.

343. Mr. MacLeod also testified that he knew about the swipe card issue, although he testified that the issue came up after the fact, during the investigation. He indicated in his testimony that he had a few questions about how the decision was made by Kim Hennigar to require her to work her switched shift, given that she had already received a warning letter from Mr. Hopkins. He testified that Kim Hennigar said that as a punishment, the Complainant could not keep her switched shift. Mr. Hopkins gave her a talking to and wrote her up. He testified that these managers indicated that it was a mix-up and that they wanted to make one decision but made two. He had difficulty recalling the details of the information he gathered in this regard.

344. As part of his investigation, he also reviewed store records. He testified that he did not see evidence of anything underhanded in how Mr. Hopkins handled his interactions with the Complainant. He testified that he had no knowledge of Mr. Hopkins making any negative remarks about the Complainant. He indicated that, unless Mr. Hopkins had fooled him, management and sales staff, which he highly doubted, Mr. Hopkins had not been underhanded because his interactions were backed up by his paperwork.

345. Mr. MacLeod testified that staff who were aware of why he was there were shocked and angry and indicated that they had never witnessed any racism in the store.

346. Mr. MacLeod prepared an investigation report which reported his conclusion that, "racism played no part whatsoever in this incident". The following is summary of key points from Mr. MacLeod's report:

- *All managers and sales associates knew why he was there.*
- *All associates were aware of the AVAC Program and have positive expectations or experiences in relation to it.*
- *Support from the entire management team was very high throughout the store.*
- *All associates who were aware of the allegations were shocked and a large number were angry as they all indicated they had never seen any sign of racism in the store.*
- *A number said they never heard the Complainant discuss racism, that she disliked Brent Hopkins, and a few had strong negative feelings towards the Complainant and how she operated on the floor.*
- *Those associates who were unaware of the subject of the complaint said to a person they never witnessed racism or any demeaning behaviour of any sort within the workplace.*
- *Associates who knew why he was there hoped the allegations would be handled appropriately because the allegations were unwarranted.*
- *Two of the individuals interviewed were minorities.*

347. Question 14 asked of the employees was:

> *Have you ever taken part in any racist discussions in the store? If so describe them. Do you think there is anything wrong with these discussions? Did anyone every ask you to stop speaking this way. If so, who?*

348. Upon being asked this question, Mr. MacLellan, a 20 year employee, answered that sales associates had concerns regarding Garnetta joining the floor. There is nothing in the report to indicate that Mr. MacLeod asked Mr. MacLellan to elaborate upon his response to question 14.

349. Another employee, Mr. Gordon, a nine year employee of Leon's, answered in relation to question 14, "Not really". There is no evidence in the investigation report that Mr. MacLeod sought any details from Mr. Gordon respecting this equivocal response.

350. Having concluded that racism played no part in what had occurred, Mr. MacLeod, nonetheless, concluded that Mr. Hopkins occasionally would come out with something that could be construed as unprofessional. He and Ms. Bishop prepared a letter of warning which was presented to Mr. Hopkins by Ms. Bishop in June 2008. That letter stated:

> *As you are aware, we have received a complaint which alleges that certain comments were made within the Dartmouth Leon's Furniture Store which were interpreted as being racial in nature.*
>
> *Leon's Furniture Limited prides itself on providing a workplace which is non-discriminatory and is welcoming to all people. Leon's takes allegations of racism or any other discrimination very seriously and strives to eliminate this conduct from all of our stores. As a result, following receipt of the complaint, we conducted an investigation with respect to the allegations.*
>
> *Please be advised that you are to avoid conduct which can in any way be interpreted as discriminatory, including comments which could be interpreted as racial in nature, regardless of what your intentions may be. This type of behaviour will not be tolerated, and will lead to further warnings, suspensions and/or a review of your employment.*

351. Mr. MacLeod was asked during direct examination if he believed that Mr. Hopkins made any comment of a racial nature and he responded "not in my mind". He testified that he concluded it was not a racist issue. When asked for his personal opinion, he indicated that he believed that the remark was said but in such a way that Mr. Hopkins thought it was a joke.

8. *<u>Additional Submissions of the Respondent Respecting the Reasonableness of the Investigation and Outcome</u>*

352. The Respondent submits that it did the best it could, given the non-participation of the Complainant in the investigation. It submits that Mr. MacLeod's evidence confirms that Leon's conducted a *bona fide* investigation into the Complainant's allegations. The Respondent submits that the investigation properly concluded that there was no racism in the store and that the Complainant was not discriminated against. The Respondent submits that it acted appropriately in the circumstances and should not be required to provide compensation to the Complainant.

9. *<u>Findings Respecting Post-Complaint Conduct of the Employer</u>*

353. I am unable to conclude that the Investigation meets the test in *Laskowska*. In my view, Mr. MacLeod was in a clear conflict of interest. He acted in contravention of his employer's written policy respecting conflict of interest which requires the "ethical handling of actual or apparent conflicts of interest between personal and professional relationships". Employees are directed to avoid actual or apparent conflicts. Mr. MacLeod did not tell anyone about his relationship with the Complainant.

354. I cannot reasonably conclude that an investigation conducted by a manager who has been in a romantic relationship with the Complainant is reasonable or appropriate in these circumstances. I find that this conflict of interest impacted the reasonableness of the findings Mr. MacLeod made and throws into question the *bona fides* of those findings. As well, Mr. MacLeod failed to make findings on key aspects of information in the possession of the Respondent respecting the Complainant's allegations.

355. The relevance of the conflict of interest is amplified, in my view, because there is no evidence of any hands-on oversight or assessment of the investigation by senior management. Mr. MacLeod was, for all intents and purposes, left in charge and determined the outcome.

356. Even if I am incorrect about the relevance and existence of a conflict of interest, I would arrive at the same overall conclusion that there were significant flaws in the investigation. This conclusion is based upon examination of Mr. MacLeod's testimony, the Investigation Report, other documentary evidence and the Complainant's testimony. I also found Mr. MacLeod's evidence on several points to be unreliable or to lack credibility, which has impacted my assessment of the evidence.

357. In my view, Mr. MacLeod did not take into account or place weight on evidence that suggested that there was anything untoward in what happened towards the Complainant. He also did not appear to fully understand what constitutes discrimination. He did not appear to understand the role that intention plays in determining whether discrimination has occurred. In my view, Mr. MacLeod placed too much emphasis on his own assessment of the personalities of those involved. In fairness to him, it does not appear that the Respondent took into account Mr. MacLeod's lack of experience in investigating issues of this nature.

358. Mr. MacLeod appeared to wish to avoid broaching the subject of his relationship with the Complainant under direct examination. Under direct examination, Mr. MacLeod described the Complainant as a friend. It was not until cross-examination that he acknowledged that their relationship was of a romantic nature.

359. Mr. MacLeod appeared to distance himself from the decision in 2006 to promote the Complainant to Sales Associate. He did not recall when it was first discussed that she might move into sales. The Complainant's evidence in reply was that her personal relationship with Mr. MacLeod started after the grand re-opening of the store in July of 2006. She testified that Mr. MacLeod asked her if she would be interested in a Sales Associate position the next day when they went to Peggy's Cove together. The Complainant's evidence is that she was subsequently informed by management that she would move to a Sales Associate position.

360. When pressed, Mr. MacLeod did not recall the conversation with the Complainant the day after the grand-re-opening of the store, but testified that he was not saying it did not happen. He testified that he is not sure how she got the position and does not recall suggesting it. He also testified that he could not recall whether he suggested the promotion to John Papailliados or whether someone suggested it to him. He implied his involvement was minimal.

361. I do not find Mr. MacLeod's poor recollection of the Complainant's promotion to Sales Associate to be credible, given that this occurred at the outset of their personal relationship. The Complainant had no sales experience. She appears to have been the only person hired as a Sales Associate without prior sales experience. Her promotion was notable and, as Area Supervisor, I expect that Mr. MacLeod would recall the extent of his involvement in her promotion with more clarity. I conclude that he was less than forthcoming about the fact that he helped her obtain her sales position.

362. Also impacting my assessment of Mr. MacLeod's testimony is his initial evidence on direct examination that he was not told about the Complainant being disciplined about taking a day off on her daughter's birthday until the investigation. At a later point he testified that they talked about her suspension after she was suspended.

363. Mr. MacLeod testified to the effect that the Complainant did not tell him about the lynching comment at the time of her performance review because, if she had, he would have been "off his chair", as the comment is racial. However, when his investigation led him to evidence that the lynching comment occurred, he described the use of that term as a "difficult matter". Mr. MacLeod also downplayed the racial context of Mr. Hopkins' reference to lynching, testifying that to him, it was a "cowboy term".

364. Mr. MacLeod failed to conclude that lynching was objectively a racial comment during his investigation. Mr. Hopkins admitted to Mr. MacLeod during the investigation that he "knew what lynching meant". Nonetheless, Mr. MacLeod made a finding that Brent Hopkins did not intend the comment to be racially charged. Mr. MacLeod's failure to recognize that the lynching comment was objectively racial when directed at an African-Canadian contradicts his testimony that, if the Complainant had told him about the lynching comment, he would have reacted immediately.

365. Mr. MacLeod clearly did not understand that the intention to discriminate is not relevant. He believed that because Mr. Hopkins was not a racist, the comment that he made was not racial in content.

366. I conclude that, because Mr. MacLeod did not recognize that the lynching comment conveyed an offensive racial message, he was surprised by the Complainant's resignation and surprised by her allegation that a racist comment had been made.

367. In my view, the impact of the conflict of interest interfered, in particular, with Mr. MacLeod's handling of his telephone conversation with the Complainant. Mr. MacLeod telephoned the Complainant on May 14, 2008, after the letter of resignation had been received by Tammy Bishop. Ms. Bishop had not been successful in reaching the Complainant. Mr. MacLeod testified that the conversation did not last long. Mr. MacLeod was clearly upset that the Complainant refused to meet with him.

368. The telephone call signaled the end of Mr. MacLeod's relationship with the Complainant. I infer that there was an underlying personal tension during that call that detracted from Mr. MacLeod's focus on doing his job, which was to ascertain as much information as possible about the allegations, particularly since the Complainant declined to meet with him. Mr. MacLeod failed to make any written record of what the Complainant's allegations were, as relayed to him during their conversation.

369. The Respondent submits that it did the best it could with the investigation, given the lack of participation of the Complainant. However, there is no evidence that the Complainant was informed of the investigation by Mr. MacLeod when he telephoned her on May 14, 2008. The Complainant denies having knowledge of the investigation at the time. Mr. Cooney's affidavit confirms that the decision to investigate was made on May 16, 2008. As far as the Complainant knew, she had been offered a meeting with her protagonist, Mr. Hopkins, and the very managers who did not recognize or react to the lynching comment. I do not find her refusal to meet unreasonable in these circumstances.

370. In my view, the Respondent cannot complain about a lack of information from the Complainant or the non-participation of the Complainant when it has not produced evidence to demonstrate that it invited her participation in the investigation. There was no written response from the Respondent to her letter of resignation and complaint. I conclude that it was not reasonable for the investigation to conclude without an invitation to the Complainant to participate.

371. I do not accept Mr. MacLeod's evidence that he was looking for any hint of discrimination and that his relationship made him "a little more ferocious" about the investigation. Mr. MacLeod had corroboration from Kim Hennigar that the lynching comment had been made. He obtained this information from her written statement of May 14, 2008 before he started his investigation. The process Mr. MacLeod followed and the questions he asked during the investigation all but ignored or glossed over this primary and corroborated allegation of the Complainant. Mr. MacLeod placed more weight on what he was told by a majority of employees, most of whom were not involved in the allegations, than on the corroborating evidence in his possession.

372. I also cannot accept Mr. MacLeod's evidence that Kim Hennigar changed her story about hearing the lynching comment. He appears to have failed to take into account that she was initially asked if she had heard any racism in the store. The specific comment was not put to her. He testified that he did not get to the bottom of this inconsistency. I infer that is because he did not make inquiries of Ms. Hennigar. During her testimony at the hearing, Ms. Hennigar explained that she did not initially identify the lynching comment as being racist, which is why she did not initially confirm it had been said.

373. In his investigation report, Mr. MacLeod noted that the managers at the performance review did not observe any reaction from the Complainant. However, at that time, he had Ms. Hennigar's statement of May 14, 2008 in which she noted that the Complainant turned to leave the room after the comment was made.

374. Mr. MacLeod failed to make critical findings in his Investigation Report. He did not conclude whether the lynching comment had been made. He made a credibility finding in favour of Brent Hopkins but failed to provide his reasons for not putting any weight on the information Ms. Hennigar provided.

375. I find that Mr. MacLeod refused to conclude that the comment was racial or to reasonably conclude that the Complainant would experience the comment as racism. He testified that the only way that he would know that the Complainant would experience the comment as racism is if she came into the store to meet with him. This testimony fails to take into account the fact that she had resigned over this remark and that she had identified the fact that she considered the comment to be racist to the Respondent in writing.

376. Mr. MacLeod also implied that Mr. Hopkins only had positive comments about the Complainant. He apparently did not perceive Mr. Hopkins' remarks about the Complainant's commitment to the store or his comments respecting her attendance and productivity as negative.

377. Mr. MacLeod also testified that he did not see anything underhanded in how Mr. Hopkins handled interactions with the Complainant. At the same time, he did not perceive Mr. Hopkins' denial of having used the lynching term as a falsehood to his employer or give serious consideration to whether it was.

378. Mr. MacLeod did not recognize that Mr. Hopkins admitted to referring to the Complainant's hair as "wool". He did not recognize the potential for this to be perceived as a negative comment, nor did he make any finding respecting Mr. Hopkins' admitted use of the name "Contessa", "Sunshine" and "Condoleezza Rice". Mr. MacLeod made no specific findings respecting whether any objectively offensive comments had been made.

379. Overall, the Investigation Report placed too much emphasis on determining whether or not any particular person was or was perceived to be a racist by other employees, as opposed to determining whether any discrimination occurred or whether anyone said anything discriminatory, whether they intended it in that manner or not. The search for racism was framed in broad terms that minimized the likelihood of determining whether there was a more subtle form of discrimination in play. The investigation looked for "blazing signs" of discrimination. It sought opinion from employees who had no training or education regarding what discrimination encompasses.

380. In my view, the effect of the questions asked during the interview was to create offence among the Complainant's co-workers. Clearly, a number of employees were offended and responded by standing up for Mr. Hopkins. As noted in the Report, all associates were "shocked" and a large number were "angry" and "all indicated that they thought these allegations were completely unfair as they pertain to Brent and would be willing to testify in any court to support him". It does not appear that the investigation was conducted with sufficient effort to be discreet or to avoid backlash against the Complainant.

381. The Investigation Report did not address all of the allegations made by the Complainant or known to exist by Mr. MacLeod. For example, the investigation report did not include any specific findings respecting the Complainant's suspension in January, nor did it address the issue of the Complainant being disciplined twice for not swiping out before leaving the store. It did not address how the Complainant was treated by other sales associates and how complaints were resolved. It also did not consider whether there were any issues related to banter between employees within the store.

382. Mr. MacLeod did not follow up on the responses to his questions made by two of the employees who he interviewed which tended to suggest there was a further story. This should have led to further questions.

383. Accordingly, I cannot conclude that the investigation was reasonable in the circumstances or that the requirements in the *Laskowska* case relied upon by the Respondent were met.

10. Duty of the Employer Respecting Resolution of the Complaint and Communication

384. The Respondent acknowledges that it has a duty to provide a healthy work environment free of harassment. It submits that it made thorough efforts to ensure that a healthy work environment was maintained. This duty is reflected in the third set of criteria in *Laskowska* respecting the reasonableness of the Respondent's response to a complaint of discrimination as follows:

> *Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and communication:*
>
> *Did the employer provide a reasonable resolution in the circumstances? If the Complainant chose to return to work, could the employer provide*

him/her with a healthy, discrimination-healthy work environment? Did it communication its findings and actions to the Complainant?

11. *Findings Respecting Resolution of the Complaint and Communication*

385. That Mr. MacLeod did not make a specific finding as to whether or not the lynching comment had occurred does not appear to have been questioned or considered by anyone to whom he reported. Mr. Cooney deposed that, in early June 2008, after reviewing Mr. MacLeod's report and the background documents, he discussed the investigation with Mr. MacLeod. It was decided by Mr. MacLeod that Mr. Hopkins would receive a warning letter. Subsequent to this conversation Mr. Cooney provided Mr. Leon with an update with respect to the matter. In mid-June 2008, Mr. Leon was shown a copy of the warning letter which was to be provided to Mr. Hopkins. Mr. Cooney further deposed that he did not change any of Mr. MacLeod's original recommendations concerning findings and credibility, outcomes and discipline arising from the investigation.

386. There was no evidence of any questions from Mr. Leon to Mr. MacLeod, or from anyone else to whom he reported. Mr. Leon accepted the Investigation Report and Warning Letter without question. This is confirmed by Mr. Leon's affidavit in which he deposed that he had no contact or input in the investigation of the behaviour of Brent Hopkins in May 2008. He further deposed as follows:

> *8. ... Given my position as president and CEO I have the authority to veto any decision on discipline. I was advised of the discipline imposed in this investigation in the normal course of business. Given the findings of credibility and recommendations in this investigation, there was no need for me to exercise any authority in this matter.*

387. The Complainant was involved in experiences that led her to resign her employment on the basis that she had been discriminated against. To the extent that the report concludes that discrimination did not occur, Leon's could have reasonably anticipated that the Complainant would be dissatisfied with the outcome of the investigation. The Respondent has relied upon its AVAC policy. I note that in that policy, Mr. Leon offered his personal assurance that he would become involved if matters were addressed by the Area Supervisor and were not resolved to the employee's satisfaction. While the Complainant did not request Mr. Leon's involvement, his lack of involvement in the face of a written complaint of discrimination involving management is inconsistent with the spirit of his personal message to employees. The criteria for assessing the reasonableness of the resolution of the complaint in *Laskowska* also includes the expectation that the Respondent's findings and actions will be communicated to the Complainant. The Respondent asserts in its submissions that it was not possible for the Respondent to communicate with the Complainant at the conclusion of the investigation or otherwise. In my view, there was nothing to prevent the Respondent from writing to the Complainant at her last known address.

388. Further, the warning letter provided to Mr. Hopkins is not a fully committed statement by the Respondent respecting the outcome of the investigation. The warning letter does not specify what the complaint is about apart from the reference to "comments".

389. While I recognize that a warning letter is a disciplinary action by the Respondent, I cannot conclude that it is a reasonable resolution of the complaint in these circumstances.

Because the warning letter does not identify what Mr. Hopkins said or did that was discriminatory, the warning letter offers no assurance that Mr. Hopkins would not repeat the behaviour again. There also is no evidence that Mr. Hopkins was offered any relevant training.

390. On these facts, I cannot conclude that the Respondent was in a position to provide the Complainant with a healthy, discrimination-free work environment, had she chosen to return to work after her resignation. As confirmed by Mr. MacLeod's Report, all managers and sales associates were aware of her allegations against Mr. Hopkins. The Investigation Report confirms that there was a significant amount of anger directed towards the Complainant. In my view, the Complainant would have been returning to a hostile work environment. To quote Mr. MacLeod's Report, "To a person each associate I interviewed would support [Brent]".

CONCLUSION RESPECTING THE MERITS

391. For the above reasons, I have concluded that the Complainant was subjected to discriminatory comments and differential treatment by the Respondent. The Respondent is liable under the *Human Rights Act* for the actions of its employees, as was held in *Robichaud*. It was appropriate for the Respondent to have investigated the allegations. I acknowledge that an investigation ought not to be held to a standard of perfection. However, the manner in which the complaint was investigated and concluded fails to meet a fundamental level of reasonableness in the circumstances. There was also a lack of awareness respecting discrimination in the workplace that contributed to what occurred. The Respondent, therefore, cannot avoid liability on the basis of its response to the complaint.

REMEDY

Position of the Complainant

392. The Complainant provided evidence with respect to the impact of her discriminatory experience since May 2008. She is claiming $10,000.00 in general damages. She is also claiming lost wages, less mitigation from alternate employment obtained since her employment with the Respondent ended. She is seeking an award of loss of income from May 2008 to May 2011 in the amount of $71,619.00.

Position of the Commission

393. The Commission provided general information respecting the range of general damage awards for loss of income and special damages. It did not take a specific position respecting appropriate remedy for the Complainant.

Position of the Respondent

394. The Respondent submits that the Complainant is entitled to only nominal damages in the amount of $1,000.00 - $2,000.00. The Respondent submits that the high watermark of general damages in Nova Scotia is $10,000.00 based on *Johnson v. Sanford and Halifax Regional Police Service* [2003] 48 CHRR, D1307 (Bd. Inq.) and that the range of general damage awards in Nova Scotia is typically between $1,000.00 -$10,000.00. In support of its position that only nominal general damages should be awarded, the Respondent also

referred to the following decisions: *Gough v. Falkenham Backhoe* 2007 N.S.H.R.B.I.D No. 4; *McLellan v. MacTara Limited* 2004 NSHRC 4, *Hall v. Dr. Seetharamdoo*, [2006] N.S.H.R.B.I.D. No. 4, *Marchand v. 3010497 Nova Scotia Ltd.* [2006] N.S.H.R.B.I.D. No. 1, *Pinner v. K. Burrill's Supermarket Ltd.* (2002), 45 C.H.R.R. D/251 (N.S. Bd.Inq.) and *Davison v. Nova Scotia Safety Assn.* [2005] N.S.H.R.B.I.D. No.5.

395. The Respondent acknowledges that more recent cases have resulted in higher damage awards: *Cottreau v. R. Ellis Chevrolet* Oldsmobile Ltd. [2007] N.S.H.R.B.I.D. No. 3 ("Cottreau"), *Trask v. Nova Scotia (Department of Justice, Correctional Services)* [2010] N.S.H.R.B.I.D No. 2 and *Willow v. Halifax Regional School Board*, 2006 NSHRC 2 (CanLII). However, it submits that these cases are distinguishable from the present case.

396. With respect to the claim for loss of income, the Respondent submits that the Complainant resigned from her employment. Accordingly, it submits that no damages for loss of income are owed to her. In effect, the Respondent is suggesting that constructive dismissal cannot be considered in the context of a human rights complaint. The Respondent also submits that there is an obligation on the employee to advise the employer of their conclusion that they have been constructively dismissed prior to leaving the employment relationship in order to allow the employer an opportunity to remedy the situation. It says that this was not done in the present case.

397. The Respondent takes the position that, should damages for loss of income be awarded, this Board of Inquiry should adopt the "reasonable notice" approach in assessing quantum on the basis of *Pinner v. K. Burrill's Supermarket Ltd.* (2002), 45 C.H.R.R. D/251 (N.S. Bd.Inq.).

398. The Respondent further submits that the Complainant's damages must be reduced by any mitigation earnings during the notice period, including any EI overpayment.

399. The Respondent acknowledges that, in some cases, Human Rights Boards of Inquiry have adopted a "restitution model" in determining an appropriate award for loss of income. The Respondent submits that, if this Board adopts such a model, it would be improper for the Complainant to be awarded damages from the date of her resignation to present, on the basis that the Complainant had "performance issues and a spotty attendance record". It submits that there is insufficient evidence that she would have remained an employee for years after the alleged conduct occurred.

Conclusions Respecting Remedy for Complainant and Order

400. The jurisdiction of this Board to award damages and other remedies in this matter is prescribed in section 34(8) of the Nova Scotia *Human Rights Act* which states:

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

401. I do not agree that there continues to be a high watermark of $10,000.00 for general damages in Nova Scotia or that this is a case where nominal damages are appropriate. The need for damages to reflect the serious nature of discrimination and to be truly compensatory was noted in the *Cottreau* case where the Nova Scotia Human Rights

Board of Inquiry quoted with approval the following comments made in *Hill v. Misener* (No. 2) (1997) CHRR, Doc. 97-217 (NS Bd. Inq.) at para. 148:

> *In a physical injury, damages in the range of $2000, [sic] to represent an extremely minor physical problem which resolves quickly. People who sustain minor physical injuries do not question who they are, they do not question their self-worth, they do not question their value as human beings. An injury to one's self respect, dignity and self-worth is an injury that is far more destructive and painful and takes a longer time to heal than a minor physical injury.*
>
> *General damage awards which not have properly applied the compensatory principles do not reflect the serious nature of discrimination and fail horribly to uphold the principles which have been established by Human Rights Legislation.*

402. The *Cottreau* decision considered other recent Nova Scotia cases where general damages were awarded that exceed $10,000.00. In general, awards for general damages have increased in recent years in other jurisdictions. In *Cottreau*, the Human Rights Board of Inquiry awarded Mr. Cottreau $10,000.00 in general damages even though there was no evidence from Mr. Cottreau, "that he suffered any long term psychological damage or injury to his self-worth".

403. In the circumstances of this case, the discrimination resulted in long-term injury to the Complainant's self-worth. The financial and emotional stability of the Complainant's life was significantly impacted and thrown off course as a result of the discrimination she experienced. The Complainant had to declare bankruptcy, was required to move her family and eventually took a lengthy medical leave alleged to be stress-related. While the Respondent cannot be held legally responsible for these subsequent events, there is no doubt that the Complainant's dignity was impacted, that she suffered a loss of self-respect and her sense of personal security and stability underwent significant upheaval by virtue of the effect of the discrimination upon her. I have also taken into consideration the nature of the discriminatory experience and the Respondent's response to the complaint. I conclude that it is appropriate to award the Complainant $8,000.00 in general damages for the discrimination that she experienced while employed with the Respondent. Accordingly, it is ordered that, within 30 days of the date of this decision, the Respondent shall pay the Complainant damages in the amount of $8000.00.

404. The Complainant did not seek damages for mental or emotional distress. I would require an appropriate evidentiary basis supported by medical information to make such an award.

405. The Complainant has not claimed interest. However, interest has been regularly and routinely awarded by Human Rights Boards of Inquiry. In the interests of rectifying the injury caused to the Complainant as a result of the discrimination she experienced, I will exercise my authority under section 34(8) of the *Act* and order the Respondent to pay the Complainant prejudgment interest at 2.5% as of the date the Complainant filed her complaint with the Nova Scotia Human Rights Commission on all monetary awards, within 30 days of this decision.

406. With respect to the Complainant's loss of income claim, I do not agree that constructive dismissal is a correct characterization of the Complainant's termination of employment, as that term arises in the context of breach of contract. Here, we are assessing damages for breach of a statutory right to be free from discrimination.

407. I have concluded that it was not unreasonable for the Complainant to discontinue the employment relationship based on her knowledge of the Respondent's response to the events that happened. This includes the lack of response to her written letter of complaint in terms of notifying her of the investigation and its outcome. I have also concluded that she would not have been able to return to the workplace, in any event, due to the impression the investigation created among her co-workers. I am prepared to award damages for loss of income in these circumstances.

408. I am not prepared to follow the approach taken in *Pinner v. K. Burrill's Supermarket* Ltd. (2002), 45 C.H.R.R. D/251 (N.S. Bd. Inq.), which awarded loss of income based on reasonable notice. The restitution model is regularly applied by Human Rights Boards of Inquiry in Canadian jurisdictions. As well, given the remedial direction in section 34(8), this Board should attempt to rectify any actual injury caused to a person through an award of compensation. I agree with the approach taken in *Hinwood v. Jerry Vanmort Sales Inc.* (1995), 24CHRR, D/244 (Ont. Bd. Inq.) which was considered in the *Cottreau* decision at paragraph 33.

409. I have considered the Respondent's submissions that it is unlikely that the Complainant would have continued working for the Respondent for years afterwards, given her poor performance and spotty attendance record. For the reasons explained above, I have concluded that the Respondent has overstated the performance and attendance issues respecting the Complainant. The Complainant's commitment to her position waned as her perception that she was being treated unfairly gained prominence in her mind. In my assessment, had these events not occurred, the Complainant would have continued working for the Respondent for a further 18 months. In reaching this conclusion, I have taken into account various contingencies including the likelihood that the Complainant would have eventually sought positions elsewhere based on her overall employment history. Accordingly, she is awarded a loss of income equivalent to her regular gross income from the Respondent, less mitigation of earnings, during the 18 month period following the cessation of her employment. It is not appropriate to further reduce this award on the basis that it may trigger an EI overpayment for the Complainant. The parties are directed to make best efforts to arrive at an agreement respecting the calculation of the amount awarded. The Respondent is ordered to pay this amount to the Complainant within 30 days of this decision.

<u>Public Interest Remedies and Order</u>

410. The Commission has requested that public interest remedies be ordered as follows:

> *1. Leon's works with the Commission over a five year period to achieve employment equity for African Nova Scotian employees in Leon's Nova Scotia stores.*
>
> *2. Leon's be trained in cultural competency in human rights as assessed and directed by the Commission; this training to include store managers, supervisors and all staff of Leon's in Nova Scotia.*

3. Leon's works with the Commission to engage a restorative process to consider any harms to Dartmouth store employees resulting from the media surrounding this public inquiry.

4. The costs of implementing these public interest remedies would be paid by Leon's.

411. I have not concluded that this is a case of systemic discrimination nor have I been provided with authorities by the Commission in support of this conclusion in these circumstances. However, I am satisfied that there was a lack of understanding of discrimination and harassment (on grounds other than sexual harassment) at Leon's Dartmouth store. I order that the Respondent be trained in cultural competency in the context of human rights under the oversight of the Nova Scotia Human Right Commission and that this training be directed to store managers, supervisors and all staff at the Dartmouth store. Any cost associated with this training is to be borne by the Respondent. In my view, this complaint concerned the Dartmouth store and I have no jurisdiction to make orders impacting other locations owned by the Respondent, nor have I been presented with evidence upon which I can conclude that such an order would be appropriate.

412. I note that the Respondent has offered diversity training to the staff at the Dartmouth store since these events occurred. I leave it in the discretion of the Commission to determine whether this training should be considered as satisfying all or part of the training required. I also encourage the Respondent to consider implementing this training in all stores in Nova Scotia. The training is to be completed no later than December 1, 2014.

413. Finally, while the Commission is to be applauded for being concerned about the impact of this experience upon the Respondent's employees, in my view, the training that has been ordered will have the effect of educating and creating awareness among employees. I trust that the explanations provided to staff through training will place these events into context.

414. I will retain jurisdiction in the event there is any difficulty respecting the interpretation, application or implementation of this award until December 15, 2014.

Dated at Halifax Regional Municipality this 8th day of April, 2014.

Kathryn A. Raymond
Nova Scotia Human Rights Board of Inquiry Chair