

Ta'an Kwäch'än Judicial Council

DECISION

Date: August 24, 2016
Case Number: TKJC 16-01
Complainant: Bonnie Harpe
Respondent: Kristina Kane
Hearing dates: June 23 and 24, 2016

COMPLAINT

The Ta'an Kwäch'än Judicial Council (TKJC) received a complaint from Ms. Bonnie Harpe on February 15, 2016. It called for the removal of Kristina Kane from her position as Chief of the Ta'an Kwäch'än First Nation. The complaint alleged that Ms. Kane had "compromised the dignity and effectiveness of her position under sections 12.2 and 12.2.1 of the Ta'an Kwäch'än Constitution" by "using the Ta'an Kwäch'än Council's VISA (TK VISA) to take personal cash advances" and by accessing the Ta'an Kwäch'än (TK) Emergency Accounts.

In a subsequent complaint from February 17, 2016 Ms. Harpe claimed that Chief Kane's actions in forwarding the February 15, 2016 complaint, which included Ms. Harpe's home address, to a non-citizen was a "malicious and vindictive" act and a breach of her confidentiality. This complaint was joined by the TKJC to the original complaint.

The allegation that Ms. Kane had used the TK TD Business Travel VISA (TK VISA) to take personal cash advances was more broadly interpreted by the TKJC whereby "personal cash advances" were understood to mean not only instances where Ms. Kane may have accessed cash against the credit card, but also where charges were made for personal use on the TK VISA.

In essence, Ms. Harpe's allegation is that because Ms. Kane used the TK VISA for personal charges which were repaid through tacitly agreed upon scheduled payroll deductions in the same fashion as payroll cash advances, they were loans of TKC public money.

JURISDICTION

The TKJC is a branch of the government of the Ta'an Kwäch'än First Nation (TKFN) created under Section 5 of the *Constitution*.

The complaint maintains that because of the violations of the "*Constitution*, the *Finance Act* and the *Human Resource Manual* and they have breached the trust of the citizens" Ms. Kane should be removed from office. The TKJC's power to

remove a TK official from office flows from section 12.2 of the *Constitution*, which states it may “remove a member of the Board if he or she is found to be compromising the dignity or effectiveness of that office.”

This jurisdiction is reinforced by Yukon Supreme Court interpretations of the TKJC’s role. “The Judicial Council has enormous powers ranging from adjudicating violations of the laws of the Ta’an Kwäch’än Council to removing members of the Board.” (Harpe vs. Massie and Ta’an Kwäch’än Council, 2006 YKSC 01) These powers, such as outlined in Section 12.1.1, allow the TKJC to also “impose such sentences as are provided by law to ensure compliance”.

Of note, the TKJC further recognizes that it “has the unique power to examine the validity of any existing law or regulation to determine if it is consistent with the customs and traditions of the Ta’an Kwäch’än.” (Harpe vs. Massie and Ta’an Kwäch’än Council, 2006 YKSC 01)

PROCEDURE:

The TKJC received two Complaints from Ms. Harpe which fundamentally raised the same evidentiary issues. One was in regard to Chief Kane and the other in regard to Deputy-Chief Telep. The parties advised the TKJC that they would be calling primarily the same witnesses for both matters.

The TKJC is the master of its own procedures, which allows it to flexibly address issues as they arise prior to or during a hearing. In this case, based on an application by the Respondents, a partial publications ban was put in place in regard to TKFN financial matters and personal financial information.

Further, the TKJC decided it was appropriate, efficient and expeditious to hear testimony on both complaints from each witness, appropriately, and subsequently issue two separate Decisions. The parties agreed to this process.

In addition, Ms. Harpe asked that the TKJC allow Ms. Pillai to assist her in presentation of her Complaint(s) as she was not represented by legal counsel. As there was no objection from the Respondents, the TKJC allowed the request.

Both Ms. Kane and Ms. Telep were represented by legal counsel, Ms. Jocelyn Barrett.

ISSUES on the KANE COMPLAINT:

1. Did Ms. Kane use public TKFN funds for personal use and if so, was such use of the TK VISA in compliance with TKFN Policy?
2. Did Ms. Kane comply with TKFN policy in regard to standard payroll advances for payroll cash advances and/or TK Visa personal charges?
3. Did Ms. Kane access the Emergency Fund, and if so, was such access in compliance with TKFN procedures?
4. Did Ms. Kane breach confidentiality by sending a copy of the complaint by Ms. Harpe to a non-TKC citizen?

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5. If any or all of the above acts are proven, did their commission by Ms. Kane compromise the dignity and/or effectiveness of her position as Chief sufficiently to warrant removal from office?

ARGUMENT OF THE COMPLAINANT

Ms. Harpe and Ms. Pillai stated in their opening and closing submissions that, in summary:

- Ms. Kane used the TK VISA credit card for personal purposes. When she did, Ms. Kane violated the TK “*Constitution*, the *Finance Act* and the *Human Resource Manual* and ... breached the trust of the citizens”;
- Ms. Kane’s personal use of the TK VISA was a criminal offence;
- Ms. Kane’s access to the Emergency Fund on two occasions lacked transparency and accountability; and
- Ms. Kane sent a copy of the Complaint to a non-TK citizen, which had the effect of distributing personal information about a TK citizen, resulting in a breach of confidentiality which raised personal security concerns for her.

Ms. Kane, through these acts, had “compromised the dignity and effectiveness of her position under sections 12.2 and 12.2.1 of the *Ta’an Kwäch’än Constitution*” and should be removed from office.

ARGUMENT OF THE RESPONDENT

Ms. Jocelyn Barrett, lawyer for Ms. Kane, argued that Ms. Kane:

- Admits to using the TK VISA for personal purchases. Given, however, there are no written rules regarding use of the TK VISA card, such use did not contravene any policy of the TKC. Also as the Cardholder Agreement was in Kane’s name and registered as a liability on Kane’s personal bank accounts it was effectively Kane’s own personal credit card. Further, when personal use of the TK VISA was later seen as inappropriate, all personal expenditures have been fully reimbursed by Ms. Kane to the TKFN.
- Admits to accessing TK’s Emergency Funds. As a TKC citizen, Ms. Kane was entitled to access the Funds in the same manner and under the same procedures as all TKC citizens, which she did on two occasions.
- Admits to sending a copy of the February 15th complaint to a non-citizen of TKFN. Ms. Kane believed such action was necessary as a proactive response intended to limit the liability of the TKFN for the potentially libellous statements made by the Complainant in that document regarding the person to whom it was sent. As well, any complaint filed with the TKJC

and all the information in it including the personal address of the complainant becomes public information.

- It is alleged that Ms. Kane has not “compromised the dignity and effectiveness of her position under sections 12.2 and 12.2.1 of the *Ta’an Kwäch’än Constitution*” on the basis of these acts and should not be removed from office.

CONSTITUTIONAL AND STATUTORY REFERENCES

The Finance Administration Act:

Chapter 2: Public money is defined as all money and negotiable instruments received, held or collected by, for or on behalf of the TKC including revenues, interest or investments, money in funds designated as special funds, money borrowed by the TKC or money in trust funds.

Finance Administration Act 29.1 states that no loan of public money shall be made except as authorized by an order of the Board and 29.2 reads that the power to make loans...from the operating fund shall not be made except in accordance with the regulations.

Of note, there are no Regulations to the *Finance Administration Act*.

Human Resources Policy and Procedures:

Section 7 explains that regular full time employees work seven hours per day, regularly Monday to Friday with a bi-weekly pay. Pay periods flow Sunday to Saturday with time sheets being submitted on the following Monday and pay received on the ensuing Friday. In essence, one week’s pay is withheld on an ongoing basis.

Section 7.2 states that Pay Advances shall only be issued to employees in cases of pressing emergencies to full time employees. Advances must be authorized, paid by manual cheque and not to be less than two days’ wages or more than one week’s gross pay. Further, they shall not be authorized if there are any outstanding (unrepaid) advances. A pressing emergency is defined as “unforeseeable circumstances that will cause hardship unless immediate financial assistance is obtained”.

The procedure for Pay Advances is that the employee completes a Pay Advance form, with 24 hours’ notice if possible, to their manager who with the payroll department reviews the reason for the request, the numbers of advances in the prior 12 months, the repayment process, ensuring no outstanding advances remain and the employee has full time status. Both the Department Manager and the Finance Manager are required to approve any pay advance prior to issuing same.

The Pay Advance form shows that the employee may request a repayment schedule which means they are not required to fully repay the advance, but carry forward a balance into future pay periods.

Chief and Deputy Chief Compensation Policy of 2013:

Section 1.2 defines Executive as meaning ‘the elected Non-employee positions of Chief and Deputy Chief’ but goes on to state that these positions are subject to the *Human Resources Policy*, excepting conflicts where this policy would govern.

Emergency Fund Policy:

Established “To provide financial assistance to TKFN Citizens in cases of emergencies”. Emergency is defined as unforeseen circumstances that cause unusual hardships and requires immediate action. It is a last resort fund, available to any TKFN citizen upon proper application, available once per anniversary year and approved by the executive director for up to \$1,000.00, up to an annual total amount as set in the TKC annual budget.

Emergency Medical Fund Policy:

To provide financial assistance to TKFN citizens for the expenses associated with medical emergencies. Medical emergency includes evacuation and critical medical and or life threatening conditions for up to \$2,000 for travel outside the Yukon.

Information and Communication Technology Policy (Section 19)

This policy covers the use of any technology owned, leased or licensed by the TKC including computers...that can create... send or receive information to or from another electronic device. It states that employees who send or forward email with any libellous, defamatory, offensive... remarks may be found liable; and if an employee sends, forwards or copies any confidential information without permission of the department manager the employee may be liable;

As part of our consideration of the legislation, regulations and policies presented as reference information to the TKJC, the TKJC recognizes several significant sub-issues and mitigating factors:

- The absence of a credit card use policy was identified as a concern by numerous witnesses. Mr. Ed Schultz, while Governance Coordinator, was tasked with putting such a policy in place. He resigned before it was implemented. A number of defects in the draft policy were identified, which have not been rectified, resulting in the ongoing absence of a policy.
- The *Finance Administration Act* “is flawed and needs revision” in the view of Mr. Johnston, the TKFN Finance Manager. “Some sections of it (are) unworkable” which “makes implementing it difficult.”

- The *Human Resources Manual* and policies are “under construction” according to Ms. Kufeldt, TKFN Human Resources advisor and Chair of the Elder’s Council.
- A Governance Oversight and Procedures Policy vacuum has been highlighted repeatedly by the testimony of TKC members. Of critical concern is the testimony by several TKC directors that they have received no basic briefing materials, policy materials or governance training upon assuming their roles as TKC directors.

EVIDENCE, WITNESS TESTIMONY and ARGUMENT:

Exhibit List (16-01 & 16-02)

EX #	DESCRIPTION	Reference/Location
1	TKC Draft Minutes February 11, 2016	
2	G/L Transaction Listing	Tab 9 in Kane List of Documents
3	Advances as of October 2012 to Date	Tab 2 in Kane Supplementary List of Documents
4	Payroll Advance/Promissory Note	Tab 1 in Kane Supplementary List of Documents
5	Personal VISA use	Tab 4 in Kane List of Documents
6	TD Business Travel VISA Card Statement	Tab 3 in Kane List of Documents
7	Personal VISA use	Tab 4 in Telep List of Documents
8	TD Business VISA Card Statements	Tab 3 in Telep List of Documents
9	Chief & Deputy Chief Compensation Policy	Tab 1 in Kane List of Documents
10	Section 7 - Human Resources Policy and Procedure Document	Tab 2 in Kane List of Documents
11	TKC Resolution 2013-52 - Councillor Payroll Advances	Tab 6 in Kane List of Documents
12	TKC Emergency Fund Policy	Tab 10 in Kane List of Documents
13	Cheque Requests	Tab 11A/B in Kane List of Documents
14	Cheque Requests	Tab 10 in Telep List of Documents

Exhibit List (Continued)

15	TKC Medical Emergency Fund	Tab 11 in Telep List of Documents
16	TKC Policies	
17	TD Canada Trust Personal Assessment	Tab 7 of Kane List of Documents
18	TKC Expense Claims	Tab 5 Telep List of Documents
19	Promissory Notes	Tab 1 Telep Supplementary Documents
20	Cheque Request Emergency Medical Fund	Tab 12 Telep List of Documents

Witnesses:

Ms. Harpe called Ms. Pillai, Ms. Diane Graham, Ms. Tiffany Eckert-Maret, Mr. Andrew Johnston, Ms. Roberta Auston, and Ms. Theresa Jacobs.

Ms. Barrett called Ms. Roberta Kufeldt, Ms. Benje Clethero, Ms. Laura Nolan and Ms. Kane.

RE: The February 11, 2016 TKC meeting

Ms. Pillai, Ms. Graham, Ms. Eckert-Maret, Ms. Clethero and Ms. Nolan presented accounts of a pivotal, heated TKC meeting on February 11, 2016 at which the use of the TK VISA cards by Chief Kane and Deputy Chief Telep for personal purchases was first revealed to the TKC as a whole. Prior to that meeting the TKC directors had not been apprised of the practice. Both Chief Kane and Deputy Chief Telep confirmed their use of the TK VISA cards for personal purposes at the meeting.

Requests for the production of details on credit card usage were never addressed. Mr. Andrew Johnson, the current TKFN Finance Manager, reported that credit card statements had been photocopied but he had been directed to wait until the end of the Judicial Council proceedings before distributing them.

Ms. Pillai, Ms. Eckert-Maret and Ms. Graham believed use of the TK VISA card for personal purposes constituted fraud. Ms. Pillai called the RCMP with this allegation of fraud at the February 11th meeting. She is unaware of any RCMP follow-up to her call.

RE: TK VISA card usage

Ms. Kane testified that she held a TK TD Business Travel VISA card issued in her name. She had signed a *Card Holder Agreement* for her TD Business Travel VISA and the liability for the credit card was registered in her Bank Account

Profile (Exhibit 17). Ms. Kane used the card for personal purchases along with bona fide TK business expenses.

Once the credit card statement was provided to her by TKFN, she identified which charges were subject to reimbursement as personal expenditures and provided the receipts to appropriate TKFN officials. Mr. Johnston stated that no interest was charged to Ms. Kane because the TKFN paid off the outstanding TD Business Travel VISA balances when they were billed so no interest accrued. The values of the personal charges were registered by payroll as payroll cash advances subject to deduction from Ms. Kane's pay.

Ms. Kane testified that the former TKFN Executive Director, Shaun O'Dell, had raised the concern about personal credit card usage once with her in a "two- to three-minute discussion". Ms. Kane's personal usage of the card began in 2013 and continued until December 14, 2015 (Exhibit 5). The total amount of personal use was approximately \$9,240 over the 3-year period. (Exhibit 6) Mr. Johnston testified that Ms. Kane's had fully repaid TKFN by April 8, 2016.

Ms. Kane testified that it she now believes it was a mistake to use the card for personal purposes and recognizes there should be a TKFN credit card use policy in place. The former Governance Coordinator, Mr. Schultz, was mandated to draft a credit card use policy. Issues with the draft emerged and have delayed the policy's finalization. The position of Governance Coordinator became vacant. No further work has been done on the policy.

Ms. Harpe argued that the use of the TK VISA for personal expenses should be regarded as a 'loan of public money' in violation of sections 29(1) and 29(2) of TKFN *Finance Administration Act*. It states in *Finance Administration Act* 29.1 that no loan of public money shall be made except as authorized by an order of the Board. She further submitted that as it is common practice in the government and corporate world to prohibit personal expense charges on a corporate credit card, which Ms. Kane should have known it was a breach of fiduciary responsibility.

Ms. Barrett submitted that the TKC indirectly authorized a 'loan of public money' by adopting the *Chief and Deputy Chief Compensation Policy*. (Exhibit 9) which states that the Chief and Deputy Chief, although elected to the positions, were subject to the *Human Resources Policy* as if they were employees of the TKFN. If this were taken to be the correct interpretation then any s. 29(1) violation would be "limited to the instances where the maximum amount permissible has been exceeded, and possibly where advances were not completely repaid prior to an application for a new advance."

RE: Cash advances

Section 7 of the *Human Resources Manual* allows employees to be advanced up to one week's pay and TKC directors can request \$500. (Exhibit 10) *Human Resources Policy Manual* section 7.2 clearly states that payroll advances shall not be authorized to employees if there are any outstanding unrepaid advances.

By virtue of the *Chief & Deputy Chief Compensation Policy* Ms. Kane is considered an "employee" subject to the *Human Resources Manual* except where the *Chief & Deputy Chief Compensation Policy* overrides.

Exhibit #3 shows 'Advances to Date'. Persons other than Ms. Kane and Ms. Telep have been blacked out. It shows that Ms. Kane applied for and received payroll cash advances while outstanding balances from previous payroll advances remained. Further, the amounts due to the TKFN for personal credit card charges were transferred and collected as if they were cash advances and these sums accrued over time.

Mr. Johnston, Chief Financial Officer, noted in his testimony that the *Finance Administration Act* is flawed and needs revision. Mr. Johnston pointed to poor practices such as officials' authorizing their own payroll cash advances as evidence of the act's deficiencies. Furthermore, key finance policies and procedures have not been developed or have been developed but not approved by the TKC.

Mr. Johnston also gave testimony that in a confidential report he had provided to the Chief and Executive Director of the day, it was his belief that personal use of the credit card was a breach of the *Finance Administration Act*. Of particular concern was the frequency of use and substantial amounts accessed. He testified that in response to his expressed concerns, the former Executive Director had confirmed the issue had been discussed with the Chief. The current Executive Director has told Mr. Johnston that she had done nothing about the practice. The practice by Ms. Kane appears to have continued until December 14, 2015.

RE: Emergency Fund

Exhibit 12 shows there are two emergency funds; one is a general fund and the other established as a medical emergency fund. There are no criteria related to income levels for individuals accessing these funds.

According to testimony from Ms. Kane, she accessed each fund. The emergency medical fund was applied to pay a dental surgeon for unanticipated dental surgery on her son while on vacation in Vancouver in the amount of \$1,000 on January 29, 2014. The second claim from the general emergency fund for \$1,000 paid on December 14, 2015 was for hotel expenses while in Vancouver. She had been asked by an elder to stay and assist in locating the son of a citizen who had been medevac'd and on life support in Vancouver.

Exhibit #13 indicates applications were made by email from Ms. Kane. While neither application was signed by Chief Kane, no evidence was provided that this process was not an accepted procedure for accessing emergency funds.

The Executive Director is responsible for ensuring that approval of applications to these Emergency Funds are provided in accordance with policy and not exceeding the total amounts allocated within each annual TK budget. Mr. Johnston stated that requests for funding from the Emergency Funds have been growing, reaching \$50,000 to 60,000 last year. Some applicants, he believes, may have been refused.

Ms. Graham testified that it was unclear as to who was responsible for authorizing the use of TK Emergency funds, but she believed from her recollection of previous TKC meetings, there were two discussions related to making access to the funds more difficult for low-income TKFN members. She feared that a 'means test' might be in place allowing the highest paid TKFN officials to freely access Fund dollars. Her evidence was not corroborated by any other evidence.

Ms. Clethero testified that the TK committee which intends to work on Emergency Fund policy has yet to meet.

RE: Breach of confidentiality

By way of summary background, when Ms. Harpe submitted her Complaint of February 15, 2016 to the TKJC for adjudication, a copy was forwarded, as required by TKJC *Policy and Procedures*, to the Respondent, Chief Kane. In the Complaint an allegation of inappropriate behaviour was made involving the Chief, Deputy Chief and Ms. Emmie Fairclough in Dawson City. Upon receipt of the Harpe TKJC Complaint, Ms. Kane forwarded a copy to Ms. Emmie Fairclough, who is not a TK citizen.

On February 17, 2016 Ms. Harpe filed an additional Complaint with the TKJC claiming that Chief Kane's actions in forwarding the February 15, 2016 Complaint, which included Ms. Harpe's home address, to a non-citizen was a "malicious and vindictive" act, a breach of confidentiality and put the security of a TK citizen at risk by disseminating her home address and contact information.

Subsequently, Ms. Fairclough, in her complaint against Ms. Harpe as filed with the TKJC (TKJC 16-03), demanded an apology and retraction of statements made by Ms. Harpe regarding allegations of inappropriate behaviour by Ms. Fairclough. Ms. Harpe retracted her statement and apologized resulting in the formal closure of Complaint TKJC 16-03.

The *Information and Communication Technology Policy* governing the dissemination of information from and within the TKFN (Section 19) covers the usage of "any technology owned, leased or licensed by the TKC including computers...that can create... send or receive information to or from another electronic device" states that "employees who send or forward email with any libellous, defamatory, offensive... remarks may be found liable; and if an employee sends, forwards or copies any confidential information without permission of the department manager the employee may be liable".

Ms. Kane testified that as the Chief, she believed she was acting in the best interest of the TKFN by forwarding the (soon-to-be public) document to Ms.

Fairclough to eliminate or at least mitigate any liability of the TKFN for the comments made by a TK citizen.

RE: Governance

Mr. Johnston and Ms. Kufeldt, both TKFN employees, pointed to lack of policy in key areas, including Governance of the TKC which is an ongoing concern, and this Complaint points to a number of challenges created by such flaws.

While a copy was not presented to the TKJC, Ms. Pillai offered a binder she said contained “board member orientation and policies” to a number of witnesses who were TKC Board Members, asking if they had received a copy of the TKC policies. Ms. Graham, Ms. Eckert-Maret and Ms. Auston, TKC councillors testified that they had not received a governance training binder with policies in it or any related training.

ANALYSIS & DECISION

1. Did Ms. Kane use public TKFN funds for personal use and if so, was such use of the TK VISA in compliance with TKFN Policy?

Ms. Kane admitted using her TK VISA card for personal purchases between October 2012 and January 2016 and that a previous TKFN Executive Director, Shaun O’Dell, had advised her that the personal use of the Credit Card was “a concern, but not a major concern”.

Ms. Kane testified that she now believes it was a mistake to use the card for personal purposes and she stopped using the TK VISA card prior to the February 11, 2016 TKC meeting. She had been reimbursing the TKFN on an on-going basis and by April 2016 all outstanding personal expenditures incurred on the card had been fully reimbursed to the TKFN.

Mr. Johnston was asked where the amounts owed for Credit Card expenses due for repayment is shown, and he explained that it shows as a general ‘Receivable’ on the Financial Statements. He also explained that the TK VISA monthly statement/invoice is sent to the TKFN office and the finance officer forwards it to the appropriate cardholder (in this case, Ms. Kane) who codes the expenses and returns it to Finance. When asked if he ‘sees the statement’ he replied that he only reviews the statements if receipts are missing and when asked if any were missing, he replied ‘nothing significant’. In spite of this testimony, no evidence of receipts provided was offered.

The absence of receipts led to an allegation that some of the charges shown on the TK VISA statements as personal expenses were, in fact, charges where cash was received. No evidence was provided to prove, or disprove this claim, but Mr. Johnston, when asked specifically, stated that there had been no cash advances shown on the Statements, that if cash was accessed at an ATM, a fee would show, but that if “cash back” was requested from a vendor, it would not show on the VISA statement.

The absence of a clear, consistent written policy on credit card usage mitigates to some degree the inappropriate use by Ms. Kane for personal charges. Additionally, the issuance of the Card in Ms. Kane's name and her personal liability for unpaid charges arising from the contractual nature of the *Cardholder Agreement* she signed could suggest that Ms. Kane did, in fact, believe it was her credit card to be used at will.

2. Did Ms. Kane comply with TKFN policy in regard to standard payroll advances for payroll cash advances and/or TK Visa personal charges?

Exhibits 3, 5 and 6 show Ms. Kane, in addition to the accruing sums for personal expenses on the credit card, took additional payroll cash advances at will. These acts resulted in non-compliance with the *Human Resources Policy Manual* section 7.2 requirement that all advances be cleared prior to accessing new funds.

The *Finance Administration Act*, Chapter 2 defines "Public Money" as all money and negotiable instruments received held or collected by, for or on behalf of the TKC including revenues, interest on investments, money in funds, money borrowed by the TKC and money in trust funds. Section 29(1) states that no loan of public money shall be made except as authorized by an Order of the Board and 29(2) states that the power to make loans or direct equity investments from the operating fund shall not be exercised except in accordance with the regulations. Unfortunately, there are no regulations supporting these sections of the *Finance Administration Act*.

The *Human Resources Policy* requires that payroll cash advances only be issued to "employees in cases of pressing emergencies" which is defined as "unforeseeable circumstance that will cause hardship unless immediate financial assistance is obtained." Further, advances may not exceed one week's pay and there is to be no additional advances until all prior amounts are repaid. Evidence clearly shows that Ms. Kane received cash advances while prior amounts for repayment still remained, in breach of the policy.

The payroll cash advances policy was breached by Ms. Kane on an ongoing basis with the knowing collaboration of the departmental employees. As the Chief of the TKFN, Ms. Kane is accountable under the policy and ultimately responsible for payroll and payroll deductions. The responsibility to uphold the policy lies squarely on Ms. Kane's shoulders.

While not at question in this matter, the TKJC must note that while names of employees have been redacted, Exhibit #3 shows multiple instances where employees are allowed to carry balances forward and access additional cash advances in non-compliance with the Policy.

A lack of adequate oversight on the part of the TKC, inadequate *Human Resources Policy* enforcement within the TKFN and the Governance Policy vacuum, coupled with a weak *Financial Administration Act* demanding amendments, however, are factors forcing the TKJC to judge these breaches in a less harsh light.

3. Did Ms. Kane access the Emergency Fund, and if so, was such access in compliance with TKFN procedures?

Ms. Kane, as a TKFN citizen, had a right to apply for assistance under the Emergency Funds. On two occasions she accessed these funds. There was no evidence presented that her accessing these funds denied access to other citizens.

In the absence of evidence that the procedures were not compliant with policy, the TKJC finds no improper access to Emergency Funds by Chief Kane, a TKC citizen.

The lack of transparency in the procedures and standards of qualification to access to the Funds and oversight related to the successful and unsuccessful application and allocation of the Funds presents a larger issue of concern.

4. Did Ms. Kane breach confidentiality by sending a copy of the complaint by Ms. Harpe to a non-TKC citizen?

Ms. Harpe's Complaint of February 15, 2016 to the TKJC for adjudication, a copy of the complaint was forwarded to Chief Kane, the Respondent, as required by the TKJC Rules of Procedure. In that complaint an allegation of inappropriate behaviour was made involving the Chief, Deputy Chief and Ms. Emmie Fairclough in Dawson City. Upon receipt of the Harpe complaint to the TKJC Ms. Kane forwarded a copy on to Ms. Fairclough, who is not a TK citizen. Ms. Fairclough subsequently demanded an apology and retraction of statement made referring to her by Ms. Harpe in the complaint. Ms. Harpe retracted her statement and apologized. A complaint to the TKJC initiated by Ms. Fairclough was subsequently formally closed on March 16, 2016 (TKJC 16-03).

Ms. Harpe filed a subsequent complaint to the TKJC on February 17, 2016 alleging that Ms. Kane had breached confidentiality by providing Ms. Fairclough with a copy of the February 15, 2016 complaint which contained her personal contact information, which caused her to fear for her personal safety and security. This complaint was joined to TKJC 16-01.

Chief Kane testified that the reason for forwarding the complaint to Ms. Fairclough was, in her mind, a fiduciary responsibility to the TKFN as Chief. She submitted that the allegations made by Ms. Harpe, naming Ms. Fairclough, put the TKFN at risk of libellous charges. Further, she stated that complaints to the TKJC are considered public documents, so the information on the complaint letter was not private.

Information and Communication Technology Policy (Section 19) provides guidance for our deliberation on this concern. The policy covers the use of any technology owned, leased or licensed by the TKC including computers...that can create... send or receive information to or from another electronic device. It clearly states that employees who send or forward email with any libellous, defamatory, offensive... remarks may be found liable; and if an employee sends, forwards or copies any confidential information without permission of the department manager the employee may be liable.

Our review of section 19 of this policy does show that Ms. Kane forwarded the email in question in breach of the stated policy on at least one count. The fact that complaints to the TKJC would have made public and thus the complaint and any information associated with it widely accessible does not diminish the injunction upon employees of the TKFN to adhere strictly to its policies.

5. If any or all of the above acts are proven, did their commission by Ms. Kane compromise the dignity and/or effectiveness of her position as Chief sufficiently to warrant removal from office?

The TKJC finds that Ms. Kane improperly used the TK Credit Card for personal expenses. Further, that such charges were transferred to Payroll for reimbursement over time was in essence a loan of TK public money.

Ms. Kane used the TK VISA for personal purchases which was treated as a payroll cash advance, reimbursed by payroll deductions over time while additional payroll cash advances were also requested and received. Both the transfer of indebtedness arising from the use of the Credit Card to payroll cash advances and the receipt of additional payroll cash advances were in violation of Section 7.2 of the *Human Resources Policy and Procedures Manual* as Ms. Kane received numerous and ongoing payroll cash advances prior to full repayment of previous balances.

As noted earlier, collection for personal charges on the TK VISA was through allocation of the amounts as payroll cash advances, which were then deducted from Ms. Kane's pay. This process is not appropriate.

Repayment should have been made monthly, in full, by cheque or cash by Ms. Kane. The charges against the TK VISA were paid in full by the TKFN out of public money. Carrying a balance of debt, therefore, is essentially a loan of TK funds. In the absence of a credit card use policy, however, we must recognize that at some time in the past an internal Council or departmental decision was made to implement this process.

Ms. Kane did not inappropriately access the emergency funds, based on current practices and procedures.

Ms. Kane violated Section 19 of the *Information and Communication Technology Policy* when she forwarded the Harpe complaint of February 15, 2016 by e-mail to Ms. Fairclough.

TKJC is provided with the constitutional power to remove any TKFN official from office. This power flows from section 12.2 of the *Constitution*, which states it may "remove a member of the Board if he or she is found to be compromising the dignity or effectiveness of that office." The TKJC has exercised this power and will continue to do so in the best interest of the TKFN.

Ms. Kane's violations are more administrative in nature than demonstrative of contempt for the laws of the TKFN. Her violations did not result in any adverse effect on the functioning of the TKFN.

While the dignity of the office of Chief is hard won, it is easily lost. The TKFN has been impacted by her actions but not widely or irreparably. As such, the TKJC will not exercise its power under Section 12.2 of the *Constitution*.

ORDER

TKJC will not exercise its power under section 12.2 of the *Constitution* by ordering Ms. Kane be removed as Chief. However, violations must involve sanctions. The highest officer of the TKFN must be held to a high standard in assessing fiduciary responsibility and accountability to the First Nation and its citizens.

Chief Kane was made aware that there were concerns regarding use of the TK VISA for personal expenses but continued to use it for personal purposes until December of 2015. Her testimony provided the TKJC a number of reasons why she believed the ongoing practice was acceptable. However, even in the absence of a credit card policy, Ms. Kane ought to have known that use of a Corporate Credit Card for personal use is not acceptable.

The TKJC orders that Ms. Kane write and make available to all members of the TKFN a letter of apology to them with specific regard to her use of the TK VISA card for personal purposes, breach of Section 7.2 of the *Human Resources Policy and Procedures Manual* with regard to receiving pay advances prior to fully repaying previous balances.

Ms. Kane shall write and ensure delivery of a letter of apology to Ms. Harpe for her breach of Section 19 of the *Information and Communication Technology Policy* in forwarding TKFN communication, and as a result, disseminating personal information of a TK citizen to a non-citizen.

As Chief of the TKFN Ms. Kane will ensure that a credit card use policy is in force for all TKFN credit card cardholders within six months of this decision.

Further, a Leadership and Accountability Act with appropriate regulations or policy must be in place, either formally approved or in interim form. It will ensure that a clearly defined hierarchy of approvals and oversight procedures for any financial requests by TKC directors, Chief and Deputy Chief exists.

Judges' Note on Authority:

In this case, the TKJC chose not to exercise its power under section 12.2 of the Constitution to remove an official from office. The TKJC has, in addition to the powers stated under Section 12 of the TK Constitution, further explicit powers such as those of the Government Administration and Interpretation Act (sec.12.3b).

The Yukon Supreme Court stated its interpretation of these powers in Harpe vs. Massie and the Ta'an Kwäch'än Council, 2006 YKSC 01. "The Judicial Council has enormous powers ranging adjudicating violations of the law to removing members of the board."

Since 2004 when the TKJC was first established, the TKJC has ordered a broad range of remedies when specific laws or regulations have been violated. These have included ordering the TKC to review all legislation passed during the tenure of a member later determined not to be eligible to have served to obligating a suspended official to retake their oath of office prior to reinstatement when certain conditions had been met.

While these remedies were not specifically legislated, the TKJC understands that the "living tree doctrine" should be applied to the Constitution. The TKJC, under Section 12.1.1 of the Constitution, has the power to "impose such sentences as are provided by law to ensure compliance" and believes "This means that, as with other constitutions, a First Nation constitution should be given a large and liberal, or progressive interpretation to ensure its continued relevance." (2006 YKSC 1, 94.1)

Issued by the Ta'an Kwäch'än Judicial Council this 24th day of August 2016.



Michael Dougherty, Judge



Barbara Evans, Judge

Judicial Note

The TKFN was founded just over a decade ago. The challenges before this new government, trying to balance traditional values with Western concepts of institutional development, have been and remain enormous.

The need for on-going governance training at all levels is key to effectively building this nation's capacity for self-government. It is the wish of the TKJC to see put in place an educational programme which would inspire all TKFN citizens, young and old, to fully realize their potential as a democratically run First Nation.

A process must be found which will allow the TKC to move forward in fulfilling its fiduciary responsibilities. Attendance issues at Council meetings must be addressed. When quorum cannot be met the effective functioning of the TKC on critical issues affecting the TKFN cannot be dealt with in a timely and democratic manner. Issues related to lack of transparency and oversight have contributed to dissatisfaction, distrust and fracturing of relationships at the highest governance level of the TKFN.

A community healing process must be an integral part of any long-term programme intended to facilitate the political growth of the TKFN. Outstanding divisive issues, long unaddressed, remain a corrosive element at the core of many of the disputes arising among the people.

It is the wish of the TKJC to see the implementation of a community healing process, which utilizes traditional means to facilitate the critical reconciliation needed to end the bitterness, retaliatory actions and promote the healthy, lasting development of the whole TKFN.

The TKJC accepts the testimony of one of the witnesses at this proceeding who said that when they were asked to testify at the hearing, they did not know what the issue was. "There are tons of issues, brought up all the time, but complaints to the TKJC only create more animosity. Loss of the community engagement is unfortunate." Therefore, the Judges wish to extend an offer to assist in any manner consistent with our authority under the *Constitution*, hoping that issues identified in this decision will spark action to move the TKFN toward better governance, oversight and administrative practices which will lead to greater transparency and accountability, promoting trust and consensus within the whole of the First Nation.

For the good of future TK generations and as an inspiration for other similarly struggling Yukon First Nations may we all work together to realize a harmonious future.