MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF a complaint made under *The Human Rights Code*, CCSM c. H175

BETWEEN

Etabezahu Metaser,
complainant,

AND

Jewish Community Campus of Winnipeg Inc.
respondent,

AND

Manitoba Human Rights Commission,
the Commission.

MHRC File No.: 12 LP 16

The complainant, in person
For the respondent, Mr Robert Watchman and Ms Karen Poetker
For the Commission, Ms Isha Khan

Heard: 10 September 2013
Decided: 25 September 2013

ROBERT DAWSON, adjudicator:

[1] A former employer moves to terminate the adjudication of a former employee's human rights complaint after the employee had rejected the employer's settlement offer. For the reasons that follow, the motion is granted.

Summary of facts

[2] The respondent, Jewish Community Campus of Winnipeg Inc., employed the complainant, Etabezahu Metaser, as a janitor for an interval in 2007 and then re-hired her for the same work in January 2008. The complainant was a newcomer to Canada, whose English language ability was limited.

[3] On 16 April 2010, the complainant complained to the Manitoba Human Rights Commission that her supervisor at work had sexually harassed her over an extended period of time. In her written complaint, the complainant alleged that, among other things,

- The supervisor had made unwelcome sexual jokes and spoken to her about his sexual interests and activities.
- In addition, starting around August 2009, the supervisor would repeatedly telephone her at home, asking her to go on dates with him, which she would decline.
- When the complainant would not answer or return the telephone calls that her supervisor had made to her home, the complaint says that the supervisor would bother the complainant at work.
- Although she had made the conduct known to the person at work to whom her supervisor reported, the complaint states that the behaviour continued, including the supervisor's alleged offer of US$300.00 on 19 October 2009 if the complainant would have sex with him.

[4] Subsequent to filing her complaint of sexual harassment, the complainant's employment was terminated on 19 August 2011, although the parties do not agree on whether or not the employer had cause to terminate her. In any event, I note that there is no allegation before me that the termination amounts to a reprisal under s. 20 of *The Human Rights Code*, CCSM c. H175 (the "*Code*").

[5] In due course, the Manitoba Human Rights Commission requested the Chief Adjudicator to designate an adjudicator to convene a hearing of the complaint, and she then designated me on 8 February 2013.

[6] On 28 May 2013, the respondent made a written settlement offer, whose terms I very generally summarize as follows:

1. The respondent would pay to the complainant the sum of $5,250.00 as damages for injury to dignity, feelings, or self-respect;

2. The respondent would pay nothing to the complainant in compensation for financial losses, expenses incurred, or lost benefits, because the respondent concluded that the complainant had suffered no such losses. In the alternative, the respondent offered to pay up to $2,000.00 if the complainant could show losses arising from the alleged sexual harassment;

3. The respondent had already taken what it deemed satisfactory steps in order to ensure future compliance with the *Code*;

4. The respondent would pay nothing by way of a penalty or exemplary damages, because the circumstances of the instant case do not support it;

5. The respondent would not adopt any affirmative action program or other special program, because the circumstances of the instant case do not require it; and,

6. The complainant would grant a limited release to the respondent limited only to the pending human rights complaint.

[7] The complainant rejected that settlement offer, and the respondent then moved pursuant to s. 37.1 of the *Code* that I therefore terminate the adjudication. In support of its motion, the respondent filed a written brief and book of authorities, and the complainant and the Commission filed a joint brief and book of authorities. At the request of the parties, I convened an oral hearing of the motion on 10 September 2013. I am especially obliged for the assistance of Ms Ruth Gebremariam, who interpreted the proceedings for the complainant.

Issues

[8] Section 37.1 of the *Code* requires an adjudicator to terminate the adjudication where a complainant fails to accept a reasonable settlement offer:

> If a complainant rejects a settlement offer made by the respondent after an adjudicator is appointed to hear the complaint, the adjudicator must terminate the adjudication if he or she considers the offer to be reasonable.

[9] Two chief issues arise in the disposition of a s. 37.1 motion:

(a) What information may an adjudicator consider when assessing the reasonableness of a settlement offer?

(b) Is the instant settlement offer "reasonable"?

Analysis

The information that an adjudicator may consider when assessing the reasonableness of a settlement offer

[10] Section 37.1 of the *Code* says nothing about what information an adjudicator may consider when assessing the reasonableness of a settlement offer, and the French version of the statute faithfully but unhelpfully echoes the silence of its English counterpart. The jurisprudence from outside of Manitoba is not directly applicable, because the drafting of human rights statutes varies across Canada. There is only one Manitoba decision that has previously considered s. 37.1, and in *Mancusi*, v. *5811725 Manitoba Inc.*, 2012 CanLii 73431 (MB HRC), Adjudicator Harrison proceeded "on the basis that the allegations as set forth in the Complaint are proven."

[11] I adopt this approach, because it gives effect to the public policy that underlies s. 37.1; namely, the parties and the adjudicative process should not expend resources to adjudicate a complaint, where the respondent has already made an offer that is the same or nearly the same as, or at least approximates, all of the remedies that an adjudicator would have ordered if the complainant's allegations had been proven during a hearing of the complaint. For the same reason, it would be appropriate for an adjudicator to consider any admissions or agreed statements of fact. This is not to say that an adjudicator must blindly accept every allegation that appears in a complaint. Where an allegation is speculative at best or highly improbable on its face, an adjudicator may reject such statements.

[12] It is important to recall that, while working from the assumption that the allegations in the complaint are proven, an adjudicator makes no findings of fact, and no one should infer that a respondent has violated the *Code*.

The settlement offer is reasonable

[13] Proceeding therefore upon the assumption that the allegations set out in the complaint are proven and taking into account any admissions or agreed statements of facts, s. 37.1 requires an adjudicator to compare the settlement offer with whatever remedial order would flow from the same findings of fact during a hearing of the complaint. However, the settlement offer need not

> ... exactly mirror what an adjudicator would order. The question is whether the offer is reasonable, in that the relief which is offered "approximates" or is "the same or nearly the same" as "the relief sought by the complainant that would otherwise be obtained if the complaint went to hearing", or the offer is equivalent to what the complainant could reasonably be expected to receive should the case proceed to a hearing.
>
> *Mancusi, supra* [citations omitted]

[14] The extent of any remedial order is defined by s. 43(2) of the *Code*, which collects such orders under 5 headings:

> (a) make an order to do or refrain from doing anything in order to secure compliance with the *Code*, to rectify any circumstances caused by the contravention, or to make just amends for the contravention;
>
> (b) order compensation payable any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention, or for such portion of those losses, expenses or benefits as the adjudicator considers just and appropriate;
>
> (c) order payment to any party adversely affected by the contravention damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect;
>
> (d) order payment to any party adversely affected by the contravention a penalty or exemplary damages in such amount as the adjudicator considers just and appropriate as punishment for any malice or recklessness involved in the contravention; and,
>
> (e) order the adoption and implementation an affirmative action program or other special program if the evidence at the hearing has disclosed that the party engaged in a pattern or practice of contravening the *Code*.

A reasonable settlement offer within the meaning of s. 37.1 must take into account each of these headings. The settlement offer that addresses only some applicable remedies is not reasonable. For example, in *Mancusi*, Adjudicator Harrison held that the offer was not reasonable, even though the respondent offered to pay a significant sum as damages for injury to the complainant's dignity, feelings, or self-respect. The adjudicator found that, among other problems, the offer in *Mancusi* had failed to compensate the complainant for financial losses, expenses incurred, or lost benefits. In

contrast, the settlement offer put forward in the instant complaint canvasses each remedial heading,

Ensuring future compliance

[15] The settlement offer begins with the remedial heading set out at s. 43(2)(a) of the *Code*. Although not mentioned in the complaint, the parties at the hearing agreed that the respondent had already taken steps towards ensuring the respondent's future compliance with the *Code*. For example, the respondent had revised its policy manual, it had sent its key staff to workshops that the Manitoba Human Rights Commission offers, and other employees had viewed relevant video-recordings that the Commission also makes available. During the hearing of the motion, the Commission did however want further improvements to the revised policy manual, although it put forward no specific suggestions.

[16] Having reviewed the relevant section of the respondent's revised policy manual that all of the parties agreed at the hearing as having been adopted, I find that the revision is the same or nearly the same as, or at least approximates, what an adjudicator would have ordered pursuant to s. 43(2)(a) of the *Code* if the information before me on this motion had been proven at a hearing of the complaint.

[17] The complainant and the Commission did not otherwise object to the settlement offer's treatment of this remedial heading, and I find that the settlement offer reasonably addresses the *Code*'s need to ensure future compliance.

Compensation for financial losses, expenses incurred, or lost benefits

[18] The settlement offer next takes up the remedial heading at s. 43(2)(b) of the *Code*, under which an adjudicator may order compensation payable to a complainant for financial losses, expenses incurred, or benefits lost as a result of a contravention of the *Code*. The offer denies that any such compensation is payable in the circumstances of the instant complaint. As all of the parties acknowledged during the hearing of the motion, the respondent had paid the complainant upon her termination a sum in lieu of notice that had at least coincided with the notice period required in the circumstances by *The Employment Standards Code*, CCSM c. E110, s. 61(2).

[19] In their joint submission, the complainant and the Commission sought a greater entitlement, because they submit that the complainant's decline in performance as an employee was a direct result of the ongoing sexual harassment to which she was being

subjected. Her loss of employment income therefore directly arises out of a violation of the *Code*, setting aside, so they argue, the limits that appear in *The Employment Standards Code*.

[20] I do not agree. Pursuant to s. 61(2) of *The Employment Standards Code*, an employer may generally terminate an employee for any lawful reason, provided that the employer either gives sufficient notice of the intended termination or pays a sum equal to those wages and benefits that the employee would have received if employment had continued through the statutory notice period. Where an employer fails either to give such notice or pay in lieu of notice, the employee suffers a calculable loss. The loss is the same for the complainant in the context of a human rights violation, because, putting aside the violation of the *Code*, the employer could have terminated the employee for any lawful reason and limited its financial liability only to an amount equal to wages and benefits accruing during the statutorily-defined notice period. As I wrote at para. 27 of *Garland* v. *Tackaberry*, 2013 CanLII 21646 (MB HRC), "[a]n award of wages paid in lieu of a notice period longer than prescribed by *The Employment Standards Code*, would effectively gift a windfall to the person adversely affected by a human rights contravention."

[21] To be sure, s. 43(2)(b) of the *Code* requires an adjudicator to take into account financial losses, expenses incurred, or lost benefits beyond merely those payable pursuant to *The Employment Standards Code*. To the extent that a complainant has suffered financial losses other than lost wages, for example, this remedial heading permits an adjudicator to order compensation for those losses.

[22] However, there are no allegations of such additional financial losses before me in this hearing. Indeed, the complaint pre-dates the termination of the complainant, and the complaint was never amended to set out any subsequent developments and their impact, if any, upon the complainant. This omission creates a difficulty for the adjudicator who must decide a s. 37.1 motion. In *Mancusi*, *supra*, Adjudicator Harrison was similarly disadvantaged, noting that,

> [a]s is the usual practice with complaints which are filed under the *Code*... the specific losses sustained and compensation being claimed, are not set out in the Complaint.... In these circumstances, I cannot determine with any degree of accuracy what amount the Complainant could reasonably be expected to receive under this head of relief.
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> *Mancusi, supra*

[23] The respondent's settlement offer anticipates the possibility that the complainant has sustained financial losses, incurred expenses, or lost benefits not arising out the termination of her employment. To the extent that she is able to show such losses or expenses, the settlement offer indicates a readiness of the respondent to pay compensation up to $2,000.00. For the purpose of assessing the reasonableness of the settlement offer, I have ignored this gesture, because the complainant has put no information before me by which to show her entitlement to such compensation or any inadequacy in the $2,000.00 maximum that the respondent has established.

[24] Accordingly, in the absence of any information that supports a compensatory award under s. 43(2)(b), I find that the settlement offer was reasonable in making no payment for financial losses, expenses incurred, or lost benefits.

Damages for injury to dignity, feelings, or self-respect

[25] The settlement offer proposes $5,250.00 in payment of damages for injury to dignity, feelings, or self-respect pursuant to s. 43(2)(c) of the *Code*. The respondent explained in its oral submission that it arrived at this sum in two steps. First, the respondent took into account previous Manitoba awards, relying upon the $1,000-$4,000 range that Simonsen J. set out at para. 39 of *Korsch* v. *Manitoba Human Rights Commission*, 2011 MBQB 222, aff'd 2012 MBCA 108. Selecting a figure at the highest end of that range, the respondent next accounted for inflation, and relying upon para. 29 of *Garland* v. *Tackaberry*, *supra*, made an offer in the amount of $5,250.00.

[26] Although it declined to suggest a specific quantum for damages under s. 43(2)(c) of the *Code*, the Commission submitted that the allegations set out in the instant complaint distinguish it from the previous Manitoba awards on which the respondent's settlement offer relies. Pointing to the complaint and inferences that directly flow from the allegations there set out, the Commission underlined that, among other things,

- the complainant is a newcomer to Canada;
- she has difficulty expressing herself in English, which made her especially vulnerable;
- the sexual harassment was ongoing over a long period of time; and,
- the conduct of the respondent's employee was even more distressing for the complainant, given her cultural background.

The Commission submitted that all of these considerations should move the complainant's claim for damages beyond the high end of the range that Simonsen J. had

set out in *Korsch*. In addition, the Commission stated that it would lead other evidence at a hearing of the complaint that would demonstrate the inadequacy of the settlement offer.

[27] For its part, the respondent submitted that its $5,250.00 offer was well within the *Korsch* range. Distinguishing the instant allegations from the findings in *Budge* v. *Thorvaldson Care Homes Ltd*, [2002] M.H.R.B.A.D. No. 1, where a $4,000.00 award was made, the respondent noted that there is no allegation of "sexual touching" in the instant complaint. The respondent went on to distinguish other cases, such as *Mancusi*, *supra*, where a $4,000.00 settlement offer was not found to be reasonable in circumstances of harassment that the respondent submitted were more troubling than those arising in the instant complaint. Similarly, in *Garland*, *supra*, where $7,750.00 was ordered payable as damages under s. 43(2)(c), the employee suffered sexual harassment that both escalated and persisted over a long period of time.

[28] I do not accept that the Commission's submission that there are considerations in the instant complaint that would push the complainant's claim for damages beyond the inflation-adjusted *Korsch* range. While I concede that an oral hearing of evidence might have moved me to make a higher award, the exercise on a s. 37.1 motion is conducted within a specific informational matrix, and I find that, on the basis of that information and in light of the case law, an offer to pay damages for injury to dignity, feelings, or self-respect in the amount of $5,250.00 is the same or nearly the same as, or at least approximates, what an adjudicator would have ordered pursuant to s. 43(2)(c) of the *Code* if the information before me on this motion had been proven at a hearing of the complaint.

Penalty or exemplary damages

[29] The parties agreed that no award of a penalty or exemplary damages under s. 43(2)(d) of the *Code* is appropriate in the circumstances of the instant complaint. I agree. Accordingly, the settlement offer reasonably proposes no such damages.

Affirmation action or special programme

[30] The parties also agreed that no affirmation action or special programme under s. 43(2)(e) of the *Code* would be an appropriate remedy in the circumstances of the instant complaint. I agree. Accordingly, the settlement offer reasonably proposes no such programme.

Release

[31] The settlement offer seeks a release of the respondent by the complainant, and the terms of the draft release restrict the waiver only to the making of a further complaint under the *Code* by the complainant in connection with the facts that give rise to the present complaint. Given that neither the complainant nor the Commission objected in their submissions to the respondent's request for a release or to the terms of the draft release itself, and given further that I myself do not find the release to be objectionable, I consider the settlement offer's inclusion of a draft release to be reasonable, even though its imposition goes beyond the remedial orders that an adjudicator could order pursuant to s. 43(2). While an adjudicator's order at the close of an adjudication of a complaint would preclude a subsequent complaint deriving from the very facts that underlay the first complaint, a complaint settled without an adjudication does not definitively rule out the complaint's revival or re-filing. Accordingly, a request for a limited release is a reasonable means by which a party may seek some finality.

Conclusion

[32] I find that the respondent's settlement offer dated 28 May 2013 addresses all of the remedial headings, arriving at an outcome that is the same or nearly the same as, or at least approximates, what an adjudicator would have ordered pursuant to s. 43(2) of the *Code* if the information before me on this motion had been proven at a hearing.

A digression about s. 37.1

[33] During oral argument of this motion, I noted that, after an adjudicator's decision pursuant to s. 37.1 to terminate an adjudication, the *Code* does compel a respondent to make good on its settlement offer. In contrast, ss. 47 and 48 of the *Code* provide a mechanism by which to enforce an adjudicator's order under s. 43(2). An amendment to s. 37.1 could helpfully extend an adjudicator's jurisdiction to "terminate an adjudication *upon such terms as the adjudicator considers just and appropriate*, if he or she considers the offer to be reasonable." Administrative amendments to ss. 47 and 48 would also be required.

[34] I go out of my way to record the assurance of the respondent's counsel that he has no reason to believe that his client would renege on its settlement offer; this digression does not therefore spring from any concern relating to the instant parties.

Decision and order

[35] For the reasons set out above, the motion is granted, and the adjudication of the instant complaint is hereby terminated.

[36] I draw to the parties' attention s. 50(2) of the *Code*, which proposes a 30-day limitation for the bringing of any application for judicial review of this decision.

25 September 2013

Original signed by

Robert Dawson