

HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF: A complaint by Natalia Collette against St. Adolphe Personal Care Home Inc. and Niverville PCH Inc. o/a Heritage Life Personal Care Home, alleging a breach of section 14 of *The Human Rights Code*

AND IN THE MATTER OF: *The Human Rights Code*, C.C.S.M., Chapter H175, as amended

Panel: Peter Sim

Appearances:

Isha Khan, *for the Commission*

Jeff Palamar, *for the Respondent*

The complainant in person

DECISION

[1] This is a motion by the Respondent under Section 37.1 of *The Human Rights Code* for a determination by an adjudicator as to whether a settlement offer made by the respondent is reasonable.

[2] There have been four decisions under section 37.1 of *The Human Rights Code* since it was enacted in 2012 and one of these decisions has been judicially reviewed. The principles on which the determination is made have been well established. The adjudicator is to assume that the allegations in the complaint have been proved and to determine whether the offer approximates the amount which an adjudicator might be expected to award after a hearing.

[3] The complaint was originally filed against St. Adolphe Personal Care Home Inc. as respondent. The commission subsequently moved to amend the claim to add

Niverville PCH Inc. as an additional respondent. Both respondents are related and were represented by the same counsel. Mr. Palamar advised me that he had not yet consented to the adding of a new respondent but it was agreed by Mr. Palamar and Ms. Khan that this hearing could proceed on the basis that both respondents had been added. When I refer to the respondent it can be taken as a reference to both respondents.

[4] The complaint alleges that the respondent discriminated against the complainant in connection with her employment, contrary to Section 14 of the Code by failing to afford the complainant reasonable accommodation for her disability.

[5] The complainant suffers from depression. Prior to December, 2001 she was employed by the respondent as a part time dietary aide. The complainant alleges that on November 25, 2011 was called into a meeting with two managers and a union representative. Her job performance was discussed and various complaints about her performance were raised. The complainant had an emotional breakdown during the meeting and left to collect herself. She came to the meeting and was asked to sign a complaint letter, which she declined to do. She had another breakdown and had to leave the meeting.

[6] Over the next few days the complainant's condition became worse. She was unable to show up for work on Saturday and Sunday. On Monday, she attended work but had another breakdown and had to leave early. Her next shift was not until Friday.

[7] On Thursday, December 1 the complainant saw her doctor who put her on anti-depressant medication and gave her a sick note. She went to a crisis unit for depression

and stayed there until December 5. On December 6, she received a registered letter from the respondent dated December 1, which advised her that her employment had been terminated.

[8] The complainant filed a complaint under the *Code* which was investigated by the commission and has been referred to an adjudicator. No hearing has been scheduled.

[9] The offer of settlement is contained in an e-mail from Mr. Palamar, the lawyer for the respondents, to Ms. Khan, the lawyer for the commission, dated March 19, 2015 which reads as follows:

Acknowledgement - With the benefit of hindsight and the clear objectivity that can come from the passage of time, my client readily acknowledges that with the information it had at the relevant time, it could and should have done much more in understanding Ms Collette's personal circumstances, and accommodating them. It apologizes for what happened.

Compensation for injury to dignity, etc. - My client is prepared to provide a payment of \$8,000 as general damages to compensate for injury to dignity, self-respect and hurt feelings. This seems consistent with the case law, and would to my own knowledge at least, seem to be one of the larger payments made to this point for these types of damages. We acknowledge that this is warranted.

Compensation for financial loss - Ms. Collette was earning approximately \$296 per week, and my client is prepared to make payment of one year's wages less any required deductions. We believe this amount fairly addresses this aspect of the claim.

Securing future compliance with the Code - My client is absolutely committed to learning from what took place and doing whatever it properly can to live up to its legal obligations and beyond. It is prepared to have appropriate people at a high level within management participate in training offered by the Commission, if need be, and/or undertake whatever policy and practice review and update is required, with the assistance of legal counsel. In exchange, of course, the complaint would need to be withdrawn and we would need a standard release containing a confidentiality clause.

[10] The commission takes the position that this is a reasonable offer and has recommended that the complainant accept it. The complainant has rejected the offer

and the respondent requested a hearing under Section 37.1. This is the first case considered under Section 37.1 where the commission has agreed with the respondent that the offer was reasonable.

[11] The commission is an independent party to these proceedings. The commission has carriage of the proceedings and normally presents the case, working in close consultation with the complainant. However, the commission ultimately represents the public interest and not the interests of the complainant and it is open to the commission to take the position that an offer is reasonable and no public interest would be served by spending public funds on a hearing.

[12] A reasonable offer under Section 37.1 must adequately address each of the forms of relief which an adjudicator may grant under Subsection 43(2) of the *Code*.

[13] Paragraph 43(2)(a) of the provides that the adjudicator may make an order for the purpose of securing compliance with the *Code* and rectifying any circumstance caused by the contravention an making just amends for the contravention.

[14] The respondent has offered an apology to the complainant and an undertaking to the commission to participate in a policy and practice review to ensure that it can live up to its obligations under the *Code*.

[15] The complainant may or may not be satisfied with the terms of the apology, but I find that it is reasonable.

[16] The steps that the respondent proposes to secure future compliance with the *Code* are an issue for the commission rather than the individual complainant. The

commission has advised that it is satisfied with the respondents' proposal and that it is sufficient for me to determine that they are reasonable.

[17] Paragraph 43(2)(b) provides for compensation to the complainant for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention.

[18] In this case, the financial loss sustained by the complainant consists of wages and benefits lost by reason of the termination of her employment.

[19] The normal measure of damages where a complainant loses employment as a result of a contravention of the *Code* is the wages and benefits lost by the complainant from the date of termination to the date of the hearing. The complainant has a duty to mitigate damages by seeking other employment, and damages will be reduced if the complainant fails to make reasonable efforts to mitigate. Damages may also be reduced or eliminated if it is found that the complainant was unable to work for reasons not related to a contravention of the *Code*. On the other hand, damages might be increased if it were proved that the contravention of the *Code* impaired the complainant's ability to find new work.

[20] This aspect of the award is the most difficult to assess in the absence of actual evidence. The respondent argues that the complainant left work because of a mental illness which pre-existed the subject of the complaint and that there is no indication that she would have been able to return to work even if the respondent had not terminated her employment. The position of the respondent, at the hearing, would be that there

should be no damages for wage loss but that it is making this offer as a gesture of good faith.

[21] The commission acknowledges the difficulty of determining when the respondent would have returned to work and agrees that the offer of 12 months lost earnings is reasonable.

[22] I am satisfied that the offer of the equivalent of twelve months earnings is reasonable. It is substantially higher than other awards that have been given in this province to persons in similar types of employment. I have reviewed the complainant's submissions and I find that even if all of her positions were accepted, it is highly unlikely that an adjudicator hearing the complaint would award her more than the amount of the offer.

[23] Section 43(2)(c) of the *Code* provides for compensation for injury to dignity, feelings or self-respect. The highest damages award under this heading in Manitoba to date has was in *Emslie v. Doholoco Holdings Ltd. o/a The UPS Store #425* where the adjudicator awarded \$15,000.00. The second highest award was \$7,750.00 in *Garland v. Tackaberry (c.o.b. Grape & Grain)*, [2013] MHRBAD 5. Both of these cases involved very serious incidents of sexual harassment.

[24] The facts of the present case are much closer to those in *K.K. v Hair Passion*, 2013 CanLII 3982 (MB HRC) where the adjudicator awarded \$2,000.00 for this head of damages.

[25] I find that it is unlikely that an adjudicator would award the complainant more than the sum of \$8,000.00 contained in the offer.

[26] Section 43(2)(d) provides for payment of a penalty or exemplary damages as punishment for malice or recklessness involved in the contravention. This is an exceptional award which is only made in exceptional circumstances. There is nothing in this case which would justify such an award. The worst characterization that can be placed on the respondent's conduct is that it badly mismanaged the discipline process.

[27] Finally, paragraph 43(2)(e) provides for adoption and implementation of an affirmative action program or other special program. This is a special remedy which can be granted in cases where there is evidence of systemic discrimination. There is no reason to consider it in a case involving failure to accommodate an individual.

[28] The offer of settlement requires that the complainant execute a release with a confidentiality clause. This is a reasonable term in a settlement offer. The confidentiality clause will be irrelevant because the terms of the settlement offer are incorporated in this decision which will be on the public record.

[29] The complainant made both written and oral submissions. Much of her submission was concerned with the facts of her case. She raised objections to various written and oral warnings she was given, and the conduct of the dismissal process and her subsequent union grievance. I found this material irrelevant and will not address it in detail. The point of an application under Section 37.1 of the *Code* is to avoid unnecessary costs by leaving aside the details of the merits of the complaint and focusing on the appropriate remedy.

[30] The complainant dealt with the issue of remedies only briefly in her lengthy written submission. At one point she raised the possibility that she might have had her job reinstated through a union grievance. She also said that the employer was not offering her a neutral letter of reference and that the financial compensation offered to not include compensation for medical expenses incurred as a result of the depression she suffered following her termination. She did follow up on any of these points

[31] Reinstatement in employment is a possible remedy under paragraph 43(2)(a) of the *Code* but it is an exceptional remedy. To the best of my knowledge, it has never been ordered by a Manitoba tribunal. A reasonable offer of settlement does not need to include reinstatement if it includes reasonable financial compensation.

[32] A letter of reference and additional financial compensation for out of pocket expenses are reasonable requests, assuming that the financial loss can be proved. However the failure of the offer to address them does not necessarily make in unreasonable. The offer needs to be considered as a whole. The offer in this case includes financial compensation which is very generous compared to what adjudicators have awarded in similar cases and that makes up for any deficiencies in other areas.

[33] I therefore find that the offer of settlement referred to above is reasonable within the meaning of Section 37.1 of the *Code*.

[34] Subsection 37.1(2) of the *Code* reads:

37.1(2) If a complainant rejects a settlement offer that the adjudicator designated under subsection (1) considers to be reasonable, that adjudicator must terminate the adjudication to the extent that it relates to the parties to the settlement offer.

[35] The section is clear that the adjudicator must terminate the adjudication once the requirements of the section have been met and has no authority to impose additional terms or conditions. However, it is not clear from the wording of the section in what order the requirements must be met. There are two possible interpretations.

[36] The first is that the adjudicator determines whether the offer is reasonable only after the complainant has rejected the offer. Once the adjudicator determines that the offer is reasonable, the adjudication must be terminated immediately. The problem with this interpretation is that it would leave the complainant entirely without a remedy. Once an offer is rejected it ceases to exist and is no longer open for acceptance unless the respondent chooses to renew it. (Mr. Palamar assured me that the respondent in this case has renewed the offer and will make good on the settlement.)

[37] The second interpretation is that the adjudicator is required to terminate the adjudication only if the complainant rejects an offer after the adjudicator has determined it to be reasonable. The complainant must therefore be given a reasonable time to accept or reject the offer after the adjudicator makes the determination. In the unlikely event that the respondent withdrew the offer before the complainant could accept, the requirements of Section 37.1 would not have been fulfilled and the adjudication would continue. I believe that this interpretation is more consistent with the remedial purposes of the *Code* than the alternative.

[38] I do not have any jurisdiction to supervise the implementation of the offer. However, that should not be necessary. Once an offer has been accepted it becomes enforceable as an ordinary contract. Subsection 24.1(3) of the *Code* also provides a

mechanism for the Commission to re-open proceedings if there is substantial non-compliance with the terms of a settlement.

[39] I therefore order that if the complainant does not accept the offer of settlement contained in paragraph [5] of these reasons within 35 days of the date of these reasons or within 35 days of the date of termination of any judicial review of this decision, whichever is later, the adjudication in this matter shall be terminated.

Date: September 14, 2015

Peter Sim, Adjudicator