MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

Interim Decision

BETWEEN:

JAMES NASH

Complainant,

-and-

FLORA NATIVIDAD

Respondent,

Appearances:

James Nash, in person

Sarah Gravelines, counsel for the Respondent

Isha Khan, counsel for the Manitoba Human Rights Commission

Krista Klassen, counsel for the Winnipeg Regional Health Authority

DAN MANNING, adjudicator:

1. This is an application by both the Complainant and Respondent to add the Winnipeg Regional Health Authority ("WRHA") as a party to these proceedings pursuant to section 40 of the *Manitoba Human Rights Code* ("the *Code*").

2. A "Complaint of Discrimination Under the Human Rights Code (Manitoba)" ("the Complaint") was submitted by Mr. Nash on April 13, 2015 alleging Ms. Natividad contravened section 13 and 16 of the *Code.* Mr. Nash was at the material time a resident of the WRHA residential program and alleges that Ms. Natividad discriminated against him in the provision of services and that Ms. Natividad and the housing coordinator for the WRHA evicted him on the basis of his disability and/or failed to accommodate his special needs. The Complaint was subsequently amended on May 15, 2015 to add the WRHA as a respondent. On July 12, 2017 the Commission dismissed the complaint against the WRHA pursuant to section 29 of the *Code.*

3. I was designated as the adjudicator for this matter by the Chief Adjudicator on October 17, 2017. In December 2017 I was advised by Mr. Nash and counsel for Ms. Natividad that they were seeking to add the WRHA as a respondent pursuant to section 40 of the *Code* even though the complaint against the WRHA was dismissed by the Commission. Counsel for the Commission at this hearing takes no position with respect to the application. The WRHA is opposed.

4. A hearing was held on March 16, 2018 and this is my decision to add the WRHA as a respondent pursuant to section 40 of the *Code.*

5. Section 40 of the *Code* reads:

40. At any time prior to the completion of the hearing, the adjudicator may, on such terms and conditions as the adjudicator considers appropriate,

(a) permit any party to amend the complaint or reply, either by adding parties thereto or otherwise; or

(b) on his or her own initiative, add another person as parties;

but the adjudicator shall not exercise his or her authority under this section if satisfied that undue prejudice would result to any party or any person proposed to be added as a party.

6. The WRHA argues firstly, that because the complaint against them was dismissed by the Commission pursuant to section 29 of the *Code* to later add them as a party at the adjudication stage would effectively allow section 40 to be employed as an appeal procedure and usurp the gatekeeping function of the initial investigation of the Commission. The Commission's decision under s.29 is entitled to deference. Section 40 should only apply to proposed *new* respondents. In the alternative, the WRHA argues that the test in *Cote* has not been made out. In support of their position the WRHA relies on *Emslie v. Doholoco Holdings Ltd.* 2014 CanLII 71723 (MB HRC) ("*Emslie*"), *Cote v. Manitoba Hydro,* 2015 MBHR 6 ("*Cote*"), and *Tekano v. Canada (Attorney General)* ("*Tekano*"), [2010] F.C.J. No. 1132.

7. In *Emslie,* Adjudicator Sim considered an application to add as a party a person who was the president, director, and principal shareholder of the respondent as a respondent in his personal capacity. The application was made nearly two years

after the initial complaint. Adjudicator Sim wrote that in such circumstances an order under s.40 should be "regarded as an exceptional order", recognizing that the Commission functions as a gatekeeper and that by making an order under s.40 the proposed respondent did not have the benefit of the gatekeeping process. I accept from *Emslie,* that the operation of ss. 26 and 29 of the *Code* by the Commission is an important gatekeeping function. I also accept that a s.40 order should be regarded as an "exceptional order." However, in my respectful view, *Emslie* does not support the WRHA's argument that s.40 can only be applied to *new* respondents.

8. *Tekano* involved the judicial review of a decision of the Canadian Human Rights Commission ("CHRC") to dismiss a complaint against the Correctional Service of Canada. The CHRC has a similar process to the Manitoba process with regards to the gatekeeping function set out in ss. 26 & 29 of the *Code.* In *Tekano* the dismissal of the complaint effectively terminated all proceedings because there were no other named respondents like the instant case. The Federal Court found that the decision to dismiss a complaint as part of the gatekeeping function of the CHRC is entitled to deference, and I accept the WRHA's argument that this principle applies equally to the Commission's gatekeeping function under s.29.

9. However, this application does not come by way of judicial review. The applicants rely on the express authority of section 40 of the *Code.* In my view,

the clear statutory authority within section 40 permits an adjudicator to add a respondent even if they have been subjected to the gatekeeping process of the Commission and had the complaint dismissed against them. If it were otherwise, then the only remedy would be to seek judicial review of the Commission's decision. This would add delay and complication to the process. In *Tekano,* for example, it took nearly one year between the Commission dismissing the complaint and the Federal Court decision.

10. In my view, the proper approach is to accept the Commission's findings as relevant to the overall analysis as one of many factors to consider when applying the *Cote* analysis. In *Cote,* Adjudicator Pinsky outlined the following factors to consider in deciding whether to add a party:

    (a) Is there some reliable evidence on which the tribunal could make the finding of liability against the party?
    (b) Would the proposed party suffer real and substantial prejudice not capable of being cured?
    (c) Does a potential remedy involve the party sought to be added?
    (d) Is it in the interest of justice given the remedial nature of the *Code* and the stage of proceedings, to add a party?

11. I now turn to the *Cote* analysis.

    (a) <u>Is there some reliable evidence on which the tribunal could make the finding of liability against the party?</u>

12. The WRHA argues that the Commission undertook a thorough investigation which included witness interviews and the examination of relevant documents and policies. The WRHA points to this process as reliable evidence in opposition to a finding of liability against them.

13. The position of Mr. Nash is that the Residential Care Housing Coordinator ("Coordinator") at all relevant times was working with Ms. Natividad and that she was equally responsible for Ms. Natividad's decision to "evict" him. He says that his "eviction" contravenes the *Code* and that the Coordinator is liable for her part in the decision.

14. There appears to be corroboration of Mr. Nash's position in Ms. Natividad's response to the complaint. At paragraph 9 of the response she wrote,

> "...so the Residential Care Housing Coordinator, ..., from the Winnipeg Regional Health Authority decided in consultation with myself that he will evicted (sic)..."

15. The extent and degree of "consultation" between Ms. Natividad and the Coordinator will obviously be an issue for trial and nothing in this decision should suggest that I have made any factual determination at this point. However, if the "eviction" is determined to have been made in contravention of the *Code,* and if the Coordinator was involved in that decision-making process, then there could be a finding of liability against the WRHA.

16. I am mindful that the Commission reached a different conclusion. However, the gatekeeping or screening function of the Commission does not typically involve full disclosure of relevant evidence nor can it resolve issues of credibility. I do not have the evidence that was before the Commission nor do I have the reasoning why the Commission dismissed the complaint against the WRHA. I am left with the conclusion, based on the information before me, that there is some reliable evidence on which a finding of liability could be made.

(b) Would the proposed party suffer real and substantial prejudice not capable of being cured?

17. The WRHA argues that undue prejudice would result to them should they be added as a party because they will have to incur further time and expenses defending the complaint.

18. The term "real and substantial prejudice not capable of being cured" relates to the denial of the principles of natural justice and fairness. Natural justice and fairness demand that an individual possess sufficient information to: (1) make representations on their own behalf; or (2) to appear at a hearing or inquiry (if one is held); and (3) effectively to prepare their own case and to answer the case (if any) they have to meet. (see *Payne v. Otsuka Pharmaceutical Co.,* 41 C.H.R.R.D./52 at paras. 19-21).

19. There was no evidence from the WRHA that their ability to answer the case to meet has been prejudiced. The WRHA has been aware of and involved in this process since April 2015 and at all material times been able to make representations on their own behalf. I am satisfied that adding them as a respondent would not result in real and substantial prejudice not capable of being cured.

(c) Does a potential remedy involve the party sought to be added?

20. If there has been a breach of the *Code* and the WRHA is not added as a party then broad remedies available under the *Code* such as education, training, and supervision of residential services providers would not be available. If liability is made out, then given the vulnerable nature of the people utilizing the Residential Services, a remedy against the WRHA would necessarily be involved.

(d) Is it in the interest of justice given the remedial nature of the *Code* and the stage of proceedings, to add a party?

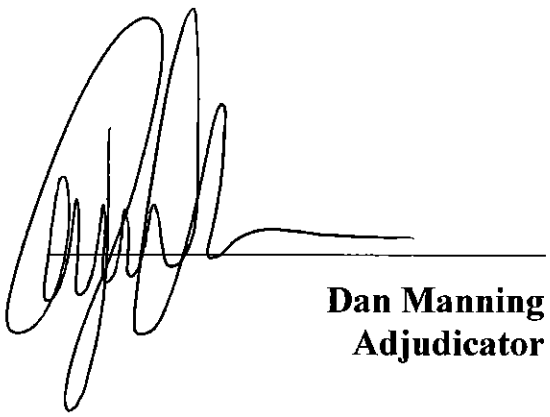
21. The WRHA has actively participated in the pre-adjudication stage of the complaint and has no doubt invested significant resources in responding to the compliant. Respondents should have confidence in the finality of decisions of

the Commission made pursuant to s.29, especially when, as is the case here, they actively participate with the Commission during the investigation phase. The Commission's decision should not be lightly disturbed. In this sense the interests of justice weigh in favour of not adding the WRHA as a party.

22. I also consider the likelihood that the Complainant and Respondent will give evidence regarding the decision to "evict" the Complainant. The Coordinator will probably be called upon to give evidence at the hearing in some form. Given the inevitable involvement of the Coordinator, in this sense, the interests of justice would be best served by having the WRHA present as a party to properly advance her evidence at the hearing.

23. In balancing all the factors, including the availability of reliable evidence, lack of prejudice, and the vulnerable nature of people utilizing the WRHA's Residential Housing, I permit the Complainant to amend the complaint to add the WRHA as a respondent pursuant to s.40 of the *Code.*

DATED: 28th May 2018



Dan Manning
Adjudicator