MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

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

BETWEEN

Robin Rankin,
complainant,

AND

Government of Manitoba,
respondent,

AND

The Manitoba Human Rights Commission,
Commission.

MHRC File No.: 17 LP 12

The complainant in person

For the respondent: Ms Terra L. Welsh, Ms Megan A. Smith, and Ms Tanya M. Cole

For the Commission: Ms Isha Khan and Ms Heather Unger

Complaint heard: 22, 23, and 26 March 2018, with supplementary written submissions that closed on 14 April 2018

Reasons published: 16 November 2018[1]

ROBERT DAWSON, adjudicator:

[1] A unionized employee complains that, without *bona fide* and reasonable cause, her employer discriminated against her on the basis of sex and family status when, because she had returned from maternity leave and parental leave, the employer had

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[1] The present version of these reasons is a consolidation that incorporates an erratum published on 23 November 2018, correcting the case law citation that closes para. 12 of these reasons.

required her work more than twelve months in order to be eligible for a salary increase. For the reasons that follow, the complaint is dismissed.

Background

[2] The complainant began working for the respondent as a full-time legal assistant with the Manitoba Department of Justice on 28 June 2004. By reason of her employment, the complainant became a member of the Manitoba Government and General Employees' Union (the "MGEU"). The terms of her employment were set out in The Manitoba Government Employees' Master Agreement ("GEMA"), a collective agreement between the respondent and the MGEU.

[3] Among other things, GEMA provided that, like all employees, the complainant would receive "merit increases" from time to time, meaning "an increase in the rate of pay of an employee within the employee's pay range which may be granted in recognition of satisfactory service on the employee's anniversary date". Section 16:04 of GEMA prescribed the minimum number of work hours that an employee would have to complete satisfactorily each year in order to receive a merit increase on the employee's anniversary date. For part-time employees, Appendix C of GEMA set out a correspondingly lower minimum. Section 16:04 also provided that, where an employee failed to accumulate sufficient hours within the year preceding the employee's anniversary date, the employee would have to wait until the anniversary date in the

following year before being eligible for a merit increase. In the years leading up to the material time of this complaint, the complainant had received a merit increase every July 1st, which was her anniversary date. In one banner year, the complainant had even received a double merit increase.

[4] Between 12 February 2011 and 24 February 2012, the complainant took maternity leave and parental leave. She returned to work on 25 February 2012 and resumed her former position. For administrative reasons that affected all employees in the complainant's classification, the complainant's anniversary date changed in early 2012 from July 1st to December 1st.

[5] Between 11 August 2012 and 23 August 2013, the complainant again took a second maternity leave and parental leave. Less than six months had elapsed since the complainant had returned to work from her first maternity leave. Accordingly, the complainant did not accumulate sufficient hours in order to be eligible for a merit increase on her anniversary date of 1 December 2012. However, GEMA anticipated that a maternity leave or parental leave could prevent an employee like the complainant from accumulating sufficient hours before her anniversary date in order to become eligible for a merit increase. Accordingly, s. 16:05 prescribed an alternative for such employees; otherwise, they would have had to wait until their next anniversary date in order to become eligible. Pursuant to s. 16:05, such employees became eligible for a

merit increase as soon as they had accumulated sufficient hours; in other words, they did not have to wait for their next anniversary date. The complainant returned to work from her second maternity leave and parental leave on 24 August 2013 on a part-time basis in her former position. By October 2013, she had accumulated sufficient hours to be eligible under s. 16:05 for a merit increase, which she received on 1 November 2013.

[6] After having been awarded that merit increase, the complainant expected her next merit increase would come relatively soon. She did not think that she would have to wait more than twelve months until 1 December 2014. At best, the complainant hoped that she might somehow be eligible for another merit increase on her usual anniversary date of 1 December 2013. At worst, she thought that the respondent would again apply the s. 16:05 exception for employees like her who had returned to work from maternity leave or parental leave. If that exception were to apply, the complainant had calculated that she would become eligible for a merit increase again in early 2014. By receiving a second merit increase so soon, she would catch-up to the merit increases that she would have received in December 2012 and December 2013 if she had not taken any maternity leaves or parental leaves. Moreover, if she received a second merit increase very soon, the complainant would be eligible as usual for a merit increase in December 2014. At that point, she would have caught up, and her pay would be as if she had not taken any maternity leaves or parental leaves.

[7] However, the respondent informed the complainant that she would have to wait for her next merit increase. It would not come in December 2013 or early 2014 as the complainant had hoped. The respondent would not again apply the exception set out in s. 16:05 for the same maternity leave and parental leave. Instead, the respondent informed the complainant that, as usual, she would be eligible for her next merit increase only on 1 December 2014.

[8] The complainant realized that this delay would effectively penalize her for the decision to take maternity leaves and parental leaves. Accordingly, the complainant went to the Union, and a MGEU representative filed a "Step 1" grievance on behalf of the complainant on 5 June 2014. In a convoluted complaint, the Union grieved that, contrary to GEMA and *The Human Rights Code*, (1) the respondent had not corrected errors about the complainant's merit increases in a timely way; and, (2) the respondent had incorrectly adjusted the effective dates of earlier-granted merit increases. The designated "Step 1" hearing officer denied the grievance on 8 August 2014. By way of appeal, the MGEU representative applied for a "Step 2" hearing and filed a revised and more precise grievance on 2 September 2014. The revised grievance alleged that, contrary to GEMA and *The Human Rights Code*, the respondent had failed to pay a second merit increase to the complainant pursuant to s. 16:05 arising out of the same

maternity leave and parental leave. On 21 October 2014, a designated hearing office denied the "Step 2" grievance.

[9] For the sake of completeness, it should be noted that the Union also filed an entirely separate grievance, complaining about the respondent's recovery of overpaid wages to the complainant, but the parties satisfactorily resolved this second grievance.

[10] Returning to the first grievance, the MGEU did not appeal the "Step 2" decision that had denied the grievance. Instead, the complainant filed a complaint with the Manitoba Human Rights Commission on 12 December 2014. Among other things, the complaint alleged in essence that, without bona fide and reasonable cause, the respondent had discriminated against the complainant on the basis of sex and family status. Because she had returned from maternity leave and parental leave, the respondent required her to work more than twelve months in order to be eligible for a merit increase. On 8 January 2018, the Chief Adjudicator of the Manitoba Human Rights Adjudication Panel designated me as the adjudicator to hear and decide this complaint. On 22, 23, and 26 March 2018, I convened a hearing of the complaint and the submissions of the parties. Arising out of closing argument, I invited supplementary written submissions about the calculation of the complainant's salary in certain hypothetical scenarios, and these submissions closed on 14 April 2018.

Jurisdiction and issue estoppel

An overview of the law

[11] Given any dispute, there are three possible kinds of jurisdiction that the governing legislation might give to decision-makers: concurrent, overlapping, and exclusive jurisdiction: *Weber* v. *Ontario Hydro*, [1995] 2 SCR 929 at para. 39, 47, and 50.

[12] A two-step process determines which kind of jurisdiction applies when resolving a dispute: first, taking into account the entire factual and legal context, the essential character of the dispute must be identified; and, secondly, the decision-maker must determine whether the nature of the dispute expressly or implicitly falls within the ambit of the decision-maker's governing statute: *Northern Regional Health Authority* v. *Manitoba Human Rights Commission* et al, 2017 MBCA 98 ("*Horrocks*") at para. 51, leave to appeal to SCC requested.

[13] Where the nature of a dispute falls within the exclusive jurisdiction of another forum, the decision-maker has no jurisdiction. However, where the nature of a dispute falls within the concurrent or overlapping jurisdiction of another forum, the decision-maker has jurisdiction, but where the other forum has already resolved the dispute, the principle of issue estoppel may preclude the decision-maker from reopening or reviewing the dispute: *Horrocks* at para 96.

[14] In order for issue estoppel to arise, three conditions must be met: (1) the same question has already been decided; (2) the decision that creates the estoppel was final; and, (3) the parties or their agents presently before the decision-maker are the same parties or their agents in the other proceedings from which the estoppel arises: *Danyluk* v. *Ainsworth Technologies Inc.*, [2001] 2 SCR 460 ("Danyluk") at para. 25.

[15] Lastly, the decision-maker has a discretion not to apply the principle of issue estoppel if, for example, there is a suggestion of unfairness in the other proceedings: *Horrocks* at para. 98.

Applying the law to disputes about the operation of the collective agreement

[16] The complaint that the complainant filed with the Manitoba Human Rights Commission sets out several points of dispute:

(a) the respondent had incorrectly adjusted the effective dates of one or more merit increases (para. 14 of the complaint);

(b) the respondent had incorrectly calculated her eligibility to advance in her pay scale (para. 16 and 17 of the complaint)

(c) the respondent had incorrectly or improperly recovered wages that it had overpaid to the complainant (para. 13, 14, and 19 of the complaint)

[17] The essential character of these disputed points relates to the operation of GEMA. For each point, the resolution of the dispute might require a plodding

application of the provisions of GEMA, a study of the respondent's payroll policies, and a review of the employee's pay and work attendance. There is nothing in these points that causes the issues to transcend GEMA.

[18] Sub-section 78(1) of *The Labour Relations Act*, CCSM c. L10, requires every collective agreement to include a provision for "for final settlement… by arbitration or otherwise, of all differences between the parties thereto… concerning its meaning, application, or alleged violation." That provision appears in Articles 50 and 51 of GEMA, reserving the resolution of such disputes about "the application, interpretation, or alleged violation of an Article of this Agreement" to decision-makers designated pursuant to its grievance and arbitration process; for example, ss. 50(2)(a) and 51:01(a) of GEMA. Accordingly, such decision-makers have exclusive jurisdiction to resolve disputes arising from the operation of a collective agreement: *Horrocks* at 71.

[19] It was for this reason that, on 20 March 2018, I had issued a procedural order that excluded from the hearing any evidence or submissions relating to (a) adjustments to the complainant's anniversary date, (b) the calculation of the complainant's eligibility in order to advance in her pay scale, or (c) the way in which the respondents had recovered any overpayments from the complainant.

Applying the law to disputes that transcend the collective agreement

[20] My procedural order of 20 March 2018 left open the consideration of "issues relating to any s. 14 discrimination that the complainant or the Commission alleges to have arisen by reason of an apparent requirement that the complainant work more than 12 months in order to receive a merit increment in pay." This point largely corresponded to the allegation set out in para. 20 of the complaint:

> the grievance alleged that the employer failed to apply Article 16:05 of the GEMA to [a] "Step 5 CL4" merit increase. It stated one of the applicable articles violated was under *The Human Rights Code.*

On the face of it and without supporting evidence, I could not conclude that such issues were beyond my jurisdiction.

[21] Unlike the earlier points in dispute, this issue goes beyond the mere operation of GEMA. It considers the way in which employers must reasonably accommodate employees who take maternity leave or parental leave but who still must demonstrate satisfactory performance at work in order to qualify for merit increases in salary. That is the essential character of this disputed point, which is squarely within the jurisdiction of a human rights adjudicator.

[22] However, a human rights adjudicator does not automatically have exclusive jurisdiction over an issue simply because it is a human rights issue. Indeed, labour arbitrators usually have jurisdiction to decide, and the responsibility to consider,

human rights and employment-related legislation in a grievance arbitration that arises under a collective agreement: *Horrocks* at para. 54(i).

[23] In the instant dispute, there was no labour arbitration of the grievance. Instead, the grievance did not progress beyond a "Step 2" decision. Nevertheless, the "Step 1" grievance decision-maker and the "Step 2" grievance decision-maker both had the same responsibility as a labour arbitrator. All of them were required to consider and decide any human rights issues that arose from the grievance before them. Although *Horrocks* and much of the other relevant case law speak only about the jurisdiction of labour arbitrators, both public policy considerations and GEMA itself capture decision-makers who have come earlier in the grievance process. Echoing *Tranchemontagne* v. *Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513, Mainella JA noted at para 68 of *Horrocks* that *The Human Rights Code* is "a statute of general application to all administrative decision-makers in Manitoba." In *Tranchemontagne*, Iacobucci J. outlined at para. 50-54 several public policy factors in support a labour arbitrator's jurisdiction to consider and decide human rights issues. Of course, these considerations apply as easily to labour arbitrators as they do to the decision-makers at "Step 1" and "Step 2" of the grievance process: arbitration resolves workplace disputes in a manner that is prompt, final, and binding; arbitration aims to protect employees from the misuse of managerial power; arbitration encourages employees to assert their rights; arbitration

represents an accessible and informal forum; and, arbitrators already possess sufficient expertise. Apart from such public policy considerations, s. 7:01 of GEMA expressly incorporates provisions found in *The Human Rights Code*, which those deciding grievances under GEMA must have to apply:

> The parties hereto agree that there shall be no discrimination, harassment, coercion or interference exercised or practiced with respect to any employee by reason of age, sex, marital status, sexual orientation, race, creed, colour, ethnic or national origin, physical disability, political or religious affiliation or membership in the Union or activities in the Union or any other applicable characteristic as set out in the Manitoba Human Rights Code.
>
> Further, as set out in the Code, the Parties agree that there shall be no discrimination with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.

An adjudicator of human rights obviously has jurisdiction to hear and decide human rights issues, but so too does a “Step 1” decision-maker and a “Step 2” decision-maker under the GEMA grievance procedure set out at Art. 50.

[24] Because a “Step 2” decision-maker already denied the grievance that the Union had filed on behalf of the complainant, the principle of issue estoppel may preclude the exercise of my jurisdiction as a human rights adjudicator to decide this complaint.

[25] In *Danyluk*, the Supreme Court of Canada set out three conditions that may give rise to issue estoppel. First, writing for the court, Binnie J. required that the same question has already been decided. At para. 54, it was explained that sameness refers to

"the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that 'issue' in the prior proceeding. Applying that condition to the instant facts, consider the grievance form filed on behalf of the complainant at "Step 2", which described the issue in dispute as follows:

> I hereby grieve that the employer failed to apply Article 16:05 to more than one merit increase affected by the same period of maternity leave and parental leave, and as a result, failed to provide me a merit increase to Step 5 of the CL4 pay range on the first of the month following the date on which I had accumulated the necessary regular hours of work after my return to work from said leave on August 24, 2012, in order to be eligible for said merit increase; and in failing to do so, the employer discriminated against me based on a protected characteristic as set out in The Human Rights Code.

Compare the grievance form's description of the issue with the human rights complaint form's description of the same point:

> The Complainant alleges that… the Respondent(s) did contravene s. 14 of *The Human Rights Code,* or any other applicable section as follows:
>
> …
>
> 20. Mr Whiteside amended the original grievance and filed it on September 3, 2014. It was taken to Step 2 of the grievance process. The grievance alleged that the employer failed to apply Article 16:05 of the GEMA to [a] Step 5 CL4 merit increase. It stated one of the applicable articles violated was under *The Human Rights Code.*

While not at all identical in wording, both the complaint and the "Step 2" grievance form set out essentially the same allegation; namely, "the employer failed to apply

Article 16:05 to a 'Step 5 CL4' merit increase, which violated *The Human Rights Code*".

Even the Commission's formulation of the issue is essentially the same:

> The Complainant was discriminated against without bona fide and reasonable cause when she was required to work more than twelve months to be eligible to move to the next step on the pay scale for her position. Specifically… the requirement to work more than 12 months in the circumstances constituted adverse treatment and that the Complainant's sex and/or family status was a factor in that adverse treatment.
>
> …
>
> The Respondent has not shown its actions are bona fide and reasonable and specifically, that it would be an undue hardship for it to use its authority and discretion to reduce or remove any negative impact on the Complainant or others in a similar position.

In denying the grievance, the "Step 2" decision-maker necessarily made certain findings, although they are only implicit in her conclusion. These facts necessarily include that (a) the employer had properly applied s. 16:05 of GEMA in denying the employee a merit increase to "Step 5 CL4"; and, (b) the employer had not violated *The Human Rights Code* when it applied s. 16.05. If a human rights adjudicator were next to decide the same issue expressed at para. 20 of the instant complaint, the adjudicator would also have to make findings about (a) whether the respondent had properly applied s. 16:05 of GEMA in denying the complainant a merit increase to "Step 5 CL4"; and, (b) whether the respondent had violated *The Human Rights Code* when it applied s.

16:05 in that manner. In effect, the human rights proceedings before me seek to re-litigate the same issue:

> issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties.
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> (*Danyluk* at para. 54)

[26] The Commission nonetheless contends that the instant complaint is about more than just the complainant and the way in GEMA has negatively affected her. Instead, the Commission sees in the complaint the negative effects upon women in all sorts of workplaces who return from maternity leave but who are still subjected to unreasonable differential treatment on the basis of their sex – and this is despite the bargained rights that have ameliorated their condition. Unfortunately, the Commission's approach does not avoid the problem about re-litigating the same issues. Whether the complaint focuses upon only one individual or whether the Commission builds upon that individual's experience in order to address a broader subject, a human rights adjudicator must still make findings that the "Step 2" grievance decision-maker would also have made. After all, the material facts and the legal issues are fundamentally the same. I therefore conclude that the same question has already been decided.

[27] The second condition requires the decision that creates the estoppel to be final. GEMA sets out a three-step grievance process that culminates in arbitration. In the instant dispute, the Union did not appeal the "Step 2" grievance decision, and the issue never went to arbitration. Accordingly, the "Step 2" grievance decision was final, because s. 50:08 of GEMA provides that

> if an employee or the Union fails to initiate or process a grievance within the prescribed time limits, the grievance will be deemed to be abandoned, and *all rights or recourse to the grievance procedure for that particular grievance shall be at an end* [emphasis added].

In addition, in terms of an appeal of the "Step 3" grievance decision, time limits have already lapsed for the convening of a grievance arbitration under s. 51 of GEMA or for an appeal to the e Civil Service Commission under Art. 52.

[28] The third condition requires that the parties, or their agents, to the instant complaint are the same parties, or their agents, as were involved in the "Step 2" grievance. Obviously, the employee and the employer, as they were known under the grievance process, have respectively become the complainant and the respondent in the instant complaint. The Union, however, is not part of the human rights proceedings, while the Manitoba Human Rights Commission was not part of the grievance process.

[29] Writing at para. 97 of *Horrocks*, Mainella JA held that, for the purpose of satisfying this third of the *Danyluk* conditions, it was sufficient that the parties to a labour arbitration were the same as those to a human rights proceeding, despite the fact

that “the complainant’s agent in the arbitration was the union, and in the human rights proceeding it was the Commission.” (It might be more accurate to say that carriage of the respective proceedings rests with the union and the Commission, because the Commission is not the agent of a complainant in a human rights matter.)

[30] The facts of the instant dispute therefore fulfil the three conditions that, according to *Danyluk*, trigger the principle of issue estoppel. In addition, the evidence does not suggest that the grievance process was unfair or that, through the application of issue estoppel, the complainant would be denied an opportunity to have her dispute heard and determined. (Her dispute has already been heard by the “Step 2” grievance decision-maker.)

[31] Accordingly, by reason of issue estoppel, I am precluded from exercising my jurisdiction as a human rights adjudicator to decide this complaint.

Decision and order

[32] For the reasons set out above, the complaint is dismissed.

[33] I draw to the parties’ attention s. 50(2) of the *Code*, which requires that any application for judicial review must be made the Court of Queen’s Bench within 30 days of the making of this decision or within such further time as the court may allow.

[Original signed by]

16 November 2018

Robert Dawson