MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

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

BETWEEN

Issa Qumsieh,
complainant,

AND

Brandon School Division,
respondent,

AND

The Manitoba Human Rights Commission,
Commission.

MHRC File No.: 15 EN 061

The complainant in person
For the respondent: Ms Celia Fergusson
For the Commission: Ms Isha Khan

Motion heard through written submissions filed on: 26 and 30 April 2019, and 1 and 2 May 2019

Reasons published: 6 May 2019

ROBERT DAWSON, adjudicator:

[1] An employer moves to defer the hearing of an employee's human rights complaint until after the employee's parallel applications about unfair labour practices have concluded before the Manitoba Labour Board. The employer further moves for a production order against the employee. For the reasons that follow, the motion is granted in part.

Background

[2] The complainant, Mr Qumsieh, began employment as a custodian with the respondent Brandon School Division in 1994. He is a Palestinian who emigrated to Canada, and he alleges that, throughout his employment, his co-workers have harassed him on the basis of his ancestry, country of origin, and religion. He further alleges that, despite complaints, his employer did nothing to stop or investigate the harassment. More or less since mid-2013, Mr Qumsieh has been away from work on medical leave.

[3] At all material times, Mr Qumsieh has been a member of a union, and a collective bargaining agreement has governed his employment.

[4] Mr Qumsieh filed a human rights complaint on or about 10 February 2015, in which he detailed these allegations. Three years later, the Commission referred to adjudication only part of the complaint; namely, the allegation that the Brandon School Division had failed to take reasonable steps to terminate the harassment of its employee, Mr Qumsieh. On 26 November 2018, the Chief Adjudicator designated me as the Board of Adjudication that would hear and decide the complaint. After a pre-hearing conference on 11 December 2018, I directed that the hearing of the complaint would begin on 10 June 2019.

[5] On or about 25 March 2019, Mr Qumsieh complained to the Manitoba Labour Board that the Brandon School Division had engaged in unfair labour practices; namely, it had not investigated his complaints of workplace harassment. At the same time, Mr

Qumsieh filed a related complaint against his union, because it had not advanced a grievance on his behalf.

[6] The respondent brought the instant motion on 18 April 2019, seeking an order that would stay the hearing of Mr Qumsieh's human rights complaint until the Manitoba Labour Board had disposed of his complaints about unfair labour practices . The respondent's motion also seeks an order that would require the complainant to produce certain documents. I invited the parties to make written submissions on the motion, and all of them did.

Arguments of the parties

[7] The respondent argued in support of its motion that the hearing of the instant human rights complaint would be an abuse of process unless I delayed the hearing until the Manitoba Labour Board had disposed of the applications that the complainant has recently filed in that forum. For the purpose of this motion, the respondent acknowledged that a human rights adjudicator and a labour arbitrator have concurrent jurisdiction over the instant dispute. However, the respondent submitted that the Manitoba Labour Board is the more suitable forum. In support of this conclusion, the respondent suggested that the issues arising from the Manitoba Labour Board applications include all of the issues that would likely be considered in a human rights

adjudication; however, the respondent added that a human rights hearing would not consider all of the issues that arise from the Manitoba Labour Board applications. The respondent further noted that the union would be a party to the proceedings before the Manitoba Labour Board, and the respondent expected that this addition would broaden the defences that the employer could advance in the face of the allegations that the employee has brought. Moreover, the respondent underlined that different remedial powers are available before the Manitoba Labour Board, including the authority to compel the union to proceed with a grievance of Mr Qumsieh's complaint. The respondent also worried about the duplicative resources that it would require in order to defend parallel proceedings. Lastly, the respondent mentioned the unwelcome risk of inconsistent outcomes, which could result if the proceedings unfolded before both tribunals.

[8] For its part, the Commission agreed with the respondent, arguing that the hearing of the instant human rights complaint should be deferred until the Manitoba Labour Board had disposed of the proceedings that the complainant has recently there commenced. Although it recognized that a human rights adjudicator and a labour arbitrator have concurrent jurisdiction over the instant dispute, the Commission submitted that I should decline to exercise my jurisdiction, because the facts that would support the human rights complaint are inextricably connected to the subject matter

that comprises the applications currently before the Manitoba Labour Board. The Commission submitted that such an approach would respect the doctrine of issue estoppel, avoid a multiplicity of proceedings, and preserve the integrity of the adjudicative process.

[9] In reply, the complainant argued that his human rights complaint is distinct from the applications filed with the Manitoba Labour Board. He characterized the latter as a claim for retroactive pay and benefits, while he submitted that his human rights complaint sought redress for discrimination and resulting injury to dignity. Moreover, he explained that, at the time of filing his applications with the Manitoba Labour Board, it was his impression that those proceedings could not affect his human rights complaint.

Analysis and decision

The motion to defer the human rights hearing

[10] Sub-section 39(1) of *The Human Rights Code*, CCSM c. H175 (the *Code*), requires an adjudicator to "convene and complete the hearing [of a complaint] without undue delay". An interpretation of this statutory direction is set out in *Blatz* v. *4L Communications Inc.* et al., 2012 CanLII 42311 (MB Human Rights Bd of Adjudication)

("*Blatz*"). In that case, an employee had first sued for wrongful dismissal in the courts. While that litigation unfolded, the employee had then filed a human rights complaint, which prompted the employer to seek the deferral of the human rights proceedings in favour of the court action. In granting the motion to defer, I concluded at para. 15 of *Blatz* that, despite its urging to proceed without undue delay, the *Code* nonetheless anticipates that an adjudicator may "defer the hearing of a complaint, provided that the resulting delay is not undue".

[11] *Blatz* also held at para. 19 that, in determining whether such a deferral would constitute an undue delay, an adjudicator should engage in "the balancing of factors, such as… instant, institutional, and policy considerations", where those considerations were defined as:

> 1. Instant considerations, which relate to the specific proceedings that give rise to the motion to defer.
>
> 2. Institutional considerations, which form the general backdrop against which the motion is brought. At an institutional level, factors include an aim to ensure fairness, show respect for the participants, and promote integrity in the administration of justice.
>
> 3. Considerations of policy, which take into account the principles, intent, and purposes that underlie the legislative framework within which human rights proceedings generally unfold.

[12] As set out below, my application of these factors has convinced me that I should exercise my discretion to defer the hearing of the instant complaint. I find that, although a deferral of the hearing would result in delay pending disposition of the proceedings

before the Manitoba Labour Board, the resulting delay would not be undue in the circumstances of this complaint.

1. Instant considerations

[13] The submission of the respondent, which I have summarized above, promotes the Manitoba Labour Board as a more suitable forum to decide the human rights issues that arise in the instant dispute. First, it is the opinion of both the respondent and the Commission that, in a hearing of the complaint, the human rights adjudicator would consider a subset of the same facts that comprise the applications to the Manitoba Labour Board. The complainant disagreed, and he sharply contrasted the proceedings now before the two decision-making forums. He submitted that the human rights complaint deals with an alleged injury to his dignity, while the complaints about unfair labour practices chiefly seek to recover his retroactive pay. As such, the complainant contended that the proceedings in the two forums are unconnected. I disagree with this characterization. From the complaints that he has filed with the Manitoba Human Rights Commission and the Manitoba Labour Board, the allegations appear to be very similar, if not substantially identical: in that part of his original human rights complaint that the Commission has referred to adjudication, the complainant alleged that the respondent has purportedly failed to take reasonable steps in order to terminate the

workplace harassment that he says he has endured, while the applications to the Manitoba Labour Board are founded upon the allegation that the respondent "declined to investigate the harassment complaints that was [*sic*] filed". I reject the complainant's characterization of the instant dispute, and I prefer to rely upon the assessment offered by experienced counsel for the respondent and the Commission. Accordingly, I conclude that, if the human rights adjudication were to proceed and result in a disposition of the human rights complaint, the same subject matter would be revisited in the proceedings before Manitoba Labour Board when that forum would in turn take up the broader issues that go beyond the human rights complaint.

[14] A second consideration arises from the involvement of the union in the proceedings before the Manitoba Labour Board. The union is not a party to the human rights adjudication, nor am I currently aware of grounds that would warrant its addition to the adjudicative process before me. The respondent submitted that the absence of the union limits the possible defences that it could advance in the face of the allegations. I am not satisfied that this arguable advantage is especially compelling. The Legislature has devised the human rights adjudicative framework in a way that deliberately confines the scope of a hearing in order to achieve specific public policy ends. These restrictions might have the effect of limiting the respondent's available defences. However, if this were the only consideration before me, it would surely be

wrong to prefer another decision-making forum only as a means to defeat legislative intent. I nevertheless take the respondent's point that, if the instant dispute were before the Manitoba Labour Board, a broader, and arguably better, understanding of responsibility could emerge.

[15] Another difference forms the third consideration that inclines me to defer the hearing of the human rights complaint. In proceedings before the Manitoba Labour Board, available remedial powers include the making of orders that would reinstate the employee or require the union to take up his concerns and advance a grievance on his behalf. A human rights adjudicator has none of these powers, so that such an adjudicator's disposition of the instant dispute might not effectively address the remedial requirements that would especially benefit the complainant.

[16] The last instant consideration relates to the current status of the proceedings. While the human rights complaint is scheduled for hearing in little over a month from now, the applications to the Manitoba Labour Board have only recently been filed. Standing alone, this consideration would overwhelmingly favour a conclusion that the human rights hearing should proceed as scheduled.

2. Institutional considerations

[17] Apart from those factors that emerge from the instant proceedings, the next collection of considerations looks at the backdrop against which the respondent's motion is brought.

[18] First, the respondent noted that the prospect of parallel proceedings would increase its costs and require a duplication of effort while it defended the employee's complaints in two decision-making forums. As a general rule, duplicative proceedings are to be avoided: *British Columbia (Workers' Compensation Board)* v. *British Columbia (Human Rights Tribunal)*, 2011 SCC 52 at para. 34. Sometimes, duplicative proceedings betray a deliberate litigation tactic, by which a party seeks to apply pressure in the hope of settling their dispute. Mr Qumsieh filed his applications to the Manitoba Labour Board after the hearing of his human rights complaint had been scheduled. However, I accept Mr Qumsieh's statement that he had been under the impression that the Manitoba Labour Board filings would have no effect upon his human rights complaint. He now realizes that his understanding was wrong and that the filings invited the instant motion.

[19] Because these parallel proceedings arise out of the same dispute, a second institutional consideration derives from the prospect that different findings of fact, interpretations, and outcomes could result in each forum. While it is likely that the

doctrine of issue estoppel would intervene before conflicting outcomes were published, there is "a public interest in the avoidance of… potential inconsistent results": *British Columbia (Attorney General)* v. *Malik*, 2011 SCC 18 at para 40.

[20] Issue estoppel could introduce complications where, despite the disposition of the instant human rights complaint by a human rights adjudicator, unsettled labour law issues still remained. The proceedings before the Manitoba Labour Board would then be forced to snake their way through a minefield of issue estoppel in order to decide those remnant issues. The hazard would increase, because, as noted above, the evidence in the human rights adjudication would likely return in the context of the applications to the Manitoba Labour Board.

3. Considerations of policy

[21] The preamble to the *Code* explains that the Legislature intended the human rights framework to go beyond the resolution of disputes between two parties. The *Code* expressly recognizes the legitimate interest of the public whenever a human rights complaint comes forward. In addition to settling the specific dispute, the *Code* ambitiously aims to promote a society that respects the dignity of every individual. Accordingly, the remedial powers of a human rights adjudicator have different public

policy functions than those that could determine an application to the Manitoba Labour Board.

Balancing the considerations

[22] There is no doubt that the Legislature has clearly set out the importance of the human rights adjudication process within the justice system. Nevertheless, a balancing of the competing factors leads to a conclusion that an undue delay would not arise from a deferral of the hearing of the instant human rights complaint. A human rights adjudicator would not decide all aspects of the dispute. Moreover, such an adjudicator would not have the necessary remedial powers to address all aspects of the dispute. On the other, proceedings before the Manitoba Labour Board could decide all aspects of the dispute, including the issues relating to human rights. Similarly, Manitoba Labour Board decision-makers would possess the remedial powers to address all aspects of the dispute. By allowing the instant dispute to proceed through the Manitoba Labour Board, the parties avoid the duplication of resources. Moreover, the prospect of issue estoppel is set aside. I therefore find that a deferral of the human rights complaint is appropriate in the instant circumstances, and I conclude that the resulting delay would not be undue.

[23] The complainant should understand that a deferral is not a dismissal. In granting the respondent's motion, the human rights complaint has not been terminated. Its hearing has only been paused while another decision-making forum considers the instant dispute. However, the deferral must not be open-ended. The *Code* precludes that undue delay would be the result.

[24] Accordingly, I grant an eighteen-month deferral of the hearing of the instant human rights complaint. During that interval, the Manitoba Labour Board is expected to have assessed the applications that Mr Qumsieh had filed. It is conceivable that the Manitoba Labour Board might summarily dismiss those applications, in which case any party to the instant human rights complain may apply for an abridgment or termination of the deferral even before the eighteen months have elapsed. At the same time, the Manitoba Labour Board might take up Mr Qumsieh's applications and, within the eighteen-month deferral, show progress towards a final disposition of those complaints about unfair labour practices. In such an instance, any party may move to extend the initial eighteen-month deferral period. At all times, the human rights adjudication process remains a backstop for the assurance and protection of the complainant.

A digression on jurisdiction

[25] Manitoba law does not automatically reserve for human rights adjudicators an exclusive jurisdiction over human rights disputes. The *Code* is "a statute of general application to all administrative decision-makers in Manitoba": *Northern Regional Health Authority* v. *Manitoba Human Rights Commission* et al, 2017 MBCA 98 ("*Horrocks*") at para. 68, leave to appeal to SCC requested. Where they do not transcend the "meaning, application, or alleged violation" of the collective bargaining agreement, human rights issues fall within the exclusive jurisdiction of a labour arbitrator: *Horrocks* at para. 67. In the instant dispute, the governing collective bargaining agreement provides that

> [t]here shall be no discrimination, interference, restriction or coercion exercised or practised with respect to any employee by reason of race, nationality, religion, colour, sex, including pregnancy, age, marital status, physical handicap, ethnic or national origin, sexual orientation, ancestry, political beliefs, or for any other reason defined in *[T]he Human Rights Code*, or by reason of membership or non-membership in the Union.

Therefore, it is arguable that a human rights adjudicator has no jurisdiction to decide the instant human rights complaint. The definitive answer depends upon whether this dispute transcends the collective bargaining agreement. However, for the purpose of this motion, the parties have deliberately chosen to proceed upon the stated assumption that a human rights adjudicator and a labour arbitrator share concurrent jurisdiction over the instant dispute. Indeed, the respondent expressly reserved the option to argue the point later in these proceedings. Accordingly, these reasons have not tested whether

the instant dispute relates to the "meaning, application, or alleged violation" of the collective bargaining agreement, or whether it transcends the agreement and engages the public policy that underlies the *Code*.

The motion for a production order

[26] The respondent moves for an order that would require the complainant to produce certain documents. The respondent asserts that they are relevant to the hearing of the complaint. However, having granted the respondent's motion for a deferral, the hearing of the instant complaint is not imminent. Indeed, it might never convene if the Manitoba Labour Board decides the human rights issues that underlie the instant complaint.

[27] Accordingly, I adjourn *sine die* that part of the respondent's motion which seeks a production order against the complainant.

Decision and order

[28] For the reasons set out above, the motion is granted in part.

[29] I order that

a. the hearing of the instant complaint is deferred until no later than 6 November 2020, pending the disposition of two applications that the

complainant had filed at the Manitoba Labour Board on or about 25 March 2019, complaining of unfair labour practices by CUPE Local 737 and the Brandon School Division;

b. by motion to me before the end of the deferral period, any party may move to extend, abridge, or end the deferral period;

c. the respondent's motion for an order for the production of documents by the complainant is adjourned *sine die*; and,

d. I remain seized of the instant human rights complaint.

[30] 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

6 May 2019

Robert Dawson