

MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

BETWEEN:

RAYMOND MOUSSEAU

Complainant,

-and-

SOUTHERN HEALTH / SANTÉ SUD

Respondent,

Appearances:

Todd Andrews & Scott Noble, Counsel for the Respondent,

Isha Khan & Sandra Gaballa, Counsel for the Manitoba Human Rights
Commission

Louis Litman, Complainant's Representative / Executor

DAN MANNING, adjudicator:

1. This is an application by the Respondent to terminate proceedings on the basis that a reasonable settlement offer was made and rejected by the Complainant's Representative / Executor, Louis Litman, pursuant to section 37.1(2).

FACTS

Background

2. On March 26, 2015, Mr. Mousseau was hired by the respondent, Southern Health / Santé Sud as a casual employee. The Respondent was, and still is, a major regional health authority in Manitoba that delivers health care services for a large part of southern Manitoba. As a casual employee, Mr. Mousseau was not guaranteed any hours of work. At the time, Mr. Mousseau was also taking courses at the University of Winnipeg. On May 31, 2018 the Complainant, Raymond Mousseau executed a will naming Louis Litman as the executor of his estate. The Will states:

I authorize my executor to act on my behalf to settle a judgement claim through the Human Rights Commission, to collect said claim on my behalf, still outstanding. I request full back-pay, CPP, UIC contributions, pain and suffering, and damages.

3. On January 5, 2019 the Complainant, Raymond Mousseau, died.

The Complaint

4. On April 5, 2015, Mr. Mousseau was working for the Respondent and on a break in the lunchroom, reading his course materials. A colleague approached him and asked him what he was reading. Mr. Mousseau discussed the course material to her and during that conversation the topic turned to subjects that were controversially ethnic, religious and political in nature. Mr. Mousseau's views upset his colleague on a personal level and she later complained to her operations manager.
5. The next day, Mr. Mousseau was asked to meet with management to discuss what happened. Several discussions took place between Mr. Mousseau and management over the next few days and on April 21, 2015 he was advised that his orientation was being cancelled, effectively terminating his employment.
6. On June 19, 2015 Mr. Mousseau filed a Complaint under the *Manitoba Human Rights Code* ("Code") alleging that the Respondent had discriminated against him based on his ancestry, ethnicity, religious belief and/or political belief by not continuing with his orientation and employment. He alleged that his orientation was canceled due to discrimination against him based on his *Code* protected beliefs.

The Proceedings

7. The matter was set for hearing May 14, 15, 16 and 23, 2019 before Adjudicator Dawson. Approximately two weeks before the hearing, the Respondent made an offer to settle (the “Offer”) which was rejected by the Complainant’s representative. I was appointed adjudicator on May 8, 2019 to hear the s.37.1 application and on June 21, 2019 I heard argument after receiving written submissions.

LAW

8. Section 37.1 of the *Code* reads:

37.1 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. The purpose of section 37.1 is to avoid an expensive hearing on the merits in situations where the Respondent has made an offer that reasonably approximates a remedy an adjudicator would have ordered if the complaint were proven. (*Nachuk v. City of Brandon*, [2014] M.H.R.B.A.D. No. 103, para. 30; *Metaser v. Jewish Community Campus of Winnipeg Inc.* CanLII 61017, para. 11)
10. The proposed offer must reasonably approximate what an adjudicator might award but does not have to mirror exactly what an adjudicator would award if the Complaint was proven. (*Young v. Amstead Canada Inc.*, 2015 CanLII 73279)

(MB HRC), para. 13; and *Nash v. Flora Natividad*, 2019 MBHR 4, para. 25). An adjudicator must be satisfied that the offer falls within a reasonable range of available remedies having regard to section 43(2) of the *Code*, the circumstances of the case, and any other relevant factor. (*Mancusi v. 5811725 Manitoba Inc. (Grace Café City Hall)*, 2012 CanLII 73431 at page 5).

THE OFFER

11. The Respondent's Offer includes providing human rights training for staff involved in the orientation and hiring process. The Respondent will also update their orientation presentation relating to its Respectful Workplace policy to include reference to political beliefs.
12. The Offer includes a payment of \$1,000 to the estate of Mr. Mousseau to compensate for injury to dignity, feelings or self respect.

POSITION OF THE PARTIES

13. At the hearing, the Commission and Mr. Litman conceded that the Respondent's Offer was reasonable. Mr. Litman advised that he felt a moral obligation to advance Mr. Mousseau's wishes as outlined in his Will. Mr. Litman said he was satisfied that the Respondent is making changes to their policy as a result of this complaint and the changes are, in his words, a positive legacy to Mr. Mousseau.

ANALYSIS

14. Despite no opposition to the Respondent's offer, I am obliged to satisfy myself that the Offer is reasonable.

15. With regards to section 43(2)(a), the Respondent's Offer includes remedies that reasonably secure the public's confidence that the Respondent will comply with the *Code*. The Respondent proposes to provide additional training of staff with the assistance of the Manitoba Human Rights Commission. The Respondent will also update their orientation presentation relating to its Respectful Workplace policy to include reference to political beliefs. I find this reasonably approximates what an adjudicator would order under this section.

16. Turning to section 43(2)(b) through (d), the Respondent asserts that any compensation under these headings is not available to the estate of Mr. Mousseau. The Respondent submits that Mr. Mousseau's estate is not entitled to damages and relies on *Canada (Attorney General) v. Hislop*, 2007 S.C.C. 10 as authority. In that case, Mr. Justice LeBel and Mr Justice Rothstein characterized an estate as:

“... , an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. The use of the term “individual” in s.15(1) was intentional. For these reasons, we conclude that estates do not have standing to commence s.15(1) *Charter claims*. In this sense it may be said that s.15 rights die with the individual.”

17. Although *Hislop* was decided in the context of a *Canadian Charter of Rights and Freedoms* (“*Charter*”) case, the Respondent submits that jurisprudence in relation to s.15 of the *Charter* is applicable when interpreting human rights legislation. (*Viner v. Hudson Bay Company (Zellers Greenwood)* 2012 CanLII 98528 which relies upon *Carrigan v. Nova Scotia (Department of Community Service)* 15 [1997] 157 N.S.R. (2d) 307 at para. 34) Therefore, the Respondent submits, the Complainant’s estate is not entitled to damages because the estate does not have substantive rights that are capable of being violated and being enforced. Notwithstanding the Respondent’s position, they offer \$1,000 under section 43(2)(c) in order to resolve the matter.

18. The Commission accepts the Respondent’s argument on this point as it relates to section 43(2)(c). In their brief the Commission wrote:

“Although the Commission is always cautious when importing principles related to liability and remedy from a civil or other context into the statutory human rights process, the Commission acknowledges that *Charter* jurisprudence can and should be considered when interpreting statutory human rights law. The Commission accordingly agrees that if the complaint were proven at a hearing, Mr. Litman as the executor of the Complainant’s estate, which is acknowledged to be a collection of the Complainant’s assets, would not be entitled to compensation for injury to the Complainant’s dignity, and agrees with the Respondent’s argument...”

19. With regards to section 43(2)(b) the Commission argued that it would be difficult to quantify what, if any loss, the Complainant suffered as a result of lost wages but acknowledged that the \$1,000 proposed does address the “potential of

compensating for some shifts, and therefore as a whole, the monetary compensation offered should be considered reasonable.”

20. I agree that damages cannot be awarded to the estate of Mr. Mousseau under section 43(2)(b) of the *Code* because the estate is not “an individual and it has no dignity that may be infringed.”

21. With regards to section 43(2)(c) of the *Code*, I am satisfied that an Adjudicator may have made an award for compensation of lost income, but given the short duration of employment and the fact that Mr. Mousseau was only hired as “casual” employee I find that the \$1,000 offer is reasonable in the circumstances. This amount is reasonable compensation for potential loss of wages and is congruent to the duration and quality of the complainant’s employment. (See *Impact Interiors Inc., v. Ontario (Human Rights Commission)*, [1994] O.J. No. 1322 at para. 15.

22. In my view, having regard to the totality of the offer, I find the Offer is reasonable, and I therefore terminate the adjudication pursuant to section 37.1(2).

23. I wish to address a matter that was argued at the hearing but did not factor into my decision. The Respondent argued that an adjudicator is without jurisdiction to hear a human rights adjudication following the death of the complainant and therefore *any* offer to settle exceeds what the Complainant’s estate could reasonably expect to be awarded were the matter to proceed to adjudication. He

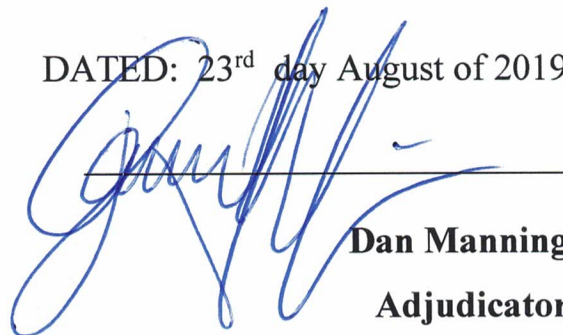
relies mainly upon *British Columbia v. Gregoire*, 2005 BCCA 585 as authority. The Commission's position on this point is that the wording of the relevant legislation is different in Manitoba than it is in British Columbia and that the *Manitoba Human Rights Code* clearly contemplates a complaint filed by, on behalf of, or against, an executor, administrator or legal representative of a person.

24. The Respondent's jurisdictional argument, *per se*, or on its own, may have merit, but that is not the motion that I am tasked to decide. In the context of this s.37.1 motion, the issue is whether the proposed Offer reasonably approximates what an adjudicator would award if the Complaint were lawfully proven. A Complaint cannot be proven if there is no jurisdiction to hear it. In effect, the Respondent's position is that any offer to settle is reasonable because the Complaint cannot be proven for want of jurisdiction. However, an inability to make out a complaint is not a relevant consideration in s.37.1 hearings. These hearings are premised on a lawfully proven complaint. Nevertheless, I am satisfied that the Offer reasonably approximates what an adjudicator would award if the Complaint were proven.

25. I wish to thank all counsel for the excellent quality of written material and persuasive oral submissions. I also give credit to Mr. Litman for his commitment and perseverance on behalf of the late Mr. Mousseau throughout this process.

26.I will retain jurisdiction to deal with any issues that arise from the making of this
Order.

DATED: 23rd day August of 2019



Dan Manning
Adjudicator