HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF:

A complaint under *The Human Rights Code,* C.C.S.M. Chapter H175, as amended

BETWEEN:

Leo Madayag (15 EN 168)
Samson Felix (15 EN 170)

Complainants,

AND

Capitol Steel Corporation,

Respondent

APPEARANCES: William Hedges, Manitoba Human Rights Commission
Jaqueline F. G. C. Boily, Manitoba Human Rights Commission
Leo Madayag
Samson Felix
Aaron M. London, Capitol Steel Corporation
Sharad Verma, Capitol Steel Corporation

BEFORE: Gary M. Sarcida, Adjudicator

DECISION

I. Introduction

[1]. In September 2015, Samson Felix and Leo Madayag (the Complainants") each submitted individual complaints under the *Human Rights Code,* C.C.S.M. Chapter H175, as amended ("the Code") to the Human Rights Commission ("the Commission"). Both Complainants allege that their employer Capitol Steel Corporation ("Capitol Steel") discriminated against them on the basis of their religion by failing to accommodate their need to attend religious meetings, contrary to Section 14 of the Code ("the Complaints").

[2]. The Complaints were consolidated by the Commission because of their similar nature and timing. The Complaints were registered with the Commission on September 29, 2015, served on Capitol Steel, and investigated by staff for the Commission.

[3]. As a result of the investigation, the Commission's Board of Commissioners referred the Complaints to adjudication before this panel.

[4]. On April 27, 2020, Adjudicator Gibson was designated to adjudicate the Complaints and hearing dates were scheduled to take place between March 9 and March 12, 2021.

[5]. On or about February 18, 2021, Capitol Steel provided counsel for the Commission with an offer to settle the Complaints, which was then provided to the Complainants for consideration ("the Settlement Offer").

[6]. On or about February 22, 2021, counsel for the Commission advised Capitol Steel that both Complainants had not accepted the Settlement Offer.

[7]. Capitol Steel then requested a Section 37.1 motion, under the Code, to assess the reasonableness of the Settlement Offer (the "Motion").

[8]. On February 23, 2021, Adjudicator Pinsky was designated to hear the Motion but recused himself on March 4, 2021.

[9]. On March 9, 2021, I was designated to hear the Motion.

[10]. On March 19, 2021, a virtual video conference was held to determine timelines and procedural issues for the Motion. At that time, counsel for the Commission raised the fact that the Settlement Offer contained a reference to a counteroffer that was made during mediation ("the Counteroffer"). Counsel for the Commission requested that the Counteroffer be redacted from the Settlement Offer and any reference to it be inadmissible. The Complainants took the same position as the Commission. Capitol Steel disagreed with the request.

[11]. I then requested written submissions from Capitol Steel, the Commission, and the Complainants, to strictly address the issue of whether the reference to the Counteroffer in the Settlement Offer be redacted.

[12]. A virtual hearing date was held on April 30, 2021, with the assistance of an interpreter for the Complainants, as per the Code (the "Hearing").

[13]. At the Hearing, I indicated that a written decision with reasons would follow. This is the decision and reasons.

II. Issue

[14]. Should the Counteroffer, referenced in the Settlement Offer, be redacted and inadmissible at the Section 37.1 motion?

III. Position of the Parties

[15]. Capitol Steel and the Commission both agree that the Counteroffer was made during the mediation stage with a view to settle the Complaints on a "without prejudice" basis.

[16]. Capitol Steel takes the position that the Counteroffer should be admitted as evidence and or information to be considered when determining the outcome of the Motion, on the basis that settlement privilege is not an absolute bar against admissibility.

[17]. The Commission takes an opposing view whereby the Counteroffer should be redacted from the Settlement Offer and no reference be made to it at the Motion, on the basis that the Counteroffer is irrelevant to the determination of a reasonable offer under Section 37.1 of the Code and is subject to settlement privilege making it inadmissible.

[18]. The Complainants take the same position as the Commission on the issue of the Counteroffer. This was confirmed at the Hearing.

IV. Law and Analysis

[19]. The Code provides certain powers to adjudicators of this panel for the purpose of exercising their responsibilities. Once such responsibility, is found at Section 37.1 and the relevant subsection reads:

> **Adjudicator to Determine Reasonableness of Offer**
>
> **37.1(1)** When a settlement offer is made after an adjudicator is appointed to hear the complaint, the chief adjudicator must designate a different member of the adjudication panel to determine if the settlement offer is reasonable.

[20]. The purpose of Section 37.1 is to avoid an expensive hearing on the merits in situations where a respondent to the adjudication has made an offer to settle a complaint, that reasonably approximates a remedy an adjudicator would have ordered if the complaint were proven. See *Mousseau v. Southern Health*, 2019 MBHR 8 (CanLII); *Nachuck v. City of Brandon*, 2014 CanLII 20644 (MB HRC); and *Metaser v. Jewish Community Campus of Winnipeg Inc.*, 2013 CanLII 61017 (MB HRC).

[21]. It is within this context that I must determine if the Settlement Offer is reasonable. Prior to doing so, the content of the Settlement Offer must be determined.

[22]. Section 42 of the Code is of assistance here. It sets out the jurisdiction for adjudicators of this panel to determine any issue in order to reach a final decision respecting a complaint. This section of the Code reads:

> **Jurisdiction re decisions**
>
> **42** Subject to the other provisions of this Code, every adjudicator has exclusive jurisdiction and authority to determine any question of fact, law, or mixed fact and law that must be decided in completing the adjudication and in rendering a final decision respecting the complaint.

[23]. As previously stated, the parties agree that the Counteroffer was "without prejudice" and communicated during the mediation stage of this proceeding. On its face, any reference made to the Counteroffer would not be admissible as it would be protected by settlement privilege.

[24]. Settlement privilege is a class of legal privilege. It is an evidentiary rule that protects correspondence and discussions exchanged between litigants from public disclosure rendering it inadmissible in court, regardless if a settlement is reached. Its public policy purpose is to drive settlement negotiations and promote settlement, in an effort to ensure that parties enter negotiations wholeheartedly, with a view to decrease the financial and emotional costs in relation to any disputed matter. See *Sable Offshore Energy v. Ameron International Corp.*, 2013 SCC 37.

[25]. Section 39(2) of the Code sets out what evidence and information can be before an adjudicator and contemplates legal privilege. This section of the Code reads:

> **General procedures at hearing**
>
> 39(2) Subject to this Code and the regulations, the adjudicator may determine the procedures to be used at the hearing and may receive at the hearing such evidence or other information as the adjudicator considers relevant and appropriate, whether or not the evidence is given under oath or affirmation and whether or not it would be admissible in a court of law, unless the evidence is subject to any type of legal privilege.

[26]. There is a well-established test to determine if an exception to settlement privilege can be allowed. In *Sable* supra, the Supreme Court indicated that the British Columbia Court of Appeal set this test out in *Dos Santos Estate v. Sunlife Assurance Company of Canada*, 2005 BCCA 4. Chief Justice Finch, of the British Columbia Court of Appeal stated at paragraph 20:

> "To establish an exception in this case, the defendant must show that a competing public interest outweighs the public interest in encouraging settlement. An exception should only be found where the documents sought are both relevant and necessary in the circumstances of the case to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice."

[27]. Capitol Steel submits that the Counteroffer is relevant as it indicates its willingness to meet the Complainants' subjective expectation of what the appropriate level of compensation should be when determining the reasonableness of the Settlement Offer. Capitol Steel goes further in submitting that the Complainants' rejection of the Counteroffer is a further relevant factor, particularly when dealing with compensation for injury to dignity, feelings, or self respect.

[28]. Capitol Steel further submits that one must go back to first principles to determine what evidence and or information should be before an adjudicator. Capitol Steel says a low threshold exists as to what type of evidence can be submitted. Relying on Section 38(1) of the Code, Capitol Steel says this section lays the groundwork as to the nature and style of an adjudication hearing. Particularly where an adjudicator could order production of documents and information which "may be relevant".

[29]. In reply, the Commission states that the Counteroffer is not relevant to determine the reasonableness of the Settlement Offer. The Commission further submits that a cautious approach should be required in order to determine whether the protection of settlement privilege should be lifted.

[30]. What is clear is that there is a high threshold for settlement privilege to be lifted. In *Dos Santos* supra, the Court reasoned at paragraph 19:

> However, the test for discharging the burden to establish an exception should not be set too low. The public policy behind settlement privilege is a compelling one. It is so compelling that even threats arising in the context of settlement negotiations may not justify an exception: Unilever, supra at p. 2449-2450.

[31]. In *Johnstone v. Locke* 2011 ONSC 7138 (CanLII), the Court established that "mere relevance does not provide a sufficiently high threshold to displace the compelling public policy underlying settlement privilege."

[32]. Jurisprudence from this panel has set out how a Section 37.1 motion is to be interpreted and applied. When assessing the reasonableness of an offer to settle, consideration should be given to the complaint made, any admissions, and undisputed facts. See *Damiankos v. University of Manitoba*, 2015 MBHR 1 (MB HRC); *Metaser v. Jewish Community Campus of Winnipeg*, supra; *Koshinsky v. MHRC*, 2019 MBHR 11 (CanLII).

[33]. This panel has further held that counteroffers are irrelevant to the determination of a Section 37.1 motion. In *Nash v. Natividad* 2019 MBHR 4 (CanLII), Adjudicator Dawson stated:

> Correspondence and counteroffers are improper additions to the factual context of the instant dispute. First, although a complainant may argue that a settlement offer is not reasonable, references to a counteroffer are irrelevant to the determination of a motion brought under s. 37.1 (1) of the Code. Secondly, an adjudicator's function at this preliminary stage of the proceedings is not dive into a trove of correspondence, weighing contentious evidence and making findings of fact. Unless such extraneous documents demonstrate the agreement of the parties upon some material fact, an adjudicator must properly ignore them: see, for example, Nachuk at para. 29, where the adjudicator refused to consider witness statements; and, Damianakos at para. 42-45, where the adjudicator rejected the respondent's reliance upon the reply filed in response to the original complaint. Therefore, for the purpose of deciding the motion brought under s. 37.1 (1) of the Code, I have given no consideration to the correspondence and counteroffer that the complainant has provided.

[34]. Given the above, I am of the view that the Counteroffer is not relevant to determine the reasonableness of the Settlement Offer and is protected by settlement privilege.

[35]. This panel has previously held what is to be assessed in order to determine the reasonableness of an offer to settle, based on a past principled approach. A complainant's subjective expectation on settlement and negotiation positions of parties has never been used by an adjudicator as the analytical basis in this context. Moreover, the threshold to lift settlement, is a high one to be met and should not be disturbed unless absolutely warranted.

[36]. With respect to the second aspect of the test found in *Dos Santos* supra, Capitol Steel submitted that inclusion of the Counteroffer is necessary as there is a compelling or overriding interest of justice that would circumvent the public policy of settlement privilege. That is, it would prevent the overcompensation of the Complainants and the abuse of process. Capitol Steel argued that the administration of justice would be brought into disrepute if the Counteroffer were excluded, as it is critical evidence of the subjective reasonableness of the Settlement Offer. If disallowed, Capitol Steel asserted that it would undermine the ability to properly assess the reasonableness of the Settlement Offer and would not ensure a just decision. As I have reasoned, the subjective expectation of the Complainants is not relevant to determine the reasonableness of the Settlement Offer.

[37]. As a passing observation, should the test found in *Dos Santos* supra be met, which is not the outside of the realm of possibility, the Commission's submission that the Counteroffer must be inadmissible to uphold the integrity of the mediation process, which is conducted on a "without prejudice" basis, gives rise to a potential circumstance that may require addressing.

[38]. The Commission stated, should the Counteroffer be admitted settlement privilege would no longer be assured. This could result in parties fearing later use of negotiation positions against them and enter into settlement discussions with reservation and apprehension. With its focus in resolving Human Rights complaints, often involving unrepresented parties, the Commission said that this public interest consideration also favours the protection of without prejudice content. Moreover, the Commission set out that most if not all complaints to the Commission under the Code are dealt without having to go to adjudication. The mere presence of an exception to the evidentiary rule of settlement privilege, would compete against this public interest. However, this is not the proper forum to address this.

V. Order

[39]. I order the following statement be redacted from the Settlement Offer:

> "the offer presented today meets Mr. Madayag's counteroffer of September 9, 2019 as presented to us by the Commission."

[40]. This matter shall now proceed to Section 37.1 hearing, without any reference being made to the Counteroffer.

Dated this 30th day of June, 2021.

Gary M. Sarcida, Adjudicator