**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:** Jacqueline F. G. C. Boily, Manitoba Human Rights Commission
Leo Madayag
Samson Felix
Raya Sidhu, 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.

[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.

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

[7]. Capitol Steel then requested a Section 37.1 motion, under the Code, to assess the reasonableness of the offer to settle (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 Pre-Hearing Conference was held to determine timelines and procedural issues for the Motion. At that time, counsel for the Commission raised the fact that the offer to settle 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 offer to settle and any reference to it be inadmissible. The Complainants took the same position as the Commission. Capitol Steel disagreed with the request.

[11]. On April 30 ,2021, a virtual hearing was held to hear the Motion with the assistance of an interpreter for the Complainants.

[12]. On June 30, 2021, my reasons for decision on the Motion was released to the parties which redacted any reference to the Counteroffer from the offer to settle and that the matter proceed to a Section 37.1 hearing.

[13]. On August 26, 2021, a second Pre-Hearing Conference was held in order to determine timelines for submissions and a full day virtual hearing was scheduled for November 26, 2021.

[14]. On or about October 6, 2021 Mr. London, in house counsel for Capitol Steel indicated he would no longer be under its employ. Accordingly, Capitol Steel requested for time to retain new counsel with respect to this matter. Time was thus provided in order for this to occur.

[15]. On or about October 27, 2021 it was confirmed by Capitol Steel that new counsel had been retained.

[16]. On October 28, 2021 a third Pre-Hearing Conference was held, but without the Complainants present (they consented to having the Commission discuss new timelines with respect to the Section 37.1 hearing). It was agreed that a full day virtual hearing was to take place on December 21, 2021 (the "Hearing") along with new timelines for submissions. It was further determined that a translator was still required with respect to the Complainants in the language of Tagalog.

[17]. At the Hearing I indicated that a written decision would follow.

## II. Issue

[18]. Is Capitol Steel's offer to settle dated February 18, 2021 as redacted by my decision of June 30, 2021 (the "Settlement Offer") reasonable under Section 37.1 of the Code as amended?

## III. The Law

[19]. At the time of writing this decision the Code was amended and such amendments came into force on January 1, 2022. One of those amendments repealed Section 37.1.

[20]. Section 37.1, however was in effect when the Complaints were filed and when the Hearing took place. The said section read:

> **General Powers of Adjudicator**
>
> **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.
>
> **Failure to Accept Reasonable Settlement Offer**
>
> **37.1(2)** If a complainant rejects a settlement offer that the adjudicator designated under subsection (1) considers to be reasonable, that adjudicator must terminate the adjudication to the extent that it relates to the parties to the settlement offer.

[21]. The Code as amended is accompanied by an Explanatory Note ("the Note"). The Note sets out in Section 29(3) and (4) relevant transitional provisions which is reproduced here:

> **Transitional**
>
> 29(3) If an adjudicator has been designated under section 37.1 in respect of an existing complaint before the day this section comes into force, the adjudicator is deemed to have been designated by the chief adjudicator under subsection 34.1(1), as enacted by section 19 of this Act.
>
> 29(4) Subsection 43(2.1), as enacted by subsection 23(2) of this Act, applies to an existing complaint only if an adjudicator has not issued a final decision on the complaint before this section comes into force. For this purpose, a final decision includes a determination under section 37.1 that a settlement offer is reasonable.

[22]. In essence, Section 37.1 was replaced with Section 34.1 of the Code as amended, and it currently states:

> **Designating adjudicator to explore settlement**
>
> 34.1(1) After an adjudicator has been appointed to hear a complaint, the chief adjudicator may designate a different member of the adjudication panel to attempt to resolve the complaint through mediation, conciliation or other means prior to the hearing.
>
> **Adjudicator to determine reasonableness of offer**
>
> 34.1(2) If a respondent makes a settlement offer prior to the hearing, the adjudicator designated under subsection (1) must determine if the offer is reasonable.
>
> **Settlement offer not accepted**
>
> 34.1(3) If a complainant rejects a settlement offer that the adjudicator designated under subsection (1) considers to be reasonable, the adjudicator must terminate the adjudication to the extent that it relates to the parties to the offer.
>
> **Offer must remain open**
>
> 34.1(4) A settlement offer referred to in subsection (3) must remain open for acceptance for at least 15 days after the day the adjudicator makes a decision under that subsection or any longer period that the adjudicator considers reasonable in the circumstances.
>
> **Termination of proceedings on settlement**
>
> 34.1(5) If the complaint or part of the complaint is settled on terms satisfactory to the parties to the complaint or that part of it, the adjudicator designated under subsection (1) must:
>
> (a) document the terms of the settlement;
> (b) make a consent order under subsection 43(5) in respect of the settlement; and
> (c) terminate the adjudication in respect of the complaint or that part of the complaint in accordance with the settlement.

[23]. With respect to Section 34.1(1), exploration of the settlement between the parties has passed given the amount of time since the filing of the Complaints and the three Pre-Hearing Conferences held in this matter.

[24]. Accordingly, the analysis to determine the reasonableness the Settlement Offer under Section 37.1 would be identical for Section 34.1(2) and (3). Any reference to Section 37.1 throughout this decision would in all intents and purposes refer to Section 34.1(2) and (3) of the Code as amended.

[25]. The purpose of Section 37.1 is to avoid an expensive hearing on the merits in situations where a Respondent to the adjudication process 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); Metaser v. Jewish Community Campus of Winnipeg Inc., 2013 CanLII 61017 (MB HRC).*

[26]. There have been past decisions that have been held that are of assistance in interpreting and applying Section 37.1. Such cases establish the context as to the determination of the reasonableness of an offer under Section 37.1. The established context is as follows:

*a.* When assessing the settlement offer the adjudicator must proceed on the basis that the allegations in the complaint have been proven. Simply put, the adjudicator must accept that the Code has been contravened as set out in the formal complaint.

> See *Mancusi v 5811725 Manitoba Inc (Grace Cafe City Hall), 2012 CanLII 73431 (MB HRC), Damianakos v. University of Manitoba, 2015 CanLII 11275 (MB HRC)*

*b.* When considering the reasonableness of the settlement offer an adjudicator should consider the proximity of the settlement offer to the remedies that an adjudicator would order if the complaint was proven at a hearing on its merits.

> See *Metaser v. Jewish Community Campus of Winnipeg Inc., 2013 CanLII 61017 (MB HRC); Nachuck v. City of Brandon, 2014 CanLII 20644 (MB HRC).*

*c.* The settlement offer that would be the subject matter of a Section 37.1 determination does not have to exactly mirror what an adjudicator would award if the complaint was proven at the hearing of its merits.

> See *Mousseau v. Southern Health, 2019 MBHR 8 (CanLII); Nash v Flora Natividad, 2019 MBHR 4 (CanLII);*

*d.* When assessing a settlement offer the formal complaints, any admissions or undisputed facts should be considered by the adjudicator. The adjudicator should take a limited approach in making any finding of fact.

> See *Damianakos v. University of Manitoba, 2015 CanLII 11275 (MB HRC); Metaser v. Jewish Community Campus of Winnipeg Inc., 2013 CanLII 61017 (MB HRC).*

*e.* By its very nature the Code has remedies that are intended to place the complainant into a position it was prior to any contravention as if the contravention had not occurred.

> See *Damianakos v. University of Manitoba, 2015 CanLII 11275 (MB HRC).*

[27]. With respect to remedial orders set out in the Code, Section 43(2) is significant as any reasonable settlement offer must take these into account in an assessment under Section 37.1. It is worth reproducing Section 43(2) here:

> **Remedial Order**
>
> **43(2)** Where, under subsection (1), the adjudicator decides that a party to the adjudication has contravened this Code, the adjudicator may order the party to do one or more of the following:
>
> (a) do or refrain from doing anything in order to secure compliance with this Code, to rectify any circumstance caused by the contravention, or to make just amends for the contravention;
>
> (b) compensate any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention, or for such portion of those losses, expenses or benefits as the adjudicator considers just and appropriate;
>
> (c) pay any party adversely affected by the contravention damages in such amount, subject to subsection (2.1), as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect;
>
> (d) pay any party adversely affected by the contravention a penalty or exemplary damages in such amount, subject to subsection (3), as the adjudicator considers just and appropriate as punishment for any malice or recklessness involved in the contravention;
>
> (e) adopt and implement an affirmative action program or other special program of the type referred to in clause 11(b), if the evidence at the hearing has disclosed that the party engaged in a pattern or practice of contravening this Code.

[28]. The settlement offer to be considered reasonable should address each of these remedial headings, if relevant.

See *Nachuck v. City of Brandon, 2014 CanLII 20644 (MB HRC).*

## IV. Analysis

[29]. The Settlement Offer made by Capitol Steel is a monetary amount of $6500.00 for each Complainant, in exchange for a full and final discontinuance and appropriate releases. It also sets out how it has handled compliance with the Code as a result of the Complaints.

[30]. Although not clearly apparent from the Code, this Panel has typically held that an adjudicator performing an analysis under Section 37.1 should not weigh evidence or make findings of fact. A limited approach had been taken in regards as to what can be considered in determining the reasonableness of an offer. I shall also do so here.

[31]. This Panel has also previously held that under a Section 37.1 an adjudicator should proceed with pause and caution before determining that a settlement offer is reasonable, as such a determination could deny a complainant the right to have their matter heard on the basis of its merits.

See Damianakos v. University of Manitoba, 2015 CanLII 11275 (MB HRC)

[32]. Capitol Steel's submission that the Settlement Offer is reasonable contains material that present factual disputes that require to be determined at a hearing on its merits. It is clear there is a factual dispute as to whether or not the Complainants were forced to resign their positions in 2015 due to the alleged discrimination or if they voluntarily quit by their own accord.

[33]. There are also submissions from the Complainants, mentioned by the Commission and acknowledged by the Respondent regarding the issues of financial loss, the effect of the mental health of the Complainants, and undue hardship allegedly suffered.

[34]. The Commission takes issue with submissions made by Capitol Steel in relation to reports and comments made during the investigation phase of this matter. Such materials were presented in written form and orally at the Hearing and submitted that this should be considered as the contextual factual matrix to determine the reasonableness of the Settlement Offer.

[35]. Information produced during the investigative process of the Complaints by the Commission, prior to the matter being referred to adjudication should not be considered and only in extraordinary circumstances.

[36]. When determining the reasonableness of a settlement offer under Section 37.1 the complaint is deemed proven and any admissions, and any undisputed facts in making an assessment under Section 37.1 should be considered and given the most weight in the assessment.

See *Koshinsky v. MHRC, 2019 MBHR 11 (CanLII).*

[37]. With disputed facts being present before me, I am of the view that such a dispute requires a hearing on its merits for determination.

[38]. Furthermore, when analyzing the Settlement Offer within the context of Section 43(2) of the Code it becomes clear that it is not reasonable under Section 37.1.

*Securing compliance with this Code, rectify any circumstance caused by the contravention, or to make just amends for the contravention*

[39]. Capitol Steel has submitted that it has made exemplary and significant changes to its organization and hierarchy in terms of dealing with the Complaints and human rights as a whole. It has argued that it has in place a Respectful Work Place Policy, Work Place Harassment Policy and Procedure, Violence Prevention Policy, implemented in-house legal counsel and strategic planning completed. The general manager who was the person enacting the alleged discriminatory action also has been confirmed by Capitol Steel to be no longer under its employ.

[40]. However, under closer review, the evidence shows that some of these policies were in place prior to or during the times when the allege discrimination took place against the Complainants. I fail to see how this comprehensively addresses this form of remedy.

*Compensate any party adversely affected by the contravention for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention;*

[41]. There is a two-step legal test when parties do not see eye-to-eye with respect to the assessment of the issue of financial losses. This is set out in *Young v. Amsted Canada Inc., 2015 MBHR 5 (CanLII)* in his decision, Adjudicator Sim writes as follows:

> *In Damianakos v. University of Manitoba, 2015 CanLII 11275 (MBRC) and Nachuk v City of Brandon, 2012 CanLII 20644 (MB HRC), it was held that it is not appropriate for an adjudicator under Section 37.1 to make findings of fact on disputed issues. The adjudicator should proceed on the assumption that the allegations in the complaint have been proved and on agreed facts. However, in most cases the assessment of financial loss will depend on findings of fact that are not included in the complaint and in this case, most of these facts are in dispute.*
>
> > *I have approached this problem through a two-step test. First, I considered whether the Respondent has calculated its offer based on appropriate legal principles and has evidence to support its*

> *position. I find that it has. Second, I considered whether the Complainant could make a case, supported by evidence, for a significantly higher amount of compensation than the amount in the offer. I also find that he can. In these circumstances, it is not appropriate for me to attempt a detailed analysis of the limited evidence before me in an attempt to decide which position is more reasonable.*
>
> *I do not believe it is necessary for an adjudicator to find that an offer is not reasonable in every case where there are facts in dispute. There will be cases where the Complainant is advancing an obviously unreasonable position that is not supported by law or evidence and other cases where the difference between the parties' positions is insignificant. However, in this case the Complainant has made a reasonable enough argument that he should be allowed the opportunity to present it at a hearing.*
>
> *If the case proceeds to adjudication, there is a possibility that the Complainant's arguments will be rejected and he will receive considerably less than the amount of the offer. However, in the Damianakos decision, Chief Adjudicator Walsh held that this was not a factor, which an adjudicator should take into account when assessing an offer under Section 37.1. The result of finding an offer to be reasonable under Section 37.1 is that the proceedings will be terminated if the Complainant rejects the offer. The adjudicator is therefore in a different position from a lawyer advising a client or a mediator in a non-binding mediation who can only recommend or urge a Complainant to accept an offer. The standard of reasonableness should be varied accordingly.*

[42]. As stated previously, I am of the view that the adjudicator tasked under Section 37.1 should not determine or make a finding of fact. There is a lack of evidence before me that would assist in determining whether or not the two-step test in *Young* has been met. Without such information, it is impossible for me to determine or approximate the reasonableness of the Settlement Offer under this form of remedy.

*Payment for Injury to Dignity, Feelings or Self-Respect;*

[43]. As is well known, the Code provides an adjudicator the ability to compensate to address the impact the contravention of the Code has in relation to the indignity of the adverse treatment complainants would have suffered. The Commission and the Complainants have stated that the Settlement Offer of $6,500.00 for injury to their dignity, feelings or self-respect is not reasonable and does not approximate what an adjudicator would see fit if the complaints were proven at a hearing on its merits.

[44]. General damages are assessed using the objective seriousness of the contradicting conduct and the effect on the individual experiencing the discrimination and there are certain factors to be considered as set out in

Arunachalam v. Best Buy Canada, *2010 HRTO 1880 (CanLII)* which set out as follows:

> *The first criterion recognizes that injury to dignity, feelings, and self-respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.*
>
> *The second criterion recognizes the applicant's particular experience in response to the discrimination. Damages will be generally at the high end of the relevant range when the applicant has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious. Some of the relevant considerations in relation to this factor are discussed in Sanford v. Koop, 2005 HRTO 53 (CanLII) [reported 55 C.H.R.R. D/102] at § 34-38.*

[45]. Furthermore, additional factors to be used on assessing the appropriate quantum of general damages are succinctly set out in Sanford v. Koop 2005 HRTO 53 (CanLII) which set out as follows:

> *a. Humiliation experienced by the complainant;*
> *b. Hurt feelings experienced by the complainant;*
> *c. A complainant's loss of self-respect;*
> *d. A complainant's loss of dignity;*
> *e. A complainant's loss of self-esteem;*
> *f. A complainant's loss of confidence;*
> *g. The experience of victimization;*
> *h. Vulnerability of the complainant; and*
> *i. The seriousness, frequency and duration of the offensive treatment.*

[46]. The Complainants were employees of Capitol Steel for some time. Only when a new general manager came into the equation did the alleged discriminatory events take place under the watch of Capitol Steel.

[47]. The Complainants have stated that they have suffered undue hardship and have made reference to medical distress with respect to this matter, but again there is a lack of evidence before me in order to determine or approximate whether or not the Settlement Offer is reasonable under this form of remedy.

[48]. Based on analysis of the Settlement Offer under the first three remedies available under Section 43(2) I am of the view that it is not reasonable under Section 37.1. The task of determining if the Settlement Offer is reasonably approximate to a

remedy that an adjudicator would order if the complaint was proven cannot be completed without proper evidence before me.

[49]. Addressing the remedies set out in Subsections 43(2)(d) and (e) would be moot as both the Commission and Complainant took no position with respect to Capitol Steel's submissions that these were not relevant in this matter.

## V. Order

[50]. I order the Settlement Offer is not reasonable under Section of 37.1 of the Code and that this matter proceed to an adjudication hearing on its merits.

Dated this 18th day of February, 2022

**Gary M. Sarcida, Adjudicator**