HUMAN RIGHTS ADJURICATION PANEL

IN THE MATTER OF: A complaint by Nicholas Wagstaff v. Green Drop Lawns Ltd., alleging a breach of s. 14 of *The Human Rights Code*

AND IN THE MATTER OF: *The Human Rights Code*, C.C.S.M., Chapter H175 as amended

BETWEEN:

NICHOLAS WAGSTAFF,

Complainant,

- and –

GREEN DROP LAWNS LTD.,

Respondent.

SECTION 34.1 (REASONABLENESS OF AN OFFER)

ADJUDICATION DECISION

Adjudicator: Robert W. Olson

Appearances

Nicholas Wagstaff	Complainant
Jacqueline Boily Megan Fultz	Counsel for the Human Rights Commission
Darryl Buxton Mathew Pena	Counsel for the Respondent

Date of Award

October 30, 2023

I. Overview

1. This matter had an adjudicator appointed to hear the complaint on its merits but on or about March 20, 2023, a settlement offer was made by the respondent employer to the complainant, prior to the hearing, with the request to proceed under section 34.1, or the "Reasonable Offer Process".

2. The Chief Adjudicator then properly assigned the matter to me as a "different adjudicator" than the one appointed to hear this matter on the merits, pursuant to section 34.1(1) and (2) of *The Human Rights Code* (Manitoba) (hereinafter referred to as "the Code"). My task, as set out by s. 34.1 of the Code at least, is to determine whether the offer made is a reasonable one in light of the Respondent's stated request to proceed under that section of the Code. If so, the Complainant shall have one more opportunity to accept the already-rejected offer. If not, the matter shall proceed to a hearing on the merits. I may also determine that insufficient information exists to determine the reasonableness of the offer, in which case the matter shall also proceed to a hearing on the merits.

3. On May 17, 2023, I held a pre-hearing conference with the parties to discuss settlement options or set a hearing date, if necessary, with deadlines for written submissions. The parties opted for a hearing date, and each party met their filing deadlines. Although encouraged to be brief in their submissions, counsel for the Commission and Respondents submitted voluminous materials, confirming the complicated and serious nature of these proceedings and the dispute before me. Public notices were properly filed and issued as required.

4. On August 3, 2023, the parties convened and discussed options for mediation or conciliation, which were rejected as the parties were at an impasse and it was determined that a hearing as to the reasonableness of the offer presented by the Respondent was necessary. The hearing then proceeded orally that same morning, with written submissions already filed and referred to throughout.

5. In anticipation of fulfilling my role pursuant to the Code, I reviewed the Code, Manitoba Human Rights Commission's ("MHRC") own online materials, the briefs submitted, the complaint, the offer, and the case law submitted by the parties pertaining to similar matters proceeding to hearing on the reasonableness of offers.

6. According to the MHRC's own materials, found under the heading of "Guide to the Reasonable Offer Process" on the MHRC website at http://www.manitobahumanrights.ca/complaints/pdf/guides/guide_to_reasonable_offer_NEW.pdf, the Executive Director shall be limited to considering only the following when considering the reasonableness of offers, in addition of course to other relevant MHRC (or other human rights tribunals') decisions:

    a. the Respondent's settlement offer;

    b. the Complainant's submission as to why the offer is not reasonable;

    c. the complaint;

    d. the reply to the complaint, if one has been provided;

    e. the investigation report, if one has been completed; and

    f. any submissions in response to the investigation report.

7. In addition to the above, the MHRC website also provides helpful information under the heading of "Reasonable Offer Process", found at http://www.manitobahumanrights.ca/complaints/reasonable.html . In particular, the MHRC states that the purpose of reviewing reasonable offers is to:

    a. "*avoid the unnecessary time, effort and expense of a hearing process when the complaint can be reasonable* (sic) *remedied without the need for a public adjudication hearing*. The Executive Director reviews the offer and considers whether or not the offer approximates what an adjudicator would order under section 43(2) of The Human Rights Code if the allegation of discrimination in the complaint was proven to be true." [emphasis added]

8. The MHRC information page then goes on to state that adjudication panels also have the authority to review settlement offers "in this way", and the Code itself again sets out that an adjudicator may be appointed to determine if an offer is reasonable.

9. While it is not explicit in the MHRC materials posted publicly that an adjudicator under section 34.1 may consider all of the items listed that the Executive Director may consider, I find that it is at least implied authority for an adjudicator (under this process) to consider all of those same listed items in appropriate situations, based on the MHRC's own statements read in concert with the relevant sections of the Code. I will however then apply the appropriate weight to each as circumstances require and/or reasonableness dictates. It was conceded at the oral hearing of this matter by the parties that the stated goal to avoid unnecessary time, effort and expense of a full hearing on the merits (not only in the monetary sense but in terms

of resources, personal cost, and so on) is a sound policy and is intended to be avoided if possible by a proceeding under section 34.1.

10. Having said that, counsel for the Commission did state their position that at least primary weight be given to the complaint, taken as proven, and of course the offer itself. I also accept and adopt this approach, subject only to my comments below.

11. With the above statements in mind, the relevant decisions in Manitoba on this issue suggest instead that an adjudicator appointed to determine the reasonableness of an offer must only consider (1) the complaint and (2) the settlement offer, when making the determination as to the reasonableness of the respondent's offer. The cases go on to suggest that the complaints be taken as proven (as though the allegations had been proven at a hearing on the merits), and that undisputed facts are also to be considered as proven. However some of the cases at least suggest that some disputed facts, if clearly disputed, may be considered as being unproven, if it is clear that they are disputed within the parameters of what I may consider.

12. However, and as considered by Adjudicator Walsh in *Damianakos* at paragraph 21, quoting from the *Metaser* decision, it is also clear that a goal of this process is to avoid unnecessary time, effort and expense of a hearing process on the merits if an offer is "the same or nearly the same or at least approximates, all of the remedies that adjudicator would have ordered if the complainant's allegations had been proven" during a hearing on the merits. I believe that my approach of assigning appropriate weight therefore remains within the precedential standards to be applied when considering an offer under s.34.1.

13. I also accept that I must balance the intended purpose of avoiding unnecessary time, effort and expense against the serious and real effect that a finding that the offer was reasonable would terminate the complainant's proceeding, allowing only that the complainant might accept the offer, or receive nothing. Proportionality must therefore be given serious consideration in proceedings under s. 34.1.

14. As Adjudicator Walsh also points out, at paragraph 24 of *Damianakos*, the purpose of the Code is to educate the public about rights and responsibilities, among other things, of employers and protect against discrimination, and any determination as to the reasonableness of an offer must take this purpose into account. This is further support that a balance must be found and proportionality must be considered, which I have done.

15. It is clear to me therefore that I must take the allegations of the complaint, howsoever they are framed but using reasonable consideration to avoid absurdity and untenable or clearly insupportable allegations, as proven, and then determine whether the offer would fall within a range of possible awards based on those "proven allegations", while also considering the various costs to all parties of proceeding further.

16. As an additional note, I requested an extension to file the within decision on September 29th which was granted by the Chief Adjudicator that same day, extending the completion of the within decision to today's date.

II. Decision

17. Although I do not propose to revisit all of the evidence and submissions made, both in writing and orally, I did consider all of the evidence and submissions. I will touch upon the more salient pieces of evidence and submissions here in support of my decision below.

18. The Complaint and the offer are again the primary pieces of evidence considered, and again I accept that they carry the most weight by far even when weighed directly against the rest of the contextual evidence, the purpose of the Code, proportionality, and my role under section 34.1.

19. I will note as well that although the complaint involved both allegations of harassment and discrimination, the parties agreed that the allegations of harassment (i.e. allegations under s.19 of the Code) were not being advanced any longer, only the allegations of discrimination were being advanced (i.e. s. 14 allegations). However, because the facts themselves, and the complaint itself, combine the various allegations so thoroughly, I must somehow take the complaint as proven on the whole, but without including any of the harassment allegations in my determination of the evidence and my decision (to paraphrase the submission of the Commission on August 3, 2023).

20. In short, the parties all agreed that the harassment claim, having been denied by the Commission, ought not be considered by me in determining the reasonableness of the offer. Counsel for the Respondents have submitted, rightly so in my view, that I consider the offer in light of same, and so I have strived to do so.

a. <u>The Complaint</u>

21. Although I am not reproducing the entirety of the complaint itself, I will note the following passages from it despite the entirety of the complaint (excluding harassment claims here, if possible) has been taken "as proven", subject to anything being clearly unsupported. Although I have considered the allegations pertaining to discrimination to be "as proven" within appropriate parameters, the ones listed below are reproduced here because they assist in explaining my reasoning below (all emphasis, and redactions for succinct clarity, are my own):

    a. "…I told (N) I was having **mental health problems** in an informal discussion and that it was affecting my concentration at work. **(N) showed sympathy** and said "That's too bad!" and **told me I didn't need to do anything I wouldn't be comfortable with** (eg: using chainsaws in adverse conditions)"

    b. "…**(M) showed concern for my health and offered to listen to me**. **I explained that I was having issues at work because of the way (L) had been treating me, and that I was concerned for my job security. He ensured me that my job was safe**, and to continue as I was doing and **make the best effort I could**."

    c. "On January 12, 2018, **I attended a disciplinary hearing, attend by M, N and myself. I was told I was being laid off from my job until March 19, 2018, and that I would have different job responsibilities** because my

personality doesn't fit the office environment. They also said I could quit. I **reminded M that I was undergoing mental health treatment** and that I had complained several times about the toxic work environment. **I also asked him about my suspension** and he repeated that "I was supposed to know" what caused it."

22. It was conceded by the Commission and the Complainant at the hearing of this matter, albeit reluctantly, that some accommodation occurred, based on the wording of the complaint itself as having been proven, which I've set out above. While I do not state that the employer here sufficiently accommodated the complainant, or made sufficient inquiries as expected and required by accommodation and human rights principles, I do find this to be relevant when considering the complaint to be proven, since these facts, as proven, may well affect the award at the end of the day.

23. Furthermore, the complaint, taken as proven, also establishes, intended or not, that the employer representatives expressed concern for the Complainant. I must take it as proven that N "showed sympathy"; that the Complainant did not have to do anything he was uncomfortable with, in the context of mental health concerns having been raised (which I note here because both the Commission and the Complainant expressed, orally, that any accommodation had only to do with physical safety, but again, taking the complaint itself as having been proven as worded, I can only conclude that it was a comment made by an employer representative that addresses

a mental health accommodation, howsoever inadequately so perhaps, and not a physical one, or at least not only a physical accommodation); and to continue doing the best he could.

24. Additionally, the complaint, taken as proven, establishes that the Respondent employer's representative (M) also assured the Complainant that his job was safe. I have no evidence, and cannot consider more than at least primarily the complaint and the offer, to say otherwise. Accordingly, I accept as a proven fact that the complainant's job was safe despite having mental health issues he was struggling with, despite again what concerns there may have been and inadequacies of the employer/Respondent in accommodating him, and accepting as fact, which I do, that the Complainant was also discriminated against based on mental health. I must accept the complaint itself, taken as proven, that he was told unequivocally that his job was safe, particularly so given the evidence found as a whole within the Complaint.

25. It was also conceded by the Commission and the Complainant during oral submissions, again reluctantly so (which is understandable under these difficult circumstances), that in fact the Complainant was not terminated. This arose because, taking the complaint once again as being proven, the employer/Respondent representatives told the Complainant that he was being laid-off/suspended until March 19, 2018, at which point he would return to work in a separate area, based at least in part on mental health reasons (making it arguably an accommodation of sorts, though again I am not stating that this was an

appropriate or sufficient accommodation). Finally, the Complainant was told, even understood, that he was being suspended, not terminated, again by his own words in the complaint.

26. While it is again perhaps understandable that the Complainant felt he could no longer stay at work, it was clear to me (from the Complaint itself) that a significant reason at least for his feeling that way was related to the harassment issues, which again I cannot consider.

27. It is also clear, and must be taken as proven, that the Complainant could have continued working for the Respondent, without loss of income, as of March 19, 2018. While I understand that he could not do so due to both the alleged harassment, and the alleged discrimination, that combination presents a challenge. It seems clear from the complaint, taken as proven, that the alleged harassment, which I cannot consider and is not before me as a violation of the Code, played at least some role in his decision that he could not return.

28. Since the complaint, taken as proven, makes it clear that he could have returned after a suspension, and that the Respondent in fact wanted him to return, I must accept as fact that the admission he was not terminated, combined with the other efforts at accommodating and addressing the concerns (albeit insufficient but still proven), would inevitably influence any award issued by an adjudicator in terms of the amount of wage loss, possibly damages, weighing of any deterrence factors, weighing of non-monetary public interest remedy considerations (perhaps), or

otherwise. The clear fact that no termination occurred, combined with at least some efforts made and concerns expressed, must be considered and weighed.

29. With all of that in mind, the remaining allegations, excluding those pertaining only to harassment, are again taken as having been proven for the purpose of my analysis. While I am cognizant of the fact that I do not have to consider every single statement made in a complaint as true (per Adj. Walsh in *Damianakos,* paras. 25-37), I have parsed it as much as possible, again with consideration to what may be harassment, what may be discrimination or result in alleged discrimination, and avoiding reliance on statements that do not appear to be supported in any sufficient way, if any.

30. There is no question that the Complainant was justified in filing his complaint. Perhaps, had it been worded differently, it would have set out additional allegations or fact that I would take as proven and so I would not be in a position to make the findings here that support the position of the Respondent to one degree or another. Perhaps more information could assist this process to make determinations without causing a chilling effect on the good and worthwhile goal of avoiding a full hearing on the merits. It is difficult to say, but complaints are not civil pleadings and ought not be treated as such, or held to the same standard. What is clear however in the complaint itself, and no surprise, is that there would have been evidence in favour of both the Complainant, and the Respondent, if this matter proceeded to a full hearing. I make this finding again, of course, based on my accepting the Complaint itself as having been proven as a whole, with specific elements also accepted as proven as they relate to discrimination.

31. To be clear however, my comments here ought not be taken by the Respondent to mean that they met required or expected standards for accommodation, or standards of inquiry into accommodation needs, or otherwise taken as a suggestion that the Respondent or its representatives otherwise acted in a satisfactory way with respect to the Complainant. Although I do not have sufficient information to determine more and can only truly consider the limited evidence before me under the parameters of a section 34.1 hearing, and believe that I have sufficient information to reach my conclusions below, I nonetheless express concern with the Respondent's actions, and am thankful that the Complainant has, by his own evidence at the hearing, seemingly managed to successfully re-establish himself and resume a financially and seemingly overall healthy life despite going through what was clearly some difficult circumstances while employed by the Respondent. There's no question, the Respondent could have, and should have, done better and done more for the Complainant based on the evidence I am able to review and consider.

32. Taking the discrimination as having been proven, but excluding the elements of harassment, while also accepting as fact that the Respondent representatives clearly expressed at least some concern and support, and some form of limited accommodation while clearly electing to not terminate employment, as evidenced by the complaint itself, I must then consider the offer and whether it is reasonable under the circumstances.

b. <u>The Offer</u>

33. Although evidence was put before me pertaining to other offers and counters made, I accept, as submitted by the Commission and conceded by counsel for the Respondent, that I am only to consider the offer itself and whether, again, it would reasonably fall within a range of possible awards issued by an adjudicator, taking the complaint as having been proven.

34. The offer itself is as follows, which I have slightly paraphrased since again I cannot consider the prior offers other than as context alone:

    a. "In a final attempt to resolve this matter we have received instructions to increase (the Respondent's) offer…for a total payment of $18,000. We would be open to structuring the settlement amount in such a way that most benefits (the Complainant). For example, we could allocate a higher amount to damages as opposed to lost wages which will reduce the income tax payable and will reduce any amounts that may have to be repaid to Employment Income Assistance by (the Complainant).

    In the event that this offer is not accepted we are requesting that our client's offer be assessed under s.34.1 of *The Code*" (sic)

35. It was admitted at the oral hearing that the time between the January disciplinary meeting and the March 19, 2018 return would have amounted to roughly $8,000 in wages having been lost. Since it's at least possible if not likely that the wage award would at most amount to this amount, under the circumstances, I take this into account in reaching my decision on the offer.

36. It was also admitted by the Respondent, and Commission, that the intent of the offer was to be assigned in any way most advantageous to the Complainant, and was not meant to improperly assign amounts or create confusion or otherwise be unclear. I accept that the intent was to properly pay a reasonable amount within an acceptable range to the Complainant as an acceptance of wrongdoing by the Respondent in violation of the Code, at least on a without prejudice basis as is typical with offers of this kind.

37. The Commission also conceded that section 43(2) of the Code, which would be considered by an adjudicator hearing this matter on the merits, is a permissive section, such that the adjudicator might award anything from nothing, to all five, of the remedies available, as set out below (emphasis mine):

> **43(2)** Where, under subsection (1), the adjudicator decides that a party to the adjudication has contravened this Code, **the adjudicator <u>may</u> order the party to do <u>one or more</u> 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.

38. Counsel for the Commission nonetheless felt that the offer should have at least assigned specific amounts under each of (a), (b) and (c) of section 43(2), but also submitted that in any event, the overall amount of the offer was far too low regardless of how the amounts might have been assigned.

39. Although I lacked sufficient evidence to determine financial losses, if any, or expenses incurred, if any, it was also clear, taking the complaint as proven, that the Respondent wanted the Complainant to return to work. That is indicative of continued effort to address mental health issues of an employee and have him return to work after a disciplinary suspension, albeit weak efforts based on the available evidence, and regardless of whether discipline was appropriate or not. This would, or should, be taken into account by an adjudicator hearing this matter on the merits, and would surely be weighed when considering the public interest, making just amends, and any damages awarded to dignity, feelings, or self-respect.

40. While the Respondent did not include as part of its offer to for instance engage in human rights or accommodation training of its staff, or commit to furthering education in some way in conjunction with or as supported by the Commission, the Commission also had every opportunity here to propose that as a counter offer. While I cannot, perhaps somewhat oddly, consider any counter offers outside of the

offer made and submitted for consideration under section 34.1, and I cannot alter the offer, I do have the authority, again in my view, to consider the proportionality of the hearing already proceeded with, the costs to all parties involved in the various ways, whether financial, time expended, efforts made, or otherwise, and whether in that context a hearing on the merits might be necessary, or unnecessary, following this Reasonable Offer Process. I have done so.

41. I would therefore urge the Respondent to engage with the Commission to improve its policies and practices, and its ability to more properly address this or similar issues that may arise in the future. I have no power to so Order, but can only hope that my comments here are taken with the seriousness in which they are included herein. I do not make these comments lightly, and include them here in an effort to perhaps balance my findings given how close this matter was, and the difficulty with which it has been decided.

42. The Respondent nonetheless made good faith efforts seemingly to correct the situation (insufficiently perhaps but effort must be acknowledged). Furthermore, the Respondent was trying to avoid termination in my view by accommodating the Complainant to another position following a suspension, right or wrong, and all while clearly knowing that he was suffering from mental health issues. The Respondent is not being malicious or refusing to accommodate in my considered view, which would be of great, deep concern. The Respondent is, based on the facts to be determined here, lacking in understanding and effort. I believe this would influence an adjudicator, and so my decision here was similarly influenced. Again, perhaps

the Respondent's attempts were poorly executed, but that evidence can only be determined at a hearing, and the complaint, as proven, clearly establishes that the Complainant was expected to return to work after a suspension. This is particularly so since no harassment may be considered, by admission of all parties.

43. While I also considered the allegation that the Complainant was told he "could quit", and take it as proven, I also assign that under the heading of further lack of understanding and effort, and again, the context taken as a whole is that the Respondent was trying to sympathize, to reassure, and to accommodate the Complainant's mental health issues, despite again poor execution by the Respondent is doing so.

44. I make this finding with full appreciation that I must do so cautiously, as it deprives the Complainant of a full hearing on the merits. However, I have considered the facts as contained in the complaint, which lead me to a conclusion that it's just as likely that the complainant might end up with less than what has been offered under all of the circumstances even after taking the allegations as proven with respect to discrimination in this case. Risk and proportionality ought not be ignored, for either party, and when weighed, also assisted me in reaching my conclusion.

45. I must also include comments as to the amount I have accepted, since part of my consideration includes the fact that a cap now exists in the Code with respect to the damages component of any award, namely at $25,000. While I agree with the submissions of the Commission that the trend in human rights damages awards have been upward, I do not accept the Commission's reasoning that once a cap has

been legislated, as in Manitoba recently, the awards will remain in the $10,000 to $20,000 range, with only the most serious violations going above, and no award ever being under $5,000 going forward.

46. I prefer the reasoning as submitted by counsel for the Respondent, namely that adjudicators ought to consider previous violations and the amounts awarded, as with any precedents, but then fit them within the “cap era” now in place for damages awarded under the Code in Manitoba. This would for instance mean that if the most serious award was X, and least serious was Y, then today X would equal roughly $25,000, and the Y would inevitably equal something less than $5,000. To do otherwise would prevent parties, counsel, and adjudicators from being able to properly predict outcomes, provide advice, make informed decisions, and ultimately have consistency in decision making. Conversely, widely different violations, with varying degrees of seriousness (however that may be defined by circumstances, appreciating that all violations are serious to a minimum degree) being awarded similar amounts by adjudicators regardless of the differences simply because there is a cap would not only create confusion, but also diminish those violations deserving of the higher end of any capped award. A serious violation getting the same or similar amount as a less serious violation would not be advisable, and surely was not the intent, in my view, of the cap placed on awarding damages under the Code. That intent could have, surely would have, been met by a minimum damage award for any violation, not the opposite system of there being a cap.

47. Finally, the efforts and extensive submissions, and time spent, by all parties was also taken into account when reaching my decision. The lengthy submissions by the parties and time, expense and effort expended cannot and in my view ought not be ignored, even though I assign less weight to it than the discrimination experienced by the Complainant.

48. I therefore find the offer to be a reasonable one based on the proven allegations pertaining to discrimination, having found that the complaint, as proven, would lead an adjudicator to conclude that although fault with the Respondent is undeniable, I believe the offer made, particularly as it was proposed (that the Commission and Complainant could structure the global amount in any manner and under any heading they wished), is one that falls within the reasonable range of possible awards if this matter proceeded to a hearing on the merits.

49. In an era of capped damages, the offer of $18,000, assigned as damages (as again offered by counsel for the Respondent in the within hearing) is therefore accepted as reasonable based on the fact that it would be viewed as being on the upper end of damage awards under the cap now existing in Manitoba, as well as my reasons provided above. While it does not assign amounts under other permissible headings found in s. 43(2) of the Code, those are only permissive categories for awards, not required, and it also demonstrates the seriousness of the Respondent's violation.

50. This decision terminates proceedings in accordance with section 34.1(3) of the Code. The offer shall however remain open for acceptance by the Complainant for 15 days following the date hereof. Upon request by the Complainant for additional

time to consider acceptance, I interpret section 34.1(4) to enable any longer period that I might consider reasonable in the circumstances to be allowed, and so I shall remain seized of same. Should the Complainant choose to not accept, the proceedings are to be considered terminated. I therefore urge the Complainant to accept.

51. Although the Code is silent as to time of payment, I hereby further determine that upon acceptance confirmed in writing by the Complainant, assuming he accepts, once communicated to the Respondent, it is within my authority to require payment by the Respondent forthwith, in full, with no deductions or reduction to the full $18,000 (CAD) offered, which is so ordered.

Dated this 30th day of October 2023 in Winnipeg, Manitoba.

_____
Robert W. Olson
Adjudicator