

HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF:

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

BETWEEN:

Gwendolyn Jaques

Complainant,

AND

Price Industries Limited,

Respondent,

APPEARANCES: Cynthia (Cindy) Lazar, Counsel for Price Industries Limited
Jesse Rock, Counsel for Gwendolyn Jaques
Gwendolyn Jaques, the Respondent
Sherry Walsh & Melanie Wire, Counsel for the Manitoba Human Rights Commission

BEFORE: Gary M. Sarcida, Adjudicator

DECISION

I. Introduction

- [1]. On August 14, 2015, Gwendolyn Jaques (the “Complainant”) filed a complaint of discrimination under the Human Rights Code (the “Code”) to the Manitoba Human Rights Commission (the “Commission”), alleging that she was discriminated against by Price Industries Limited (the “Respondent”), pursuant to section 14 of the Code on the basis of her sex and age, and harassment pursuant to section 19 of the Code on similar grounds (the “Complaint”).
- [2]. On or about November 13, 2015, the Respondent filed a reply to the Complaint. This matter was then referred by the Commission for further investigation. On March 26, 2019, an investigation report was produced (the “Investigation Report”) and this matter proceeded to mediation.
- [3]. On April 6, 2021, the Respondent made an offer to settle, which was not accepted by the Complainant. The Commission’s board also found that the offer to settle was unreasonable. This matter was then referred for adjudication to determine finality of the Complaint.

- [4]. In March 2022, the Complainant requested permission from this adjudication panel to amend the Complaint to include the ground of reprisal.
- [5]. On September 9, 2022, the Respondent provided a second settlement offer (the "Offer to Settle").
- [6]. On June 27, 2023, Adjudicator Pelletier held a hearing to determine the inclusion of the ground of reprisal within the Complaint.
- [7]. On October 2, 2023, Adjudicator Pelletier in her written decision did not permit the amendment to the Complaint as requested by the Complainant.
- [8]. In the interim, the Complainant rejected the Offer to Settle, and the Respondent sought to have the Offer to Settle to be determined if reasonable pursuant to Section 34.1 of the Code.
- [9]. On November 21, 2023, I was designated to hear the request to determine the reasonableness of the Offer to Settle.
- [10]. On December 14, 2023, a Pre-Hearing Conference was held to set timelines for written materials to be filed and a hearing date set. It was also briefly discussed whether this matter could be settled. The parties indicated that there was no reason to explore settlement as previous attempts were unsuccessful.
- [11]. On April 17, 2024, a virtual hearing was held ("the Hearing"), with parties presenting oral submissions and all had filed written materials prior to.
- [12]. At the Hearing, I indicated that a written decision would follow.
- [13]. As the Code sets out a statutory timeline for when written decisions are to be completed, I requested of the Chief Adjudicator, for an extension of time for these written reasons to be rendered. The said request was granted, and the timeline was extended to July 12, 2024.

II. Issue

- [14]. Is the Offer to Settle reasonable under Section 34.1 of the Code?

III. The Law

- [15]. The substance of this proceeding is governed by Section 34.1 of the Code which is reproduced here:

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.

[16]. It is worth noting that Section 34.1 of the Code came into force in January 2022 and as a result decisions that dealt with the former Section 37.1(2) of the Code are of assistance for adjudicators during the analytic decision-making process under this context. The following paragraphs of these reasons cite cases under the former Section 37.1(2) of the Code and are salient with the issue at hand.

[17]. For all intents and purposes the existence of Section 34.1 of the Code is to avoid an expensive hearing on the merits in situations where an offer to settle is made, that reasonably approximates a remedy an adjudicator would have ordered if the complaint were proven.

Madayag v Capitol Steel Corporation, 2021 CanLII 59497 (MB HRC)

[18]. When assessing the settlement offer the adjudicator must proceed on the basis that the allegations stated in the complaint have indeed been proven.

Koshinsky v. Winnipeg Folk Festival, 2019 MBHR 11

- [19]. In addition to the complaint, an adjudicator should consider any admissions or undisputed facts and take a limited approach in making any finding of fact.

Koshinsky v. Winnipeg Folk Festival, 2019 MBHR 11

- [20]. Furthermore, information produced during the investigation process of a complaint by the Commission, prior to the matter being referred to adjudication should only be considered in extraordinary circumstances.

Madayag v Capitol Steel Corporation, 2021 CanLII 59497 (MB HRC)

- [21]. Moreover, one must not forget that the purpose of the Code is remedial in nature, during the decision-making process for the adjudicator in this context.

Damianakos v. University of Manitoba, 2015 CanLII 11275

- [22]. Finally, the Adjudicator must take into the account the remedial orders as set out in Section 43(2) of the Code which is reproduced 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.

[23]. Suffice it to say, any settlement offers to be determined reasonable or not by this adjudication panel, should address each of these remedial headings if relevant.

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

IV. Analysis

[24]. The Offer to Settle made by the Respondent to the Complainant can be summarized as follows:

- (i) The Respondent has apologized for not thoroughly recognizing and addressing the sexist atmosphere in the workplace and not remediating the effects it had on female employees. The Respondent has instituted remedial measures such as annual employee training on respect in the workplace, requires employees to acknowledge a violence and harassment policy, and have had hiring managers and leadership trained on an adopted inclusion statement.
- (ii) The Respondent shall pay to the Complainant \$25,000.00 as general damages for injury to dignity, feelings, or self-respect.
- (iii) The Respondent shall pay \$150,000.00 less statutory deductions, as compensation for financial loss.
- (iv) The Respondent has committed future compliance with the Code by implementing certain administrative procedures such as sending resumes to managers "blindly" and removing all identifiers, requiring all employees to go through unconscious bias training, and having a reasonable number of human resource and managerial personal attend human rights training offered by the Commission within six (6) months of the resolution of this complaint.

[25]. The Complainant has taken the position that the Offer to Settle is not reasonable under Section 34.1 of the Code. It is submitted by the Complainant that when a particular factual contextual matrix is used in the analysis to determine, if it is or not, the Offer to Settle would not be held as reasonable.

[26]. The factual contextual matrix the Complainant submits would include the materials and conclusion of the Investigation Report which found, on a balance of probabilities, that:

- (i) The Complainant was subject to harassment based on sex (female);
- (ii) The Respondent did not take reasonable steps to terminate the harassment;
- (iii) The Respondent systematically discriminates against female employees; and

- (iv) The Respondent did not discriminate against the Complainant on the basis of age.

- [27]. The Complainant relies on a decision of Adjudicator Olson which held that under a Section 34.1 proceeding the investigation report by the Commission, and any submissions in response thereto would be part of the materials that can be reviewed by an adjudicator.

Wagstaff v Green Drop Lawns Ltd., 2023 CanLII 106615 (MB HRC)

- [28]. The Complainant says that the Complaint should be read and considered as a whole, along with the additional context of the Investigative Report, given there is disagreement between the parties as to what allegations are included in the Complaint, and thus accepted as proven under a Section 34.1 analysis. Specially the Complainant states that what should be included, or inferred to be included within the Complaint, is that she was denied advancement and terminated by the Respondent for discriminatory reasons, based on sex and age.
- [29]. The Respondent and the Commission both take the position that the Investigation Report is based on unsworn, unproven evidence and should not be considered. Further, it has been submitted that the comments in *Wagstaff* on this point is an outlier and are to be qualified.
- [30]. The *Guide to An Adjudication Hearing* flyer listed and available on the Commission's website does state that at adjudication hearings the adjudicator has the authority to hear any evidence they decide is relevant.
- [31]. Section 39(2) of the Code is also of assistance here. It reads as follows:

General Proceedings and Hearing

39(2) Subject to this Code and any rules established under subsection 8(6), 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.

- [32]. The Code is clear that the adjudicator in a hearing "*May receive...such evidence or other information as the adjudicator considers relevant and appropriate...*". However, the Code does not state that a specific item must be considered during the analysis for a decision to be made.
- [33]. I have also previously held that information produced during the investigation process should only be considered in extraordinary circumstances.

Madayag v Capitol Steel Corporation, 2021 CanLII 59497 (MB HRC)

- [34]. In my view the Investigation Report is appropriately before me, but it should be only used as a question of weight as to how it factors in the final analysis.
- [35]. Both the Respondent and the Commission have taken the position that the Offer to Settle is reasonable as it pertains to the Complaint as it was originally filed and that the allegations set out therein should be considered as the only ones as proven.
- [36]. I agree with the Respondent and the Commission. The allegations as set out in the Complaint, as filed at first instance, should be the only allegations considered as proven. Those allegations are that the Complainant was discriminated against and harassed by the Respondent based on sex and age during her employment with the Respondent. The allegations are clear. There is no reference that such discriminative action by the Respondent limited advancement or as the reason for the Complainant's termination from employment.
- [37]. The decision of Adjudicator Pelletier, in this proceeding, did not allow any amendments to the Complaint as filed, which further binds to look at the Complaint as it stands within its "four corners".
- [38]. Thus, I find that the Offer to Settle is reasonable under Section 34.1(2) of the Code.
- [39]. The Offer to Settle in its totality, when assessing it with the Complaint as proven, does address the remedial orders as set out in Section 43(2)(a), (c), and (e) of the Code as follows:
- (i) It secures compliance and has made amends for the contravention of the Code;
 - (ii) It has met the statutory limit of general damages for injury to dignity, feelings, or self-respect of the complainant; and
 - (iii) It has implemented administrative and human resource programs to comply with the Code and has agreed to have relevant personnel undergo further human rights training.
- [40]. In terms of exemplary damages this remedial order of the Code (as per Section 43(2)(d)), is not material here. This remedial head was never alleged in the Complaint or brought up in written or oral submissions to be considered.
- [41]. With respect to financial loss, where a respondent to a complaint under the Code can be ordered to pay a complainant monetary losses sustained because of a contravention (as per Section 43(2)(b)), the figure offered in the Offer to Settle under this heading is more than sufficient.
- [42]. In *Young v. Amsted Canada Inc.* 2015 MBHR5, a two-step test is laid out to use when the issue of financial loss is in dispute. Adjudicator Sim stated:
- "First, I considered whether the Respondent has calculated its offer based on appropriate legal principles and has evidence to support its position...Second, I*

considered whether the Complainant could make a case supported by evidence, for a significantly higher amount of compensation than in the offer.”

- [43]. The Complainant has submitted that a case can be made for a significantly higher monetary amount for financial loss suffered, than what has been offered. Notwithstanding, no documentation or source information was presented in written materials or at the Hearing by the Complainant, as to what these actual financial losses are. There was some reference that the Complainant had actuarial reports to this effect, and this should have been presented at this forum, but it was not.
- [44]. The Respondent, on the other hand, based its calculations for monetary loss on appropriate principles as evidenced by its detailed explanation of relevant employment opportunities and positions.
- [45]. The Complainant also stresses that “she would want her day in court” and that this matter should move forward by having a hearing on its merits to test the evidence. Again, such evidence was not presented in written submissions or at the Hearing.
- [46]. Accordingly, one must be reminded of the proportionality purpose of the Code, where Section 34.1 is in place to avoid an expensive hearing on the merits and situations where an Offer to Settle that reasonably approximates an adjudicator would have ordered if the complaint were proven. This holds true here.

V. Conclusion

- [47]. Given that the Offer to Settle has been determined to be reasonable, I remind the parties of the entirety of Section 34.1 of the Code. Particularly subsections (3), (4) and (5).
- [48]. The Code indicates that the Offer to Settle is open for acceptance by the Complainant for at least fifteen (15) days after the day of this decision. Notwithstanding, I would order that it would be reasonable that the Offer to Settle remain open for acceptance by the Complainant for at least thirty (30) days after the day of this decision.

Dated this 11th day of July 2024.



Gary M. Sarcida, Adjudicator