

CI15-01-94811

THE QUEEN'S BENCH

WINNIPEG CENTRE

BETWEEN:) Mr. K. Maclean and
) Ms. M. Beaumont
 THE UNIVERSITY OF MANITOBA,) for the Applicant
)
 Applicant,) Ms. I. Khan
 - and -) for the Respondent
)
 THE MANITOBA HUMAN RIGHTS)
 COMMISSION and)
 PEGGY DAMIANAKOS,)
) Judgment delivered
 Respondents.) January 7, 2016

1 LANCHBERY, J. (Orally)

2 I begin by thanking counsel for their excellent
 3 briefs and oral submissions in this matter. As I stated
 4 during the hearing, this case has a very unique set of
 5 facts.

6 The standard of review is reasonableness and it was
 7 agreed by counsel, given the special skill and knowledge of
 8 Adjudicator Walsh, that a high degree of deference is owed
 9 to her decision.

10 The facts have been set forth in the briefs of
 11 the parties and the decision of Adjudicator Walsh, so I
 12 will not delve into them in any great detail as the parties
 13 are well aware of the positions they have taken in this
 14 matter and there will be a few of those facts that I
 15 consider in this endorsement.

16 The legislation is Section 37.1 of the Manitoba

1 Human Rights Code which says, in sub (1):

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12 And sub (2):

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"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."

"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."

As we have said, the standard of review is reasonableness and what I must determine is whether the decision of Adjudicator Walsh fell within a range of possible acceptable outcomes which are defensible in respect of the facts and the law.

Adjudicator Walsh, at paragraph 22 of her decision, states as follows:

"In making a determination under s.37.1 an adjudicator must also bear in mind the underlying purpose of the Code itself.

1 Determining that a settlement
2 offer is reasonable has the effect
3 of terminating the adjudication of
4 a complaint which the Commission
5 has determined should be resolved
6 by way of adjudication. A
7 determination that an offer under
8 s.37.1 is reasonable, therefore,
9 must be based on a determination
10 that the offer approximates what
11 an adjudicator would award having
12 regard to the purpose of the
13 Code."

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15 Again, I find the parties were in agreement with these
16 principles outlined in the comments above.

17 At paragraph 44 of her decision the adjudicator
18 states:

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20 "An adjudicator proceeding under
21 s.37.1 cannot consider competing
22 statements of fact or allegations
23 since to do so would be
24 inconsistent with the accepted
25 test of assuming that the
26 allegations set out in the
27 complaint are proven."

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29 The applicant takes issue with this conclusion as
30 it limits the ability of an adjudicator to consider all the
31 facts in order to properly assess its position.

32 The respondent is clearly of an opposite mind as this
33 is not in keeping with the previous decisions other
34 adjudicators appointed under the Code have made.

1 The settlement offer in this matter is set out in
2 paragraph 52 of the decision, as well as the specific
3 remedial orders are set out in paragraph 53. At paragraph
4 54 of the decision, Adjudicator Walsh states:

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6 "An adjudicator proceeding under
7 s.37.1 must consider the
8 respondent's offer in the context
9 of each remedial sub-heading under
10 s.43(2). This is not to say that
11 in every case an offer will only
12 be determined to be reasonable if
13 it offers something under each
14 heading. Reasonableness will still
15 be assessed having regard to the
16 specific allegations in the
17 complaint. Not every contravention
18 of the Code requires the same set
19 of remedies."

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21 I will summarize the applicant's argument as
22 follows:

23 a) The adjudicator failed to allow information which
24 would have clarified the terms of the settlement offer.

25 b) By failing to do so, it would be impossible for
26 any adjudicator to reach a decision because vital
27 information would not be present, other than the complaint
28 itself and the offer.

29 c) That reinstatement would not have been a remedy
30 available as the position in question had been filled and
31 by the operation of Section 44 of the Code, could not be
32 considered by any adjudicator.

33 d) That the financial compensation package was
34 reasonable, but that proper consideration of the package

1 could not occur due to the refusal of the adjudicator to
2 consider additional information.

3 e) That the adjudicator's stated reluctance to
4 proceed with caution not to deny a complainant a full
5 hearing was an error in law, as the process was designed to
6 promote settlement and that the complainant did not have a
7 right to a full hearing.

8 Again, as this is an endorsement, the respondent's
9 position that the decision was well within the range of the
10 possible acceptable outcomes that are defensible in respect
11 of the facts in law and it confirmed the position the
12 respondent forth in his brief.

13 It is important to review the conclusion of
14 Adjudicator Walsh to determine whether the outcome indeed
15 was within the range of possible acceptable outcomes,
16 defensible in facts and law. At paragraph 120 she states:

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18 "A determination under s.37.1 is a
19 summary process which is based on
20 limited information. Accordingly,
21 it will not be uncommon for an
22 adjudicator to find that he or she
23 cannot determine the
24 reasonableness of an offer not
25 because the parties are not
26 proceeding on the appropriate
27 legal principles but simply
28 because there are gaps in the
29 information the adjudicator can
30 consider in this process. I have
31 found many examples of such gaps
32 in this case."

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34 Adjudicator Walsh found that she did not have the

1 information to make decisions on three of the headings set
2 forth in Section 43(2)(a) to (e), therefore was this a
3 reasonable conclusion?

4 I disagree with the applicant that Adjudicator
5 Walsh's decision had to be either an outright yes or an
6 outright no, she had to make a decision. A decision on
7 lack of information to make a decision is well within her
8 authority in this matter and in itself is that she has made
9 a decision.

10 Adjudicator Walsh properly recognized that if the
11 parties had filed an agreed statement of facts, these facts
12 would have been considered as part of her decision, however
13 I find no reference to an agreed statement of facts in this
14 case. There may have been facts that, if agreed, may have
15 assisted Adjudicator Walsh in reaching her decision but now
16 to suggest that Adjudicator Walsh should have permitted
17 additional information to be entered into the record, would
18 have been an error in law not supported by the fact that it
19 had to be what had been in the complaint itself.

20 As the Code is remedial in nature, the question before
21 Adjudicator Walsh is whether or not the offer addressed the
22 remedial function. She found she could not.

23 However, there was nothing to say that the
24 applicant could, in its offer, included all background
25 material to support the financial compensation package, the
26 public interest function and why reinstatement should not
27 be considered in this case.

28 As agreed, Section 37.1 provides scant direction to
29 the adjudicator, it provides equally no information as to
30 what a settlement offer may contain. In the event that the
31 applicant had provided this information within its
32 settlement offer, the outcome may have been different. If
33 Adjudicator Walsh had refused to consider this information,
34 again, that would be a very different set of circumstances.

1 In the Section 37.1 adjudication, the offeror is
2 under the obligation to make an offer that an adjudicator
3 may find sufficient to make a determination of
4 reasonableness. That burden is on the offeror. If the
5 offeror meets its burden and the offer is found to be
6 reasonable, the full adjudicative process is determined.
7 The claimant has absolutely no say in what follows after
8 that.

9 I find that the reluctance expressed by
10 Adjudicator Walsh to accept any offer that would result in
11 the termination of the claim does not support the position
12 of the applicant that in all circumstances the limitations
13 in this process would mean that you could not find any
14 offer reasonable. What Adjudicator Walsh said was the gaps
15 in the information were such that she could not find this
16 offer reasonable.

17 Adjudicator Walsh determined that the offeror had not
18 met its burden as she did not have enough information. In
19 a summary proceeding, that is a reasonable outcome based
20 upon the facts and the law in this case. These proceedings
21 are of a complex nature with many live issues. It would
22 not be unexpected that a decision could not be made in
23 these circumstances. Therefore the decision of Adjudicator
24 Walsh is confirmed and the applicant's motion for judicial
25 review is denied.

26 I would also say, just as somebody on the outside
27 that is not involved in the rest of the process, I think
28 parties need to look prior to February hearing dates at
29 some form of settlement in this matter. I do not believe
30 the fact circumstances are going to be a slam dunk based on
31 what Adjudicator Walsh was required to decide. This may
32 be in everyone's best interest moving forward. Good
33 afternoon.

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RECORDED COURT TRANSCRIPT
FROM THE OFFICE OF
TRANSCRIPTION SERVICES UNIT

J. Peyton

TRANSCRIPTION SERVICES UNIT

