Date: 20150330
Docket: CI 13-01-86158
(Winnipeg Centre)
Indexed as: Manitoba Human Rights Commission et al.
v. Jewish Community Campus of Winnipeg Inc.
Cited as: 2015 MBQB 47

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

MANITOBA HUMAN RIGHTS COMMISSION AND ETABEZAHU METASER,	)	Counsel:
	)	
	)	Isha Khan and Heather Unger
applicants,	)	for the applicants
- and -	)	
	)	
JEWISH COMMUNITY CAMPUS OF WINNIPEG INC.,	)	Robert A. Watchman
	)	for the respondent
	)	
respondents.	)	JUDGMENT DELIVERED:
	)	March 30, 2015

PFUETZNER, J.

Introduction

[1] The Manitoba Human Rights Commission (the "Commission") brought an application for judicial review seeking an order quashing the decision of an adjudicator appointed under ***The Human Rights Code***, C.C.S.M., c. H175 (the "***Code***") and sending the issue back for redetermination by another adjudicator.

[2] The adjudicator had been appointed to determine a complaint brought by Etabezahu Metaser (the "complainant") against her employer, the respondent, Jewish Community Campus of Winnipeg Inc. (the "JCC").

[3] Prior to the hearing of the complaint, the JCC made a written settlement offer to the complainant, which she rejected. The JCC then requested that the adjudicator determine under s. 37.1 of the ***Code*** whether the offer was reasonable.

[4] The adjudicator held a hearing on the issue and rendered his decision on September 25, 2013, in which, for the reasons that will be described herein, he found that the settlement offer was reasonable and accordingly terminated the adjudication. See ***Metaser v. Jewish Community Campus of Winnipeg Inc.***, 2013 MHRBAD 6, 2013 CanLII 61017 (MB HRC).

[5] The Commission has applied to this court for judicial review of the adjudicator's decision.

Background

[6] At the time of the adjudicator's decision, s. 37.1 of the ***Code***, which was proclaimed into force on June 14, 2012, provided:

> **Failure to accept reasonable settlement offer**
> 37.1 If a complainant rejects a settlement offer made by the respondent after an adjudicator is appointed to hear the complaint, the adjudicator must terminate the adjudication if he or she considers the offer to be reasonable.

[7] Section 37.1 of the ***Code*** has since been amended. However, there was no issue that the version set out above is applicable.

[8] The complaint was filed with the Commission on April 16, 2010. The complaint alleges that the JCC contravened s. 19 of the ***Code*** on a continuing

basis up to and including October 19, 2009, indicating that the ***Code*** violations ceased nearly six months prior to the complaint being filed. The complaint alleges that the complainant was subject to sexual harassment by her male supervisor at the JCC.

[9] Several incidents of the alleged sexual harassment are described in the complaint, including sexually offensive jokes, propositioning for sexual favours, asking the complainant to go on dates or to have sex, calling the complainant at home, trying to strangle the complainant, and offering the complainant US$300 for sex. The complaint indicates that there was ongoing sexual harassment for some time, with some of these events described as happening in August 2009, some in September 2009 and the last incident, being the offer of US$300 in exchange for sex, as happening on October 19, 2009. Some of the incidents are not described with reference to a specific time frame.

[10] The parties agreed that the complainant remained employed by the JCC for a further 16 months after the date the complaint was filed. The JCC's position was that the complainant's employment was terminated at that time due to job performance concerns and she was paid an amount by the JCC in lieu of notice that was at least the minimum required by ***The Employment Standards Code***, C.C.S.M., c. E110.

[11] The complaint was never revised to allege that the termination of the complainant constituted a reprisal under s. 20 of the ***Code*** or was in any other way connected with the alleged sexual harassment. No separate complaint was

filed by the complainant under the ***Code*** in connection with the termination of her employment.

[12] The offer by the JCC to settle the complaint was made on May 28, 2013, and was for an all-inclusive sum of $5,250. The offer addressed in detail each of the five areas that can be addressed by remedial orders of adjudicators under s. 43(2) of the ***Code***, that is:

> (a) ensuring future compliance by the respondent with the Code;
>
> (b) compensation for financial losses sustained, expenses incurred or benefits lost by reason of the contravention of the Code;
>
> (c) damages for injury to dignity, feelings or self-respect;
>
> (d) whether a penalty or exemplary damage award is appropriate; and
>
> (e) whether an affirmative action or special program is appropriate.

[13] The offer allocated the entire $5,250 to address the head of damages for injury to dignity, feelings or self-respect under s. 43(2)(c) of the ***Code***.

The Standard of Review

[14] The Commission took the position that correctness is the applicable standard of review on questions of law and the interpretation of human rights legislation and that the standard of review of a human rights tribunal's findings of facts and the application of law to those findings of fact is one of reasonableness.

[15] The JCC's position was that the applicable standard of review in this case, which involves the interpretation and implementation by a specialized adjudicator of his home statute, is reasonableness. The JCC relied on the Supreme Court of Canada decision in ***Dunsmuir v. New Brunswick***, 2008 SCC 9, [2008] 1 S.C.R. 190 and the post-***Dunsmuir*** line of Supreme Court of Canada cases dealing with the standard of review on judicial review applications, including ***Alberta (Information and Privacy Commission) v. Alberta Teacher's Association***, 2011 SCC 61, [2011] 3 S.C.R. 654; ***McLean v. British Columbia (Securities Commission)***, 2013 SCC 67, [2013] 3 S.C.R. 895; and ***Canadian National Railway Co. v. Canada (Attorney General)***, 2014 SCC 40, [2014] 2 S.C.R. 135.

[16] These cases stand for the principle that the standard of reasonableness is presumed when considering a decision of an administrative tribunal interpreting or applying its home statute, including questions of law. The onus is on the challenging party to rebut the presumption.

[17] The presumption will only be rebutted in respect of four types of administrative decisions, as described by Fish J. in ***Smith v. Alliance Pipeline Ltd.***, 2011 SCC 7, [2011] 1 S.C.R. 160 (at para. 26):

> Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir*, at para. 60 citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or

> *vires*" (paras. 58-61). On the other hand, reasonableness is normally the governing standard where the question: (1) relates to the interpretation of the tribunal's enabling (or "home") statute or "statutes closely connected to its function, with which it will have particular familiarity" (para. 54); (2) raises issues of fact, discretion or policy; or (3) involves inextricably intertwined legal and factual issues (paras. 51 and 53-54).

[18] In this case, the adjudicator was interpreting and applying s. 37.1 of the ***Code***, a matter squarely within his specialized area of expertise and relating to the adjudicator's "home" statute. Based on the guidelines set down in ***Dunsmuir***, and as further described in the subsequent cases referred to above, I find that reasonableness is the appropriate standard of review.

[19] This is consistent with the Manitoba Court of Appeal decision in ***Korsch v. Human Rights Commission (Man.) et al.***, 2012 MBCA 108, 288 Man.R. (2d) 44, which I find is directly on point. In that case, a complainant sought judicial review of the decision of the Commission under then s. 29(2)(b) of the ***Code***, the wording of which is indistinguishable in substance from s. 37.1 of the ***Code***. In ***Korsch***, Hamilton J.A. confirmed, as the parties had agreed, that the applicable standard of review was reasonableness, given that the Commission is an expert tribunal and was dealing with its home statute.

[20] The Commission did not include this case in its written submissions and it was brought to my attention by counsel for the JCC. The Commission attempted to distinguish the case before me from ***Korsch*** on the basis that the facts underlying the case are different. The Commission argued that the way in which the adjudicator approached this case was so incorrect as to make his decision of

central importance to the legal system and thus to necessitate review on a correctness basis.

[21] The problem with this argument is that it focuses on the degree of the alleged error made by the decision maker as opposed to the nature of the decision that was made. The determination of the correct standard of review depends upon the nature of the decision that was undertaken by the adjudicator, not on an assessment of the outcome, or actual decision that was made. The assessment of the decision can only be undertaken once the proper standard of review is identified.

[22] Accordingly, for all of the reasons previously stated, I find that reasonableness is the correct standard of review.

[23] The concept of the reasonableness standard is described by Bastarache J. and LeBel J. in ***Dunsmuir*** (at para. 47):

> .... A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[24] The application of the reasonableness standard is context specific, as described by McLachlin C.J.C. in ***Catalyst Paper Corp. v. North Cowichan (District)***, 2012 SCC 2, [2012] 1 S.C.R. 5 (at para. 18):

> The answer lies in *Dunsmuir*'s recognition that reasonableness must be assessed in the context of the particular type of decision making involved

> and all relevant factors. It is an essentially contextual inquiry (*Dunsmuir*, at para. 64). As stated in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59, *per* Binnie J., "[r]easonableness is a single standard that takes its colour from the context." The fundamental question is the scope of decision-making power conferred on the decision-maker by the governing legislation. The scope of a body's decision-making power is determined by the type of case at hand. ....

Was the Decision Reasonable?

[25] In order to assess the reasonableness of the adjudicator's decision, I will first review the context of s. 37.1 of the ***Code***.

[26] The policy of s. 37.1 of the ***Code*** is to provide for proportionality in the adjudicative system when a reasonable settlement offer has been made and rejected. This is described in ***Nachuk v. City of Brandon (Brandon Police Services)***, 2014 MHRBAD 3, 2014 CanLII 20644 (MB HRC) (at para. 30):

> The intent of section 37.1 is to eliminate the need for an expensive adjudicative process where the Respondent has made an offer that is found to reasonably approximate a remedy that an adjudicator would have ordered if proven after a hearing. ....

[27] In the very recent decision of Adjudicator Walsh in ***Damianakos v. University of Manitoba***, 2015 CanLII 11275 (MB HRC), the adjudicator stressed that a determination under s. 37.1 of the ***Code*** must be made in the context of the underlying remedial purpose of the ***Code***.

[28] Another purpose of s. 37.1 of the ***Code*** is to encourage respondents to make reasonable settlement offers and to encourage complainants to act reasonably in deciding whether to accept an offer. In argument, the Commission stated a concern that adjudicators should be cautious in determining that an

offer is reasonable under s. 37.1 of the ***Code*** because such a determination takes away the complainant's right to a full hearing. However, the policy of s. 37.1 of the ***Code*** is that a complainant has no right to a full hearing once he or she has rejected a reasonable settlement offer.

[29] It is clear that in enacting s. 37.1 of the ***Code***, the Legislature intended adjudicators to be given broad discretion to determine what constitutes a reasonable offer in the circumstances of each case. In addition, there is nothing in s. 37.1 of the ***Code*** which sets out the procedure to be followed for making such a determination, or which lists particular factors or circumstances to consider. This indicates the intention of the Legislature that adjudicators should be given broad discretion to decide the appropriate procedures for determinations under this section and to decide the matters that should be considered in making determinations under this section.

[30] As all such decisions are subject to a reasonableness standard of review, deference must be given by the court to the decisions of the adjudicator.

Information Considered in Assessing the Offer

[31] The adjudicator issued detailed written reasons for his decision. The first issue he addressed was to decide what information he should consider when assessing the reasonableness of the offer.

[32] The adjudicator noted that s. 37.1 of the ***Code*** does not provide any guidance on this issue. The adjudicator decided to adopt the approach taken in the only prior decision on s. 37.1 at the time, ***Mancusi v. 5811725 Manitoba***

Inc. (Grace Cafe City Hall), 2012 MHRBAD 4, 2012 CanLII 73431 (MB HRC), in which Adjudicator Harrison proceeded "on the basis that the allegations as set forth in the Complaint are proven." This is the same approach taken by Adjudicator Walsh in ***Damianakos***.

[33] After referring to the ***Mancusi*** decision, Adjudicator Dawson in this matter sets out his reasons for adopting this approach (at para. 11):

> I adopt this approach, because it gives effect to the public policy that underlies s. 37.1; namely, the parties and the adjudicative process should not expend resources to adjudicate a complaint, where the respondent has already made an offer that is the same or nearly the same as, or at least approximates, all of the remedies that an adjudicator would have ordered if the complainant's allegations had been proven during a hearing of the complaint. For the same reason, it would be appropriate for an adjudicator to consider any admissions or agreed statements of fact. This is not to say that an adjudicator must blindly accept every allegation that appears in a complaint. Where an allegation is speculative at best or highly improbable on its face, an adjudicator may reject such statements.

[34] The parties agreed that this is a reasonable approach for the adjudicator to have taken.

[35] The Commission took the position, however, that despite the written decision of the adjudicator consistently stating that he was proceeding on the basis of assuming the allegations in the complaint to be proven, that he did not, in fact, accept the complaint as proven. This was the first alleged error of the adjudicator according to the Commission. The Commission based its position on the nature of the arguments made at the hearing before the adjudicator by the JCC and some of the questions asked by the adjudicator at the hearing, the transcript of which was before me. The Commission claims that the adjudicator

was urged by the JCC at the hearing to consider the JCC's reply to the complaint and to assess the credibility of the examples of sexual harassment set out in the complaint. In the Commission's written submissions to the court, the Commission acknowledged that the adjudicator did not specifically identify in his written decision which of these arguments, if any, he accepted.

[36] In response, the JCC argued that the written decision of the adjudicator indicates that he clearly proceeded on the basis that he accepted the complaint as proven. He rejected absolutely nothing in the complaint. The JCC argued that interlocutory remarks of the decision maker during the course of a hearing are not to be regarded as part of the decision and relied upon. The JCC cited the decision in ***Faryna v. Chorny***, [1952] 2 D.L.R. 354 (BCCA).

[37] This is a complete answer to the issue raised by the Commission. The decision of the adjudicator consistently shows that he proceeded on the basis that he accepted the complaint as proven. There is nothing in his decision indicating that he considered the reply to the complaint or took part in an assessment of the credibility of the allegations in the complaint, nor can this be inferred from the decision, or from the submissions made to, or the comments made by, the adjudicator at the hearing.

[38] To be clear, I am not saying that the only reasonable way for an adjudicator to proceed in assessing the reasonableness of a settlement offer under s. 37.1 of the ***Code*** is to proceed in the manner of the adjudicator in this

case. It was accepted by the parties that to proceed in such a manner would be appropriate, and I agree.

Consideration of the Offer

[39] The adjudicator proceeded to evaluate the JCC's offer by considering how it addressed the five types of remedial orders that can be made by adjudicators under s. 43.(2) of the ***Code***. In other words, in order to determine if the offer was the same or nearly the same as or at least approximated, all of the remedies that an adjudicator would have ordered if the complainant's allegations had been proven during a hearing of the complaint, the adjudicator considered the available remedies and how they were addressed in the offer. The parties did not dispute that this was a reasonable way for the adjudicator to proceed.

[40] Of the five types of remedial orders available, the parties agreed that the offer reasonably addressed three, being: (1) ensuring future compliance by the JCC with the ***Code***; (2) that no penalty or exemplary damage award is appropriate; and (3) that no affirmative action or special program is appropriate.

[41] The position of the Commission was that the adjudicator erred in finding that the offer was reasonable in how it addressed the areas of: (1) compensation for financial losses sustained, expenses incurred, or benefits lost by reason of the contravention of the ***Code***; and (2) damages for injury to dignity, feelings or self-respect. I will now deal with each of these issues.

Compensation for Financial Loss

[42] The offer did not allocate anything to financial losses on the basis that the complainant did not lose any wages or benefits as a result of the alleged breach of the ***Code***. The offer referred to the fact that the complainant remained employed for 16 months after the date of filing of the complaint. The offer stated that the reasons for her subsequent termination were unrelated to the complaint, and that there had been no suggestion through the proceedings to the date of the offer that the termination had any connection to the complaint.

[43] The offer addressed the issue of expenses incurred by the complainant by offering to reimburse the complainant for expenses up to the amount of $2,000 if she could provide proof of any such expense and demonstrate that it is connected to the allegations of harassment, as opposed to the termination of her employment. The offer indicated that the complainant had claimed such expenses in the course of the proceedings, but had not produced any evidence of the expenses.

[44] The adjudicator determined that it was reasonable for the offer not to provide any amount for financial losses in connection with the termination of employment of the complainant. The adjudicator referred to joint arguments made by the Commission and the complainant at the hearing to the effect that they intended to bring forward evidence, at the hearing of the complaint on the merits, that the decline in job performance of the complainant which led to her termination was a direct result of the sexual harassment.

[45] The adjudicator rejected this argument on the basis that the complainant did not suffer any financial loss due to the termination of her employment that had not already been compensated for by the pay in lieu of notice that she received from the JCC under ***The Employment Standards Code***. Adjudicator Dawson set out his reasoning (at para. 20):

> ... Pursuant to s. 61(2) of *The Employment Standards Code*, an employer may generally terminate an employee for any lawful reason, provided that the employer either gives sufficient notice of the intended termination or pays a sum equal to those wages and benefits that the employee would have received if employment had continued through the statutory notice period. Where an employer fails either to give such notice or pay in lieu of notice, the employee suffers a calculable loss. The loss is the same for the complainant in the context of a human rights violation, because, putting aside the violation of the *Code*, the employer could have terminated the employee for any lawful reason and limited its financial liability only to an amount equal to wages and benefits accruing during the statutorily-defined notice period. As I wrote at para. 27 of *Garland v. Tackaberry*, 2013 CanLII 21646 (MB HRC), "[a]n award of wages paid in lieu of a notice period longer than prescribed by *The Employment Standards Code*, would effectively gift a windfall to the person adversely affected by a human rights contravention."

[46] The Commission argued that the adjudicator erred in law by applying common-law principles of reasonable notice of termination of employment to the assessment of financial losses flowing from a contravention of the ***Code***. There is certainly case law supporting the Commission's argument that this is an error in law. I was referred to the Ontario Court of Appeal decision in ***Piazza and Human Rights Commission (Ont.) v. Airport Taxicab (Malton) Association and Mann*** (1989), 34 O.A.C. 349. This principle was affirmed by Simonsen J. in ***Korsch v. The Manitoba Human Rights Commission***, 2011 MBQB 222, 269 Man.R. (2d) 161 (at para. 41):

> .... Because damages recoverable are those caused by a contravention of the **Code**, the authorities indicate that damages for wrongful dismissal are not the proper measure of damages in a human rights complaint ....

[47] The remedial purpose of s. 43(2)(b) of the ***Code*** is to restore a complainant as far as is reasonably possible to the position that the complainant would have been in had the discriminatory act not occurred. Such compensation would not necessarily be limited to reasonable notice or an amount in lieu thereof as determined in the employment law context.

[48] However, having found that the adjudicator incorrectly stated the law, this does not necessarily mean that the outcome of his decision was unreasonable on the issue of whether the offer reasonably dealt with financial loss. In assessing whether the decision of the adjudicator met the standard of reasonableness, the court must apply the principles from ***Dunsmuir***. The decision will meet the ***Dunsmuir*** standard of reasonableness if the outcome fell within a range of possible acceptable outcomes that would be defensible in respect of the facts and law without needing to rely on the error in law that was made. Applying these principles, it was open to the adjudicator to find that the offer was reasonable despite allocating nothing to financial loss.

[49] There is nothing in the complaint that indicates that the alleged breach of the ***Code*** resulted in financial loss to the complainant. There is no allegation that, for example, the complainant's job was terminated, or that any of her working conditions changed so that she incurred a loss in income. The parties

accepted that it was reasonable for the adjudicator to consider only the complaint and the offer in evaluating the reasonableness of the offer.

[50] The adjudicator correctly proceeded by assuming all of the allegations in the complaint to have been proven. Having done so, it was open to him to find that the offer reasonably addressed the issue of financial loss without needing to address whether the complainant received an appropriate amount of pay in lieu of notice upon her termination some 16 months later and whether that precluded her from compensation under the ***Code*** for financial loss.

[51] It simply was not an allegation in the complaint that the termination of the complainant was connected to the sexual harassment, nor could this be inferred from the complaint. The complaint could have been amended by the Commission under s. 24 of the ***Code*** to include an allegation that the termination of the complainant was connected to the sexual harassment, or was a reprisal under s. 20 of the ***Code***, or a separate complaint could have been filed. This was not done.

[52] The Commission argued that the adjudicator should have considered the possibility that evidence might have been led at the ultimate hearing to establish a connection between the harassment and the termination of employment.

[53] I do not accept this. The Commission took the position at the s. 37.1 hearing, and in this application, that all that the adjudicator should consider was the complaint, proven to be true, in assessing the settlement offer. I accept that this is a reasonable way for the adjudicator to proceed. It is illogical to then say

that the adjudicator was unreasonable by failing to consider the possibility that evidence might be led at the hearing to prove an allegation that does not appear in the complaint, either explicitly or by implication. To take into account such extraneous matters would mean that either party could engage in unsubstantiated speculation regarding what might happen at the hearing, resulting in an automatic dismissal of any request for a determination under s. 37.1 of the ***Code***. This would effectively eliminate the possibility of a successful determination under s. 37.1 of the ***Code***. One must presume that the Legislature meant this section of the ***Code*** to be used for its intended purpose.

[54] The Commission argued that it does not have the onus to substantiate in the complaint any remedy to which the complainant may be entitled and that the complaint is not comparable to a pleading in a civil litigation context. I agree that a complaint does not need to have the precision of a pleading, with a particularization of the amount of financial losses, damages and the like. However, if the complainant, or the Commission, intends to prove compensable financial losses at a hearing, the basic facts that would entitle the complainant to that compensation should be stated in the complaint. The complaint should provide proper notice of the allegations.

[55] The Commission relies on the decision of Adjudicator Harrison in ***Mancusi*** in which she was not prepared to find that an offer to compensate for lost wages was reasonable based solely on the complaint because she recognized that she required evidence to determine if that aspect of the remedy offered was

reasonable. This case is significantly different from the case at bar. In ***Mancusi***, the complaint contained an allegation that the complainant was forced to quit her job due to sexual harassment at work. The necessary inference is that the complainant suffered lost wages as a result of the alleged breach of the ***Code***. In ***Mancusi***, the complainant stated that she had not received Employment Insurance ("EI"), while the respondent employer stated that she had. The adjudicator determined that she could not evaluate the reasonableness of the offer in this respect without evidence regarding the receipt of EI benefits, as the amount of the complainant's financial losses would depend upon whether she received EI benefits.

[56] In the case before me, there is no allegation in the complaint that the complainant's job was terminated as a result of the sexual harassment, or allegations of any other nature that imply a financial loss suffered by the complainant. Accordingly, the adjudicator quite reasonably declined to engage in the type of speculation encouraged by the Commission. In ***Mancusi***, there was financial loss alleged in the complaint, either directly, or by implication, and conflicting submissions on the factual basis for calculating the financial loss.

Compensation for Injury to Dignity, Self-Respect and Feelings

[57] The JCC offered the sum of $5,250 as compensation for injury to the complainants' dignity, self-respect and feelings. The adjudicator found this to be reasonable as he found it approximated what an adjudicator would award if the information before him had been proven at a hearing of the complaint.

[58] The adjudicator considered awards made in previous decisions in cases of sexual harassment, including ***Korsch***, where it was noted by Simonsen J. that awards made under this head of damages in human rights complaints in Manitoba have been in the range of $1,000 to $4,000. The adjudicator also considered ***Budge v. Thorvaldson Care Homes Ltd.***, [2002] M.H.R.B.A.D. No. 1 (QL), aff'd 2006 MBCA 122, where an award of $4,000 was made to a complainant who suffered workplace harassment over an extended term of employer inaction. The adjudicator also noted the decision in ***Garland v. Tackaberry (Grape & Grain)***, 2013 MHRBAD 5, 2013 CanLII 21646 (MB HRC). The award in that case was $7,750 for a case of sexual harassment of a young female worker by a middle-aged customer that the adjudicator described as "shocking" and "abhorrent."

[59] The Commission quite rightly pointed out that the "range" referred to in ***Korsch*** should not be viewed as a cap on damages and that an award of damages under this head will be determined based on the particular facts of each case. Having said that, prior determinations of awards under this head of damages do have precedential value and are routinely referred to by adjudicators making decisions in adjudications under the ***Code***.

[60] The Legislature, in enacting s. 37.1 of the ***Code***, intended adjudicators to assess the appropriate quantum of damages likely to be awarded if the matter were to go to a hearing and the complaint proven. This is a matter squarely

within the expertise of human rights adjudicators as they are required to make these determinations regularly in the adjudication of human rights violations.

[61] The adjudicator gave due consideration to prior awards under this head of damages in similar cases and determined that this offer, being at the higher end of the range of awards in similar cases, was reasonable as it was the same, or nearly the same as, or at least approximated, what an adjudicator would have ordered pursuant to s. 43(2)(c) of the ***Code*** if the complaint had been proven at a hearing.

[62] The adjudicator turned his mind to all of the relevant considerations under this head of damages. He assumed the allegations in the complaint had been proven, he reviewed prior awards in similar cases, and he applied a sensible test to determine if the offer in this case was reasonable.

[63] In applying a reasonableness standard of review to his decision, I find that his determination that this part of the offer was reasonable was a decision that was open to him on the facts and the law. Accordingly, I find he came to a reasonable conclusion.

Conclusion

[64] I find that the adjudicator's decision that the offer was reasonable for purposes of s. 37.1 of the ***Code*** was a decision that fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[65] The application of the Commission is dismissed.

Costs

[66] At the hearing I invited the parties to make submissions on costs. The Commission indicated that, whether or not it was successful, it would not be seeking costs. The JCC was content to leave the issue of costs until I had issued my reasons. In the event that the parties cannot agree on costs, arrangements can be made for me to hear cost submissions.

PFUETZNER, J.