

**MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION**

**IN THE MATTER OF:**

An application to terminate adjudication of a Complaint pursuant to s.37.1

**BETWEEN:**

**BILLY-JOE NACHUK**

Complainant,

**-and-**

**CITY OF BRANDON  
(BRANDON POLICE SERVICES)**

Respondent,

**Appearances:**

Terrence Green, counsel for the Complainant

Robert L. Patterson, counsel for the Respondent

Isha Khan, counsel for the Manitoba Human Rights Commission

**DAN MANNING, adjudicator:**

1. This is an application by the respondent, City of Brandon (Brandon Police Services) ("BPS") to terminate the adjudication on the basis that a reasonable settlement offer ("Offer") was made and rejected by the complainant pursuant to section 37.1(2) of the *Human Rights Code*. (the "*Code*")

## **The Complaint**

2. A Complaint of Discrimination ("Complaint") dated 7 June 2011 was filed by Billy-Jo Nachuk alleging that on 16 April 2011, three on-duty police officers employed by BPS behaved in a manner that if proven would amount to discrimination under section 13 of the *Code*.
3. In the Complaint Mr. Nachuk describes himself as a decorated Canadian Forces member who at the time was suffering from "Occupational Stress Injuries which include: PTSD, major depression, anger, trust, anxiety and stress issues." He has been hospitalized previously due to suicide related incidents. Through the Manitoba Search and Rescue, ("MSAR") Elite Service Dog Program, Mr. Nachuk trained with a service dog (Gambler) to minimize his functional limitations. Gambler and Mr. Nachuk were evaluated and certified, as an active service dog team on March 25 2011.
4. His psychiatrist has stated that having a service dog "greatly alleviated" his level of distress. On this particular day he went out with a friend and his service dog, Gambler, to the Keystone Motor Inn Lounge ("Keystone") to socialize. It was the first time in two years that he had attempted to socialize in such a public space.
5. About an hour after he arrived he was approached by an employee of Keystone who told him he had to remove his service dog, Gambler, from the premises. Mr. Nachuk produced Gambler's certification papers which the employee took and produced to three BPS officers who were on scene. The BPS officers approached Mr. Nachuk's table and spoke with him.
6. Mr. Nachuk alleges that one officer asked, "So what's with the dog?" to which he replied "it is a service dog." Mr. Nachuk describes the officer as responding "aggressively", "Why? You're not blind!" Mr. Nachuk tried to explain his situation but was interrupted by the same officer who said, "You're not going to be doing a search tonight, either." He continued to try and explain what kind of dog his service dog was but the officers "refused to listen." A second officer told him that the manager wanted the dog out and that he "was very close to being thrown in jail." At this point, "feeling totally degraded" he took his coat and he, his friend and his dog Gambler were escorted out of the bar by the police.

7. Mr. Nachuk alleges that as a result of this incident he felt that his mental health had regressed and was told by his Mental Health Clinician that it would "likely require considerable work ... to recapture the gains made in therapy over the past year."
8. Mr. Nachuk filed an identical Complaint of Discrimination against Keystone. That matter has been resolved but is relevant to this decision.
9. The respondent denies the allegation as outlined in his Response dated November 30, 2011.

### **Proceedings**

10. Adjudicator Lawrence Pinsky is designated to adjudicate the complaint and multi-day hearing dates have been set commencing 19 May 2014. It is anticipated that the hearing will be approximately one week.
11. On 14 March 2014, the respondent presented a without prejudice and without admission of liability settlement offer that was rejected by the Complainant on the 24 of March 2014.
12. To summarize the Offer: The respondent has made revisions to the BPS policy with respect to service animals which was distributed amongst its Members and the Manitoba Human Rights Commission ("MHRC"). The respondent endeavours to have ongoing involvement of the MHRC staff in the training of new recruits for the BPS. The respondent has made a commitment to continue to support widely recognized and accredited organizations where service animals are utilized. BPS is prepared to pay general damages of \$5,500 under section 43(2)(c) of the *Code*. Absent from the Offer are legal costs under 43(2)(b) and exemplary damages under section 43(2)(d).
13. Adjudicator Lawrence Pinsky advised the Chief Adjudicator that it was necessary to appoint an adjudicator for the purposes of considering a settlement offer in accordance with section 37.1(1) of the *Code*. On 24 March 2014, pursuant to section 37.1(1), I was designated by the Chief Adjudicator to determine if the settlement offer was reasonable. Written material was filed by all parties and an oral hearing was conducted on the 16 April 2014 by teleconference.

## Position of the Parties

14. Essentially the issue is money. The respondent suggests that \$5,500 is reasonable for general damages pursuant to 43(2)(c) whereas the Commission and the complainant disagree. The complainant argues that a reasonable Offer should include legal fees and exemplary damages. The Commission takes the position that there is no evidence of conduct that would result in exemplary damages and furthermore that there is no evidence that would warrant an award for costs under the *Code*.

## BPS

15. The respondent takes the position that the Offer in its entirety is reasonable given the totality of the circumstances. The Offer addresses each of the remedial clauses contained within Section 43(2). The respondent argues that there ought to be no financial compensation for legal fees pursuant to s.43(2)(b) and that there should be no finding of recklessness or malice pursuant to section 43(2)(d).

16. With respect to quantum under s.43(2)(c) the respondent points out that the highest award from a Manitoba Human Rights Board of Adjudication is \$7,750 in *Garland v. Scott Tackaberry o/a Grape & Grain*, 2013 CanLII 21646 (MB HRC).

17. The respondent also submits the Offer is reasonable in light of previous decisions. In *Metaser v. Jewish Community Campus of Winnipeg Inc.* 2013 MHRBAD 6, 2013 CanLII 6107, a settlement proposal of \$5,250 was deemed reasonable for damages in relation to a matter that involved sexual harassment in the workplace over an extended period of time. In *CR v. Canadian Mental Health Association, Westman Region*, 2013 CanLII 125 a \$4,000 award was granted in a case involving discrimination in employment. In *Korsch v. The Human Rights Commission*, 2011 MBQB 222, a case involving discrimination in the workplace, Madame Justice Simonsen reviewed awards made under this head of damage and observed that the range at that time was \$1000 to \$4000.

18. With respect to general damages the respondent suggests there is another factor I should consider. It is their "firm belief" that the complainant received financial compensation from Keystone. They argue that these are identical complaints and that if financial compensation was paid by Keystone then that is relevant to these proceedings. The complainant should not be entitled to "*double recovery*," from BPS and Keystone. Any financial compensation already received from Keystone would factor in to the reasonableness of the respondent's offer. The respondent argues that the Board should compel the complainant to disclose and confirm exactly what was received from Keystone for compensation and other relief. Counsel for the respondent suggests that an *in camera* hearing might accommodate a balance between respecting possible confidentiality terms reached with Keystone and yet providing relevant facts to determine if the offer is reasonable.

### **The Commission**

19. The Commission takes the position that \$5,500 is not reasonable so as to require the termination of the adjudication of the proceedings. Previous general damages awards in Manitoba provide limited guidance as to what an adjudicator would likely award if this complaint were adjudicated because there are no cases in Manitoba under the *Code* that involve discrimination in the provision of services against an individual who relies on a service animal to assist with managing mental health symptoms.
20. The Commission argues that exemplary damages are not likely to be included in an adjudicator's award given that recklessness and malice must be proven to be awarded relief under this head of damages. In this case, the Commission takes the position that there is no such evidence.
21. The Commission suggests that section 43(2)(b) is not the appropriate remedial provision to seek legal costs and points to section 45(1) that states that parties to an adjudication must pay their own costs. The Commission submits that there is no evidence in this case that either the Complaint or Reply are frivolous or vexatious and that neither party has met the burden set out in subsection 45(2) of the *Code*.

22. The Commission takes the view that the Keystone complaint has no relevance to the assessment of the reasonableness of the Offer. The Commission argues an adjudicator determining the matter would assess liability and therefore the applicable remedy as against each of the respondents individually based on their respective involvement in contravening the *Code*. Therefore, the complainant cannot obtain "double recovery" because any offer to remedy the complaint must be focused on putting the complainant in the position he would have been in had the discrimination by the respondent not occurred.

### **The Complainant**

23. The complainant largely adopts the position of the Commission with respect to general damages under s.43(2)(c).

24. The complainant suggests that an order for legal costs should flow because "recent decisions across Canada" hold that mental health issues diminish an individual's ability to represent themselves. No authorities have been provided.

25. The complainant also suggests exemplary damages are reasonable based on the "special duty of care owed to a person with a disability as obligated by a Manitoba police officer under the *Police Services Act*."

### **Analysis**

26. Section 37.1 reads:

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.

27. All parties agree that the test under s.37.1 of the *Code* is that which was enunciated by Adjudicator Lynne Harrison in *Mancusi v. 5811725 Manitoba Inc. (c.o.b. Grace Cafe City Hall)*, 2012 MHRBAD 4 at paragraph 28:

"I accept, as the respondent has submitted, that the concept of reasonableness is different from that of appropriateness. It is not necessary that an offer to settle exactly mirror what an adjudicator would order. . . The question is whether the offer is reasonable, in that the relief which is offered "approximates" or is "the same or nearly the same" as "the relief sought by the complainant" that would otherwise be obtained if the complaint went to hearing, or the offer is equivalent to what the complainant could reasonably be expected to receive should the case proceed to a hearing" (citations removed)

28. Before commencing the analysis I must deal with an issue that arose regarding the information that I am to rely upon during my analysis of the Offer. Counsel for BPS made reference to observations and subsequent information that BPS collected in interviews from members involved. This information is not contained in the Complaint. For example, there was an observation that Mr. Nachuk and his friend were seen "singing and having fun" as they were heading in the direction of the "*Road House*," another nearby licenced establishment. Another reference was made by counsel that one of the three members of BPS involved in the incident himself suffers from "PTSD," and "OSD." These are contentious issues of fact. For reasons below, I do not factor these or any other contentious factual assertions outside of the Complaint into my assessment of whether or not the Offer is reasonable for the reasons that follow.
29. In my view the proper role of an adjudicator determining the reasonableness of an offer under section 37.1 of the *Code* is to proceed on the basis that the allegations contained in the Complaint are proven. (See *Mancusi, supra*, at paragraph 22, and *Metaser, supra* at paragraph 10 and 11). It is an issue for the trier-of-fact, in this case, Adjudicator Lawrence Pinsky who is the adjudicator of first instance to resolve disputed issues of fact. It is not to be resolved by the adjudicator who is determining the reasonableness of the offer. As Adjudicator Robert Dawson put it in *Metaser, supra*: "It is important to recall that, while working from the assumption that the allegations in the complaint are proven, an adjudicator makes no finding of fact, and no one should infer that a respondent has violated the Code."
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. The determination of disputed factual issues requires an adjudicator to hear evidence and make findings of fact and that cannot be the role of the adjudicator who is tasked to determine the reasonableness of an offer as intended by section 37.1

31. I therefore do not take into consideration facts that are not in the Complaint. I rely on the information in the Complaint and proceed as if the allegations are proven.

### **Should the Complainant be compelled to disclose the Keystone Settlement?**

32. For similar reasons I decline to compel the complainant to disclose the settlement terms (if they exist) relating to the Keystone complaint. The Keystone settlement may be relevant however it is my view that to make such an order would require me to embark on a fact-finding procedure which is not the role of an adjudicator under s.37.1.

### **The Offer**

#### **43(2)(a) and 43(2)(e)**

33. The first and last heading of section 43(2) is not at issue. All parties agree that the Offer is reasonable with respect to section 43(2)(a) and 43(2)(e). I agree.

#### **42(b)**

34. I also find, based solely on the assertions in the Complaint, that the Offer reasonably addresses section 43(2)(b). The Supreme Court of Canada has reviewed similar remedial provisions in the *Canadian Human Rights Act* and decided that legal costs do not fall in similar worded provisions. See *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471 ("Mowat"). The complainant has not made an application under section 45(2).



### 43(2)(c)

35. In *C.R. v. Canadian Mental Health*, supra, Adjudicator Lynne Harrison considered damages under this remedial provision:

"General damages, or in the language of the *Code*, "damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect" may be ordered pursuant to clause 43(2)(c) of the *Code*. What is "just and appropriate" will depend on the particular facts and circumstances of each case. Guidance on this issue may be drawn from the relevant authorities."

36. Adjudicator Lynne Harrison also referred with approval a passage in *Budge v. Thorvaldson Care Homes Ltd*, decision of Adjudicator Peltz dated March 2002 (found online at [www.manitobahumanrights.ca/decisions.html](http://www.manitobahumanrights.ca/decisions.html)):

Although damage awards in human rights cases historically were small in size, they have become progressively more substantial in recent years. It is now a principle of human rights damage assessments that damage awards ought not be minimal, but ought to provide true compensation other than in exceptional circumstances for two reasons. First, it is necessary to do this to meet the objective of restitution . . . Second, it is necessary to give true compensation to a complainant to meet the broader policy objectives of the *Code*. It is important that damage awards not trivialize or diminish respect for the public policy declared in the Code. *Cameron v. Nel-Gor Castle Nursing Home* (1984) 5 C.H.R.R. D/2170, approved in *Miller*, a 1995 decision cited earlier at para. 201 . . .

37. The cases that the respondent relies upon in support of the reasonableness of their offer under section 43(2)(c) are all distinguishable from this case. The most significant distinguishing feature is that none of these cases involve an allegation of a breach of the *Code* by police officers in the execution of their duty. In my view a further distinguishing factor is the vulnerability of the complainant and that the discrimination bears directly on his vulnerability. Therefore previous general damage awards made in Manitoba can only provide limited guidance as to what an adjudicator would award.

38. I conclude that the Offer fails to reasonably approximate what an adjudicator would award under the head of general damages. I rely on the following factors to draw this conclusion:

- a. The complainant, given his various mental health issues, was particularly vulnerable in the situation in which he was placed by BPS. He had been hospitalized in the past due to suicide related incidents. This was his first time in two years that he had attempted to socialize in such a public space. As such injury to dignity as a result of these allegations would be exacerbated as a result of his pre-existing medical condition as outlined in the Complaint.
- b. Manitobans expects that police uphold, not transgress, the *Code*. This is enshrined in legislation as the preamble to the *Police Services Act*, S.M. c. 32 which states, "AND WHEREAS the importance of safeguarding the fundamental rights protected by the *Canadian Charter of Rights and Freedoms* and *The Human Rights Code* is recognized by all." Furthermore, if proven, veiled threats of incarceration ("(you are) very close to being thrown in jail") suppressed the complainant's attempt at explaining the legitimate reason for having his service dog. These factors also exacerbate injury to dignity, feelings, and self-respect.
- c. Being escorted out of a public premise by police officers in this manner was "degrading" to the complainant and allegedly exacerbated his symptoms such that his mental health had regressed and would likely require considerable work to recapture gains made in therapy over the previous year.

39. I am therefore not satisfied that the Offer reasonably approximates what an Adjudicator would award under section 43(2)(c).

**43(2)(d)**

40. The complainant argues that a reasonable Offer should include compensation under the head of exemplary damages. I am satisfied that I do not need to decide whether or not the allegations of the complainant, if proven, would amount to evidence of "malice or recklessness". I do not need to decide because for reasons already discussed, the Offer does not reasonably approximate what an adjudicator would award for general damages pursuant to s.43(2)(c).

**Conclusion**

41. For the above reasons I dismiss the application.

DATED: 30th day of April, 2014

"Dan Manning"

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**Dan Manning**  
**Adjudicator**