MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

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

IN THE MATTER OF: A Complaint by Jodie Mancusi against 5811725 Manitoba Inc. o/a Grace Cafe City Hall alleging a breach of section 19 of The Human Rights Code.

BETWEEN:

JODIE MANCUSI,

Complainant

- and -

5811725 MANITOBA INC. o/a GRACE CAFE CITY HALL,

Respondent

REASONS FOR DECISION

The Respondent seeks an Order, pursuant to section 37.1 of *The Human Rights Code* ("the *Code*"), that the adjudication of this Complaint be terminated on the basis that the Respondent has made a reasonable settlement offer which the Complainant has rejected.

Section 37.1 is a recent addition to the *Code*. It deals with settlement offers from a respondent where an adjudicator has been appointed to hear a complaint. Under that section, if a complainant rejects a settlement offer made by a respondent after an adjudicator has been appointed, and the adjudicator considers that offer to be reasonable, the adjudicator must terminate the adjudication.

On May 28, 2012, I was designated by the Minister of Justice under subsections 32(1) and (2) of the *Code*, as a Board of Adjudication, to hear and decide this Complaint.

The Respondent has now made an offer to settle the Complaint for the all-inclusive amount of $4,000, which it says is more than reasonable and ought to be sufficient to settle the Complaint. It says that if the Complainant is unwilling to accept that amount, the Complaint ought to be dismissed pursuant to section 37.1 of the *Code*.

The Complainant has rejected the Respondent's offer. In a Joint Submission, the Manitoba Human Rights Commission (the "Commission") and the Complainant say that the offer is not reasonable, and ask that the Complaint proceed to adjudication as scheduled.

The issue on this application, therefore, is whether the Respondent's settlement offer is reasonable, such that the adjudication of the Complaint must be terminated without a hearing.

This is the first decision to address this new section of the *Code*. The *Code* is silent with respect to any process for bringing an offer under section 37.1 before the adjudicator for his or her review. The application in this instance is proceeding on the basis of the written materials which have been filed by the parties. These materials consist of the Complaint dated March 29, 2010, the Respondent's response to the Complaint dated May 3, 2010, the Respondent's written submission of August 30, 2012, the Commission and the Complainant's Joint Submission in response dated September 14, 2012, and two e-mails from Respondent's counsel dated September 17, 2012 replying to the Joint Submission.

Facts

The background information or facts which follow are based on the above-noted materials, as filed by the parties. In setting them out, I am not making any findings of fact or findings on the merits of the Complaint.

It is common ground that the Complainant was employed at the Grace Café City Hall ("Grace Café"), primarily as a dishwasher, from at or about the beginning of July 2009 to November 25, 2009. At the time her employment ended, she was earning a regular wage which was slightly above minimum wage or $9.50 per hour.

In the Complaint, it is alleged that one of the owners of the Respondent, who was also the on-site manager of Grace Café, subjected the Complainant (and other female staff) to a series of objectionable and unwelcome sexual behaviour. Several examples of such behaviour are set out in the Complaint, and include an incident which allegedly occurred on November 25, 2009. The Complainant states that she left work and quit her job that day. The Complainant claims that she was subjected in her employment to a course of abusive and unwelcome conduct or comment made on the basis of her sex, and/or one or more sexual solicitations or advances, by a person who was in a position to confer or deny benefits to her and who knew or ought reasonably to have known that they were unwelcome, contrary to section 19 of the *Code*.

The Respondent filed a detailed response to the Complaint dated May 3, 2010, in which it either denies or endeavours to provide an explanation for most of the allegations.

The Complaint was investigated and an assessment report prepared and provided to the Commission's Board of Commissioners. The Board decided to refer the matter to mediation and, when the mediation was not successful, requested that a member of the adjudication panel be designated to adjudicate the Complaint. Accordingly, as indicated above, I was designated to hear and decide the Complaint.

On July 11, 2012, by agreement of the parties, the dates of September 25 to 27, 2012 were set for the hearing of the Complaint. The issue of whether the Respondent intended to ask the adjudicator to consider a settlement offer under section 37.1 of the Code was raised, and the manner in which that might occur was discussed at that time.

On August 30, 2012, the Respondent provided a written submission, under section 37.1 of the Code, in support of the reasonableness of an offer to settle the Complaint for the all-inclusive amount of $4,000.

The Respondent replied to the Joint Submission in two e-mails dated September 17, 2012.

During a conference call on September 20, 2012, the parties advised, through counsel, that they preferred to have the issue of the reasonableness of the Respondent's offer decided on a separate basis, as a preliminary matter. They also advised that they were satisfied that no further or oral submissions on this issue were necessary.

The hearing on the merits of the Complaint was thus adjourned to fixed dates in December, 2012, if necessary, in the event that the adjudication is not terminated based on the Respondent's offer of settlement.

Position of the Parties

In submitting that its offer of $4,000 is more than reasonable, the Respondent notes, among other things, that the Complainant earned just over minimum wage and had been employed for less than six months when she resigned. The Respondent says that the Complainant was scheduled for regular hours but missed a significant number of working hours, that her entire gross earnings totaled $4,321.32, and that she received Employment Insurance (EI) benefits after resigning. The Respondent says that it was told by the mediator that she felt that $4,000 would be a reasonable settlement, taking all of the factors into account. The Respondent says that although it initially refused to pay that amount, it is now prepared to do so to settle the case, even though the allegations are relatively minor compared to other sexual harassment complaints. It adds that another employee, who has been identified as a witness for the Commission in these proceedings, settled a similar complaint against the Respondent for $2,000.

The Commission and the Complainant submit that I must consider, based on the information before me, "whether the Complainant might obtain a much better result than the $4000 offered by [the Respondent] to settle the complaint, at the conclusion of a public adjudication hearing under *"The Code* . In arguing that the Respondent's offer is not reasonable, the Commission and the Complainant note, among other things, that the offer does not distinguish between different heads of damages, including general damages for injury to dignity, self-respect and feelings, and damages for lost wages. They point out that the allegations relate to both a poisoned work environment and sexual advances. The Commission and the Complainant refer to *Budge* v. *Thorvaldson Care Homes Ltd*., [2002] M.H.R.B.A.D. No. 1, a sexual harassment case in which the Complainant was awarded $4,000 in general damages. Noting that *Budge* was decided a decade ago, they submit that relying on that case as providing a maximum cap on general damages would frustrate the broad remedial powers of adjudicators and the essential foundation of human rights laws to protect against discrimination. They submit that proof of general damages will depend on oral testimony, and that they expect the evidence will establish that $4,000 is insufficient even for general damages. In addition, they state that the Complainant was ineligible to receive EI based on her insurable hours of employment, and that it has been extremely difficult for her to find comparable employment. If it is established that she was

forced to resign due to harassment and/or a poisoned work environment, she would be entitled to an amount on account of pay in lieu of notice or to bridge the time it would take her to seek comparable employment. They also argue that the Respondent's offer does not include any remedial measures in the public interest of preventing future harassment, such as training or the circulation or posting of a harassment policy in the workplace.

In reply, the Respondent argues that the Commission acknowledges in its submission that "unless the outcome of the adjudication is likely to be a 'much' larger award than the amount offered, then the offer is within the reasonable range." Reasonableness, it submits, is a different concept from appropriateness. The Respondent also notes that the Joint Submission does not address several key factors, including that $4,000 was what the Commission's own mediator expressed to the Respondent in the statutory mediation process. To order more than that would simply be punitive. The Respondent adds that it has no objection to having the entire amount of $4,000 treated as damages, and not lost income, for the purposes of determining deductions.

Decision

Recent amendments to the *Code*, as enacted under *The Human Rights Code Amendment Act*, S.M. 2012, c. 38, came into force on June 14, 2012. As indicated above, those amendments include the addition to the *Code* of section 37.1, which reads as follows:

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.

In deciding whether the Respondent's settlement offer is reasonable on this application, I have to proceed on the basis that the allegations as set forth in the Complaint are proven.

I would note that the Respondent has referred in its submission to certain statements which it says were made by individuals in the course of the investigations into this Complaint. As the adjudicator who has been designated to adjudicate this Complaint, I do not have the results of any investigations that have been conducted in respect of this Complaint, and have not considered the references by the Respondent to such statements in reaching my decision herein.

The Respondent has also placed considerable reliance on what it says it was told by the mediator, i.e., that $4,000 would be a reasonable offer, taking into account all of the factors in this case. Assuming that the mediator made such a comment (and I note that the Commission and Complainant are silent on this point), I would certainly not be bound by, and am not convinced that it would be either appropriate or helpful to consider, same.

In this regard, it is the adjudicator under section 37.1 who is tasked with deciding whether, in his or her view, an offer is reasonable. The *Code* does not authorize the adjudicator to defer to, or delegate its decision-making power on this issue to, a mediator or anyone else.

In its reply on this application, the Respondent emphasizes that $4,000 was exactly what the "Commission's own mediator" expressed to the Respondent. The Commission similarly refers to the mediator in its submission as the "Commission's mediator", but also states that the mediator is independent. In spite of this, there is nothing to indicate, and I certainly cannot conclude, that the Commission is bound by or has accepted what the mediator is alleged to have said to the Respondent, or that the Commission has somehow conceded, through the mediator or otherwise, that the Respondent's offer is reasonable. On the contrary, the Commission has clearly taken the position on this application that the Respondent's offer of $4,000 is not reasonable.

The Respondent also refers to a $2,000 settlement in what it says was a similar case. I have no information with respect to the facts or circumstances of that case, including what were the specific allegations in the case or the circumstances surrounding the settlement referred to by the Respondent. I am therefore not in a position to consider to what extent, if at all, that settlement might be relevant or helpful as an authority or basis for assessing the reasonableness of the Respondent's offer or position in this case.

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. (*Carter* v. *Travelex Canada Ltd.* (2007), 61 C.H.R.R. D/107, at para. 30 (B.C.H.R.T.), aff'd 2009 BCCA 180) 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" (*Ibid.*, at para. 42 (C.A.)), or the offer is equivalent to what the complainant could reasonably be expected to receive should the case proceed to a hearing. (*Losenno* v. *Ontario (Human Rights Commission)* (2005), 78 O.R. (3d) 161, at para. 58 (C.A.))

In considering the reasonableness of the Respondent's offer to settle, I must therefore assess that offer in the context of what the Complainant could reasonably be expected to achieve before a board of adjudication, based on the allegations and any admissions which have been made, and the available remedies.

The remedial orders which an adjudicator may make when he or she determines that a party has contravened the *Code* are set out in subsection 43(2) of the *Code*. These include damages for injury to dignity, feelings or self-respect (under s.43(2)(c)), compensation for any financial losses sustained, expenses incurred or benefits lost by reason of the contravention of the *Code* (s.43(2)(b)), and an order to "do or refrain from doing anything in order to secure compliance with the *Code*" (s.43(2)(a)).

In offering to settle the Complaint for the global amount of $4,000, the Respondent does not distinguish between or address the various potential heads of damages under the *Code*, or quantify what might reasonably be awarded to the Complainant under each of these.

I would observe that while the Respondent has stated that it has no objection to having the entire amount of its offer treated as damages, and not lost income, this is no answer to the question of whether $4,000 is a reasonable settlement amount taking into account all of the monetary relief

which an adjudicator could reasonably be expected to order in respect of the conduct alleged or admitted.

With respect to damages for injury to dignity, feelings and self-respect (s.43(2)(c)), I accept, based on the allegations in the Complaint and the awards that have been made in other human rights proceedings in Manitoba, including the *Budge* decision, that the sum of $4,000 falls within the range of what the Complainant might reasonably expect to receive under this head of damages in this case. With reference to the *Budge* case in particular, while it may be, as the Respondent has argued, that the alleged conduct in this case is more minor in nature than in *Budge*, it must also be recognized that that case was decided more than 10 years ago.

In assessing the reasonableness of the Respondent's offer, however, I must also consider what compensation, if any, might reasonably be awarded to the Complainant under clause 43(2)(b) of the *Code*, for financial losses sustained, expenses incurred or benefits lost. Having carefully reviewed the Respondent's offer to settle, as well as its submission in support of same and the other materials which are before me, I am not satisfied that that offer adequately addresses such losses.

The allegations in the Complaint which, as stated previously, I have assumed for the purposes of this application to be proven, point towards the Employee having been effectively forced out of her employment or constructively dismissed, as opposed to having quit. In these circumstances, the Complainant would reasonably be expected to receive compensation for losses sustained as a result of this alleged contravention of the *Code*.

In considering what might reasonably be awarded to the Complainant for such losses under clause 43(2)(b) of the *Code*, I note that a remedy under that clause is intended to restore the affected party so far as is reasonably possible or appropriate to the position he or she would have been in if the discrimination had not occurred. This differs from the remedy of reasonable notice or wages in lieu of notice in a claim for wrongful dismissal at common law, which depends on the length of time that an employee was employed. The fact that the Complainant was employed for less than six months would therefore not be determinative of the amount of compensation she might reasonably be awarded under clause 43(2)(b) of the *Code*.

As is the usual practice with complaints which are filed under the *Code*, the specific relief which the Complainant is seeking, and in particular, the specific losses sustained and compensation being claimed, are not set out in the Complaint. Nor are they specified in the materials which are before me on this application. In these circumstances, I cannot determine with any degree of accuracy what amount the Complainant could reasonably be expected to receive under this head of relief. Nevertheless, there are indications in the materials that the Complainant is seeking a relatively significant amount as compensation for losses sustained. For example, in the Joint Submission, it is stated that finding comparable employment has been extremely difficult for the Complainant (para. 34).

In addition, the Respondent has argued that the Complainant received EI benefits. Presumably, it took this factor into account in arriving at the amount of its offer to settle. The Complainant says that she did not receive EI. The resolution of this issue as to whether the Complainant

received EI benefits would depend on the evidence adduced at the adjudication. However, assuming that the Complainant did not receive EI, as she claims, it is reasonable to expect that her losses and the amount of compensation which she would be awarded for lost income would be considerably higher.

Based on the foregoing, I cannot conclude that the Respondent's offer of $4,000 adequately addresses the relief which the Complainant could reasonably expect to obtain under both clauses 43(2)(b) and (c) of the *Code*, or in other words, that that amount is the same or nearly the same as what an adjudicator might reasonably award at an adjudication under the *Code* in light of the conduct alleged or admitted in this case.

The Commission and the Complainant have also argued that the Respondent's offer is deficient in that it does not contemplate any remedial measures in the public interest, such as training or the circulation and posting of a harassment policy. (para. 35) No specifics are provided in terms of what the Complainant and/or the Commission might be seeking in this regard. Moreover, I note that elsewhere in its submission, the Commission indicates that a harassment policy has since been put in place. (para. 28) The Respondent has not provided any response to this argument in its reply. In the circumstances, and given my conclusion with respect to the quantum of the Respondent's offer, I do not intend to comment any further on this point.

In conclusion, I am not satisfied that the Respondent's settlement offer is reasonable in all of the circumstances, such that the adjudication must be terminated. The hearing on the merits of the Complaint is scheduled for December 3 to 5 and 19 to 20, 2012, and will proceed on those dates.

Respondent's counsel had also previously advised that if the offer was not ruled reasonable, the Respondent would be taking the position that the adjudicator who reviewed the submissions on this application could not hear the case, and that the hearing of the merits of the Complaint would have to be before a different adjudicator. Pending a decision with respect to the reasonableness of the Respondent's offer, a further date of November 12, 2012 was set for the hearing of a preliminary Motion by the Respondent with respect to this jurisdictional issue. In light of my decision herein, the hearing of that Motion will proceed on that date.

Dated at the City of Winnipeg, in Manitoba, this 8th day of November, 2012.

"M. Lynne Harrison"
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