HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF: A complaint by Peggy Damianakos v. University of Manitoba, alleging a breach of s.14 of *The Human Rights Code*

AND IN THE MATTER OF: The Human Rights Code, C.C.S.M., Chapter H175, as amended

BETWEEN:

PEGGY DAMIANAKOS

complainant

and

THE UNIVERSITY OF MANITOBA

respondent

REASONS FOR DECISION

1. The respondent seeks an Order pursuant to s.37.1 of *The Human Rights Code (*the *"Code")* requiring 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.

Background

2. The complainant Peggy Damianakos filed a complaint under the *Code* on May 11, 2011 in which she named as respondents, the University of Manitoba and four individual members of the University's staff.

3. On the first page of her complaint, the complainant alleges that :

> *I believe that the Respondents discriminated against me in my employment on the basis of my sex (female) including pregnancy or circumstances related to pregnancy and family status (parent of young children) and that the discrimination was not based upon bona fide and reasonable requirements or qualifications for the employment or occupation, contrary to Section 14 of The Human Rights Code.*

4. The respondents filed a joint reply to the complaint on November 27, 2012.

5. After conducting an investigation pursuant to s.26 of the *Code*, the Manitoba Human Rights Commission (the "Commission") having been satisfied that additional proceedings in respect of the complaint would further the objectives of the *Code* or assist the Commission in discharging its responsibilities under the *Code*, requested the Chief Adjudicator, pursuant to s.29(3) of the *Code* to designate a member of the adjudication panel to adjudicate the complaint.

6. At the same time, the Commission dismissed the complaint as against the individual respondents leaving only the University of Manitoba.

7. On April 16, 2014, Adjudicator Manning was designated under s.32(1) of the *Code* as an adjudicator to hear and decide the complaint. The hearing is scheduled to take place over the course of two weeks: April 7-10, 2015 and July 7-9, 2015.

8. On January 28, 2015, the parties wrote to me in my capacity as Chief Adjudicator to advise that the respondent had made a settlement offer which had been rejected by the complainant and to request that I designate a member of the adjudication panel to determine if the settlement offer is reasonable, pursuant to s.37.1(1) of the *Code*. I was the next available adjudicator on the rota.

9. Section 37.1 provides as follows:

> ***Adjudicator to determine reasonableness of offer***
>
> *37.1(1) 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.*

Failure to accept reasonable settlement offer

37.1(2) 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.

10. The *Code* is silent with respect to the process for bringing an offer under s.37.1 before an adjudicator for his or her review. The application in this instance proceeded on the basis of written submissions filed by the parties with the Commission and the complainant filing a joint submission.

11. The parties, including the complainant herself, then made oral submissions before me on March 2, 2015.

Section 37.1

12. Section 37.1 is a relatively recent amendment to the *Code*. It has been considered by a Manitoba Human Rights Adjudication Panel on only three previous occasions. I encouraged the parties in their oral submissions to provide me with their positions as to how I should proceed in determining whether the settlement offer is reasonable and in particular, to consider the following issues:

(a) what is the test to be applied in making a determination under s.37.1; and

(b) what information or material should an adjudicator consider in applying that test.

13. The parties submitted that in deciding whether a respondent's settlement offer is reasonable, pursuant to s.37.1, an adjudicator must proceed on the basis that the allegations as set forth in the complaint are proven. I agree.

14. This is the test that was applied by Adjudicator Harrison in *Mancusi* v *5811725 Manitoba Inc.* (c.o.b. Grace Café City Hall) 2012 MHRBAD No. 104.

15. Adjudicator Harrison at para.28 of her decision went on to discuss the application of the test, saying that:

…the concept of reasonableness is different from that of appropriateness. It is not necessary that an settlement offer 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.))

Further, she said that in considering the reasonableness of the offer an adjudicator 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 had been made, and the available remedies.

(Mancusi, supra, para.29)

16. The process under s.37.1 is a summary process. It does not involve a “hearing” as that term is used within the meaning of the *Code*. Section 43.1 of the *Code* provides:

> ***Determination re contravention***
>
> *43(1) After completion of the hearing, the adjudicator shall decide whether or not, on a balance of probabilities, any party to the adjudication has directly or indirectly contravened this Code in the manner alleged in the complaint.*

“Hearing” is defined in s.1 to mean “a hearing held by an adjudicator for the purpose of adjudicating a complaint”.

17. Under s.37.1, however, an adjudicator performs a different function. The process under s.37.1 does not involve a hearing of the complaint on the merits nor does it allow for an adjudicator to decide whether or not on a balance of probabilities any party to the adjudication has contravened the *Code*.

18. Proceeding on the basis of assuming the allegations contained in the complaint are proven is the only realistic way to proceed given the summary nature of the process under s.37.1.

19. Further, in my view, proceeding in this manner, is consistent with what has been determined to be the public policy underlying s.37.1.

20. In *Nachuk* v *City of Brandon (Police Services)*, 2014 MHRBAD 3, at para.30, Adjudicator Manning found that:

> *The intent of s.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.*

21. Similarly, Adjudicator Dawson in *Metaser* v *Jewish Community Campus of Winnipeg Inc.*, 2013 MHRBAD 6, at para.11, set out his understanding of the public policy underlying s.37.1 as follows:

> *… 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.*

22. I agree with these statements. But there is more. In making a determination under s.37.1 an adjudicator must also bear in mind the underlying purpose of the *Code* itself. Determining that a settlement offer is reasonable has the effect of terminating the adjudication of a complaint which the Commission has determined should be resolved by way of adjudication. A determination that an offer under s.37.1 is reasonable, therefore, must be based on a determination that the offer approximates what an adjudicator would award having regard to the purpose of the *Code*.

23. I agree with the Commission’s submission that it is well established that the purpose of human rights legislation is remedial and therefore the available statutory remedies are intended to put the individual complaining of discrimination in the position that he or she would have

been in had the discrimination not occurred. In support of this submission, counsel cited the following:

> *I find that the law has established as a general principle that human rights remedies are intended to encompass full and complete compensation for the complainant's losses. The purpose of the damage award is to put the complainant, so far as money can do, in the position she would have been in had her rights not been violated. An award of damages under the [Human Rights] Code must reflect the social importance of the rights that are being protected.*
>
> *Remedies in Labor, Employment and Human Rights Law,* (looseleaf: Thompson Carswell, Toronto) 2008 at pages 6-7 as cited in *McTavish* v *Prince Edward Island* 2009 PESC 18

24. As a remedial instrument the *Code's* purpose is to educate the public about the rights and responsibilities, among other things, of employers and to protect against discrimination of individuals. A determination as to whether an offer is reasonable must take this purpose into account. Therefore, if it is clear from a respondent's offer that the respondent appreciates its obligations and is prepared to take the steps necessary to deal with the findings of discrimination in both an individual and systemic basis, then neither the respondent nor the complainant should be put through a hearing.

What May Be Considered

25. The next question to determine is what an adjudicator may consider in carrying out the test under s.37.1.

26. The parties agreed that an adjudicator proceeding under s.37.1 should consider the complaint and the Settlement offer.

27. They also agreed the adjudicator may consider any agreed statements of fact or admissions. This was acknowledged by the adjudicators in both the *Metaser* and *Mancusi* decisions, *supra*.

28. Where the parties were not in agreement was the extent to which an adjudicator should consider the information contained in the complaint.

29. The respondent submitted that a complaint filed with the Commission is comparable to a pleading in a civil action and therefore should not contain a long recitation of the facts or include statements of hearsay or opinion, or statements which are irrelevant to the allegations.

30. The respondent's submission was that although an adjudicator proceeding under s.37.1 should assume the allegations set out in the complaint are proven, that does not mean that every single statement set out in the complaint must be considered.

31. On this point, the Commission agreed that in assuming the allegations in the complaint are proven an adjudicator does not need to consider every single statement as true.

32. The Commission submitted that the complaint should not be viewed as a form of civil pleading where every material fact must be pleaded, remedies must be articulated and statements

of hearsay and evidence must be avoided. Most complaints, the Commission submitted, do not address remedy at all.

33. The Commission further submitted that there are no statutory requirements with respect to what a complaint under the *Code* should include other than an allegation made on the basis of a characteristic protected by the *Code* and in one of the areas protected by the *Code*.

34. With respect to filing a complaint, the *Code* simply provides as follows:

> ***Complaints***
>
> *22(1) Any person may file, at an office of the Commission, a complaint alleging that another person has contravened this Code.*
>
> ***Complaint form***
>
> *22(4) Every complaint shall be filed on a form approved by the Commission.*

35. I agree that in making a determination under s.37.1 and assuming the allegations in the complaint are proven, an adjudicator does not have to consider every single statement made in the complaint. The adjudicator simply needs to accept that the *Code* has been contravened in the manner alleged in the complaint.

36. In this case, although the written complaint was long and contained statements which went beyond what would be considered mere allegations of fact, I was nonetheless able to identify, from reading the complaint as a whole, the manner in which the complainant alleges she has suffered discrimination and the *Code* has been contravened.

37. In doing this, as will be clear from my findings detailed below, I did not make assumptions as to what was being alleged or draw conclusions about the allegations that were not supported by what was clearly set out in the complaint.

Reply

38. The respondent urged me to consider portions of its reply to the complaint, as well. With respect to the extent to which an adjudicator proceeding under s.37.1 may consider the respondent's reply, Commission counsel pointed out that the *Code* does not require a respondent to file a reply, that a complaint may proceed to adjudication in the absence of a reply being filed and that the process under s.37.1 is still available in the absence of a reply being filed.

39. The respondent's position was that an adjudicator exercising her authority under s.37.1 must apply a common sense approach in assuming that the allegations set out in the complaint are proven. To that end, the respondent submitted, an adjudicator is entitled to consider those portions of the reply that are uncontested or reflected in the allegations set out in the complaint and any portions that common sense tells an adjudicator are accurate.

40. In this case, the respondent urged me to consider the following paragraphs from its reply:

> …
>
> 3. As a result of a University Administration initiative to seek ways to create efficiencies,

> enhance service and reduce costs, of which the ROSE project (Resource Optimization and Service Enhancement) was part, in early 20 l0 reorganization of certain administrative functions was considered. As a result of the impending retirement of Sharon McCollough, the University 's Privacy Officer, and Maggie Duncan, the University's Equity Services Advisor, a determination was made to merge the reporting lines of these 2 services in one new position, and to add the reporting of Legal Services to the same position.
>
> 4. The position of Director of Fair Practices and Legal Affairs ("Director") was created to direct all 3 units- Equity Services, Legal Affairs and Access and Privacy. McCallum determined upon this new administrative structure and considered. potential candidates for the job with the purpose of appointing the candidate who would best meet the requirements of the position. The. Complainant was considered by McCallum , who was very familiar with her abi1It1es having worked with her in many capacities, and the decision was made that she was not the best candidate for the position. Instead , it was determined that Juliano was a better candidate. McCallum's recommendation to President Barnard was accepted and the Board of Governors approved the appointment of Juliano. He was offered and accepted the position.
>
> 6. the University 's Executive Director of Human Resources, Terry Voss ("Voss") engaged in discussions and correspondence with the Complainant to assure her that under the new administrative structure h e r position remained essentially unchanged except for the reporting line to Juliano rather than McCallum, and the University anticipated her return to her former duties and position on completion of her maternity leave in October 2010.
>
> 8. The University provided a number of opportunities for her to reconsider (her) inflexible position but ultimately advised her that as her leave had expired and she refused to return to work, her employment was considered ended.

41. The respondent submitted that the statements set out in these paragraphs of the reply are facts which are not denied and which are effectively found in the complaint, and that they indicate that the complainant refused to return to her position but that that was of her own choosing.

42. While I agree that in order to assess the reasonableness of an offer, an adjudicator must have regard to the facts relating to the complaint in a given case, the information upon which an adjudicator can proceed in making that determination must be undisputed in order for it to be properly considered.

43. As Adjudicator Manning correctly identified in *Nachuk,* the role of an adjudicator who is tasked to determine the reasonableness of an offer under s.37.1 does not involve the determination of disputed factual issues.

44. An adjudicator proceeding under s.37.1 cannot consider competing statements of fact or allegations since to do so would be inconsistent with the accepted test of assuming that the allegations set out in the complaint are proven.

45. In proceeding on the basis that the allegations set out in a complaint are assumed to be proven, it would not make sense nor would it be correct to consider statements set out in a reply which seek to deny or contradict the allegations set out in the complaint or which are not clearly set out in the complaint. An adjudicator performing an analysis under s.37.1 cannot weigh evidence or make findings of fact.

46. I agree with the decision of Adjudicator Manning in *Nachuk* where he determined that he would not consider any facts that were outside of the complaint. In this case, I am not able to

conclude that the portions of the reply which the respondent urged me to consider are in fact set out or reflected in the complaint and I am not prepared, therefore, to consider them. It strikes me generally, in any event, that if information contained in a reply is in fact reflected in a complaint, it would not be necessary for the adjudicator to consider the reply.

47. In this case, I find that it is not clear that the facts set out in the portions of the reply the respondent asked me to consider are undisputed, nor that the conclusion taken from those paragraphs which the respondent urged me to make, is supported by the allegations which are set out in the complaint.

48. I am not, therefore, prepared to consider anything other than the complaint and the settlement offer in making my determination as to the reasonableness of the respondent's offer.

The Allegations And Facts In This Case

49. I proceeded on the basis that the allegations set out on the first page of the complaint quoted earlier, were true. Those allegations read as follows:

> *I believe that the Respondents discriminated against me in my employment on the basis of my sex (female) including pregnancy or circumstances related to pregnancy and family status (parent of young children) and that the discrimination was not based upon bona fide and reasonable requirements or qualifications for the employment or occupation, contrary to Section 14 of The Human Rights Code.*

50. I also considered the following facts which are contained in the complaint and set out in paras.1-16 of the Commission's submission, as representing the essential facts in support of the complainant's allegations of discrimination. Although not necessary for my determination on this point, I note that the parties agreed that these facts represented the essential facts underlying the complaint:

> *1. In or about February 1999, the Complainant commenced employment with the Respondent, University of Manitoba, as a Legal Advisor. The Complainant progressed to the position of Legal Counsel and in or about late 2002, was promoted to the position of General Counsel, receiving an annual base salary of $105,000.*
>
> *2. As General Counsel, the Complainant was part of, and provided counsel to, the Respondent's Senior Administration, comprised of the President and Vice-Chancellor, Vice President (Academic) & Provost, Vice President (Administration), Vice President (Research) and Vice President (External) and those reporting to these positions, as well as to all university departments and units generally.*
>
> *3. As General Counsel, the Complainant reported to Deborah McCallum, Vice President (Administration) whose responsibilities included ensuring the enforcement of the Respondent's "Respectful Work and Learning Environment Policy".*
>
> *4. As General Counsel, the Complainant was the Respondent's head legal officer and was responsible for overseeing the operations and strategic direction of the Legal Services office, including all financial matters, recruitment, information management, and training and development of legal and support staff.*
>
> *5. In or about December 2004, the Complainant went on maternity/parental leave and her work was covered off by another lawyer. She returned to work in or about December 2005.*
>
> *6. In or about April 2007, the Complainant went on maternity/parental leave and her work was covered off by another lawyer. She returned to work in or about April 2008.*

7. Since commencing work with the Respondent, the Complainant had been directly involved in discussions related to reorganizing the manner in which legal services were provided to the Respondent. On her return to work in or about April 2008, the Complainant specifically discussed with Ms McCallum the idea of merging the Respondent's access, privacy and equity work with the work of the Legal Services office.

8. In or about May 2009, the Complainant informed Ms McCallum that she was pregnant.

9. In or about October 2009, the Complainant went on maternity/parental leave and her work was covered off by another lawyer in the office, Mr. Juliano, who assumed the role of Acting General Counsel. At this time she was the Respondent's head legal officer and the most senior of the four lawyers providing counsel to the Respondent.

10. On or about May 19, 2010, the Respondent met with the Complainant while she was on leave, at which time the Complainant was advised that the Respondent's legal and two of the quasi-legal units had been restructured to consolidate the work of the Legal Services Office with the Access & Privacy Office and Equity Office into a single office, Legal Services. The Respondent created a new position that would provide strategic and financial oversight of all affairs of the Legal Services Office and directly appointed Mr. Juliano to this position.

11. The Complainant retained her position title of General Counsel although by virtue of the restructuring, she was no longer the Respondent's head legal officer reporting to Mr. Juliano as Director of Legal Services rather than directly to Ms McCallum as Vice President (Administration).

12. Mr. Juliano, in his new position, assumed oversight of the Legal Services office.

13. The Complainant raised concerns that she felt she was being discriminated against on the basis of her sex, pregnancy and/or family status, which concerns were at no time investigated by the Respondent through their Respectful Work and Learning Environment Policies & Procedures, which Ms McCallum was responsible for overseeing, or otherwise.

14. The Complainant has not returned to work for the Respondent.

15. On or about May 11, 2011, the Complainant submitted the Complaint to the Commission. At the time of submitting the Complaint, the Complainant was 38 years old.

16. The Commission requested that an adjudicator be appointed to determine if The Code had been contravened by the Respondent University of Manitoba as alleged in the Complaint and dismissed the complaint as filed against the individual respondents.

51. It is against the backdrop of these facts and allegations, as found from the statements set out in the complaint that I assess the reasonableness of the respondent's settlement offer.

The Respondent's Settlement Offer

52. The respondent's settlement offer was set out in its written submission as follows:

Section 43(2)(a)

The Complainant is seeking reinstatement to her position as General Counsel (Complaint para. 103). The University is not prepared to offer to reinstate the Complainant.

Section 43(2)(b)

The Complainant is seeking compensation for lost wages and special damages. (Complaint para. 104). The University is prepared to pay to the Complainant $212,000.00, less any applicable deductions.

Section 43(2)(c)

The Complainant is seeking general damages (Complaint para. 104). The University offers payment to the Complainant under this head in the amount of $15,000.00.

<u>Section 43(2)(d)</u>

The University makes no offer in this regard.

<u>Section 43(2)(e)</u>The University makes no offer in this regard.

The University seeks a release related to the termination of employment in favour of the University of Manitoba, in a form satisfactory to counsel.

53. Section 43(2) of the *Code* sets out the potential remedies an adjudicator may order following a determination pursuant to s.43(1) that the *Code* has been contravened. It reads as follows:

> ***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 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.*

54. An adjudicator proceeding under s.37.1 must consider the respondent's offer in the context of each remedial sub-heading under s.43(2). This is not to say that in every case an offer will only be determined to be reasonable if it offers something under each heading. Reasonableness will still be assessed having regard to the specific allegations in the complaint. Not every contravention of the *Code* requires the same set of remedies.

Section 43(2)(a) – Reinstatement

> *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*

55. Under this heading, the respondent acknowledged that the complainant is seeking reinstatement to her position as General Counsel. The respondent said it is not prepared to offer to reinstate the complainant. It submitted that reinstatement is not reasonable and would not be awarded by the adjudicator hearing the evidence. The respondent submitted that the complainant had two options upon learning of the restructuring which occurred at the University: she could leave her employment and complain that she had been constructively dismissed; or she could stay and file a complaint under the University's *Respectful Work and Learning Environment Policy*.

56. The respondent submitted that it is not reasonable to expect that an adjudicator would award reinstatement in this case for three reasons:

(a) because to do so would not be viable from a relationship perspective;

(b) no positions are available; and

(c) reinstatement is not permitted according to s.44 of the *Code*.

57. The respondent submitted that an adjudicator would find that a return to the workplace would not be viable from a relationship perspective because senior staff who are referenced in the complaint remain in authority and the legal office is a small office which only accommodates a few lawyers and which has only one client, namely the University itself. The respondent also submitted that in light of the complainant's past unwillingness to return to her position in 2010 an adjudicator would not find reinstatement to be a reasonable remedy.

58. In support of its position, the respondent cited the decision of the Ontario Superior Court of Justice, which was a judicial review of a decision of the Ontario Human Rights Tribunal: *Fair* v *Hamilton-Wentworth District School Board* 2014 ONSC 2411. In that case, the court confirmed that reinstatement is an uncommon remedy in human rights litigation.

59. The Tribunal in that case did reinstate the complainant, however, it did so because it found that there was suitable alternative employment available for her.

60. The respondent submitted that in this case the complainant's position is no longer available and there is no alternative employment. On that basis it distinguished the findings in *Fair*.

61. The respondent further submitted that because the respondent's one senior legal position, is now occupied, no adjudicator would order the individual currently occupying that position to leave. In support of its argument it relied on s.44 of the *Code* which reads as follows:

> ***No expulsion of incumbents***
>
> *44 No decision or order made by an adjudicator under this Code shall*
>
> *(a) require the removal of any person from an employment or occupation, if the person accepted the employment or occupation in good faith.*

62. For all of the above reasons, the respondent urged me to conclude that to the extent that the offer does not contain an offer of reinstatement it is reasonable.

63. The Commission submitted that the offer is not reasonable because by failing to offer reinstatement it does not make the complainant whole.

64. It acknowledged that reinstatement is a unique remedy and that common sense would say that it is rare that someone would want to go back to their job after a finding of discrimination. Nonetheless, the Commission submitted that in this case, based on the facts it expects will be adduced at the hearing , reinstatement is a likely option.

65. Counsel for the Commission submitted that if I were going to consider the information that the respondent's counsel urged me to consider relating to the position having been filled, I should also consider other information such as the fact, it said, that the Commission has made it clear to the respondent and to Adjudicator Manning that the complainant wants to be reinstated.

66. The Commission in its written submission stated that the respondent cannot rely on s.44(a) "when it has at all times been aware of the complainant's desire to be reinstated and instead took active steps to fill the relevant positions on a presumably permanent basis which has directly or indirectly resulted in subverting the complainant's opportunity to return to the workplace."

67. The Commission went on in its written submission to say that there are a number of factors present in this case that would suggest that reinstatement is viable and would likely be awarded by Adjudicator Manning at the conclusion of the hearing, which factors are unique to the complaint including, it said, that a "number of individuals who were involved in the discriminating action" are no longer in the workplace.

68. Ultimately, however, the Commission submitted that I do not have the evidence before me to determine whether the respondent's offer as to reinstatement is reasonable.

69. It is apparent from the submissions of both counsel that a determination as to the reasonableness of the respondent's offer regarding reinstatement cannot be made by proceeding on the summary basis required by s.37.1. Both counsels' submissions rely on evidence which exceeds the information that is set out in the complaint.

70. The complaint does not contain information, for example, as to whether an order of reinstatement would require the removal of an individual who has already accepted that position in good faith or whether other comparable positions are available, or whether reinstatement is viable from a relationship perspective based on the staff who are currently in authority. All of these issues can only be determined by the adjudicator who hears evidence that will be adduced at the hearing. Accordingly, based on the information I can consider, I am not able to determine that the respondent's offer with respect to reinstatement is reasonable.

Section 43(2)(a) – Public Interest

> *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*

71. The Commission submitted that the respondent's offer is deficient with respect to another aspect under s.43(2)(a). The Commission submitted that the reason that the *Code* requires the Commission to be a party to every adjudication, pursuant to s.34 of the *Code*, is so that it can address public interest. It submitted that an offer must be reasonable not just from the perspective of the individual complainant but also from the perspective of the public interest generally and must demonstrate that the respondent has taken whatever steps are determined to be necessary to ensure that no one else will suffer discrimination in the manner of the particular complaint.

72. On this point, the respondent submitted that it already has in place everything that could possibly be done to "secure compliance" with the *Code* or "to rectify any circumstance caused by the contravention". It submitted that the allegations in the complaint do not disclose a pattern or practice of the respondent contravening the *Code*. Further, it said that it already has extensive measures in place to address issues of diversity, inclusion, discrimination and other human rights related issues, including the following:

1. Comprehensive Respectful Work and Learning Environment Policies and Procedures.
2. An Office of Human Rights and Conflict Management, whose mission it is to promote a respectful working and learning environment in which individuals are treated equitably and diversity is valued.
3. Governing Documents – which establish equity and diversity as core principles.
4. Comprehensive Maternity and Parental Leave Policy & Procedures.
5. A Diversity & Inclusion Office in its Human Resources Department.
6. A Childcare Initiative, to generate ideas for providing additional support to staff and students who are parents.
7. The President's Advisory Committee on Respect, which has a mandate to address a wide variety of equity and inclusion issues.

73. Many of these policies it said, and in particular, the *Respectful Work and Learning Environment Policy,* were in place at the time the contraventions are alleged to have occurred.

74. The respondent argued that the fact that these policies already exist means that nothing further would be ordered by an adjudicator under this heading. It urged me to find that there is nothing wrong with the policies or system in place now or at the time of the alleged contraventions of the *Code*. The problem, it submitted, was that the complainant did not avail herself of the policies that the respondent had to offer.

75. In particular, it referred to its *Respectful Work and Learning Environment Policy*, a copy of which it attached to the reply it filed in response to the Commission's submission in this application. The respondent submitted that that policy provides a mechanism to deal with allegations or complaints of discrimination and that everything was already in place to ensure that fair treatment of this complaint would have taken place in the circumstances or to ensure other complaints of this nature are properly addressed, in the future. The respondent's counsel, therefore, queried what more should be done. It submitted that in light of the existence of this and other policies to which it referred the adjudicator hearing this matter would not be expected to make any award requiring it to take further action under this remedial heading.

76. In response, the Commission submitted that the reasonableness of this offer has to be assessed on acceptance of the fact that the complainant was discriminated against notwithstanding the existence of various policies. It submitted that the adjudicator who makes that finding would acknowledge that the process in place failed the complainant in spite of the existence of policies and procedures and would go on to order that something more was required to be done by the respondent.

77. The complainant in her brief oral submission submitted that it is not enough to have policies in place. To avoid contravening the *Code* those policies must be properly implemented and that more was required to remedy the circumstances which caused the contraventions in her case.

78. I have already found that in determining whether an offer is reasonable under s.37.1 an adjudicator must have regard to the underlying purpose of the *Code*.

79. I agree with the Commission's submission that having accepted that the complainant suffered discrimination notwithstanding the existence of policies and procedures the respondent said are aimed at preventing discrimination, it is not reasonable to conclude that an adjudicator would not make some sort of award under this heading.

80. Accordingly, I am not able to determine that the offer is reasonable with respect to the public interest requirement under s.43(2)(a).

Section 43(2)(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*

81. In offering the sum of $212,000.00 under this heading, the respondent proceeded on the principle that compensation for loss of income which results from discrimination should be calculated on the same basis as the principles under the common law that govern cases of wrongful dismissal.

82. The respondent said it took two approaches to calculating the actual amount of compensation offered. One approach was quantified based on 18 months of salary with no reduction for failure to mitigate. The other was based on 2 years of salary with a reduction for advance of maternity leave benefits because the complainant failed to return to work.

83. In both instances, the calculations were premised on the common law principles of wrongful dismissal which quantify loss based on an employee's entitlement to reasonable notice before dismissal or payment in lieu thereof.

84. The respondent submitted that this is an appropriate approach to calculating loss which it described as "pure economic loss" because of the other remedies which are available under the *Code* such as, for example, the remedy available under s.43(2)(c) to award damages for injury to dignity, feelings or self-respect. The respondent's position was that having made an offer of $15,000.00 under that heading which in this case the Commission and complainant conceded would be appropriate, what is left is a pure economic employment loss which should be calculated having regard to and consistent with the principles of wrongful dismissal.

85. In making this argument, the respondent's counsel conceded that there are decisions in human rights law that say the considerations in the human rights context are different but in counsel's submission if all the other factors are addressed such as, for example, compensation for general damages for injury to dignity then the common law principles relating to wrongful dismissal are an appropriate guide.

86. Put another way, the respondent submitted that the economic loss was not a function of humiliation or injury to dignity but rather a function of the loss of employment. Therefore, once general damages have been addressed as they are in this case by its offer of $15,000.00, the damages which flow from the actions which led to the loss of employment should not be factored in twice.

87. With respect to mitigation, the respondent submitted that the complainant ought to have mitigated her loss by remaining in the position that was offered to her and then filing a complaint under the *Respectful Work and Learning Environment Policy*. Having failed to do that, the respondent argued, the complainant has failed to prevent a loss either to her dignity or her income.

88. Overall, the respondent submitted that its offer under this remedial head of damage is at the high end of what is reasonable in approximating the complainant's wage loss.

89. The Commission submitted that in the context of a human rights analysis the principles that derive from the common law relating to wrongful dismissal are not applicable. Human rights principles, it said, require that a complainant be made whole in the sense of assessing what position she would have been in if the discrimination had not occurred. In this case, that would mean putting the complainant in the position she would have been in had the restructuring of legal employee positions not occurred.

90. The calculation for determining the complainant's loss in that regard, the Commission submitted, would cover the period from the date of alleged discrimination in May 2010 to the date an award is made in 2015.

91. In support of its position, the Commission cited the decision by Adjudicator Harrison delivered January 31, 2013 in *K.K.* v *G.S. (c.o.b. Hair Passion)*, 2013 MHRBAD 102. In that case, Adjudicator Harrison found that there are significant differences between the nature and purpose of the remedy under s.43(2)(b) of the *Code* and the remedy of wages in lieu of notice for wrongful dismissal at common law.

92. At paras.225 & 226 of the decision, Adjudicator Harrison stated:

> *An award on account of wages in lieu of notice is the measure of damages in a claim for wrongful dismissal at common law, and is based on a contractual obligation to give an employee reasonable notice of an intention to terminate his or her employment. ... The purpose of an award of damages in a wrongful dismissal case is to place the former employee in the position the employee would have been in if reasonable notice has been given, as contemplated under the contract.*
>
> *A remedy under clause 43(2)(b), on the other hand, is aimed at compensating the affected party for financial losses sustained by reason of the contravention of the Code. The purpose of such compensation is 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.*

93. The Commission submitted that in order to put the complainant in the position she would have been in had the discrimination not occurred her financial loss has to be calculated taking into account what the complainant was earning at the time that she left her employment in 2010 and what she would have continued to make had she stayed. This calculation, the Commission submitted, would require considering information which is not set out in the complaint or before

me in this proceeding such as, for example, information as to the amounts of benefits and salary increments paid over the years since 2010.

94. With respect to the issue of mitigation, the Commission submitted that while the onus is on the complainant to prove her wage loss, the burden rests with the respondent to show that the complainant has failed to mitigate her loss. In support of this position, the Commission cited *Vestad* v *Seashell Ventures Inc. (c.o.b. Rose & Crown Pub)*, 2001 BCHRT 38. Accordingly, the Commission submitted, while mitigation is an issue that the respondent can raise it must have evidence to support any arguments to that effect. Again, the Commission's position was that the evidence upon which the respondent relied in support of its mitigation position is not before me.

95. It is well established that the purpose of human rights legislation is remedial and therefore the available statutory remedies are intended to put the individual complaining of discrimination in the position that he or she would have been in had the discrimination not occurred. See the passage quoted from *McTavish* v *Prince Edward Island*, *supra*.

96. I accept the Commission's submission that a remedy under s.43(2)(b) of the *Code* which is intended to restore the complainant insofar as is reasonably possible to the position she would have been in if the discrimination had not occurred differs from the remedy of wages in lieu of notice in a claim for wrongful dismissal at common law. Accordingly, the basis for calculating the losses resulting from a loss of employment due to a contravention to the *Code* differs from the calculation of the reasonable notice an employee ought to have received at common law. This is consistent with the decision in *K.K.* v *G.S.*, *supra.*

97. On this point I note that the respondent submitted that the proposition that loss should be calculated from the date of discrimination to the date of the hearing presents an arbitrary basis for calculating loss which encourages delay on the part of a complainant and is therefore against public policy.

98. I find, however, that this approach to determining the period for which loss should be calculated is not arbitrary and represents the most realistic way to make a complainant whose rights have been violated, whole. As the complainant herself pointed out, a complainant has no control over the pace at which a matter moves through the human rights system.

99. With respect to whether calculating financial loss is purely a matter of economic loss, where an award is otherwise made under s.43(2)(c) I find that the two headings must be considered as distinct. The remedy under s.43(2)(b) is aimed at putting the complainant as much as possible back in the position she would have been in had the contravention not occurred. In quantifying an award that sets out to do this no deduction should be made for damages paid under a separate heading. Each remedial heading is designed to compensate for different and varied losses that may flow from a violation of the *Code*.

100. I find, therefore, that the respondent's offer under s.43(2)(b) has not been calculated on the basis of the appropriate legal principles. Further, I am unable to determine what an adjudicator would order when quantifying an award under this heading without the benefit of more information, including evidence as to benefits and salary increments.

101. In these circumstances, I cannot conclude that the offer approximates the award the adjudicator hearing this case could be expected to make under s.43(2)(b) relating to financial loss calculations. In light of this finding, I do not need to comment on the parties' arguments with respect to mitigation.

102. Before I leave this remedial sub-heading however, I do want to comment on one other argument which was raised by the respondent.

103. In support of the reasonableness of its offer under this remedial hearing, the respondent, submitted that there is a strong argument that an adjudicator will find at the end of a full hearing that the respondent owes the complainant nothing for financial loss and, on that basis, the offer of $212,000.00 is more than reasonable.

104. In my view, this is not an argument that can be accepted by an adjudicator who is making a determination as to the reasonableness of an offer pursuant to s.37.1 of the *Code*. To do so, would be inconsistent with the accepted test of proceeding on the basis of assuming the allegations in the complaint are proven.

105. The possibility that an adjudicator at the conclusion of a hearing may find that the allegations in the complaint have not been proven or that a complainant may not receive an award as favourable as expected are certainly factors that parties may consider in the course of holding without prejudice settlement discussions. These are not, however, factors that an adjudicator proceeding under s.37.1 of the *Code* should take into account. The adjudicator in this process is stepping into the shoes of an adjudicator who, having heard the evidence at the end of a full hearing, has made a finding that the *Code* has been contravened in the manner alleged in the complaint and is ready to make an award to address that contravention.

Section 43(2)(c)

> *pay any party adversely affected by the contravention damages in such amount as the adjudicator considers just and appropriate for injury to dignity, feelings or self-respect*

106. The respondent offers payment to the complainant under this head in the amount of $15,000.00. In support of this offer, the respondent submitted that the highest amount of general damages ever awarded for injury under this heading was $15,000.00 awarded in the recent Manitoba decision by Adjudicator Sim: *Emslie* v *Doholoco Holdings o/a The UPS Store* 2014 CanLII 71723 (MB HRC). The respondent submitted that the facts in that case which involved an egregious sexual harassment were more egregious than the conduct represented by the allegations in this complaint and that this offer is in excess of what has been awarded by adjudicators in other cases which involved complaints of a much more serious nature.

107. The Commission and complainant said they do not have any concern with respect to this remedy offered by the respondent.

Section 43(2)(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*

108. Under the *Code,* the maximum of such penalty or damage is $25,000.00 (s.51(1)). The respondent makes no offer in this regard. In support of that, the respondent pointed to the decision of Adjudicator Harrison in *C.R.* v *Canadian Mental Health Association Westman Region Inc.*, 2013 CanLII 125 (MB HRC), where she noted that punitive or exemplary damages are rarely awarded by human rights adjudicators and that in order to support an award for such damages, malice or recklessness must be found. In this case, the respondent submitted there is no basis for such a finding.

109. Again the Commission and the complainant said they have no concern with this aspect of the offer.

Section 43(2)(e)

> *adopt and implement an affirmative action program ..., if the evidence at the hearing has disclosed that the party engaged in a pattern or practice of contravening this Code*

110. The respondent made no offer in this regard. In support of its position, the respondent submitted that the allegations in the complaint do not disclose a pattern or practice of the respondent contravening the *Code* and in any event, the respondent already has extensive measures in place to address issues of diversity, inclusion, discrimination and other human rights related issues, citing the existence of a number of policies including its *Respectful Work and Learning Environment Policy.*

111. The Commission and the complainant submitted they have no concern with the respondent not offering to include an affirmative action program.

112. The Commission submitted and I agree that an adjudicator proceeding under s.37.1 must make an independent determination as to whether the offer is reasonable notwithstanding the fact that the Commission does not take issue with certain aspects of the offer.

113. I find that with respect to the offer of damages for injury to dignity and feelings and self-respect under s.43(2)(c), based on the allegations in the complaint and the awards that have been made in other human rights proceedings in Manitoba the sum of $15,000.00 falls within the range of what the complainant might reasonably expect to be awarded by an adjudicator.

114. With respect to the offer under s.43(2)(d), I agree there is no reason to expect an adjudicator would make an award in respect of exemplary damages.

115. Finally, with respect to the respondent's offer under s.43(2)(e), taking into account the award that may be made under s.43(2)(a) regarding public interest, as discussed above, I think it is unlikely an adjudicator would make an order of affirmative action.

CONCLUSION

116. Based on my findings set out above I am not satisfied, in all of the circumstances that the respondent's offer is reasonable in the sense of approximating what an adjudicator would award having heard the evidence and determining that the *Code* has been contravened in the manner alleged in the complaint.

117. In reading this conclusion, I accept the Commission's submission that an adjudicator proceeding under s.37.1 must proceed with caution before determining that a settlement offer is reasonable and thereby depriving a complainant of the right to have their matter determined on the basis of a hearing on the merits.

118. The adjudicator proceeding under s.37.1 must be satisfied that the offer is based on the legal principles which are applicable to human rights law and which further the purposes of the *Code* from the perspective of both the individual complainant and the general public.

119. The adjudicator must also be satisfied that the information which supports a determination that the offer is reasonable is in fact contained in what the adjudicator can consider, namely the allegations set out in the complaint or any admissions or agreements as to facts.

120. A determination under s.37.1 is a summary process which is based on limited information. Accordingly, it will not be uncommon for an adjudicator to find that he or she cannot determine the reasonableness of an offer not because the parties are not proceeding on the appropriate legal principles but simply because there are gaps in the information the adjudicator can consider in this process. I have found many examples of such gaps in this case.

121. Accordingly, for all of the reasons set out above, I am not satisfied that the respondent's settlement offer is reasonable in all of the circumstances, such that the adjudication must be terminated.

March 10, 2015

____

Sherri Walsh, Adjudicator