HUMAN RIGHTS ADJUDICATION PANEL

IN THE MATTER OF: A complaint by Robert Young v. Amsted Canada Inc., 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:

ROBERT YOUNG,

Complainant,

and

AMSTED CANADA INC.,

Respondent

Panel: Peter Sim, adjudicator

Appearances:

The Complainant in person

For the Commission: Ms. Isha Khan

For the Respondent: Mr. Jeff Palamar

Decision

[1] This is an application under Section 37.1 of *The Human Rights Code*, C.C.S.M., Chapter H175 (the "*Code*") to determine whether an offer of settlement made by the Respondent is reasonable.

[2] The basis of the complaint is that the Respondent discriminated against the Complainant in his employment because of his disabilities by denying him the opportunity to work weekend overtime.

[3] The Respondent operates a foundry. The Complainant began to work for the Respondent as a mould finished and then as a pourer.

[4] In May 2011, the Complainant experienced chest pains and low blood pressure while at work. He was placed on short-term disability and when he returned to work, he was under a permanent restriction of staying out of extreme heat.

[5] The Complainant applied for and was given a position as a crane operator. He says that there was no special consideration given to him and he received it through the normal bidding process under the collective agreement. However, it did have the effect of accommodating his heat restriction, as the crane was a climate-controlled environment.

[6] In July 2012, the Complainant injured his shoulder and suffered rotator cuff injury and nerve root irritation. He was placed on short-term disability and returned to work under some temporary restrictions regarding lifting.

[7] The complaint was filed on October 9, 2012. The complaint refers to a number of incidents in 2012 where the Respondent is alleged to have questioned the Complainant's heat restriction or disciplined him for refusing work, which was outside his heat restriction. The Commission has considered these allegations and they do not form part of the complaint referred to adjudication.

[8] The Complainant continued to work for the Respondent until May 2013, when his employment was terminated in circumstances, which are not relevant to this complaint.

[9] The Commission staff investigated the complaint and the investigator prepared a report, which concluded that the Complainant had disabilities of rotator cuff strain, nerve root disability and extreme heat intolerance. The report went on to state that:

> The Complainant's disabilities were not a factor in his discipline and termination and he was accommodated during regular work hours. His disabilities were a factor in the Respondent's decision to deny him overtime, therefore the Complainant has established a prima facie case of discrimination ….

[10] The Commission adopted the recommendations of the investigator and referred the case to mediation. When mediation failed to reach a settlement, the Commission requested the appointment of an adjudicator under section 29(3)(a) of the *Code.*

[11] In this hearing, I have proceeded on the basis that the subject of the complaint is the complaint in the form approved by the Commission. The only subject of the complaint is therefore the allegation that the Respondent discriminated against the Complainant by denying him overtime to which he was entitled.

[12] The Respondent has made an offer of settlement in the following terms:

> 1. Acknowledgement - With the benefit of hindsight and the clear objectivity that can come from the passage of time, my client apologizes for not more thoroughly investigating what weekend overtime work opportunities Mr. Young could have been capable of working.
>
> 2. Compensation for injury to dignity, etc.- My client is prepared to provide a payment of $5,000 as general damages to compensate for injury to dignity, self-respect and hurt feelings.
>
> 3. Compensation for financial loss —The objective records of overtime worked do not seem to support any claim for lost overtime, but despite that and in good faith, my client is

> prepared to provide a payment of $5,000 (gross and subject to required deductions). In our respectful view that would be more than fair compensation for any losses arising from the alleged discrimination.
>
> 4. Securing future compliance with the Code - My client is absolutely committed to learning from what took place and doing whatever it properly can to live up to its legal obligations and beyond. As to the public interest in ongoing human rights, my client has always been and remains 100% committed to maintaining human rights in its practices. To help with that, it as no problem whatsoever in having a reasonable number of human resources/management personnel attend human rights training offered by the Commission, within six (6) months of the resolution of this complaint. At minimum this would include the Human Resources Manager responsible for the Winnipeg operation. The Company would also undertake its own internal review and evolution of practice and policy, assisted by legal counsel as may be required, which would also be completed within six (6) months of the resolution of the complaint.

[13] A number of cases have now been decided under Section 37.1 and the basic principles are clear. An adjudicator under Section 37.1 must consider the remedies available under each paragraph subsection 43(2) of the *Code* and determine if the offer reasonably approximates what an adjudicator might award after a hearing.

[14] Paragraph 43(2)(a) permits an adjudicator to direct a Respondent to do or refrain from doing anything in order to secure compliance with the *Code* or make just amends for the contravention. The Respondent has apologized to the Complainant and has given an undertaking to have human resources and management personnel attend human rights training and to undertake its own internal review. All of this is to be completed within 6 months.

[15] Counsel for the Commission advised that the Commission was satisfied with these undertakings. She noted that the undertakings were specific both with respect to the persons who would receive training and with respect to the time limits within which the training would be completed. Remedies of this nature are primarily the concern of the Commission and the Complainant did not take a position on this point. I find that this aspect of the offer was reasonable.

[16] There is nothing in this case which would justify an award of exemplary damages under paragraph 43(2)(d) or an affirmative action program under paragraph 43(2)(e).

[17] The submission of the Respondent includes a list of damage awards under paragraph 43(2)(c) for damages for injury to dignity, feelings or self-respect from 1998 to 2015. The awards in cases involving failure to provide reasonable accommodation for disabilities have ranged from $2,000.00 to $10,000.00. I find that the offer of $5,000.00 reasonably approximates what an adjudicator might be expected to order.

[18] The portion of the offer on which there is substantial disagreement is the award under paragraph 43(2)(b) for financial losses sustained because of the contravention of the code. The measure of this loss was the overtime pay that the Complainant might have received if the Respondent had not discriminated against him when assigning overtime.

[19] It was explained that under the collective agreement, employees volunteer to work overtime by signing a sheet. The Respondent then assigns overtime work on the basis of qualifications and seniority. If a sufficient number of qualified employees do not

volunteer to work overtime, the employer may require additional employees to work overtime.

[20] The calculation of the overtime pay that the Complainant might have earned involves multiple factors, including:

- The Complainant's base rate of pay and the formula for calculating overtime pay;
- The period over which the Complainant was discriminated against in the assignment of overtime;
- How much overtime was available during the applicable period in positions for which the Complainant was qualified;
- Whether the Complainant signed up for overtime on a particular weekend;
- Whether the Complainant had sufficient seniority to be entitled to overtime on a particular weekend;
- How much overtime the Complainant actually worked.

[21] There is no agreement between the parties on any of these factors except the first.

[22] The submission of the Commission states that the relevant period for computing lost overtime was from August 15, 2012 to February 2013. After February 2013, the Commission says that the Respondent began offering the Complainant additional overtime until the end of his employment. The Commission says that its investigator has

reviewed the overtime records provided by the Respondent and is satisfied that the offer of $5,000.00 approximates what an adjudicator would award at a hearing.

[23] The Respondent submits that loss of overtime should be calculated by comparing the overtime worked by the Complainant during a base line period from January to May 2011 with the overtime worked after September 2011. Between May and September 2011, the Complainant was off work on short-term disability. He returned to work with permanent heat restriction after September 2011 and it is after this period that the Respondent says that accommodation should have been offered.

[24] The Respondent says that the Complainant only worked 8 hours of overtime during the baseline period and was in fact offered much more overtime during the subsequent period. The Respondent alleges that overtime work in positions for which the Complainant was qualified was not available every weekend, the Complainant did not sign up for overtime every weekend and he did not have sufficient seniority to be entitled to all the overtime he requested. The Respondent maintains that the records do not support any claim for lost overtime but is prepared to offer the sum of $5,000.00 less deductions as a gesture of good faith.

[25] The Complainant presented his own calculations of lost overtime. He claims that the problems with denial of overtime began in August 2012, when he returned to work with a temporary shoulder restriction. It was at this point, he says, that the Respondent began to question his heat restriction and deny him overtime. His claim is based on lost overtime during the period from August 2012 to the end of his employment.

[26] The Complainant says that overtime was available every weekend during this period and he signed up almost every weekend. His heat restriction was not a significant factor because the furnaces did not run on weekends and the only jobs he was restricted from doing involved cleaning out the furnaces. He was qualified for numerous other jobs available. He also says that he had sufficient seniority to work most weekends and sometimes senior employees were required to work overtime they did not ask for on weekends when he had signed up and was not offered overtime.

[27] The Complainant did his own review of his pay records and alleged that during the period in question there was about $30,000.00 in overtime earnings available. He said the he earned about $3,000.00 in overtime. If he had been give half of the overtime he signed up for, he estimates that he would have earned an additional $14,000.00.

[28] In *Damianakos v. University of Manitoba*, 2015 CanLII 11275 (MB HRC) and *Nachuk v City of Brandon*, 2014 CanLII 20644 (MB HRC), it was held that it is not appropriate for an adjudicator under Section 37.1 to make findings of fact on disputed issues. The adjudicator should proceed on the assumption that the allegations in the complaint have been proved and on agreed facts. However, in most cases the assessment of financial loss will depend on findings of fact that are not included in the complaint and in this case, most of these facts are in dispute.

[29] I have approached this problem through a two-step test. First, I considered whether the Respondent has calculated its offer based on appropriate legal principles and has evidence to support its position. I find that it has. Second, I considered whether the Complainant could make a case, supported by evidence, for a significantly higher

amount of compensation than the amount in the offer. I also find that he can. In these circumstances, it is not appropriate for me to attempt a detailed analysis of the limited evidence before me in an attempt to decide which position is more reasonable.

[30] I do not believe it is necessary for an adjudicator to find that an offer is not reasonable in every case where there are facts in dispute. There will be cases where the Complainant is advancing an obviously unreasonable position that is not supported by law or evidence and other cases where the difference between the parties' positions is insignificant. However, in this case the Complainant has made a reasonable enough argument that he should be allowed the opportunity to present it at a hearing.

[31] If the case proceeds to adjudication, there is a possibility that the Complainant's arguments will be rejected and he will receive considerably less than the amount of the offer. However, in the *Damianakos* decision, Chief Adjudicator Walsh held that this was not a factor, which an adjudicator should take into account when assessing an offer under Section 37.1. The result of finding an offer to be reasonable under Section 37.1 is that the proceedings will be terminated if the Complainant rejects the offer. The adjudicator is therefore in a different position from a lawyer advising a client or a mediator in a non-binding mediation who can only recommend or urge a Complainant to accept an offer. The standard of reasonableness should be varied accordingly.

[32] I am not able to find that the offer is reasonable within the meaning of Section 37.1 of the *Code*. I therefore dismiss the application.

Dated: November 10, 2015

Peter Sim, Adjudicator