MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

IN THE MATTER OF a complaint made under *The Human Rights Code*, CCSM c. H175

BETWEEN

Raymond Mousseau,
complainant,

AND

Southern Health/Santé Sud,
respondent,

AND

The Manitoba Human Rights Commission,
Commission.

MHRC File No.: 15 EN 155

For the complainant: Mr Lewis Litman, representative of the late Raymond Mousseau

For the respondent: Mr William S. Gardner and Mr Andrew J.D. Buck

For the Commission: Ms Isha Khan and Ms Sandra Gaballa

Motion heard: 5 March 2019, with supplementary written submissions on 8 March 2019

Reasons published: 26 March 2019[1]

ROBERT DAWSON, adjudicator:

[1] By way of an interlocutory motion, an employer seeks to terminate the hearing of a former unionized employee's human rights complaint on the ground that a labour arbitrator should hear and decide the dispute. For the reasons set out below, the motion is denied.

[1] The present version of these reasons is a consolidation that incorporates an erratum published on 28 March 2019, correcting a misspelt surname in the appearances.

Background

[2] The respondent hired the complainant as a probationary unionized employee on 20 March 2015. Within a couple of weeks or so, the complainant had a verbal argument with another employee at the workplace. The disagreement appears to have arisen out of the complainant's political views about the RCMP and the other employee's comments, which the complainant construed as an attack upon his religious beliefs and an affront to his ancestry or race. A similar confrontation seems to have occurred when the complainant met with management to discuss the original argument. The respondent employer soon terminated the complainant's probationary employment on the ground that he had breached the respectful workplace policy. No grievance was ever filed, even though the collective bargaining agreement included a provision by which the respondent employer contractually undertook "to exercise its management rights… in a consistent, equitable and non-discriminatory manner." Instead, the complainant filed a human rights complaint on 19 June 2015, alleging that the employer had discriminated against him on the grounds of his religion, ancestry or race, and political views. The complainant has since died.

[3] After the Chief Adjudicator had designated me on 3 October 2018 to hear and decide the complaint, the respondent's lawyer brought this interlocutory motion, which I heard on 5 March 2019. I also allowed the respondent to file a supplementary written

argument on 8 March 2019. Because the hearing of this complaint has already been scheduled to begin in only two months from now, it was expedient that I should make an interlocutory order on 9 March 2019, denying the respondent's motion with written reasons to follow. These are those reasons for my decision.

Arguments of the parties

[4] The respondent submitted that the instant dispute does not transcend the collective bargaining agreement. The dispute arises out the misconduct of a unionized probationary employee who had breached his employer's respectful workplace policy. The employee had expressed certain views in a manner that was inappropriate for the workplace; moreover, he had been subsequently unable to recognize the consequences of his actions. Accordingly, the employer had terminated him. The employer had not, however, considered the *substance* of those views while deciding that the complainant was unsuitable for continued employment, so no discrimination had occurred. Instead, the employer had looked only at the breach of the respectful workplace policy. Because it arises out of the application of the collective bargaining agreement and contractual provisions about the termination of probationary employment, the instant dispute therefore is about the operation of that agreement. By reason of this essential character, a human rights adjudicator has no jurisdiction to hear and decide the matter. In the

alternative, the respondent argued that, if a labour arbitrator and a human rights adjudicator have concurrent jurisdiction over the instant dispute, the former is the more appropriate forum, and a human rights adjudicator should decline to exercise his or her jurisdiction.

[5] By way of reply, the Commission argued that the instant dispute transcends the collective bargaining agreement. The complaint sets out more than allegations that the employer had terminated the complainant in a way that is inconsistent with the collective bargaining agreement. The instant dispute is not about the individual merit and performance of an employee. Instead, the complaint alleges that the employee's ancestry or race, religious beliefs, and political views were a factor in the decision to terminate the probationary employment. As such, the Commission therefore submitted that a human rights adjudicator has at least concurrent jurisdiction over the dispute.

[6] A representative of the deceased complainant appeared at the hearing of the motion. He underlined certain points, including that the verbal argument in the workplace had obviously involved another employee, whom the complainant had considered the antagonist. The complainant's representative also stated that the employer had preferred to deny shifts to the complainant instead of working towards a mediated resolution of the problem.

Analysis and decision

a) The basis for the underlying facts

[7] The factual context of the instant dispute is important, but the interlocutory nature of this motion precluded the calling of evidence. In the circumstances, I have relied upon the complaint and the reply filed in response to the complaint. On some points, the two versions agree. On other points, the two scenarios are sharply different. Without proceeding out of blind acceptance, I have used the complaint and the reply in order to identify facts on which the parties appear to agree. However, where the documents present competing versions of events, I have merely noted that the difference without my having made an attempt to reconcile those differences or prefer one version over another. I have also mined the complaint and the reply in order to define the legal issues that arise in the instant dispute.

[8] Because of the interlocutory nature of the motion, I heard no witnesses and accepted no documentary evidence, and I have relied upon s. 39(2) of *The Human Rights Code*, CCSM c. H175, as the authority by which I may determine the procedures that I have adopted. As a small and helpful exception, I did consider a brief excerpt of the collective bargaining agreement, which the respondent had slipped into its motion brief. The extracted provision establishes the employer's contractual undertaking to

exercise its managerial rights in a non-discriminatory way. However, I declined to receive the full collective bargaining agreement, which the respondent's lawyer offered during the hearing of the motion itself.

b) A caution against presumed jurisdiction

[9] A human rights adjudicator does not necessarily have jurisdiction to hear and decide a dispute merely because a complainant alleges that a contravention of *The Human Rights Code* has occurred. As Mainella J.A. explained for the Manitoba Court of Appeal at para. 68 of *Northern Regional Health Authority* v. *Manitoba Human Rights Commission* et al., 2017 MBCA 98 ("*Horrocks*"), leave to appeal to SCC requested,

> human rights tribunals are not superior forums for the adjudication of human rights disputes…. [The Manitoba Human Rights] Code does not give the administrative tribunal created by the statute exclusive jurisdiction to hear and decide matters relating to the Code. Rather, the Code is a statute of general application to all administrative decision-makers in Manitoba.

[10] Accordingly, there are three kinds of jurisdiction that a human rights adjudicator might have in respect of any dispute: the adjudicator's jurisdiction might be concurrent with that of another administrative decision-maker; the jurisdiction might overlap the jurisdiction of another administrative decision-maker; or, a human rights adjudicator might have no jurisdiction, because another administrative decision-maker has

exclusive jurisdiction over the dispute: *Weber* v. *Ontario Hydro*, [1995] 2 SCR 929 at para. 39, 47, and 50.

[11] A two-step analysis determines which kind of jurisdiction applies to a dispute: first, taking into account the entire factual and legal context, the essential character of the dispute must be identified; and, secondly, the decision-maker must determine whether the nature of the dispute expressly or by implication falls within the ambit of the decision-maker's governing rules: *Horrocks* at para. 51.

c) The essential character of the dispute

[12] The instant dispute goes beyond the specific employment context, and it transcends the collective bargaining agreement. The issues properly engage the underlying public policy of *The Human Rights Code*, which is the recognition, protection, and promotion of the worth and dignity of every individual.

[13] I agree with the respondent that a labour arbitrator in Manitoba has exclusive jurisdiction to hear and decide a dispute where an alleged breach of *The Human Rights Code* gives rise to the termination of the employment of a unionized worker: *Horrocks* at para. 67. I also recognize that s. 78(1) of *The Labour Relations Act*, CCSM c. L10, equips a labour arbitrator with an extensive jurisdiction over disputes about the meaning, application, or violation of a collective bargaining agreement:

> Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties thereto, or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning, application, or alleged violation.

[14] However, the instant dispute is not about the "meaning, application, or alleged violation" of a collective bargaining agreement.

[15] In one sense, the collective bargaining agreement is not even at issue here. For reasons that are not known at this interlocutory stage, the complainant and his union did not grieve the termination of his probationary employment. Instead, the complainant filed a human rights complaint. At para. 80 of *Horrocks*, the Manitoba Court of Appeal made much of that complainant's choice to file only a human rights complaint: "the essential character of the dispute raised in the complaint to the Commission must be examined in light of the factual context, particularly the absence of a grievance…."

[16] Putting aside that point, I find that, in any event, the issue of discrimination at the unionized workplace goes beyond the specific employment context.

[17] Consider the relevant excerpts of the complaint:

> 1. I am Aboriginal, non-Christian, Jewish-religious/ethnic affiliation….
>
> …
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> 4. On April 5, 2015, during my down time at work I was reading an article that was part of my {university] course material and A.W., a casual employee (also on probation), approached me and asked what I was

studying. I told her it was a paper from my Critical Social Issus course and she said, "Oh so you are into that." Ms W. took an interest in a photography [*sic*] in my opened study notes. The photograph was of a Nazi criminal named Adolf Eichmann. Ms W. took an interest in the photograph and I asked her if she knew that person and she said she did not and shook her head. I respectfully explained from an educational context that, "Adolf Eichmann is a Nazi criminal who is considered to be the Logistical Architect of the Holocaust; he was captured[,] tried and executed in Israel for major war crimes and crimes against the Jewish people." We talked about many things including Bill C-51, Police use of force, Mikmaq Blockade in New Brunswick etc. and Ms W. appeared to be interested in the conversation at first then she became hostile towards me, openly challenged me stating, "The Anti-terrorism bill is a good idea. Bill C-51 is justified and a good idea. The RCMP risked their lives in New Brunswick, they tried to kill my family member, I'm dating an RCMP officer, my dad is an RCMP officer, I have family members that are RCMP officers." As a First Nations person I was offended and an argument ensued and I withdrew from the conversation. Ms W. then left the room. Ms W. filed a vexatious and frivolous complaint against me….

…

6. On April 17, 2015, I was called by Ms B. (who is of German ancestry). She said she would like to speak to me "off the record" about the conversation I had with Ms W. I asked her if we could meet the following day.

7. On April 18, 2015, I attended the meeting. The off the record conversation became an interrogation with Ms B. and Ms L.R., a supervisor, who acted as a personal witness to the meeting without the opportunity for me to get my union representative.

8. The interrogation was based on the argument that took place between Ms W. and I [*sic*]. I was accused of displaying offensive pictures, making reference to Nazis, talking about Nazis, pushing my personal views on others and not stopping the conversation when Ms W. said she felt offended. The questions were not limited to my academic course content but to my religious beliefs and asked if I were going to challenge a religious perspective and I said, "No, I'm not talking about this anymore…."

[18] In varying degrees, racial, religious, and political discrimination lie at the heart of the allegations that the complainant has set out in his complaint. The verbal argument with his co-worker and the later meeting with management appear to have left the complainant feeling that his workplace would not tolerate his race or ancestry, religious beliefs, and political views. Long before the respondent had terminated his probationary employment, the complainant had felt that his worth and dignity as an individual were under attack. The operation of the collective bargaining agreement was therefore never engaged.

[19] This conclusion recalls the holding of the Nova Scotia Court of Appeal in *Halifax (Regional Municipality)* v. *Nova Scotia (Human Rights Commission)*, 2008 NSCA 21, leave to appeal to SCC refused. A unionized employee alleged that he had suffered racial discrimination in the workplace. In addition to racial comments, the employee claimed that, unlike white employees, he had been passed over for jobs and denied compassionate leave. At para. 52, Saunders J.A. wrote for the court that

> [a]ll of the incidents and discriminatory treatment complained of by Mr. Hellesoe occurred, he says, because he is an African-Canadian. The dispute he identifies does not arise explicitly or implicitly from the interpretation, application or administration of the Collective Agreement.

[20] In its oral and written submissions, the respondent urged me to reject such a characterization of the instant dispute. The respondent distinguished the *Halifax* case on the ground that, as the respondent set out in its motion brief, "[t]he basis for the alleged

discriminatory treatment in *Halifax* had nothing to do with the complainant's ability or capacity to carry out his employment." In the instant dispute, the termination of employment reflected the respondent's "[c]oncerns for a collegial and respectful workplace" and the apparent inability of the complainant to perform within that setting. By this analysis, the dispute did not transcend the collective bargaining agreement.

[21] By way of illustration, the respondent relied upon *Canada (House of Commons)* v. *Vaid*, [2005] 1 SCR 667. A parliamentary employee alleged that, motivated by racial prejudice, his workplace had constructively dismissed him through demeaning treatment. Considering the detailed allegations, Binnie J. held at para. 94 that there was nothing "to lift these complaints out of their specific employment context." These allegations included a statement that the employee was overqualified for his job; a question about the ability of the employee's wife to support him if he lost his job; an inquiry about the employee's willingness to work on a split shift and do other work; a prohibition against working while wearing a cervical collar; and, an offer of alternate work duties. While none of the preceding detailed allegations appear discriminatory, the employee believed that they were motivated by racial prejudice. Only two additional allegations were overtly racial: a question about the employee's ancestry, and his replacement by white drivers. Not surprisingly, Binnie J. concluded at para. 98 that

"[w]e are dealing with a single employee who says he was wrongfully dismissed against a background of alleged discrimination and harassment." The respondent in the instant dispute submits that the same conclusion applies here.

[22] However, I disagree. Unlike *Vaid*, the instant dispute is not about the termination of the complainant's probationary employment, set against a background of alleged discrimination. Instead, like *Halifax*, the instant dispute is about alleged discrimination, set against a background of unionized employment. The meaning, application, or alleged violation of the collective bargaining agreement are not in play.

[23] In oral submissions during the hearing of the motion, the respondent suggested that, by this approach, all unionized employees could bring their termination within the jurisdiction of a human rights adjudicator. To do so, it seemed to the respondent that such employees needed only to play up the human rights aspect of their dispute. However, this is a misunderstanding of the test by which to determine the essential character. A dispute must go beyond the ambit of a specific collective bargaining agreement. There must be facts that engage the public policy underlying *The Human Rights Code*. The rhetoric of a craftily-drafted complaint alone could artfully accentuate faint traces of discrimination in order to lift a dispute somehow beyond the operation of a collective bargaining agreement. Without a factual foundation, the jurisdiction of a

human rights adjudicator cannot be triggered, and the labour dispute remains within the exclusive jurisdiction of an arbitrator.

[24] The respondent submitted a further reason that the essential character of the instant dispute fell within the ambit of the collective bargaining agreement. Echoing parts of its original reply to the complaint, the respondent denied that, when terminating the complainant's probationary employment, it had taken into account the complainant's race or ancestry, religious beliefs, or political views. Instead, the respondent represented that it had focused only upon the inappropriate conduct of the complainant in the workforce and the complainant's inability to recognize the consequences of his actions. In this version of events, the human rights allegations are relegated to the background of the dispute. The essential character centres upon the respondent's exercise of its contractual rights to enforce its respectful workplace policy and terminate probationary employees. However, at this interlocutory stage, there is no basis to adopt the respondent's version of events. I have no evidence by which to determine what role, if any, the alleged discrimination played in the termination of the complainant's employment.

d) The concurrent jurisdiction of a human rights adjudicator

[25] By reason of the characterization of this dispute as transcending the operation of the collective bargaining agreement, a human rights adjudicator and a labour arbitrator have concurrent jurisdiction to hear and decide the instant dispute.

[26] In the instant dispute, there is no parallel proceeding before a labour arbitrator. Nevertheless, the respondent argues that I should not exercise my jurisdiction. The respondent instead urges me to defer, allowing a labour arbitrator to hear and decide the dispute. I reject that approach for several reasons. First and most practically, there is no appointed arbitrator to whom I could defer. Secondly, a deferral of my jurisdiction would be wasteful, because the parties have engaged with the Manitoba Human Rights Commission over the past four years in the expectation that a hearing would result. Thirdly, such a deferral would introduce undue delay while the arbitration process unfolds instead of proceeding with the scheduled hearing of this complaint in two months. Fourthly, I have no evidence about whether or not a labour arbitration may be convened. I do, however, note and entirely accept the respondent's undertaking not to raise any objection to the late filing of a grievance. Fifthly, I have no evidence about the ability or willingness of the deceased complainant's Estate to participate in the grievance process. In short, although I find myself able to continue listing concerns, I

shall simply state that I intend to exercise my jurisdiction and hear and decide the instant dispute.

Decision and order

[27] For the reasons set out above, the interlocutory motion is denied.

[28] I confirm that the hearing of the complaint itself is scheduled to take place in Winnipeg at a location to be determined on 14, 15, 16, and 23 May 2019.

[Original signed by]

26 March 2019

Robert Dawson