MANITOBA HUMAN RIGHTS BOARD OF ADJUDICATION

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

BETWEEN

James Nash,
complainant,

AND

Flora Natividad, and
Winnipeg Regional Health Authority,
respondents,

AND

The Manitoba Human Rights Commission,
Commission.

MHRC File No.: 15 EN 052

The complainant in person
For the respondent Flora Natividad:
Ms Sarah Gravelines
For the respondent Winnipeg Regional Health Authority:
Ms Krista Klassen
For the Commission: Ms Isha Khan

Motion heard: 8 February 2019
Reasons published: 16 May 2019

DECISION NO. 2[1]

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[1] Decision No. 1 relates to a motion that Adjudicator Manning had granted, adding the Winnipeg Regional Health Authority as a respondent: *Nash* v. *Natividad (No. 1)*, 2018 MBHR 2.

ROBERT DAWSON, adjudicator:

[1] Suppliers of residential health care services move to terminate the adjudication of a former resident's human rights complaint after the resident had rejected the suppliers' settlement offer. For the reasons set out below, the motion is granted with costs.

I. Background to the motion

[2] The complainant, James Nash, had lived in a residential care facility since 1995 until his eviction in 2015. He was schizophrenic and, in 2013, was also diagnosed as suffering a bipolar disorder. At all material times, the respondent Flora Natividad had been Mr Nash's residential care provider, and the respondent Winnipeg Regional Health Authority ("WRHA") had overseen the arrangement.

[3] In late 2014, Mr Nash wrote to Ms Natividad, complaining that the residential care facility had

- prohibited him from contacting an individual who used to work at the facility;
- limited his use of the facility's telephone;
- charged him rent at a rate that was slightly higher than the rent charged to other residents;
- cancelled a newspaper subscription;
- accused him of damaging a phonebook;
- shared information about him with his social worker; and,
- directed him not to refer to Ms Natividad as his landlord, but instead to refer to her as his health care provider.

[4] Shortly after making those complaints, Mr Nash informed Ms Natividad that he would unilaterally reduce his rent payments in 2015. He also demanded an apology from the residential care facility.

[5] On 29 January 2015, Ms Natividad informed the WRHA that she intended to evict Mr Nash at the end of February 2015. She alleged that, among other things, Mr Nash had yelled at staff members, bothered other residents, and made inappropriate comments and gestures. Although Mr Nash managed to find alternate lodgings before the eviction date, he had been briefly concerned that he was going to be homeless.

[6] On 26 March 2015, the complainant filed a complaint under *The Human Rights Code*, CCSM c. H175 (the "*Code*"). He alleged that, contrary to ss. 13 and 16 of the *Code*, Ms Natividad had discriminated against him on the basis of his mental disability and failed to make reasonable accommodation in the provision of a service or the rental of residential premises.

[7] The WRHA was not an original respondent to the complaint, but was added after the complaint had been amended on 15 May 2015. However, the Commission later dismissed the complaint as against the WRHA pursuant to s. 29 of the *Code*, and Ms Natividad was left as the sole respondent. After the complaint had been referred to adjudication, the WRHA was again added as a

respondent by order of Adjudicator Manning, dated 28 May 2018: *Nash* v. *Natividad (No. 1)*, 2018 MBHR 2.

[8] On 27 November 2018, the respondents made a joint settlement offer to the complainant, proposing to pay $8,000.00 to Mr Nash. In addition, the respondents promised to review and, if necessary, revise their policies, procedures, and staff training. Almost immediately, Mr Nash rejected the settlement offer.

[9] The respondents therefore brought the instant motion to terminate the adjudication on the ground that the complainant had rejected a reasonable settlement offer. On 7 December 2018, the Chief Adjudicator designated me to hear and decide the motion. I invited the parties to file motion briefs before hearing oral argument on 8 February 2019. In advance of the hearing, I informed the parties that, on the basis of their briefs, it would not be necessary to hear from the respondents and the Commission on the s. 37.1 issue.

II. The preliminary issue of the settlement offer itself

[10] Section 37.1 of *The Human Rights Code* requires that an adjudicator terminate the adjudication of a complaint where a complainant is found to have rejected a reasonable settlement offer. However, as the respondents themselves

have pointed out, there is a problem with the settlement offer that underlies the instant motion.

[11] I excerpt below all of the terms of the settlement offer, as it appeared in the letter that the respondents had addressed to Mr Nash on 27 November 2018:

> 1. Mr. Nash shall receive a total lump sum damage award in the amount of $8,000.00 which shall be payable from Ms. Natividad.
>
> 2. Within 3 months of acceptance of this offer, Ms. Natividad agrees to meet with the WRHA Community Mental Health Program to review her current House Rules to ensure are reasonable and fair to the residents who reside in her Residential Care Facility.
>
> 3. Within 6 months of acceptance of this offer, the WRHA undertakes to conduct a review of its policies, processes and training provided to employees of the Community Mental Health Program to ensure that they adequately address and respond to the evolving the needs of the client/patient population it serves. Any changes which are identified by policy reviews will be made and implemented as soon as practicable thereafter.
>
> 4. Within 6 months of acceptance of this offer, the WRHA undertakes to conduct a review of its policies, processes and training provided to employees of the Community Mental Health Program related to Residential Care Facilities to ensure that they adequately address and respond to the evolving needs of the client/patient population who access or reside in Residential Care Facilities. Any changes which are identified by policy reviews will be made and implemented as soon as practicable thereafter.
>
> a. Addresses and delineates the specific roles of the WRHA and its Community Mental Health Program employees, the Department of Families as the Licensing Body and the Residential Care Provider, to ensure they align with the roles and framework established by *The Social Services*

Administration Act, and in particular, The Residential Care Facilities Licensing Regulation.

b. Includes a component regarding the development, implementation and enforcement of House Rules by the Residential Care Provider for use in the Residential Care Facility, and the relevant human rights considerations for Residential Care Providers with respect to the same.

c. Provides the appropriate and necessary training to Residential Care Providers, including training regarding the roles of all parties and the importance of ensuring appropriate communication when making decisions that impact residents.

5. Confirmation of completion of the items noted in points 3, 4, and 5, shall be provided to the Manitoba Human Rights Commission by the WRHA through its legal counsel.

6. The terms of the settlement are confidential as between all parties.

7. The terms of this offer and the settlement are being made on a without prejudice basis.

8. Mr. Nash will sign a full and final release in favour of the WRHA.

9. Mr. Nash will sign a full and final release in favour of Flora Natividad.

[12] While preparing for this motion, the respondents noticed what one might describe as a "copy-and-paste" mistake in the settlement offer that they had sent to Mr Nash. Comparing the first few lines of Point #3 of the settlement offer with the opening lines of Point #4, the respondents noticed that part of Point #3 has been more or less copied and jarringly inserted into Point #4. In their motion

brief, the respondents set out the intended version of Point #4 of their settlement offer, which I compare here:

Original settlement offer	*Intended settlement offer*
4. Within 6 months of acceptance of this offer, the WRHA undertakes to conduct a review of its policies, processes and training provided to employees of the Community Mental Health Program related to Residential Care Facilities to ensure that they adequately address and respond to the evolving needs of the client/patient population who access or reside in Residential Care Facilities. Any changes which are identified by policy reviews will be made and implemented as soon as practicable thereafter.	4. Within 6 months of acceptance of this offer, the WRHA undertakes to work with the Department of Families to review the orientation training provided to Residential Care Providers (which for certainty, is provided by the Department of Families for the Province of Manitoba as the Licensing Body) to ensure that the orientation and training:

[13] Having discovered this error only after bringing their motion, the respondents did not withdraw the motion and resubmit the corrected settlement offer to the complainant. Instead, the respondents submitted that, for the purpose of this motion, the intended and correct version of the settlement offer should be considered instead of the actual version that the respondents had sent to the complainant and which he had rejected.

[14] While the Commission took no position on the respondents' request, the complainant wrote in his motion brief that he objected, but he did not explain his objection. Instead, the complainant indicated that he was prepared to "allow" the respondents' request on the conditions that (a) the respondents pay him $1,000,000.00; (b) the respondent WRHA hire him as a consultant for at least 5 years at an annual fee of $150,000.00; and, (c) the employment of two named individuals must be terminated.

[15] Ignoring these utterly disconnected conditions, I have nonetheless searched the complainant's written and oral submissions for any hint that the respondents' "copy-and-paste" mistake had been any kind of consideration in the complainant's rejection of the original settlement offer. I have been similarly attuned for any indication that, having reviewed the intended and correct version, the complainant was now moved to accept – or even just consider – the revised settlement offer. However, as his own motion brief makes clear, the complainant had not even noticed the error until the respondents themselves first raised it in their motion brief. His response was to consent to this motion's substitution of the intended settlement version, provided the respondents satisfied his odd conditions. I am therefore satisfied that the complainant's

rejection of the original settlement offer had nothing to do with the "cut-and-paste" mistake that the respondents now recognize and seek to correct.

[16] Despite all this, I have been slow to accept ultimately the respondents' submission that, for the purpose of this motion, the intended and correct version should have a retroactive existence. For the most part, where the correction of an error in litigation causes delay and the duplication of resources, that disruption simply is the consequence of putting things right. However, in the instant circumstances, I have weighed against such considerations the nature and effect of the error and its proposed correction. I have already noted that the error played no part in the complainant's rejection of a settlement prospect. I now observe that the proposed revision does not alter the original settlement offer in a way that is prejudicial to the complainant. At most, the proposed revision brings clarity and supplies context for the substantive subparagraphs that follow in Point #4. The revision itself, though, does not alter the proposals that are set out in those subparagraphs.

[17] Accordingly, on this preliminary issue and in exercise of my procedural authority under s. 39 of the *Code*, I grant leave to the respondents to revise Point #4 of the original settlement offer in the manner that they propose, and I shall

consider the corrected and revised settlement offer in deciding the instant motion.

III. Issues

[18] In determining whether or not to terminate the instant adjudication pursuant to s. 37.1 of the *Code*, two chief issues arise in the disposition of this motion:

(a) what information may an adjudicator consider when assessing the reasonableness of a settlement offer? and,

(b) is the instant settlement offer reasonable*?*

[19] Three further issues arise in connection with an order of costs against the complainant, pursuant to s. 45(2) of the *Code*:

(a) was the complainant's conduct vexatious?

(b) did his conduct prolong the adjudication? and,

(3) did the respondents incur costs as a result of the complainant's conduct?

IV. Termination of the proceedings because of a reasonable settlement offer

[20] Section 37.1 of *The Human Rights Code* requires that an adjudicator terminate the adjudication of a complaint if the adjudicator concludes that the complainant has rejected a reasonable settlement 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.	37.1(1) Si une offre de règlement est faite après qu'un arbitre a été nommé pour entendre la plainte, l'arbitre en chef désigne un autre membre du tribunal d'arbitrage afin qu'il détermine si l'offre de règlement est raisonnable.
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.	37.1(2) S'il juge raisonnable une offre de règlement que le plaignant rejette, l'arbitre désigné en vertu du paragraphe (1) met fin à l'arbitrage relativement aux parties visées par l'offre.

However, s. 37.1 of the *Code* neither defines what amounts to a reasonable settlement offer, nor prescribes what information an adjudicator may consider when assessing the reasonableness of a settlement offer.

A. The information that an adjudicator may consider

[21] A determination of the reasonableness of a settlement offer obviously begins with the offer itself. Beyond that starting point, the considered context is narrowly prescribed. Since the enactment of s. 37.1 of the *Code*, Manitoba human rights adjudicators have consistently approached motions like the instant one on the basis that the allegations as set out in the complaint are proven: *Mancusi*, v. *5811725 Manitoba Inc*., 2012 CanLII 73431 (MB HRC) ("*Mancusi*"); *Metaser* v. *Jewish Community Campus of Winnipeg Inc.*, 2013 CanLII 61017 (MB HRC) ("*Metaser MHR*") at para. 11, aff'd 2015 MBQB 47 (CanLII) ("*Metaser QB*"); *Nachuk* v. *Brandon (City)*, 2014 CanLII 20644 (MB HRC) ("*Nachuk*") at para. 27; *Damianakos* v. *University of Manitoba*, 2015 CanLII 11275 (MB HRC) ("*Damianakos*") at para. 35; *Young* v. *Amsted Canada Inc.*, 2015 CanLII 73279 (MB HRC) ("*Young*") at para. 28; and, *Collette* v. *St. Adolphe Personal Care Home Inc*., 2015 MBHR 4 ("*Collette*") at para. 2. An adjudicator may also consider any admissions and agreed statements of fact: *Mancusi* at para. 28; *Damianakos* at para. 27; *Metaser QB* at para. 33; and, *Young* at para. 28.

[22] The respondents submitted that, for the purpose of deciding a motion under s. 37.1 of the *Code*, an adjudicator may also take into account the legislation that defines the roles and specific services that each respondent provides. I have

been able to understand the complaint and settlement offer without reference to *The Social Services Administration Act*, CCSM c. S165, or the Residential Care Facilities Licensing Regulation, Man. Reg 484/88R. Accordingly, it is unnecessary for me to rule on the inclusion of legislation with the information that an adjudicator may properly consider.

[23] For his part, the complainant proposed the inclusion of selected correspondence between the parties, including his own counteroffer. The respondents' motion brief also appended, and made reference to, the complainant's counteroffer and amended counteroffer. However, correspondence and counteroffers are improper additions to the factual context of the instant dispute. First, although a complainant may argue that a settlement offer is not reasonable, references to a counteroffer are irrelevant to the determination of a motion brought under s. 37.1 of the *Code*. Secondly, an adjudicator's function at this preliminary stage of the proceedings is not dive into a trove of correspondence, weighing contentious evidence and making findings of fact. Unless such extraneous documents demonstrate the agreement of the parties upon some material fact, an adjudicator must properly ignore them: see, for example, *Nachuk* at para. 29, where the adjudicator refused to consider witness statements; and, *Damianakos* at para. 42-45, where the

adjudicator rejected the respondent's reliance upon the reply filed in response to the original complaint. Therefore, for the purpose of deciding the motion brought under s. 37.1 of the *Code*, I have given no consideration to the correspondence and counteroffer that the complainant has provided.

[24] During the hearing of the motion, the complainant attacked the very premise of s. 37.1. He complained that, where a respondent is successful on its motion under s. 37.1 of the *Code*, complainants are effectively denied their right to a hearing of their complaint. However, this is fallacious reasoning, because no complainant has a right to the hearing of a complaint where the respondent has already made an offer that at least approximates the remedial order that an adjudicator would make if the complainant's allegations had been proven during a hearing of the complaint: *Metaser QB* at para. 28. To do otherwise would expend unnecessary or expensive resources in the disposition of complaints: *Metaser MHR* at para. 11; and, *Nachuk* at para. 30.

B. The settlement offer is reasonable

[25] Proceeding upon the premise that the complaint is proven, an adjudicator must decide if a settlement offer is reasonable. Without defining what amounts to reasonableness, the *Code* therefore extends a broad discretion to adjudicators:

Metaser QB at para. 29. Within the context of s. 37.1, a reasonable settlement offer is one that approximates, or is the same as, the relief that an adjudicator would allow order if the complaint were proven at a hearing: *Mancusi* at para. 28*;* *Metaser QB* at para. 33-34; *Damianakos* at para. 22; *Young* at para. 13; and, *Collette* at para. 2. However, an approximation does not mean that a reasonable settlement offer must necessarily mirror exactly what an adjudicator would order after finding that the complaint had been proven: *Ibid.*

[26] Section 43(2) defines the remedial order that an adjudicator may make where a violation of the *Code* has been proven during a hearing of the complaint:

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:	Si en vertu du paragraphe (1), l'arbitre statue qu'une partie à l'arbitrage a contrevenu au présent code, il peut ordonner à celle-ci d'accomplir l'un ou plusieurs des actes suivants :
(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;	a) faire ou s'abstenir de faire une chose afin que l'observation du présent code soit assurée, réparer un état de choses découlant de la contravention ou compenser équitablement un dommage causé par la contravention au présent code;

(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;

b) indemniser toute partie touchée par la contravention, pour les pertes financières subies, pour les dépenses engagées ou les avantages perdus suite à la contravention, ou pour la partie de ces pertes, dépenses ou avantages que l'arbitre estime juste et appropriée;

(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;

c) verser à toute partie touchée par la contravention les dommages-intérêts que l'arbitre estime justes et appropriés dans le cas où celle-ci est atteinte dans sa dignité, ses sentiments ou son amour-propre;

(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;

d) verser à toute partie touchée par la contravention l'amende ou les dommages-intérêts exemplaires que l'arbitre, sous réserve du paragraphe (3), estime justes et appropriés, à titre de peine pour toute malveillance ou imprudence commise lors de la 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*.	e) adopter et mettre à exécution un programme de promotion sociale ou tout autre programme particulier du genre mentionné à l'alinéa 11b), si la preuve lors de l'audience a démontré que la partie a contrevenu par sa conduite ou ses habitudes aux dispositions du présent code.

[27] For the purpose of a motion brought under s. 37.1 of the *Code*, a reasonable settlement offer must satisfactorily address each of the five headings under which s. 43(2) has collected the remedial powers of an adjudicator: *Metaser MHR* at para. 14; *Damianakos* at para. 54; and, *Young* at para. 13. A settlement offer that takes into account only some applicable remedies is not reasonable. For example, in *Mancusi*, the settlement offer included the payment of damages for injury to the complainant's dignity, feelings, or self-respect, but no compensation for the complainant's financial losses, expenses incurred, or lost benefits. As a result, Adjudicator Harrison concluded that the settlement offer was not reasonable and dismissed the motion.

[28] Having considered the respondents' settlement offer, I find that it satisfactorily addresses each remedial heading set out in s. 43(2) of the *Code*, and I

further find that the settlement offer approximates the relief that the complainant would have otherwise obtained if his complaint had been proven at a hearing.

1. Ensuring future compliance

[29] Section 43(2)(a) of the *Code* equips an adjudicator with a broad authority to promote future compliance with the *Code*. This discretionary power advances an aim to eradicate discrimination. At paragraphs 2, 3, and 4, the respondents' settlement offer proposes improvements in sharing information, coordinating processes, and training staff. The proposal goes beyond the respondents named in the instant complaint, extending to all residential care providers and the entire community mental health program that the respondent health authority operates. In short, the respondents – and especially the respondent health authority – un20dertake to review how their operations could have given rise to the instant complaint, and, where they would identify deficiencies, they propose to improve their operations for the benefit of all those to whom they provide residential care. In its motion brief, the Commission described the respondents' proposal as "sufficiently detailed and thoughtful". The complainant did not address this remedial heading. I am therefore satisfied that the respondents' settlement offer approximates the remedial order that an adjudicator would likely have made pursuant to s. 43(2)(a) of the *Code*.

2. Compensation for financial losses, expenses incurred, or lost benefits

[30] Where a complainant suffers financial loss as a result of a violation of the *Code*, s. 43(2)(b) allows an adjudicator to order the payment of compensation. As explained in *K.K.* v. *Hair Passion*, 2013 CanLII 3982 (MB HRC) ("*Hair Passion*."), the remedy

> 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.

[31] The respondents submitted that no compensation for such financial losses would be awarded in the instant dispute, so their settlement offer proposed no payment under this remedial heading. The Commission agreed, suggesting that there was no allegation in the complaint that the complainant had suffered a financial loss as a result of the purported discrimination that ended with his eviction. At most, the Commission pointed to paragraph 8 of the complaint, which sets out that,

> [o]n February 20, 2015 my lawyer sent a letter to [redacted name of supervisor] demanding they stay the eviction. However, just after this being sent I found a new place (a bachelor suite in an independent living situation) and as of the end of February 2015 I moved to my new location.

For this reason, the respondents and the Commission argued that, in the circumstances of the instant dispute, a reasonable settlement offer need not provide for any compensation for financial loss.

[32] I agree with this submission. The complaint does not set out any direct connection between the alleged discrimination and any expenses incurred as a result of the move. Although he moved, the complainant did not move to another residential care facility. Any moving expenses could arguably go beyond the cost of transferring to another facility. Even if the discriminatory allegations were proven, the complainant would not be entitled to recover the costs of improving his residential accommodations.

[33] In his motion brief, the complainant particularized expenses in a total amount of $6,100.00. Even if this information goes beyond what an adjudicator may properly consider in deciding a motion brought under s. 37.1 of the *Code*, I find that the complainant's list of expenses is unreliable. Even the complainant labelled his list as "approximations or actual figures for apartment set up costs". There are no supporting receipts, and there is no indication of which figures are guesses instead of actual expenses incurred. Given that most of the figures are neatly rounded numbers, I assume that most of the list of expenses is a guess. In addition, some of the items comprising his list of expenses go beyond moving

costs, such as a claim for reimbursement of legal fees incurred. In the end, I simply decline to engage in the speculation needed to calculate any expenses.

[34] I conclude that, whether directly or by implication, the complaint does not allege that the complainant has incurred a financial loss as a result of a violation of the *Code*. Accordingly, I find that, on that basis, an adjudicator would not order payment of compensation pursuant to s. 43(2)(b). In the circumstances, it is reasonable that the respondents' settlement offer provides for no compensation for financial losses, expenses incurred, or lost benefits.

3. Damages for injury to dignity, feelings, or self-respect

[35] Section 43(2)(c) of the *Code* gives an adjudicator the authority to award compensation for the indignity that a complainant suffers by reason of the contravention of the *Code*. The respondents' settlement offer provides for payment in the amount of $8,000.00.

[36] In determining whether that sum is just and appropriate, an adjudicator must consider the circumstances of the particular complaint and draw guidance from relevant authorities: *C.R.* v. *Canadian Mental Health Association (Westman Region) Inc.*, 2013 CanLII 125 (MB HRC) ("*CMHA*").

[37] In the instant dispute, the complaint alleges that an ongoing series of negative interactions had occurred between the complainant and the respondent

residential care facility. The problem continued over a brief interval of approximately two months, and it culminated in the eviction of the complainant. There is no suggestion that the respondent residential care giver had been aggressive. At most, the complaint alleges that, instead of recognizing that the complainant's behaviour stemmed from schizophrenia and a bipolar disorder, the respondents had failed to accommodate him and excuse his problematic behaviour. The conduct of the respondents was not egregious, although the circumstances are aggravated in light of the age of the complainant and his vulnerability as a person in need of residential care. In addition, faced with the prospect of eviction, the complainant had been briefly concerned that he would be homeless.

[38] There are no comparable Manitoba human rights decisions that award damages for injury to dignity arising from discrimination on the basis of a disability in the provision of a service. However, in the context of employment where an employer has failed to make reasonable accommodation for an employee's disability, recent Manitoba human rights decisions have made awards, ranging from $2,000.00 to $8,000.00: see, for example, *Hair Passion; CMHA*; and, *Collette.*

[39] The complainant's brief set out an expectation of damages of at least $1,000.000.00. During oral argument, I drew to the complainant's attention that no human rights decision in Canada has resulted in an award that even comes close to the amount that he advanced. In reply, the complainant explained that a relatively low award would be insignificant for an organization like the respondent health authority. I reject such a consideration, because the purpose of a compensatory award under s. 43(2)(c) is not to punish the respondent.

[40] In the end, the complainant abandoned his original position and alternately submitted that an award in the range of $10,000.00 would be appropriate. Although that is a more reasonable position, I decline to find that an award beyond $8,000.00 would be warranted in the circumstances of the instant complaint. In arriving at that conclusion, I have considered, among things, that the dispute took place over a short interval, it was unpleasant but not aggressive, and the eviction process was orderly. But for the vulnerability of the complainant and the respondents' role in providing for his care, a compensatory award for injury to dignity would fall to the very low end of the existing range. I am therefore unwilling to fix a compensatory award under s. 43(2)(c) of the *Code* at more than $8,000.00, and I am satisfied that the respondents' settlement offer

approximates the remedial order that an adjudicator would likely have made under that remedial heading.

4. Penalty or exemplary damages

[41] Although s. 43(2)(d) of the *Code* permits an adjudicator to order the payment of a penalty or exemplary damages, the remedy is available only where the evidence establishes malice or recklessness: *CMHA*. The respondents and the Commission submit that, in the circumstances of the instant dispute, an adjudicator would not make such an order after hearing the complaint, so the settlement offer proposes no payment of a penalty or exemplary damages.

[42] In his written submission, the complainant characterized himself as a whistleblower whom the respondents had punished for his criticism of the residential care system. He therefore asserted an entitlement to exemplary damages in the amounts of $10,000,000.00 against the Commission, $15,000.00 against the respondent residential care giver, $200,000 against the respondent health authority, and $1,000,000.00 against the Attorney General of Manitoba "in his personal capacity".

[43] Setting aside the quantum that he proposes and the persons whom he targets for the payment of exemplary damages, the complaint sets out no basis whatsoever for allegations of abuse of authority by the respondents. By any

sense of the word, the complainant was not a whistleblower. The complaint does not support any allegation that the respondents had acted against the complainant in retaliation for some crusade about improvements to the residential care system. Unlike the facts in *Werestiuk* v. *Small Business Services Inc.* (1998), CHRR Doc. 98-216 (Man. Bd. Adj.), there has been no "deliberate and planned abuse of authority" on the part of the respondents in this case. I find that an adjudicator would not order the payment of a penalty or exemplary damages after hearing the instant complaint. I am therefore satisfied that, in declining to pay any penalty or exemplary damages, the respondents' settlement offer approximates the remedial order that an adjudicator would likely have made pursuant to s. 43(2)(d) of the *Code*.

5. Affirmative action or special program

[44] The instant complaint sets out no allegations that the respondents had engaged in a pattern or practice that violates the *Code*. For this reason, the respondents and the Commission submit that an adjudicator would not make an order for the adoption and implementation of an affirmative action or other special program pursuant to s. 43(2)(e) of the *Code*. The complainant did not address this remedial heading. I agree with the submissions of the respondents

and the Commission. I am therefore satisfied that the respondents' settlement offer approximates the remedial order that an adjudicator would likely have made pursuant to s. 43(2)(e) of the *Code*.

6. Additional terms of the settlement offer

[45] Paragraphs 6, 7, 8, and 9 of the respondents' settlement offer address points beyond the remedial order that an adjudicator may make pursuant to s. 43(2) of the *Code*. The complainant made no comment about paragraphs 6 and 7 of the settlement offer, whereby all parties would be required to consider the settlement offer on a "without prejudice" basis and treat the settlement terms as confidential. However, the complainant did raise a passing objection to paragraphs 8 and 9 of the settlement offer, which expect the complainant to give releases in favour of the respondents.

[46] Where the terms of a settlement offer go beyond the remedies defined in s. 43(2) of the *Code*, it is arguable that a settlement offer is not reasonable. However, it is important to balance that consideration against the practicalities that any settlement involves: *Metaser MHR* at para. 31.

[47] Although the outcome of an adjudication would be a matter of public record, there are satisfactory reasons that would cloak a settlement offer in the

confidentiality that paragraph 6 proposes. Settlements reflect the compromises of the parties, and confidentiality prevents one party from publicizing the voluntary concessions that another has made. Such publicity may be prejudicial, signalling to the world at large that a party is willing to compromise its positions and setting out the extent to which such concessions might go. In contrast, none of these problems arises after the publication of an adjudicator's reasons for decision.

[48] Paragraph 7 reflects the accepted practice to label as "without prejudice" the discussions and documents that aim to settle a dispute. The reservation precludes the later use of settlement information as an admission or other prejudice that would affect the legal rights of the party.

[49] Paragraphs 8 and 9 of the instant settlement offer require the complainant to give releases to the respondents. Reflecting the prudent practice, a release from the complainant would protect the respondents against possible proceedings in another decision-making forum on the same set of facts. Where an adjudication terminates by reason of s. 37.1 of the *Code*, no findings of fact have been made, so the doctrine of issue estoppel could not properly apply in order to preclude the revival of the dispute before another tribunal. However, a release would have the same result.

[50] Accordingly, the inclusion of Paragraph 6, 7, 8, and 9 do not render the instant settlement offer to be unreasonable, even though these additional terms go beyond the remedial headings that derive from s. 43(2) of the *Code*.

7. Conclusion

[51] I find that the respondent's settlement offer dated 28 November 2019 addresses all of the remedial headings set out in s. 43(2) of the *Code*. The offer proposes a disposition of the instant dispute on terms that are the same, or at least approximate, the order that an adjudicator would make after finding that the allegations set out in the complaint had been proven.

C. A digression about law reform

[52] In his oral argument, the complainant expressed concern about the enforcement of the respondents' settlement offer if he were to accept it. He rejected the effort and expensive that would be required if he had recourse to the courts in order to enforce the settlement contract between the complainant and the respondents. Of course, the respondents have given no indication that they would renege on their settlement offer, and I have every reason to expect that they would act in accordance with the terms there set out, including the payment

of money to the complainant. Nevertheless, the complainant has correctly interpreted the *Code*, finding no authority by which an adjudicator may compel a party to make good on its settlement offer after the proceedings have been terminated: see also my previous comments in *Metaser MHR* at para. 33. While ss. 47 and 48 of the *Code* provide a mechanism by which to enforce an adjudicator's remedial order made under s. 43(2), there is no comparable authority in relation to s. 37.1.

V. Order for costs

[53] Section 45(1) of the *Code* generally precludes an order for costs against any party to a human rights adjudication:

Subject to subsection (2), the parties to an adjudication shall pay their own costs.	Sous réserve du paragraphe (2), les parties à un arbitrage paient leurs propres frais.

This sub-section promotes the filing of complaints in an attempt to eradicate discrimination and achieve other public policy goals that underlie the *Code*. The mere prospect of an order for costs generally operates as a deterrent to litigation, which the Manitoba Court of Appeal acknowledged in, for example, *232 Kennedy Street Ltd.* v. *King Insurance Brokers (2002) Ltd.*, 2009 MBCA 22 at para. 26; and, *Robertson* v. *Harding*, 2018 MBCA 67 at para. 35. It is undesirable from a policy

perspective that such a deterrent should discourage human rights complainants from filing and advancing their complaints.

[54] At the same time, aiming to control frivolous or vexatious conduct, s. 45(2) of the *Code* sets out a narrow exception to the general rule against ordering costs:

> Where the adjudicator regards a complaint or reply as frivolous or vexatious, or is satisfied that the investigation or adjudication has been frivolously or vexatiously prolonged by the conduct of any party, the adjudicator may order the party responsible for the complaint or reply or for the conduct to pay some or all of the costs of any other party affected thereby.
>
> Si l'arbitre juge qu'une plainte ou une réponse est futile ou vexatoire ou s'il est convaincu que l'enquête ou l'arbitrage a été prolongé de manière futile ou vexatoire par la conduite d'une partie, il peut ordonner à la partie responsable de la plainte ou de la réponse ou de la conduite répréhensible, de payer une partie ou la totalité des frais d'une autre partie touchée par la plainte, la réponse ou la conduite.

Accordingly, an order for costs may be exceptionally ordered in two circumstances: first, a complaint or reply is frivolous or vexatious, or the conduct of a party has been frivolous or vexatious; secondly, where conduct is in question, the investigation or adjudication of the complaint has been prolonged; and, thirdly, another party has incurred costs by reason of the frivolous or vexatious complaint or reply, or the frivolous or vexatious conduct.

[55] Before hearing of the motion on 8 February 2019, I advised the parties on 28 January 2019 that I would invite submissions about an order for costs against

the complainant. By then, I had especially become alive to the issue after reviewing the brief that the complainant had filed in connection with the instant motion. Prior to that time, I had only a vague sense that the complainant was engaged in problematic behaviour. Having insulated myself since early December 2018 using e-mail filtering tools, I had not been reading the stream of correspondence that the complainant was unnecessarily sending to me. Appended to his motion brief, the complainant collected examples of his own e-mail messages. The content of these messages raised questions for me about the complainant's conduct. At about the same time, counsel began to express concerns about security arrangements for the hearing of the motion.

[56] At the hearing, the respondents took no position on an order for costs against the complainant. However, the Commission made submissions in support of such an order, detailing the conduct of the complainant and explaining the effect of his behaviour. In reply, the complainant unhelpfully sought his own order for costs against the respondents and the Commission.

A. Statement of facts

[57] In connection with the instant motion, the complainant wrote and sent to the parties at least 115 e-mail messages and 3 delivered letters between

December 2018 and April 2019. These communications have been shockingly disrespectful of their intended recipients, attacking counsel, the adjudication process, and third parties in the most vulgar and ungentlemanly language. Set by the complainant in upper case, excerpts from his communications include the following, which preserves the original spelling and formatting:

- 9 December 2018, writing to the Chief Adjudicator: "THERE IS A NAZIS IN CHARGE OF THE MHRC PLUS THE JUSTICE MIN ATTRNEY GENERAL WHO SHUD BE PUT IN JAIL."
- 12 December 2018, writing to me and closing his e-mail with this empty bravado: "ADVOCATE FOR EVERY HUMAN RIGHTS COMPLAINTANT NOT ONLY IN MB BUT CANADA.THE SYSTEM IS GOING TO BE CHALLENGED IN MB AS NEVER BEFORE AND TO YU MS KHAN I SUGGEST YU RESIGN AND TAKE THE NASIZ JUSTICE MINISTER WITH YU WHO DOESNT HAVE THE GUTS TO RESPOND TO ME AS A CANADIAN MB CITIZEN BORN IN THIS COUNTRY.SON OF A VETERAN WHO KNOS RT FROM WRONG".
- 13 December 2018, writing to me: "DAWSON I WILL NOT ATTEND OR ALLOW KHAN TO BE IN THE SAME ROOM AS ME.I DO NOT

ACCEPT YU AS THE ADJUDICATOR AND YU HAVE HAVE CLEARLY BEEN TOLD YU ARE USING NAZIS TACTICS CONTINUE TO DO SO".

- 21 December 2018, writing to the lawyer for the Commission, but copying all parties, adjudicators, and some politicians and a newspaper: "I AM ACCUSING YU THE GOV OF MB THE CHIEF ADJ OFFICER WALSH THE ORIGINATING HEARING ADJUDICATOR MANNING. THE SPECIAL HEARING OFFICER DAWSON THE TWO OPPOSING COUNSEL OF THE 2 RESPONDENTS PLUS THE JUSTICE DEPT WHICH IS CLEARLY INVOLVED IN THIS CONSPIRACY TO CAUSE DAMAGE TO ME".
- 13 January 2019, writing to the lawyers for the respondents and the Commission: "Clarificatiom of how i desribed dawsoni told hom he is a BASTARD UNFIT TO BE A HR ANYTHING ESP AN ADJUDICATOR FURTHER HE GOT MY STUFF WED BUT HASNT LOOKED AT IT BUT LOOKED AT KHSNS FROM FRIDAY.HE IS DISRESPECTING ME HAS SINCE BEGINNING IS A NAZIS AND WILL BE DEALT WITH."
- 22 January 2019, writing to the lawyer for the Commission but copying all parties and adjudicators, some politicians, and a newspaper: "COMMENT TO DAWSON U HAVE NOT HAD THE COURTESY TO TEPLY TO MY

LAST EM TO U AND I REPEAT U ARE A BASTARD AND HAVE NO BUSINESS BEING A HR ANYTHING.J.R.N."

- 28 January 2019, writing to me about the lawyer for the Commission and using the following as a subject line for his e-mail message: "FAILURE OF THE MUSLIM.NAZIS TO PROVIDE ME WITH HARD COPIEOF HER LAST DOCUMENTS SENT TO THE NAZIS ADJUDICATOR DAWSON"
- 30 January 2019, writing to all parties and adjudicators, some politicians, and a newspaper, while using the following as a subject line for his e-mail message: "NAZIS DAWSON THE MUSLIM NAZIS KHAN IS REFUSING TO PROVIDE ME WITH THE ADDITIONAL DOC SHE SUBMITTED AFTER JAN 12 H.THE DEADLINE FOR SUBMITTING.IF I DONT HAVE THEM BY FRIDAY FEBRUARY 1 2019 THE HEARING FOR FEB 8 WILL NOT BE ALLOWED TO PROCEED."
- Motion brief of the complainant, which sets out on its cover sheet: "HUMAN RIGHTS ADJUDICATION ABOUT SECTION 37.1 OF THE HUMAN RIGHTS CODE OF MANITOBA AN ABSOLUTE FARCE AND A VIOLATION OF EVERY HUMAN RIGHTS COMPLAINT ANT IN MANITOBA IN THIS ADJUDICATION APPOINTED ROBERT DAWSON A LIAR AND DEMONSTRATING NAZI TACTICS WHO HAS

BEEN ASKED TO STEP DOWN AND IS REFUSING TO DO SO AS HE IS UNETHICAL; IMMORAL AND INTERESTED ONLY IN HIS COMPENSATION AND MAINTAINING THE GOOD BOOKS WITH THE MHRC TO GET MORE LUCARATIVE APPOINTMENTS AS SCRATCH MY BACK I' LL SCRATCH YOURS IS THE CORRUPT LEGAL SYSTEM IN MANITOBA".

- Also in the motion brief of the complainant, a corruption of the style of cause when referring to the respondent Ms Natividad: "FLORA NATIVIDAD (RESIDENTIAL CARE PROVIDER) (Not yet a Canadian Citizen-AFAK -Filipino)".

[58] Some of the complainant's communications also made threats of physical harm to the lawyers for the respondents and the Commission, including:

- 29 January 2019, writing to all parties and adjudicators, some politicians, and a newspaper: "YUNAZIS DAWSON CAN TAKR 37.1& 45 UP YUR ASS AS CAN NAZIS KHAN ABND I WUD WARNYUTO AND KLASSEN AND TO A MUCH LESSER EXTENT GRAVELINES YU PEOPLE ARE INSERIOUS DANGER.WHAT I AM NOT GOING TO SAY BUT IF YU DARE THREATENME AGAIN NAZIS DAWSON YU WILL BE VERY SORRY. I HAVE NO INTENTION OF RETAINING A LAWYER

> WHO WUD PROBABLY BE AS BAD A PERSON AS YUKHAN AND KLASSEN.DONT THROW QB RULES AT ME .YU HAVE ALREADY VIOLATED ME RE THOSE RULES."

- 4 February 2019, writing to all parties and adjudicators, some politicians, and a newspaper: "BY THE WAY UR CONDUCT MANNINGS AND KHAN TO A LESSE EXTENT GRAVELINES ARE ALL PROBABLY FACING CRIMINAL CHARGES AND UP TO 14 YEARS IN.PRISON FOR WHAT SEEMS TO.MY GUT THE FRAUD INVOLVING THIS E7.1 HEARING. U ARE HETEBY SERVED UR ATTEMPT TO INTIMIDATE ME WITH SEV 45 U ARE GOING TO RUE THE DAY U DID THIS. I REPEAT U ARE ALL NAZIS AND ARE GOING TO GET WHAT THE WEST DID TO THE NAZIS AND ALL OTHER EVIL INCLUDING MUSLIM NAZIS KHAN."

B. Application of s. 45(2) to the facts

[59] In essence, s. 45(2) of the *Code* may be distilled to the following for the purpose of the instant motion:

> Where the adjudicator… is satisfied that the… adjudication has been… vexatiously prolonged by the conduct of any party, the adjudicator may order the party responsible… for the conduct to pay some or all of the costs of any other party affected thereby.

It follows that, in the instant proceedings, an order for costs under s. 45(2) depends upon three findings: (1) the complainant's conduct was vexatious; (2) his conduct prolonged the adjudication; and, (3) the respondents incurred costs as a result of the complainant's conduct.

1. Vexatious conduct

[60] Section 45(2) of the *Code* does not define the term "vexatious". The word appears in more than 40 other Manitoba statutes, but always without definition. There is no reason that an ordinary sense of the word should not apply, so "vexatious" refers to something done to annoy or embarrass: see, for example, *York University* v. *Markicevic*, 2017 ONCA 651, where Madam Justice Epstein helpfully applies the meaning at para. 32.

[61] By way of summary, the communications of the complainant may be collected under the following headings:

- Subjecting other parties and their lawyers to irrelevant and disrespectful personal attacks that are unrelated to the allegations set out in the complaint
- Showing disrespect for the adjudicative process and the adjudicators

- Engaging in conduct that has a serious impact upon the integrity of the decision-making process
- Making threats against the security of participants in the adjudicative process

[62] In reviewing these communications, I have considered whether the conduct of the complainant merely reflects his choice to appear without a lawyer throughout these proceedings. A tribunal will obviously not expect lay persons to behave themselves in accordance with the standards and formalities that govern the conduct of members of the legal profession. However, the complainant's conduct goes well beyond what is acceptable. Moreover, I had cautioned the complaint after he had left a telephone voice-message for me in which he disparaged the participants and the Chief Adjudicator. Writing on 9 December 2018, I even drew his attention to the possibility that such conduct could result in an order of costs against him pursuant to s.45(2) of the *Code*. As Madam Justice Shelley observed in *McKeekin* v. *Alberta (Attorney General)*, 2012 ABQB 456 at para 199,

> [w]hen a person takes an incorrect action, is informed of their error, but then persists and commits the same 'error' again and again, that is evidence that the person does not misunderstand their action is incorrect. Rather, that indicates the person wants to break the rules.

[63] I have also considered whether the conduct of the complainant results from the medical conditions that he has described in the complaint; namely, schizophrenia and a bipolar disorder. Human rights tribunals should be especially ready to make allowances and accommodations for those whose medical conditions might unfavourably affect their participation in the adjudicative process: see, for example, *Miller* v. *Treasure Cove Casino and Supply Ltd.*, 2009 BCHRT 126 at para. 94-95. However, I have no information before me about those purported medical conditions. I am therefore unable to conclude that those conditions have affected the complainant or otherwise caused him to engage in this very inappropriate conduct. I had given advance notice to the parties that I would hear submissions about an order for costs, but the complainant made no helpful arguments or comments, and he submitted no supporting medical information.

[64] Unable to excuse his frequent and offensive communications, I find that the complainant's conduct has been vexatious.

2. Prolonged adjudication

[65] Section 45(2) of the *Code* does not supply a meaning for the term "prolonged". Although the word appears in other Manitoba legislation, no

definition is provided, and it mostly arises in the unrelated context of disability claims. For its part, *The Oxford English Dictionary* suggests that the verb "prolong" means "[t]o lengthen out in time; to extend in duration; to cause to continue or last longer; to continue, carry on". The definition implies a sense of waste, in that a matter has taken more time than it should.

[66] By reason of the complainant's 115 e-mail messages and 3 letters, the lawyers acting for the respondents and the Commission have necessarily taken time to wade through the correspondence. It was never an option for those lawyers to ignore the complainant's communications. I take notice that a lawyer's standard of accepted practice requires her to review incoming correspondence in connection with a matter for which a client has given instructions. By a very conservative measure, it is likely that each of the lawyers spent at least 0.1 hours of time in reviewing each message from the complainant, therefore accumulating a total of at least 11.8 hours of time for all of the communications. But for the complainant's vexatious conduct, this is time that the lawyers would not normally have spent.

[67] In other words, the vexatious conduct of the complainant has lengthened the amount of time required from these lawyers in order to move the

adjudication forward. I therefore find that the adjudication has been vexatiously prolonged by the conduct of the complainant.

3. The costs of affected parties

[68] Neither the respondents nor the Commission submitted calculations of the costs that their respective clients have incurred by reason of the complainant's conduct. I safely assume that this was not a negligent omission; instead, I suspect that it was a deliberate choice not to appear like public entities extracting money from an individual complainant. Nevertheless, there are reliable means by which to calculate those costs.

[69] Whether directly in the case of a lawyer in private practice or indirectly for in-house counsel or government lawyers, the clients of lawyers pay for the services that their lawyers provide. Using a very low rate of $75 per hour and discounting any applicable taxes, I calculate that each client has incurred in some way costs in the amount of $885.00 for the 11.8 hours that their respective lawyers have spent in reviewing the complainant's communications.

[70] In addition, the Commission incurred the cost for the attendance of a police officer throughout the hearing, and it arranged for provincial protection officers to accompany the lawyer for the Commission as she travelled from her

office to the hearing room. The Commission has not quantified its expenses, but I estimate that these security measures incurred costs for the Commission in an amount equal to at least $250.00.

4. Conclusion

[71] I find that the adjudication has been prolonged by the vexatious conduct of the complainant, causing the respondents and the Commission to incur costs. Pursuant to s. 45(2) of the *Code*, I therefore order costs against the complainant and in favour of each of the respondents in the amount of $885.00 and in favour of the Commission in the amount of $1,135.00. The total in costs equals $2,905.00.

[72] It unsettles me that an order of costs has been necessary in the instant adjudication. During the hearing, I had invited and encouraged the complainant to apologize for his shameful conduct. He expressly refused to do. In the face of his patently vexatious conduct, I have been left without a choice. The instant circumstances fall squarely within the *Code*'s narrow exception to the general rule that parties to an adjudication must pay their own costs. Accordingly, the outcome of these proceedings should not especially deter current and potential complainants in the filing and advancement of their own human rights complaints.

C. Another digression about law reform

[73] The *Code* contains no provision by which an adjudicator may suspend or terminate a human rights adjudication in order to take steps to protect participants from vexatious conduct or harassment. In contrast, s. 19(1) of the *Code* requires an employer, for example, to take reasonable steps to terminate the harassment of an employee. However, there is no comparable protection for participants in a human rights adjudication. Employees are entitled to a respectful workplace, especially because many of them would feel as if they have no choice but to endure harassment if they wished to earn a living. The participants in a human rights adjudication are similarly and inescapably tied to the adjudication. It is not an option for a respondent that she may simply walk away from the adjudication process, even if that is the only way in which she may no longer be subjected to harassment.

VI. Decision and order

[74] For the reasons set out above, the motion is granted with costs, and I make the following order:

a. The adjudication of the instant complaint is terminated;

b. The complainant shall pay forthwith the sum of $855.00 to the respondent Flora Natividad, the sum of $855.00 to the respondent Winnipeg Regional Health Authority, and the sum of $1,135.00 to the Manitoba Human Rights Commission; and,

c. I retain jurisdiction in respect of the implementation of this order.

[75] I draw to the parties' attention s. 50(2) of the *Code*, which requires that any application for judicial review must be made the Court of Queen's Bench within 30 days of the making of this decision or within such further time as the court may allow.

[Original signed by]

16 May 2019

Robert Dawson