

IN THE MATTER OF a complaint made under *The Human Rights Code*, CCSM c. H175 (the "Code") between Margaret Koshinsky (the "Complainant"), Winnipeg Folk Festival (the "Respondent), and the Manitoba Human Rights Commission (the "Commission").

Appearances:

The Complainant, in person.

For the Respondent, Ms. Sarah Carr.

For the Commission, Ms. Sandra Gabella.

1. The Respondent, a former employer, moves to terminate the adjudication of a human rights complaint filed by its former employee, the Complainant, after the Complainant had rejected the Respondent's settlement offer. For the reasons that follow, the motion is granted.

Summary of Facts

2. The Complainant commenced employment with the Respondent on or about January 25, 2010 as Manager of Marketing and Communications.

3. On February 5, 2014 the Complainant commenced a medical leave of absence from work in order to undergo treatment for breast cancer, during which leave the Complainant received disability benefits under the Respondent's benefits plan.

4. In January 2016 the Complainant was medically cleared to return to work.

5. On March 14, 2016 the Respondent met with the Complainant and advised her that it was unable to accommodate the Complainant's return to work and further, that the Complainant's employment would terminate when her disability benefits terminated in June 2016.

6. On May 24, 2016 the Complainant complained to the Commission that the Respondent discriminated against her on the basis of physical or mental disability (breast cancer) when the Respondent failed to accommodate her return to work and further, when it terminated her employment (the "Complaint").

7. In due course, the Commission requested the Chief Adjudicator to designate an adjudicator to convene a hearing of the Complaint. The Chief Adjudicator designated an adjudicator to hear the Complaint and hearing dates were set. Prior to the hearing, the Respondent sought an Order from the Manitoba Human Rights Board of Adjudication terminating the adjudication in respect of the Complaint in accordance with section 37.1 of the Code.

8. As a result of the above, the dates set for the hearing of the Complaint were adjourned to November 2019 so that the Chief Adjudicator could designate an adjudicator to hear the motion brought forward by the Respondent. In September 2019 the Chief Adjudicator designated me to hear the Respondent's motion, which motion was heard in Winnipeg on October 9, 2019.

Legal Principles

9. Section 37.1 of the Code requires that an adjudicator terminate the adjudication of a complaint if the adjudicator concludes that the complainant has rejected a reasonable settlement offer.

10. The purpose of section 37.1 is to avoid an expensive hearing on the merits in situations where a respondent has made an offer that reasonably approximates a remedy an adjudicator would have ordered if the complaint were proven. (*Mousseau v. Southern Health/Sante Sud* M.H.R.B.A.D. August 23, 2019, para 9; *Nachuk v. City of Brandon*, [2014] M.H.R.B.A.D. No. 103, para 30; *Metaser v. Jewish Community Campus of Winnipeg Inc.* CanLII 61017, para 11).

11. Adjudicators are given broad discretion to determine what constitutes a reasonable offer in the circumstances of each case. (*Manitoba Human Rights Commission et al v. Jewish Community Campus of Winnipeg Inc.*, 2015 MBQB 47 at para 29). In order to determine whether the settlement offer is reasonable, the adjudicator must proceed on the basis that the allegations contained in the complaint are proven. (*Nash v. Natividad*, [2019] M.H.R.B.A.D. No. 4, para 21). Consequently, a determination of the reasonableness begins with the offer itself. An adjudicator may also consider any admissions and agreed statements of fact. (*Damianakos v. University of Manitoba*, [2015] M.H.R.B.A.D. No. 101, para 27). An adjudicator must be satisfied that the offer falls within the reasonable range of available remedies having regard to section 43(2) of *The Human Rights Code*. Reasonableness must be assessed having regard to the specific allegations in the complaint. (*Damianakos, supra*, para 54).

12. Further, the onus is on the respondent to provide sufficient information (such as background information regarding benefit and salary increments and the structure of the workplace) to allow the adjudicator to determine whether the settlement offer reasonably addresses the remedial function of the Code. (*Damianakos, supra*, para 100; *University of Manitoba v. The Manitoba Human Rights Commission and Peggy Damianakos*, oral decision at pages 6 and 7). Finally, the settlement offer must be considered as a whole. A settlement offer that contains a generous provision compared to what adjudicators have awarded in similar cases may make up for deficiencies in other areas of the offer. (*Collette v. St. Adolphe Personal Care Home Inc.*, [2015] M.H.R.B.A.D. No. 104, para 32).

The Offer - Sections 43(2)(a) to (e) of the Code

13. By letter dated August 2, 2019 the Respondent made a written settlement offer (the "Offer"), whose terms I very generally summarize as follows:

- a) The Respondent recognizes and apologizes to the Complainant;
- b) The Respondent will provide to the Complainant a lump sum payment of \$20,000.00 in respect of general damages;
- c) The Respondent will provide to the Complainant the amount of \$110,000.00, less required deductions, representing in excess of 18 months' wages, pension and benefits, based upon the salary, pension and benefit increases the Complainant would have received had she returned to work on a full-time basis on April 1, 2016;
- d) The Respondent will provide to the Complainant a letter of reference;
- e) All inquiries from prospective employers regarding the Complaint directed to the Respondent will be responded to by the Respondent's Executive Director in a manner consistent with the letter of reference;
- f) Those employees of the Respondent responsible for decisions relating to accommodation in the workplace and the Chair of the Respondent's Board of Directors will, on or before June 30, 2020, attend a seminar provided by the Commission regarding human rights;
- g) The Respondent will review its accommodation-related policy in consultation with legal counsel on or before December 31, 2019 and will ensure that employees involved in human resources at the Respondent are made aware of the policy;
- h) The Respondent will, as soon as they are available, provide to the Complainant two (2) weekend passes to the Respondent's 2020 Festival as a good faith gesture; and
- i) The Complainant will sign a full and final release in favour of the Respondent.

Position of the Parties

14. In its Brief filed in these proceedings, the Commission conceded that the Offer was reasonable. The Complainant filed a Brief via email on October 2, 2019, and then filed a corrected version on October 3, 2019. In her Brief, the Complainant submitted that I could not assess an offer for its reasonableness, prior to, or without hearing her oral testimony. Further, the Complainant submitted that none of the cases brought forward by the Respondent related to "cancer discrimination", and therefore, they were not comparable. The Complainant submitted that "cancer survivors including myself are highly vulnerable post treatment and this vulnerability is often a barrier to successful return to work outcomes".

15. Notwithstanding the above, at the hearing of the within motion, after hearing the submissions of both the Respondent and the Commission, the Complainant conceded that the Offer was reasonable. At the conclusion of her submissions, the Complainant conceded that she did not have an absolute right to a hearing, and expressed that she simply wanted to be heard. She indicated that by being given the opportunity to speak at the motion, she was satisfied with the process.

16. Despite no opposition to the Offer, I am obliged to satisfy myself that the Offer is reasonable. (*Mousseau, supra*, para 14)

17. In that regard, I find as set out below.

18. With regard to section 43(2)(a) of the Code, an adjudicator may order a party to do or refrain from doing anything in order to secure compliance with the Code, to rectify any circumstances caused by the contravention, or to make just amends for the contravention.

19. Paragraph one of the Offer contains the Respondent's apology for the impact of its failure to return the Complainant to work following her medical leave. Paragraph six of the Offer confirms the Respondent's commitment that those responsible for decisions relating to accommodation in the workplace and the Chair of the Respondent's Board of Directors will, before June 30, 2020, attend a seminar provided by the Commission regarding human rights. Paragraph seven of the Offer confirms that the Respondent will review its accommodation-related policy in consultation with legal counsel on or before December 31, 2019 and will ensure that employees involved in human resources at the Respondent are made aware of the policy.

20. After considering the above, I find that paragraphs one, six and seven of the Offer reasonably approximate what an adjudicator would order under section 43(2)(a).

21. Turning to section 43(2)(b) of the Code, an adjudicator may order a party to compensate another party adversely affected by a contravention of the Code 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.

22. Paragraph three of the Offer provides that the Respondent will provide to the Complainant the amount of \$110,000.00, less required deductions, in respect of lost wages and benefits. The Respondent asserts that such amount represents more than eighteen (18) months' wages, pension and benefits based upon the salary, pension and benefits increases the Complainant would have received had she returned to work on a full-time basis on April 1, 2016 as set out in Appendix "A" attached to the Offer. This calculation is accepted by both the Commission and the Complainant.

23. The Respondent submits that the offer is in excess of what would be awarded by an adjudicator pursuant to section 43(2)(b) of the Code. The Commission and the Complainant submit that the offer approximates what an adjudicator would order under that section.

24. After considering the submissions of the parties, I find that paragraph three of the Offer either reasonably approximates or exceeds what an adjudicator would order under section 43(2)(b) of the Code.

25. Section 43(2)(c) of the Code provides that an adjudicator may order a party to 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.

26. As set out in paragraph two of the Offer, the Respondent is prepared to pay to the Respondent a lump sum payment in the amount of \$20,000.00 in respect of general damages. The Respondent submits that this amount is equal to the highest amount in respect of general damages awarded by a Manitoba adjudicator, that being in *Jedrzejewski v. A+ Financial Services Ltd.*, [2016] M.H.R.B.A.D No. 101 at paras 60 and 61. The Respondent further submits that they make this offer notwithstanding that Adjudicator Dawson concluded that in the context of employment where an employer has failed to make reasonable accommodation for an employee's disability, recent human rights decisions made awards ranging from \$2,000.00 to \$8,000.00. (*Nash, supra*, para 38). This submission is not disputed by the Commission or the Complainant.

27. After considering the submission of the parties, I find that paragraph two of the Offer reasonably approximates or exceeds what an adjudicator would order under section 43(2)(c).

28. Section 43(2)(d) of the Code provides that an adjudicator may order a party to pay any party adversely affected by the contravention a penalty or exemplary damages in such amount, up to a maximum amount of \$5,000.00 for an individual and \$25,000.00 in any other case, as the adjudicator considers just and appropriate, as punishment for any malice or recklessness involved in the contravention.

29. The Respondent makes no offer under this head on the basis that prior decisions of the Board of Adjudication "confirm that an award of punitive or exemplary damages is exceptional and limited to circumstances of malice or recklessness". The Respondent further submits that if the Complainant were successful at the adjudication on the merits of her Complaint, an adjudicator would not award any amount in respect of punitive or exemplary damages, and that therefore, the lack of an offer under this head reasonably approximates an order that an adjudicator would make under section 43(2)(d) of the Code.

30. The Commission submits that the Complaint does not contain any indication of malice or recklessness on the part of the Respondent.

31. After considering the submission of the parties, and after reviewing the authorities cited by the Respondent (*Korsch v. Manitoba (Human Rights Commission)*, [2011] MJ No. 304, para 45, upheld on appeal, [2012] MJ No. 378; *CR v. Canadian Mental Health Assn.*, [2013] M.H.R.B.A.D. No. 101, para 186; *Collette, supra*, para 26), I find that the Offer reasonably approximates an order that an adjudicator would make under section 43(2)(d) of the Code.

32. Section 43(2)(e) of the Code provides that the adjudicator may order a party to adopt and implement an affirmative action program or other special program of the type referred to

in section 11(b) of the Code, if the evidence at the hearing has disclosed that the party engaged in a pattern or practice of contravening the Code.

33. The Respondent makes no offer under this head on the basis that the Complaint does not contain any allegations of a pattern or practice on the part of the Respondent in violation of the Code. The Commission concurs and submits that the Complaint does not contain any indication that the Respondent has a pattern or practice contravening the Code and that an adjudicator would be unlikely to order implementation of an affirmative action program if the Complaint were proven.

34. Ordering an affirmative action program or other special program is a special remedy that can be granted in cases where there is evidence of systemic discrimination. However, where a complaint contains no allegations that a respondent engaged in a pattern or practice in violation of the Code, an offer that does not include an offer under this remedial heading approximates the remedial order that an adjudicator would make under this section. (*Nash, supra*, para 44).

35. As a result, I find that the absence of an offer pursuant to section 43(2)(e) of the Code reasonably approximates or exceeds what an adjudicator would order under this section.

The Offer - Additional Terms

36. As set out in paragraphs 4 and 5 of the Offer, the Respondent proposes to provide to the Complainant a letter of reference, and a commitment that any oral inquiries will be directed to its Executive Director and that such inquiries would receive a response consistent with the letter of reference.

37. Although references do not fall specifically under any of the remedies contemplated by sections 43(2)(a) to (e) of the Code, they would in any event be useful to the Complainant, and further, are the type of remedy that ought to be considered when looking at the Offer "as a whole".

38. In addition, at paragraph 8 of the Offer, the Respondent proposes to provide to the Complainant, when available, two weekend passes to the Respondent's 2020 Festival. Again, although an offer of this type is not specifically contemplated by sections 43(2)(a) to (e) of the Code, the passes are the type of remedy that ought to be considered when looking at the Offer "as a whole".

39. Pursuant to paragraph nine of the Offer, the Respondent proposes that the Complainant sign a full and final release in favour of the Respondent, which release includes provisions related to confidentiality and a restriction on the Complainant from making any future disparaging or derogatory comments or communications with respect to the Respondent. Both the Commission and the Complainant concede that the terms of the release proposed by the Respondent are reasonable.

40. A settlement offer that requires a complainant to execute a release is prudent practice with a view to avoiding duplicate proceedings. (*Nash, supra*, para 49). Moreover, an offer that requires a complainant to execute a release with confidentiality clause in order to avoid potentially prejudicial publicity has been held to not render an offer as unreasonable. (*Collette, supra*, para 28; *Nash, supra*, para 47).

41. In addition, paragraph ten of the Offer proposes that the Commission will provide to the Respondent satisfactory written confirmation that all proceedings in respect of the Complaint have been terminated. At paragraph eleven, the Respondent acknowledges that the Commission may publically refer to the terms of the settlement, but requests that Commission not identify the persons or entities involved in this matter.

42. The Commission submits that the terms of paragraphs nine, ten and eleven serve the same purposes as in *Nash*, that is, avoiding duplicate proceedings and protecting confidentiality, and as such are not unreasonable.

43. I find that the inclusion of additional terms as contained in paragraphs nine and ten of the Offer are reasonable. At the hearing of this matter, counsel for the Respondent conceded that subsequent to the hearing, the Respondent was no longer in a position to request non-disclosure of the names of parties and entities involved.

Conclusion

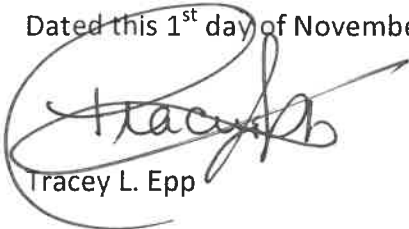
44. I find that the Respondent's offer addresses all of the remedial headings, arriving at an outcome that is the same or nearly the same as, or at least approximates, what an adjudicator would have ordered pursuant to section 43(2) of the Code.

45. Each of the Complainant, Respondent and Commission request that the Complainant be given one (1) week to "accept" the Respondent's offer.

46. For the reasons set out above, the motion is granted, and the adjudication of the instant complaint is hereby terminated. I have recorded for the record the assurance from the Respondent's counsel that the Respondent's Offer will remain open for one (1) week in order that the Complainant may accept same.

47. I draw to the parties' attention section 50(2) of the Code, which proposes a 30-day limitation for the bringing of any application for judicial review of this decision.

Dated this 1st day of November, 2019



Tracey L. Epp