

Manitoba Labour Board

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DISMISSAL NO. 1833

Case No. 281/07/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An application by

J.S.T.,

Applicant,

-and-

Canadian Union of Public Employees, Local 2153,

Persons Concerned,

-and-

**WINNIPEG CHILD AND FAMILY SERVICES,
PROVINCE OF MANITOBA,**

Respondent.

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

WHEREAS:

1. On April 20, 2007, the Applicant filed an Application (the “Application”) with the Manitoba Labour Board (the “Board”), seeking unspecified remedies pursuant to Section 31(4) of *The Labour Relations Act* (the “Act”) on the basis that, on or about October, 2003, April, 2004 and July, 2004, the Respondent Winnipeg Child and Family Services, Province of Manitoba (the “Respondent”) discriminated against him by failing to make “any reasonable accommodation as a result of disability arising in and out of employment ...” The Applicant alleges that the actions of the Respondent were in violation of Sections 20(a); 20(b); 5(3); 8; 13(1); 17; 26; 80(1); and 150(2) of the *Act*.
2. The Applicant alleges that Sections 8 and 20 of the *Act* have been breached by the Respondent/Employer. These Sections address unfair labour practices that relate to unions and they do not apply to employers. The Applicant named the Canadian Union of Public Employees, Local 2153 (the “Union”) as a Person Concerned only and not a party Respondent.
3. On May 28 and 29, 2007, the Applicant filed further documentation with the Board.

4. On May 29, 2007, following an extension of time, the Respondent, through Counsel, filed its Reply disputing the Application and asserts, *inter alia*, that the Board has no jurisdiction under the *Act* to grant the Applicant a remedy based on any alleged failure to make an accommodation on account of a (purported) disability. The Respondent further asserts that the Application, in its entirety, deals, in substance, with disciplinary and related matters between the Applicant and the Respondent and, as such, these matters are properly subject to the just cause and grievance/arbitration provisions of the April 1, 2003 to December 31, 2004 Collective Agreement (the “Agreement”) between the Respondent and the Union.
5. In the alternative, the Respondent submits that the Board not only ought to refuse to hear the Application pursuant to Section 140(7) of the *Act*, but also should dismiss the Application pursuant to Section 30(2) of the *Act* on account of the Applicant’s undue delay in filing the complaint. In summary, the Respondent asserts that the Board should dismiss the Application without a hearing on the grounds that there is no legal and factual basis for the Board to proceed under the *Act* because the Applicant has failed to demonstrate any *prima facie* breach of the *Act* and the Board ought to exercise its discretion and decline to take any further action pursuant to Sections 30(3) and/or 140(8) of the *Act*.
6. On May 30, 2007, following an extension of time, the Union, through Counsel, filed its Reply asserting that the Application raises no allegations that the Union breached the *Act* in any way and therefore the Application should, as it relates to or is intended to relate to the Union, be dismissed by the Board. Alternatively, insofar as any provisions of the *Act* which the Applicant alleges have been violated and which arguably relate to the Union, the Union asserts that the Applicant has failed to make out a *prima facie* case that Sections 5(3), 8, or 20 of the *Act* have been breached and that the Application ought to be dismissed without a hearing. The Union submits that the matters raised by the Application are not within the jurisdiction of the Board because, in substance, the matters of which the Applicant complains otherwise fall within the jurisdiction of an arbitrator under the Agreement and/or *The Human Rights Commission*. The Union also asserts that the Application should be dismissed on the basis of undue delay as no reasonable explanation has been offered by the Applicant for his failure to contact the Union for a period in excess of two (2) years regarding the matters referred to in the Application.
7. On June 4, 2007, the Applicant filed a Reply To Respondent.
8. The Board, following consideration of all material filed by the parties, has determined the following:
 - a) A hearing is not necessary in that the issues raised in the Application can be determined by a review of the written materials filed by the parties.

- b) The Board is satisfied that the substance of the Application relates to the decision of the Respondent to terminate the Applicant's employment for the reasons outlined in the letter to the Applicant dated April 29, 2004 (App. B to the Respondent's Reply). The Union filed grievances relating to the Applicant's termination of employment and other disciplinary measures taken by the Respondent in January and May of 2004. The Board accepts that, by August 10, 2004, these grievances, including the grievance relating to the termination of the Applicant's employment, had been denied by the Employer (App. H to the Respondent's Reply) and, that, by letter dated November 23, 2005 from the Union to the Respondent, the outstanding disciplinary grievances were withdrawn by the Union (App. I to the Respondent's Reply).
- c) The Union, on the basis of information available in 2004, decided not to proceed with the grievances, including the grievance relating to the termination of his employment in April of 2004 and that the Union's decision was communicated to both the Respondent and to the Applicant. While, by letter dated November 25, 2004, the Applicant requested the Union to "continue on" with his outstanding grievances, the Union replied to the Applicant on November 26, 2004, advising him that the Union Executive, following consideration of all material and a legal opinion obtained from Counsel, reconfirmed the decision not to refer outstanding grievances to arbitration. (Appendix A to Union Reply).
- d) As the substance of the Applicant's complaint now before the Board is that the Respondent failed to make any reasonable accommodation as a result of a disability arising out of his employment, and then, only in respect of events which transpired in 2003 and 2004, the Board is satisfied that the Applicant has "unduly delayed" the bringing of his complaint, pursuant to Section 30(2) of the *Act*. In this regard, the Board is applying the principle expressed in a number of its decisions that an unexplained delay beyond a period of six (6) to nine (9) months following the event complained of constitutes an unreasonable/undue delay. In these circumstances, the Application was filed well in excess of two (2) years following the last material event complained of by the Applicant, including the withdrawal of the grievances by the Union in November, 2004. The provisions of *The Limitations of Actions Act* relied upon by the Applicant have no application to a proceeding before the Board under the *Act*.
- e) Regardless of the finding in sub-paragraph (d), supra, the Applicant has failed to disclose a *prima facie* violation of any provision of the *Act* by the Respondent. Based on the material filed, the Applicant has failed to plead any material facts which could arguably constitute a breach by the Respondent of Sections 5(3), 13(1) or 17. Further, none of Section 26 (the duty of a bargaining agent and an employer to bargain in good faith); Section 13(1) (the duty to reinstate employees following strike or lockout); Section 80(1) (the deemed inclusion of a provision in a collective agreement) and Section 150(2), (the general/special damages provision) has any relevance to the facts pleaded in the Application.

- f) Conduct which may constitute an unfair labour practice is defined in Part I of the *Act* and the Application does not, on its face, disclose a *prima facie* breach of any substantive provisions in Part I of the *Act* in respect of conduct by an employer which may constitute an unfair labour practice. An allegation by an employee that he/she has been dismissed without just cause or for an improper reason does not, standing alone, constitute an unfair labour practice under the *Act*. In this case, the Applicant initially sought relief through the grievance/arbitration procedure of the Agreement but, in November of 2004, the Union withdrew the outstanding grievances, including the grievance relating to the Applicant's termination of employment. The Applicant cannot seek to enforce a purported breach of the Agreement by filing an unfair labour practice complaint under Section 30(1) of the *Act*.
 - g) To the extent the Application makes reference to the conduct of the Union under Sections 5(3), 8 and 20 of the *Act*, the Application, on its face, discloses that the Applicant knew of the Union's position in respect of the outstanding grievances in November of 2004. Therefore, the Applicant has unduly delayed the filing of his complaint(s) against the Union, contrary to Section 30(2) of the *Act*. Further, the Application fails to disclose a *prima facie* case that the Union breached any or all of Sections 5(3), 8 and 20 of the *Act*.
 - h) That the Applicant contacted the Union on or about January 18, 2007 to advise the Union that there was further medical information to support his claim that the Respondent filed to reasonably accommodate him in 2004 and the fact that the Union is currently investigating the significance of this medical evidence to determine if it is linked to the events in 2003 and 2004 do not affect the disposition of this Application because the core issue arising from any new evidence of this nature still relates to the Respondent's alleged obligation to reasonably accommodate the Applicant's purported disability at the time of his termination in 2004 and that issue does not fall within the jurisdiction of the Board.
9. Based on the foregoing, the Board **DECLINES** to take any further action on the Application pursuant to Section 30(3) of the Act and, accordingly, the Application is to be dismissed.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the application filed by J.S.T. on April 20, 2007.

DATED at **WINNIPEG**, Manitoba, this 5th day of July, 2007, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

W.D. Hamilton – CHAIRPERSON

WDH/ar/rb-s