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DISMISSAL NO. 1935
Case No. 112/09/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

J.E., A.P., J.W.M. and D.E.,

Applicants,

- and -

BRANDON UNIVERSITY and BRANDON UNIVERSITY FACULTY ASSOCIATION,

Respondents.

BEFORE: W. D. Hamilton, Chairperson
I. Giesbrecht, Board Member
M. Wyshynski, Board Member

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

SUBSTANTIVE ORDER

WHEREAS:

1. On April 20, 2009, the Applicants filed an application (the "Application") seeking various remedies for alleged unfair labour practices committed by the Respondent Brandon University (the "University") and the Respondent Brandon University Faculty Association ("BUFA" or the "Union"), contrary to various provisions of *The Labour Relations Act* (the *"Act"*). The Applicants J.E., A.P., and D.E. retired on September 1, 2008, having been employed as faculty members by the University prior to that date. The Applicant, J.M. retired as a faculty member of the University on December 31, 2008. The essence of the claim(s) advanced by the Applicants is that when the University and the Union negotiated, ratified and signed a new collective agreement covering the term April 1, 2008 to March 31, 2011 (the "Agreement"), those parties failed to make two (2) pension improvements retroactive to April 1, 2008 and, as a consequence of that omission, "… the Applicants have been deprived of between $6,000.00 to approximately $10,000.00 per year in pension benefits depending on their retirement date." The Applicants allege that, by the

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Respondents failing to make these pension provisions retroactive, the Applicants were deprived of benefits and, in the result, that the University and the Union discriminated against the Applicants on the basis of their retired status, contrary to the Human Rights Code (the "Code") and the *Act*. Further, the Application asserts that the University's refusal to make the said pension provisions retroactive "… for their small group was a discriminatory act done for the purposes of punishing J.E. for his perceived union activism and on the basis that the Applicants were retired."

2. In more particular terms, the Applicants submit that the University committed unfair labour practices in violation of Sections 5, 7, 17 and 26 of the *Act*, as well as certain provisions of the Code by refusing to make the said pension provisions retroactive and by discriminating against the Applicants on the basis of their union activity and/or retired status. As to their claim against the Union, the Applicants submit that the Union committed unfair labour practices in violation of Sections 8, 20 and 26 of the *Act*, in addition to provisions of the Code, on the same grounds. In paragraph 17 of the Application, the Applicants allege that the two Respondents, by discriminating against the Applicants, failed to bargain in good faith as required by Section 62 and 63 of the *Act* and therefore, have violated Section 26 of the *Act*.

3. As to remedial relief, the Applicants request the following:

> "a) A declaration that the University and the Association have committed unfair labour practices;
> b) An order that the University and Association cease and desist from committing the unfair labour practices and otherwise violating *The Labour Relations Act* and/or *The Human Rights Code*;
> c) An order that the University and the Association pay $2,000.00 to each of the Applicants;
> d) An order that the University and Association amend the Collective Agreement provisions, as they relate to pension benefits, retroactive to April 1, 2008;
> e) An order that the University and Association rectify and provide restitution in respect of the losses suffered by the Applicants as a result of the unfair labour practices;
> f) An order that the University and Association post a copy of the Board's decision and order in the workplace and distribute a copy of each to the members of the Association immediately following the date of the decision and order;
> g) An order that the University and Association do anything else equitable to be done to remedy the consequences of the unfair labour practices.

4. On May 11, 2009, following an extension of time, the University, through Counsel, filed its Reply submitting, on various grounds, that the Application ought to be summarily dismissed. In summary form, the University submits:

   (a) As none of the Applicants were employees of the University at the time the Application was filed, the Board has no jurisdiction to entertain the Application;
   (b) The Application was only filed on behalf of J.E., (he being the only Applicant taking the required Statutory Declaration on Form A) and therefore the Application must be summarily dismissed in respect to of A.P., J.M. and D.E.;
   (c) The Application does not disclose a *prima facie* case as none of the actions of the University amount to a breach of the *Act*;
   (d) The Applicants have no status to file a complaint pursuant to Section 26 of the *Act* as only a union or an employer, being parties to the collective bargaining relationship, have the right to file an application alleging that there has been a breach of the duty to bargain in good faith and/or to make every reasonable effort to include a collective agreement (i.e. Section 62 of the *Act*);
   (e) The allegations against the University in respect of Section 5, 7 and 17 have no factual underpinnings for any applicant, other than J.E., and making a distinction regarding the Applicants (i.e. discrimination) due to their retired status is not prohibited under either the *Act* or the Code. During collective bargaining, it is lawful to treat retired faculty differently than active faculty members;
   (f) The University asserts that the Applicants are not entitled to the relief requested in the Application and that, in particular, the Board has no jurisdiction to rewrite the Agreement negotiated and ratified by the Respondents and the members of the Union;
   (g) The fact that none of the amendments made to pension benefits was retroactive to April 1, 2008, resulted from positions taken during collective bargaining between the Respondents;
   (h) In the result, the University submitted that the Application did not disclose a *prima facie* case and that it ought to be dismissed.

5. On May 13, 2009, following an extension of time, the Union, through Counsel, filed its Reply alleging that the Applicants have failed to establish a *prima facie* case and that, even if proved, the allegations contained in the Application do not amount to an unfair labour practice and, therefore, the Application should be dismissed without a hearing. The Union submits that pension improvements were not made retroactive to April 1, 2008 and the improvements which were negotiated, one of which took effect on date of ratification of the Agreement and the other on April 1, 2009 (see Appendix F to the Agreement) was a product of collective bargaining. The Union also submits the following:

   (a) Sections 62 and 63 of the *Act* impose an obligation to bargain in good faith only on the Union and the University and therefore Sections 26, 62 and 63 of the *Act* have no applicability to an application commenced by the individual Applicants;

(b) The Applicants were not employees and therefore owed no duty of fair representation by the Union under Section 20 of the *Act*, but, in any event, the obligations imposed on a union pursuant to Section 20 of the *Act* do not apply to collective bargaining but only apply to rights arising in the administration of the Agreement;

(c) Section 8 of the *Act* is inapplicable because the fact that one group of employees does not receive a benefit which the group wants during bargaining does not amount to discrimination, as contemplated by Section 8;

(d) The Application is untimely and ought to be dismissed on account of the delay in filing the Application because the Applicants were or ought to have been aware of the ratified provisions of the Agreement on or about October 23, 2008; and

(e) The complaints of the Applicants other than J.W.E., not being supported by the required Statutory Declaration, should be struck from the Application.

6. On July 22, 2009, the Board advised all parties that it had some concerns in respect of the status of the (purported) Applicants A.P., J.W.M. and D.E. given the absence of any Statutory Declaration from these individuals, as required by the Board's Rules. In the circumstances, the Board sought certain written assurances, to be verified by statutory declarations filed on or before July 31, 2009, that A.P., J.W.M. and D.E. were, prior to April 20, 2009, aware of the fact that the Application was being filed on their behalf; that they were aware of the contents of the Application and that they properly authorized J.E. to file the Application naming them as Applicants.

7. Further, in its notice to the parties dated July 22, 2009, the Board advised the parties that this matter will proceed to a hearing in order to address a number of preliminary issues as to whether or not J.E., (or any other Applicants who may be properly joined in the matter) have established a *prima facie* case. In this regard, the Board notified the parties as follows:

> "In order to establish a *prima facie* case, an applicant must satisfy the Board that there are facts contained in an application, that if proven, and not rebutted or contradicted, would support a conclusion that the respondent(s) has breached one or more sections of *The Labour Relations Act* (the "*Act*") referred to in an application. If an applicant satisfies the Board that there is a *prima facie* case, then the Board shall direct that the matter proceed, in whole or in part, to a full hearing of the evidence and argument relating the application. If, however, the Applicant is unable to satisfy the Board that there exists a *prima facie* case, then the application shall be dismissed.
>
> In particular, on the question of whether a *prima facie* case exists, the following questions must be addressed at a hearing convened for this purpose, namely:

1. As it is undisputed that the Applicant J.E. (and the other purported Applicants) were not "employees" of the University at the time the Application was filed on April 20, 2009, do the Applicant(s) have any status to bring the Application?

2. As to the allegations against the University:

   a. Does the Application, as pleaded, disclose a *prima facie* case that Section 5 of the *Act* has been violated by the University?
   b. Does the Application, as pleaded, disclose a *prima facie* case against the University that Section 7 of the *Act* has been violated by reference to one or more of clauses (a) to (h) of that Section, thereby requiring the University to satisfy the Board that it did not breach Section 7 for any of the reasons set out in clauses (a) to (h)?
   c. Does the Application, as pleaded, disclose a *prima facie* case that the University has violated either Section 17(a) or 17(b) of the *Act*?

3. As to the allegations against the Association, does the Application, as pleaded, disclose a *prima facie* case that the Association has breached Section 8 of the *Act*, thereby requiring a full answer from the Association?

4. In view of the jurisprudence of the Board that Section 20 does not apply to the collective bargaining process itself because the bargaining process does not involve, "… representing the rights of any employee under the collective agreement" [see, for example, ***K.D. – and – Members of CAW Local 2169 – and – Boeing Canada Technology and CAW, Local 2169*** (2007), M.L.B. 133/07/LRA], does J.E. (or any other applicant who may be properly joined to this Application) have the right/status to allege that the Association, as bargaining agent, and/or the University, as Employer, have failed to bargain in good faith and make every reasonable effort to conclude a collective agreement, as required by Section 62 and 63 of the *Act*, thereby violating Section 26 of the *Act*.

8. On July 31, 2009, A.P., J.W.M. and D.E., through Counsel, filed Statutory Declarations in response to the concerns raised by the Board in its letter of July 22, 2009 regarding the status of those individuals.

9. On August 13, 2009, the Board informed the parties that it was satisfied that A.P., J.W.M. and D.E. were properly joined as Applicants to the Application. Accordingly, the parties were advised by letter dated September 4, 2009 that the matter would proceed to hearing on the preliminary issues identified by the Board in its letter of July 22, 2009.

10. On November 2, 2009, the Board conducted a hearing, at which time all parties appeared before the Board to present submissions and argument through their respective Counsel on the preliminary issues as to whether or not the Application disclosed a *prima facie* case.

11. Based on the facts disclosed in the pleadings filed by the parties, the following material facts are applicable to the issues before the Board:

    (a) Under Certificate No. MLB-3976, dated January 3, 1986, the Board certified the Union as the exclusive bargaining agent for a unit of academic and instructional staff employed by the University as described in the Certificate.

    (b) Negotiations leading to the conclusion of the Agreement took place over a period of some seven (7) months. A tentative agreement was reached between the University and the Union on or about October 15, 2008, with the members of the bargaining unit represented by the Union ratifying the Agreement on or about October 30, 2008. The Agreement was executed by the parties on November 10, 2008.

    (c) The conclusion of the Agreement resulted in two (2) pension improvements, one of which came into effect on the date of signing of the Agreement, and other improvement coming into effect on April 1, 2009. These improvements are revealed in Appendix F .7.4 as follows:

> "(c) <u>For BUFA Members who retire on or after the date of signing of this collective Agreement,</u> the Normal Form of pension (Article 8.1 of the Brandon University Retirement Plan) shall be changed to the form of pension currently known as the "Mandatory Survivor Pension" and commonly referred to as "joint and 2/3 survivor" for members who have an eligible spouse at retirement, i.e. the joint and 2/3 form of the pension shall not be actuarially reduced to account for the spousal entitlement. The costs associated with the change shall be financed by the Employer through an increase in the Employer contribution levels under Article 4.1 and/or 4.2 of the Brandon University Retirement Plan text, in addition to those specified in F.7.3 above. The increased Employer contribution level shall be based on the cost of this improvement as recommended by the Plan actuary. The Employer will not finance this benefit through the use of actuarial surplus of the Plan.
>
> (d) <u>For BUFA Members who retire on or after 1 April 2009,</u> the maximum pension, as referenced under Article 7.4 of

> the Brandon University Retirement Plan, shall be $1,975 per year of service, for all years of service. The costs associated with the change shall be financed by the Employer through an increase in the Employer contribution levels under Article 4.1 and/or 4.2 of the Brandon
>
> specified in F.7.3 above. The increased Employer contribution level shall be based on the cost of this improvement as recommended by the Plan actuary. The Employer will not finance this benefit through the use of actuarial surplus of the Plan.
>
> (e) Effective 1 April 2009, BUFA members' contributions to the Plan shall increase by 0.5% of earnings."
> (Emphasis added)

No member of the bargaining unit received retroactive improvements to the pension plan, effective as of April 1, 2008.

(d) A review of the Agreement reveals that the salary scale was retroactive to April 1, 2008 (Appendix F.1). This provision also stated:

> "A one time payment equivalent to retroactive salary adjustments will apply to members who have retired or terminated their employment between 1 April 2008 and the date of signing this agreement. These payments are not subject to university pension or other employee group benefits."
>
> This provision would have applied at least to J.E., D.E. and A.P.. Appendix F.5 of the Agreement reveals that sessional stipends were adjusted effective September 1, 2008.

(e) Mileage and meal allowances were made effective the date of signing of the Agreement (see Appendix H.2 of the Agreement).

(f) The Application does not contain factual allegations regarding any union activities of D.E., A.P. and J.W.M.. No facts were pleaded in respect of these three Applicants alleging, even in a *prima facie* way, that the University and/or the Union took any (prohibited) actions regarding these three Applicants due to their union involvement, activity, or membership.

(g) Insofar as J.E. is concerned, Paragraph 12 of the Application asserts that J.E. is an active member of the Union and that during his employment and thereafter

> "… he was regarded by the University to be a union activist." Further, Paragraph 14 of the Application asserts that J.E.'s e-mail account provided by the University was cut off and his personal e-mail account was blocked from access to the University on April 14, 2008, and was not restored until May 3, 2008, at the direction of the President of the University and as a consequence, it is alleged that J.E. missed critical negotiation updates from the Union.
> Board will accept the foregoing statements as being substantially true for the purposes of the question of whether a *prima* facie case has been established.

12. The Board assessed the issues before it in accordance with the following general principles:

(a) When assessing whether a *prima facie* case exists in respect of a particular statutory provision there must be more than a bare allegation or assertion. Rather, there must be a sufficient factual foundation evident in the Application in order to enable the Board to draw reasonable conclusions therefrom, which, at a minimum, would call for an answer from a respondent. Unsupported allegations, without any factual underpinnings, entitle the Board to conclude that a *prima* facie case has not been established. This approach is evident in *B.K. - and- Director, Workplace Safety & Health -and- Barkman Concrete Ltd.* (Case No. 27/08/WSH) where in respect of the reverse onus provision of Section 42.1(4) of *The Workplace Safety & Health Act* (the "WSHA"), (analogous to Section 7 and 8 of the *Act)*, the Board observed at page 10 in respect of Section 42.1(4) of the WSHA:

> > "There must be a reasonable basis to conclude that the worker has conducted himself/herself in a manner described in Section 42(1) in relation to the discriminatory action. There must be some reasonable evidence before the tryer of fact that a worker … has engaged in one or more of the types of conduct referred to in Clauses (a) to (h) of Section 42(1) and that such conduct can be linked to the discriminatory action in a *prima facie* manner."

In *Krahn*, the Board noted that a "… a *prima facie* enquiry does not require an appellant (here, Applicants) to meet an onus which, in effect, displaces or subsumes the ultimate onus that falls on an employer or union under the presumption in Section 42.1(4)". Nevertheless, the Board also noted in *Krahn* "… there must be a nexus established between the action taken and one of the protected forms of conduct in Section 42(1)" (p.11)

(b) Whether or not a *prima facie* case exists regarding one of the specific unfair labour practice provisions contained in Part 1 of the *Act* must be determined by reference to the wording of that specific section. In this regard, Section 30(1) of

the *Act* which states that any employer, employee or other person, or any union or employers' organization may file a written complaint in respect of an unfair labour practice is a general authorizing section but any determination regarding who has status to bring an application and what elements are required to be proved in any given case must be determined by the specific section defining the unfair labour practice at issue.

(c) The Board notes (confirmed by counsel for the Applicants) that there is no allegation that the provisions relating to the pension plan, *supra,* are illegal in the sense that the parties negotiated a provision that is prohibited by law or contrary to a specific statutory provision. The basis of the Application is that the Applicants, as retirees, were not afforded these pension benefits on a retroactive basis during collective bargaining between the University and the Union.

(d) The Board accepts that, during collective bargaining, parties will make "distinctions" between or among various classifications or categories of employees (eg. full-time, part-time, and casual) and, for any number of reasons, improvements to existing benefits or the introduction of new monetary benefits are often implemented at different times during the term of a new collective agreement. This is not unusual in collective bargaining and either the timing regarding the introduction of new or improved benefits or the fact that only certain categories or classifications of employees are entitled thereto is not illegal. Making a distinction between or among different groups of employees during collective bargaining is not a form of discrimination prohibited by law unless it reflects a prohibited motive, contrary to law.

(e) The essence of the Application relates to the results achieved in collective bargaining between the Respondents regarding pension improvements.

(f) The Board does not function as a surrogate Human Rights Commission (the "Commission") and, has no jurisdiction to assess whether any provision of the Code was violated. This falls within the jurisdiction of the Commission.

13. The Board, the context of the facts and principles recited in paragraphs 11 and 12, and after considering the material filed and submissions made, has **DETERMINED:**

(a) As to the assertion of the Union that the Application is untimely and should be dismissed as a result of delay, the Board is satisfied there was no "undue delay" in the filing of the Application, as contemplated by Section 30(2) of the *Act*. Accordingly, the Application will not be dismissed on this basis. In reaching this conclusion, the Board had regard to its generally accepted principle that undue delay is to be determined by reference to a filing of an application after 6 to 8 months, following the alleged breach. See *Kepron v. Brandon University*

Faculty Association (2004) 103 CLRB (2d) 102, particularly the distillation of principles and authorities commencing at page 137 thereof. As the Application was filed approximately 6 months following the date of ratification of the Agreement, it is timely within the principles discussed in *Kepron.*

(b) Insofar as the Applicants allege that the University and the Union failed to bargain in good faith, as required by Sections 62 and 63 of the *Act*, when the breaching Section 26 of the *Act*, the Application is dismissed. Section 26 of the *Act* states:

> "Every party to collective bargaining which fails to comply with any requirement of, as the case may be, Sections 62 or 63 in the circumstances described therein commits an unfair labour practice." (Emphasis added)

The applicable provision here is Section 63, and it imposes an obligation to bargain collectively in good faith and make every reasonable effort to conclude a renewal or a revision of a collective agreement on the *parties* to the collective agreement. Individual employees represented by a bargaining agent, who are ultimately bound by any collective agreement reached between an employer and a bargaining agent, following proper ratification pursuant to Section 69(1) of the Act, do not have the status to bring an application pursuant to Section 26 of the *Act*. This right is reserved exclusively to the parties to the collective bargaining regime, namely, the employer or the exclusive bargaining agent. In this regard, see *Construction Labour Relations Association of Ontario* [2007] OLRB Report May/June 600 at Para. 16; *SNC-Lavelin Power Ontario Inc.* [2007] OLRB Report July/August 800, particularly Para. 24; *Re Gallagher and Robert Lougheed and Hotel Employees and Restaurant Employees International Union Local 47 and Alberta Camp Enterprises Ltd*. 8 et al [1992] Alta. LRB 459, at p. 22. See also *Albert Mills et al* v. *The Canadian General Electric* [1980] OLRB Report August 1179, (Adams), at Paragraphs 13, 14, 15. The Board affirms the principles applied in these cases.

(c) Insofar as the Application alleges that the Union breached Article 20 of the *Act*, the Application is dismissed. The jurisprudence of the Board clearly establishes that Section 20 does not apply to the collective bargaining process itself because the bargaining process does not involve "… representing the rights of any employee under the collective agreement." [See *K.D. –and- Members of the CAW Local 219 and Boeing Canada Technology and CAW L2169I (2007)* MLB 133/07/LRA].

(d) Insofar as the Application alleges a breach of Section 5 of the *Act* by the University, the Applicants have failed to establish a *prima facie* case, on the

facts pleaded. This is certainly the case in respect of J.W.M., D.E. and A.P., because there are no facts pleaded on their behalf which would engage Section 5(1) of the *Act* at all. Similarly, as to J.E., the assertions contained in the Application on his behalf do not establish a reasonable or sufficient nexus to establish a *prima facie* violation of Section 5.

(e) Insofar as the Application alleges the University breached Section 7 of the *Act*, the Applicants have failed to establish a *prima facie* case that Section 7 has been breached. The subsections upon which the Applicants rely in Section 7, are subsections (a), (b), and (h). In the case of D.E., J.W.M. and A.P. there were no facts pleaded regarding any union involvement on their part or in respect of any actions taken by the University. Therefore, subsections (a) and (b) can have no application to them. As to J.E., the bare assertion that he was a "union activist" and the reference to the cutting off of e-mails for three weeks in April/May of 2008, some 5 months prior to the conclusion of bargaining and the ratification of the Agreement, does not, in the Board's view, establish a proper factual foundation or nexus to establish a *prima facie* violation of Subsections (a) and (b) of Section 7. Further, the Application does not disclose that the University "… discriminated in regard to employment" against any of the Applicants based on their retired status or because they have exercised or is exercising his rights under this or any Act of the Legislature or of Parliament ..." The fact that the Applicants chose to retire at the time(s) they did, and that, during collective bargaining, the parties differentiated between retired employees and active faculty does not disclose "discrimination" in the pejorative or illegal sense, nor is the negotiation of pension benefits on this basis contrary to the *Act*. In reaching this conclusion, the Board notes that neither of the two pension improvements were made retroactive for <u>any</u> member of the bargaining unit, including active faculty members. The fact is that, at the time these benefits came into effect, the Applicants were not entitled to them because they had retired in the normal course.

(f) Insofar as the Application alleges that the Union discriminated in regard to employment, a term or condition of employment, membership in the Union or imposed a pecuniary or other "penalty" on the Applicants, contrary to Section 8 of the *Act*, the Application fails to disclose a *prima facie* case. There are no facts pleaded which would allow the Board to reasonably conclude that the Applicants had engaged in any of the forms of conduct referred to in subclauses (a) to (e) of Section 8.

(g) Insofar as the Application alleges that the University breached Section 17 of the *Act*, the Application does not reveal a factual basis to establish a *prima facie* case that the University violated either subclauses (a) or (b) of Section 17. In particular, the Board is not satisfied that the Application discloses a *prima facie*

case in the sense that the Applicants were denied pension rights or benefits for any of the grounds referred to in Section 17 (a)(i), (ii), or (iii) of the *Act*.

(h) In making the foregoing determinations in respect of "discriminatory conduct" the Board applied the principle that not every difference in treatment among employees amounts to illegal discriminatory conduct. To be prohibited conduct, there must be an action taken which will result in a difference in treatment that has no labour relation rationale or reflects a prohibited form of conduct and/or motive. Mere dissatisfaction with the result of the collective bargaining process, by an individual employee or group of employees does not, standing alone, amount to a violation of Sections 7, 8, 17 of the *Act*.

(i) It is not necessary to address the position(s) of the Respondents that the Applicants had no status to bring the Application because, at the time of the filing of the Application, they were not "employees" of the University. Addressing this "status" issue is not required due to the foregoing determinations of the Board regarding the Sections of the Act relied upon by the Applicants.

14. Having regard to the findings in Paragraph 13, the Board is satisfied that the Applicants have failed to establish a *prima facie* case that either or both Respondents violated the provisions of the *Act* pleaded in the Application. In the result, it follows that the Application will be dismissed.

T H E R E F O R E

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by J.E., A.P., J.W.M. and D.E. on April 20, 2009.

DATED at **WINNIPEG**, Manitoba this 27th day of November, 2009, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

W. D. Hamilton, Chairperson

"Original signed by"

I. Giesbrecht, Board Member

"Original signed by"

M. Wyshynski, Board Member

WDH/ar/rb-s