MANITOBA LABOUR BOARD
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CASE NOS. 239/09/LRA and 114/09/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

L.K.Y.W.,

Applicant,

- and -

Canadian Union of Public Employees, Local 998,

Respondent,

- and -

MANITOBA HYDRO,

Employer.

BEFORE: C. S. ROBINSON, Vice-Chairperson

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

REASONS FOR DECISION

The Applicant filed an Application Seeking Review and Reconsideration of Dismissal No. 1915 issued by the Board on July 30, 2009. In Dismissal No. 1915, the Board determined the Applicant had unduly delayed in filing his Application Seeking Remedy for Alleged Unfair Labour Practice contrary to section 20(b) of *The Labour Relations Act* (the "*Act*") and, accordingly, dismissed the Application pursuant to section 30(2) of the *Act*. In the present Review and Reconsideration Application, the Applicant submits that he was "medically incapable" of filing his Application in a more timely manner and he requests that the Board review and reconsider its decision and address the merits of his original Application. The Respondent replied that the present Application should be dismissed. The Employer elected

not to file a Reply.

The Board has determined that an oral hearing is not necessary as this matter can be determined by a review of the written material filed by the parties. The Application Seeking Review and Reconsideration of Dismissal No. 1915 is dismissed for the reasons that follow.

A brief review of the background to the present Application is as follows. The Applicant filed his unfair labour practice Application on April 23, 2009. The Applicant alleged that "Between 1994 and 2007" the Respondent repeatedly failed to comply with section 20 of the *Act*. He asserted that the Respondent acted in a "discriminatory, dishonest and bad faith manner" towards him. He attributed the Respondent's failure to comply with section 20 of the *Act* to certain members of the Respondent's executive harbouring a "personal dislike" for him. He alleged that the Respondent "conspired" with the Employer for many years to negatively impact his career progression and earning potential. He further claimed that the Respondent and Employer had a "mutual desire to get rid" of him. The remedial relief requested by the Applicant included a declaration that the Respondent repeatedly acted in a discriminatory, dishonest and bad faith manner and that the Board order the Respondent to "pay the cost of independent counsel to prepare my case and represent me in a possible future arbitration hearing or civil lawsuit pertaining to the Respondent and the Employer conspiring to deliberately ruin my mental and physical health and the Employer terminating my employment on November 27, 2008 without cause and in contravention of the Collective Agreement". It should be noted that the Employer specifically denied that it has terminated the Applicant and asserted instead that "he has been off work on either paid sick leave or Long Term Disability since January 25, 2007".

In their Replies to the unfair labour practice Application, the Respondent Union and the Employer took the position that the Applicant had unduly delayed in filing his Application and that it should therefore be dismissed without a hearing. In response to those positions, the Applicant responded that due to his documented disability and the fact that he was off work in receipt of Long Term Disability benefits, he was unable to file his complaint with the Board any earlier. Following consideration of all of the material filed, the Board issued Dismissal No. 1915

dated July 30, 2009 pursuant to section 30(2) of the *Act* having concluded that the Applicant unduly delayed in the filing of the complaint.

As noted above, the present Application requests that the Board review and reconsider that decision. The Applicant maintains that he was "medically incapable of meeting the unspecified time limitation" in the *Act*. In support of this position, the Applicant provided the Board with twelve "medical documents" prepared from March 6, 2006 to December 8, 2008 which outline diagnoses of his medical condition.

The Board is not satisfied that the particulars and medical documentation which the Applicant provided establish that his medical condition was such as to prevent him from filing a timely complaint against the Respondent with the Board.

The particulars provided by the Applicant indicate that he was capable of filing, and he did file, a number of complaints and requests with various tribunals and government offices related to his employment and health issues in the years 2007 and 2008. For example, the Applicant states that he filed an Application with the Manitoba Human Rights Commission on July 5, 2007. The Applicant also notes that he filed a complaint with the Ombudsman on an unspecified date. In addition, he was capable of making a request under *The Personal Health Information Act* in or about 2007. The Applicant also provided the Board with a copy of a letter addressed to the Chairperson of the Psychological Association of Manitoba from a medical professional in response to complaints made by the Applicant against that medical professional in 2008. Finally, the Board notes that the Applicant, according to medical documentation provided by him, was capable in early 2007 of providing his doctors with "workplace related documentation including an 18 page summary of situations in which you perceived harassment/bullying, intimidation, discrimination, work abuse, and reprisals". As the Board stated in *Re Moreau and M.A.H.C.P.* (2004), 102 C.L.R.B.R. (2d) 263: "ascribing priority to other complaints or applications is not an acceptable explanation, in all of the circumstances" for unduly delaying in filing a complaint with this Board.

The Applicant also disclosed in his Application Seeking Review and Reconsideration that in November of 2007 he "retained the legal services of [a] prominent employment and human

rights lawyer [name omitted] to prepare my MLRB complaint against CUPE Local 998 whom I suspected had colluded with Manitoba Hydro…" However he says that counsel advised him that the Respondent Union "might be of assistance in my Manitoba Human Rights Commission complaint against Manitoba Hydro". The Applicant states that he "parted company" with his counsel in December 2008 due to "disagreements". Clearly, in late 2007, the Applicant contemplated filing a complaint with the Board against the Respondent and retained counsel to advise and assist him in that regard. Nevertheless, and despite having very experienced counsel from November 2007 until December 2008, the Applicant further delayed filing his Application with the Board until April 23, 2009, a period of approximately 17 months. It is clear on the face of the Applicant's submissions that following consultation with counsel, he made a conscious decision to delay filing his Application with the Board against the Respondent in hopes of gaining the Respondent's assistance with his complaint filed with the Manitoba Human Rights Commission and not because he was medically incapable of filing a complaint with this Board.

Section 30(2) of the *Act* enables the Board to refuse to accept a complaint where its filing has been unduly delayed. Section 30(2) reads as follows:

> **Undue delay**
> 30(2) The board may refuse to accept a complaint filed under subsection (1) where, in the opinion of the board, the complainant unduly delayed in filing the complaint after the occurrence, or the last occurrence, of the alleged unfair labour practice.

Undue delay has been interpreted by the Board to mean periods of as little as six months in duration. In *Kepron v. Brandon University Faculty Association* (2004), 103 C.L.R.B.R. (2d) 102, Vice-Chairperson Hamilton, as he then was, comprehensively reviewed section 30(2) of the *Act* and a number of the Board's decisions relating thereto. Commencing at page 137 (paragraph 53), he stated as follows:

> First, section 30(2) is a discrete provision which applies to any unfair labour practice application brought before the Board. The discretion reserved to the Board under this section may be invoked regardless of whether or not a *prima facie* case is established under section 20. While the Board recognizes that the issues of "undue delay" and "*prima facie*" case are often intertwined, the fact is

> the Legislature has empowered the Board the power to address "undue delay" as an independent issue….
>
> So, leaving aside (for the moment) Kepron's reasons for the delay, there can be no question that, by any objective standard, three years constitutes undue delay within the meaning of section 30(2). In these circumstances, Kepron clearly bears an onus (whether one wishes to call it a legal or practical onus is of no moment) to convince the Board that the circumstances of his case are extraordinary. It is our opinion that he has failed to satisfy this onus….
>
> Fourth, in its previous decisions, this Board has stated that its normal rule or practice is not to entertain a section 20 complaint if it is filed some six to eight months beyond the event(s) referred to in the complaint. We took this jurisprudence into account when arriving at our opinion. A brief reference to some of the Board's decisions is warranted. In *K. Scheurfeld - and - Canadian Paperworkers Union, Local 830 - and - I.W.A. Local 830 - and - Domtar Inc.* [1995] M.L.B.D. No. 4 (Quicklaw), ("*Scheurfeld*"), an employee filed a section 20 complaint some 28 months after his employment had been terminated, claiming that the union(s) had not taken reasonable care to represent him when they did not take his dismissal to arbitration. The unions submitted that a lapse of 28 months constituted undue delay. On the facts prevailing, the Board found that there had been undue delay and the application was dismissed.

In his unfair labour practice Application, the Applicant claimed that the Respondent repeatedly violated section 20 of the *Act* between 1994 and 2007. Having filed his Application in April of 2009, the delay in advancing these claims ranges from approximately 17 months to 15 years in duration. Rarely, if ever, has this Board been confronted with such an extreme example of undue delay. As the Board noted in *Scheurfeld,* supra, one of the primary functions of any adjudicative body, especially in matters relating to labour relations, is to deal with matters in a prompt and expeditious fashion. The detrimental effects of delay are largely self-evident: memories may fade; witnesses may not be available; documentary material may be lost; and if no complaint has been advanced in a reasonable period of time, parties may assume that matters are resolved or will otherwise not be litigated. In *Re Janzen and Director of Workplace Safety and Health*, [2005] M.L.B.D. No. 13 (leave to appeal denied by the Manitoba Court of Appeal at 2006 MBCA 17 per Scott C.J.M.), the Board stated that: "Delay in advancing a claim can have profound and corrosive effects upon the ability of the responding party to fairly defend itself".

Where extreme delay is evident, as in the present case, labour relations boards, including this Board, have accepted that such delay is inherently prejudicial to the responding party's

ability to address the allegations brought against it. For example, in *Keystone Generator and Starter Rebuilders Limited*, [1995] O.L.R.D. No. 5241, the Ontario Labour Relations Board concluded as follows, commencing at paragraph 9:

> In terms of prejudice to the responding party, although the Board will normally require parties seeking to have an application dismissed for undue delay to provide some evidence of specific prejudice resulting from the delay, in cases where the delay is "extreme", the Board is prepared to assume that the lapse of a significant period of time is corrosive on the memory of witnesses and, therefore, that the ability of a party to prepare its defence to the allegations raised is significantly impaired. In such circumstances, the opposing party need not establish prejudice because the prejudice is assumed, and the onus of explaining the reasons for the delay shifts to the applicant (see SHELLER GLOBE, [1982] OLRB Rep. Jan. 113 and JOHN KOHUT, [1991] OLRB Rep. Dec. 1367).
>
> Applying these principles to the facts of this case, it is evident that the two-year delay in bringing the application is extreme and I have concluded that the responding party is significantly prejudiced by the applicant's delay.

In the present case, in addition to the prejudice inherent in cases of extreme delay, the Respondent Union pointed to actual prejudice in answering the Applicant's dated complaints. In its Reply to the original Application, the Union pointed out that two of its former executive members whom the Applicant identified as having a personal dislike for him, were retired and no longer involved with the Union. More troubling, the Respondent noted that a third former Union executive member, whom the Applicant alleged harboured personal animosity towards him, was now deceased. It should be noted that the Applicant identified the personal animosity of four former executive members and one current executive member as "the underlying reason for the Respondent's repeated failures in its duty of fair representation".

In conclusion, there is no question that the Applicant's delay in advancing his unfair labour practice Application was extreme and undue. The Board has consistently held that delay in excess of six months may be considered undue and an application may be dismissed on that account under section 30(2) of the *Act*. The delay in the present case ranges from approximately 17 months to 15 years. That quantum of delay is magnitudes beyond what this Board has previously characterized as undue. The Applicant's contention that he was medically incapable of filing his unfair labour practice application in a timelier manner is not established on the basis

of the medical documentation which he provided. Moreover, it is clear that he was capable of filing applications with the Manitoba Human Rights Commission and other tribunals and government offices in 2007 and 2008. Finally, the Applicant retained counsel in November of 2007 in order to prepare his complaint to be filed with this Board regarding his allegations against the Respondent, however, he chose not to do so and instead delayed until late April 2009 to file with the Board.

The Board is satisfied that the Applicant has not provided any new evidence or advanced any particulars or submissions sufficient to persuade it that its original decision should be reviewed or reconsidered. Accordingly, for the reasons set out herein, the Application Seeking Review and Reconsideration is dismissed.

DATED at **WINNIPEG**, Manitoba, this 30th day of October, 2009 and signed on behalf of the Manitoba Labour Board by

"Original signed by"

C. S. ROBINSON, Vice-Chairperson

CSR:tj/rb-s