Manitoba Labour Board
Suite 500, 5th Floor - 175 Hargrave Street
Winnipeg, Manitoba, Canada R3C 3R8
T 204 945-2089 **F** 204 945-1296
www.manitoba.ca/labour/labbrd

DISMISSAL NO. 1980
Case No. 266/10/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

A.D.,

Applicant,

- and –

B.S.,
United Brotherhood of Carpenters and Joiners of America, Local 343,
Bargaining Agent/Respondent,

- and -

O'CONNELL NIELSEN EBC,

Employer.

BEFORE: W.D. Hamilton, Chairperson

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

SUBSTANTIVE ORDER

WHEREAS:

1. On September 29, 2010, the Applicant filed an application (the "Application") with the Manitoba Labour Board (the "Board") seeking certain remedies for an alleged unfair labour practice committed by the individual Respondent B.S. and the Respondent Bargaining Agent (the "Union"), contrary to Section 20 of The Labour Relations Act (the *"Act"*). The Applicant alleges that the Union has failed to process a grievance filed on behalf of the Applicant on November 7, 2009 in respect of his dismissal from employment by the Employer on November 6, 2007 (the "Grievance"). The Applicant asserts that the Union "…. has not done any work and the file is stalled (not moving ahead)". The Applicant

alleges that the failure of the Union and/or its representatives constitutes a breach of Section 20. In paragraph 6(b) of the Application, the Applicant recites three reasons why the Application was filed more than six months after he became aware of the alleged violation on November 7, 2009. As to remedial relief the grievor seeks to be returned to his foreman job with the Employer.

2. On October 20, 2010, following an extension of time, the Employer, through counsel, filed its reply asserting that the Applicant had unduly delayed the filing of the Application and that the Board ought to dismiss the Application pursuant to Section 30(2) of the *Act*. The Employer asserts that none of the reasons given by the Applicant for the delay constitute reasonable or sufficient explanations. Further, for the reasons given in its reply, the Employer asserts the Application contains no evidence on its face that the Union discriminated against the Applicant or otherwise acted arbitrarily, unreasonably, or in bad faith and that the Application out to be dismissed without a hearing.

3. On October 28th, 2010, following an extension of time, the Union, on its own behalf and on behalf of B.S., filed its reply asserting the Applicant has unduly delayed the filing of the Application without sufficient cause and without providing sufficient reason for the delay and that the Application should be dismissed on that ground, pursuant to Section 30(2) of the *Act*. For reasons giving in its reply, the Union denies that it has acted in an arbitrary, discriminatory or bad faith manner in respect of the Applicant's dismissal from employment and requests that the Board exercise its jurisdiction pursuant to Section 140(8) of the *Act* and dismiss the Application without the necessity for a hearing on the basis that it is without merit and does not disclose a *prima facie* case.

4. The Board has determined that it should address, in the first instance, the position of both Repondents that the Application ought to be dismissed on the grounds of undue delay because, if this position is upheld, then such a finding would be dispositive of the case and the Application would be dismissed. On the issue of undue delay, the Board is satisfied that an oral hearing is not necessary as the matter can be determined by a review of the written material filed by the parties.

5. Based on the material filed by the parties, the Board is satisfied that the material facts relevant to the issue of undue delay may be summarized as follows:

   a) arising out of events which took place on November 6, 2009, the Applicant was dismissed from his employment by the Employer on November 7, 2009 for reasons disclosed in the pleadings filed by the parties. On November 7, 2009, the Applicant, with the assistance of the Union, filed a grievance claiming that he had been "unjustly terminated" (the "Grievance"). On November 7, 2009, the Applicant was given his flight tickets and left the worksite in Northern Manitoba to return to his home in New Brunswick. According to the Application, the Applicant spoke with B.S. shortly after he returned home.

b) on November 8, 2009 the Employer denied the Grievance. (Ex2 of Employer Reply).

c) the Union asserts, and the Board accepts, that on or about November 7, 2009 itself, after the filing of the Grievance and subsequent to an investigation into the facts relating to the events of November 6, 2009, the Applicant was informed that a Grievance would not be pursued in light of the facts disclosed to the Union during its investigation. The Union was of the view that there was no merit in pursuing the Grievance based on the facts revealed in its investigation.

6. When deciding whether there has been undue delay in the filing of any application, the Board is guided by the following provisions of the *Act* and principles:

1. The *Act* provides that the Board has the discretion to: a) refuse to accept an application if an individual has unduly delayed the filing the complaint, b) decline to take further action on a complaint, or c) dismiss a request, application or complaint at any time. In this regard, Subsections 30(2), 30(3)(c), and 140(8) of the *Act* provide 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.
>
> **Disposition of complaint**
> **30(3)** Where the board accepts a complaint filed under subsection (1), the board may
> (a) refer the complaint to a representative of the board for the purposes of subsection (4); or
> (b) proceed directly to hold a hearing into the alleged unfair labour practice; or
> (c) at any time decline to take further action on the complaint.
>
> **Matters without merit**
> **140(3)** Where, in the opinion of the board, a request, application or complaint is without merit or beyond the jurisdiction of the board, it may dismiss the request, application or complaint at any time.
> (Emphasis added)

(b) Undue delay has been interpreted by the Board to mean periods of as little as six months in duration. In the leading case of *Kepron v. Brandon University Faculty Association* (2004), 103 C.L.R.B.R. (2d) 102, the Board comprehensively reviewed

Section 30(2) of the *Act* and a number of the Board's decisions relating thereto. Commencing at page 137 (paragraph 53) the Board stated as follows:

> "53 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….
>
> 55 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….
>
> 57 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 union 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 *Scheurfeld*, the Board stated:
>
> > This Board must give reasonable meaning to the statute which creates it. The Legislature has said, under subsection 30(2), that matters are not to be "unduly delayed." The term "undue delay" has been interpreted by this Board to mean periods of up to approximately six or eight months. In the case of *Raoul McKay - and - University of Manitoba Faculty Association - and - University of Manitoba*, M.L.B. Case No. 186/94/LRA, Sept. 29, 1994, a delay of eight months was held to be undue delay. Similarly, in the case of *J.E. Labra - and - Sheet Metal*

> *Workers' International Association, Local 551 - and - E.H. Price*, [1992] M.L.B.D. No. 6, M.L.B Case No. 217/92/LRA, a delay of eleven months was held to be undue delay. In this case, the delay is well over two years.
>
> The Legislature has used the term "undue delay." We are of the view that the lengthy period taken by the Applicant to file his application is an extreme example of such delay. One of the primary functions of any adjudicative body, especially in matters of labour relations, is to deal with matters in a prompt and expeditious fashion. It is not really necessary for this Board to recite the detrimental effects that can occur because of delay. Memories may fade; witnesses may not be available; documentary material may be lost; and of equal importance is the fact that, if no proceedings have been taken in any reasonable period of time, the parties may well assume that the matter has been finalized or, at least, will not be proceeded with. It must also be noted, in this case, that the Applicant was attempting to establish some form of claim during this period. He attended at the Employment Standards branch; he obviously communicated with the union; he communicated with the Employer; and we are not sure if he communicated with anyone else. Perhaps he did not obtain the proper advice, or perhaps he did not seek advice from well-informed individuals. It is perhaps trite to state that ignorance of the law is no excuse, especially after such a lengthy period.

58 In *Andrzej Bal - and - United Food and Commercial Workers' Union, Local No. 832 - and - Burns Meats Ltd.*, [1997] M.L.B.D. No. 6 (Quicklaw), ("Bal"), an employee filed a claim under section 20, some twelve months after the union advised him of its decision not to proceed with his grievance. The Chairperson of the Board found that the delay of twelve months was excessive in the circumstances, and the application was, therefore, ruled to be untimely.

59 In *Wayne Smith - and - International Association of Machinists and Aerospace Workers - and - Motor Coach Industries*, [1998] M.L.B.D. No. 4, (Quicklaw), ("Smith"), the Board found that the applicant had failed to disclose a prima facie case in a dismissal situation and that no complaint was filed until almost a year after a "last chance agreement" was signed. The Board (Ms. D.E. Jones, Q.C. Vice-Chairperson) observed that,

> 3….Normally the Board's practice is not to entertain unfair labour practice complaints which are filed more than 6 months beyond the facts complained of.
>
> 60 In *Juan Enrique Labra - and - Sheet Metal Workers' International Association, Local Union No. 511 - and - E.H. Price*, [1992] M.L.B.D. No. 6, (Quicklaw), ("Labra"), a delay of one year was fatal. The employee was aware of the union's intention not to proceed with his grievance for one year and, during most of that period, he had access to legal representation. The application was dismissed on the basis of "undue delay" under section 30(2)."

(c) The principles enunciated in *Kepron* have been consistently applied by the Board in many of its subsequent decisions. See, for example, *R.M. and the Manitoba Government and General Employees' Union and Manitoba Public Insurance Corporation* (2009) MLB Case No. 23/09/LRA; and *T.H. and Local 500 of the Canadian Union of Public Employees and the City of Winnipeg* (2009) MLB Case No. 405/08/LRA, particularly at p. 13 to 15.

7. After applying the material facts and principles distilled in paragraphs 4 and 5, the Board has **DETERMINED** the following:

(a) The Union, to the knowledge of the Applicant, did file the Grievance regarding the Applicant's dismissal on November 7, 2009.

(b) On November 7, 2009, the Applicant also knew that the Union had decided not to advance the Grievance to arbitration or at all.

(c) The Application was filed some eleven months after the Applicant had knowledge of the Union's decision not to proceed with the Grievance, based on the Union's assessment of the case.

(d) The reasons advanced by the Applicant in Paragraph 6(b) of the Application do not constitute legitimate explanations for the delay in filing the Application. In this regard, the assertion that the Union Representative acted in bad faith or in an arbitrary fashion is the essence of a Section 20 application and does not constitute a reason for a delay in the filing of an application. As to the assertion that the Applicant was waiting for a decision from Manitoba Labour and Immigration, the Board reasonably concludes that this refers to the fact that the Applicant, on or about December 15, 2009, filed a complaint with the Employment Standards Division, a copy of which complaint was attached to the Application. No details are provided in the Application as to the relief being claimed but it would have to have been a complaint filed pursuant to the *Employment Standards Code*

(the *"Code"*). The Board notes that on or about April 21, 2010 the Employment Standards Division advised the Applicant that the Division was discontinuing its investigation into his claim against the Employer. Filing a complaint under the *Code* against one's employer, or former employer, is unrelated to an application filed pursuant to Section 20 of the Act against a bargaining agent for an alleged failure to represent an employee. Lastly, the bare allegation that the Applicant suffered from a depression from March 17 to June 20, 2010 does not constitute an adequate explanation for the overall delay of eleven months in filing the Application. The Board is satisfied that the Applicant was aware of the fact that Union was not prepared to pursue the matter of his dismissal on November 7, 2009. The Board notes that the Applicant himself states that he first became aware of the alleged violation of Section 20 on November 7, 2009, which is consistent with Union's position.

(e) A delay of approximately eleven months in filing the Application constitutes undue delay within the meaning of Section 30(2) of the *Act,* as determined by the jurisprudence of the Board. The Applicant has not provided a satisfactory explanation for this undue delay, given his knowledge of the Union's position on November 7, 2009.

8. Based on the foregoing, the Board is satisfied that the Applicant has unduly delayed the filing of the Application within the meaning of Section 30(2) of the *Act*. In the result, the Board declines to take any further action on the Application pursuant to Section 30(3) of the *Act* and 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 A.D. on September 29, 2010.

DATED at **WINNIPEG**, Manitoba this 13th day of December, 2010, and signed on behalf of the Manitoba Labour Board by

"Original signed by"

W. D. Hamilton, Chairperson

WDH/lo/rb-s