

**MANITOBA LABOUR BOARD**

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**DISMISSAL NO. 1893**

**Case No. 66/08/LRA**

**C/R Case No. 65/08/LRA**

**IN THE MATTER OF: *THE LABOUR RELATIONS ACT***

**- and -**

**IN THE MATTER OF: An Application by**

**Jim H. Budde,**

**Applicant,**

**- and -**

**Canadian Union of Public Employees, Local 500,**

**Union,**

**- and -**

**CITY OF WINNIPEG,**

**Employer/Respondent.**

**WHEREAS:**

1. On February 26, 2008, with additional documentation filed on February 27, 2008, the Applicant filed an application seeking remedy for an alleged unfair labour practice contrary to Sections 7, 17, 72, 80, 150, and other relevant sections of *The Labour Relations Act*.
2. On April 18, 2008, following an extension of time, the Employer, through Counsel, filed its Reply denying that it committed an unfair labour practice, denying that it breached *The Labour Relations Act*, denying that it discriminated against the Applicant, denying that the Applicant is entitled to the relief requested in the application, and asserting that the Board should summarily dismiss the application. Alternatively, the Employer requested a preliminary hearing regarding its position regarding deferral to arbitration.
3. The Union did not file any Reply to the application.
4. On September 23, 2008 and October 1, 2008, the Board, by way of letter from the Registrar, informed the parties that the Board determined the matter would proceed to hearing to address the preliminary issue as to whether the Applicant has established a *prima facie* case, as well as the issue raised by the Employer regarding Section 140(7) of *The Labour Relations Act* and deferral to arbitration.

5. On January 5, 2009, the Board conducted a hearing, at which time all parties appeared before the Board and presented evidence and argument; the Employer and Union being represented by Counsel.
6. The Board reviewed and considered the entire application including all of the documentation submitted by the Applicant as well as the evidence and submissions of the parties at the hearing. A summary of the facts relevant to the disposition of this case is as follows:
  - a) The Applicant asserted that the Employer breached sections 7, 17, 72, 80, and 150 of the *Act* by reason of an “incorrect calculation of my wage top-up to the extent of my net pay wage loss benefits” for the period of time commencing March 22, 2002 and ending February 7, 2004. The Applicant maintains that the manner in which the Employer calculated his net pay top up was erroneous and in violation of the collective agreement between the Employer and the Union, the Canadian Union of Public Employees, Local 500. The Applicant requested that the Board order the Employer to pay him \$15,914.21 plus lost interest and all applicable taxes which he believes were paid in 2004 along with compensation for diminution of income and all shift premiums, holiday wages and long service over and above the \$2,411.02 that he admits to having received.
  - b) At the hearing, the Applicant provided a bank statement, payroll information and two benefit statements in support of his position that the Employer had erred in its calculations. He added that he did not know whether the error was deliberate or not, however in his view it was clear that the amount paid to him was incorrect. The Applicant added that others including individuals working for Revenue Canada, the Provincial Ombudsman and Ms. Bonnie Harrigan (an employee of the City of Winnipeg) verbally advised him that the calculation made by the Employer “did not make sense”.
  - c) The Applicant also filed an unfair labour practice against the Union concerning the issue referred to in paragraph (a) above.
  - d) The Applicant indicated at the hearing that the sole issue which he wished to pursue by way of the current applications(s) concerned the issue referred to in paragraph (a) above.
  - e) By letter dated February 25, 2004, the Applicant first received a detailed written response from the Employer regarding his inquiries into the calculation of the \$2,411.02 paid to him respecting the net pay top up for the period of time commencing March 22, 2002 and ending February 7, 2004.

- f) The Applicant had numerous verbal and written communications with the Employer and the Union regarding the issue respecting the calculation. For example, on March 19, 2004, the Applicant wrote to the Employer, care of Ms. Harrigan, to reiterate that he had not been paid all of the amounts owed to him. The Applicant wrote to the Employer's Chief Administrative Officer, Ms. Annita Stenning, on March 23, 2004. He indicated that he had not received a response from payroll or human resources and that there had "been no communication from the City explaining the propriety of the calculation process that was used or where the WCB benefits were factored into a gross pay adjustment". The Applicant requested in this letter that Ms. Stenning "personally enquire into this situation and advise me of the action that will be taken by the City to ensure my pay has been, is, and will continue to be, properly processed". Ms. Stenning responded to the Applicant by letter dated April 6, 2004.
- g) By letter dated March 23, 2004, the Employer's Paymaster, Mr. Dennis Wolochatiuk, wrote to the Applicant and provided another detailed explanation of the calculation made by the Employer in relation to the net pay top up he received for the period of time commencing March 22, 2002 and ending February 7, 2004. The letter concludes with an invitation for the Applicant to contact Mr. Wolochatiuk if he had any further questions or concerns regarding the calculations. A copy of the correspondence was sent by the Employer to the Union. The Applicant continued to have discussions and to exchange correspondence with the Employer following Mr. Wolochatiuk's letter of March 23, 2004.
- h) On October 1, 2006 and May 31, 2007, the Employer provided further correspondence explaining the payments received by the Applicant.
- i) On March 1, 2007, the Union scheduled a meeting with the Applicant to review explanations the Union received from the Employer regarding the calculations. The Union scheduled a meeting between the Applicant, Mr. Bob Ripley and the Employer on May 3, 2007 in order to review the method of calculation. The Applicant agreed to the meeting, however on the morning of May 3, 2007 he called the Union to indicate that he would not be able to attend due to health issues. The Union offered to have the meeting rescheduled, however, the Applicant directed the Union to proceed with the meeting in his absence. Mr. Ripley and Mr. Greg Mandzuk of the Union attended the May 3, 2007 meeting with the officials from the City including Ms. Deanna Rasmussen, Manager of Payroll, Ms. Angie Munch, Manager of Human Resources, and Ms. Gwen Telenco, Corporate Finance. At the meeting, the calculations made by the Employer were reviewed and explained to the Union. Ms. Munch followed up on the meeting with the letter dated May 31, 2007, referred to above, in which she provided another detailed analysis of the calculations in question.

- j) The Applicant agreed that he was never able to explain how specifically the calculation made by the Employer was incorrect. He testified at the hearing that he was not qualified to show how the calculation was wrong, however in his view the calculation did not make any sense and “the numbers just don’t add up”.
  - k) The Applicant acknowledged, during cross-examination, that the Union never accepted his position regarding the calculation and instead that the Union agreed that the Employer had calculated the amount payable to the Applicant correctly.
  - l) The Union refused to pursue the Applicant’s concerns with respect to the calculations of the Employer at arbitration.
7. The Board, following consideration of all material filed, the evidence adduced at the hearing and the submissions of the parties, has **DETERMINED:**
- a) None of the facts or allegations advanced by the Applicant in his application and the documentation attached thereto or during the hearing, even if true, would constitute an unfair labour practice by the Employer. The Applicant disagrees with the calculation of benefits he feels he is entitled to under a collective agreement to which he was subject. The essential subject matter of the dispute between the Applicant and the Employer concerns the application of the collective agreement.
  - b) As was noted in paragraph 6, the Applicant asserted that the Employer breached sections 7, 17, 72, 80, and 150 of the *Act* by reason of an “incorrect calculation of my wage top-up to the extent of my net pay wage loss benefits” for the period of time commencing March 22, 2002 and ending February 7, 2004. Conduct which may constitute an unfair labour practice is set out in Part I of the *Act* and includes sections 7 and 17. Sections 72, 80 and 150 of the *Act* are not included in Part I and are not provisions which may be said to ground an unfair labour practice allegation. Section 72 provides, in part, that a ratified collective agreement is binding upon the bargaining agent and all of the employees in the bargaining unit to whom the collective agreement applies and the employer. It is not an unfair labour practice section. Section 80 provides that all collective agreements shall include a provision obliging the employer, in administering the collective agreement, to act reasonably, fairly, in good faith, and in a manner consistent with the collective agreement as a whole. It is not an unfair labour practice section. Finally, section 150 principally concerns general / special damages and the capacity of parties to sue and be sued. It is not an unfair labour practice provision. Accordingly, section 72, 80 and 150 have no relevance to the facts pleaded by the Applicant.

- c) With respect to the Applicant's allegation that the Employer has violated section 7 of the *Act*, there are no material facts pleaded or adduced during the hearing which, if true, could arguably constitute a *prima facie* violation of those provisions. Section 7 prohibits employers or persons acting on behalf of employers from discharging, refusing to employ, or discriminating against any person on the basis of certain enumerated factors set out therein. There is no evidence that the calculations of the benefit to which the Applicant claims entitlement was linked to, tainted by, or in any way influenced by any of the prohibited grounds set out in Section 7.
  - d) With respect to the Applicant's allegation that the Employer has violated section 17(a) or (b) of the *Act*, there are no material facts pleaded or adduced during the hearing which, if true, could arguably constitute a *prima facie* violation of those provisions. Section 17 prohibits employers or persons acting on behalf of employers from denying or threatening to deny pension rights or benefits to which an employee is entitled or would have been entitled except by reason of a cessation of work due to a strike or lockout or the exercise of a right under this or any other *Act* of the Legislature or Parliament. Section 17(b) prohibits employers or persons acting on their behalf from using intimidation, coercion, threats, penalties, promises etc. to compel or induce a person to refrain from exercising specific enumerated rights. There is no evidence that the calculations of the benefit to which the Applicant claims entitlement was linked to, tainted by, or in any way influenced by any of the prohibit grounds set out in Section 17.
  - e) The application also references "any other relevant sections" of the *Act*. There is no evidence that satisfies the Board that any other sections of the *Act* have been violated as alleged.
8. The Board, following consideration of material filed, evidence and argument presented is satisfied that the Applicant has failed to establish a *prima facie* case that the Employer has acted contrary to Section 7, 17, 72, 80 and 150 of *The Labour Relations Act* and accordingly, pursuant to Section 140(8) of *The Labour Relations Act*, finds that the application should be **DISMISSED**.

**T H E R E F O R E**

The Manitoba Labour Board **HEREBY DISMISSES** the Application filed by Jim H. Budde on February 26, 2008.

**DATED** at **WINNIPEG**, Manitoba, this **3rd** day of **April 2009**, and signed on behalf of the Manitoba Labour Board by

**"C.S. Robinson"**

**C.S. Robinson, Vice-Chairperson**

BJG/dlm/acr

**NOTES**

**REQUEST FOR REVIEW BY MANITOBA LABOUR BOARD OF A DECISION, ORDER, ETC. OF THE BOARD**

- (a) Subsection 143(3) of *The Labour Relations Act* of Manitoba, C.C.S.M. Chapter L10 provides:

**Board Review**

143(3) the board or any panel of the board may review, rescind, amend, alter or vary any decision, order, direction, declaration or ruling made by it, and may rehear any matter if it considers it advisable to do so.

- (b) Request for review by the board of its decision, order etc. must be made by application to the board, within ten days of the making of the board decision, order, etc.

Section 17 of the *Manitoba Labour Board Rules of Procedure* (being *Manitoba Regulation 184/87R*, published in the Manitoba Gazette Part II) provides:

**Application for Review of Board Decision**

17(1) Where an application is made to the board under subsection 143(3) of the *Act*, to review, rescind, amend, alter or vary any decision, order, direction, declaration or ruling made by it, the applicant, in addition to the material required to be filed under section 2, shall

- (a) file a concise statement of any new evidence with such evidence being verified by statutory declaration;
- (b) file a statement explaining when and how the new evidence became available and the applicant's reasons for believing that the new evidence so changes the situation as to call for a different decision, order, direction, declaration or ruling; and

- (c) in the absence of any new evidence, file a concise statement showing cause why the board should review or reconsider the original decision, order, direction, declaration or ruling.

**Time Limit for Review**

17(2) Except by leave of the board, no application under subsection 143(3) of the *Act* for a review of any decision, order, direction, declaration or ruling made by the board shall be reviewed by the board after more than 10 days have elapsed following the date of the making of the decision, order, direction, declaration or ruling.

**JUDICIAL REVIEW OF FINAL DECISION OF THE MANITOBA LABOUR BOARD**

Subsection 143(6) of *The Labour Relations Act* of Manitoba provides:

**Judicial Review of Final Decision**

143(6) Notwithstanding any other Act, a final decision, order, direction, declaration or ruling, but not a procedural, interim or any other decision, order, direction, declaration or ruling, of the board or a panel of the board may be reviewed by a court of competent jurisdiction solely by reason that the board or the panel failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, if

- (a) the applicant for review has first requested the board or the panel, as the case may be, to review its decision under subsection (3), and the board or the panel has decided not to undertake a review, or has undertaken a review and rendered a decision thereon, or has failed to dispose finally of the request to review within 90 days after the date on which it was made;
- (b) the board has been served with notice of the application and has been made a party to the proceeding; and
- (c) no more than 30 days have elapsed from, as the case may be, the decision by the board or panel not to undertake a review, or the date of the decision rendered by the board or panel on the review, or the expiration of the 90 day period referred to in clause (a).

**REASONS FOR DECISION**

It is the policy of the Manitoba Labour Board that where a party to the proceedings is adversely affected by an Order or by a decision of the Board, within ten (10) calendar days of the date on which the Board's Order or decision was signed, that party may request the Board in writing to furnish written reasons for its Order or decision. The Board then may consider such request for reasons for its Order or decision and shall notify the requesting party as to whether reasons will be provided.