



MANITOBA LABOUR BOARD  
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**DISMISSAL NO. 1899**  
**CASE NO. 405/08/LRA**

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

**- and -**

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

**Theresa Henry,**

**Applicant,**

**- and -**

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

**- and -**

**CITY OF WINNIPEG,**

**Employer.**

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

**REASONS FOR DECISION**

**I. Overview**

On December 30, 2008, the Applicant filed with the Manitoba Labour Board (the “Board”) an application seeking remedy for an alleged unfair labour practice. The Applicant alleged a violation of Section 20 of *The Labour Relations Act* (the “Act”) which imposes certain obligations upon bargaining agents. However, it is clear from the application and request for

remedial relief that the Applicant also alleges that the Employer committed an unfair labour practice. Accordingly, the Board considered the Applicant's allegations as against both the bargaining agent, Canadian Union of Public Employees, Local 500 (the "Union"), and the Employer, the City of Winnipeg (the "Employer").

The application provides that "commencing on or about October 28, 2005, and continuing through to on or about November 30, 2007 and court of law proceedings in April 2008 and ongoing" the Union and the Employer committed unfair labour practices. Specifically, the Applicant claims that the Union violated Section 20 of the *Act* by failing to provide her with "fair representation" and that it acted arbitrarily, in bad faith and without due care or diligence with respect to her claim for dental benefits. She also referred to the Union's failure to proceed with "numerous" other grievances on her behalf, some of which she claims originated in 2001 and 2002. With respect to the Employer, the Applicant asserted that it "was in breach of its fiduciary duty" to her to act fairly in applying its policies with respect to employee benefits and dental coverage. The application further indicated that the Employer committed an unfair labour practice "by failing to act fairly and in compliance with the collective agreement" in effect between the parties and failing to "respect its own policies pertaining to employee benefits and dental coverage".

The Applicant requested that the Board order that the Union and the Employer "pay damages and other losses" for:

- a) certain dental work which she required from on or about October 28, 2005 to on or about February 12, 2007;
- b) the loss of two teeth;
- c) corrective dental and cosmetic procedures;
- d) pain and suffering;

- e) the loss of self-esteem, the loss of enjoyment of food, and mental stress caused by the loss of two teeth;
- f) general, special and punitive damages; and
- g) such further relief as the Board deemed “civil, fair and just”.

In addition to the above-noted request for an order relating to the damages and other costs associated with the Applicant’s alleged losses, she asked that the Board order the Union to “pursue numerous and outstanding grievances (that were used as reasons for my termination in February 2007) noted on point #24 above...”. Paragraph 24 of the application indicates that the Applicant spoke to Mr. Wally Skomoroh of the Union on November 30, 2007 regarding what actions the Union was taking with respect to her “list of outstanding grievances” which she recorded as follows:

- 1) My dental claim.
- 2) Non accommodation medical [reference to Exhibit omitted].
- 3) Unjust discipline re: qualifications that was scheduled for arbitration which my employer, the City of Winnipeg had used in reasons for termination.
- 4) Outstanding grievance for unfair practice of denying my doctors (sic) and without notice deducting one week pay (sic) approximately 2001.
- 5) Respectful Workplace complaint March 2002.
- 6) Differential treatment from 2002-2007.

Both the Union and the Employer, through their respective counsel, filed Replies disputing the application. The Union denied violating the *Act* and claimed that the Applicant failed to establish a *prima facie* case. In addition, the Union submitted that the Applicant unduly delayed in the filing of her application with the Board. As such, the Union requested that the Board exercise its statutory authority to dismiss the application without the necessity of holding an oral hearing. Similarly, the Employer’s Reply denied that it committed any unfair labour practice and submitted that the Applicant failed to provide any information indicating it had acted in contravention of Part I of the *Act* (which contains the unfair labour practice provisions).

By Order dated February 26, 2009, the Board, following consideration of the material filed, dismissed the application pursuant to subsections 30(2), 30(3)(c), and 140(8) of the *Act*, having determined that the Applicant unduly delayed in filing the complaint and that it was without merit. By letter dated March 1, 2009, the Applicant requested written reasons for the Board's decision.

## **II. Facts**

The Board reviewed and considered all of the material filed by the parties. A summary of the most salient information set forth in the material filed is as follows:

1. The Applicant commenced employment with the Employer on July 8, 1977. The Employer terminated her employment on February 12, 2007.
2. The Applicant was a member of the Union.
3. The Union and Employer, at all material times, have been parties to a collective agreement which set out certain terms and conditions of employment applicable to the Applicant.
4. The Applicant stated that she was absent from the workplace commencing October 1, 2005 due to illness. In its Reply, the Employer clarified that the Applicant was absent but in receipt of sick leave benefits from October 1, 2005 to October 28, 2005. From on or about October 29, 2005 to on or about October 20, 2006, the Applicant was absent from the workplace on an unpaid leave of absence for medical reasons. In November of 2006, the Applicant was absented from the workplace for disciplinary reasons and, as noted above, her employment was terminated by the Employer on February 12, 2007.
5. From January to December of 2005, the Applicant consulted with a dentist regarding certain "dental difficulties" which she was experiencing. The dentist recommended

the removal of a bridge over her upper teeth, the construction of two crowns and the insertion of a dental implant or denture. The Applicant claims that on or about August 8, 2005, x-rays showed that the teeth under the bridge work were in good condition and the prognosis for success with her dental procedures was high. The Applicant further asserted that she intended to file a claim with Blue Cross for benefits in accordance with the collective agreement with respect to the removal of the bridge and construction of the crowns.

6. In November and December of 2005, while on an unpaid leave of absence, the Applicant submitted claims respecting dental work performed on her daughter and husband. Those claims were denied on the basis that the Applicant's benefit coverage had been cancelled prior to the dates of the dental visits. The Employer's Reply concedes that the benefits were denied in error and that the Employer reimbursed the Applicant upon realizing the mistake.

7. The Applicant submitted that in December of 2005, she contacted the Employer's payroll and human resources office to inquire into the denial of dental benefits. She asserted that representatives of the Employer advised her that she was not eligible for dental benefits as she was on a leave of absence without pay.

8. The Applicant submitted that her husband spoke with Mr. Bob Ripley, a Local Representative with the Union, in December of 2005 regarding the denial of dental benefits. It is the Applicant's position that Mr. Ripley advised that a permanent employee "on unpaid sick leave is not entitled to benefits, including dental" under the collective agreement. The Applicant alleged that Mr. Ripley refused the request made on her behalf to put in a grievance respecting the denial of benefits on the basis that there were "no grounds" to do so. The Reply of the Union acknowledged that Mr. Ripley advised the Applicant that "she was not entitled to maintain her benefits coverage at the expense of the City and if she wanted to maintain her coverage then she was required to pay the premiums herself". The Union takes the position that this advice was actually given to the Applicant in January of 2006 rather than December of 2005 as alleged.

9. The Union denied that it refused to put in a grievance on behalf of the Applicant. The Reply suggests that the Applicant first requested that the Union file a grievance on her behalf respecting her entitlement to dental benefits “some time after November 10, 2006” by which time the Employer, as shall be discussed below, had already acknowledged that she should not have been removed from benefit coverage in the circumstances and had indicated to the Applicant that she was free to resubmit any claims which had been denied during her leave of absence.

10. The Applicant further claims that in December of 2005 Mr. Ripley was consulted with respect to her claim that the Employer failed to pay her holiday wages owed for November 11, 2005. She claimed that Mr. Ripley failed to take action on her behalf respecting that issue. The Union’s Reply acknowledged that the Applicant consulted with Mr. Ripley regarding an alleged shortage of pay. However, the Union alleged that it investigated the Applicant’s concerns by making inquiries of the Employer and concluded that the Applicant had not been underpaid as she claimed. The Union added that the Applicant did not raise this issue again until the time of her dismissal in 2007.

11. The Applicant states that her husband contacted Mr. Ripley again in January of 2006 regarding the Employer’s position that she was not entitled to dental benefits while on an unpaid leave of absence. She claims that Mr. Ripley reiterated that she did not qualify for dental benefits while on an unpaid leave of absence. The Union’s Reply agrees that Mr. Ripley spoke to the Applicant’s husband regarding the denial of Blue Cross benefits in January of 2006. Mr. Ripley claims that he discussed the matter with the Employer and that its response was consistent with his understanding of what he described as “the clear language in the collective agreement”.

12. The Applicant asserts that she wished to have the dental procedures described in paragraph 5 above performed, however she was unable to afford the recommended procedures given the Employer’s position that she was not entitled to dental benefits and the Union’s agreement with that position. As such, she states in her application that she anticipated getting the work done when she “came back on payroll”.

13. The Applicant's teeth deteriorated badly. She states that in July of 2006 she "suddenly and unexpectedly" developed a large abscess on her gums near the bridged teeth. The extraction of two teeth became necessary and was in fact completed in October of 2006.

14. As noted above, the Applicant, following her leave of absence, returned to work in October of 2006.

15. On or about November 10, 2006, the Applicant attended a disciplinary meeting. Mr. Ripley also attended. At the meeting, Mr. Brian Woodward of the Employer's Human Resources Department handed the Applicant a copy of an email from Ms. Marilyn Gill, the Employer's Human Resources Systems Coordinator. A copy of the email was attached to the present application. The email indicates that the Applicant's "Dental/Vision & Amb/Hosp plans were cancelled in error 10 28 05". It appears that Ms. Gill advised Blue Cross to reinstate the Applicant's benefits and that she was advised of her right to "resubmit any claims that she may have had during this time frame". The Applicant says that she remarked to Mr. Woodward and Mr. Ripley at the time that she could have avoided having her teeth removed had she been able to afford the required dental procedures during the relevant period. The Employer's Reply indicates that the Applicant's medical and dental benefits were cancelled in error and denies that its actions were deliberate or malicious. The Applicant, says the Employer, was reimbursed for all four claims that she ultimately submitted for the period during which she was mistakenly denied coverage.

16. The Applicant's position is that "the collective agreement states that [she] was entitled to benefits in her circumstances and was entitled to coverage for the desired dental work". The Union's position, as set out in its Reply, is that the collective agreement is silent with respect to whether an employee on medical leave of absence without pay is entitled to benefits coverage, though there is a provision allowing employees to pay the premiums to maintain benefit coverage during a leave of absence without pay. The Reply of the Employer also provides that "the collective agreement is silent with respect to an employee's entitlement to benefits when on

an unpaid medical leave”. The Union further states that the collective agreement does not address the type of dental work that is covered by the plan.

17. The Union states that Mr. Ripley was first advised that the Employer “unilaterally implemented a change in its policy respecting the treatment of employees who are on leave of absence without pay and their right to maintain coverage for benefits” at the meeting of November 10, 2006. However, the Applicant attached a copy of a Union publication dated “Spring 2002” in which, under the heading “City Approves Blue Cross Improvements”, it is noted that effective March 1, 2002 the “City will extend dental and vision care benefits to City of Winnipeg employees who are on unpaid sick leave”.

18. In October and November of 2006, employment issues arose relating to medical accommodation for, and discipline of, the Applicant. The Applicant recalled that during this period of time, she had discussions with Mr. Wally Skomoroh, a National Representative with Canadian Union of Public Employees, who purportedly advised her that the dental issue would be pursued later. The Union’s Reply indicates that Mr. Skomoroh began dealing with the Applicant in June of 2006 and that his primary focus was with respect to her claim to long term disability and eventually her return to the workplace following the leave of absence. The Union also stated that at the approximate time that the Applicant was attempting to return to work, the Union became concerned that the Employer might discipline or potentially terminate the Applicant.

19. The Applicant states that she called Mr. Ripley on November 14, 2006 and left a voice mail message for him regarding the cancellation of her dental benefits in error. She claims that he did not respond to her phone call. The Union’s Reply admits that Mr. Ripley did not immediately respond to the Applicant’s phone call as he made inquiries of the Employer and confirmed what the Union characterized as the Employer’s unilateral change in policy regarding the benefit entitlement of persons on unpaid leaves of absence.

20. The Applicant alleged that she sent a facsimile to Mr. Ripley on November 15, 2006 requesting a written explanation as to why she was informed that she had been erroneously denied benefit coverage while she was on an unpaid leave of absence. She says that she did not receive any response from Mr. Ripley. The Union admits to having received the facsimile, but denies that the Applicant did not receive a response.

21. The Applicant asserts that she called Mr. Ripley on January 25 and 29, 2007 regarding the dental benefit error and to specifically inquire into what actions would be taken to compensate her for the loss of teeth which she alleged had resulted. She states that she requested that a grievance be filed on her behalf. She further states that he replied “let me see what I can do” and he added that he did not advance grievances for members but that he would inform another union representative, Ms. Nicole Campbell, of the issue and that she would handle the grievance. In its Reply, the Union acknowledged that Mr. Ripley spoke with the Applicant in January of 2007, although he did not recall the details of the conversation. Mr. Ripley further conceded in the Reply that he advised the Applicant that he does not file grievances and recalls that he advised the Applicant that she should contact a National Representative.

22. Commencing November 24, 2006, the Applicant was placed on unpaid disciplinary leave by the Employer and her employment was terminated by the Employer on February 12, 2007. The Applicant states that the Union refused to proceed to arbitration on the grievance respecting the termination of her employment following the receipt of a legal opinion. She claims that she was advised of her right to file a human rights complaint respecting her allegation of non-accommodation by the Employer. Her application makes reference to her “Human Rights complaint for non accommodation” and she notes that the Union provided documentation respecting that complaint. The Union’s Reply noted that Mr. Skomoroh was interviewed by a representative of the Manitoba Human Rights Commission respecting the Applicant’s complaint and that it provided a copy of counsel’s legal opinion to the representative.

23. The Union states that it investigated the Applicant’s termination grievance and referred

the matter to Mr. Garth Smorang, Q.C. to obtain a legal opinion. The Union's Reply provides that Mr. Smorang's opinion was that the Applicant's grievance would not succeed. In addition, the Union submitted that the legal opinion considered other related complaints of the Applicant included the alleged non-accommodation of her medical condition. The legal opinion was that grievances on those related issues would not be successful.

24. The Applicant says that she inquired of Mr. Skomoroh on approximately October 23, 2007 regarding compensation relating to her dental situation and that he replied that the Employer did not agree to pay compensation. The Union states that Mr. Skomoroh does not specifically recall that conversation.

25. On November 30, 2007, the Applicant spoke Mr. Skomoroh to inquire into what the Union was doing to assist her with her "outstanding grievances" (set out in Part I of these Reasons). She recalled that Mr. Skomoroh advised her that she was no longer a member of the Union and that it was not obligated to take further actions on her behalf. The Union's Reply acknowledged that Mr. Skomoroh spoke with the Applicant regarding various grievances which she felt remained outstanding. The Union denies that Mr. Skomoroh told the Applicant that it was not obliged to assist her as she was no longer a member of the Union. The recollection of Mr. Skomoroh recorded in the Union's Reply is that he advised her that the Union decided not to proceed with the termination grievance and "the other related grievances" on the basis of counsel's legal opinion and further that certain other issues she complained of were "well past the time limits and/or which had been dealt with by the Union and/or which were investigated and had no merit".

26. The Union's Reply indicated that its Executive decided not to proceed to arbitration with the termination grievance on the basis of Mr. Smorang's legal opinion and that the Applicant's appeal to the Executive was not successful and, accordingly, the grievance was ultimately withdrawn.

27. The Applicant filed a Statement of Claim against the Union and the Employer in the Court of Queen's Bench on October 29, 2007. The Respondents each filed a Notice of Motion seeking the dismissal of the action or striking out the claim in its entirety on the basis, amongst other things, that the Court did not have jurisdiction over the subject matter of the action. According to the application, Court proceedings remain pending.

### **III. Analysis**

In Dismissal Order No. 1899, the Board dismissed the present application without the necessity of conducting an oral hearing. The *Act* provides, *inter alia*, that the Board has the discretion to: a) refuse to accept an application if an individual has unduly delayed in 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 the following:

#### **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 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(8)** 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.

In the present case, the Board cited each of the above-quoted statutory provisions in its Order dismissing the application.

A) Undue Delay

As the recitation of facts makes clear, a central complaint of the Applicant relates to the failure or refusal of the Employer to provide dental benefits during the period of her leave of absence without pay for medical reasons which occurred from on or about October 29, 2005 to on or about October 20, 2006, and the failure of the Union to fairly represent her regarding what she alleged was the Employer's violation of the collective agreement in that regard. On or about November 10, 2006, the Employer conceded that her enrolment in the dental and other benefit plans had been cancelled in error and the Applicant was advised as such and told that she could re-submit any claims that she had for the period during which the error transpired. Unfortunately, complications arose during the period of the erroneous denial of benefits. The Applicant alleges that but for the decision to deny her dental benefits, she would not have endured the loss of teeth and the accompanying pain, suffering and costs associated therewith. She alleges that she continued to press the Union to take action, but that it steadfastly refused to file a grievance or otherwise assist her in seeking a remedy for the denial of dental benefits and the consequences thereof.

The original denial of dental benefits occurred commencing October of 2005. Clearly, the Applicant was aware of the denial of benefits at least in November and December of 2005 when claims for dental procedures incurred by members of her family were rejected. The Applicant also submits that she was aware in December of 2005 that the Union, through Mr. Ripley, took the position that she was not entitled to the benefits claimed given her status on leave of absence without pay. She alleged that in December of 2005, Mr. Ripley advised her that the Union would not file a grievance on her behalf. The Union disagrees, in part, with the assertions and dates advanced by the Applicant. However, the Union does concede that in January of 2006, Mr. Ripley spoke with the Applicant's spouse and advised that she was not entitled to maintain her benefits at the expense of the Employer given the language of the

collective agreement. As noted, in November of 2006, the Employer advised the Applicant and the Union that the Applicant's dental and other benefits had been denied in error but were being retroactively reinstated. While the Applicant had further discussions with the Union in relation to her dissatisfaction with the Employer's acts, the Application makes it clear that on or about November 30, 2007, the Union advised her that they would not pursue any of her alleged grievances including the one with respect to her dental claims. It should be noted that some of the matters that the Applicant included on her "list of outstanding grievances" dated back to 2001 and 2002. Indeed, her employment was terminated on February 12, 2007.

The present application was not filed until December 30, 2008. This marks thirteen months from the date upon which the Applicant says that the Union advised her that it was not willing to proceed with any of her grievances. Moreover, that is approximately three years after the Applicant was aware that her dental coverage had been cancelled and approximately two years after being advised of the Employer's position that the said cancellation was in error. The Applicant provided no explanation for her delay in filing the application with the Board.

As noted above, section 30(2) of the *Act* empowers the Board to refuse to accept a complaint where its filing has been unduly delayed. 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:

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 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 *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).

This review of Board decisions illustrates that periods of delay of relatively equal or lesser magnitude than is evident in this matter have been deemed undue by the Board and have accordingly resulted in those applications being dismissed.

The Board determined that the Applicant unduly delayed in filing this application. The application was filed long after the Applicant knew all of the facts and circumstances which she set out in her application in support of her position that the Union and the Employer committed

unfair labour practices. Accordingly, pursuant to section 30(2) of the *Act*, the application was dismissed.

**B) Duty of Fair Representation Allegations**

Notwithstanding the determination that the Applicant unduly delayed in filing her application, the Board also considered whether the application established a *prima facie* case that the Union committed an unfair labour practice. The Union asserted that the Applicant failed to identify how the Union acted in a manner that was contrary to section 20 of the *Act*. Section 20 states:

**Duty of fair representation**

20 Every bargaining agent which is a party to a collective agreement, and every person acting on behalf of the bargaining agent, which or who, in representing the rights of any employee under the collective agreement,

(a) in the case of the dismissal of the employee,

(i) acts in a manner which is arbitrary, discriminatory or in bad faith,  
or

(ii) fails to take reasonable care to represent the interests of the employee; or

(b) in any other case, acts in a manner which is arbitrary, discriminatory or in bad faith;

commits an unfair labour practice.

The Board has reviewed the meaning of the phrase “arbitrary, discriminatory or in bad faith” in a number of cases. A concise summary of the Board’s decisions regarding the standard set out in section 20(b) of the *Act* appears in *Budde v. Canadian Union of Public Employees*, M.L.B. Case No. 65/08/LRA, April 3, 2009, at page 7:

“Arbitrary” conduct has been described as a failure to direct one's mind to the merits of the matter, or to inquire into or to act on available evidence, or to conduct any meaningful investigation to justify a decision. It has also been

described as acting on the basis of irrelevant factors or principles, or displaying an attitude which is indifferent, summary, capricious, non-caring or perfunctory. Flagrant errors consistent with a non-caring attitude may also be arbitrary, but not honest mistakes, errors of judgment, or even negligence. "Bad faith" has been described as acting on the basis of hostility or ill-will, dealing dishonestly with an employee in an attempt to deceive, or refusing to process the grievance for sinister purposes. A knowing misrepresentation may constitute bad faith, as may concealing matters from the employee. The term "discriminatory" encompasses cases where the union distinguishes among its members without cogent reasons.

The Applicant also alleged that the Union failed to fairly represent her with respect to her dismissal from employment. Section 20(a) of the *Act* applies in cases where the employee has been dismissed. When dealing with dismissal cases, bargaining agents must not act in a manner which is arbitrary, discriminatory or in bad faith. In addition, in dismissal cases, bargaining agents must take reasonable care to represent the interests of the employee. "Reasonable care" has been defined by this Board as the degree of care which a person of ordinary prudence and competence would exercise in the same or similar circumstances. The failure to exercise such care constitutes ordinary negligence [see *Perrin and Manitoba Nurses' Union*, (2007) 139 C.L.R.B.R. (2d) 152].

The primary focus of the application concerns the denial of dental benefits during the Applicant's leave of absence without pay from on or about October 29, 2005 to on or about October 20, 2006. The Applicant alleged that the Union acted in a manner that was arbitrary, in bad faith, and negligent in relation to the dental benefits issue. The Board is satisfied that the application does not identify any behaviour of the Union which may be characterized as "bad faith" or "discriminatory". Furthermore, the negligence standard or requirement to exercise reasonable care does not apply to a non-dismissal case. The remaining issue to be determined is therefore whether or not the Union acted in an arbitrary manner in representing the Applicant with respect to her dental claim.

The facts indicate that the Applicant was denied dental benefits during the period of her leave of absence. She says that she sought the Union's assistance and asked that a grievance be

filed on her behalf. No grievance was filed. The Union asserts that Mr. Ripley discussed the matter with the Employer and received a response consistent with his understanding of the collective agreement which is silent with respect to an employee's entitlement to benefits while on unpaid leave. Ultimately, the Employer informed the Applicant and the Union that the Applicant's enrolment in the dental and other benefit plans had been cancelled in error. The Applicant was advised of her right to resubmit any claims that she had during the period in question.

The Board is satisfied that, assuming all of the facts set out in the application are true, the most negative conclusion that could be reached is that the Union made an honest mistake in advising the Applicant in the manner that it did. Given all of the circumstances, the Board is satisfied that any alleged errors were certainly not so flagrant as to be considered arbitrary; nor do the actions of the Union in dealing with the Applicant's dental claims indicate indifference, capriciousness, or an otherwise uncaring attitude. This Board has ruled that "... an honest mistake even if negligent is not sufficient to constitute a breach of the duty" (*Jerry Dewald - and - Supercrete, a Division of Canada Cement Lafarge Ltd. - and - General Teamsters, Local 979*, [1989] M.L.B.D. No. 33).

The Board determined that the application does not disclose facts that, if unexplained or not contradicted, are sufficient to sustain a conclusion that the Union acted in a manner which was arbitrary, discriminatory or in bad faith contrary to section 20 of the *Act* in dealing with the Applicant's dental claim. As such, her complaint regarding the Union's representation on that issue is without merit. Accordingly, pursuant to subsections 30(3)(c) and 140(8) of the *Act*, the Board dismissed the Applicant's complaint against the Union in relation to her dental claim.

The application also refers to the refusal of the Union to proceed with certain other grievances. The other grievances cited in the Application include the alleged failure of the Employer to accommodate her medical condition, unjust discipline, deduction of pay in 2001, a respectful workplace complaint dating back to 2002, and an issue referred to as "differential

treatment” from 2002 to 2007. The Applicant says that the Union advised her on November 30, 2007 that it would not take any further action on her behalf with respect to any of those matters as well as the dental claim issue reviewed above. The Union acknowledged that the Applicant was advised that her “various grievances had been closed due to the fact that they were either extremely dated or had been investigated and dealt with by the Union...”

The application provides extremely limited information with respect to the above-noted matters. Essentially, the claim of the Applicant is that the Union advised her on November 30, 2007 that it was not obligated to take further action on her behalf with respect to her outstanding grievances. The application certainly does not disclose any facts sufficient to sustain a conclusion that the Union acted in a manner which was arbitrary, discriminatory or in bad faith under section 20 of the *Act* with respect to the refusal to proceed with any of the referenced grievances. Having failed to disclose a *prima facie* violation of the *Act* with respect to these matters, this portion of the application is without merit and was dismissed pursuant to sections 30(3)(c) and 140(8) of the *Act*.

Finally, the Applicant notes that the Union did not agree to proceed to arbitration on her behalf to contest the termination of her employment. The Applicant said that the Union hired a lawyer to assess the case and he provided an opinion. The Union’s Reply confirmed that the Union hired a lawyer, Mr. Garth Smorang, Q.C., to provide a legal opinion regarding the Applicant’s dismissal and other related complaints including the non-accommodation of her medical condition. The legal opinion concluded that the grievances respecting the dismissal and the other issues reviewed would not be successful if advanced by the Union to arbitration.

As noted above, section 20(a) of the *Act* applies in cases where the employee has been dismissed. That provision imposes a duty on bargaining agents to take reasonable care to represent the interests of an employee in such cases in addition to the general duty to refrain from acting in a manner which is arbitrary, discriminatory or in bad faith. Once again, the application does not contain facts which disclose a violation of section 20(a) of the *Act*.

Indeed, the Applicant makes it clear that the Union relied upon legal advice in determining that it would not proceed to arbitration with a grievance into the termination of her employment. This Board has previously determined that bargaining agents are entitled to rely upon legal opinions in determining whether or not to proceed with a grievance to arbitration [see for example, *Re Maintenance Trades* (2006), 120 C.L.R.B.R. (2d) 83]. The Union's decision not to refer the Applicant's dismissal grievance to arbitration is buttressed by the written legal opinion provided by its counsel. Reliance upon legal advice has long been characterized as a potent defence to duty of fair representation claims under section 20 of the *Act*.

The application neither satisfied the Board that the Union acted in a manner which was arbitrary, discriminatory or in bad faith or that it failed to take reasonable care to represent her interests with respect to the termination of her employment. Accordingly, the Board dismissed the Applicant's claim in that regard pursuant to sections 30(3)(c) and 140(8) of the *Act*, having concluded that that complaint was without merit.

**C) Unfair Labour Practice Allegations against the Employer**

Notwithstanding the determination that the Applicant unduly delayed in filing her application as against the Employer, the Board also considered the Employer's submission that it did not commit any unfair labour practice as alleged and further that the application failed to identify how the Employer was alleged to have done so. As was noted above, the Applicant only identified section 20 of the *Act* as having been violated. Section 20 of the *Act* imposes duties upon bargaining agents and those persons acting on their behalf in representing the rights of employees under a collective agreement. This section does not impose any duties upon employers. Nevertheless, the Applicant went on to allege that the Employer "was in breach of its fiduciary duty...to act fairly in applying its policies with respect to employee benefits and dental coverage". She says that the Employer "committed an unfair labour practice in contravention of [the *Act*] by failing to act fairly and in compliance with the collective agreement governing the parties by failing to act fairly in compliance with and with respect to its own policies pertaining

to employee benefits and dental coverage during the relevant time”. The Applicant further alleged that the Employer “deliberately misapplied its policies” to defeat her claims for dental benefits.

The Board agrees with the position of the Employer that the Applicant failed to identify how it allegedly committed an unfair labour practice. The application alleges that the Employer acted unfairly and contrary to the collective agreement. Such an allegation is not properly the subject of an unfair labour practice proceeding. Ordinary disputes regarding the application of the provisions of a collective agreement are properly determined under the final dispute provisions of that agreement. The Applicant refers to the Employer allegedly failing to act fairly and in compliance with the collective agreement. Section 80 of the *Act* does provide that all collective agreements shall include a provision obliging the employer to administer the collective agreement in a manner which is reasonable, fair, in good faith and consistent with the collective agreement as a whole. This section, however, is not an unfair labour practice section.

The unfair labour practice provisions are set out in Part I of the *Act*. The application does not provide any facts which suggest that the alleged actions of the Employer are linked to or tainted by any prohibited grounds set out in the unfair labour practice provisions of the *Act*. As such, the Applicant’s complaint that the Employer committed an unfair labour practice is without merit and was dismissed pursuant to subsections 30(3)(c) and 140(8) of the *Act*.

#### **IV. Conclusion**

For the reasons set out above, the Board determined that the Applicant unduly delayed in filing a complaint and further that the application was without merit. Accordingly, pursuant to

subsections 30(2), 30(3)(c), and 140(8) of the *Act*, the Board dismissed the application.

**DATED** at **WINNIPEG**, Manitoba, this 19<sup>th</sup> day of May, 2009 and signed on behalf of the Manitoba Labour Board by:

“original signed by”

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

CSR/mr