

Manitoba Labour Board

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DISMISSAL NO. 1997

Case No. 96/11/LRA

IN THE MATTER OF: *THE LABOUR RELATIONS ACT*

- and -

IN THE MATTER OF: An Application by

S.S.,

Applicant,

- and -

**(MGEU) Manitoba Government and General
Employees' Union,**

Bargaining Agent/Respondent,

- and -

Y.W.C.A. RESIDENCE INC.,

Employer.

BEFORE: C. S. Robinson, Vice-Chairperson

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

SUBSTANTIVE ORDER

WHEREAS:

1. On March 1, 2011, the Applicant filed an Application Seeking Remedy for Alleged Unfair Labour Practice contrary to Section 20 of *The Labour Relations Act* (the "Act").

2. On April 13, 2011, the Bargaining Agent/Respondent filed its Reply to the Application, requesting that the Application be dismissed without a hearing on the basis that the Applicant unduly delayed in filing its Application and that the Application failed to disclose a *prima facie* case.
3. On April 29, 2011, the Applicant filed a Reply to the Bargaining Agent/Respondent's Reply.
4. On May 4, 2011, the Registrar corresponded with the parties informing them that the *Manitoba Labour Board Rules of Procedure* do not provide for the filing of a Reply to a Reply and the Board may have to address any challenges that may be taken by the Respondent(s) to its filing and shall determine the weight, if any, to be placed on the Reply.
5. The Employer did not file a Reply to the Application.
6. The Board, following consideration of all material filed, has DETERMINED the following:
 - a. An oral hearing is not necessary as this matter can be determined by a review of the written material filed by the parties;
 - b. The Applicant was disciplined in early 2009 and ultimately his employment was terminated by the Employer on or about February 5, 2009. The Union filed grievances on behalf of the Applicant regarding the discipline and the termination of his employment. The Applicant alleged that the Union failed to represent him in violation of section 20 of the *Act* when a union official pressured him to accept an offer to settle his grievances. The grievances, including the termination grievance, were settled and the Applicant signed a "Final Release" on May 15, 2009. The Applicant claimed that he was told that if he did not accept the offer, the Union would accept it on his behalf over his objections.
 - c. The Applicant filed this application with the Board on March 30, 2011.
 - d. The Respondent requested that the application be dismissed without a hearing on the basis that the Applicant unduly delayed in filing the Application and that the Application failed to disclose a *prima facie* case.
 - e. Section 30(2) of the *Act* provides that the Board may 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.
 - f. 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 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 *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.

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.

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,

...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.

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).

- g. The delay in filing this Application is more than 22 months following the date upon which the Applicant alleged that he became aware that the Respondent acted in violation of the *Act*.
- h. The Applicant attempted to explain his delay in filing the Application by asserting that he was seriously injured in an automobile accident in March of 2010. The Board has considered the Applicant's explanation for his delay in filing the present Application. The explanation is inadequate in at least two respects. First, by March of 2010 when the accident occurred, the Applicant had already unduly delayed in filing a complaint regarding his allegations against the Union which, he says, came to his attention on April 29, 2009. Second, the Board is not satisfied that the Applicant has established that he was medically incapable of filing his unfair labour practice application in a timely manner due to the automobile accident or otherwise.
- i. Accordingly, pursuant to section 30(2) of the *Act*, the Application is dismissed as the Applicant has unduly delayed in filing his complaint.

T H E R E F O R E

The Manitoba Labour Board hereby **DISMISSES** the Application Seeking Remedy for Alleged Unfair Labour Practice filed by S.S. on March 30, 2011.

DATED at **WINNIPEG, Manitoba** this 3rd day of June, 2011, and signed on behalf of the Manitoba Labour Board by

“Original signed by”

C. S. Robinson, Vice-Chairperson

CSR:tj:lo-s