Labour Relations Board
Saskatchewan

SASKATCHEWAN JOINT BOARD RETAIL, WHOLESALE AND DEPARTMENT STORE UNION and RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 568, Applicant v. OFF THE WALL PRODUCTIONS LTD, Respondent

LRB File No. 146-06; January 26, 2009
Vice-Chairperson, Steven Schiefner; Members: Gerry Caudle and Clare Gitzel

Practice and Procedure – Delay – Union files application – Following initial application, little activity on file - Board Registrar writes to Union 6 times over 23 months seeking information as to status and scheduling of application – Board receives no communication from Union – Board concludes Union had ample opportunity to prosecute and advance claims - Board concludes delay excessive - Union providing no explanation for delay - Board summarily dismisses application without oral hearing.

Practice and Procedure – Dismissal for Want of Prosecute – Board discusses procedure to be followed in event of excessive delay in prosecution of alleged violation of *The Trade Union Act* - Board invokes procedure for summary dismissal - Board summarily dismisses application without oral hearing.

***The Trade Union Act*, ss. 18 (p) and (q)**

REASONS FOR DECISION

Background:

[1] **Steven Schiefner, Vice-Chairperson:** The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (the "SJBRWDSU") is certified as the collective bargaining agent for an appropriate unit of employees of Off the Wall Productions Ltd. (the "Employer").

[2] On September 25, 2006, the Retail, Wholesale and Department Store Union, Local 568 (the "Local") filed an application with the Board alleging the Employer committed a violation of Section 43 of *The Trade Union Act*, R.S.S. 1978, c.T-17 (the "*Act*") by reasons of facts particularized as follows:

> *(a) The Saskatchewan Joint Board, Retail, Wholesale and Department Store Union is the certified bargaining agent for all employees of the Corporation;*
>
> *(b) The collective agreement between the Corporation and the Trade Union expires October 31, 2006;*
>
> *(c) The Corporation has apparently temporarily ceased its operation and all members of the Trade Union who were employed by the Corporation are no longer working as of September 7, 2006;*
>
> *(d) The Corporation has not given any written notice to the Trade Union nor to the employees;*
>
> *(e) The Trade Union served notice to bargain collectively for renewal and/or revision of the collective agreement during the open period prior to the lay-off/closure; and*
>
> *(f) The Corporation has not given the Trade Union any information whatsoever as required pursuant to section 43 of the Trade Union Act.*

[3] On September 26, 2006, SJBRWDSU filed an application with the Board seeking interim relief pending final determination of the Local's application alleging a violation of the *Act*.

[4] It should be noted that, with respect to the applications before the Board, SJBRWDSU and the Local were operating in concert and were represented by the same legal counsel; being the general counsel of SJBRWDSU. For the purpose of these Reasons for Decision, SJBRWDSU and the Local were considered synonymous and have hereinafter been collectively referred to as the "Union".

[5] The Union's interim application was heard on October 3, 2006, at which time the Board issued an interim Order providing for the following:

> ***INTERIM ORDER***
>
> ***HAVING READ*** *the Application and Interim Application pursuant to sections 5, 5.3, 18, 42 and 43 of The Trade Union Act, together with the Affidavit of Chris Banting and the Draft Order, all filed;*

AND HAVING HEARD *the submissions of Larry Kowalchuk, counsel for the Applicant;*

THE LABOUR RELATIONS BOARD HEREBY ORDERS:

(1) ***THAT****, within forty-eight (48) hours of the issue of this Order, the Respondent, Off The Wall Productions Ltd., shall reinstate and continue to pay wages and to provide benefits to all employees terminated, laid off or displaced as a result of the closure of business, until the final determination of the application or further order of this Board;*

(2) ***THAT****, within seventy-two (72) hours of the issue of this Order, the Respondent shall reimburse each employee reinstated pursuant to paragraph (1) of this Order for any monetary loss suffered by the employee as a result of the termination, lay-off or displacement;*

(3) ***THAT****, within seventy-two (72) hours of the issue of this Order, the Respondent shall meet with the Union for the purposes of bargaining a workplace adjustment plan pursuant to s. 43(8) of The Trade Union Act;*

(4) ***THAT,*** *the Board shall remain seized with respect to any issues regarding the implementation of this Order, including, but not limited to, the quantum of compensation for monetary loss.*

[6] On October 16, 2006, the Board Registrar wrote to the parties to coordinate the scheduling of a pre-hearing conference or a formal hearing of the application and she did so in accordance with the Board's usual practice for coordinating and scheduling of an application alleging a violation of the *Act*.

[7] Prior to October 18, 2006, all communications with the Employer were directed to the Employer's registered corporate office, being the law firm of Kanuka Thuringer. On October 18, 2006, the law firm of Kanuka Thuringer filed a Notice pursuant to ss. 19(3.1) and 247 of the *Business Corporations Act*, R.S.S. 1978, c. B-10, ceasing as the registered office for the Employer.

[8] The Board Registrar did not receive a reply to her October 16, 2006 letter from the Union regarding scheduling.

[9] The Board Registrar wrote to counsel for the Union on January 18, 2007 seeking an update from the Union as to the status of the matter and seeking direction

from the Union as to whether the application should be adjourned, withdrawn or scheduled for hearing. Similar letters were sent by the Board Registrar on June 18, 2007, December 18, 2007, June 20, 2008 and September 22, 2008. In the September 22, 2008 letter, the Board Registrar indicated that, should she not hear from the Union within twenty-one (21) days, she would place the Union's application in front of an *in camera* panel of the Board (a panel convening in the absence of the parties) for a determination as to the status of the application.

[10] On November 21, 2008, an *in camera* panel of the Board comprised of Vice-Chairperson Schiefner and Board members Gitzel and Caudle, considered the application, together with the information contained on the Board's file, which included the Union's application for interim relief and material filed by the Union in support thereof, as well as the Board's interim Order dated October 3, 2006, and the correspondence thereafter from the Board Registrar to the parties regarding the status of the application.

Decision:

[11] In the Board's opinion, the application should be summarily dismissed without an oral hearing for want of prosecution. In so doing, the Board relies upon the authority set forth in ss. 18(p) and (q) of the *Act*:

> *18. The board has, for any matter before it, the power:*
>
> *(p) to summarily dismiss a matter if there is a lack of evidence or no arguable case;*
>
> *(q) to decide any matter before it without holding an oral hearing;*

[12] In making this decision, the Board is mindful that summary dismissal of an application without an oral hearing is a harsh remedy.

[13] The various applications coming before the Board pursuant to the *Act*, as well as similar legislation falling within the jurisdiction of the Board, including *The Construction Industry Labour Relations Act, 1992*, S.S. 1992, c.C-29.11, and *The Public Service Essential Services Act*, S.S. 2008, c.P-42.2, are predicated on the fundamental

rights and obligations of employees, trade unions and employers. The summary dismissal of an application without an oral hearing should not be granted lightly.

[14] In a civic context, the trend in Saskatchewan has been to permit parties to have their day in court; see: *Wong v. Schienbein*, [1983] Sask. D 3702-03 (Sask. Q.B.); and not to be deprived from the right to pursue his/her cause of action except in the clearest and most obvious case; see: *Goertz v. Radiers*, [1981] Sask. D. 3702-02 (Sask. Q.B.). In the labour context, the Board has held that applicants should not be deprived of their "day in court", so to speak (not see their applications summarily dismissed without an oral hearing) except in clear and obvious cases and in accordance with due process. See: *Beverley Soles v. Canadian Union of Public Employees, Local 4777 and Parkland Health Region*, [2006] Sask. L.R.B.R. 413, LRB File No. 085-06.

[15] Within this framework, the Board must decide if this is an appropriate case for summary dismissal without an oral hearing. As the Board has stated previously, time is of the essence in dealing with disputes in a labour-relations context. Timely commencement and resolution of applications before the Board are an important component in maintaining amicable labour relations in this Province. To this end, parties have the right to expect that claims, which are not asserted within a reasonable period of time, or which involve matters which appear to have been satisfactorily settled, will not later re-emerge. See: *Dishaw v. Canadian Office & Professional Employees Union, Local 397*, 2009 CanLII 507 (SK L.R.B.), LRB File No.164-08.

[16] Periodically, applications are filed with the Board that, for one reason or another, seem to fall into a period of unexplained hiatus. For example, applications are sometimes filed with the Board and are subject to an initial flurry of activity but later experience an extended period of inactivity (as in the present case). Sometimes, applications are adjourned *sine die* by the parties, with neither party seemingly desirous of advancing the claim thereafter. As was done in the present case, the Board's practice is to have the Board Registrar contact the applicant every few months seeking an update on the status of their application and asking whether or not the matter should be adjourned, withdrawn or scheduled for hearing. Often, the Board Registrar will receive a letter from an applicant indicating they wish to withdraw their application. However, occasionally and for reasons unknown to the Board, some applicants neither

advance their application nor communicate with the Board, notwithstanding the passage of many months with no advancement of their claims. These abandoned applications consume the scarce resources of the Board and can represent contingent liabilities for respondents.

[17] In the present case, the Board Registrar wrote to the Union six (6) times over a twenty-three (23) month period. On the last occasion (September 22, 2008), the Board Registrar advised that, if no response was received, the Union's application would be placed before an *in camera* panel of the Board for a determination as to the status of the application. The only communication that the Board Registrar received was a phone call on or about November 14, 2008 from a representative of the Union asking that material from the Board's file be sent by facsimile transmission to the Union. The Board Registrar faxed the requested information and again reminded the Union of her intention to present the Union's application to an *in camera* panel of the Board for direction.

[18] No response was received from the Union and the application was considered by an *in camera* panel of the Board on November 21, 2008.

[19] In all of the above, the Board is satisfied that the Union was receiving the Board Registrar's correspondence. The Union is an active trade union in the province corresponding with the Board at the address provided on other matters before the Board. However, if it had been otherwise, the outcome would have been the same. Parties before the Board must use due diligence if they change their address to ensure that the Board and the other parties are aware of their new address. The onus is on the moving party to advise the Board (and the other parties) of the change of their address. See: *Satpal Virdi v. Treasury Board (Department of Human Resources and Skills Development)*, 2006 PSLRB 124 (CanLii).

[20] In the Board's opinion, the Board Registrar followed an appropriate procedure. The Union had ample opportunity to prosecute and/or advance its claims against the Employer and was reminded on a reasonable and periodic basis by the Board Registrar of the need to do so. It is reasonable and appropriate for the Board to assume the application has been abandoned by the Union. In a similar situation before the British Columbia Labour Relations Board, that Board dismissed an application for

want of prosecution following a lengthy and unexplained delay in proceedings, during which the Applicant was no longer communicating with the Board. See: *High Grade Mill Installations v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local No. 1-3567*, 2008 CanLII 31318 (BC L.R.B.).

[21] Even if the Union were to take the position that it has not abandoned its application, the effluxion of time is sufficient (over 24 months) that the Employer could be presumed to have suffered prejudice in its ability to respond to the Union's application, including the unavailability of witness, the recognized corrosive effect on the memories of witnesses, and the general deterioration of evidence associated with excessive delay. *See*: *Evelyn Brody v. East York Health Union*, [1997] O.L.R.D. No. 157. *See also*: *McLennan and Teamsters, Local 464* (2001), 69 C.L.R.B.R. (2nd) 54.

[22] The Union has provided no explanation for its delay and, as such, has not overcome the presumption of prejudice to the Employer associated with excessive delay. See: *McKenly Daley v. Amalgamated Transit Union and Corporation of the City of Mississauga*, [1982] O.L.R.B. Rep. March 420; *Brody, supra* and *Dishaw, supra*.

[23] Finally, the Board is satisfied that it has jurisdiction to invoke its authority pursuant to s. 18(p) and (q) on its own initiative as well, as upon the application of a Respondent.

[24] Simply put, the Board is satisfied that the Union has either abandoned its application or unreasonably delayed the prosecution thereof such that it is a clear and obvious case that justice can no longer be done if the application is allowed to continue. Furthermore, the Board is satisfied that it would be an unreasonable and unnecessary use of the Board's scarce resources to allow the application to continue. Upon the analysis made and the conclusions reached, the Board is satisfied that there is no arguable case and that the Union's application must be summarily dismissed without an oral hearing.

[25] As previously stated, the timely resolution of applications before the Board is an important component in maintaining amicable labour relations in this

Province. The parties to alleged violations of the *Act* have the right to expect that claims, which are not advanced or prosecuted within a reasonable period of time, will not later re-emerge.

[26] In the future, if a respondent believes that excessive delay has occurred in the prosecution of an alleged violation of the *Act*, the respondent may make application to the Board in accordance with the procedure established by this Board is *Soles, supra;* that being to ask that the impugned application be presented to *in camera* panel of the Board to decide whether or not summary dismissal is an option. If the panel determines that it is, the applicant will be invited to file a written submission in reply. Both the respondent's and applicant's submissions will be considered by another *in camera* panel of the Board to determine whether or not all or part of the impugned application should be dismissed without an oral hearing.

[27] Similarly, if the Board Registrar believes that excessive delay has occurred in prosecution of an alleged violation of the *Act* and has received no communication from the applicant following reasonable notice, an *in camera* panel of the Board may be asked to review the application to determine whether or not all or part of the application should be dismissed without an oral hearing.

Conclusion:

[28] In conclusion, having examined the facts and allegations contained in the Union's application, together with the material contained in the Board's file, including, *inter alia*, the correspondence of the Board Registrar to the parties hereto, the Board concludes that the Union's application must be, and is hereby, summarily dismissed without oral hearing pursuant to ss. 18(p) and (q) of the *Act* for want of prosecution.

DATED at Regina, Saskatchewan, this **26th** day of **January, 2009.**

LABOUR RELATIONS BOARD

Steven Schiefner,
Vice-Chairperson