PRINCE EDWARD ISLAND
LABOUR RELATIONS BOARD

File No.

Decision No.
01-004, 01-020 and 01-022

IN THE MATTER OF

MOTION TO AMEND UNFAIR LABOUR PRACTICE COMPLAINTS 01-004, 01-020 and 01-022

BETWEEN

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 864, et. al.

COMPLAINANTS

POLAR FOODS INTERNATIONAL INC., et. al.

RESPONDENTS

Eugene P. Rossiter, Q.C. — Counsel for the Complainants

Murray Murphy — Counsel for the Respondents

DECISION ON MOTION TO AMEND COMPLAINTS

Background

The Complainant Union filed with the Labour Relations Board of Prince Edward Island a series of Unfair Labour Practice Complaints pursuant to sections 9 and 10 of the *Labour Act, R.S.P.E.I. 1988, Cap L-1*, three of which were designated as Board files 01-004 filed on the 17th day of April, 2001; 01-020 filed on the 10th day of September, 2001; and 01-022 filed on the 12th day of September, 2001. The Replies to these Complaints were filed by the Respondent on the 7th day of May, 2001 for file 01-004, and the 27th day of September, 2001 for the other two files.

In Board file 01-004, the Union and 16 individual Complainants (employees at Polar's Beach Point Division) allege that, on or about the 22nd day of January, 2001, Polar laid off the individual complainants because of union activity. The Complainants seek, in part, compensation for losses allegedly resulting from the lay-off for themselves and all other employees laid off.

The Complaint in Board file 01-020 is brought solely by the Union and alleges that the Respondents reduced the wages of summer students at its Souris Division during a statutory wage freeze. The Complainants seek, in part, a retroactive payment of all wages to all employee students at the Polar Division in the 2001 season.

The Union and 17 individual Complainants (employees at Polar's Souris Division) in Board file 01-022 allege that, on or about the 22nd day of January, 2001, Polar laid off the individual complainants because of union activity. The Complainants seek, in part, compensation for losses allegedly resulting from the lay-off for themselves and all other employees laid off.

The Respondents deny the allegations and opposes the Complaints.

The hearings respecting these and other matters among the parties first convened on the 30th day of September, 2001. On the 22nd day of October, 2001, the Board ordered consolidation of the hearing of twelve Unfair Labour Practice Complaints, including the three instant Complaints. Because a reverse onus applies to some of the Complaints, the parties consentually proposed and the Board ordered that the Respondents present their case first.

On the 30th day of October, 2001, the Respondents advised the Board that they would rely upon the sworn evidence contained in its Replies and would call no further evidence. Counsel for the Respondents confirmed on the record that the Respondents closed their case, subject to its right to call rebuttal evidence. The Board confirmed, and the parties acknowledged on the record, that the law of rebuttal evidence would limit the scope of evidence that could be called in rebuttal. Given that the replies had been sworn to by Mr. Jack Quinn and Mr. Milton MacKay, counsel for the Complainants submitted that he was at a procedural disadvantage of calling his case a those individuals had not been presented by the Respondent for cross-examination. In light thereof, counsel for the Complainants advised he would be calling Messrs. Quinn and MacKay during presentation of his case. Accordingly, the parties agreed that the Complainants would have the right of recall of witnesses if necessary as a result. By agreement, the Complainants were given the right of recall of witnesses if necessary, due to cross-examination of Messrs Quinn or MacKay.

Also on the 30th day of October, 2001, the Complainants began calling their case. Between the 30th day of October and the 5th day of November, 2001, the date Motion to Amend was made orally, there were thirteen of the Complainants' witnesses presented for examination and cross-examination.

On the 5th day of November, 2001, there was an oral Motion to Amend to the effect that, as set out in Counsel's written submission, "*..to amend certain outstanding Unfair Labour Practice Complaints to include persons laid off who were not otherwise specifically identified in the Complaints so they could benefit from any remedy which might be received by employees as a result of the wrongful lay-offs at Beach Point and Souris, Prince Edward Island; in particular, the amendments were to Complaints 01-022, 01-014 and 01-004.*" Respondents' counsel advised the Board that Polar would be objecting to the motion, requested that the Complainants make the motion in writing, and requested the opportunity to make written submissions on the motion. Additionally, there were discussions as to whether or not the Complaints could be amended without evidence from the individual Complainants, either by affidavit or *viva voce* basis. The Board directed that briefs on the issue of the amendment were to be submitted to the Board by the 19th day of November, 2001.

On the 5th and 6th days of November, 2001, the Complainants' counsel presented some 22 witnesses for examination and cross-examination.

On the 19th day of November, 2001, the Complainants' counsel again confirmed that the motion would be for amendment to the relevant Complaints being 01-004, 01-022, 01-014 and 01-020, pointing out that the amendments would be confirmed by *viva voce* or affidavit evidence of the individual Complainants to be added to the Complaints. It was agreed between the parties that the parties would make written submissions on a later date.

Between the 19th day of November, 2001, and the 9th day of January, 2002, the Complainants presented a further 51 witnesses for examination and cross-examination. On the 9th day of January, 2002, it was agreed that the applicant would call some additional witnesses on this particular date, and then the applicant would file the written motion to reflect the substance of the motion for amendment of the relevant Complaints. The parties agreed to a time to be fixed to file briefs on the motion, the Board would rule on the motion and then the Respondent, if necessary, could call rebuttal evidence. On the 9th and 10th days of January there were 38 witnesses presented by the complainants for examination and cross-examination.

On the 10th day of January, 2002, it was agreed that the written amendment to the Complaints would be filed with the Board by the 21st day of January, 2002. Written briefs on the issue were to be presented by the 8th day of February, 2002. The hearings were adjourned to the 26th and 27th days of February, 2002 at 9:30 a.m.

On the 21st day of January, 2002, an Amended Complaint was filed with respect to Complaint 01-004 by adding individual Complainants as listed in Schedule "A" annexed thereto. There were no amendments to this Complaint other than adding named individuals as Complainants. Also on the 21st day of January, 2002, an Amended Complaint was filed with respect to Complaint

01-022. Again, this document proposed to change the original Complaint by adding additional individual Complainants as listed in Schedule "B" annexed thereto. Further, on the 21st day of January, 2002, an amendment was filed with the Board to Complaint number 01-020. The amendment again was to propose to add additional persons as Complainants as listed in Schedule "A" annexed thereto.

The written briefs were eventually filed with the Board on the 14th day of February, 2001. Given the extensive nature of these briefs the Board directed that it would hear oral submissions on the 26th day of February, 2002. The Board convened on that date and heard oral submissions from counsel for the entire day.

Cases Considered

1. *Kane v. UBC* [1980] 1 SCR 1105;
2. *Atlantic Packaging Products Limited,* [1995] OLRB Rep. (Sept.) 1147;
3. *Angel Merchandising Services,* [2000] Alta. LRBR 108;
4. *Rothwell Foods Co. Ltd. and Retail Clerks Union, Local 1518,* [1984] No. 184/84;
5. *Marriott Corp. v. C.G.L.U., Local 1079A* [1989] P.E.I.J. No. 37 (T.D.);
6. *UFCW, Local 1252 v. Lobster Specialities Limited* [13 July 1990] PEILRB;
7. *Peter McIntyre and Usen Fisheries* (NSLRB No.2319, October 15, 1976);
8. *Gravel and Lake Services Limited v. International Woodworkers of America - Canada, Local 2693, et al.,* [1992] OLRB No. 603 ;
9. *Cuddy Food Products Ltd.,* [1989] OLRB (Feb.) 126;
10. *Wigmar Construction (B.C.) Limited,* [1985] 7 CLRBR (NS) 99 (BCLRB);
11. *Construction and General Labourers' and General Workers v. Cameron Masonry Limited* (1999), 174 Nfld & PEIR 169 (P.E.I.S.C.T.D.);
12. *Royal Homes Ltd.,* [1992] O.L.R.B. No. 744;
13. *C. U. I. E. v. Reed Ltd.,* [1978] O.L.R.B. Rep. 1;
14. *United Gas Ltd.,* [1965] CLLC 16,056;
15. *International Brotherhood of Electrical Workers, Local Union 424 v. John Cusack et. al. and TNL Industrial Contractors Limited,* [1995] Alta. L.R.B.R. 547; and
16. *TNL Industrial Contractors ltd. (Re),* [1999] Alta. L.R.B.R. 519.

Statutes Considered

(a) *Labour Act,* R.S.P.E.I. 1988, Cap. L-1, Sections 11;

(b) *Labour Act,* Regulations (EC 521/71) Sections 19, and 26;

(c) *Age of Majority Act,* RSPEI Cap. A-8, Sections. 1 and 2;

Texts Considered

(a) Sara Blake, Administrative Law in Canada (ed). Markham, Butterworths, 2001, p. 35

(b) Labour Relations Board Remedies in Canada (Aurora: Canada Law Book Inc., 1999)

Evidence

There was no evidence called on behalf of either the parties in support of nor in defence of this Motion.

Issues

The sole issue before the Board at the present time is: should the Board permit the Motion to Amend the Complaints in the circumstances of this case?

Decision

The submissions and supporting authorities have been carefully considered by the Board. The Board is prescribed authority to grant amendments to complaints under s. 26 of the *Labour Act Regulations*, supra which states as follows:

> *26. An application, reply, intervention, complaint, statement of desire to make representation or notice may be amended before or at the hearing by leave of the Board on such terms and conditions as the Board thinks advisable.*

The Board was referred to the decision of the Alberta Labour Relations Board in International Brotherhood of Electrical Workers, Local Union 424 v. John Cusack et al and TNL Industrial Contractors Limited, [1995] Alta. L.R.B.R. 547 which states in part:

> *On the second day of hearing, but well into the Union's evidence, counsel for the Union asked the Board to add Blaine MacDonald, Rob Collins, and Peter Seibel as Complainants. Counsel submitted only the day before did the Union become aware of the particulars related to these three individuals which showed they applied for work at TNL within the relevant time, being January 1 to May 30, 1995. He pointed out this application was made within 90 days of the filing of the original complaints and all three had or would testify in the hearing in any event. Counsel argued it was more expedient to amend the complaint at this stage rather than to have the individuals file new complaints and require a separate hearing. He suggested no prejudice flowed to the Employer as the three individuals were already testifying in this hearing.*

Counsel for the Employer opposed the application, suggesting the passage of time and the fact that two of the three had already testified (one fully and the other in-chief) caused prejudice to the Employer in that it affected the way it may have proceeded with its case. He encouraged the Board to decline such late amendments in the spirit of encouraging a speedy disposition of matters before the Board. He suggested if these individuals wished, and could meet the timeliness provisions, they could file new complaints. Finally, counsel argued these complaints were being filed outside the 90 days contemplated by section 15(1.1) and the Board should refuse to accept them on that ground.

The Board, in its oral decision, relying on section 15(6) and the Board's decision in Lougheed and Gallagher v. Hotel and Restaurant Employees, Local 47, supra granted the application to add Peter Seibel and Blaine MacDonald as Complainants, but dismissed it for Rob Collins. Mr. Collins had not applied for work with TNL during the relevant period and we refused to add him as a Complainant for that reason.

Section 15(6) provides:

> *15(6) The Board may permit an amendment to a complaint, reference or application at any stage in its proceedings subject to the rights of affected parties to make any representations and defences that may be necessitated by the amendment.*

We found the issues for these new Complainants to be the same as those raised in the complaints already before us and the evidence overlapped. Mr. Seibel had not yet testified and the Employer had not yet cross-examined Mr. MacDonald. The Board concluded it made good labour relations sense to add these individuals to the complaints already before it rather than to require them to file formal complaints and begin a new litigation process.

Section 15(1.1) gives the Board a discretion to refuse to accept a complaint filed more than 90 days after the Complainant became aware of the circumstances giving rise to the complaint. It reads:

> *15(1.1)The Board may refuse to accept any complaint that is made more than 90 days after the Complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.*

The particulars provided by the Union showed Mr. MacDonald's last contact with TNL was February 24th while Mr. Seibel's was in late April or early May. Mr. Seibel's complaint was therefore only two to three weeks past the 90 day limit. Mr. MacDonald's complaint was about three months outside the 90 day period.

In Guylera v. Amalgamated Transit Union [1994] Alta.L.R.B.R. 495 the Board found it would not normally exercise its discretion to refuse accepting a complaint unless the delay in filing was extreme or it would create a prejudice to a party litigating the issue. See also: Don MacDonald v. CUPE Locals 709 & 37 [1995] Alta.L.R.B.R. 340 and NASA v. University of Alberta and Focus Bldg. Services et al [1995] Alta.L.R.B.R. 396. The case before us presents neither situation.

The Board noted, throughout the processing of these complaints, there had not been strict adherence to the Rules of Procedure to this point and the Board had given considerable latitude to the parties on procedural matters. We found no compelling reason to be overly strict with procedure at this point.

As a result, the Board accepted the complaints of Mr. Seibel and Mr. MacDonald and directed they be combined with the other complaints already before us.

Counsel pointed out that this case was subject to a Judicial Review Application before the Alberta Supreme Court Queens Bench Division on the 29th day of February, 1999 [TNL Industrial Contractors Ltd. (Re) , [1999] Alta. L.R.B.R. 519] [Tab 8]. The judicial review application dealt with, inter alia, the issue of the amendment of the complaints to include additional complaints. Paragraphs 28 through to 33 of the Decision stated as follows:

28 The third question involves TNL's argument that the Panel ought not to have allowed IBEW to add MacDonald and Seibel as Complainants on the second day after the hearing had begun. Both were successful. At the time the application to join them was made MacDonald had been examined by IBEW but not cross-examined by TNL's counsel and Seibel had not testified. The issues respecting these two men were the same as those of the existing Complainants. The Panel, utilizing s. 15(6) of the Code, allowed them to be added. Section 15(6) provides:

> *(6) The Board may permit an amendment to a complaint, reference or application at any stage in its proceedings subject to the rights of affected parties to make any representations and defences that may be necessitated by the amendment.*

29 The Panel, following three earlier decisions of the Board, decided that as the delay in filing was not extreme and would not create prejudice to a party litigating the issue, it would allow the two to be added and their claims dealt with along with those of the other Complainants.

30 TNL and Lund say that in doing so the Panel breached the principles of natural justice. It is claimed that they were adversely affected, being deprived of the opportunity to take advantage of the pre-hearing procedures built into the Code. Therefore, they were not allowed the opportunity to properly prepare to defend themselves against the claims of these two men.

31 Section 15 of the Code deals with the making of complaints. Section 15(1.1) sets a 90 day limit for making a complaint after the Complainant first had or ought to have had knowledge of the acts giving rise to the complaint. If that is exceeded, the Board may refuse to accept a complaint.

32 With the lack of a record of what took place this Court is left with no knowledge of what representations and/or defences were said to be necessitated by such an amendment being granted at that stage of the proceedings. There is no suggestion that an adjournment was sought nor is there evidence as to what if any prejudice was claimed before the Panel. The Panel found there was no prejudice and rather than have the two Complainants initiate their claims separately, allowed them to join with the existing complaints for the following reasons, at p. 8:

> *We found the issues for these new Complainants to be the same as those raised in the complaints already before us and the evidence overlapped. Mr. Seibel had not yet testified and the Employer had not yet cross-examined Mr. MacDonald. The Board concluded it made good labour relations sense to add these individuals to the complaints already before it rather than to require them to file formal complaints and begin a new litigation process.*

33 I agree with counsel for IBEW that the Panel had jurisdiction to add pursuant to S. 15(6) and appear to have acted reasonably in doing so.

The Board was also directed to other example of decisions dealing with situations of similar fact and issues. The Respondents' written submission states as follows:

The Ontario Labour Relations Board considered a similar issue in Atlantic Packaging Products Limited, [1995] OLRB Rep. (Sept.) 1147. The case dealt with an alleged discharge for union activity. Like in the instant case, the reverse onus provisions of the Ontario Labour Relations Act applied. Midway through the employer's case, the union sought to amend its application to include further particulars with respect to the Complainant's support for the union. The Board denied the union's request, writing at p. 1148:

> ***The responding party was entitled to know the case it had to meet before commencing to call its evidence. That is one of the primary purposes of the Board's rules with respect to pleadings. . . . The company had called its evidence and organized its case in reliance on the pleadings which had been filed. The union's only explanation for not filing the particulars earlier is that its advisor had just remembered them. In these circumstances, the Board concluded that it was not appropriate to permit the applicant to amend its pleadings.***

Next consider Angel Merchandising Services [2000] Alta. LRBR 108, an Alberta Labour Relations Board decision. At the end of the hearing, the union asked the Board to amend its complaint to include an alleged violation of an additional section of the Labour Relations Code. In rejecting the Union's request, the Board wrote at paragraph 36 of the QuickLaw version:

> ***We refuse to accept the amendment to the complaint. The complaint is dated October 15, 1999. Even though the missed section resulted from an oversight, it would be grossly unfair to include this new section at this stage in the proceedings. Angel has closed its case. It may have presented different evidence or argued differently if it had known Local 805 was alleging interference with its representation of these employees.***

In Rothwell Foods Co. Ltd. and Retail Clerks Union [1984] No. 184/84, the British Colombia Labour Relations Board considered the issue. Counsel for the Union, in his summation and argument at the close of the case, sought to amend its complaint to include an additional allegation of a unfair labour practice. The Board refused to allow the amendment and said:

> ***The Board is not prepared to permit this amendment. The Employer presented its case on the basis of the complaint before the Board. It is simply too late, once the evidence is complete, to add an allegation that another provision of the Code has been violated.***

The Alberta Labour Relations Board would seem to have set out a two, or perhaps even a four step test for determining such issues. It would appear this test would have the Board consider whether there was extreme delay, whether there is prejudice, whether there are new issues being raised and whether there is an overlap in the evidence. While neither of these decisions is exactly on all fours with the instant case, they each provide valuable insight to this Board in dealing with the current Motion to Amend.

The Respondents argued that there has been delay in bringing the Motion both in terms of the time line of pleadings themselves and in terms of perfecting the written Motion. However these arguments have been addressed by counsel for the Complainants insofar as the names of the all of the employees would have been on the employment records of the corporation and not as readily available to the Complainant union as they would have been to the Respondent employer. Furthermore, the delay in perfecting the written submissions was by consent of both parties.

Similarly, in regards to the matter of whether there is a similarity of issues and an overlap of evidence of the newly named Complainants, there is indeed in this instant case an overlap of the evidence and the same issues are being raised.

The determinative issue in the circumstances of this particular case is whether there is prejudice to the Respondents arising from the Motion to Amend. The written pleadings of both parties had been completed months prior to the oral Motion to Amend being made. The Respondents had closed their case subject to the limited ability to call rebuttal evidence. The Complainants were well into the presentation of their case having called some thirteen witnesses by the time the oral Motion to Amend the pleadings was made. These events, the record of proceedings, and the written and oral submissions of counsel have very clearly established that there is "... the possibility or the likelihood of prejudice in the eyes of a reasonable person..." , the test as outlined by the Supreme Court of Canada in *Kane v. UBC*, [1980] 1 S.C.R. 1105. The Board finds that there would be prejudice to the Respondents in these circumstances to allow the proposed amendments. The Respondents are therefore successful in defeating the Complaints' Motion to Amend the pleadings.

The Board wishes to state that it is yet to be determined whether or not employees who are not specifically named in the various Unfair Labour Practice Complaints can be granted any relief. However, it is noteworthy that in the various documents filed with the Board, the person alleged to be aggrieved include individuals not named and the remedies requested include requests for compensation for employees who are not specifically named. The Board feels that it incumbent to point out the foregoing to the parties and to state that at the time any decision will be rendered in relation to same, the Complainant Union is the certified bargaining agent for the Respondent's employees at its Beach Point and Souris Plants.

Summary

In summary, the Board dismisses the Complainants' Motion to Amend the Complaints pursuant to section 26 of the *Labour Act Regulations*. The Board will proceed with the resumption of the hearing into the Complaints of Unfair Labour Practices on a date to be fixed.

Robert R. MacArthur
Chair

Elizabeth MacFadyen
Member

Gerald Doyle
Member

This Decision made by the Prince Edward Island Labour Relations Board on this 4th day of April, 2002 and issued under the hand of its Chief Executive Officer.

Roy J. Doucette
Chief Executive Officer