FILE NO. CI 17-01-07094

THE QUEEN'S BENCH
WINNIPEG CENTRE

BETWEEN:

OSWALD COOMBS and BENJAMIN MICHALUK,

applicants,

- and -

MAGELLAN AEROSPACE LIMITED and UNIFOR, LOCAL 3005 and THE MANITOBA HUMAN RIGHTS COMMISSION,

respondents.

ENDORSEMENT SHEET

SITTING DATE(S) February 20, 2018 **MASTER CLEARWATER**

COUNSEL PRESENT
Bret Lercher for the respondent Magellan Aerospace Limited
Trevor Ray for the respondent Unifor, Local 3005
Heather Unger for the respondent The Manitoba Human Rights Commission

Oswald Coombs in person
Benjamin Michaluk in person

ENDORSEMENT

[1] This is my decision on the motion filed by the respondent Magellan Aerospace Limited, as supported by the respondents Unifor, Local 3005, and the Manitoba Human Rights Commission (collectively the respondents) to dismiss the judicial review application of Oswald Coombs and Benjamin Michaluk (the applicants) for delay in accordance with Queen's Bench Rule 38.12. The rule provides as follows:

> DISMISSAL OF APPLICATION FOR DELAY
>
> **Motion**
> 38.12(1) The court may on motion dismiss an application for delay.
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> **Grounds**
> 38.12(2) On hearing a motion under this rule, the court may consider,
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> (a) whether the applicant has unreasonably delayed in obtaining a date for a hearing of a contested application;
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> (b) whether there is a reasonable justification for any delay;
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> (c) any prejudice to the respondent; and
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> (d) any other relevant factor.

> **Dismissal not a defence to subsequent application**
> 38.12(3) The dismissal of an application for delay is not a defence to a subsequent application unless the order dismissing the application provides otherwise.
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> **Failure to pay costs**
> 38.12(4) Where an applicant's application has been dismissed for delay with costs, and another application involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest before payment of the costs of the dismissed application, the court may order a stay of the subsequent application until the costs of the dismissed application have been paid.

[2] For the reasons set out below, I am granting the motion and dismissing the judicial review application for delay. I also direct that this dismissal may be used as a defence to a subsequent application in accordance with rule 38.12(3).

[3] This is not a case in which the respondents are alleging there has been an inordinate or unreasonable delay in proceeding since the application for judicial review was filed. Rather, the respondents' position is that the unreasonable delay in this case was in filing the application in the first instance. This is so, say the respondents, given the decision of the Manitoba Human Rights Commission (the Commission) that the applicants are seeking to have reviewed, was made and communicated to the parties on or about October 16, 2014, some 29 months before the application was filed.

[4] The respondents urge the court to consider the spirit and intent of the language in *The Human Rights Code*, C.C.S.M. c. H175 (the Code), and the general principles in labour relations, all of which are designed to ensure an expeditious and efficient mechanism for dispute resolution. A 29 month delay in bringing a judicial review application, particularly in this context, and without any reasonable explanation for the period of delay, is, the respondents argue, inordinate and unreasonable. As a result, the respondents say the application should be dismissed.

[5] The applicants, despite acknowledging the delay, are jointly contesting the motion. For their part, the applicants primarily rely on health issues suffered by the applicant Coombs in this case as an explanation for the delay. They argue in light of these ssues, the delay was not unreasonable, and the motion should be dismissed.

[6] The parties all filed materials in support of their positions, including affidavits, transcripts of cross exams on affidavits (Exhibits 1-3), and briefs. The relevant facts may be summarized as follows:

1. The applicants are employees of the respondent Magellan Aerospace Limited (Magellan). Unifor, Local 3005 (Unifor) is the exclusive bargaining agent for a group of employees at Magellan, which group includes the applicants in this case. The applicants are both over 65 years of age.

2. At all material times, the terms of employment of the applicants were governed by negotiated collective agreements between Magellan and Unifor, including terms of a company Retirement Savings Plan and Deferred Profit Sharing Plan (Tab B, affidavit of Kim Alexander sworn April 18, 2017). In accordance with these terms, certain insurance and retirement related benefits cease, or are limited for employees over the age of 65. These same, or similar negotiated limits have been in place since at least 2009, and continue to date.

3. On or about July 21, 2009, a colleague of the applicants filed a human rights complaint with the Commission alleging these employment terms were discriminatory (the first complaint). Specifically, the first complaint alleged the following terms discriminated against the employees on the basis of age:

> 4. CAW is alleging that Bristol is discriminating against members based on age, by not matching the contribution to the "RRSP" for any employee who continues to work past the age of 65, even though the employee continue to contribute on their own to the "RRSP".
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> 5. In the case of life insurance, schedule D of the Collective Agreement sets out that::(sic)
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> a) No individual eligibility criteria exists other than being active employee of the Company.
> b) Coverage is provided automatically to the amount of $40,000 for each qualified employee.
> c) Life insurance coverage changes upon reaching age 65 down to $3,000 from $40,000 for no particular reason other than the fact the employee reaches the age of 65.

4. The first complaint was investigated and ultimately dismissed by the Commission on or about May 30, 2011.

5. By this time, the applicant Michaluk was already over 65 years of age. A grievance had also been filed by Unifor on Michaluk's behalf, alleging Magellan had discriminated against him on the basis of age by enforcing these same employment terms. That grievance was filed or about April 22, 2009, denied by Magellan, and ultimately discontinued by the Union on or about September 17, 2009.

6. Just over two years later, on or about October 15, 2013, after the applicant Coombs also turned 65, he and Michaluk filed separate but virtually identical complaints with the Commission alleging discrimination on the basis of age based on these same employment terms (the second complaints).

7. Magellan defended the second complaints in the same manner as the first, and also raised the decision of the Commission in the first complaint in support of its position.

8. The second complaints were investigated. The Commission ultimately adopted the investigator's findings, dismissing the second complaints. All parties were notified of the dismissal by the Commission by way of letters dated October 16, 2014.

9. While there was some confusion in the affidavit evidence of the applicants on this point, both confirmed at the hearing that they became aware of the determination of the Commission regarding the second complaints on or around October 16, 2014. Coombs specifically acknowledged in his submissions, as also outlined in the transcripts of the cross examination of George Sarides (Exhibit 2, pages 1-2), that the applicants contacted the former Executive Director of the Commission, within two days of receiving the Commission's decision, to discuss options open to them. The applicants confirmed they were advised, at

that time, that they could request a hearing for reconsideration or seek judicial review of the decision.

10. No action at all was taken by the applicants until they filed a statement of claim relating to the same issues in July, 2015. After some discussion, this claim was discontinued without costs on September 3, 2015.

11. On or about September 1, 2015, the applicant Coombs was advised by Isha Khan, counsel for the Commission, that judicial review of the decision was an option that may be available to him, and he was encouraged to discuss this with counsel.

12. In the affidavit of Coombs, affirmed May 9, 2017, relied on by the applicants in this motion, Coombs advises he suffered from a heart attack and required an operation. He advises he was hospitalized from December 2015, through January, 2016. While not in evidence, in the applicants' submissions Coombs advised he was very ill, and required some recovery time. He also advised the court, again not in evidence, that he had a knee operation sometime in 2015, preceding his heart issues. This was, he advised, around the same time as he and Michaluk filed the Statement of Claim.

13. There was no evidence presented concerning any barriers to, or an explanation for Mr. Michaluk's failure to pursue the judicial review application during the entire 29 months after the Commission dismissed the second complaints.

14. The applicants jointly contacted counsel in around August of 2016 to assist them with a judicial review application. That counsel changed firms once during the relevant period of time.

15. The application for judicial review was ultimately filed on March 21, 2017. The application was immediately met with this motion, which was filed April 13, 2017.

[7] In accordance with the authorities filed by the respondents in this case, all of which have been reviewed, the factors to be considered pursuant to rule 38.12 are the same as those to be considered in motions under rule 24. In ***Thorogood v Victoria General Hospital***, 2003 MBQB 196, the court acknowledges the rules are very similar, and adopted the test set out in the leading case of ***Law Society of Manitoba v Eadie***, [1988] M.J. No. 342, as follows:

> Amongst the matters which should be taken into account on a motion such as this are:
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> (i) the subject matter of the litigation;
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> (ii)the complexity of the issues between the parties;
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> (iii) the length of the delay;
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> (iv) the explanation for the delay;
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> (v) the prejudice to the other litigant;
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> It may be that, on an application to dismiss an appeal for undue delay, the merits of the appeal should be taken into account. In the case at bar, it is impossible to say what the merits are without a transcript of the evidence. This will not always be the case. I am of the view that, in an appropriate case, this court is entitled to review the merits of the appeal as one factor relevant to the motion to dismiss it.

[8] In addition to the relevant factors to be considered, the respondents did note for the court the changes to rule 24, which came into effect on January 1, 2018. The respondents acknowledged that, given the timing of this motion, the old rules would apply, but encouraged the court to keep in mind the principles of proportionality that are supported by the new rules, and have been adopted by the courts, particularly when dealing with procedural issues such as this.

[9] In this case, what is of particular importance to the court is the subject matter and the nature of the dispute between the parties. I am guided, in this part of the consideration, by comments made by McCawley J. in the ***MAHCP v Manitoba (Labour Board)***, 2016 MBQB 158, concerning the importance of addressing disputes in the labour relations realm in an expeditious manner (see paragraph 13).

[10] I am also guided in my assessment, by the language in the Code concerning the process for investigating and resolving disputes. This includes s. 50(2) which, although not directly applicable, does provide that an application for judicial review following adjudication of a claim "shall be" made within 30 days, or as a court may allow. This supports the need to address disputes of this nature, particularly in employment/labour contexts, as quickly and efficiently as possible.

[11] While no cases have been provided that directly consider the issue of timing for a judicial review application following a decision made by the Commission in Manitoba, I find guidance in the decision of ***Green v. Ontario***, [2010] O.J. No. 2058. This case does consider the timing of a judicial review application of the decision of the Ontario Human Rights Commission to dismiss a complaint. The complainant waited over 17 months in that case to file his application. The court held:

> **6** In considering whether to dismiss a judicial review application for delay, the Court will have regard to the length of the delay as well as any justification offered for the delay. Traditionally this Court has expressed concern about any delay greater than six months: Jeremiah at para. 45. The delay in this case is well beyond that point.
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> **7** Further, the applicant in this case has offered no explanation whatsoever for the delay since the Commission's October 2007 decision. The combination of inordinate delay and the absence of an adequate explanation for it is sufficient to warrant dismissal: Jeremiah at para. 48. Given the failure to meet these two tests, we cannot accept the applicant's submission that the merits of the application must be considered on a motion to dismiss for delay (see also Balanyk). However, in this case, there is a further complicating factor as a result of extensive amendments to the Human Rights Code that have come into force since the Commission's decision in October 2007.

[12] Concerning other factors the court should consider in cases like this, the complexity of the issues between the parties does not, in my view, support the delay in filing an application in the first instance. Further, while no specific prejudice has been raised, there is clear inherent prejudice in this case,

particularly given the consequences a review of this decision could have on the larger labour relationship between the parties.

[13] Having regard to all of the relevant factors for my consideration, I find the delay of 29 months in filing a judicial review application is inordinate and unreasonable. As noted above, that delay alone gives rise to inherent prejudice.

[14] In terms of the explanation provided, even giving generous consideration to the impact of the health issues of one of the applicants in this case, this explanation at best supports a delay covering the period between December 2015 to August 2016. This is when Coombs had a heart attack, followed by surgery and a lengthy recovery process. This delay occurs after over a year had already passed from when the initial decision of October 16, 2014 was released. In addition, there is no suggestion Michaluk, the joint applicant in this case, was incapacitated during this time, or at all during the 29 months.

[15] Further, even considering other health issues suffered by Coombs not found in the evidence, but raised in submissions, the applicants concede they were aware that judicial review was an option as early as October, 2014 when they spoke with the Commission's former Executive Director. Instead of pursuing this, they waited almost a year, and then preceded with filing a statement of claim in August of 2015, during the period Coombs allegedly was impacted by his knee surgery. As set out above, that claim was discontinued after some discussions in the fall of 2015, at which time the applicants were advised again, by counsel for the Commission this time, to consider judicial review. They did not.

[16] In August 2016 the applicants contacted their own counsel to assist, and despite all of these factors, did not proceed with the within application until March of 2017. When considered together, this does not provide the court with any reasonable explanation for the delay.

[17] Given the unreasonable and inordinate delay, with no reasonable explanation provided, and given the inherent prejudice suffered by the respondents as a result, I find in favor of the respondents in this case. The application for judicial review will be dismissed for delay.

[18] Further, and particularly given some of the comments of the applicants that they intend to re-file the same complaint at the Commission level, this despite the finding of the Commission on two separate occasions, I direct that the defendants may use this dismissal as a defence to any further application. I appreciate that I cannot bind the court should a new decision of the Commission on this

issue be made, and a new judicial review application filed, I do believe it is critical to allow a court to reference these findings in the future should that arise.

[19] In light of the success of the respondents in this case, they would normally be entitled to an award of costs. If costs cannot be agreed, an appointment may be obtained to address same.

DATE: March 2, 2018 **MASTER** _____

Copies of this Endorsement Sheet have been sent to counsel/parties on the 2nd day of March, 2018.