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Brotherhood of Maintenance of Way Employees v. Litke

Between
Brotherhood of Maintenance of Way Employees, plaintiff
(appellant), and
Wayne Litke, defendant (respondent)

[1998] M.J. No. 569
Docket: CI 98-01-08761

Manitoba Court of Queen's Bench
Winnipeg Centre
Keyser J.

December 18, 1998.
(12 pp.)

Labour law Unions Constitution and by-laws Effect on civil action Discipline of members For failure to strike or picket Jurisdiction Damages Entitlement Requirements of loss Penalties Courts Provincial courts Manitoba Court of Queen's Bench Jurisdiction, appeals.

Motion by the defendant employee, Litke, challenging the jurisdiction of the Manitoba Court of Queen's Bench to hear the appeal by the plaintiff Union, Brotherhood of Maintenance of Way Employees, from the dismissal of the Union's action in Small Claims Court. The employee was employed by the Canadian Pacific Railway. Between March 12 and March 24, 1995, the Union was on legal strike against the Railway. After the strike was settled, the Union alleged that the employee, a member of the Union, had violated the strike by acting as a strikebreaker contrary to the union constitution. The Union held a hearing and the employee was found guilty and fined $5,000. The employee did not pay the fine and did not appeal the decision as provided for in the union constitution. The Union initiated an action against the employee in Small Claims Court. That action was dismissed and the union appealed. The employee argued that the court lacked jurisdiction to hear the Union's claim because the claim was barred by the Trade Unions Act, the claim was outside the jurisdiction of the court under the Small Claims Practices Act, and the claim was for penalties and therefore could not be enforced by the court. The Union argued that the Trade Unions Act was inapplicable because the Union was not registered under that Act.

HELD: Motion allowed. The Union's appeal was dismissed. The Trade Union Act was inapplicable because the Union was not registered. However, the Union still did not have the power to enforce its rules in a court of law as an unregistered Union at common law. Further, while the Small Claims Act did not specifically proscribe a claim to collect a penalty, penalties which were purely punitive rather than compensatory, such as the penalty in this matter, were unenforceable by the courts at common law.

Statutes, Regulations and Rules Cited:

Canada Labour Code, R.S.C. 1970, c. L-1.
Court of Queen's Bench Small Claims Practices Act, R.S.M. 1987, c. C285, ss. 3(1), 3(1)(a).
Trade Unions Act, R.S.C. 1985, c. T-14, ss. 4(1)(a), 4(1)(b), 5(2), 29.

Counsel:

Mel Myers, Q.C. and Elliot Leven, for the plaintiff (appellant).
Larry J. Bird, for the defendant (respondent).

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6 1 **KEYSER J.**: This case involves a challenge by the defendant of the jurisdiction of this court to entertain the claim of the plaintiff.

Background

6 2 The plaintiff is a union operating in the federal labour field. The defendant is an employee of the Canadian Pacific Railway ("CPR"), an interprovincial company incorporated under federal legislation. Between March 12 and March 24, 1995, the union was on legal strike against the CPR. After the strike was settled, the plaintiff alleged that the defendant was a member of the union and that he had violated the legal strike by acting as a strikebreaker, contrary to Article 23(17) of the constitution of the union (Exhibit 1). The plaintiff held a hearing, after which the defendant was found guilty and fined $5,000.00. Article 23(17) provided for the imposition of a minimum fine of $200.00 per day payable on proof of the breach, but was silent on the method of collection. The defendant did not pay the fine, nor did he appeal the decision as was provided for in the union constitution.

6 3 The plaintiff initiated action against the defendant in Small Claims Court. The hearing officer dismissed the claim of the plaintiff, who then appealed to this court. For the purposes of the preliminary motion on jurisdiction, the accuracy of the union's position that the defendant acted as a strikebreaker will be presumed.

6 4 The defendant maintained that the court lacked jurisdiction to hear the claim for three reasons:

(1) that the claim was barred by sections 4(1)(a) and (b) of the Trade Unions Act, R.S.C. 1985, c. T-14;
(2) that the claim was outside the jurisdiction of the court under s. 3(1) of the Court of Queen's Bench Small Claims Practices Act, R.S.M. 1987, c. C285; and
(3) that penalties will not be enforced by the court.

(1) THE TRADE UNIONS ACT

6 5 Sections 4(1)(a) and (b) provide as follows:

> 4. (1) Nothing in this Act enables any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any agreement
> (a) between members of a trade union, as such, concerning the conditions on which any members of the trade union shall, or shall not, sell their goods, transact business, employ or be employed;
> (b) for the payment by any person of any subscription or penalty to a trade union;

6 6 It is not disputed that the plaintiff union was not registered under the Trade Unions Act. The plaintiff maintained that the Trade Unions Act had, therefore, no application. The Act, in s. 5(2), specified that, "This Act does not apply to any trade union not registered under this Act". That would appear to be determinative of the issue. However, the defendant referred the court to the case of International Association of Machinists and

Aerospace Workers v. Perks, Grancy and Hearn (1986), 62 Nfld. & P.E.I.R. 69, which was virtually identical to this case. Perks contained the following similarities:

(a) the union was federal, but not registered under the Trade Unions Act,
(b) the defendant was alleged to have acted as a strikebreaker contrary to a union constitution;
(c) a trial was held and the defendant fined as a result of being found guilty;
(d) he neither paid the fine nor appealed the finding; and
(e) the union brought an action in Small Claims Court to collect the penalty imposed.

6 7 Mr. Justice Barry of the Newfoundland Supreme Court (Trial Division), in a lengthy judgment, agreed that there was no jurisdiction in the court to enforce such a claim. He discussed at length the history of trade unionism in England and Canada and found that unions initially were illegal at common law as being in restraint of trade. To this day, that historical background is reflected in the present Trade Unions Act, which declares, in s. 29, that:

> The purpose of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of the trade union liable to criminal prosecution for conspiracy or otherwise, or so as to render void or voidable any agreement or trust.

6 8 Mr. Justice Barry, at p. 75 of Perks, in discussing the Trade Unions Act, said:

> [15] Clearly, s. 4 . . . was intended to keep the courts out of the internal union affairs in respect of the subjects mentioned. At the time of enactment such a provision was considered desirable and necessary to allow unions to function effectively. . . . the Act does not enable courts to entertain actions to enforce payment of any subscription or penalty to a trade union.

He quoted with approval the comments of Lord MacDermott in Bonsor v. Musician's Union, [1956] A.C. 104 (H.L.) at 135-136, which referenced a similar proscription in the English Act against court enforcement of penalties imposed by trade unions (p. 79 of Perks):

> [24] . . . It applies to trade unions within the definition to which I have already referred, and therefore to unions which are not registered and not juridical persons as well as to unions which are registered . .

6 9 It was unclear whether the English Act embodied a specific provision of non-applicability to unions which were not registered under it. Notwithstanding that, however, Barry J. adopted those comments in finding the prohibition in the Trade Unions Act to extend, in Canada, even to unions which were not registered.

6 10 The plaintiff maintained that courts have become involved in the internal workings of unions, as in Orchard v. Tunney, [1957] S.C.R. 436. There, the court ordered reinstatement of a member of the union contrary to an internal decision to expel. In ordering this reinstatement, Rand J. commented, at p. 441, on the nature of the status of trade unions:

> In the absence of incorporation or other form of legal recognition of a group of persons as having legal capacity in varying degrees to act as a separate entity and in the corporate or other name to acquire rights, incur liabilities, to sue and be sued, the group is classified as a voluntary association. There are many varieties of this class ranging from business partnerships, labour unions, professional, fraternal and religious societies...

> ... In a degree depending upon the nature of their objects, they have been left largely to their own government on the ground, probably, that it is better to let family affairs settle themselves; but as they have evolved and membership has taken on greater economic importance resort to the Courts has become more frequent and the warrant for juridical interposition to prevent injustice has called for a more critical analysis of the jural elements involved.

That case and those comments were considered by Barry J. in Perks. He quoted several cases where the courts had intervened to correct abuses in the internal affairs of unions, as occurred in Orchard He commented at p. 82:

> [30] . . . The intrusion of the court into the internal affairs of trade unions had been justified by the courts on the ground that it is not an enforcement of the rules of its constitution but merely an intervention to place members in a position where they can call upon their union to enforce the rights accorded to them under its rules.

6 11 The plaintiff had argued that, as a matter of public policy, a union needed to be able to strike to achieve its ends effectively and, as a result, required the means to enforce its rules. Of course, there were other means of enforcing the rules, such as the threat of expulsion, which empower the union without involving the courts. In Perks, Barry J. found that the plaintiff, although not registered under the Trade Unions Act, was nonetheless a trade union by definition and in fact, having been certified as a bargaining agent under the Canada Labour Code, R.S.C. 1970, c. L-1. I quote with approval the following passage (at p. 85 of Perks):

> [38] . . . Prior to the enactment of the Trade Unions Act, trade unions with objects considered unlawful at common law as being in restraint of trade did not possess the power to enforce their rules in court. The respective legislators of the Trade Unions Act, 1871 in England and its counterpart in Canada, undoubtedly realized the importance to a trade union of the power of enforcement of its rules; but rather than give that power to them, they each enacted provisions that nothing in their respective Acts was to be construed as rendering the rules of a trade union unlawful. This did not mean that the effect of registration of a union is to deprive it of a vested or previously held right to enforce its rules in a court of law. If that were true, it would place the unregistered union in a more favourable position to enforce its rules than a registered union. As Lord MacDermott stated in the Bonsor case (supra) it was not the intention of the legislature to allow a union to circumvent that part of s. 4 of the Act by simply not registering and by framing its rules so that the members were contractually bound by them. Accordingly, I am satisfied that the appellant did not have the power to enforce its rules in a court of law, either at common law as an unregistered union or by virtue of its status as a certified bargaining agent under the Canada Labour Code.

6 12 I am in agreement with the reasoning and the result of Barry J. and, accordingly, find that the court has no jurisdiction to entertain the appeal of the plaintiff union. In case I am in error, I propose to deal with the other two grounds.

(2) JURISDICTION OF THE SMALL CLAIMS COURT

6 13 The jurisdiction of the Court of Queen's Bench in small claims matters is found ins. 3(1) of the Court of Queen's Bench Small Claims Practices Act and provides as follows:

> 3(1) A person may file a claim under this Act
>
> (a) for an amount of money not exceeding $5,000. which may include general damages in an amount not exceeding $1,000. . . ..

6 14 The defendant again relied on Perks, where it was also submitted that the claim fell outside the jurisdiction of the Small Claims Court. However, the Small Claims Actin Newfoundland is worded differently and referred to a claim for a debt. Mr. Justice Barry discussed at length whether a penalty as imposed by the union amounted to a debt in law and found that it did not. The Manitoba Act does not limit a claim to a debt, but specifically indicates that it can be "for an amount of money". This is fundamentally different. Although the defendant argued that the section does not specifically permit collection of a penalty, neither does its broad wording proscribe this. Thus, I would not have found lack of jurisdiction to entertain the appeal based on the wording of the Court of Queen's Small Claims Practices Act

(3) THE UNENFORCEABLE NATURE OF PENALTIES

6 15 The plaintiff argued that the claim involved the breach of a contractual relationship with the remedy of a trial and consequential fine. A similar situation was discussed in Perks at p. 85, where Barry J. stated that:

> [40] Other than in the case of a statutory penalty the question of the enforceability of a penalty in court generally arises in actions for breach of contract wherein some monetary detriment or forfeiture is imposed upon the defaulting party. The general rule is that penalties are unenforceable, although there are some exceptions which are not relevant to this appeal. .

6 16 The plaintiff referred the court to a number of cases where penalties had been upheld by the court. One was the decision in Brotherhood of Maintenance of Way Employees and Brotherhood of Maintenance of Way Employees, Lodge 205 v. Jack Schile et al. (15 September 1997), (Alta. P.C.) [unreported]. Judge Hironaka upheld the penalty imposed, that being the minimum of $200.00 per day. Having said that, it must be noted that:

1) the defendants in that case were unrepresented by counsel;
2) the Perks decision was not presented to the learned trial judge; and
3) although the minimum penalty was upheld, Judge Hironaka commented that the court would not assess damages beyond those that could be properly constituted as liquidated damages or those damages that were calculable in advance.

6 17 The plaintiff also relied on Elsley et al. v. J. G. Collins Insurance Agencies Ltd (1978), 83 D.L.R.(3d) 1 (S.C.C.). This case involved a covenant by an employee not to compete with his previous employer on pain of an obligation to pay $1,000.00 as liquidated damages. Mr. Justice Dickson (as he then was), writing for the court, stated at p. 15:

> It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.

6 18 Counsel for the plaintiff maintained that, as illustrated above, penalties would be upheld in the absence of a finding by the court of oppression. However, Dickson J., at pp. 15-16, summarized his conclusions, which included the following:

> ....
>
> 3. Where the stipulated sum is a penalty he may only recover such damages as he can prove, but the amount recoverable may not exceed the sum stipulated.

....

Here, there was no proof of damages and no stipulated sum, only a minimum, which could be increased and which ultimate amount would be unknown to the defendant at the time he undertook any prohibited conduct. Elsley was quoted in Prudential Insurance Co, of America v Cedar Hills Properties Ltd,, [1995] 3 W.W.R. 360 (B.C.C.A.). This involved payment of an "interest rate standby fee" of $100,000.00 for the benefit of reserving funds and fixing an interest rate, which fee was payable if the borrower decided not to proceed with the financing. Goldie J.A. relied on comments of Lord Dunedin in Dunlop Pneumatic Tyre Co v New Garage & Motor Co,, [1915] A.C. 79 (H.L.). In discussing the difference between a penalty and liquidated damages, Lord Dunedin made the following observations at pp. 5-6 (p. 364 of Prudential):

....

2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage .

4. ....

(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

6 19 The plaintiff relied on these comments and pointed out that the defendant never asserted oppression. However, there was no evidence of the possibility of loss from the breach of the contractual relationship, unlike the situation in Elsley and Prudential. The case at bar differs, in my view, from those cases for a number of reasons:

1) the penalty suggested was not a predetermined amount, such that the defendant knew the penalty he would face should he embark on a prohibited course of conduct;
2) the amount potentially payable was open-ended, with a minimum of $200.00 per day to be assessed, but no maximum set; and
3) the plaintiff did not suggest that there was a measurable loss that it suffered as a result of the actions of the defendant.

6 20 It is interesting that the amendment to the constitution and by-laws of the union (Exhibit 2) has now fixed the amount payable by an individual acting as a strikebreaker at $250.00 per day as "pre-estimated liquidated damages in consideration of the harm, damage and additional costs that his or her breach of the Constitution and By-laws has caused the Brotherhood". It has further indicated that, "The amount of pre-estimated liquidated damages referred to above shall constitute a legal debt and shall be fully enforceable by way of civil proceedings in the appropriate court of law".

6 21 Such was not the situation when the defendant here was prosecuted. The union posted a notice of BMWE Strikebreaker Penalties (Exhibit 7), which publicized Article 23(17) of its constitution. This included notice that anyone found guilty of failing to comply with a valid strike "shall be subject to a minimum fine of $200.00 per day for each day that the member worked during the strike . .. ." (emphasis added). This was not described as an estimate of damages that might be suffered by the plaintiff. The penal rather than compensatory nature of the proceedings was reinforced by the letter sent to the defendant by the plaintiff after his trial (Exhibit 5), wherein he was notified that a fine of $5,000.00 had been levied against him. I therefore find that the $5,000.00 amount claimed is a penalty and is not one that will be enforced by the court.

6 22 In conclusion, then, I find that the court has no jurisdiction to entertain this appeal.

KEYSER J.

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