

Fining Union Members

Alan Shanoff

Should unions have the right to impose fines on members and collect them through the use of the courts?

To answer this question we must venture back to 2004 when more than 125,000 members of the Public Service Alliance of Canada were on strike for seven days. About 200 crossed the picket line. One of them was Jeffrey Birch says he couldn't meet his financial obligations on the \$50 per day of strike pay. He also didn't know how long the strike would last; he reluctantly chose to cross the picket line.

The union issued fines against Birch and others who crossed the picket line. Next came the hard part - trying to collect. Some paid, but many didn't. Those who didn't pay were sued by the union in Small Claims Courts. Some failed to defend themselves or show up in court.

The union obtained default judgments against them. Birch decided to contest the union's ability to collect the fine. He had a colleague, who also crossed the line, retained counsel and the issue - whether a union can fine its members and use the courts to collect - was left to be resolved via an agreed statement of fact in an application in the Ontario Superior Court of Justice.

The application was heard by Justice Robert Smith. The union argued its constitution specifically allowed it to impose fines on its members and that the fines were reasonable. It contended that the terms of the constitution were contractually binding on its members and that it had a contractual right to impose and collect the fines.

That is somewhat disingenuous as members have no real input into the language of the union constitution. Also, traditionally a court will not allow a party to enforce a penalty clause in a contract unless the amount of the penalty bears a reasonable relationship to the loss suffered by the party.

But what loss did the union suffer? It claimed it lost about one penny per union member and with about 26,000 members, a fine of about \$260 was justified. Yet the union fined Birch \$476.75, equivalent to the gross amount earned by Birch during the three days he worked after crossing the line.

Smith concluded that the penny-a-member calculation was pure speculation. He also ruled that the union's imposition of the fines amounted to a penalty and disallowed it as not bearing any relationship to the losses suffered.

Smith went further and found that the fines were unconscionable. Levying a fine of the gross wages earned would require Birch to pay more money than he earned after taking into account all deductions. Such a fine, particularly during a strike when "members may already be suffering financially" was "very unfair." Therefore the fines could not be enforced with the court's assistance, meaning that the fines were effectively unenforceable.

The union appealed to the Ontario Court of Appeal. It argued the fines were trivial, not unconscionable, and that Birch should have appealed his fine under the union constitution, and if he failed in that appeal he could have filed a complaint with the Public Service Labour Relations Board.

Of course, it was the union which sued, so why should Birch be restricted in his rights to defend the action? How could he be forced to exercise his internal rights of appeal while before a court in litigation? The real

problem for the union is that if it cannot levy fines then it cannot enforce its picket lines. It can't stop free riders - those who obtain the benefits of the strike without suffering the ill effects of the strike. Also, a union's most powerful weapon is the right to strike and anything that weakens that power can weaken the union's bargaining position.

In early December, the OCA dismissed the appeal 2-1. The majority upheld Smith's reasons on every issue. What is problematic however is that the majority left open the issue of whether a union may use the courts to enforce a fine that is deemed to be fair. The court also left open the issue of whether a fine limited to the member's net pay would be deemed to be unfair. I understand why courts are often reluctant to decide questions that don't require immediate resolution, but leaving these important questions open merely invites another expensive action or application.

In the meantime, I understand that union members continue to be threatened with fines and court action for crossing picket lines. It does seem unfair that members continue to face these threats when this issue could have been put to rest.

No word has been received on a leave application to the Supreme Court of Canada although John Craig of Heenan Blaikie LLP counsel for Birch, has advised me any leave application will be vigorously contested. In the meantime, what's the answer for the unions?

Increase the strike pay so members won't be as tempted to cross picket lines. Also, there is nothing to stop the union from suspending members who cross picket lines. True, this doesn't impose a financial penalty, but it does bar those members from social functions and disentitles them some membership rights.

Similar actions to enforce fines with the court's assistance have failed in other provinces. Saskatchewan is the only province where unions have been given the statutory power to fine members who have crossed picket lines.

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