On May 7, 2009 the Supreme Court of Canada dismissed the Telecommunication Workers Union Local 202 application for Leave to Appeal. This ruling stands

Court of Queen's Bench of Alberta

Citation: Telecommunications Workers Union Local 202 v. Macmillan, 2008 ABQB 657

Date: 20081023
Docket: 080104129
Registry: Calgary

Between:

Telecommunications Workers Union Local 202

Appellant

- and -

Wayne Macmillan, Robert (Bob) Pinchak and Cody Gejdos

Respondents

Reasons for Judgment
of the
Honourable Madam Justice M.C. Erb

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[1] The Telecommunications Workers Union Local 202 appeals a decision of the Alberta Provincial Court declining jurisdiction to enforce fines levied by the Union following disciplinary proceedings against the Respondents for failing to support Union activities during a labour dispute.

[2] The Respondents are all members of T.W.U. and employees of Telus Communications Inc.

[3] The Appellants contend that the learned trial judge failed to apply proper principles of statutory interpretation when considering section 9.6 of the *Provincial Court Act*, R.S.A. 2000, c.P-31, and failed to properly interpret "debt" or "damages" to include fines made by a Union against its members.

[4] Accordingly, this Court has been asked to resolve the following issues:

1. What is the appropriate standard of review to be applied in this Appeal?

2. Are the fines debts?

3. Are the fines damages?

Background

[5] T.W.U. went on strike for about five months on July 21, 2005, after Telus issued a 72-hour First Notice of Lockout under the provisions of the *Canada Labour Code.* The Respondents, as Telus employees, had become members of the T.W.U. by each signing the required application form for membership, which reads, in part:

> If my application for membership is accepted, I will comply with the Constitution of the Telecommunications Workers Union and By-Laws as written and amended from time to time.

[6] T.W.U's Constitution contains the following provisions:

> Section A: Offences
>
> Any member may be disciplined for violation of any of the provisions of this Constitution or Local by-laws, or for violation of the policies of the Union, or <u>for cause detrimental to the welfare of the Union</u>, or for bringing charges under this Article without reasonable grounds for believing such charges to be true, or for crossing or working behind any picket line without authorization from the Executive Council. (emphasis added)
>
> Section C: Penalties
>
> 1. Upon a verdict of guilty of any charge the Trial Board may impose a penalty of expulsion, suspension, fine (not to exceed $1,000), public reprimand or admonishment by the President, special remedial action appropriate to cure the offence or other penalty appropriate to the offence or any combination thereof, and the Trial Board shall determine when any such penalty has been satisfied. Pending satisfaction of a penalty, except expulsion, a penalized member shall be denied the right to attend meetings and any benefits they may receive as a member in good standing.
>
> 2. Any imposed fine shall be collected from the member by the Secretary of the Local concerned and shall be paid into the Local

funds within 30 days. Failure to pay the fine within 30 days from the date such fine was imposed shall invoke automatic suspension.

3. Expulsion shall mean expulsion from the Union with loss of all benefits.

[7] The Respondents were among the T.W.U. members who crossed picket lines during the labour dispute. They were charged with violating the Union's Constitution. A Trial Board was convened and following hearings, the Respondents, none of whom attended to answer the charges, were found guilty and fined for "cause detrimental to the welfare of the Union" and for crossing or working behind a picket line.

[8] The Respondent MacMillan was fined $1,550; the Respondent Pinchak was fined $3,650 and the Respondent Gejdos was fined $2,150.

[9] The Respondents did not pay the fines imposed and, as a result, Mr. Pinchak and Mr. Gejdos were suspended from the Union. T.W.U. sued the Respondents in the Provincial Court Civil Division, seeking a judgment in debt, or alternatively damages, to enforce the Trial Board's fines, together with interest.

Standard of Review

[10] I agree with the parties that because the issues that arise in this Appeal are all questions of law and jurisdiction, the appropriate standard of review is correctness.

The Provincial Court decision

[11] His Honour, Judge J.N. LeGrandeur heard T.W.U.'s claims against the Respondents on February 16, 2007. His reasons are summarized at para.60:

1. The Plaintiff (T.W.U.) is not precluded from advancing its claims before the Provincial Court pursuant to the provisions of s.4(1)(a) and (b) of the *Trade Unions Act*.

2. The Plaintiff's claims against the Defendants are not an action in either debt or damages. There is no cause of action at common law or by statute authorizing the Plaintiff to enforce the disciplinary penalties in a court of law.

3. The T.W.U. constitution and by-laws do not authorize the T.W.U. to seek redress in the courts for an internal disciplinary matter.

Are the Fines "Debts" within the meaning of the *Provincial Court Act*?

[12] Section 9.6 (1) of the *Provincial Court Act* provides:

> The Court has, subject to this *Act,* the following jurisdiction:
>
> (a) for the purposes of Part 4,
>
> (I) to hear and adjudicate on any claim or counterclaim
>
> (A) for debt, whether payable in money or otherwise, if the amount claimed or counterclaimed, as the case may be, exclusive of interest payable under the Act or by agreement on the amount claimed, does not exceed the amount prescribed by the regulations,
>
> (B) for damages, including damages for breach of contract, if the amount claimed or counterclaimed, as the case may be, exclusive of interest payable under an Act or by agreement on the amount claimed, does not exceed the amount prescribed by the regulations.

[13] The learned trial judge held, at para.35:

> There is no doubt that the "fines" which the Plaintiff asserts are debts enforceable under the jurisdiction of the *Provincial Court Act*, have some of the attributes of many of the definitions of "debt". Nonetheless I have no hesitation in concluding that the fines the Plaintiff seeks to be made into judgments of this Court are not debts within the meaning of that word as used in the *Provincial Court Act* or as broadly understood at common law. The fines imposed by the Plaintiff against the individual Defendants and asserted to be debts are penalties imposed upon the Defendant through an internal union disciplinary process as a consequence of their apparent misconduct in breaching the union constitution by crossing a picket line. This Court is, in reality, being asked to confirm that fine and thereby in fact impose a disciplinary measure upon the individuals in the form of a judgment which has the authority of law. The Provincial Court of Alberta has no jurisdiction to discipline union members for an apparent breach of the union constitution and certainly making a fine imposed by a union through its internal procedures, a judgment is to in fact impose the fine. That is not enforcement of a debt, it is discipline.

[14] The learned trial judge further adopted the reasoning in *I.A.M v. Hearn*, [1986] N.J. No. 261 (Sup.Ct.T.D.) in which it was held that the Provincial Court of Newfoundland did not have jurisdiction to hear a claim brought by a Union seeking to enforce its penalties. Barry J. had this

to say about whether a penalty imposed by a Union was a debt within the meaning of Newfoundland's *Small Claims Act*:

> The appellant alleges that it is entitled to recovery of these penalties as debts. To meet the definition of a civil debt, which arises out of a contract, the claim must be either for a specific amount stipulated in the contract, or an amount ascertainable from the terms of the contract by the parties by arbitration or in a court of law. The penalties imposed in this case do not meet any of these criteria. The sections in the appellant's rules which establish penalties for breach of its mandatory provisions leave their calculation entirely in the hands of other members of the union. In my view, apart from any consideration of the question whether a penalty imposed by a trade union could qualify as a debt, it would be contrary to public policy to require the courts to enforce payment of a monetary penalty whose limits are not fixed. In such a case as this, it was open to the appellant through the procedure in its constitution to set the fine at any amount it chose and in cases where the fines imposed may be inordinately excessive, the court would be required to enforce unjust penalties without having the right or power to review or adjust them.
>
> While there are circumstances in which parties to an agreement may pre-determine a penalty to be paid by a defaulting party, and the penalty will be enforced by action in court as a debt or as liquidated damages, a penalty which is to be determined after the breach by the party claiming to be wronged, cannot be so classified. It cannot be said that the fine imposed in this case was an amount agreed upon by the parties to the appellant's constitution since it was not specified therein, or otherwise made known to the respondents prior to the alleged breach. For these reasons alone, it is clear that the fines cannot be regarded as debts within the meaning of the *Small Claims Act*.

[15] Orsborn J, in *Newfoundland Assn. of Public Employees v. Drake*, [2002] N.J. No. 25 (Sup.Ct.T.D.), followed Barry J.'s lead. In that case, the union constitution contained a provision to the effect that any fine imposed by the union would constitute a debt to the union and, unlike *Hearn*, there was evidence before the Provincial Court Judge which established the basis upon which the fines were levied, which was the net financial gain that accrued to the union members by receiving salary instead of strike pay. Nevertheless, Orsborn J. concluded that the penalties imposed by the union did not constitute a debt within the meaning of Newfoundland's *Small Claims Act*. At para.19 Orsborn J. pointed out that merely labelling a penalty a debt does not make it one:

> Simply by agreeing to classify a fine as a debt, parties to an agreement cannot give to a court jurisdiction it does not otherwise possess, nor require it to exercise a jurisdiction it would otherwise decline to exercise.

[16] After considering *Hearn*, Orsborn J. concluded, at paras. 28 - 31:

> The proceeding to recover a debt in small claims court is meant to be speedy, inexpensive and informal. The debts contemplated by the Act are those which arise in the normal activities of daily living, debts which are fixed and ascertainable at the time of their incurrence and for which valuable consideration is given. Where the jurisdiction of the small claims court is to extend beyond that, specific provision is made...
>
> Here, NAPE and his members have agreed that "any fines imposed shall constitute a debt...". However, in the constitution, there is no reference to any amount, nor to any agreed method of quantifying the fine. The member has simply agreed that any future financial punishment imposed by the union pursuant to the constitution will be considered as money owing to the union.
>
> The punishment is not ascertainable until fixed by the Discipline Committee of NAPE. It is not a levy placed in return for membership, nor a fee charged for some other service or consideration. It is simply a financial penalty, imposed and quantified by one party to the agreement, to punish the member or members in question and influence their future conduct and the conduct of others.
>
> Absent specific legislative direction, the fines imposed are not debts for the purposes of the *Small Claims Act*.

[17] T.W.U. contends that there are reasons why the *Hearn* and *Drake* decisions should not be followed in Alberta.

[18] Firstly, *Hearn* and *Drake* are Newfoundland decisions considering Newfoundland legislation and are not binding on Alberta courts. However, there is nothing in the learned trial judge's reasons which suggests that he considered the Newfoundland case law binding. He considered the reasoning and decided to adopt it. Further, the trial judge is correct that the jurisdiction described in Newfoundland's *Small Claims Act* and Alberta's legislation is identical. On that basis, he found the Newfoundland decisions to be persuasive.

[19] Secondly, T.W.U. submits that both cases were decided previous to the Supreme Court of Canada's decision in *Berry v. Pullen*, [2002] 2 S.C.R 493, which T.W.U. submits clarified the relationship between unions and union members in a manner that is inconsistent with the reasoning in *Hearn* and *Drake*. Furthermore, T.W.U. submits that in adopting the reasons in *Hearn* and *Drake*, the learned trial judge followed two Newfoundland judges who failed to interpret the relevant legislation in the manner mandated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 and *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559.

[20] In *Rizzo*, the Supreme Court held, at para.21:

> Today there is only one principle and approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[21] Section 10 of the *Interpretation Act*, R.S.A. 2000, c.I-8 provides:

> An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[22] T.W.U. complains that the learned trial judge failed to reference those principles in his written reasons. I do not accept T.W.U.'s approach on that point. Surely a Provincial Court judge need not refer specifically to the principles expressed in *Rizzo, Bell ExpressVu* or the *Interpretation Act*, every time a statute requires interpretation. What is important is that the interpretation the judge ultimately applies is in fact consistent with those principles. Similarly, a Provincial Court judge makes no error by adopting the reasoning in decisions that do not refer specifically to those decisions either, as long as the reasons are consistent with the proper approach to statutory interpretation.

[23] In *Berry*, the Supreme Court did consider the nature of the relationship between union members and their union. The narrow issue was whether a union member who breaches the union constitution may incur personal liability in contract to another union member who suffers damage as a result. At para.54, Iacobucci J. (for a unanimous Court) rejected the "legal fiction of a web of contracts between [union] members", holding instead that because a union has sufficient legal personality to enter into contracts of membership with its members, duties arise between the union and individual members, and not between union members themselves. He further held, at paras. 48-49:

> ...the time has come to recognize formally that when a member joins a union, a relationship in the nature of a contract arises between the member and the trade union as a legal entity. By the act of membership, both the union and the member agree to be bound by the terms of the union constitution, and an action may be brought by a member against the union for its breach... I say that this relationship is in the nature of a contract because it is unlike a typical commercial contract. Although the relationship includes at least some of the indicia of a common law contract (for example offer and acceptance), the terms of the contractual relationship between the union and the member will be greatly determined by the statutory regime affecting unions generally as well as the labour law principles that courts have fashioned over the years...

> Having said that there exists an enforceable contract between union members and the union, I believe it is worth elaborating on several factors which make this contract unique. First, it is essentially an adhesion contract as, practically speaking, the applicant has no bargaining power with the union. Moreover, in many situations, union membership is a prerequisite to employment, leaving the individual with little choice but to accept the contract and its terms. Finally, it must be borne in mind that a statutory labour relations scheme is superimposed over the contract between the member and the union, and can create legal obligations. Consequently, the contract must be viewed in this overall statutory context...

[24] In *Berry*, Iacobucci J. (para. 63) further elaborated on the nature of the duties owed by the union and its members to one another:

> ...By joining a union, the member agrees to follow the rules of the union and, through the common bond of membership, union members have legal obligations to one another to comply with these rules. If there is a breach of a member's constitutional rights, this is a breach by the union, and the union may be liable to the individual. Similarly, the disciplinary measures in the constitution can be imposed by the union on a member who contravenes the union's rules. A failure by the union to follow these disciplinary measures may cause it to breach its contractual obligations to the other members, giving rise to corresponding contractual remedies.

[25] I agree with T.W.U. that the *Berry* decision is essential to a proper understanding of the legal status of unions and union membership in Canada. I further agree that part of the statutory context that a Court must consider in entertaining the issue of union-imposed discipline is s.95 of the *Canada Labour Code*, which implicitly recognizes the right of trade unions to take disciplinary actions or impose penalties against their members. I agree that the fines imposed against the Respondents were a form of penalty, assessed in conformity with the standards set out in the T.W.U. Constitution. In short, there is no question that a relationship in the nature of a contract (with caveats as noted in *Berry*) exists between T.W.U. and the Respondents, and that T.W.U. has the right, under its Constitution and the *Canada Labour Code*, to impose discipline upon the Respondents.

[26] However, this falls short of directly addressing the issue of whether union-imposed discipline may be enforced by the Provincial Court of Alberta as a debt. While it is appropriate to consider the matter in the context of labour relations law in Canada, and it is necessary to interpret s.9.6 in the manner set out in *Rizzo* and *Bell ExpressVu* and the *Interpretation Act*, the simple fact remains that the penalties must be capable of characterization as debt or damages *before* they can be the subject of an action in the Provincial Court of Alberta.

[27] In defining "debt", T.W.U. points to *Clayborn Investments Ltd. v. Wiegert*, [1977] A.J. No. 448 (C.A.) (para. 46), in particular, Morrow J.A's dissent:

> Quite simply put debt is defined as “a sum of money due from one person to another.”... At page 39, in *Diewold v. Diewold*... the Supreme Court of Canada... accepted the definition in Stroud’s Judicial Dictionary, by “a sum payable in respect of a liquidated money demand, recoverable by action”...

[28] T.W.U. also cites *Canada (Secretary of State) v. Neitzke* (1921), 62 S.C.R. 262, in which the broad meaning of the word “debt” was described (p. 270):

> that which is owed or due, anything, as money, goods or service, which one person is under obligation to pay or render another; a sum of money or a material thing.

[29] Finally, T.W.U. cites *J.R. Paine and Associates Ltd. v. Cairns*, (1987), 55 Alta. L.R. (2d) 293 (Q.B.), a decision in which Andrekson J. considered the broad definition of debt from a variety of sources, then held (p. 312):

> In my view the essence of the technical use of the term “debt” is that at a minimum the claim be one to recover a sum certain or a sum readily reducible to certainty. It cannot be an action where damages must be proven.

[30] It is important to observe that the fines imposed by T.W.U., while subject to upper limits provided for in its Constitution, are determined after the alleged breach, solely by T.W.U. They are only “readily ascertainable” or “sums certain” after they have been imposed by the Union. They are penalties, not debts.

[31] As the Respondents pointed out, where there is specific statutory authority, penalties may be enforced as debts: see, for example, s.72(5) of the *Legal Profession Act*, R.S.A. 2000, c.L-8, and s.143(4) of the *Traffic Safety Act*, R.S.A. 2000, c.T-6. Absent specific statutory authority, however, penalties are not debts and are not enforceable as such by the Provincial Court of Alberta. I agree with T.W.U. that *Berry* establishes the context in which the relationship between unions and memberships should be viewed and I agree that the relationship is quasi-contractual in nature. However, I see nothing in *Berry* that undermines the reasoning in *Hearn* with respect to the distinction between penalties and debts, or indeed, the decision of the learned trial judge in this case.

[32] Accordingly, I find that the learned trial judge correctly decided that the Union’s fines were not debts within the meaning of s. 9.6(1) of the *Provincial Court Act.*

Are the Fines “Damages” Within the Meaning of the *Provincial Court Act*?

[33] The issue of whether penalties imposed by a union could be enforced as damages was recently considered in *Birch v. Union of Taxation Employees, Local 70030*, [2007] O.J. No. 3980

(Sup.Ct.). In that case, certain members of the union brought a test case to determine whether the union could sue its members to recover fines imposed on members who crossed picket lines. Noting that the Supreme Court of Canada in *Berry* established that a relationship in the nature of a contract existed between the union and its members, R. Smith J. considered whether a penalty imposed for a breach of the union constitution was enforceable in court. He noted (para.20) that "the common law rule that courts will not uphold a penalty clause in a contract unless the provision is a genuine pre-estimate of damages to be incurred in the event of a breach." There was no evidence that the fines imposed were related in any way to an actual loss suffered by the union, and R. Smith J. held at paragraph 28:

> I find the essence of the penalty and fine imposed was really used "in terrorem" in the words of Lord Dunedin, to prevent Union members from crossing the picket line and working during a legal strike.

And at paragraph 30:

> I find that the plain and ordinary meaning of the words imposing a fine and taking disciplinary action is in fact to impose a penalty to dissuade Union members from crossing the picket line during a legal strike. The purpose of the clause is clear and it is not related to making a genuine estimate of damages, but rather is intended to force members of the Union to follow the terms of the constitution by imposing a financial penalty if a member does do so.

[34] T.W.U. contends that the learned trial judge erred in concluding that its fines were a penalty in the absence of evidence that they were "extravagant and unconscionable", and that, in any event, the fines were not intended to represent a pre-estimate of general damages and should instead be considered as something akin to aggravated or punitive damages.

[35] However, the fines are very clearly characterized as penalties in T.W.U.'s. Constitution. I find that the learned trial judge correctly characterized them as penalties rather than a genuine pre-estimate of damages. The fines cannot be enforced as general damages.

[36] T.W.U. places much greater emphasis on the argument that the fines are more akin to aggravated or punitive damages. The Supreme Court of Canada described aggravated and punitive damages in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, (para.16) this way:

> Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only

> be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

[37] T.W.U. submits that there is no reason in law why aggravated damages cannot be awarded independent of general damages. It is difficult to envision a circumstance in which this would be appropriate, but, in any event, it is clear that the fines were not intended to be compensatory, they were intended to be punitive. Accordingly, they are not aggravated damages.

[38] The learned trial judge made the following observation (para 43) regarding T.W.U.'s argument that the fines could be characterized as punitive damages:

> For a claim in punitive damages to be actionable, the offensive conduct which the order of damages is sought to address must constitute a separate actionable wrong from the principal breach of contract upon which the damage claim is initially founded.

[39] He found that T.W.U.'s pleadings did not disclose any independent actionable wrongs over and above the alleged breach of contract. I agree. There are a number of additional reasons why the fines cannot be characterized as punitive damages. In *Vorvis,* McIntyre J.(para 27) held:

> ...punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature... where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment.

This is an extremely high standard, and while I appreciate the importance of the issue from the union perspective, I would not characterize the act of crossing the picket line as so reprehensible and malicious, so extreme in its nature, that it meets the standard for the imposition of punitive damages.

[40] T.W.U. pointed to no authority in support of the proposition that fines imposed by one party could be recognized as punitive damages by a court thereafter. This is a fundamental point: punitive damages may only be assessed by a court and only, as the Supreme Court recognized in *Vorvis*, after the most careful consideration. Simply adopting the fines imposed by T.W.U. and calling them punitive damages would be inconsistent with the approach to the assessment of punitive damages mandated by the Supreme Court of Canada.

Conclusion

[41] The fines imposed by T.W.U. against the Respondents are neither debts nor damages within the meaning of section s.9.6 of the *Provincial Court Act.* The learned trial judge made no error in concluding that the fines imposed by T.W.U. were not debts. He made no error in concluding that the fines were not general, aggravated or punitive damages. The learned trial judge's decision was well reasoned and correct.

[42] Accordingly, the Appeal is dismissed. The Respondents are entitled to their costs.

Heard on the 5th day of September, 2008.
Dated at the City of Calgary, Alberta this 23rd day of October, 2008.

M.C. Erb
J.C.Q.B.A.

Appearances:

William J. Johnson, Q.C.
For the Appellant

David J. Corry
For the Respondents