Birch v. Union of Taxation Employees Local 70030, 2007 CanLII 43894 (ON SC)

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
JEFFREY BIRCH and APRIL LUBERTI	)	John D.R. Craig and Richard Sinclair, for the Applicants
Applicants	)	
- and -	)	
UNION OF TAXATION EMPLOYEES LOCAL 70030	)	Christopher Rootham, for the Respondent
Respondent	)	
	)	**HEARD:** March 19, 2007 (Ottawa)

REASONS FOR DECISION

R. SMITH J.

[1] This is a test case to decide if the federal union, "PSAC", can sue its members in court to recover fines levied against members who crossed the picked line during the 2004 strike, equal to the gross salary earned each day a member crossed the picket line.

[2] Jeffrey Birch and April Luberti were members of the Union of Taxation Employees Local 70030 ("UTE"), a component of the Public Service Alliance of Canada ("PSAC"), (the "Union"). They crossed the picket line to work during three days of a seven day strike, which was called in 2004.

[3] The Union has sued the Applicants in the Small Claims Court to collect the fine imposed by the Union against the Applicants for crossing the picket line during the strike in September and October of 2004, in breach of the Union's constitution and bylaws. The fine imposed on the Applicants was an amount equivalent to their gross salary for each day that they worked, while the Union was on strike.

[4] A number of other Union members have also been fined by the Union for crossing the picket line and numerous actions have been commenced by the Union in the Small Claims Court to collect the fines. The parties have agreed to bring this application in the Superior Court based on an agreed Statement of Facts for a determination of whether the courts will enforce the fine, or financial penalty imposed by the Union under its constitution, against its members who crossed the picket line to work during the PSAC strike in 2004.

[5] The following issues must be decided in this application:

The main issue is:

> Should the court enforce the fines levied by the trade union against its members for breaching its constitution by crossing a picket line to work during a legal strike?

To decide the main issue, the following issues must be decided:

(i) Should the Applicants be prevented from pleading a defence to the claim made against them by their Union in the Small Claims Court, because they did not appeal the fine within the Union's constitution and then to the Public Service Labour Relations Board? (Is the Superior Court the proper forum?)

(ii) Are the fines imposed on the members pursuant to the Union constitution a penalty imposed under a contract, which are unenforceable in court?

(iii) If the fines imposed by the Union amount to a penalty:

1) Is the penalty imposed by the Union enforceable because it is not unconscionable in the circumstances; or

2) Is the penalty imposed by the Union and its enforcement by the Court, authorized by statute.

Agreed Facts

[6] The parties agreed to the following Statement of Facts:

1. The Union of Taxation Employees Local 70030 ("UTE") is a component of the Public Service

Alliance of Canada ("PSAC") (referred to collectively as the "Union").

2. At all material times, the Applicants were employed at the Canada Revenue Agency ("CRA"), formerly known as Revenue Canada. PSAC is the certified representative of a bargaining unit at CRA, which includes the Applicants. The Applicants are members of PSAC, and their designated component is the UTE.

3. As part of its internal governance, the UTE has its own by-laws. The UTE is created by, and subject to, the PSAC Constitution and its Regulations, attached hereto at Tab "1". The UTE is one of seventeen components in PSAC. The majority of members of PSAC are employed in the federal public service. Therefore, fourteen of the components of PSAC are designated along departmental lines: the UTE, for example, represents employees of CRA.

4. Section 25 of the PSAC Constitution contains a provision permitting the Union to assess a fine against members who refuse to participate in a strike. In addition, the UTE's By-Law 11 permits the Union to assess a financial penalty against members in accordance with the procedures specified in the PSAC Constitution and in the UTE's own Regulation 26.

5. The Union was engaged in a legal strike at CRA for a total of seven (7) days in 2004: September 10, 13, 14, 15, 23, October 12 and 13. The Union has alleged that the Applicants refused to participate in this strike, and instead reported to work, on September 23, October 12 and October 13, 2004.

6. In accordance with the procedures established in the PSAC Constitution, the Applicants' memberships in the Union were suspended for one year for each day they did not participate in the strike (i.e. three years in total for each Applicant), and they were each assessed a fine/financial penalty pursuant to the provisions in (4) above. The fine/financial penalty was equivalent to the Applicants' gross salary for each day they did not participate in the strike, and totaled $476.75 for each Applicant.

7. Each Applicant has failed and refused to pay the fine/financial penalty. Each Applicant has also failed and refused to appeal the Union's decision to assess the fine/financial penalty pursuant to an appeal process established by the Union pursuant to section 25 of the PSAC Constitution and PSAC Regulation 19.

8. The Union has sought to enforce the fines/financial penalties in (6) above in the Small Claims Division of the Ontario Superior Court of Justice.

Analysis

Issue I: Should the Applicants be prevented from pleading a defence to the claim made against them by their Union in the Small Claims Court, because they did not appeal the fine within the Union's constitution and then to the Public Service Labour Relations Board? (Is the Superior Court the proper forum?)

[7] Under the PSAC constitution, Regulation 19, Section 12, a member may appeal a decision of the PSAC National Board of Directors to implement disciplinary action to a three-person tribunal comprised of a representative of the member, a representative of the Union (UTE) and a third independent person agreed to by both parties or appointed by an appropriate labour organization such as a Canadian Labour Congress affiliated union, a Federation of Labour or the Canadian Labour Congress, as determined by the AEC.

[8] The Union submits that by not appealing the fine to the three-member panel, the Applicants have lost their right to raise a defence in the Small Claims Court action commenced by the Union against them as defendants. As a result, the Union argues that the Applicants are in the wrong forum and ought to have appealed to the three-

person panel and then to the Public Service Labour Relations Board, pursuant to s. 25 of the PSAC constitution.

[9] The Applicants submit that the fines imposed by the Union constitute the imposition of a penalty which were not a genuine estimate of damages and are therefore unenforceable by the court. The Applicants further submit that the Union commenced a new proceeding when it sued its members in the courts, to collect the fine imposed by the Union. The Applicants argue that their failure to appeal through the Union's internal procedures set out in its constitution is irrelevant to the Applicants' right to raise valid defence in the action commenced in the court by the Union.

[10] It is not disputed that the Applicants decided not to appeal the fine imposed by the Union to the three-person panel, because the third member would have been selected by a labour organization, if they both could not agree on the third member, and then members believed the panel would not be impartial. The Public Service Labour Relations Board (the "PSLRB" or the "Board") has jurisdiction to hear complaints against disciplinary action taken by a union against a member under sections 188, 190 and 192 of the *Public Service Labour Relations Act* provided that all internal appeals have been exhausted.

[11] Where Parliament has clearly created a scheme for dealing with labour disputes, the courts should not jeopardize the comprehensive dispute resolution process contained in the legislation by permitting routine access to the courts. *Vaughan v. Canada*, 2005 SCC 11 (CanLII), [2005] 1 S.C.R. 146 at para. 39, and *Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Local 50057*, 1990 CanLII 110 (SCC), [1990] 1 S.C.R. 1298.

[12] Where a labour dispute resolution process is contained in legislation, routine access should not be allowed for employees or employers to sue in the courts. However, in this case, a Union member is not seeking to sue his or her employer or Union in the courts, but rather it is the Union that is suing its members in the courts and seeking to prevent its members from raising a defence in the court proceeding.

[13] The Board has not been given the jurisdiction to enforce the penalty imposed by the Union on its members and therefore the Union submits that it should be permitted to sue its members in the Small Claims or Superior Court to collect the fine penalty that it has imposed. The Union argues that while it has jurisdiction to sue in the courts, the Union members are not allowed to file any defence because they did not appeal internally. I agree that the Superior Court has an inherent jurisdiction, and that where a right has been established but no remedy is provided, the court may have jurisdiction, however I do not agree with the Union's submission that the Union member sued in the Superior Court would be prevented from raising any defence open to him or her in that court proceeding.

[14] Rule 25.07(4) of the *Rules of Civil Procedure* relates to pleading defences in a civil action, states that: "In a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party […]". The rule uses the mandatory "shall" language and proper pleading would require a party to plead any defence on which it intends to rely at trial to defend a claim.

[15] Rule 25.06(2) of the *Rules of Civil Procedure* applies to all pleadings and states: "A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded." I find that the rules clearly state that any point of law may be raised in a claim or defence and any defence which may defeat the claim of the opposite party, must be pleaded in a defence.

[16] The case before me is distinguished from the *Vaughan* and *Gendron* cases cited by the Union, as in this case, it is the Union who seeks access to the courts to sue its members to collect the financial penalties imposed by it on its members. The Union has not provided me with any case which supports its position that I should deprive any party that is sued in the Superior Court including the Applicants from pleading a possible defence in a court proceeding.

[17] For the above reasons, I find that the fact that the Applicants did not appeal to the Union's internal appeal tribunal does not deprive the members, who are sued in the Superior Court by their Union, from pleading any possible defence in the Superior Court or Small Claims Court action.

Issue II: Are the fines imposed on the members, pursuant to the Union constitution a penalty imposed under a contract, which are unenforceable in court?

[18] The Applicants submit that the fine provisions of the Union's constitution amount to unenforceable penalty clauses in a contract. The Union argues that the penalty clauses in its constitution are not unenforceable penalty clauses but are rather clauses that provide for payment of a fine on the happening of an event; and secondly that a penalty clause in a contract, is only unenforceable if the penalty provisions are unconscionable in the circumstances; and thirdly that the Union is authorized by statute to impose and collect fines from its members in the courts.

Analysis

[19] In *Berry v. Pulley*, 2002 SCC 40 (CanLII), [2002] 2 S.C.R. 493 at para. 49 the Supreme Court of Canada held that when individuals join a trade union, their relationship with the trade union is governed by its constitution, which is in the nature of a contract between the member and the trade union. The court stated as follows.

> […] 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; […]

The Supreme Court of Canada further held that the contract that is formed has some unique features, and the Supreme Court recognized that it was "essentially an adhesion contract as, practically speaking, the Applicant has no bargaining power with the union." Both parties have argued that the trade union constitution is to be considered as a contract and that the typical rules of contract construction and interpretation apply.

[20] The common law rule is that the 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. *Canadian General Electric Co. v. Canadian Rubber Co. (1915)*, 27 D.L.R. 294 (SCC); *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.* [1915] A.C. 79 (H.L.); *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate*, 1978 CanLII 7 (SCC), [1978] 2 S.C.R. 916.

[21] In *International Association of Machinists and Aerospace Workers v. Perks, Grandy and Hearn*, [1984] N.J. No. 219 at para. 33, (Nfld. Prov. Ct.), aff'd [1986] 87 C.L.L.C. 14007 (Sup. Ct. Nfld), a decision of the Newfoundland Supreme Court, the court held that a trade union's constitution is a contract that must nevertheless be subject to the typical rules of construction and interpretation and as such, the fines claimed under the constitution can only be recoverable in accordance with contract law.

[22] In *Peachtree II Associates – Dallas L.P. v. 857486 Ontario Ltd.* 2005 CanLII 23216 (ON CA), (2005), 76 O.R. (3d) 362 (C.A.) Sharpe J.A. considered the law on penalty clauses and forfeiture and stated as follows:

> [22] The courts of common law and equity adopted similar but distinctive rules with respect to stipulated remedy clauses that had penal consequences. The courts of common law dealt with attempts to enforce the payment of penalties while the courts of equity dealt with pleas for relief from penal forfeitures […]

Justice Sharpe then quotes the common law rule with regards to the enforcement of penalties as follows:

> [23] There is a venerable common law rule to the effect that the courts will not require a party to pay a genuine or true penalty on grounds of public policy. The parallel, but distinctive, equitable rule is to the effect that penal forfeitures will be relieved against where their enforcement would be inequitable and unconscionable.

[23] Justice Sharpe further set out the common law penalty rule in contracts quoting from *Dunlop Pneumatic*

Tyre, supra, as follows*:*

> [24] […] The common law penalty rule involves an assessment of the stipulated remedy clause only at the time the contract is formed. If the stipulated remedy represents a genuine attempt to estimate the damages the innocent party would suffer in the event of a breach, it will be enforced. On the other hand, again to quote Lord Dunedin from Dunlop, supra, "[i]t 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 be conceivably be proved to have followed from the breach".

[24] In the *Peachtree II* decision, Sharpe J.A. declined to decide whether the courts retain a residual discretion to enforce the payment of a penalty under the common law rule in circumstances where the penalty imposed is not unconscionable. Justice Sharpe declined to decide whether the equitable principles of unconscionability should be imported into the common law rules pertaining to the enforcement of penalty clauses, although from his reasoning he appears to favour applying a similar approach to the enforcement of penalty clauses and to forfeiture.

At para. 26 Sharpe J.A. stated as follows:

> [26] […] The central pillar of the appellant's argument, as I understand it, is that there is an iron-clad rule to the effect that all stipulated remedy clauses, whether penalties or forfeitures, assessed at the date of the contract as having penal consequences will not be enforced. In my view, that proposition does not represent an accurate statement of the law. Not all stipulated remedy clauses having penal consequences are unenforceable. In particular, the equitable doctrine of relief from forfeiture enforces such penalty clauses, where they are in the form of a forfeiture, where it is not unconscionable to do so.

[25] Notwithstanding Justice Sharpe's comments in the *Peachtree II* decision, without a decision from the Court of Appeal changing the common law rule with regards to the enforcement of penalty clauses in a contract, and given the statements of Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd, supra,* the public law rule remains in effect that the courts will not require a party to pay a genuine or true penalty on grounds of public policy. However in view of the comments of Justice Sharpe in the *Peachtree II* decision, I will also consider if the penalties imposed would be enforced if the equitable principle of unconscionability was applied in the circumstances of this case.

[26] The Union claimed that the fines were a genuine estimate of the damages inflicted by the Applicants on the whole Union. The Union assumed damages of one cent per union member and since there were 25,895 employees in the Union, it calculated its damages as $258.95. The Union claimed that this amount was less than the actual amount claimed against the Applicants of $326.75. In fact the amount claimed by the Union was $476.75 and not $326.75. There was no evidence on which the Union estimated its damages at one cent per member and I find this estimate was pure speculation on the part of the Union.

[27] The Applicants argue that the Union would have to deduct $50.00 per day for the three days that the Applicants did not participate in the strike, and for which strike pay was not paid to the Applicants. This would reduce the Union's loss from $258.95 ($258.95 - $150.00) to $108.95 per Applicant. The fine levied against the Applicants of $476.75 would be an amount 454% greater than the Union's estimated damages. The Applicants argue that requiring a member to pay a fine which is 454% greater than the Union's estimate of damages is excessive and unconscionable in this circumstance and in comparison to the damages which could be proven as a result of the breach. I agree with the Applicants' submission.

[28] Notwithstanding the Union's attempt to fix a value to their estimate of damages, I find that there was no evidence before me that the fines imposed by the Union were related in any way to the actual or an estimate of damages suffered by the Union. I find that the fines were imposed on the Union members in order to persuade them not to cross the picket line during a strike by imposing a financial penalty, which exceeded the income which a member could earn by crossing the picket line and working. 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.

[29] I am also persuaded that the fine represented a penalty by examining the wording of Section 25 Sub-section (1) of the PSAC constitution which states that the National Board of Directors may discipline members … for contravening any provision of the constitution. Section 25 Sub-section (3) states that any disciplinary action taken under the provisions of Sub-Sections (1) and (2) of this Section for a cause listed in Sub-Section (5)(n) of this Section shall include the imposition of a fine. The terminology used in the Union's constitution is clear that a member who crosses a picket line during a legal strike is subject to disciplinary action including a fine.

[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.

Happening of an Event

[31] The Union submits that the provisions of Section 25 of its constitution do not provide for the imposition of a penalty for a breach of the constitution but rather provides for the payment of an amount of money on the happening of an event. The Union did not vigorously argue this interpretation, in its submissions.

[32] Section 25(3) of the PSAC constitution authorizes disciplinary action including the imposition of a fine for a cause listed in sub-section 5(n). Sub-section 5(n) states that a PSAC member is "guilty of an offence against the constitution" by crossing the picket line during a legal strike. These sections indicate that crossing the picket line clearly amounts to "an offence against the constitution" and a breach of the terms of the constitution and do not support the Union's submission that crossing the picket line was only the "happening of an event".

[33] Where one party agrees with another in a contract to pay a certain sum of money when a certain event happens, this is generally not intended to include the imposition of a penalty but assumes a legitimate commercial purpose. Every penalty clause could be categorized as requiring a payment on the happening of an event, namely when a breach of the contract occurs. I find that the essence of the contract must be considered in the context in order to determine if the parties intended to impose a penalty in the event of a breach or whether the happening of the proposed event had a legitimate commercial purpose. Performing this contextual analysis is particularly important in this case where a Union contract is one of adhesion, where the Union member has no real negotiating power with the Union. I find that the proper characterization of the constitutional provision which allows the Union to discipline members by imposing a fine on members who cross the picket line was intended to impose a penalty by the Union in the form of a fine. The provisions are designed as a penalty to deter Union members from crossing the picket line and not as an agreement between two parties for a legitimate commercial purpose to pay a sum of money, when a certain event happens.

Issue III: Is the penalty imposed by the Union enforceable because it is not unconscionable in the circumstances?

[34] The Union submits that the fines imposed are still enforceable even if they are a penalty because they are not unconscionable in the circumstances. In the case of *Harry v. Kreutziger* (1978), 95 D.L.R. (3d) 231 the court held that where a claim is made that a bargain is unconscionable, the party challenging the contract must show the following:

(a) There was an inequality in the positions of the parties due to the ignorance, need or distress of the weaker, which would leave him or her in the power of the stronger; and

(b) Proof of substantial unfairness of the bargain.

[35] While conceding that there is an inequality of bargaining power between the Union and its members, the Union claims that this inequality alone is insufficient to meet the first element of the test of unconscionability. The Union submits that the inequality of bargaining power must be coupled with some impairment of the weaker party,

such as “ignorance, need or distress”. The Union refers to *Ekstein v. Jones*, [2005] O.J. No. 3497 as authority for this proposition.

[36] The Applicants submit that the Union has mischaracterized the ratio of the *Ekstein* case and claims that the court stated that a party asserting unconscionability must demonstrate:

> (a) That the terms are very unfair or that the consideration is grossly inadequate;
>
> (b) That there was an inequality of bargaining power between the parties and that one of the parties has taken undue advantage of this.

[37] The Applicants point out that the court in *Ekstein* provided a list of examples of what might constitute an inequality of bargaining power, which included the factors suggested by the Respondent, but that this list was not a closed list.

[38] I find that a close reading of *Ekstein* indicates that the Applicants’ characterization of the test in *Ekstein* is correct. As such, it must now be determined whether the fine provisions are very unfair, and whether there was an inequality in bargaining power of which the Union has taken advantage.

Very Unfair

[39] The Union submits that the fines imposed are not unfair because the amount of the penalty is fair and reasonable. The Union claims that the impossibility of an exact determination of damages is a factor that makes a penalty clause more, not less reasonable. As support for this proposition, they cite *Dimensional Investments Ltd*. v. Canada, 1967 CanLII 85 (SCC), [1968] S.C.R. 93. In that case, the court said:

> Under these circumstances, any exact determination of the damage flowing from a breach of the agreement was almost an impossibility and it appears to me to be not at all unreasonable to view the provisions of para. 10 of the agreement as reflecting a genuine pre-estimate of the damage to which both parties had agreed.

The above passage does not support the Union’s contention. Essential to the court’s finding that the clause in question was reasonable, was its determination that the clause was a genuine pre-estimate of damages. A genuine pre-estimate of damages is different from a penalty clause and is enforceable. The reasonability of the penalty imposed is not dependent on how difficult it is to determine the exact amount of damages.

[40] The Union further submits that the penalty imposed is reasonable because it represents a trivial sum compared to the damage inflicted on the bargaining unit as a whole. The evidence submitted in support of this contention is highly speculative. The Union submits that it estimates the damage to the whole bargaining unit to be approximately $258.95, per Applicant, a penny per Union member less than the Union was able to bargain for over the course of the collective agreement. The Union argues that the amount levied as a penalty on each Applicant is not disproportionate to this damage. No evidence was provided to support these assumptions of damages. The Union’s position assumes that the Applicants, having crossed the picket line on three of the seven days, caused at least a one penny per member decrease in the amount of the contract the Union ultimately agreed to sign. There is simply no evidence of this assertion and it cannot support a finding that the amount of the fines is reasonable and fair on this basis.

[41] I do not agree with the Union’s submission that the imposition of a penalty equal to the Applicant’s gross pay over the three days on which they worked is not unfair, because it would be difficult to ascertain the members’ net pay, and because the gross pay reflects the value of the work to the employer, rather than the employee. Basing the amount of the penalty on the value of the work to the employer does not justify or minimize its onerous effects on the Applicant members who crossed the picket line or make the amount of the fine levied fair to the members who crossed the picked line.

[42] The Union also claims that the fines were not unfair because they allow the Union to take steps to prevent

employees from becoming free-riders on the collective bargaining process and that there is nothing unfair or unreasonable about taking steps to prevent such behaviour. While taking steps to prevent employees from becoming free-riders on the collective bargaining process may not be unconscionable, it cannot be said that it would not be unfair or unreasonable for the Union to impose any amount of fine it may choose for the above purpose.

[43] In this case, the imposition of a substantial fine is one option among many that the Union could take to prevent the free-rider problem. As the Applicants point out, the Union could have waged information campaigns to persuade its members that they should support the Union's course of action, or the Union could have set their "strike pay" at a rate that would have encouraged support for the strike. I agree with the Applicants that the imposition of an onerous fine on the Applicants by the Union was not a reasonable or fair way to achieve the goal of preventing free-riders.

[44] I am satisfied that the Applicants have demonstrated that the fines imposed were extremely onerous. The imposition of a hefty fine, at a time when members may already be suffering financially as a result of strike action, supports the conclusion that the fine provisions are very unfair. The Applicants also point out that Union members are not legally obliged to refrain from working during a strike in the federal jurisdiction. The Applicants argue that the Canada Labour Code, by not prohibiting an employee in a bargaining unit from continuing to work during a strike, necessarily implies a public policy and legislative determination that employees in a bargaining unit should be free to work during a strike or lock out, should they so choose. The Applicants submit that the imposition of a fine for choosing to carry out a lawful act, is unfair and unreasonable.

[45] No jurisdiction in Canada, other than Saskatchewan, has enacted a provision empowering a trade union to impose fines on members who continue working during a strike. The Applicants urge the court to conclude from this that Parliament did not intend to allow unions to utilize the courts to penalize employees who have exercised their right to work during a work stoppage. They also point out that the Saskatchewan legislation authorizes the imposition of a fine in such cases only to the extent of a member's net pay.

[46] I find that based on the above factors, the fines levied by the Union were not reasonable and fair and were in fact very unfair to the members and as such, the Applicants meet the first part of the *Ekstein* test.

[47] The second part of the test requires that there is an inequality in bargaining power and that one party has taken advantage of said inequality. The Supreme Court of Canada recognized at para. 49 of *Berry*, that the contract between a union and its members is "essentially an adhesion contract as, practically speaking, the Applicant has no bargaining power with the Union." I find that the Supreme Court of Canada's statement confirms that the requirement that there was an inequality in bargaining power has been met and that this inequality was to the Union's advantage. Therefore I find that the fines imposed on the Applicants by the Union, equal to their gross pay, meet the test for unconscionability laid out in *Ekstein* and as such cannot be enforced.

[48] In the event that the common law test for the enforcement of penalty clauses is found to include equitable principles of unconscionability, as is the case under equitable forfeiture rules, then I find that penalizing a Union member who crosses a picket line, an amount equal to the gross remuneration earned before deducting income taxes would be unconscionable. The amount levied as a fine exceeds the total amount earned, as the employee would not only have not earned any remuneration whatsoever for his or her day's work, but would in fact be paying an amount in excess of what they had actually earned namely the income tax and other deductions deducted by the employer. In these circumstances, I find that the levying of such a fine would be very unfair and not proportionate to the remedy sought and would be unconscionable under circumstances, such that the penalty provisions would not be enforceable if equitable principles were to be applied to the enforcement of a penalty clause.

Issue # IV: Is the penalty imposed by the Union and its enforcement by the court, authorized by statute?

[49] I agree with the Union's submission that if the penalty provisions were authorized by statute that this would

constitute an exception to the common law rule that penalty clauses are not enforceable in a contract unless they are a genuine pre-estimate of damages in the event of a breach. The Union submits that because certain conduct is prohibited under the unfair labour practices provisions of Sections 188 to 192(1)(f) of the *Public Service Labour Relations Act*, and there is no prohibition in the *PSLRA* prohibiting the imposition of fines by the Union on members, that these statutory provisions authorize the imposition and collection of fines imposed by the Union, in the courts.

[50] Under the provisions of Section 188 of the *PSLRA*, the Union is prevented from engaging in unfair labour practices by taking disciplinary action against any Union member in certain specified circumstances. The circumstances specified include imposing penalties on an employee in a discriminatory manner, imposing a penalty "on an employee by reason of that employee having exercised any right under this Part or Part 2 of the Act" and (e) "to impose a financial or other penalty on a person, because that person has (i) testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part or Part 2, (ii) made an application or filed a complaint under this Part or presented a grievance under Part 2, or (iii) exercised any right under this Part or Part 2."

[51] The Union argues that because the imposition of a fine on members for crossing the picket line during a legal strike is not specifically prohibited under sections 188 to 192 of the *Public Service Labour Relations Act* they are therefore authorized by statute. I do not agree.

[52] In the case of *Bobinski v. Canada (Treasury Board)*, [1985] F.C.J. No. 244, the Federal Court of Appeal considered section 91 of the 1970 version of the *Public Service Staff Relations Act*. This section is now section 209 of the *PSLRA*. That section stated that disciplinary action resulting in a financial penalty was referable to adjudication. The Federal Court of Appeal found that the right to refer disciplinary action, resulting in a financial penalty, to adjudication implied that the employer had the right to impose a fine as a disciplinary measure.

[53] The Union argues that since in *Bobinski, supra*, the court concluded that the existence of a recourse procedure against an employer who imposed a "financial penalty" implied the existence of the right of the employer to impose a fine, similarly the existence of a recourse procedure against a union that imposed a "financial or other penalty" proves the existence of a union's right to impose a fine.

[54] I do not agree with the above submission as it assumes that sections 188(c) – (e) and 192(1)(f) are similar to section 209 in that they both set out the recourse mechanism against a decision to impose a financial penalty. In fact, sections 188(c) – (e) and 192(1)(f) do not set out a recourse mechanism for the situation where a union imposes a financial penalty on one of its members, instead, they set out a recourse mechanism for when a union engages in an unfair labour practice.

[55] Section 192(1)(f) allows the Board, if it determines that a complaint under subsection 190(1) is well founded, to make an order requiring the Union to pay compensation. Under section 190(1)(g), the Board must examine and inquire into any complaint made to it that the employer, an employee organization or any person has committed an unfair labour practice. Section 192(1)(f) is a recourse mechanism for Union members to use against a union that has committed an unfair labour practice against them. Such unfair labour practices include imposing fines in certain circumstances but do not include the imposition of a fine for crossing the picket line. These sections simply do not apply to fines imposed by unions other than in circumstances amounting to unfair labour practices.

[56] Parliament has chosen to outlaw, as unfair labour practices, a discrete list of the most egregious forms of abusive union conduct. That choice merely means that Parliament has also chosen not to treat other kinds of objectionable trade union conduct as unfair labour practices. At most, sections 188(c) – (e), and 192(1)(f) simply have no application to the case at bar and they do not authorize the Union to impose financial penalties on their members for crossing a picket line and do not authorize the Union to collect those fines in court.

[57] I find that an actual statutory grant of authority to a Union to impose and collect fines imposed in the courts would be required before a trade union could resort to the courts to recover penalties levied against members

under the Union's constitution. Saskatchewan is the only jurisdiction in Canada that has passed legislation to empower trade unions to impose fines on members who continue working during a strike and to collect the fines as a debt. Section 36 of the *Saskatchewan Trade Union Act* states as follows:

> (4) […] a trade union may assess or fine any of its members who has worked for the struck employer during a strike held in compliance with this Act a sum of not more than the net earnings that employee earned during that strike.
>
> (5) No trade union shall require any member to pay an assessment or fine pursuant to subsection (4) unless the constitution of the trade union provides for the assessment or fine prior to the commencement of the strike.
>
> (6) A fine imposed on a member pursuant to subsection (4) with respect to an action that takes place after the coming into force of this subsection is deemed to be a debt due and owing to the trade union and may be recovered in the same manner […]

[58] Section 36(6) of the *Saskatchewan Trade Union Act* converts the fine levied into a "debt due" and this accomplishes the legislative goal of permitting a union to enforce fines against Union members in the courts as otherwise the fines imposed would not be recoverable in the courts. No such legislation exists under any Federal Act.

[59] As a result, I do not agree with the interpretation advanced by the Union, namely that the absence of any statutory authority in fact constitutes the statutory authority for the Union to levy and then collect fines in the courts. I agree with the submission by the Applicants that the fact that Parliament has outlawed certain conduct by statute, does not and cannot be construed as granting positive statutory permission, not only to engage in all conduct not so outlawed, by also to permit resort to the courts to collect penalties imposed under the Union constitution.

Disposition

[60] For the above reasons, I find that the fines imposed by the Union on the Applicants pursuant to its constitution amount to a penalty imposed under a contract for the purposes of deterring members of the Union from crossing the picket line. I further find that the fines imposed do not amount to a reasonable pre-estimate of damages to be incurred in the event of a breach of the Union's constitution by crossing the picket line. I also find that the imposition of a fine and penalty equal to the gross income earned by any employee is unconscionable in the circumstances, making the penalty unenforceable even if equitable principles were applied. I also find that the authority to levy fines in the Union's constitution and the authority to collect the fines imposed in the courts are not authorized by statute. I also find that the imposition of a fine on Union members as discipline for crossing a picket line constitutes the imposition of a penalty and not the happening of an event.

[61] The Applicants' application is therefore granted and there will be an order that the Superior Court of Justice in the Province of Ontario will not enforce the fine/financial penalty provisions set out in the constitution of the Public Service Alliance of Canada and the bylaws of the Union of Taxation Employees ("UTE"). The claim brought by the Union against the Applicants in the Small Claims branch of the Superior Court of Justice is dismissed.

[62] The Applicants will have 15 days to make submissions on costs. The Respondent shall have 15 days to respond and the Applicants shall have 10 days to reply.

R. Smith J.

Released: October 17, 2007

COURT FILE NO.: 06-CV-35925
DATE: 2007/10/17

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JEFFREY BIRCH and APRIL LUBERTI

Applicants

– and –

UNION OF TAXATION EMPLOYEES
LOCAL 70030

Respondent

REASONS FOR DECISION

R. Smith J.

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Released: October 17, 2007