CITATION: Birch v. Union of Taxation Employees, Local 70030, 2008 ONCA 809
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COURT OF APPEAL FOR ONTARIO

Armstrong, Juriansz and Rouleau JJ.A.

BETWEEN

Jeffrey Birch and April Luberti

Respondents (Applicants)

and

Union of Taxation Employees, Local 70030

Appellant (Respondent)

Chris Rootham for the appellant

John Craig and Richard Sinclair for the respondents

Heard: May 14, 2008

On appeal from the judgment of Justice R. Smith of the Superior Court of Justice dated October 17, 2007 and reported at (2008), 288 D.L.R. (4th) 424.

ARMSTRONG J.A.:

INTRODUCTION

[1] This appeal addresses the question of whether a trade union may invoke the jurisdiction of the court to enforce fines that it has imposed against its members for crossing a picket line.

[2] The respondents, Jeffrey Birch and April Luberti, were fined by the appellant union for crossing the picket line to attend work during a legal strike. In an application to

the Superior Court of Justice, Justice Robert Smith held that a provision in the appellant's constitution authorizing the fines was an unenforceable penalty clause. The appellant appeals that finding.

[3] For the reasons that follow, I would dismiss the appeal.

FACTS

[4] The parties proceeded on an agreed statement of facts in the Superior Court of Justice. Mr. Birch and Ms. Luberti, employees of the Canada Revenue Agency, crossed a picket line to attend work on three days during a legal strike by the Public Service Alliance of Canada ("PSAC") in the fall of 2004. Mr. Birch and Ms. Luberti were members of the appellant, the Union of Taxation Employees ("UTE"), a component of PSAC (UTE and PSAC are referred to from time to time as "the union"). The UTE brought disciplinary proceedings against Mr. Birch and Ms. Luberti for violating the PSAC constitution by working during a legal strike. The union suspended the membership of Mr. Birch and Ms. Luberti for three years (one year for each day that they crossed the picket line). The union also fined each member $476.75. The fine was equivalent to the total of each employee's gross salary for the three days they crossed the picket line.

[5] The relevant provisions of the PSAC constitution under which Mr. Birch and Ms. Luberti were fined are the following:

> Section 25(5)(n)
>
> A PSAC Regional Council, Component, Local, Area Council officer or member, is guilty of an offense against this constitution who:
>
> (n) is a worker in a legal strike position, who either crosses the picket line or is paid by the employer not to participate in strike action, or performs work for the employer, unless required to do so by law, or who voluntarily performs struck work;
>
> Section 25(3)
>
> 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 that equals the amount of daily remuneration earned by the member, multiplied by the number of days that the member crossed the picket line, performed work for the employer or voluntarily performed struck work.

[6] Mr. Birch, Ms. Luberti and a number of other employees, who had been fined for crossing the picket line, refused to pay their fines. UTE sought to enforce the payment of the fines in the Small Claims Division of the Superior Court of Justice. The parties agreed that this matter should proceed by way of application brought by Mr. Birch and Ms. Luberti in the Superior Court on an agreed statement of facts as a test case. Mr. Birch and Ms. Luberti sought the following relief in their application:

> a. A Declaration that the Superior Court of Justice of the Province of Ontario does not have the jurisdiction to enforce provisions set out in the constitution of a trade union that provide for fines/financial penalties against the trade union's members;
>
> b. In the alternative, a Declaration that the Superior Court of Justice of the Province of Ontario does not have the jurisdiction to enforce the fine/financial penalty provisions as set out in the Constitution of the Public Service Alliance of Canada ("PSAC") and/or the By-Laws of the Union of Taxation Employees ("UTE") (referred to collectively as the "Union");
>
> c. An order dismissing claims brought by the Union against the Applicants in the Small Claims Branch of the Superior Court of Justice[.]

[7] The application judge, in different wording, granted the relief sought by Mr. Birch and Ms. Luberti.

[8] UTE appeals the judgment of the application judge on the ground that he erred in failing to find that the penalty clause in the PSAC constitution was not unconscionable and therefore could be enforced. UTE also asserts that Mr. Birch and Ms. Luberti should have appealed the fines under the provisions of the PSAC constitution and, if necessary, filed a complaint with the Public Service Labour Relations Board. According to the union, the failure of Mr. Birch and Ms. Luberti to exercise their internal rights of appeal and statutory complaint to the Public Service Relations Board precludes them from asserting by way of defence in the Superior Court that the fines are unenforceable.

THE REASONS FOR JUDGMENT OF THE APPLICATION JUDGE

[9] The application judge addressed four issues:

(i) Are Mr. Birch and Ms. Luberti entitled to defend in the Small Claims court?

(ii) Are the fines imposed on Mr. Birch and Ms. Luberti penalties levied under the union constitution and, if so, are they unenforceable by the court?

(iii) Are the fines imposed by the union enforceable because they are not unconscionable in the circumstances?

(iv) Are the fines imposed by the union and their enforcement by the court, authorized by statute?

(i) Are Mr. Birch and Ms. Luberti entitled to defend in the Small Claims Court?

[10] A union member who has been disciplined may appeal the penalty imposed to a three person tribunal comprised of a representative of the member, a representative of the union and an independent person agreed to by both parties or appointed by a labour organization such as the Canadian Labour Congress.

[11] The Public Service Labour Relations Board has jurisdiction to hear complaints concerning disciplinary action taken by a union against a member under ss. 188, 190 and 192 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 as long as all internal appeals have been exhausted.

[12] The union's position before the application judge and in this court was that by failing to appeal their fines to a three member panel and then to file a complaint (if necessary) to the Public Service Labour Relations Board, Mr. Birch and Ms. Luberti lost their right to defend against the actions commenced in the Small Claims Court for the enforcement of the fines.

[13] The application judge held that once the union had sued its members in the Small Claims Court the members were entitled to raise any defence open to them. The application judge made reference to rule 25.07(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 relating to the pleading of defences and to rule 25.06(2) concerning the pleading of points of law. The application judge observed that the union had not provided him with any authority in support of its position that he should deprive a defendant in the Superior Court from pleading all possible defences available.

(ii) Are the fines imposed on Mr. Birch and Ms. Luberti penalties imposed under the union constitution, and, if so, are they unenforceable by the court?

[14] The application judge concluded that the relationship between a trade union and its members is governed by the union constitution which is a contractual relationship. See *Berry v. Pulley*, [2002] 2 S.C.R. 493 at para. 48:

> [T]he 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 application judge held that the contract between the union and its members is a contract of adhesion as the members had no real bargaining power with the union: see *Berry* at para. 49.

[15] The application judge further held that, at common law, the courts will not enforce a penalty clause in a contract that does not provide a genuine pre-estimate of damages: see *Canadian General Electric Co. v. Canadian Rubber Co. of Montreal* (1915), 27 D.L.R. 294 (S.C.C.); *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] 2 S.C.R. 916.

[16] The application judge referred to *Peachtree II Associates – Dallas LP v. 857486 Ontario Ltd.* (2005), 76 O.R. (3d) 362 (C.A.) where Sharpe J.A. "declined to decide whether the equitable principles of unconscionability should be imported into the common law rule pertaining to the enforcement of penalty clauses". At para. 26, Sharpe J.A. said:

> 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.

[17] After reviewing the above legal principles, the application judge concluded at para. 30 of his judgment:

> 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.

[18] There is no issue in this appeal with the application judge's finding that the provision in the union constitution that imposes a fine for crossing a picket line constitutes a penalty clause.

(iii) Is the penalty imposed by the union enforceable because it is not unconscionable in the circumstances?

[19] In respect of the enforcement of the penalty clause, the application judge concluded that notwithstanding the language used by Sharpe J.A. in *Peachtree II* "the [common] 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, as a result of the views expressed by Sharpe J.A. in *Peachtree II*, the application judge considered the application of the doctrine of unconscionability to the facts of this case.

[20] The application judge adopted the test for unconscionability expressed in *Ekstein v. Jones*, 2005 CanLII 30309 (Ont. S.C.) at para. 57 as follows:

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

[21] The application judge found that the penalty clause was very unfair for the following reasons. First, the application judge rejected the union's principal submission that the penalty provision in the constitution was fair and reasonable because the amount of the fines imposed was trivial when compared with the damages caused to the union by the respondents crossing the picket line. The union estimated the damages at $258.95 for each member – calculated on the basis of one cent per union member. This submission

was postulated on the theory that the respondents' conduct in crossing the picket line caused a decrease in the benefits that the union was able to negotiate in the new collective agreement at the rate of one cent per member. The application judge concluded that there was no evidence to support this theory.

[22] Second, the union submitted that a fine equivalent to the members' gross pay was not unfair because it would be difficult to determine a member's net pay and, in any event, the fine represented the value of the work to the employer rather than the member. The application judge rejected this argument and concluded that a fine based "on the value of the work to the employer does not justify or minimize its onerous effects on the … members who crossed the picket line or make the amount of the fine levied fair to the members who crossed the picket line."

[23] Third, the union also submitted that the fines were not unfair because they prevent free-loading by individual members of the union during the collective bargaining process. The application judge concluded that the union had other means available to accomplish this end such as the waging of information campaigns and the setting of strike pay on a basis that would encourage support for the strike.

[24] The application judge concluded that the respondents had satisfied him that the fines levied against the respondents were extremely onerous. He said:

> The imposition of a hefty fine, at a time when members may already be suffering financially as a result of strike action supports the conclusions that the fine provisions are very unfair.

[25] The application judge observed that Mr. Birch and Ms. Luberti were not "legally obliged" to refuse to work during a legal strike and by extension that the *Canada Labour Code*, R.S. 1985, c. L-2 supported a policy that bargaining unit employees are free to work or not in the circumstances of a legal strike.

[26] The application judge also noted that the only jurisdiction in Canada which authorizes a union to levy fines against its members who cross the picket line during a legal strike is Saskatchewan. Such fines, he noted, are limited by s. 36(4) of the *Saskatchewan Trade Union Act*, R.S.S. 1978, c. T-17 to an employee's net pay earned during the strike.

[27] Although the application judge said that the union conceded that there was an inequality of bargaining power between the union and its members, he addressed this issue as if there was no such concession. The union does not concede the issue on this appeal. The application judge relied upon the statement of the Supreme Court of Canada in *Berry* at para. 49 that a contract between a union and its membership is "essentially an

adhesion contract, as practically speaking, the [membership] has no bargaining power with the union."

[28] On the above analysis, the application judge concluded that the penalty provision in the union constitution was unconscionable.

(iv) Is the penalty imposed by the union and its enforcement by the court, authorized by statute?

[29] Before the application judge, the union contended that under the unfair labour practice sections of the *Public Service Labour Relations Act*, the union was prohibited from imposing penalties (including fines) on its members in certain circumstances: see ss. 188(c) – (e) and 192(1)(f). Those circumstances do not include the imposition of fines for crossing a picket line during a legal strike. The union therefore submitted that because there was no such prohibition, it was entitled to impose fines for such conduct.

[30] The application judge rejected this submission. He held that ss. 188(c) – (e) and 192(1)(f) have no application to this case. Those sections do not authorize the union to fine their members for crossing the picket line. He concluded that an express statutory grant of authority to a union to levy fines and enforce their collection in the courts would be required in these circumstances. This, he observed, is what was done by the Saskatchewan legislature in s. 36 of the *Saskatchewan Trade Union Act*.

THE APPEAL

[31] The union raises the following issues on appeal:

(i) The application judge erred in concluding that the penalty clause in the constitution was *per se* unenforceable.

(ii) The penalty clause in the union constitution is not unconscionable.

(iii) The statutory context under which the union operates established a recourse system which presupposes that the union has the right to levy fines on their members.

(iv) Mr. Birch and Ms. Luberti were required to proceed in alternative forums to challenge the validity of the penalty clause in the constitution.

(v) If the union does not succeed on the above issues it seeks to amend its claim to plead breach of contract.

ANALYSIS

(i) Did the application judge err in concluding that the penalty clause in the union constitution was per se unenforceable?

[32] The Union relies upon the *obiter dicta* of Sharpe J.A. in *Peachtree II*. *Peachtree II* involved two commercial contracts which contained identical stipulated remedy provisions that in the event of default certain promissory notes were deemed to be paid in full. The respondents alleged default under the agreements before an arbitrator and sought a declaration deeming the promissory notes paid in full. The arbitrator held that the stipulated remedy provision could be regarded as a penalty clause. However, he upheld the clause and refused to grant the appellant relief from forfeiture. On appeal to the Superior Court the appeal judge held that the respondent could enforce the clause even if it was a penalty.

[33] On appeal to this court Sharpe J.A. said at para. 30:

> Should the impugned clause in the present case be assessed from the perspective of the common law rule against penalty clauses or does the appellant's case amount to a request for relief from forfeiture? For the following reasons, I consider that the appellant's case amounts to a request for relief from forfeiture.

Sharpe J.A. proceeded to decide the case on the basis of a request for relief from forfeiture and concluded at para. 36 of his reasons:

> My conclusion with respect to relief from forfeiture makes it unnecessary for me to consider the point dealt with by the appeal judge, namely, whether there is a residual discretion to enforce a payment that would be a penalty under the common law rule, and I leave that question to another day.

[34] While the court in *Peachtree II* declined to decide the issue of whether a penalty clause in a contract remains *per se* unenforceable Sharpe J.A. did not leave much doubt concerning where the courts should head when squarely faced with this issue. He said at para. 32 of his reasons:

> Second, I agree with Professor Waddams' observation in *The Law of Damages*, looseleaf (Aurora: Canada Law Book Inc., 1991) at para. 8.310 that as there is often little to distinguish between the two types of clauses and that there is much to be said for assimilating both under unconscionability. The effect of assimilation would be "to provide a more rational

> framework for the decisions of both forfeitures and penalties". Unconscionability is also the direction suggested by the dictum of Dickson J. in *Elsley v. J.G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916, 83 D.L.R. (3d) 1, at p. 937 S.C.R.: "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." As pointed out by the appeal judge, this would also appear to be the direction of s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C43: "A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise, as are considered just." All of this suggests to me that courts should, whenever possible, favour analysis on the basis of equitable principles and unconscionability over the strict common law rule pertaining to penalty clauses.

[35] The union also advanced four supplementary arguments for enforcing penalty clauses:

> (a) Any general rule against them is an unnecessary interference with freedom of contract.
>
> (b) Penalty clauses are economically efficient.
>
> (c) Such a general rule is unnecessary in light of the historical development of contract law and the doctrine of unconscionability.
>
> (d) Reliance upon the rule in the past has created uncertainty, as shown by its unpredictable and inconsistent application.

Counsel for the union referred us to Chapter 7 of the Ontario Law Reform Commission's *Report on Amendment of the Law of Contracts* (Toronto: *Ministry of the Attorney General* 1983) which recommended that penalty clauses should be enforceable unless they are manifestly excessive.

[36] Counsel for Mr. Birch and Ms. Luberti submits that this is not the case to revisit the common law rule against penalty clauses. He contends that the appellant seeks to support its argument on the basis of commercial considerations that arise between sophisticated commercial parties that have no place in the circumstances that obtain here.

Accordingly, notions of economic efficiency and interference with the freedom of contract are simply not relevant.

[37] Assuming that the common law rule against penalty clauses still has some life, I would agree that this is not the case to make a sweeping pronouncement that the rule is no longer applicable to the law of contract generally. The rule was developed through a wide spectrum of what might be described as typical commercial cases. Whatever may be said of the facts of this case, it is not a typical commercial case and I would not wish to be taken as suggesting that what follows is intended to be general authority for sounding the death knell for the rule against penalty clauses. Like Sharpe J.A. I am of the view that the broader issue should be left to another day.

[38] While I agree with the view that a union constitution represents a different kind of contract between a union and its members and that a penalty clause is not necessarily unenforceable in accordance with the common law rule I see no reason to suggest that the law of unconscionability does not apply to these kinds of agreements. Given the *obiter dicta* expressed by Sharpe J.A. in *Peachtree II*, it was understandable that the application judge hesitated to declare the rule against penalty clauses was no longer applicable. In any event, he properly proceeded to consider whether the clause in issue was unconscionable.

[39] I can discern nothing in the unique contractual relationship between a union member and his or her union which would suggest to the court that we should refuse to apply the doctrine of unconscionability in appropriate circumstances. To suggest otherwise would be to deny the exercise of the equitable jurisdiction of the court to provide a remedy to individual members who have suffered an injustice at the hands of their union.

[40] The above said, I move to a consideration of whether the clause in issue here was or was not unconscionable.

(ii) Is the penalty clause unconscionable?

(a) The test for unconscionability

[41] I start with a consideration of the test for unconscionability. There are cases in this court, other provincial courts of appeal and the Supreme Court of Canada that articulate a test for unconscionability in respect of the law of contract. There does not appear to be a single articulation of a test applicable to all situations. This is not surprising, given that the doctrine of unconscionability has been applied in a wide variety of cases.

[42] Professor Waddams in *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) at para. 515 describes Bradley Crawford's definition of unconscionability from his

"Comment" (1966) 44 Can. Bar. Rev. as "an immoderate gain or undue advantage taken of inequality of bargaining power." Professor Waddams cites *Dyck v. Mann Snowmobile Association*, [1985] 1 S.C.R. 589 as a leading Supreme Court authority which adopted Crawford's definition. In *Dyck* at page 593, the Supreme Court described unconscionability as occurring in a transaction where "the stronger party has taken unfair advantage of the other."

[43] The union relies on the judgment of the British Columbia Court of Appeal in *Harry v. Kreutziger* (1978), 95 D.L.R. (3d) 231 at page 237 where McIntyre J.A. said:

> Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain.

[44] Most, if not all, of the cases that discuss the doctrine of unconscionability refer to the inequality of bargaining power of the parties. However, this court in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1 noted that the inequality of bargaining power alone does not render a contract unconscionable or unenforceable. Robins J.A. speaking for the court said at page 11:

> The trial judge was of the opinion that there was an inequality of bargaining position between the plaintiff, a small retailer, and the defendant, a large security protection firms, and treated this as militating in favour of striking the clause. While I agree that such inequality is a relevant criterion, the fact that the parties may have different bargaining power does not in itself render an agreement unconscionable or unenforceable. Mere inequality of bargaining power does not entitle a party to repudiate an agreement. The question is not whether there was an inequality of bargaining power. Rather, the question is whether there was an abuse of the bargaining power.

[45] However one articulates the test for unconscionability, I am satisfied that it involves more than a finding of inequality of bargaining power between the parties to a contract. Both the test adopted by the application judge in *Eckstein* and the test in *Harry* of the British Columbia Court of Appeal recognize that a determination of unconscionability involves a two-part analysis – a finding of inequality of bargaining power and a finding that the terms of an agreement have a high degree of unfairness. I

see little, if any, difference between a description of terms of a contract as "very unfair" or "substantially unfair". I am also of the view that "abuse of the bargaining power" identified by Robins J.A. in *Fraser Jewellers* is another way of describing substantial unfairness.

[46] I can find no error in the application judge's articulation of the test for unconscionability.

(b) The standard of appellate review

[47] The next issue, before turning to the application judge's conclusion, is the standard of appellate review. McLachlin J.A. (as she then was) in *Principal Investments Ltd. v. Thiele Estate* (1987), 37 D.L.R. (4th) 398 (B.C.C.A.) at page 402 concluded that a finding of unconscionability is a question of mixed fact and law:

> The question of unconscionability is one of mixed fact and law. The trial judge's conclusions as to the events which occurred are questions of fact with which this Court may interfere only if clear and overriding error is established: *Stein et al v. The Ship "Kathy K" et al* (1975), 62 D.L. R. (3d) 1, [1976] 2 S.C.R. 802, 6 N.R. 359; *Beaudoin-Daigneault v. Richard et al*, [1984] 1 S.C.R. 2 at p. 8, 37 R.F.L. (2d) 225, 57 N.R. 288. On the other hand, determination of whether the established facts support a conclusion of unconscionability on the applicable legal principles is primarily a question of law, with which this Court can interfere if it finds the conclusion to be wrong.

In the much cited case of the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 36, the majority said:

> Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the

> matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises, supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

(c) The penalty clause is unconscionable.

[48] I prefer to discuss the two parts of the test for unconscionability in the reverse order to that articulated by the application judge.

[49] Counsel for the union submits that the application judge erred in finding that there was inequality of bargaining power and substantial unfairness in this case. Relying on the strict language of the British Columbia Court of Appeal in *Harry*, he argues that the inequality of bargaining power must be linked with some "ignorance, need or distress" of the weaker party. Counsel suggests that inequality of bargaining power can result from old age, emotional distress, dependence, lack of business experience, or poverty. Counsel further submits that there is no evidence that such factors exist in this case. I do not accept this submission. There is no fixed set of criteria that establishes inequality of bargaining power.

[50] The application judge relied upon Iacobucci J.'s reasoning in *Berry* that in a contract of adhesion, a union member has no bargaining power with the union. Iacobucci J. also concluded that it is when the contract is formed that determines whether there was inequality of bargaining power. When Mr. Birch and Ms. Luberti joined the union, they took the union constitution as they found it with no ability to negotiate or change its terms until they became members. The fact that they could recommend and lobby for change after becoming members does not alter the analysis.

[51] I am satisfied that the application judge committed no error in concluding that there was inequality of bargaining power between the respondents on the one hand and the union on the other hand.

[52] I turn to the question of whether the application judge erred in finding that the fines levied against the respondents as provided for in the union constitution were "very unfair". As I read the reasons for judgment, the application judge considered all of the facts relevant to this issue.

[53] The application judge determined that there was no evidence to support the union's position that the fines were proportional to the damage suffered by the union as a result of Mr. Birch and Ms. Luberti crossing the picket line. Before the application judge, the union sought to justify the fines as a genuine pre-estimate of the damages

suffered by the union. Although there was no evidence to support this position, the union submitted that the damages amounted to one cent per member which produced an amount of $258.95 for the total union membership of 25,895. If $50 per day strike pay (for a total of $150.00) is subtracted from that amount, the total amount of the damages would be reduced to $108.95. The actual amount of the fine was $476.75 or 454 per cent greater than the union's estimate of its damages less the $150.00 for strike pay. I agree with the application judge that a fine of that magnitude can properly be described as excessive and unconscionable. Even if I did not agree with him, I am satisfied that a high degree of deference is owed to the application judge on that issue.

[54] In this court, the union did not advance the one cent per member theory but argued that a fine of $476.75 is a trivial sum. In all of the circumstances, I disagree.

[55] The application judge rejected out of hand the submission that a fine representing the gross pay of an employee was justified because it represented the value of the work to the employer. I agree with the application judge's conclusion that basing the fine on the value of the work to the employer does not make an excessive fine justifiable. It is the circumstances of the employee that determines whether the fine meets the test of substantial unfairness. In this case, the application judge determined that a fine, which exceeded an employee's take-home pay, "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." I note that counsel for the union argues that there was no direct evidence of members suffering financially as a result of the strike action. While that may be so, the application judge's general statement that members may be suffering financially appears to me to be a logical inference to draw from the circumstances of a cessation of work due to a strike.

[56] The fact that Saskatchewan is the only jurisdiction in Canada that has seen fit to authorize a trade union to levy a fine on a member who crosses the picket line during a legal strike, limited to a member's net pay, adds support to the conclusion of the application judge that a fine greater than that amount is excessive. While I do not think it is necessary to conclude, as did the application judge, that no fine is enforceable in the absence of legislation authorizing the imposition of a fine, I find the legislation in Saskatchewan is informative on the issue to be decided here.

[57] The application judge also considered whether the fines provided under the constitution were justified in order to deter members from taking the benefits of union membership without accepting the burden of a work stoppage due to a legal strike. He decided that there were more appropriate means than fines of the magnitude here to accomplish this end. I also note that the respondents were suspended from union membership for three years. In my view, a suspension of such duration is a significant

penalty in itself. The respondents not only lose the benefits of union membership but risk ostracism and ridicule from their fellow employees who are members of the union.

[58] I recognize that a fundamental principle of the union movement and the collective bargaining process is union solidarity. I accept that the penalty provision in this case was aimed at preserving union solidarity. As important as that principle is, the means adopted to achieve it in this case have been found to be "very unfair".

[59] In my view, the application judge applied the correct test for unconscionability to the agreed facts and to the inferences which he drew from those facts. I can see no basis upon which this court could or should interfere with his conclusion that the penalty clause in the constitution is unconscionable and therefore unenforceable.

[60] Before leaving the question of unconscionability, I wish to comment on the dissenting reasons of Juriansz J.A. My colleague suggests that the simple answer to the question concerning unconscionability is that the respondents could have resigned from the union before crossing the picket line and avoided the imposition of the fines. If the respondents have the right to resign their union membership, I disagree that such action would take the element of unconscionability off the table.

[61] The penalty clause in the union constitution is either unconscionable or it is not. Resigning from the union does not change the conclusion that the penalty provision is unconscionable. If this were so, no penalty clause could be unconscionable. Let us suppose that the penalty clause provided for a $10,000 fine per day for each day that a union member crossed the picket line or a fine of $500 for some other breach such as failure to wear a union hat during a strike. In my view, no court would say that such a clause is not unconscionable because a union member could resign from the union before he or she crossed the picket line or declined to wear a union hat. The failure to resign from the union before crossing the picket line or declining to wear a union hat does not turn an unconscionable penalty into an enforceable obligation.

[62] When the respondents joined the union, they entered into a contract, the terms of which were fixed at that point in time. Only those terms which were not unconscionable could be enforced against them and the unilateral act of resignation at some later date does not make an unconscionable provision enforceable by the courts.

[63] On another point, Juriansz J.A. says that his real point of departure from my approach is the failure to focus the analysis on the quantum of the damages suffered by the union. Juriansz J.A. refers to "the actual damage suffered by the union". I have two responses. First, as already stated, there is not a scintilla of evidence of any damage to the union. Second, if there was any evidence of damage, such damage would be to the other members of the bargaining unit. Again, there is no such evidence. In my view, the

discussion about the intangible nature of damage to the union is simply irrelevant because there is no evidence of damage – intangible, actual or otherwise.

(iii) Does the Public Service Labour Relations Act recourse system presuppose that the union has the right to levy fines on its members?

[64] I agree with the application judge that the absence of a prohibition against the imposition of fines for crossing a picket line during a legal strike in ss. 188(c)-(e) and 192(1)(f) of the *Public Service Labour Relations Act* does not entitle a union to impose such fines. I do not find it necessary to decide whether the application judge was correct in holding that an express statutory grant is required to give the union such authority to impose a fine. Whatever one may make of the statutory context under which this union operates, I find nothing in it that would permit the enforcement of a fine that the court found to be unconscionable.

[65] As indicated above, the application judge rejected the union's argument that ss. 188(c) – (e) and 192(1)(f) prohibited the union's imposing of fines in situations that did not include a fine for crossing the picket line. I do not find it necessary to decide whether the application judge was correct in holding that an express statutory grant is required to give the union such authority. Whatever one may make of the statutory context under which this union operates, I find nothing in it that would permit the enforcement of a fine that the court found to be unconscionable.

(iv) Were Mr. Birch and Ms. Luberti required to proceed in alternative forums to challenge the validity of the penalty clause in the constitution?

[66] It is a settled principle of administrative law that a party who seeks to challenge a decision of a domestic body must first exhaust his or her internal remedies before seeking judicial review in the courts. I do not see that the principle applies here. In this case, it is the union, not Mr. Birch and Ms. Luberti, who is seeking the court's assistance. In the case at bar, it is conceded that there is no provision in the union constitution or in the *Public Service Labour Relations Act* which provides for the enforcement of fines levied by the union. In my view, it would be a surprising result to permit the union recourse to the courts to enforce a fine or penalty and deny the union member the right to advance a defence that the penalty was not enforceable because it was unconscionable. I see no merit in this ground of appeal. I perhaps should add that, unlike the application judge, I find it unnecessary to resort to rules 25.07(4) and 25.06(2) of the *Rules of Civil Procedure* to come to this conclusion.

[67] I also add that, in the view I take of this case, the question of whether judicial enforcement of a fine imposed by a domestic organization requires legislative sanction (as is provided for in s. 36(6) of the *Saskatchewan Trade Union Act*)[1] is better left for another case.

(v) Should the claim be amended to plead breach of contract?

[68] The union asserts that its claim filed in the Small Claims Court ought not to have been dismissed without leave to amend. Counsel argues that if the penalty provision is unenforceable, the appellant could still seek damages for breach of contract. So, in the alternative to dismissing the actions, the union now asks this court to strike the claims with leave to amend to plead breach of contract without reference to the fine provision.

[69] Counsel for the union did not seek to amend its claims before the application judge and since the commencement of the claims, the limitation period has expired.

[70] The claims in the Small Claims Court and the application in the Superior Court concerned the enforcement of a penalty clause in a contract. To permit an amendment at this stage for breach of contract, with no reference to the penalty clause, would totally transform the cases as they are presently constituted. I agree with the submission of counsel for the respondents that such an amendment would permit the union to circumvent the application of the limitation period. In all the circumstances, I would decline the request to amend the claims.

DISPOSITION

[71] As stated at the outset of these reasons, I would dismiss the appeal.

COSTS

[72] At the conclusion of the oral argument, counsel agreed that whoever wins the appeal should have costs fixed at $3,000 inclusive of disbursements and GST and I would so order.

"Robert P. Armstrong J.A."

"I agree Paul Rouleau J.A."

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[1] The *Saskatchewan Trade Union Act*, s. 36(6) provides that "a fine imposed on a member pursuant to subsection (4) … is deemed to be a debt due and owing to the trade union and may be recovered in the same manner as a debt owed pursuant to a contract in a court of competent jurisdiction.

Juriansz J.A. (Dissenting):

Introduction

[73] I have read the reasons of Armstrong J.A. Their thoroughness and clarity assists me in explaining why I take a different view and would reach a different result. I need not review the facts or the reasons of the application judge. I simply adopt Armstrong J.A.'s narration of them.

[74] Nor do I need to discuss the governing legal principles at any length as I generally agree with those the Armstrong J.A. states.

[75] I agree with Armstrong J.A. that the respondents were not required to exhaust the appeals available to them under the union constitution before being allowed to attack the validity of the disciplinary provision in their defence to the union's action. I also agree with him that there is nothing in the statutory context under which the union operates that would permit the enforcement of a fine that the court found to be unconscionable. I also agree that there is nothing in the unique contractual relationship between a union and its members that implies the doctrine of unconscionability does not apply to the contract between them. I would add, however, that the unique nature of the contract may well be relevant in determining whether one of its provisions is unconscionable.

[76] Armstrong J.A. would find that the fine is unconscionable and so would dismiss the appeal. I would find that the fine is not unconscionable. I would find further that the common law rule that penalties are *per se* unenforceable does not apply to the disciplinary provisions of a union constitution. I would allow the appeal.

The Test for Unconscionability

[77] I agree with Armstrong J.A.'s discussion of the test for unconscionability and his observation that inequality of bargaining power alone does not render a contract unconscionable or unenforceable. The basis for this observation, which I consider key to the analysis in this case, is apparent from the formulation of the test that Armstrong J.A. sets out at para. 42 of his reasons. For convenience I reproduce that paragraph here:

> Professor Waddams in *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) at para. 515 describes Bradley Crawford's definition of unconscionability from his "Comment" (1966) 44 Can. Bar. Rev. as "an immoderate gain or undue advantage taken of inequality of bargaining power." Professor Waddams cites *Dyck v. Mann Snowmobile Association*, [1985] 1 S.C.R. 589 as a leading Supreme Court authority which adopted Crawford's definition. In *Dyck* at page 593, the Supreme Court described unconscionability as

> occurring in a transaction where "the stronger party has taken unfair advantage of the other."

[78] Armstrong J.A. also cites the comment of Robbins J.A. in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1 at page 11 that "[m]ere inequality of bargaining power does not entitle a party to repudiate an agreement. The question is not whether there was an inequality of bargaining power. Rather, the question is whether there was an abuse of the bargaining power."

[79] In this case the application judge adopted that test from *Ekstein v. Jones,* 2005 CanLII 30309 (Ont. S.C.) at para. 57. For convenience I repeat that formulation:

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

While Armstrong J.A. finds no error in the application judge's articulation of the test, I prefer Armstrong J.A.'s own review and formulation of it. In my view the application judge, in applying the *Ekstein* formulation, concludes that the contract is unfair and that there is an inequality of bargaining power without sufficiently considering whether the unfairness stems from the unequal bargaining power. Keeping in mind whether "the stronger party has taken unfair advantage of the weaker" during the analysis makes it apparent, in my view, that the respondents' plight - their liability for the fine imposed by the union - does not arise from an abuse of unequal bargaining power.

Unequal Bargaining Power

[80] At the outset of assessing the parties' relative bargaining power, it is worth observing that employees in the bargaining unit can enjoy the wage rates and all the other employment benefits the union obtains without joining the union. The union lacks the power to adversely affect those who decline membership. The union needs to attract employees as members in order to mount collective action. As long as the majority of the employees become members and support the union, other employees can attend to their own individual interests while obtaining the benefits of the members' collective action. Therefore, it may well be a matter of debate which party had the greater need to persuade the other to enter the contract.

[81] Notwithstanding the union's need to recruit members, when the contract was formed the respondents lacked any ability to negotiate or change its terms until they became members. This is understandable because a union constitution, by its nature, must

govern all its members in the same terms. Nonetheless, it follows that there existed an inequality of bargaining power in the negotiation of the terms of the contract.

[82] Still, the existence of inequality of bargaining power alone does not render a contract unconscionable. There must be an abuse of that bargaining power. An abuse of unequal bargaining power is not difficult to find in an ordinary contract because the weaker party is generally locked into the contract. However, the situation is different with a union constitution because a member can resign from the union at any time. Both counsel accepted this fact and the appeal was argued on that basis.

[83] Counsel for the union asserted that the purpose of the clause is not to prevent employees from working during a strike. Rather its purpose is to prevent them from working during a strike while remaining members of the union. He submitted in his factum "[m]embers can either support the strike or quit the union and cross the picket line: they cannot do both."

[84] Counsel for the respondents acknowledged that there is nothing in the record to explain why the respondents did not resign from the union. He offered several reasons why the respondents might have chosen not to do so. First, he said, perhaps they did not resign because they were aware they would be expelled from the union anyway. Second, he said a person who disagrees with what the union is doing in bargaining may decide not to resign because he or she values solidarity with the other employees. Third, he submitted that perhaps the respondents did not want to give up their right to vote on the ratification of the collective agreement, a right they would lose upon resigning.

[85] I accept counsel's submissions about the value of union membership and his suggestions as to why the respondents might have wished to retain their union membership instead of resigning. The fact, however, is that the lack of bargaining power did not trap the respondents in a contract that subjected them to a penalty clause. They could decide for themselves whether the benefits of union membership outweighed the obligations of membership. They could not choose to enjoy the benefits of membership without being subject to its obligations. As long as they were members they were bound by the union's constitution and bylaws. Section 4(13) of the union constitution provides:

> Every individual member of the PSAC is deemed to agree to abide by and to be bound by the provisions of this Constitution and the applicable Component and Local By-Laws, upon applying for membership in the PSAC or continuing membership in the PSAC.

[86] I take the view that the respondents had ample power in the contractual relationship to avoid the liability the application judge found to unconscionable. That liability resulted, not from a lack of bargaining power, but from the fact they did not

resign their memberships before crossing the picket line. The union did not use its greater bargaining power to coerce performance. (It is worth repeating that, if they resigned, the respondents would still reap the results of collective bargaining, though they would forego the right to participate in union governance.)

[87] In the circumstances of this case, I would find there was no abuse of bargaining power.

The Fairness of the Provision

[88] The above finding is sufficient reason to conclude that the disciplinary provision is not unconscionable. I would go on to find that the disciplinary provision is not unconscionable for an additional reason - the fine imposed is not unfair. In his reasoning, Armstrong J.A., like the application judge, considers whether the fine is unfair from the perspective of the breaching union member. At paragraph 55 Armstrong J.A. says, "[i]t is the circumstances of the employee that determine whether the fine meets the test of substantial unfairness." The application judge's conclusion that the fine is unfair rested on the fact that the fine of gross pay exceeded the take home pay of the breaching union members earned during the strike at a time they were experiencing financial hardship. I disagree with this approach.

[89] I begin with an aside about the application judge's observation that a "hefty fine" was imposed "at a time when members may already be suffering financially as a result of strike action". There was no evidence about the respondents' financial circumstances. It may well be a logical inference that that workers on strike suffer financially. In spite of this, I do not consider the inference to be helpful in determining whether the fine is unfair. The clause specifically applies only to a situation where members are on strike and not being paid. In joining the union, the respondents took on the contractual obligation to undergo and endure a degree of financial hardship while on strike. Indeed, one might infer that the respondents suffered relatively less financial hardship than did their co-members who remained on the picket line. In my view, the notion that the respondents may have suffered financial hardship does not inform the determination of the fairness of the fine without relating it to the hardship that they would reasonably have foreseen when entering into the contract and to the hardship suffered by their co-members.

[90] The real point of my departure from Armstrong J.A.'s reasoning, however, is that the analysis should focus primarily on the quantum of damage suffered by the innocent party rather than on the circumstances of the breaching party. The law does not regard it as unfair to make the party who breaches a contract liable for the whole of the innocent party's damages even if that liability is greater than the profit made from the breach and irrespective of the breaching party's financial position. Consequently, a stipulated remedy

that reflects the actual damages suffered by the innocent party should not be found to be unconscionable, except perhaps in the most unusual circumstances.

[91] For this reason one must begin the analysis of unfairness from the perspective of the damage suffered by the union. Granted, this is a challenging perspective because the union's damage is intangible; the union has suffered damage to its solidarity. The difficulty of quantifying this damage, however, does not mean that the damage is not real and not significant. As the union`s counsel submitted "[s]olidarity forms the very heart of the relationship between the union and its members". By breaking rank with their fellow members and electing to derive the benefits of their fellow members' concerted action without contributing to it, the respondents have struck at the very core of the union's solidarity. Union members who cross the picket line demoralize their fellow members and demonstrate to others the benefits of being "free riders". Strike-breaking members provide labour to the employer thus undermining the other members' collective action. Once collective action is undermined, there can be no union.

Estimating the Union's Damages

[92] I would find that the damage caused to the union by the respondents' breach is real and significant. The question is whether the disciplinary provision, gross pay earned during the strike, is disproportionate to the damage making it unfair. At first blush, the damage suffered by the union appears completely intangible and its quantification subjective. Likewise, what one considers "unfair" may also appear to be largely subjective. By what criteria is the judgment made that a fine of gross pay is "unfair"? Take-home pay, which the application judge seemed to suggest is the maximum that could be appropriate, would not even remove the full amount by which the breaching members enriched themselves, as many of the deductions made from gross pay would stand to their credit in other accounts.

[93] I believe, however, that in the narrow context of a strike, a component of the union's damage is capable of estimation.

[94] During the economic struggle of a strike, the union's fundamental goal is that its members provide no labour to the employer. To help foster the collective action necessary to attain the union's goal, the union's constitution forbids the members from working during a strike and they, by becoming and remaining members, agree not to work during a strike. In essence, the benefit that the union contracted for is that its members will provide no labour to the employer during the strike. Here, the appellants breached their contract by doing exactly that. In doing so they caused the union damage by diminishing its strength in its economic struggle with the employer. The amount by which the union's strength has been diminished is equal to the quantity of labour provided to the employer. The best measure of the labour provided to the employer is the

amount that the employer paid for it. It might even be argued that, during a strike, labour has a greater value to the employer than the usual wages paid.

[95] Viewed from this perspective, gross pay is a reasonable, if not a particularly apt, pre-estimate of the estimable damage the union will suffer due to a member's breach of contract by working during a strike. The union's total intangible damage would be even greater. If anything, it is a low estimate as it does not take into account the intangible damage to the union's solidarity.

[96] Having recognized that the damage to the union's solidarity, while somewhat intangible, is real, substantial and capable of some estimation in the context of a strike, I do not regard a "fine" of gross pay to be disproportionate to that damage. I would conclude that the fine is not unfair and application judge erred by finding that it was.

The Common Law Rule Against Penalties

[97] I should add that I am not troubled by the fact that the clause of the contract is written in terms of a disciplinary provision and not a pre-estimate of damages. This is not an ordinary contract but a union constitution. The caution a court normally exercises before imposing its values on parties who freely enter into a contractual relationship should be heightened when the contract involved is a union constitution. In *Berry v. Pulley*, [2002] 2 S.C.R. 493, at para. 49, Iacobucci J., cautioned against losing sight of the surrounding collective bargaining context of this special kind of contract when interpreting it. He stated "the unique character and context of this contract, as well as the nature of the questions in issue, will necessarily inform its construction in any given situation."

[98] The primary rationale of *Berry* is to make a union constitution enforceable by a union against its members without the intermediary artifice of a web of contracts among the members. Iacobucci J. said at para. 50:

> [characterizing the union constitution as a contract] not only fulfills the practical purpose of providing a basis from which the terms of the union constitution may be enforced, but it also serves as an accurate and realistic description of the nature of union membership. The individual applies for membership with the union. It is the union, represented by its agents, that accepts the individual as a member, and this individual agrees to follow the rules of the union. [Emphasis added]

[99] To leave no doubt that a union could sue to enforce the disciplinary provisions provided in its constitution Iacobucci J. continued:

> 51 By acceding to union membership, the individual agrees to be bound by the union constitution, the terms of which will almost inevitably include internal disciplinary provisions in the event of a breach by the member. In light of the significant powers and duties of the union vis-à-vis its members, and in particular its ability to enforce the terms of the membership agreement internally, it is only logical to hold that the legislature has intended unions to have the status at common law to sue and be sued in matters relating to their labour relations functions and operations. [Emphasis added]

[100] Union constitutions include internal disciplinary provisions and the Supreme Court in *Berry* clearly contemplated that unions could sue to enforce them. While, like Armstrong J.A., I would decline to make a sweeping pronouncement that the rule against penalty clauses is no longer applicable to the law of contract generally, I would conclude the common law rule against penalty clauses does not apply to a union constitution.

[101] This conclusion reflects the evolution of the law towards an increasing appreciation of the value of collective bargaining. Collective bargaining is now recognized as a fundamental Canadian right, accorded a measure of protection under s.2 (d) of the *Charter*: see *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391; *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760 (CanLII). The courts, because of strong privative clauses and their own disinclination, have traditionally been reluctant to intervene in cases of labour law. The decisions of labour boards and arbitrators are almost always accorded the highest level of deference by the courts. This theme of non-interference in labour law matters signals that the courts should exercise considerable restraint before finding a union constitution unenforceable.

[102] The above analysis leads me to conclude that the law should not regard provisions such as the one at issue in this case as inherently invalid. That said, I have indicated my agreement with Armstrong J.A. that the doctrine of unconscionability applies to a contract between a union and its members. The framework for dealing with the validity the internal disciplinary provisions of a union constitution should be that of unconscionability. For the reasons given above, I would find the clause at issue in this case is not unconscionable.

Conclusion

[103] In summary, I would find that the disciplinary provision is not unconscionable for two reasons. First, while there is inequality of bargaining power, no unfair advantage has been taken of the weaker party by the stronger. Second, the amount of the fine is not

unfair when considered in the light of the actual damage suffered by the union. Further, I would find that the disciplinary provision is not inherently unenforceable as a penalty.

[104] I would allow the appeal, set aside the order below and replace it with an order dismissing the application the respondents brought in the Superior Court of Justice. I would fix costs in favor of the union in the amount of $3000 inclusive of disbursements and GST in accordance with the agreement of counsel.

RELEASED:
"DEC -3 2008" "R.G. Juriansz J.A."
"RGJ"